



### **Maneuvering Through TBI Litigation**

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Due to the recent explosion of Traumatic Brain Injury (TBI) diagnoses in athletes other than just American football athletes, doctors are becoming more adept at diagnosing and treating TBI, and insurance companies and juries are taking notice. Over the last five years, for example, some of the lawsuits with the primary injury being a TBI have resulted in jury verdicts of: \$500,000 (2020)<sup>1</sup>, \$450,000 (2019)<sup>2</sup>, \$530,000 (2019)<sup>3</sup>, \$109,000 (2018)<sup>4</sup>, \$290,000 (2017)<sup>5</sup>, and \$1.2 million (2016)<sup>6</sup>.

Because of this increased awareness, personal injury attorneys should take a serious look at ensuring their clients who suffer head trauma are being properly diagnosed, but also that when the case goes to trial, not being solely reliant on neurologists and neuropsychologists to prove their case because the diagnosis is not as specialized as it once was.

As you evaluate a potential TBI case, the key components are: (1) the diagnosis; (2) the treating experts; and (3) debunking the MRI/CT scan myth.

#### **Diagnosis**

The DSM-5 defines Traumatic Brain Injury as: an impact to the head or other mechanisms of rapid movement or displacement of the brain within the skull, with one or more of the following: (1) Loss of consciousness; (2) Posttraumatic amnesia; (3) Disorientation and confusion; and/or (4) Neurological signs (e.g. neuroimaging demonstrating injury; a new onset of seizures; a marked worsening of a preexisting seizure disorder; visual field cuts; anosmia; hemiparesis). These findings must also present themselves immediately after the occurrence of the TBI or immediately after recovery of consciousness and persist past the acute post-injury period.<sup>7</sup>

Because the findings to support a TBI diagnosis must be present “immediately after the occurrence of the TBI or immediately after recovery of consciousness and persist past the acute post-injury period,” you should immediately focus your attention on these cases and begin to think about what experts can support the diagnosis. Up until now, most trial lawyers have utilized only neurologists or neuropsychologists to support their case. However, internal medicine physicians, for example, are

increasingly being called upon to quarterback the care of TBI patients and are often more than qualified to serve as experts in this regard. Internists are also more efficient to work with and many times less costly.

It is the job of the trial lawyer to appreciate the evidence that is necessary to persuade a jury and to begin collecting it immediately. If a trial lawyer tries to put the pieces together a month before the expert deadline, it is too late and the lawyer likely let the case slip away.

Again, because the ongoing TBI symptoms must be apparent after the acute post-injury period, the trial lawyer must be vigilant to ensure that they are documented.

#### **Treating Experts**

After an accident, nearly any patient with persistent concussion-like symptoms will be referred by their “primary treater” (internist or neurologist) to a concussion clinic consisting of a team of speech-language and occupational therapists. A concussion clinic is a physical therapy center that instead of focusing on the body, focuses on the brain. These therapists are acutely trained in treating TBI patients and likewise should be strongly considered as potential experts in a TBI case. For example, if the patient/client is suffering from symptoms that prevent them from maintaining employment, the occupational therapist is likely your strongest expert. If the patient/client is primarily suffering from communication impairment, the speech-language therapist is the best clinician to provide evidence of the daily communication struggles the TBI has caused. But regardless of which expert(s) you choose, you must discuss with the expert up front whether they can opine as to permanent disability, or whether the “primary treater” must fill that void for you.

As your client is receiving treatment at a concussion clinic, you need to be in close contact with them to determine what progress, if any, they are receiving. This is also a good chance to speak to their family to start developing the “before and after” TBI evidence. Family, friends and co-workers can take video of your client and capture their day-to-day struggles. You can reach out to their employer early on to let them know your concerns and get their thoughts. All of the people you speak to early on can and should be witnesses in your case.

#### **Debunking the MRI/CT Scan Myth**

Without a doubt the number one defense you will face in a TBI case is that you (Plaintiff’s counsel) have zero radiologic evidence of a TBI and therefore your client did not suffer one. The defense attorney will display your client’s radiology films through your experts and theirs to show there is no structural damage to your client’s brain, and therefore, no TBI. Do not fall for this.

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