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ROAD TO THE FUTURE

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DEFENDING AGAINST INVISIBLE INJURIES: TRAUMATIC BRAIN INJURIES AND CHRONIC PAIN CLAIMS

Presenters:

Colleen Shepherd, Assistant Vice President, Vanliner, Inc.
Todd Williams, Managing Attorney, AutoZone, Inc.
Paul Robinson, Meyer, Darragh Buckler Bebenek & Eck, PLLC
Sean McDonough, Morrison Mahoney, LLP (Moderator)
Pre-suit call from Litigation Manager to Counsel

- Letter of Representation received.
- What should I do with claim?
What Do I do with This?

- [Insert Photo of Damaged Tractor Trailer]
- Accident on 5/15/16 at 2:00pm
- Sideswipe accident involving a passenger vehicle
Further Accident Details

- [Insert Picture of Damaged Passenger Vehicle]
- Medium to low impact
- No air bag deployment
- Car was towed from scene
- Tractor suffered only minor damage
- Police report: No injuries reported on scene
Status of Passenger Driving in Vehicle

- Operator of vehicle, 28 years old
- Goes to the ER that night c/o neck and back pain
- No loss of consciousness or headache
- X-Rays of C and L spine negative, show degeneration only.
- Passenger/Plaintiff treats with neurologist and attends PT
One Month Post Accident

- Plaintiff complains of headaches and memory issues
- Says she hit her head on window
- C/o radiating right leg pain and numbness
- MRI of head, neck, and back are negative
- Passenger has pre-existing fibromyalgia
Beyond One Month Post Accident

- Plaintiff now in pain management clinic
- Sees psychiatrist for PTSD
- Receives monthly trigger point injections
- Plaintiff was out of work for 6 months
State of Claim at This Point

- No settlement demand
- Plaintiff’s medical bills are $18,000
- Plaintiff’s lost earnings are $32,000
Questions??

• What is the value of this claim?
• Am I going to be able to resolve this claim?
• What should I do at this point?
Panel Discussion - How did we get here?

- Was a comprehensive initial investigation completed?
- Medical Canvassing
- Background and Asset Check
- Social Media Research
- Early and Ongoing Surveillance
- Were early “Red Flags” proactively identified?
- Claimant's refusal to give a Statement
- Sudden change in privacy settings on Social Media Accounts
Second call from the Litigation Manager to Counsel

- Mediation failed.
- Suit has been filed.
- Settlement demand of $1.7 million
- What is the value of this claim.
- What needs to be done to defend and how much will it cost.
Panel Discussion – Where do we go from here?

- Brief history of “behavioral issue” treatment.
- Types of experts to retain for head injury and chronic pain claims.
- Determining a base line in head injury claims.
- How much will this cost?
- Admissibility of certain test results under Daubert and Frye.
Traumatic brain injury claims
Brief history of “behavioral issue” treatment

- Greeks and Egyptians noted correlation between brain and behavioral issues. In 1700, the Edwin Smith Surgical Papyrus was the first written description of the human brain.
Brief history of “behavioral issue” treatment

• Phineas Gage: 1848. A construction foreman who had a tamping iron drive through his skull causing social inappropriateness for 12 remaining years of life, but intelligence, memory, and motor skills unchanged. Taught significance of frontal lobe and “cerebral localization”.

Brief history of “behavioral issue” treatment – cont’d

• “Mr. Tan” (Louis Victor Leborgne) - 1861. Began losing speech and ultimately could only say “tan.” Died shortly thereafter and autopsy found a lesion on frontal lobe by a French physician, Dr. Broca (“Broca’s area”), linking frontal lobe to speech and confirming differing brain locations affect different behaviors.

ON THIS DAY IN PSYCHOLOGY

APR 18 1861

French physician, anatomist and surgeon Pierre Paul Broca performed an autopsy on Louis Victor Leborgne. Monsieur Leborgne more commonly known as “Tan” due to the fact that this was just about the only word he could say is one of the most important patients in the history of neuropsychology.

Having autopsied Leborgne’s brain, Broca reported that he had discovered an abnormality in the left frontal lobe and concluded that this must be the patient’s cortical speech production center, a part of the brain that would subsequently become known as “Broca’s area.”

www.all-about-psychology.com
Brief history of “behavioral issue” treatment – cont’d

- H.M. (Henry Molaison) – 1957. Had epileptic seizures. They removed hippocampus and amygdala. Cured of seizures but unable to have new memories (anterograde amnesia) and past memories (retrograde amnesia). Remained intelligent and language remained intact. Studied him for 50 years until death in 2008. Discovered temporal lobes affect memory. Brain was cut into 200 slices and is on the internet.
Brief history of “behavioral issue” treatment – cont’d

Lobotomies: 1930 - 1977
Rose Marie "Rosemary" Kennedy (September 13, 1918 – January 7, 2005) was the oldest daughter born to Joseph, Sr. and Rose Fitzgerald Kennedy, and a sister of President John F. Kennedy, and Senators Robert F. Kennedy and Ted Kennedy. Rosemary displayed behavioral problems, resulting in less academic and sporting ability than her siblings, and some say promiscuous behavior. Her father arranged one of the first prefrontal lobotomies for her at the age of 23, but it failed and left her incapacitated permanently. Rosemary spent the rest of her life in an institution in Jefferson, Wisconsin, with minimal contact from her family. Her condition may have inspired her sister, Eunice, to initiate the Special Olympics during 1962.
• ECT (ElectroConvulsive shock Treatment): 1930s – present!: When medication fails to ease the symptoms of clinical depression, there are other options to try. ECT is still used to treat major depression that has not responded to standard treatment.
Brief history of “behavioral issue” treatment – cont’d

- CT Scan 1972: First picture of live brain
Brief history of “behavioral issue” treatment - cont’d

• MRI: 1952 Harvard student dissertation; 1972 first MRI machine; 2003 Nobel Prize
Medications:

- Amphetamines (1935): Depression
- Lithium (1949): Mania
- Thorazine (1950s): First anti-depressant. Affected dopamine receptors
• Medications – cont’d.

• Psychotropic (Prozac) – FDA approval in 1987: Depression

• Psychotherapy: Sigmund Freud. Led to talk therapy
Brief history of “behavioral issue”
treatment cont’d

• CBT (Cognitive Behavioral Therapy, and other Therapies

• CBT focuses on the development of personal coping strategies that target solving current problems and changing unhelpful patterns in cognitions (e.g. thoughts, beliefs, and attitudes), behaviors, and emotional regulation. It was originally designed to treat depression, and is now used for a number of mental health conditions
Brief history of “behavioral issue”
treatment cont’d

• Decade of the Brain (1990s). Declared by Library of Congress and National Institute of Mental Health "to enhance public awareness of the benefits to be derived from brain research."

1990s: The Decade of the Brain

President George Bush designates the 1990s as the Decade of the Brain: "to enhance public awareness of the benefits to be derived from brain research" through "appropriate programs, ceremonies, and activities."
Types of experts to retain regarding an alleged head injury depends on the Plaintiff’s alleged symptoms and claims

- Neuropsychologist: Has a Doctorate in psychology and training in neuropsychology. Tests cognitive abilities such as attention, memory, language, visual-spatial, perception skills, motor skills, and executive function.

- Neurologist/Neurosurgeon: The medical specialty concerned with the diagnosis and treatment of disorders of the nervous system, which includes the brain, the spinal cord, and the nerves.
Types of experts to retain regarding an alleged head injury depends on the Plaintiff’s alleged symptoms and claims

Psychiatrist/Neuropsychiatrist: A psychiatrist is a medical doctor who specializes in psychiatry, the branch of medicine devoted to the diagnosis, prevention, study, and treatment of mental disorders. A neuropsychiatrist, unlike a neuropsychologist is not usually a medical doctor. With a background in psychology, a neuropsychologist can help you decide whether a psychological approach such as cognitive behavioural therapy may be helpful to you.
Importance of finding the Plaintiff’s BASELINE

- Lawsuits are for loss of enjoyment of life’s pleasures (amongst other categories of damages).
- Need to compare pre-accident and post-accident lives to identify the loss.
- Cannot allow jury to only hear of current problems without also hearing of problems which existed before.
How to find BASELINE

- ALL school records and standardized tests
- Pre-accident medical records
- Pre-accident counseling records
- Investigation and depositions of those that knew the Plaintiff (co-worker rage example)
- Work history (reviews/psychological testing/terminations)
- Imprisonment jail and infirmary records
- Military records
- Prior baseline testing – becoming mandatory in many sports and schools
- SOCIAL MEDIA SEARCHES
Use of prior school testing to establish baseline and develop comparison with post-accident neuropsychological testing.

- Comparison of school testing in 2002 with neuropsychological testing in litigation (V.S.)
Use of neuropsychological testing with comparison to general population.

Green's Word Memory Test

- Patient: Test administered on November 14, 2013.
- All outpatients, fail WMT (Dr. Gervais)
- Major depression: fail WMT (Dr. Gervais)
- Chronic pain syndrome: fail WMT (Dr. Green)
- Abnormal Performance Area
Chronic pain
(neuropathic/myofascial) claims

- Pain lasting longer than a few months
- Types of treatment commonly seen:
  - Surgery
  - PT
  - Medications – ibuprofen to opioids
Chronic pain (neuropathic/myofascial) claims – cont’d.

- Nerve root blocks
- Epidural steroid injections
- Trigger point injections
- Acupuncture (accepted by jurors?)
- Radiofrequency Ablation (RFA)
Experts to consider retaining for chronic pain (neuropathic/myofascial pain) claims

- Orthopedic
- Neurologist
- Physiatrist (Do they all find problems?)
- Psychiatrist
Objective Testing

- **CT Scan (Computerized Tomography):** X-Ray of the brain. Can measure tissue density
- **MRI (Magnetic Resonance Imaging):** No radiation like a CT scan and reveals layers/slices of the brain
Objective Testing

- SPECT Scan (Single Photon Emission Control Tomography): Uses CT technology and used to identify blood flow through injection of a radioactive ingredient.
Objective Testing

- PET Scan (Positron Emission Tomography): Uses CT technology, the scan uses a dye with radioactive tracers absorbed by the brain.
Objective Testing

- imPACT (Immediate Post-concussion Assessment and Cognitive Testing): Used with baseline, but also without! Effort is critical, and no malingering questions are included.
Objective Testing

- EEG (Electroencephalogram): measures electrical activity and can identify sleep disorders and epilepsy
Objective Testing

- MEG (Magnetoencephalography): Uses EEG technology and can identify brain cell activity by measuring small magnetic fields produced in the brain.
Objective Testing

• *fMRIs (Functional MRI): Functional MRI is a functional neuroimaging procedure using MRI technology that measures brain activity by detecting changes associated with blood flow. This technique relies on the fact that cerebral blood flow and neuronal activation are coupled.
• DWI (Diffusion Weighted Imaging) or DW-MRI: Imaging method that uses the diffusion of water molecules to generate contrast in MRI images
DTI (Diffuse Tensor Imaging) (Fiber Tracking): is an MRI-based neuroimaging technique which makes it possible to estimate the location, orientation, and anisotropy of the brain's white matter tracts.
Objective Testing

- DTI and fMRI combination
Objective Testing

- Glasgow Coma Scale

### Glasgow Coma Scale

<table>
<thead>
<tr>
<th>BEHAVIOR</th>
<th>RESPONSE</th>
<th>SCORE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eye opening response</td>
<td>Spontaneously</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>To speech</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>To pain</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>No response</td>
<td>1</td>
</tr>
<tr>
<td>Best verbal response</td>
<td>Oriented to time, place, and person</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Confused</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Inappropriate words</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Incomprehensible sounds</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>No response</td>
<td>1</td>
</tr>
<tr>
<td>Best motor response</td>
<td>Obeys commands</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>Moves to localized pain</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Flexion withdrawal from pain</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Abnormal flexion (decorticate)</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Abnormal extension (decerebrate)</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>No response</td>
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</tr>
<tr>
<td>Total score:</td>
<td>Best response</td>
<td>15</td>
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<tr>
<td></td>
<td>Comatose client</td>
<td>8 or less</td>
</tr>
<tr>
<td></td>
<td>Totally unresponsive</td>
<td>3</td>
</tr>
</tbody>
</table>

### Scoring

- Score 13 – 15: Mild brain injury
- Score 9 – 12: Moderate brain injury
- Score 8 or less: Severe brain injury
Neuropsychological Testing (Objective?)

Neuropsychological testing is routinely utilized to confirm or to rule out traumatic brain injury known to affect cognitive functions (i.e., concentration, word retrieval, thinking, memory and attention).

Neuropsychological Tests

- Intellectual Functioning Tests
  - WAIS-IV
  - Raven's Progressive Matrices
- Repeatable Battery for Neuropsychological Status (RBANS)
- Sensory-Motor Tests
  - Finger writing
  - Touch Discrimination
  - Rapid Alternating Movements
  - Stressed Ambulation (Heel Toe, Backward, One Foot Standing, One Foot Hopping)
- Memory Test
  - Verbal Learning Tests
  - Complex Figure Tests
  - Contextual Verbal Learning Tests
  - Facial Memory Tests
- Motor Functioning
  - Finger Tapping Test
- Measures of Executive Functioning
  - Booklet Categories Test
  - Wisconsin Card Sorting Test
  - Trailmaking Parts A and B
How much is this going to cost?

- Retention of experts
- Testing
- Depositions of experts
- Good news for Pennsylvania claim handlers – no expert depositions.
Daubert/Frye/Cross-Exam

In Baxter v. Temple, a New Hampshire Supreme Court case in which plaintiff alleged she suffered brain damage. Defendant's "forensic" neuropsychologist, David Faust, Ph.D., argued that, while plaintiff's treating neuropsychologist's testing may have been appropriate in a "clinical" setting, her choice of tests in a "forensic" setting was inappropriate and invalid. Over the years, there has developed a belief that medical providers and clinicians should not serve as expert witnesses and that only "forensic" independent examiners should be permitted to serve as expert witnesses.
A treatment relationship creates a professional and ethical obligation to act in the patient's best interest both during and after the treatment relationship, and an inherent conflict is created.

This also creates a danger of intentional bias.

There is a danger of unintended bias toward the patient.

Because a treating clinician who anticipates reporting to a lawyer, court or insurance company, professional ethics. This awareness affects the patient's revelations to the clinician and thus the validity of any report or testimony.

The clinician's roles in training and treatment are not forensic.
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