

The Traumatic Brain Injury Case: — Seven Steps to Success

by Gary Gober

If you are a Plaintiffs' personal injury lawyer, sooner or later a potential client will walk into your office who has sustained a traumatic brain injury. Over 1.4 million of these injuries occur every year in America. Traumatic brain injury (TBI) is the hottest health topic in the country today; it is only a matter of time until you encounter one.

This brief article does not purport to be an exhaustive manual on how to handle a TBI case. Rather, I merely offer some guidelines to the lawyers who may be inexperienced in this field, and particularly young lawyers, consisting of seven basic steps to take in order to achieve success. I think they are indispensable.

FIRST: SCREEN YOUR CASE CAREFULLY

Proper case selection can make the difference between victory and defeat, between solvency and bankruptcy. You need to look at three factors of decision: first, LIABILITY. TBI cases are often defended vigorously on the issue of causation. That involves experts and experts are expensive. Battling over liability before you even get to the issue of causation and damages drains money and energy, is distracting and gives the jury something additionally to argue about when they decide whether your client gets any award at all. Clear liability is always a plus in case selection when it comes to TBI cases in which causation and damages is hotly disputed, as will be the situation in most mild TBI claims. Of course, if you have a manifestly severe life-altering TBI where the client's prospects are destroyed, it may be worth fighting over who had the green light. It all depends on the facts.

The second factor is COLLECTABILITY. No coverage, no money. Low coverage, low money. You've got to have adequate coverage, which in my experience usually means a commercial defendant. The stark fact is that most plaintiffs and most individual defendants are underinsured with a 25 or 50k policy. By the time the client gets to you, the decisions that will determine the financial parameters of the case have usually already been made. Count yourself fortunate if they have been made in your client's favor.

The third factor is CREDIBILITY. Ask yourself "Can I sell this claim to a jury? Will they buy our story? Most lawyers with some experience develop a feel for this. Credibility is more than just believability; it includes trustworthiness. To have credibility, the client must not only be believed by the jurors, they must believe IN him. This embraces qualities like honesty, humility, simplicity, straightforwardness, diligence, sobriety, and likability. Life is unfair, and long experience has taught me that if the jury doesn't like your client, they won't award an adequate verdict, and an adequate verdict is, for most of us, a large verdict. Nobody gets high fives for little verdicts.

Screen your TBI cases. Approach the intake decision with

a certain open-minded but hard-nosed sense of reality. We all want to say "yes" to new business. Sometimes "no" is the most profitable answer we can give.

SECOND: COUNT THE COST

Litigation is expensive, and TBI cases cost as much or more than most to prepare. For one thing, most mild TBI is not detected on conventional CT or MRI scans, and must be inferred from behavioral or cognitive changes in the individual. This requires expensive neuropsychological testing and evaluation. Neuropsychology has become a cottage industry for litigation with plaintiff and defense experts at the ready to testify for one side or the other. These experts are not cheap.

Additionally, recent advances in neuroimaging have yielded diagnostic tools such as 3 tesla MRI and diffusion tensor imaging which may provide clearer evidence of shearing of axonal brain circuits in traumatic events such as vehicular crashes. Accessing these diagnostic modalities and then getting expert testimony to explain them can be very expensive. All of which is to say that if you are going to do this type of work, you need to have access to either cash or credit to pay for it. Many law firms are forming joint ventures to share the costs and financial risks of TBI litigation. Before undertaking representation, you should be confident that you have the resources to see it through.

THIRD: KNOW THE MEDICINE

You should be familiar with the anatomy and physiology of the brain. Take a course in human anatomy and physiology at your local state college. Go on the Internet and explore the vast literature on TBI that is to be found in publications like the Journal of Neurotrauma and another peer-reviewed journal, Neurology. One learned paper that I would recommend without hesitation to lawyers wanting to handle TBI cases is an article by Drs. Bret Masel and Douglas De Witt in Vol. 27 of the Journal of Neurotrauma. August 2010, entitled "TBI: a Disease Process, Not An Event." Also, read HEAD CASES, by Michael Paul Mason, published by Farrar, Straus and Giroux for a dramatic depiction of how TBI can permanently transform the lives of its victims. Powerful stuff.

Join the TBI Litigation Group of the American Association for Justice. It's a goldmine of information regarding developments in the literature, case results across the nation, experts to retain and avoid, developing evidentiary trends and perhaps most important, networking opportunities. Every lawyer who represents plaintiffs in TBI cases should belong to this group.

FOURTH: ORGANIZE THE MEDICAL PROOF

Traumatic brain injuries are of three kinds: mild, moderate and severe. The vast majority are usually considered in

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the “mild” category, although this is a concept that is coming increasingly under attack.

It has been estimated that some 57% of “mild TBI” are not diagnosed in the ER. Regular CT scans and MRI scans usually show no abnormalities so there’s a good chance that your potential client’s true condition has been missed entirely. That means you may need to do the differential diagnosis to look for signs of brain injury. Some are as follows: any alteration in mental status at the time of the traumatic event, pre or post traumatic amnesia, dizziness or confusion; memory loss, difficulty concentrating or processing written material, headache, slurred speech, anosmia (loss of sense of smell); some personality change such as loss of inhibition, inappropriate outbursts, depression and loss of energy.

You must procure ALL the client’s medical records going back to childhood. This includes prior intelligence scores and psychological records. These can provide a baseline against which later neuropsychological test results can be measured.

If the client’s head injury has been diagnosed dismissively as a “concussion” with no additional treatments prescribed, there’s a good chance that his PCP has not considered the presence of a significant brain injury. It will be up to you to find the treating or retained experts to round out the proof. You may need to consult a neuropsychologist for the purpose of testing to measure cognitive impairment, a neuropsychiatrist who can treat the resulting depression, a neurologist who can diagnose or treat impairments resulting from headache, seizures, and reduced executive decision-making arising from a so-called “mild” TBI. If the client has a long-standing relationship with his PCP, post-traumatic differences in personality and affect can be documented.

A TBI case is a Production and the victim’s lawyer is the Producer. He or she must produce the medical evidence that is powerful and persuasive in winning the jury over to the client’s cause.

FIFTH: KNOW YOUR CLIENT’S STORY

Every case involves a story and in order to win you must tell that story effectively. You will have to immerse yourself in the client’s life. Get to know your client. Visit in his home. Have dinner with the family. Spend quality time learning how the injury has affected your client’s everyday life. In a limited way you should become part of the family. You can’t tell what you don’t know and the best way to know something is to experience it. This way you will know what your client means when she says, “I’m not me anymore.”

SIXTH: USE LAY DAMAGE WITNESSES

Your goal is to persuade the jury that your side has the truth. To do that, you must produce expert testimony, but in all candor, it has been this writer’s experience and observation that the jurors think that you have your bought-and-paid-for experts, and the defense has theirs. Good expert testimony can have persuasive value but the jury is likely to feel that on the whole, expert testimony is a wash. You have to have it, but it is usually not the most decisive factor in winning. The most

persuasive and powerful witnesses are those non-technical persons who can describe the changes in your client since the injury. You need to identify and interview the cast of characters in your client’s life. It is they who will tell the jury how the injury has affected your client’s existence.

Who is the most effective lay witness? Someone who has known your client for some time, whether months or even years; someone who has no axe to grind, no personal interest in the outcome of the case, like a co-worker or better yet, a supervisor; someone who is credible, a salt-of-the-earth person who exudes believability and trustworthiness. That kind of witness will make your case. That kind of witness testimony will enhance the award by convincing the jury that your client has sustained a real injury with life-changing consequences.

The lay witness testimony must be anecdotal to be effective. Statements like “he’s almost a different person” won’t cut it. How different? What examples can be given? An unexpected outburst in a restaurant; a rescue after forgetting how to get home from the store; the lapse of effectiveness on the job to the extent that your client had to be replaced. These are real-life glimpses of the client’s experiences and resultant suffering. The credible lay witness can be the key to the damage award in your case. Use them.

SEVENTH: DEVELOP POWERFUL THEMES FOR SUMMATION

I believe that advocating for the Plaintiff in a life-changing TBI case is a spiritual experience. You are dealing with the great themes that define the meaning of life. What counts is not what the defendant by his negligence has taken away; it’s what your client has left. To be sure, your client may LOOK normal; she may take care of herself and arrange her clothes, in short, she may survive. But as the great Moe Levine once said, “If all we have left is mere survival, who needs it?”

Michael Paul Mason in his book, HEAD CASES tells the story of a woman who was taking her seven-year-old daughter to school when they were hit by a train at a railroad crossing. The woman was in a coma for weeks. When she woke up she had no memory at all of her daughter nor of her fourteen-year marriage to her husband. These lost memories are permanent; the memory circuits in her brain that held them have been destroyed, likely forever. The woman has procedural memory. She remembers how to clean up, make the beds and do the dishes. But she has lost all episodic memory of relationships. She lives in the perpetual present and cannot remember what happened five minutes ago.

How would you sum up in a case like that? What would you draw upon to convey to a jury the enormity of that loss? How would you describe the loss of thrilling to a little girl’s laughter on a Christmas morning, or the excitement of your wedding day when you and your spouse set out on your honeymoon and began your life together? Well, I can’t give you the words to say; there is no form book on that. Each advocate must find his or her own words, as the great Nashville lawyer Jack Norman once said, “in the lonely temple of his soul”.

Nonetheless there are things you can do. Find out what



moves you, what themes thrill your heart, and tie into those themes. Read scripture. Know your Bible, that great source of the spirit for the ages. Read great poetry. Hear great inspirational speakers, particularly great trial lawyers. Unfortunately, most of the great rhetorical giants of the trial bar have passed on; we live in a diminished age of power point and computer animations. But there are still some profound thinkers out there. Learn who they are and expose yourself to their teaching. You will grow in wisdom, and you will win.

ABOUT THE AUTHOR

Gary Gober is the founder of the Gober Law Firm in Nashville. He is a former TTLA President and a TTLA Lifetime Achievement Award Winner. Gary has litigated for over 50 years in both criminal and civil courts in Tennessee, representing a host of seriously and permanently injured men, women and children in cases ranging from brain injuries to burn injuries. He is nationally known as an inspiring teacher of trial lawyers in the field of trial advocacy.

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