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Successful Strategies for Effective Defense of Mild TBI Claims with Major Settlement Demands

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INTRODUCTION:

Traumatic brain injury ("TBI") claims are on the rise. The Congressional Brain Injury Taskforce, established in 2001, estimates that approximately 1.4 million Americans experience a TBI each year and an estimated 3.2 million Americans are living with long-term, severe disabilities as a result of brain injury. The Taskforce also noted that the national cost of TBI is estimated to be $60 billion annually.[1] The Center for Disease Control ("CDC") reports that nearly 20% of all TBIs result from motor vehicle accidents,[2] with other studies indicating that this percentage could be as high as 50%.[3] The highest incidence of TBI occurs in males (2 to 1 ratio), who are between the ages of 15 to 25 years of age.[4] Alcohol intoxication appears to be a contributing factor in both rate of occurrence and severity of injury.[5]

While there is a continuing increase in the incidence of traumatic brain injuries in recent years, statistics indicate that a vast majority of the reported brain injuries are mild in nature and do not have a significant effect or impact upon an individual's continued functioning. The Center for Disease Control reports that about 75% of TBIs that occur each year are concussions or other forms of mild TBI.[6] These mild head injuries are referred to commonly as "post-concussion

syndrome" and account for a growing number of Workers' Compensation and third party litigation claims.

Regardless of the fact that a majority of TBIs are mild in nature, defense attorneys are being confronted with an increase in claims alleging serious TBIs with severe and debilitating effects, often resulting from seemingly minor accidents. Recent verdict research shows multiple settlements and jury verdicts in excess of $500,000, across the nation, arising from accidents where the plaintiff left the scene with no apparent loss of consciousness or claim of head injury.[7] Symptoms including alleged loss of memory, headaches, depression and anxiety, change in mood, and confusion are being alleged in lawsuits to be the result of TBI, often where the plaintiff did not complain of those symptoms or any head injury at all until many months after the accident or where plaintiff has pre-existing mental or psychological conditions, but argues that their condition was "not as bad" or that they were asymptomatic before the accident.

Mild TBIs can be difficult to assess from a legal standpoint because they are not readily shown by objective testing, such as an MRI or CAT scan. Instead, litigators use neuropsychological testing as the most common basis for justifying damages and also disproving or neutralizing a claim of TBI. Neuropsychology studies the way that brain damage effects the way people think, act and behave. Clinical neuropsychologists evaluate individuals who may have compromised brain functioning to determine what their level of functioning was prior to the accident and if, or to what extent that functioning may have been diminished as a result of the accident. This is done through the administration of neuropsychological tests which are performed to assess levels of functioning. The testimony of neuropsychologists as experts in brain injury cases has been generally accepted across all jurisdictions and has been since as early as the 1980s.[8]

In the context of litigation, a neuropsychologist plays the role of establishing the presence or absence of a neuropsychological disorder or injury, determining causality related to a specific event/accident, indicating probable prognosis, and advising as to the medical necessity of treatment and disability status. It is important when faced with a claim alleging significant TBI to retain a neuropsychologist to assist with the investigation of the claim and later to conduct the examination of the claimant. Neuropsychologists can be helpful throughout the course of the litigation, including assisting with discovery, conducting a review of the plaintiff's medical records and other records gathered during discovery, providing a critical review of the plaintiff's neuropsychological expert's report and raw data, assisting with deposition of both the plaintiff and of the plaintiff's

neuropsychological expert, and conducting an examination of the plaintiff and preparing a report of their findings.

The role of the neuropsychologist is particularly important in civil litigation claims because of the underlying issue of secondary gain. Secondary gain is the social, occupational or interpersonal advantages that a patient derives from their symptoms. For example, secondary gain would exist where the plaintiff's claimed impairments are contributed to by an external motivator such as the desire for financial incentive arising from litigation. As Jim Hom of the Neuropsychology Center noted, "[t]oo often the mere co-occurrence of the motor vehicle accident, for example, and the patient's complaints are used to establish the accident as the cause of the cognitive deficits. However, considering that the patient has experienced the trauma of an MVA and also has a financial incentive to appear impaired, it is the responsibility of the forensic neuropsychologist to determine whether the deficits found are the result of brain impairment from this accident, as opposed to psychological trauma, physical (peripheral) injury, malingering, a pre-existing condition, or some combination of these causes."[9]

In fact, while it would be expected that individuals with the most severe brain injuries would be most likely to bring claims for damages in the context of civil litigation, research has appeared to show that the opposite is actually true and that the reality is that individuals claiming mild traumatic brain injury tend to bring claims at an elevated rate.[10] Moreover, studies have shown patients with mild traumatic brain injuries who are engaging in litigation presenting with complaints of greater cognitive impairments than those patients who were not bringing any claims.[11] In one study, suspected probable malingering was detected through testing in 29% of personal injury evaluations.[12] It is the role of your neuropsychologist to determine whether a cognitive impairment exists and, if so, whether any of these alternative factors have contributed to or caused the impairment.

DISCOVERY:

Thorough and comprehensive discovery is absolutely necessary to provide the basic foundation upon which you are your neuropsychologist will evaluate the plaintiff's claim of a traumatic brain injury. The documents which you are able to uncover through the use of document demands and other investigation will form the basis for you neuropsychologist's evaluation of the plaintiff. A checklist of documents to seek during discovery in a TBI case is attached.

Failure to obtain all relevant documents can result in your neuropsychologist missing a "piece of the puzzle" which may be vital to determining whether the plaintiff has sustained a traumatic brain injury or whether some other factor is the reason for the plaintiff's symptomology or if plaintiff is displaying "symptom magnification." [This topic will be addressed later in the report]. For example, studies have shown that certain medications can have a "masking" effect which can alter the result or outcome of certain neuropsychological tests, including certain neuroleptics and antidepressants.[13] Failure to obtain a plaintiff's complete list of prescribed medications from his or her local pharmacy could mean that your neuropsychologist would be unaware of potential contributing factors in evaluating the results of a plaintiff's neuropsychological test results. Similarly, without knowing the exact prescriptions taken by the plaintiff, you will be unprepared to attack the diagnosis of the plaintiff's neuropsychologist, which could be faulty due to the masking effect of a prescribed medication taken by the plaintiff.

Documents which are obtained in discovery are also vital in determining premorbid functioning, that is, how the plaintiff was functioning prior to the accident. In a majority of situations, test results taken before the accident will not be available as a tool for comparison as to the plaintiff's functioning after the accident. If that is the case, your neuropsychologist will attempt to determine premorbid functioning and will rely upon the documents gathered through discovery to do so, as well as his own observation of the plaintiff during the testing process and information given by the plaintiff at that time. Information gathered which can assist a neuropsychologist in evaluating premorbid functioning in the absence of previous test results can include educational transcripts (pay particular attention to repeating of grades or if the plaintiff obtained a General Education Development diploma or "GED"), occupational levels, present ability measures, and evidence of preexisting deficits (learning disabilities).

There are certain documents which are absolutely vital to the defense of a neuropsychological claim that may be tricky in obtaining. In many cases, the most valuable materials will often be the hardest to come by and may require a number of motions or even appeals to obtain. However, these documents can be worth their weight in gold. A few of these records and potential obstacles in obtaining them are highlighted below.

1) <u>Special Education Records/IEPs</u>

Always be sure to confirm whether or not the plaintiff has received special educational services through their school, as special education testing provides a

valuable opportunity to compare functioning prior to and after an accident. Specific inquiries should be made as to whether the plaintiff underwent special educational testing and whether the plaintiff has an "Individualized Educational Plan" or "IEP" pursuant to the Individuals with Disabilities Education Act. The Individuals with Disabilities Education Act ("IDEA") came into existence on October 30, 1990.[14] It was overhauled in 1997.[15] Beginning on December 3, 2004, IDEA was amended by the Individuals With Disabilities Education Improvement Act of 2004, now known as IDEIA, which sought to bring the legislation into alignment with the "No Child Left Behind" legislation.[16]

IDEA requires public schools to develop an IEP for every student with a disability who is found to meet the federal and state requirements for special education. The term "IEP" refers both to the educational program to be provided to a child with a disability and to the written document that describes that educational program. IEPs are developed, monitored, and modified by the IEP team, which includes the child's parent, at least one of the child's special education teachers, at least one of the child's regular education teachers, a representative from the public agency overseeing the IEP, any other individual deemed to have specific knowledge or expertise as to the child, and, if appropriate, the child themself. At the end of twelfth grade, students with disabilities will receive an IEP diploma if they have successfully met the IEP goals. If they have met the requirements for the high school diploma, then it may be given in place of the IEP diploma, so the fact that a person obtained a high school diploma does not mean that they were not provided special education services or did not have an IEP.[17]

Section 200.2 of the Regulations of the Commissioner of Education requires that school districts maintain a policy to insure that a student's IEP remains confidential and is not disclosed to any other person consistent with the school district's policy for ensuring the confidentiality of student records. Such policy must be developed in accordance with the confidentiality requirements in IDEA and in the Family Educational Rights and Privacy Act (FERPA). Because of this and the personal and confidential nature of special education testing and the IEP documents, schools will not automatically turn over those materials when provided with a standard authorization for academic records or transcripts. Instead, a separate authorization must be provided which specifically authorizes disclosure of the plaintiff's IEP and any other special education testing or materials. It is best to save time by requesting a separate and specific authorization for IEP and special education materials from the plaintiff's attorney from the beginning.

2) Raw data from neuropsychological testing

Attorneys are strongly advised to obtain all raw test data from neuropsychological testing, as well as any notes which may be in the plaintiff's testing file. This material may have to be forwarded directly to your IME neuropsychologist. It is crucial that your neuropsychologist review this data to determine if the plaintiff's neuropsychologist has made any inappropriate, erroneous, or inadequate interpretations resulting in a wrong conclusion or diagnosis. Raw test data may be the source of discovery of scoring mistakes and methodological errors which can be scrutinized on cross-examination.

In order to obtain raw data from neuropsychological testing, you should first obtain an authorization for the release of that data from the plaintiff, specifically referring to all raw test data, test materials, and any notes taken during the testing process. You can anticipate that even with the authorization, you may encounter some resistance from the plaintiff's neuropsychologist, who will likely argue that principles of ethics prevent him from disclosing the raw material and that they would be in violation of the ethical guidelines of the American Psychological Association ("APA")'s rules if they were to disclose the raw testing data. They may also argue that confidentiality of the raw data is absolutely necessary to protect the integrity of the testing materials.

The APA's guidelines regarding the release of raw data have evolved significantly over recent years. In its current form, APA Guideline 9.04, "Release of Test Data" states that:

> a) The term test data refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during an examination. Those portions of test materials that include client/patient responses are included in the definition of test data. Pursuant to a client/patient release, psychologists provide test data to the client/patient **or other persons identified in the release.** Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law.

> (b) In the absence of a client/patient release, psychologists provide test data only as required by law or court order. (emphasis added).[18]

APA Guideline 9.04 seems to permit the release of neuropsychological testing raw data to a defendant's attorney so long as that attorney and/or law firm is identified on a properly executed release form. However, the second portion of the guideline muddies the water, indicating that a psychologist can refuse to provide test data "to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test…" This confusion is exacerbated by APA Guideline 9.11, "Maintaining Test Security," which states:

> The term test materials refers to manuals, instruments, protocols, and test questions or stimuli and does not include test data as defined in Standard 9.04, Release of Test Data. Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code.[19]

The items which Guideline 9.11 excludes from the definition of "test data" under Guideline 9.04 includes materials which should be reviewed by your neuropsychological expert in assessing the plaintiff's neuropsychologist's report, particularly the test questions. Guideline 9.11 indicates that those documents, unlike "test data" need not be disclosed to a party with an authorization obtained from the plaintiff.

Regardless of more recent updates in the APA Guidelines, they continue to be utilized by neuropsychologists refusing to provide raw test data and other materials utilized during testing in civil litigation. Because of this, the courts have had to devise methods of addressing both the confidentiality concerns posed by neuropsychologists and the need for discovery posed by litigants. Possible resolutions in the Federal Courts were highlighted in the case of *Taylor v. Erna*, 2009 WL 2425839 (D. Mass. 2009). The *Taylor* case involved a motor vehicle accident wherein the plaintiff, a rear-seated passenger, was alleged to have sustained a TBI which would require ongoing medical care. She began a regime of neuropsychological testing and evaluation, consisting of six evaluations over the course of five months. Defendants sought production of the raw test data and related testing materials utilized in the evaluation from plaintiff's neuropsychologist, who refused to provide that material. Plaintiff argued that the request for raw data would require their neuropsychologist to violate ethical guidelines of the APA.

The *Taylor* court recognized the conflict between the APA's Ethical Principals and Federal Rule of Civil Procedure 26, which requires an expert witness's report to include the witness's opinions, along with the basis and reasons therefore and the data or other information considered in forming those opinions. The court also noted the decision of the Supreme Court in *Detroit Edison Co. v. NLRB*, 440 US 301 (1979), wherein the court held that compelling psychological testing materials without any limiting conditions was erroneous. The *Detroit Edison* case pertained to employment related psychological aptitude testing and a union's request for the actual tests completed by its members, wherein the APA, as *amicus curiae*, indicated that it was ethically bound to withhold the actual tests and test scores from the union, but could share the questions and answers with individual examinees.

The *Taylor* court indicated that the *Detroit Edison* case represented an attempt to form a more "focused and conditioned" disclosure which would be acceptable to both parties. It noted that the most common resolution for this type of dispute involved "a compromise between full, unconditioned disclosure and total exemption from the Federal Rules of Civil Procedure." Two options were offered, including ordering that the testing materials be turned over to opposing counsel's qualified expert (supported by *Chiperas v. Rubin*, 1998 WL 765126 (D.D.C. 1998)) or ordering disclosure under a protective order barring further disclosure to non-parties (supported by *Reiner v. Warren Resort Hotels,* 2008 WL 5120682 (D. Mont., 2008); *State ex rel. Svejda v. Roldan*, 88 S.W.3d 531 (W.D. Mo. 2002). The *Taylor* court chose to utilize the later method, finding that a non-disclosure agreement provided confidentiality and disclosure, while "as a collateral matter protecting [the neuropsychologist's] professional obligations."

In the event that you encounter resistance from the plaintiff's neuropsychologist in producing the raw data and testing materials utilized during their evaluation of the plaintiff, you should consider requesting that the plaintiff's neuropsychologist provide the raw data directly to your retained neuropsychologist for review in order to quell any concerns about protecting the "integrity" of the testing materials. If that is not successful, issuance of a subpoena duces tecum should follow, which will either require the neuropsychologist to comply or to appeal to the court for a protective order. A standard non-disclosure agreement should be sufficient to protect the interests of the neuropsychologist and he will not be said to be in violation of the APA ethical guidelines if compelled to provide the raw data under duly issued court order.

3) Social media

Social media is an excellent source of information about a plaintiff. Very often, the information posted on social media websites can be of an extremely personal nature and can provide a foray into the plaintiff's mental state and activities. Content posted on a social media website could lead to the discovery of information which could point to alternative reasons for the plaintiff's behavior other than the claimed TBI. Pictures posted on social media websites can provide photographic evidence of a plaintiff's physical capabilities and impressions about their mental state (ie, appearing smiling and happy versus angry or withdrawn). Photographs on social media websites also provide evidence of a plaintiff's behavior or lifestyle, such as the use of drugs or alcohol. Often these social media websites cross-reference profiles on other websites, such as a personal blog or webpage, leading to additional information about the plaintiff. On a number of social media websites, you are able to connect directly to the webpages of the plaintiff's friends or family, which may provide additional information about the plaintiff, including, potentially, information regarding other stressors that could cause/contribute to symptoms alleged to be the result of a TBI, such as marital problems, family issues, problems at work, or financial troubles.

Social media sites to review in your investigation of plaintiff should include social networking profile pages, such as Myspace.com, Facebook.com, and Linkedin.com Because these websites are constantly changing, with information being added and sometimes deleted from web pages, it is imperative to make copies of the content of these pages routinely. Pay particular attention to photographs posted, educational and employment history noted, and personal content posted on the plaintiff's "wall." Facebook.com allows a person to link their profile automatically to that of their family members or spouse, so check their personal information to see if they have done that. Myspace.com permits linking to a "top ten" list of friends, which may also be helpful.

In addition to photographs posted on social networking sites like Facebook.com and Myspace.com, the website Flickr.com allows individuals to upload photographs which can then be viewed by the public at large. Check to see if your plaintiff has a Flickr.com account for additional images that may be posted. Another website growing in popularity is called Photobucket.com, which allows web users to post large volumes of photographs and arrange by album. There also may be video footage of your plaintiff posted on Youtube.com.

Your plaintiff's personal thoughts, feelings and impressions could also be found on their Twitter.com feed, which allows users to post small notations which

can then be viewed by their "followers" and the public at large. Larger and more detailed posts may be found on a plaintiff's blog.

Also, do not discount checking personals sites or matching websites to see if the plaintiff has posted a profile. Some of these websites may require a subscription, but many of them are free. If you know your plaintiff's religious or ethnic background, you may be able to check websites specific to that background (for example, the well-known "JDate.com" is geared specifically for Jewish individuals, "Catholicmatch.com" for Catholics, and "Latinamericancupid.com" for individuals of Hispanic descent).

Social media websites can be useful in the investigation phase by both you and your neuropsychologist, but at some point you may be need to access information on those sites in a form that can be utilized during trial. Additionally, social media websites often have privacy settings, in which the user may be able to limit access to content to only designated individuals and to block content from the general public. In this case, you may have to seek judicial intervention to obtain access to social media content.

As the use of social media has been on the rise with the development of smartphones and tablets, also developing is a string of cases dealing with discovery of social networking evidence in civil actions. A central issue in the background of all these cases is whether the opponent is entitled to relevant information from the other party's social networking profiles or whether the user has a privacy interest as to his or her profile. A few of these cases where the court addressed this issue in the personal injury context are highlighted below. The disclosure of social media site content has not yet been addressed in many jurisdictions, however, although it is expected to become a more prevalent concern as the use of social media continues to grow.

One of the most recent cases to address disclosure of information Facebook in the civil litigation context is in *Higgins v. Koch Development Corp*., 2013 WL 3366278 (S.D.Ind. 2013). The plaintiffs in that case claimed they were injured when exposed to high amounts of chemicals at a commercial waterpark. After the plaintiffs' depositions, where both admitted to having a Facebook page, the defendant served discovery for the information on the Facebook pages and also demanded that evidence on the Facebook page be preserved in its then-current form. Plaintiffs refused, claiming the information was private.

The court in *Higgins* stated that courts may compel production of a party's Facebook information or data if the "party seeking disclosure makes a threshold

relevance showing" which is not offset by privacy concerns. Looking at the claims made by the plaintiffs, the court found it sufficient that plaintiffs had alleged such broad claims as enjoyment of life, loss of ability to engage in certain outdoor activities and hobbies, loss of employment, permanency of injury, lack of pre-existing symptoms and impairment of future earning capacity. As to privacy concerns raised by plaintiffs, the *Higgins* court noted that the fact that a person's social media profile is set to "private" does not imbue it with any form of privilege or a greater expectation of privacy, allowing it to act as a shield to discovery. In granting the defendant's motion to compel discovery of the Facebook material, the court also pointed to the policy of Facebook itself, posted on its website, that all posting is "done at one's own risk."

Disclosure of social media content was also addressed in the Pennsylvania Court of Common Pleas in *McMillen v. Hummingbird Speedway, Inc., et al*., 2010 WL 4403285 (Pa. Ct. of Common Pleas 2010). In that case, the plaintiff alleged that he was injured and rendered disabled when he was rear-ended during the "cool down" lap after a stock car race. Photographs of the plaintiff posted on his Facebook and Myspace pages, however, showed him partaking in numerous recreational activities, including fishing and attending the Daytona 500. The defendant sought full discovery of plaintiff's social networking sites to look for evidence which would discredit plaintiff's claim that he had suffered a loss of enjoyment of life. Specifically, the defendant requested actual access to the profile pages, including the login names and passwords for any of plaintiff's social networking accounts.

With respect to confidentiality of communications, the *McMillen* court cited to the Facebook and MySpace terms of service which (according to the court) make clear to users that there should be no expectation of confidentiality in anything that is posted to (or sent through) Facebook or MySpace. Specifically, the court stated that "Facebook, MySpace, and their ilk are social network computer sites people utilize to connect with friends and meet new people. That is, in fact, their purpose, and they do not bill themselves as anything else. Thus, while it is conceivable that a person could use them as forums to divulge and seek advice on personal and private matters, it would be unrealistic to expect that such disclosures would be considered confidential." Lastly, the court noted that the potential for harm caused by the disclosure was far outweighed by the "benefit of correctly disposing with the litigation." The court ordered the plaintiff to preserve his Facebook and Myspace pages and ordered that defendant's attorneys were to be afforded "read-only" access to the account itself.

In another similar case, *Romano v. Steelcase, Inc*., 30 Misc. 3d 426 (Supreme Court of New York, Suffolk County, 2010) a recent New York trial court entered an order granting the defendant's request for access to the plaintiff's "current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information." The plaintiff had sued, seeking damages for personal injuries that she claimed left her confined to her house and unable to participate in activities she previously enjoyed. The defendant wished to introduce portions of her social networking pages that showed her maintaining an active lifestyle outside of her home and traveling out of the state. Plaintiff's Facebook.com profile picture showed her "smiling happily in a photograph outside the confines of her home despite her claims that she has sustained permanent injuries and is largely confined to her house and bed." The court ruled that the defendant was entitled to the requested discovery because both the public and private portions of the plaintiff's Facebook and MySpace pages were reasonably likely to contain additional evidence of her activities.

In granting the defendant's request for access, the *Romano* court rejected the plaintiff's argument that allowing discovery of her Facebook and MySpace accounts would violate her right to privacy. Because neither Facebook nor MySpace "guarantee complete privacy," the court determined that the plaintiff had no "legitimate reasonable expectation of privacy" in the information she posted on those websites. "[W]hen Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings," it ruled.[20]

It should be noted that some courts have required some showing that the plaintiff's social media page "contained information that was clearly inconsistent with the plaintiffs' claims of disabling injuries." *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387 (E.D.Mich., 2012). This approach seems to create a Catch 22, however, where the defendant is stuck with the burden of proving that information which has been kept from their viewing by a privacy setting is "inconsistent with plaintiff's claims" in order to be able to even view that information in the first place. In *Tompkins*, for example, the court refused to allow access to plaintiff's social media pages, finding that a "public" photograph of her holding a small dog and surveillance of her pushing a shopping cart was not enough to show that she was likely to have done things which were inconsistent with her claims of disability. This approach was recently criticized in *Giacchetto v. Patchogue-Medford Union Free School Dist*., 293 F.R.D. 112 (E.D.N.Y. 2013), where the court noted that it would allow a plaintiff to hold back information which is relevant to the defense of the case simply because of how they choose to set their privacy settings.

Even if defense counsel is able to clear the hurdle of obtaining access to the social media site, they still have the challenge of getting the data admitted at trial. Because the information is stored on the web, it is subject to all of the authenticity concerns which typically arise when dealing with computer data, including the possibility of spam, viruses, hackers and the like which make social media sites susceptible to manipulation or fraud. For this reason, courts are typically very cautious when admitting social media data. One recent Law Review article noted the steps that some judges have recently taken to "authenticate" social media content: in some cases, judges have become online "friends" with a party in order to authenticate postings, photos, captions and comments (*Barnes v. CUS Nashville, LLC,* 2010 WL 2265668 (D.C. Tenn. 2011)), other courts have allowed printed copies with time date stamps to corroborate facts (*Treat v. Tom Kelley Buick Pontiac GMC, Inc.,* 710 F.Supp.2d 777 (D.C. Indiana, 2010*)*), and finally, some courts have used circumstantial evidence associated with the creation of the data (i.e. metadata and hash tags) to authenticate social media content. (*Lorraine v. Markel Am. Insur. Co.* 241 F.R.D. 534 (D.C. Maryland, 2007)).[21]

HOT TOPICS IN BRAIN INJURY LITIGATION:

As the number of TBI cases continues to grow, questions and concerns regarding the use of neuropsychologists in these cases have become more prevalent. Addressed in this section are three issues which have become hot topics in brain injury litigation, which you may come across at some time in your practice when handling TBI cases and should be aware of.

THIRD PARTY OBSERVERS AND VIDEORECORDING AT THE INDEPENDENT NEUROPSYCHOLOGICAL EXAMINATION

Perhaps the most contentious issue at this time in regard to the use of neuropsychologists is whether the presence of a third party observer or videorecording of a neuropsychological evaluation will have the effect of altering testing results. Often, plaintiff's attorneys wish to either observe a neuropsychological consultation, provide an observer from their office, or videotape the recording, so that the examination can later be scrutinized for inconsistencies in an attempt to undermine the defense neuropsychologist's findings. Neuropsychologists, on the other hand, question whether allowing third parties to be present during an examination will skew results and wish to protect the integrity of the testing process.

In 1999, the National Academy of Neuropsychology ("NAN") issued an Official Statement regarding the presence of third party observers during neuropsychological testing, which labeled the presence of a third person during the assessment process as a "threat to the validity and reliability of the data generated by an examination conducted under these circumstances" and which also had the effect of "compromise[ing] the valid use of normative data in interpreting test scores."[22] The NAN found the presence of third party observers to be inconsistent with the standards of the industry and noted that many standardize test manuals, including the WAIS-III, WMS-III Technical Manual, specifically advised that third party observers should be excluded from the examination room to keep it free from distractions.[23] As the NAN noted, these standardized tests were developed with the expectation that the only individuals involved are the examiner and the examinee and that the introduction of a third party presence "introduces an unknown variable into the testing environment which may prevent the examinee's performance from being compared to established norms and potentially precludes valid interpretation of test results."[24] It was also indicated that the presence of a third party could result in an increase in "the risk of motivational effects related to secondary gain" and cautioned neuropsychologists not to permit third party observers unless absolutely necessary.[25]

The American Academy of Clinical Neuropsychology ("AACN") responded in 2001 by publishing their own "Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments."[26] The policy pertained specifically to what the AACN referred to as "medicolegal consultations," that is consultations wherein the neuropsychologist was required to formulate a professional opinion on a patient's condition in relation to tort litigation. The Policy Statement explicitly indicated that it "is not permissible for involved third parties to be physically or electronically present during the course of an evaluation assessment of a plaintiff patient" with the limited exception of cases pertaining to toddlers or young children, where physical separation could cause a behavioral reaction or adults displaying similar extreme behavioral disturbances, such as severe mental illness or delirium.[27] The AACN noted that in these cases, the presence of a third party could have a potentially facilitating influence, and that a neuropsychologist should assess the situation to determine whether the third party's presence should be permitted, based upon their "best clinical judgment."[28]

The AACN stated that in all other cases, "involved" third parties should be excluded from the assessment, including any individual who has a stake in the outcome of the examination or pending litigation, including a "legal stake, financial, family, social or other relationship or benefit."[29] This would include

both friends and family, but also individuals who may not even know the plaintiff, such as a paralegal employed by their attorney's office. The AACN noted concerns that the presence of involved third party observers had the significant likelihood of introducing "a distortion of the patient's motivation, behavioral self-selection and rapport with the examiner(s)."[30] Adverse side effects to a third party presence included potential distractions, such as overt distractions like the observer sneezing or moving around, and internal distractions like the incentive to increase severity of subjective complaints to present what might be considered to be a "stronger" case for financial reward in a lawsuit, particularly if the attorney or a representative of the attorney's office is observing the assessment.

In 2007, the American Psychological Association ("APA")'s Committee on Psychological Tests and Assessment promulgated a "Statement on Third Party Observers in Psychological Testing and Assessment."[31] The Statement was the result of over seven years of staff effort and evaluation regarding the issue of third party observation and was meant not to set forth policy, but to act as guidelines for practitioners confronted with requests for third party observation or videotaping of psychological testing. In that Statement, the APA noted a number of studies which showed that the presence of a third party altered the subject's behavior and resulted in compromised test scores.[32] This included recent studies of neuropsychological evaluations which indicated that the presence of observers increases performance errors and results in an increased number of false positives on the measures used.[33] The APA concluded that this affect had to do, in part, with the fact that "some examinees may be less likely to share personal information if they believe that others are observing or could observe their actual statements or behavior."[34]

The likelihood of altered results where a subject merely believed that someone was observing their statements extends to situations involving video or audiotaping of the testing process as well. The AACN noted in their Policy Statement that while external distractions may be reduced through videotaping or audiotaping, internal distractions, including the financial motivation to exaggerate symptoms in order to create a "stronger" case at trial, would not be reduced.[35]

On the other hand, failing to advise a subject that they were being videotaped or audiotaped raised significant ethical concerns and legal issues regarding the psychologist's obligation to disclose to the examinee the fact that the session is being observed or recorded and the identity of individuals who may have access to the observation or recording.[36] The APA strongly cautioned against "surreptitious surveillance," regardless of the fact that it may eliminate the

possibility that the subject is altering their assessment behavior during examination.[37] The NAN has also recommended against attempts to allow third party observation without the knowledge of the subject, indicating that to do so would be "deceptive."[38] The NAN also noted that some studies showed that in instances where an assessment was conducted without the examinee's knowledge but with that of the examiner, the examiner's behavior could actually be altered, altering the assessment as a whole.[39] Lastly, the NAN noted the very distinct possibility that the subject could become aware of the surreptitious monitoring of the examination and feel betrayed or cheated, in which case the rapport between the subject and neuropsychologist would certainly suffer a breakdown, rendering altered test results.[40] The AACN has also cautioned against secretive or surreptitious monitoring of assessments.[41]

Additionally, organizations representing neuropsychologists have cautioned against permitting third party observation of testing and video or audiorecording of the testing process on the basis that it compromises the security of testing materials and any copyright of the materials. The APA noted that allowing observation or, more significantly, recording of the testing process "creat[es] a retrievable record of test items and responses and by making this record available to non-psychologists, the security of test materials and the copyright may be compromised."[42] As the APA noted, "observers who learn the specific item content of psychological tests could potentially use this information to 'coach' or otherwise prepare subsequent clients,"[43] which could make determining whether a subject is malingering or displaying symptom magnification even harder for neuropsychologists.

Both the APA and the NAN do, however, indicate that third party observation can be allowed in limited situations. The most significant of these is in the situation where a subject's testing may actually be enhanced by the presence of an individual who provides a soothing presence on the subject, such as a parent with a child. As the APA noted, where a subject does not have the emotional security to engage in the assessment, testing results may actually be undermined by a refusal to allow an observer who provides the subject with a sense of security.[44] The NAN also confirmed that in certain situations, the presence of a third party observer may not be problematic, such as parent where they provide a calming presence to a child who is being evaluated.[45] A disinterested party, such as a trainee or other neuropsychological professional, would also not likely interfere with the assessment process or skew test results.[46] There also may be practical situations where a third party observer is needed for the testing to occur. The APA noted that a third party observer may be necessary to facilitate the assessment in

situations where the subject requires the assistance of a sign or voice language interpreter.[47]

While professional neuropsychological and psychological associations and groups have certainly indicated a distaste for the presence of third party observers during assessment in a majority of situations, the issue of whether third party observers will be allowed or permitted by court order has still not been addressed in many jurisdictions. In the federal courts, neuropsychologists are treated the same as a physician for the purposes of conducting defense examinations pursuant to Federal Rule of Civil Procedure 35. Accordingly, they are found to be bound to the same rules that apply to physicians conducting independent medical examinations ("IMEs") of a plaintiff's physical person. This includes rules applicable to the observation of IMEs by third persons or videotape recording of examinations. Federal courts that have examined the third party observer issue have traditionally applied the rule fashioned in regard to regular IMEs or mental health examinations that "observers should not be allowed unless the person to be examined shows special need or good reason for the observer." *Ardt v. Allstate Insurance Company*, 2011 WL 768294 (E.D. Mich. 2011).

The case in *Ardt* is a fairly good example of a situation where a special need is established that would make the presence of a third party observer necessary and perhaps even beneficial. In that case, the plaintiff, Robert Ardt, had been struck by a motor vehicle as a pedestrian. In litigation commenced on his behalf, it was asserted that he had sustained a serious TBI as a result of the accident. He had to be moved into a special care center and had frequent behavioral outbursts and limited speech capabilities. Because of these behaviors, plaintiff's sister, Christine Parker, began to accompany him to medical and dental appointments, as she provided a calming influence, often being able to facilitate his cooperation during treatment. The defendant sought an examination of the plaintiff with a neuropsychologist, which was granted by order of the magistrate judge, although that order permitted plaintiff to be accompanied by his sister, Ms. Parker. The defendant appealed from that order, indicating that their neuropsychologist refused to perform the examination with Ms. Parker present. The magistrate judge's condition was upheld by the district court, who concurred with a finding that Ms. Parker's presence could help facilitate the examination. This result, the court noted, was consistent with the policy statements issued by the NAN and AACN, discussed above, which both confirmed that under special and unique situations, a third party observer may be permitted. The district court also directed, however, that if Parker was to interfere in any way with the examination, the examination could be discontinued with plaintiff paying the costs of that examination.

Application of the "special need" criteria is unique to the particular circumstances of a case, which can result in divergent caselaw across federal courts. For example, the "special need" rule was applied in *Maldonado v. Union Pacific Railroad Co.*, 2011 WL 841432 (D.C. Kan. 2011) only a week or so after the *Ardt* decision in upholding third party observation in a very different case than *Ardt*. In *Maldonado*, the question was whether the court would permit the videotaping of a plaintiff's neuropsychological examination so that the plaintiff's attorney could view the examination after the fact. The court upheld the request to videotape the examination, regardless of the arguments made by the defendant and the defendant's neuropsychologist that videotaping could impact the validity of testing. The court reasoned that plaintiff had shown a special need for the videotaping in that plaintiff was a non-English speaker with only a third grade education, whose medical records showed reference to memory and cognitive limitations. Based upon this, the court found that videotaping was permissible because otherwise the plaintiff may have difficulty "communicat[ing] to his counsel what occurred during the examination."[48]

The *Maldonado* court's reasoning in this respect seems questionable, as almost every plaintiff would have some difficulty relaying the entire scope of an examination to their attorney. Moreover, the purpose of the examination would be, in part, to assess the existence of any memory or cognitive limitations, meaning that almost any plaintiff could argue that they are entitled to have their examination videotaped. This is certainly not the result that the "special need" criteria seems to support. Application of the "special need" criteria is more aptly noted in the court's decision in *Cabana v. Forcier*, 200 F.R.D. 9 (D.C. Mass, 2001), wherein the court refused to permit attorney observation of a neuropsychological examination in a case where the plaintiff alleged that he had sustained cognitive deficits as a result of brain injury sustained from exposure to hazardous waste leaks from the truck he was operating.

Clearly, courts are still grappling with requests for third party observation during neuropsychological examinations, resulting in decisions that vary to a wide extent. If for some reason a third party observer is either needed due to the plaintiff's special or unique situation or if the court orders your neuropsychologist to permit observation by a third person, the APA suggests a number of methods which can be utilized to protect the integrity of your neuropsychologist's examination.[49] First, if possible, the observer should be seated behind the examinee and should be advised not to speak at all during the assessment process. If the third party is permitted to observe by court order, you should seek to have

included in that order a provision that the permitted observer not speak or otherwise interrupt the assessment and indicating that if any interruption does take place, the test may be discontinued with the cost of the exam to be paid by the plaintiff. Secondly, you should have your neuropsychologist explicitly note to the plaintiff at the outset of the assessment and also in their report that the results of the evaluation may be altered by presence of a third party to the extent that the presence of outside observers has been shown to produce a higher rate of false positives during neuropsychological testing.

SYMPTOM MAGNIFICATION AND MALINGERING

More and more often it is appearing that plaintiff's counsel are including claims for psychological injuries or claims of TBI among injuries alleged to have been sustained in even minor motor vehicle accidents. As a recent article in the scholarly publication Clinical Neuropsychology noted, this may be because some experiences associated with mild traumatic brain injury ("MTBI") are also associated with other aspects of the experience of a motor vehicle accident.[50]

In the article entitled "A Comparison of Complaints by Mild Brain Injury Claimants and Other Claimants Describing Subjective Experiences Immediately Following their Injury," the authors noted that many individuals involved in motor vehicle accidents describe an altered mental state with no evidence of a TBI. In fact, individuals may describe the same altered mental state, consistent with being startled, upset, or agitated by the accident or potential accident even where no injury occurred. For this reason, plaintiffs and perhaps their medical providers may be associating symptoms such as being "dazed and confused" with a potential TBI, where it could just be the result of shock or distress from the accident. Additionally, the article also noted that the symptomology associated with a TBI could be the result of other factors. For example, attention or memory problems or depression, all symptoms associated with TBI, have actually been found to also be common symptoms of chronic pain associated with orthopedic injury.[51] It also noted that some symptoms, such as headaches, fatigue, irritability, and concentration problems have been found common in the general population at large.[52]

The authors of the Clinical Neuropsychology article also conducted their own study of symptoms associated with TBIs, comparing personal injury claimants whose loss of consciousness and Glasgow Coma scale immediately after the accident indicated a potential MTBI (the MTBI group) with that of other personal injury claimants who did not fit that profile (the other claimants group).[53]

Interestingly, the study noted a higher rate of reported anxiety, irritability, and depression among the other claimants group than the MTBI group.[54] Reports of headaches, concentration issues, dizziness and confusion were comparable between both groups.[55] The study confirmed that many of the symptoms associated with TBI were also present in non-TBI claimants. The authors caution against confusing symptoms of a TBI with "general stress symptoms," which they indicate may lead to misleading and erroneous diagnoses where no TBI actually exists.[56] This possibility of misdiagnosis is likely the culprit of an increased number of psychological claims or claims of TBI among plaintiffs.

If, in fact, symptoms are found to be associative with a TBI and not merely generalized stress, attention should be paid to the plaintiff's symptomology, as compared to other TBI patients, and rate of recovery to determine whether or not the patient is displaying evidence of symptom magnification and/or malingering. A malingering patient may attempt to exaggerate their injury, typically to increase the potential value of compensation, or falsify an injury altogether by presenting a false impression regarding their competence.[57] Malingering involves not putting forth maximum effort during the testing process in an attempt to obtain results indicating a more severe impairment than there actually is or to show injury where no injury exists.

As Clinical Neuropsychology noted in its article on detecting neuropsychological malingering, accurate assessment during neuropsychological testing is "dependent upon the patient putting forth his or her best possible effort."[58] A plaintiff in the midst of the litigation process, with expectations of a large settlement, has little incentive to put forth maximum effort during an independent examination by the defendants' expert. The plaintiff may attempt to exaggerate symptoms in an attempt to present a more severe impairment, hoping to increase the value of their case. The plaintiff may also not want to cooperate with the neuropsychologist, taking an adversarial approach solely because the neuropsychologist was retained by, and thus "aligned with", the defendants. As discussed in the previous section, these effects are heightened when third parties are permitted to observe the testing process or when testing is video or audiotaped.

There are a number of tests may be useful in detecting malingering and your neuropsychologist should be prepared to utilize these tests during an independent examination to assess the plaintiff's applied efforts. To give an example of how a neuropsychological test is utilized to demonstrate malingering, neuropsychologists sometimes utilize the Computerized Assessment of Response Bias-97 (CARB-97) test. The CARB-97 test begins by requiring the patient to memorize a string of

five numbers. The patient is then shown that same string of five numbers as well as an alternative string of the same numbers in a different sequence and is asked to choose the original number from among the two options.[59] The location of the correct answer on the computer screen (right or left) is random, as is the selection of the alternate number sequence. This exercise is performed repeatedly over 75 occasions, with the patient selecting what they believe to be the original number. This test assesses both correct answers and the time taken to reach these answers. The CARB-97 test has been found to be a reliable method of detecting incomplete effort as studies have shown that even people with severe brain injury typically score well above a 90%. Even leaving it to chance, randomly picking one number or the other, a person would choose the correct number around 50% of the time. Scoring at or below the chance performance level of 50% is a good showing that the test taker is exaggerating. Longer reaction times are often demonstrated among malingering subjects where those subjects with confirmed brain injuries did not display prolonged reaction time.[60] One study showed that the CARB-97 test was still effective in displaying malingering in its test "patients" even where those subjects were given information on how neuropsychological testing worked and were coached to avoid detection of malingering.[61]

It may be startling to learn, but studies have indicated that as many as 70% of patients assessed by a clinical neuropsychologist in a forensic context are thought to alter their presentation during assessment and that as many as half of all workers' compensation claims may involve faked cognitive deficits.[62] In light of the high incidence of malingering, it is vital that your neuropsychologist be prepared to assess during examination whether a plaintiff is exaggerating symptoms during the testing process and that the subject of malingering be covered extensively in his report.

Malingering can also be detected by looking at the results of serial testing. As one scholar noted, "serial testing over 3- to 6-month intervals can be extremely illuminating in these cases, since the malingering patient has difficulty maintaining consistent performance from test session to test session."[63] While highly unlikely that a court would authorize serial neuropsychological examinations by the defendant's examining physician, if the plaintiff has undergone serial testing with their treating neuropsychologist, all raw test data and material could be analyzed by the defendant's neuropsychologist to determine whether there were any inconsistencies shown between the results of the multiple testing sessions that could indicate exaggeration of symptoms.

A finding that the plaintiff in your case is malingering could be the breakthrough which results in a finding of "no cause" by a jury or a substantial weapon to reducing damages. Courts have credited a neuropsychologist's finding of symptom magnification and malingering in finding that a claimant/plaintiff was not injured either at all or that the plaintiff was not injured to the extent that they claimed. *Ferris v. Comm'r of Soc. Sec*., 2010 WL 2640043 (W.D. Mich. 2010)(denial of Social Security benefits based on finding that claimant malingered); *Amato v. City of Saratoga Springs*, 170 F.3d 311 (2d Cir. 1999)(refusing to grant compensatory damages to plaintiff who alleged he suffered a TBI as a result of excessive force used by police, based upon neuropsychologist's finding that plaintiff was malingering).

The plaintiff's neuropsychologist should also be subject to cross-examination at trial about the efforts that they utilized, if any, to detect malingering in their patient. While a plaintiff has motivation to exaggerate their injury even during examination by their own neuropsychologist in order to bolster proof in their medical records, the plaintiff's neuropsychologist is not as likely to scrutinize the possibility of malingering as the defense's neuropsychologist may be or may not be as thorough in his or her efforts to verify whether the plaintiff is exaggerating symptoms. As you can imagine, a physician who comes out and tells his client that he believes that they are lying is not likely to maintain that client for very long, so in many cases plaintiff's neuropsychologists often gloss over the issue of symptom magnification or malingering . Efforts should be made on cross-examination to point out a lack of effort to rule out the possibility of malingering by the plaintiff's neuropsychologist, thereby introducing a plausible alterative cause of any neuropsychological test deficits.

POST-TRAUMATIC STRESS DISORDER

In addition to the higher incidence of TBI claims arising from symptoms which can be generally associated with other factors, such as generalized stress, defense attorneys and claims adjusters are seeing an upswing in claims of post-traumatic stress disorder ("PTSD") alleged to have resulted from motor vehicle accidents and other trauma. Post-traumatic stress disorder is defined by the APA as "an anxiety problem that develops in some people after extremely traumatic events, such as combat, crime, an accident or natural disaster. People with PTSD may relive the event via intrusive memories, flashbacks and nightmares; avoid anything that reminds them of the trauma; and have anxious feelings they didn't have before that are so intense their lives are disrupted."[64] A nexus has been shown between neuropsychological functioning and PTSD.[65]

PTSD does not happen in a vacuum and in many situations the incidence or severity of PTSD symptoms are affected by pre-existing conditions. For example, PTSD has a higher incidence of in individuals with pre-existing psychological conditions.[66] PTSD has also been shown to have a higher incidence in individuals with alcohol dependency or abuse issues.[67] For this reason, it is important for an attorney or claims adjuster confronted with a PTSD claim to thoroughly examine the plaintiff or claimant's medical records for evidence of a pre-existing psychological or psychiatric issue or for evidence of alcohol abuse. This documentation should be provided to any neuropsychologist who may be retained to examine the plaintiff or claimant.

PTSD is diagnosed largely based upon the self-reporting of the patient. That is, PTSD is marked by hallmark symptoms including flashbacks and nightmares, which are reported by the patient but not able to be independently verified by objective medical evidence. For this reason, it can be easy for a plaintiff to claim symptoms of PTSD and difficult for a defense examiner to discredit those claims. There are a number of "red flags" however which may indicate that a plaintiff is falsely claiming or exaggerating PTSD symptoms.

First, symptoms of PTSD usually begin immediately after the event that formed the basis of the anxiety.[68] However, often times a defense attorney will find that many months have passed between the motor vehicle accident and first references to PTSD symptoms in a plaintiff's medical records and should be skeptical of such a claim. Additionally, in some instances, plaintiffs will claim PTSD and at the same time claim a simultaneous loss of consciousness, which simply does not make logical sense.

Secondly, post-traumatic flashbacks and nightmares are <u>always</u> associated directly with the event that caused the trauma.[69] Nightmares or episodes should "symbolize or resemble an aspect of the traumatic event and/or physiologic reactions to events that resemble the trauma."[70] If, for example, the plaintiff claims persistent nightmares about a completely different event, it is likely that those symptoms are either contrived or are not related to PTSD. For example, a plaintiff in a motor vehicle accident has persistent and reoccurring nightmares in which they are shot by an armed assailant. This reaction would not be the result of PTSD.

Lastly, in most cases, PTSD symptoms will begin to remit within a number of weeks or months.[71] While some individuals may have more difficulty than others extinguishing anxiety resulting from a traumatic incident, including children or the elderly, most people are capable of making at least some progress in

returning to a normal lifestyle after a few months. Be particularly wary of cases where the plaintiff's claimed PTSD symptoms do not recess after months of treatment, but actually increase, as this runs against the norm.

Like traditional TBI symptoms, PTSD symptoms can also be the result of other factors, such as the use of medication. Claimants frequently report symptoms associated with PTSD to their physicians, such as difficulty falling asleep, irritability, and hypervigilence, which their physician may confuse for a PTSD condition. In actuality, these symptoms could be the result of side effects from medication use, caffeine use, daytime napping or irregular sleep patterns, depression or other factors.[72] A diagnosis of PTSD should always be scrutinized with care.

While post-traumatic stress disorder may seem like an ancillary complaint to other physical or neuropsychological injuries, it should not be ignored. Just recently, a plaintiff in New York was awarded over $5.3 million based upon a PTSD claim, where she was unable to provide any evidence of having sustained a brain injury. *Nash v. Port Authority of New York and New Jersey* (New York County, February 2011) involved a claim arising from the original 1993 World Trade Center bombing in New York. The female plaintiff, Linda Nash, was a 45 year old senior claims examiner at Deloitte & Touche on the 97th floor of the north tower. The incident occurred when Islamic terrorists equipped a 1500 pound bomb in a rented van parked in a parking garage beneath the World Trade Center, which exploded injuring thousands and killing six. Ms. Nash had just exited her vehicle in the parking garage when the bomb exploded. She was struck with debris, but did not lose consciousness and was able to crawl through the debris to reach a payphone, from where she contacted emergency personnel. She spent hours waiting in the debris before she was located by emergency response crews. She ultimately sued the Port Authority of New York and New Jersey, the owners of the parking garage, alleging that a report that they had commissioned showed the possibility of a terrorist attack in the garage but they still did not close the garage to the public.

Ms. Nash sustained some temporary or minor physical injuries resulting from being hit by the debris, but the bulk of her claims at trial were that she had sustained mental and psychological defects, including a short-term memory deficit and PTSD. While she returned to work at Deloitte & Touche, her performance suffered after the incident and she was ultimately terminated from her position. She had not been unable to find new employment and claimed that the PTSD limited her ability to function. She also claimed damage to her liver resulting from

the use of antidepressants. She did not present any medical evidence substantiating a brain injury whatsoever.

Ms. Nash's lawsuit was initially consolidated with that of other World Trade Center bombing victims for a liability trial, which resulted in a finding that the Port Authority was negligent. It was then heard on damages only, after which the jury in the *Nash* case came back during the damages portion of a bifurcated trial with an award of **5.3 million dollars**, including pain and suffering and lost wages from her job at Deloitte & Touche, which plaintiff claimed she was unable to perform due to her PTSD symptoms. Just recently, the liability determination upon which the damages trial was based was overturned in *Nash v. Port Authority of New York and New Jersey*, 102 A.D.3d 420 (1 Dept. 2013), however, the case still highlights how significantly a jury can evaluate and assess damages in a case involving claimed traumatic brain injury with no reported loss of consciousness and otherwise minor injuries. Although this is certainly a strange and unique case, it is a good example of a situation where a plaintiff's case, based primarily upon a PTSD claim, garnished large numbers at trial.

CONCLUSION

If confronted with a case where TBI is alleged as the result of a motor vehicle accident or other traumatic event, it is important to retain a neuropsychologist early in the process, who can assist in a variety of ways, including providing assistance in reviewing the plaintiff's medical file, conducting an examination of the plaintiff, and assisting in cross-examination of the plaintiff and/or their neuropsychologist. Pay careful attention to your expert's qualifications, including education and training, as well as their experience, both in practice and testifying in the courtroom. The best neuropsychologist will have the same traits as any good witness—the ability to convey your point to the jury in a clear and understandable manner together with a sense of approachability and believability. Make sure to prepare your neuropsychologist with a full range of materials regarding the plaintiff, which can be obtained through aggressive pursuit of discovery. Lastly, be prepared to address the many ever evolving concerns that continue to arise regarding the use of neuropsychological testimony and assessment in tort litigation, such as the presence of third party observers or videorecording of neuropsychological testing.

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[43] Statement on Third Party Observation, APA, *supra*, p. 3.
[44] Statement on Third Party Observation, APA, *supra*, p. 3.
[45] Official Statement, NAN, *supra*, p. 380.
[46] Official Statement, NAN, *supra*, p. 380.
[47] Statement on Third Party Observation, APA, *supra*, p. 1.
[48] Note that the court also indicated that because the plaintiff needed a translator during the testing process, there would already be a third party observer involved who could "skew" test results, which the court found weakened the defendant's argument against allowing videotaping.
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