



Jury Issues in the Traumatic Brain Injury Case

By Mark A. Modlin, M.S., N.C.C. and Becky S. Jones, M.B.A.

A new client enters your office. The first thing you notice is a small, fading bruise over her left eye. She doesn't remember much about the accident, but she tells you she had been shopping at a local mall. While walking to her car in the parking lot, a car backed out of a parking space, struck her, and knocked her to the ground. She got a little bump on her head and has been having headaches. She had some scrapes and cuts on her hands and legs. But her chief complaint now is a very painful back and neck. She was seen in a hospital emergency room immediately after the accident, and is now under the care of a chiropractor. X-rays and magnetic resonance imaging (M.R.I.) are normal. She has been diagnosed with cervical and lumbar sprains.

She has worked as a bookkeeper in a small manufacturing business for seven years. She returned to work a couple of days after the accident. Although her supervisor has been complaining about her work, she hasn't lost any pay. What do you do? Is this a "typical whiplash" case? Maybe not. Not if you have really been listening to your client. Not if you ask the right follow up questions, and listen some more.

Definition of Mild Traumatic Brain Injury (M.T.B.I.)

According to the Head Injury Interdisciplinary Special Interest Group of the American College of Rehabilitation Medicine, M.T.B.I. is a "traumatically induced physiological disruption of brain function" which involves at least one of the following:

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- Any period of loss of consciousness,
- Any loss of memory for events immediately before or after the accident,
- Any alteration in mental state at the time of the accident, (e.g., feeling dazed, disoriented or confused), and/or
- Focal neurological deficit(s) that may or may not be transient,

But where the severity of the injury does not exceed the following:

- Loss of consciousness of approximately 30 minutes or less,
- After 30 minutes, an initial Glasgow Coma Scale (G.C.S.) of 13-15, and
- Post traumatic amnesia (P.T.A.) not greater than 24 hours.

The definition includes either a blow to the head or a shaking of the head from acceleration/deceleration movement (i.e., whiplash).

The definition does not include

strokes,
anoxia,
tumors,
encephalitis,
or other such conditions.¹

Any time you have a case that involves a blow to the head or significant whiplash you should investigate the possibility of brain injury.

Spotting Undiagnosed Mild Brain Injury in Your Client

First recognize that the medical community, in general, is not trained in neurobehavior. Doctors often fail to recognize the disturbing short

term and potentially long term problems with closed head injuries. You, as an attorney, are often the first professional in a position to recognize the symptoms associated with closed head injury. You are usually the professional who first takes a comprehensive history from the client, which allows you to put together the often diverse galaxy of symptoms which occur in a closed head injury that has resulted in mild brain injury. Unfortunately, lawyers who have had little or no experience with closed head injuries sometimes dismiss these subtle symptoms as the complaints of a hypochondriac. Your client herself may be unaware of the symptoms she is experiencing and will often, even if she is aware of such symptoms, not make the connection between the accident and those symptoms. For this reason, your client may have failed to communicate the existence of those symptoms to her treating physicians.

Any time you have a case that involves a blow to the head of your client, or that involves a significant whiplash type injury, you should investigate the possibility of brain injury. During your initial interview, you should make observations concerning the client's mannerisms and behavior. While under the definition of M.T.B.I. a

loss of consciousness is not necessary, you should inquire as to whether or not your client believes she lost consciousness at the time of the accident. At the

same time, you should keep in mind that the injured person often does not recognize that he or she lost consciousness. It is important that you discuss the client's condition with other witnesses.

¹ Journal of Head Trauma Rehabilitation, 8 (3), 86-73.

In the present case, what has your client told you that you need to follow up on, as far as a potential brain injury is concerned? In the brief history she has given, you have learned the following:

- She struck her head on the pavement.
- She has been having headaches since the accident.
- She has been having some kind of trouble with her work, to the extent that her supervisor has been complaining about her performance.

What more do you need to know at this point? What questions should you ask? What information do you want to elicit?

The following questions can help you assess whether your client may have suffered a mild brain injury. They should be asked not only of the client, but also of relatives and friends who may be used as witnesses in the case. For each of these items, have the individual being interviewed classify the symptoms as to frequency, and determine whether the symptoms appear to be mild, moderate or severe.

Inquire whether any of the individual symptoms occurred at any time prior to the accident, and if so, how often.

Has the plaintiff:

- had headaches since the accident?
- been dizzy or complained of dizziness since the accident?
- noticed any blurring of vision or complained of blurred vision since the accident?
- been confused or appeared to be confused since the accident?

- had trouble with memory or appeared to have some memory loss since the accident?
- exhibited any changes in personality, such as irritability, temperamental changes, inability to properly control emotions, or changes in motivation since the accident?
- appeared to suffer from unexplained fatigue?
- had spells of vomiting?
- exhibited sensitivity to light or noise?
- exhibited problems with speech, either the inability to come up with the appropriate word or apparent problems with diction?
- noticed or exhibited any changes in ability to perform simple mathematical calculations?
- exhibited any sexual dysfunction?

An affirmative response to one or more of these questions indicates that mild to moderate brain injury may have occurred as a result of the accident. In addition, a mention by the plaintiff or a member of her family to you during the initial interview of any one of the symptoms set forth above should trigger a response from you to ask the remaining questions on the list. An affirmative response to three or more of these questions, along with a characterization of the symptoms as being moderate or severe and occurring on a regular basis may indicate that your client has sustained a mild to moderate brain injury. This is, of course, assuming that the symptoms specified did not exist prior to the accident in question.

An attorney is often the first professional in a position to recognize the symptoms associated with closed head injury.

If you have made the determination that your client may have suffered a brain injury as a result of the accident, the question then becomes this: What steps do you, as her attorney, take to assure that her rights are fully protected, that her medical problem is properly diagnosed and treated, and that she is adequately compensated for the brain injury she may have received?

It is best if your client can be referred by her treating physician to the appropriate specialist for evaluation of a possible brain injury. Obviously, you, as her attorney, can send her to neurologists or neuropsychologists in order that she may be appropriately examined and tested. Indeed, sometimes it is necessary that you do so. However, if your client can have her treating physician, whether it be family practitioner, orthopedic surgeon, or even a chiropractor, make the referral, it is less likely that the referral will raise red flags within the record which can be later exploited by defense counsel.

It is certainly appropriate for you, as her attorney, to assist your client in making a list of the symptoms you uncovered in your questioning process to be presented to her treating physician at her next office visit. After presenting the list of symptoms to the treating physician, the client should seek a referral to an appropriate specialist. If the treating physician declines to make such a referral, it is your duty, for the good of your client, to make the referral yourself.

Documents, Investigation and Analysis

In any personal injury case, it is important to gather and analyze all of your client's medical records. This includes:

- Hospital records
- Physician's records
- Psychologist's records

- Physical therapy records
- Rehabilitation records
- Chiropractic records, and
- In the case of the brain injury client, neuropsychology records and neurorehabilitation records.

In order to spot mild to moderate brain injury in your client, you should:

- Pay attention to what your client says to you.
- Pay attention to what your client's spouse and family say about your client.
- Ask appropriate questions about symptoms that have occurred since the accident, indicating changes in your client's personality, emotion, sensory abilities and/or cognitive abilities.
- If your investigation indicates that such a brain injury may have occurred, be aggressive in assuring that appropriate professionals in the field of brain injury see your client.

In addition, you should obtain occupational records and vocational assessment records. These include tax records, employment benefits records, and personnel records from your client's present employer and perhaps jobs that your client has held in the recent past. It is often very important that you receive vocational assessment records wherein your client's performance may have been reviewed by her employer in the past, especially the recent past and immediately prior to the accident that caused the injury. It is also important

in some cases, depending on the age of your client, for you to acquire educational records, especially I.Q. and aptitude test records.

In analyzing the information you have gathered, it is extremely important to correlate your client's superior capacity and ability prior to the brain injury, as contrasted with the reduced capabilities exhibited after the accident.

Expert Witnesses

Every physician that has come into contact with your client since her accident is a potential expert witness in a case involving a closed head injury. A close review of the documents detailed above will give you some guidance as to whom you may want to consult. It can be helpful to consult with physicians who examined your client before the accident. This is especially true if these physicians have also examined her after the accident.

It is certainly important to anticipate that the defense of the case will include claims of pre-existing physical or psychological conditions. Thus you will want to talk to your client's family physician, internist, pediatrician, ophthalmologist, and psychiatrist or psychologist. In establishing organic brain damage you will, obviously, need to consult with your client's neuropsychologist and neurologist. Under some circumstances it may be a good idea for you to consult with the physician who saw and treated your client in the emergency room immediately after the accident.

Neuropsychologist

A neuropsychologist is not a medical doctor.

He or she is a Ph.D. clinical psychologist with specialized training in neuroanatomy and brain function.

Neuropsychological evaluation can help you understand and explain to a jury the effect and extent of brain damage in a traumatic injury case. Neuropsychology is a science that is concerned with the diagnosis, measurement and effects of human brain damage. In many cases, neuropsychological testing will be the most definitive evidence that organic brain damage has occurred. Neuropsychological evaluation often

If your client's treating physician refers her to a specialist, it is less likely to raise red flags within the record that can later be exploited by defense counsel.

provides evidence of organic brain damage when conventional medical examination and testing does not reveal such damage. Neuropsychology combines modern

behavioral assessment techniques with a knowledge of neuroanatomy. Assessment is accomplished by individual objective tests and standardized test batteries.

Neurologist

The neurologist has a number of diagnostic modalities available in assessing organic brain damage. However, as stated above, such tests will often show normal results when, in fact, it is clear from both anecdotal evidence from your client, lay witnesses and neuropsychological evaluation that your client does suffer from organic brain damage on a cellular level. In addition to the computed tomography (C.T.) which is often used in the emergency room, the neurologist has available the M.R.I., which provides greater definition of lesions than the C.T. There are also metabolic scans available which are often more helpful in finding functional cellular level injury. These include the functional magnetic

resonance imaging (F.M.R.I.) scan and the positron-emission tomography (P.E.T.) scan. Additionally, there are several controversial procedures that are sometimes used, such as the single-photon emission computed tomography (S.P.E.C.T.) scan and the quantitative electroencephalogram (Q.E.E.G.). These tests can produce quite dramatic “pictures” of your client’s brain injury, which may be of great use to the expert in the courtroom setting in helping the jury understand the injury.

Clinical Psychologist

Often ignored or at least downplayed in the plaintiff’s case presentation are the psychological ramifications of the M.T.B.I. The clinical psychologist can verify the emotional and psychological status of the plaintiff and evaluate and explain the relationship of those problem areas to the organic injury of the plaintiff’s brain. The plaintiff’s emotional difficulties are often viewed by the defense counsel as an area of weakness. This is especially true in a case where a plaintiff has a prior history of depression or anxiety. In fact, however, recent studies demonstrate the relationship between organic brain injury and an exacerbation of various psychological difficulties. This area, if properly addressed, can be a strength, not a weakness, in a plaintiff’s case.

Ophthalmologist/Neuro Ophthalmologist

It is, unfortunately, common for deficits in the visual system to go unrecognized in individuals with M.T.B.I. Any reference by your client to visual changes should be of concern. One common complaint is of “blurring” vision. An ophthalmological

examination should be sought to determine if the symptoms stem from occipital lobe, visual cortex or optic nerve injury. Disorders of the movement of the eyes may be related to frontal lobe damage or cranial nerve injury.

E.N.T./Otolaryngologist

Complaints of changes in hearing, including a “ringing” or “roaring” in the ears (tinnitus) or partial hearing loss, should be evaluated by an otolaryngologist (E.N.T.). Typically, this would involve an audiological evaluation to determine if your client has a loss of conductive hearing or neurological loss of hearing within specific ranges of frequencies. If possible, the E.N.T. examining your client should have specific training in neurotology.

Other Experts

Other experts who may be useful to you and who should be considered in these cases are:

- Speech pathologists who can assess and treat a wide range of speech/language and oral-motor dysfunctions
- Occupational therapists who can assess and treat a wide range of neurodisabilities often found in the M.T.B.I. client
- Anatomists and biomechanical engineers who can be used to explain the mechanism of injury
- Vocational and rehabilitation counselors and consultants who can be used to explain the effect that the mild brain injury and its accompanying disabilities will have on your client’s everyday

A substantial percentage of M.T.B.I. individuals go undiagnosed and suffer significantly from injuries that are unrecognized by health care providers.

- and occupational life, and
- Life care planners and economists, to quantify the damages in terms of the dollar amount necessary for the future care of your client's needs.

Lay Witnesses

A partial list of lay witnesses you should interview concerning your client's brain injury (and especially changes in your client which occurred subsequent to the accident causing the injury) are as follows:

- Your client
- Your client's parents
- Your client's spouse
- Your client's children
- Your client's other family members
- Your client's friends
- Eye witnesses to the injury
- Emergency medical personnel
- Your client's supervisor at work
- Your client's personnel manager
- Your client's fellow employees, and
- Your client's teachers.

Evaluating the Brain Damage Claim

The evaluation of the claim for mild to moderate brain damage involves basically the same category of damages that you would consider in any significant injury case, as follows:

- Impairment to income
 - Past—lost wages
 - Future—lost earning capacity
- Injury-related expenses
 - Medical expenses to date
 - Psychiatric/psychological expenses to date

- Future medical/psychological expenses
- Life care and maintenance expenses
- General damages
 - Pain and suffering—past and future
 - Loss of consortium

A national publication assessing verdicts and settlements nationwide between 1988 and 1998 found the midpoint jury award for mild brain injuries was \$412,500. The midpoint settlement for mild brain injuries was \$500,000. The midpoint jury award for moderate brain injuries was \$1,300,000, and the midpoint settlement for moderate brain injuries was \$1,000,000. In this analysis, mild brain injury was defined as being characterized by the permanent impairment of the quality of life, but with no significant continuing care being required. Moderate brain injury was defined a more significant impairment of the quality of life, with the individual being capable of performing day to day activities with assistance of ongoing care, and/or seizure disorders characterized by muscular tremors and convulsions. Also in the moderate category were cases where mental deficiencies were characterized by mental retardation and a resulting inability to live independently.²

Conclusion

Not every injured client who has had a blow to the head or a significant "whiplash" has incurred a traumatic brain injury. But the fact is that a substantial percentage of M.T.B.I. individuals go undiagnosed and suffer significantly from injuries that are unrecognized by health care providers. An attorney with an understanding of M.T.B.I. and an attentive attitude can be of

² *Personal Injury Verdict Review*, LRP Publication, 1999.

real benefit to such people. The important things are to keep your eyes and ears open, and be willing to put in the time, resources and effort necessary to uncover these often undiagnosed and/or misdiagnosed conditions. The beneficiary of such concern is your client. Such diligence on your part will ultimately be rewarding to you personally and professionally.

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Correction:

The Editors of *The Jury Expert* would like to thank Kevin Bouly, M.A. of the University of Kansas, and Amy Johnson, Ph.D. of Zagnoli McEvoy Foley, for contributing the questions in last month's interviews with Andrew Sheldon and Mark Duncan. Proper acknowledgement was inadvertently excluded in the final publication. We apologize for any confusion or inconvenience. "For Civil Rights: Insights on Jury Selection and Prosecution in a Landmark Civil Rights Case" appeared in the November 2005 issue of *The Jury Expert*.

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*For more information on Bob's new book, **101 Quick Courtroom Tips for Busy Trial Lawyers**, visit www.CourtroomPresentationTips.com.*

**Quick
Courtroom
Tips**

**By
Bob Gerchen**

There Is Beauty in Simplicity

A law school education is the enemy of simplicity. It's amazing how attorneys will use four or five words when two will do, or throw around phrases such as "have the occasion to" or "did there come a point in time..." or "what did you understand to be...."

My favorite story of a lawyer using simplicity beautifully goes like this:

Around the turn of the century (the 20th century, that is), railroad companies, in hopes of stemming the tide of accidents at railroad crossings and their subsequent lawsuits, turned to a lawyer to write a warning that would spell out what the duties and responsibilities of pedestrians and those in wagons and motor cars would be at the crossings. They paid him \$10,000 in advance (a monstrous fee at the time).

This is what he sent back:

Stop, Look and Listen

The railroad executives must have gone bananas—\$10,000 for FOUR WORDS!! And one of them was "AND!"

But guess what? Accidents at crossings went down. Payouts from lawsuits went down. And chances are, decades later, someone used those four words when teaching you the safe way to cross the street.

There is, indeed, beauty in simplicity. It's not required to use more words. If two words will do, use two.

New Scholarship on Punitive Damages

By Merrie Jo Pitera, Ph.D.

Headline cases like Enron, WorldComm and Tyco, suggest that for the foreseeable future, we will be in a litigation context where corporate defendants are unusually vulnerable to punitive damages and to large awards that are quasi-punitive. This vulnerability makes the fairly recent publication of *Punitive Damages*, by Cass Sunstein, et al.,¹ a fortuitous event.

Although *Punitive Damages* suffers from many of the shortcomings that have traditionally limited the value of academic jury research for “real” litigation (e.g., the use of written case summaries as stimuli) it is the best scholarship to date on the subject and offers a number of intriguing insights into the process by which mock jurors arrive, or do not arrive, at punitive damages. Exemplary insights, along with our view on their “real world” implications, include the following:

- Given a common set of facts, 80 percent of the research subjects agreed about whether to award punitive damages. However, only 18 percent agreed on a damages figure.

Implication: Trial consultants are working on research designs and analytical tools that, while not abandoning the traditional focus on distinguishing punishers and non-punishers, focus more attention on learning how to better distinguish punitive minimizers from maximizers--i.e., vengeful misanthropes whose awards are motivated by diffuse anger rather than by the facts of the case before them.

- Judge’s instructions, which ostensibly impose a higher “clear and convincing” standard for punitive damages, impose few, if any,

constraints on the impulse to punish. This is partially a comprehension problem. The comprehension rate for punitive damage instructions hovered around five percent. On the other hand, the higher a juror’s rate of comprehension, the lower his or her propensity to punish.

Implication: Of course some jurors choose not to comprehend instructions because instructions get in the way of their intuitive impulses to punish. However, this finding serves as a reminder of how important it is in today’s litigation climate to teach the instructions early and often, preferably with the help of pedagogical graphics, such as decision trees that break the instructions down into more comprehensible, discrete decisions.

- Defendants who had rejected an expensive, risk-reduction measure on the basis of cost-benefit analysis were punished more severely than were other defendants when jurors associated that policy with subsequent injuries to plaintiffs.

Implication: It is clear from our research in the real world that corporations are hurt less by cost-benefit analysis per se than by the dramatic, documented “revelation” of such analysis by plaintiffs. This academic research serves as a reminder of how important it is for corporate defendants to minimize the impact of such revelations by acknowledging, and where feasible, proactively embracing their cost-benefit decisions from a perspective that emphasizes benefits to consumers like the jurors, not to the company’s shareholders.

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¹ Sunstein, C.R.; Hastie, R.; Payne, J.W.; Schrade, D.A.; & Visaisi, W.K. (2002). *Punitive damages: How juries decide*. The University of Chicago Press: Chicago.

**Juror
Research**

By
**Thomas P.
Baggott, Ph.D.**

When to Ask Jurors for Money

The Problem: Many attorneys, during voir dire, want to ask questions to try to discover whether jurors have a fixed damages amount in mind. Engaging in this line of questioning changes the way jurors see plaintiff attorneys and offends their sense of propriety. Asking a juror for money is akin to asking a stranger to do you a favor. If you plan on asking for quite a bit, you must first build a relationship.

The Case: Two plaintiffs in the same case each hired their own counsel. I had been retained by only one of the plaintiff attorneys. We conducted an entirely appropriate voir dire and left the potential jurors with smiling faces and warm feelings for the attorneys who were there to protect the widow and children of a deceased man.

*Asking a juror for money is akin to
asking a stranger to do you a favor.*

The second plaintiff attorney then conducted his voir dire and he immediately informed the jurors that he intended to ask for “millions of dollars. In fact, more than 20 million dollars.” He then harangued the potential jurors and forced them into agreeing that they could award more than 20 million dollars. The voir dire was so bad that the attorney ended up arguing with one of the jurors when she said she needed to hear the evidence before she could make a determination. By the time he was done, the jurors no longer had happy faces and they were convinced that the entire plaintiff side was simply a money-oriented group of ambulance chasers.

The Research: We wished to discover whether jurors would think less of plaintiff attorneys who asked for money too early. To test this, we used a four-panel design and videotaped attorney presentations. By using videotaped presentations instead of live presentations, each panel would receive the exact same information.

The only variable in the design was the opening. Groups One and Two heard in the opening that the plaintiff was asking for millions of dollars. Money was never brought up in the opening presented to Groups Three and Four. The videotaped opening statements were made by each side, followed by video presentations of the direct and cross examinations of the primary witnesses. Witness summaries, accident reports and medical information were also provided. At the completion of the case in chief, videotaped closing statements were presented to each of the four panels.

As part of my normal research design, I usually use Likert scales¹ to conduct an analysis of what we actually taught the jurors during the presentation. By using Likert scales, we can determine whether we changed anyone’s mind, what information was powerful, and the degree of change which occurred. These questions normally deal only with the evidence presented. In this case, I

¹ Likert scales ask respondents to specify their level of agreement with particular statements, usually ranging from “strongly agree” to “strongly disagree.”

added additional questions to assess the juror's perceptions of the attorney's conduct, likability, professionalism and motives.

Case Findings: The jurors that were not asked for money during the opening statement awarded significantly higher damage awards than the jurors who were asked for large amounts of money during the opening statement.

There was also great disparity in the attitudes towards the attorneys by the jurors in each condition. The jurors in the unaltered (no money mentioned) condition said the attorneys were generally likeable, professional and motivated toward helping their clients. They also felt that lawsuits such as this one were necessary in today's society.

Conversely, jurors who were asked for significant amounts of money early on found that while damages were proven, the motives of the attorney were toward profit-making, not humanitarian needs. The attorneys were seen as unlikable, somewhat unprofessional and concerned with enriching themselves rather than their clients.

Conclusions: It appears the awarded damages are lower when the jury is put off by the attitude of the plaintiff attorney toward money. Many studies have shown that the likability of witnesses directly correlates to their believability; this brief research shows there is a probability that the same facts would carry over to attorneys.

While this study sample is extremely small, it does tend to support a belief held by many consultants that attorneys must be very careful as they approach the subject of damages. Amounts must be reasonable and timing is very important. The attorney should not ask for a specific sum of money until such time as she or he has built a relationship with the jurors and feels comfortable asking them for that great favor.

Dr. Thomas P. Baggott is the lead consultant at Jury Behavior Research Corp., in Tucson, AZ. He is a Fellow of the American College of Forensics Examiners and a Diplomate of the American Board of Psychological Specialities. Dr. Baggott may be reached at (520) 297-9691 or by e-mail at drbaggott@juryadvisor.com.

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