

# The Brain Injury Case With Psychological Overtones

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Many personal injury lawyers are afraid to try the mild traumatic brain injury case when their client has not recovered and now has a psychiatric diagnosis of a condition such as depression, post traumatic stress disorder, anxiety, or chronic pain syndrome along with the diagnosis of persistent post concussive syndrome. In my opinion, some lawyers take a too defensive approach to these cases. It has been my experience that a good trial lawyer can win many of these cases with the right case theme and a sensible approach to the client's problems.

I'd like to share some thoughts with you concerning how to put these cases together.

To begin with, let's talk about the mild TBI case with psychological overtones that I am most comfortable trying. In a good mild TBI case, I usually have four things going for me:

## 1. A DETERMINED PLAINTIFF

I do not mind if my client has had plenty of adversity and experienced his or her share of ups and downs in traveling the road of life. However, as plaintiff's counsel, I must be able to demonstrate that prior to the accident, my client was a warrior who had persevered through adversity, worked through his or her problems and managed to be at least reasonably successful in his or her personal and professional life.

## 2. WITNESSES WHO SUPPORT THAT THE CLIENT HAS TRIED TO RECOVER SINCE HIS/HER INJURY

In a mild TBI case it is particularly critical for the plaintiff's lawyer to call disinterested witnesses who will support my argument that the plaintiff has really tried to overcome his or her injuries but has failed through no fault of his or her own. Therefore, key witnesses include the plaintiff's boss and/or co-workers to testify that the client came back to work and tried hard, but could not do the job as well as before. In the case of an injury to a child or young adult, I am looking to call teachers who will praise my client's efforts, but verify that the results of his or her schoolwork were not the same as before.

## 3. TESTS SHOWING MY CLIENT IS NOT A MALINGER

A number of neuropsychiatric tests have been study validated and are fairly effective (though not foolproof) at detecting malingering. These include the tests of NEUROPSYCHOLOGICAL MALINGERING, THE REY 15 ITEM TEST, and THE WARRINGTON RECOGNITION MEMORY TEST. If my client has generally scored well on these tests, then the defendant is going to have a much harder time proving that his or her injury is not genuine. Usually the defendant's neuropsychologist gives these tests too. When the defendant's neuropsychologist is on the stand, if he downplays the results of these tests, it is hard for that expert to explain why he administered the tests in the first place.



## 4. A SYMPATHETIC CLIENT

My client needs to be sympathetic and, hopefully, likeable in the courtroom. I cannot overemphasize the importance of pretrial witness preparation. You must work with the client until he or she feels comfortable taking the stand and has worked through any anger towards the defendant. It is hard for a jury to "warm up" to a nervous or defensive plaintiff, and in these cases, it is particularly critical for the jury to "connect with" the plaintiff.

## DEVELOPING THE CASE THEME

In the mild TBI case, it is critical to define the case on your terms and to frame the issue your way — not the defendant's way. The defendant is going to try to engage you on his or her turf. He or she will do this by challenging you to prove that all of the plaintiff's problems are the result of permanent structural brain damage.

A savvy plaintiff's attorney recognizes this "challenge" as a trap. Why? Because medical science has not yet developed all of the answers concerning why 10% - 15% of people who sustain mild head injuries do not fully recover and go on to develop permanent cognitive and emotional problems and disabilities. Therefore, in most mild TBI cases, plaintiff's counsel will have difficulty establishing the medical proof to connect brain damage caused by mild traumatic brain injury to the client's permanent disability.

To win, you need a more flexible approach. Your theory should be that the accident caused the injury and has led to both physical and psychological complications which eventually disabled your client. You start by establishing that your client initially sustained a brain injury. You will argue that your client is still suffering because anatomically and biochemically his or her brain is not working normally. But you must also convince the jury that the brain damage is now only part of your client's problem. Your client has developed

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persistent psychological problems which are a recognized complication of TBI.

Do not be defensive about the fact that your client has suffered psychological problems. The point is, this accident didn't just cause a simple head injury, it caused a head injury that resulted in other serious complications. These conditions are cumulative. When an accident victim breaks a leg, requires surgery and develops a staph infection, you don't question that the patient is entitled to recover from the tortfeasor damages resulting from all of his or her problems, including those which resulted from the staph infection. Your mild TBI case is no different. You must however, establish in the jury's mind the connection between mild TBI and psychological complications.

I have five building blocks that I use to persuade a jury that the psychological problems the client has developed are connected to the traumatic brain injury and to my client's current disabled condition.

**BUILDING BLOCK NO. 1**

**PROVING THAT STRUCTURAL BRAIN DAMAGE IS PRODUCED BY MILD TRAUMATIC BRAIN INJURY**

It is now established in accepted medical literature that even mild traumatic brain injury causes injury to brain anatomy. Plaintiff's biomedical expert or neuropsychologist expert can demonstrate this by reference to autopsy studies of individuals who were known to have suffered mild TBI during their lifetime. Microscopic analysis of brain tissue can also be used to demonstrate how acceleration/deceleration causes injury to the brain through shearing of the fragile axons in the brain tissue. It is important to teach these concepts to your jury, starting in your opening statement.

**BUILDING BLOCK NO. 2**

**PROVING BIOCHEMICAL CHANGES CAUSED BY MILD TRAUMATIC BRAIN INJURY**

While the evidence is not as clear, there is growing medical evidence that following even a mild traumatic brain injury, injurious biochemical activity occurs within the brain. Several recent studies from the Journal of Neurotrauma and from the journal "Brain Research" analyze the results of animal studies and support the conclusion that mild to moderate brain injury causes biochemical changes, increasing levels of serotonin production to certain areas of the brain and increased chemical activity in the hippocampus of the brain.

**BUILDING BLOCK NO. 3**

**PROVING THE CONNECTION BETWEEN MILD TRAUMATIC BRAIN INJURY AND MOOD DISORDERS**

There are many medical studies establishing a very high association between mild TBI and psychological illnesses. In particular, these studies can be cited to support a high incidence of depression in patients who have suffered traumatic brain injuries, including mild brain injuries. One such study, entitled "Depression After Mild Traumatic Brain Injury, A Review of Current Research" nicely summarizes and annotates many of these studies linking TBI and depression. Generally, the published studies demonstrate that somewhere between one-third and two-thirds of all patients

who sustain a mild traumatic brain injury will go on to develop significant depression during their acute or post-acute recovery.

While the etiology linking mild TBI and depression is not precisely understood, no credible neuropsychologist can deny that there is a linkage.

There are similar studies linking TBI with other psychiatric mood disorders. For instance, a recent study by Cant entitled "Prevalence of Apathy Following Head Injury"<sup>2</sup> found that nearly 80% of all patients who sustained a traumatic brain injury experienced clinically significant apathy in the post-acute recovery period. Other studies link TBI with other mood disorders such as chronic pain syndrome and anxiety.

By reviewing this research with your expert on the witness stand, you will add credibility to your claim that the mild TBI your client suffered caused or exacerbated his or her psychological disorder. This in turn, will help you discredit the defendant's claim that your client's psychiatric condition is simply a function of an aberrant personality.

**BUILDING BLOCK NO. 4**

**PROVING THAT PSYCHIATRIC DISORDER AND MILD TBI EQUAL A POOR OUTCOME**

Many psychiatric outcome studies show that patients with mild TBI which is accompanied by psychiatric disorders such as depression, anxiety, post traumatic stress disorder, and chronic pain disorder have functional outcomes which are generally much poorer than those experienced by patients with mild TBI who do not develop psychological problems. Even the defense expert is generally "on the record" conceding this point. Use the defendant's argument to make your points. The law permits your client to recover for aggravation or worsening of preexisting conditions as well as asymptomatic latent psychiatric conditions which were "lit up" by the accident. See Model Utah Jury Instructions' 27.6 and 27.7

**BUILDING BLOCK NO. 5**

**PROVING THE CONNECTION BETWEEN MILD TRAUMATIC BRAIN INJURY AND COGNITIVE INEFFICIENCY**

All by themselves, psychiatric disorders interfere with cognitive efficiency. You must make the jury understand that a person's ability to succeed in life not only depends upon how intelligent he or she may be, but upon how well that person is able to use the brain power that he or she has. Performance is significantly affected by concentration, mental endurance, interpersonal skills and other factors which are often damaged by traumatic brain injury even when raw intelligence is left intact.

You can explain this to the jury in common sense terms: When a person is depressed, he or she has a more difficult time concentrating and performing complicated mental tasks. A person has similar difficulties when they are experiencing a great deal of anxiety. People understand that chronic pain which is severe and unrelenting can also cause problems with concentration. Likewise, if a person is preoccupied by fearful thoughts, such as when experiencing post traumatic stress disorder, he or she will have a harder time concentrating and

functioning.

All of us know that when we have not slept well, we will have similar problems. If a person is having problems from sleep deprivation due to chronic pain, headaches or anxiety, this too will eventually cause thinking and/or concentration-related problems.

The famous football coach, Vince Lombardi, once said: "Fatigue makes cowards of us all." If you have played basketball or another strenuous sport you know that when you are physically exhausted you are much more prone to make physical and mental mistakes.

Your neuropsychologist can cite to research which supports that chronic pain, sleep deprivation and depression cause measurably lower scores in tests of cognitive efficiency. More importantly, people sitting on your jury know this is true from their own common sense.

Now, you may be asking "Isn't this the defendant's argument?" You can make this your plaintiff's effective argument by defining the case your way. This can be done by developing a case theme which "connects the dots," showing the vicious progression between the initial TBI and your client's current disability.

### **THE VICIOUS CYCLE OF DISABILITY**

Once you have proven that mild TBI sets off a chain of structural, anatomical and biomechanical changes in the brain, that these changes can and often do lead to psychiatric disorders and that all of these factors combine to cause serious interference with cognitive efficiency, it is not so hard to get the jury to understand how and why your client has become disabled.

Very frequently the initial brain injury results in an acute period of memory loss, headaches, personality changes, chronic pain, and disruption of the client's life routines. Depression or other mood disorders often follow. Soon your client may be spiraling downhill emotionally. The mounting medical bills, the disruption in family and work relationships, and problems at work mount and the stress becomes worse and worse. The things your client easily succeeded at in the past now become a struggle. Failures begin to pile up.

Eventually your client may have lost his or her job. Doctors may tell your client that he or she will eventually get better, and when that doesn't happen, stress increases further. Soon, the "vicious" cycle of injury has eroded your client's confidence, and when a person's confidence is shattered, we all know how difficult it is to succeed.

The human psyche may be even more fragile than is the human brain.

### **THE MORAL OF THE STORY**

The moral of this story is simple: Sometimes the difference of being at the pinnacle of success and the bottom of failure is a human being's confidence.

Medical science has not been able to isolate something in the brain which is responsible for the destruction of self-confidence. But we know it happens, and we know that a traumatic brain injury, especially when it leads to serious mental illness, can ultimately destroy a person's confidence. When this occurs, even if you cannot point to damage visible in an MRI of the brain, your client has suffered a serious and

devastating injury and is entitled to substantial compensation.

I suggest that plaintiff's counsel tackle this question head on. Is a theory of malingering consistent with your client's previous life history or with his or her efforts towards rehabilitation and recovery after the accident?

Point out to the jury that defendant's position is overly simplistic and cynical. People do not only want money. We value human qualities that brain injury takes away from us, such as the ability to be successful in our job and family relationships, and to have clarity of thought. Moreover, it is important to trust people and to be seen by them as successful, smart and competent.

Brain injured people are frequently confused, mentally slow, depressed and unsuccessful, and are viewed that way by others. Who would really choose to act mentally disabled when they are not?

Challenge the jury. Is your client the kind of person who would really fake a brain injury or, is your client really a survivor of a tragic but understandable circumstance caused by an accident for which someone else is responsible.

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