

NEW HAMPSHIRE ASSOCIATION FOR JUSTICE

TRIAL BAR NEWS

Volume 32 Fall 2011

In This Issue

Representing Clients with Traumatic Brain Injuries

By Andru H. Volinsky, Esq.

An Interview with Nina C. Gardner

By Sabrina C. Beavens, Esq.

Discovery of Non-Party Inmate Records In Federal Court

By Heather V. Menezes, Esq.

Unethical Demands in Medical Negligence Settlement Agreements

By Mark A. Abramson, Esq. and Kevin F. Dugan, Esq.

National Perspectives

By Robert S. Peck, Esq. and Jeffrey R. White, Esq.

Bet on David

By Martin R. Jenkins, Esq.

Plus Verdicts and Settlements, Superior Court Digest, and more

Representing Clients with Traumatic Brain Injuries

by Andru H. Volinsky

Representing individuals who have suffered traumatic brain injuries (“TBIs”) presents a number of special challenges requiring the lawyer to become part forensic investigator and part clinician. The lawyer must also become deeply familiar with neuropsychology and be prepared to defend that branch of psychological testing against legal challenge. Although representing clients who have suffered TBIs may present many hurdles, lawyers will find that working with people with brain injuries is personally and professionally very rewarding.

The Challenges

Here are a couple of common challenges counsel may face in TBI cases and examples of how they may present themselves.

The client has no memory of important events making proof of liability difficult.

Our client, Elizabeth, was run

over by a car while riding her bicycle in a crosswalk, but had absolutely no memory of how it happened. To complicate things further, the police did a poor job of preserving road evidence and, I suspect with some help from the insurer, the Defendant lacked any memory of the crash. How do you prove liability?

The client did not suffer an obvious head injury.

David was rear ended on the highway by a drunk, speeding motorist. David suffered obvious muscle and neck injuries, but lacked an overt injury to his head. The Emergency Room doctors focused on his acute physical injuries but gave only passing notice to cognitive problems and scored David as unimpaired on the protocol for head injuries, the Glasgow Coma Scale. How do you prove damages while contesting the insurer’s claims of malingering without overt evidence of a brain injury?



ANDRU H. VOLINSKY, ESQ.

ANDRUE H. VOLINSKY is a member of Bernstein Shur’s Litigation and Labor and Employment Practice Groups. His practice focuses upon commercial litigation, including trade secrets and unfair trade practices disputes, employment law related litigation and issues of white collar crime. He represents business clients and individuals at trial, on appeal, before administrative agencies, and in arbitrations. Attorney Volinsky is recognized by Best Lawyers in America for his employment law, education law, commercial litigation, and white collar crime work and by Chambers USA for his litigation practice. He is AV-rated by Martindale Hubbell.

The client has other mental health issues that complicate the proof that his brain injury is the likely cause of his cognitive problems.

Our client, Jim, was a brilliant scientist who suffered fractures of his skull and facial bones in a terrible fall. Jim, however, had a long, documented history of alcoholism and the defense latched on to the alcoholism as being the cause of his memory impairment and poor judgment. How do you rule out other causes of damages while likely fighting off a challenge to your expert on *Daubert* grounds?

What is a TBI and how may the injury affect your client?

With each passing year, the diagnosis of brain injuries becomes more acceptable and better understood. A part of this understanding comes from the military. Two-hundred thousand

U.S. Postal Service / Statement of Ownership, Management and Circulation

Title of publication: Trial Bar News		Publication no.: 08934789
Frequency of issue: quarterly		No. of issues published annually: 4
Date of filing: November 21, 2011		
Annual subscription price: included in annual membership dues, \$300 for eligible subscribers		
Complete mailing address of known office of publication: 40 North Main Street, 2 nd Floor, Concord, NH 03301		
Full name and complete mailing address of publisher: Ellen J. Shemitz, 40 North Main Street, 2 nd Floor, Concord, NH 03301		
Full name and complete mailing address of editor: Thomas R. Watson, PO Box 469, Portsmouth, NH 03802		
Full name and complete mailing address of owner: New Hampshire Association for Justice, 40 North Main Street, 2 nd Floor, Concord, NH 03301		
Extent and Nature of Circulation	Avg. No. Copies Each Issue During Preceding 12 Months	Actual No. Copies of Single Issue Published Nearest to Filing Date
Total no. copies	525	525
Paid circulation:		
Sales (dealers / carriers)	0	0
Mail subscription (in-county)	152	152
Mail subscription (outside county)	272	272
Total paid circulation	424	424
Free distribution by mail or other means, samples, complimentary & other free copies		
Total distribution	487	487
Copies not distributed:		
Office use, left over	38	38
Return from news agents	0	0
Total	525	525

I certify that the statements made by me above are correct and complete.

Signature of Publisher

service men and women suffered TBIs during the last decade.¹ During this same time period, an estimated 1.7 million people in the general population were diagnosed with a TBI.² The treatment of professional and college athletes has also added to the common acceptance of TBIs and the need for careful assessment of symptoms. Reliable sources of information about TBI symptoms are also becoming more available, including web sites maintained by the Brain Injury Association of New Hampshire³ and the National Institute of Health.⁴ Do not expect your friendly insurance adjusters to subscribe to any of these more enlightened approaches.

In its simplest form, a TBI is an

injury to the brain caused by a blow to the head or some other trauma. The problem is, however, nothing about the brain is simple. An individual may suffer severe brain injuries and fully return to a pre-injury lifestyle. Other head injuries may appear minor or go completely unnoticed and something about the injured person changes for good. In fact, the person who suffered the injury may not even be able to pinpoint the problem.

This was the case with our client, David. David was a very successful sales person who worked on commission before his crash. In interviews, David had a superficially friendly affect, but when we spoke to his wife we learned that David's personality had

changed. He lost his happy-go-lucky ways and had become tense and irritable, particularly around his young children. David missed appointments with customers or ran late. While still able to be attentive to a particular task on which he focused, David could no longer simultaneously speak on the phone while scanning the web and updating his calendar.

David's case required us to be alert to clues that led to a neuropsychological referral. What David experienced was damage to his executive functioning expressed in his personality change involving increased irritability. It was also expressed in his decreased organizational skills and inability to multi-task. Other clients experience decreased executive functioning as showing poor judgment. While counsel cannot make a diagnosis or fully recognize symptoms, they must be alert to factors that justify referrals to appropriate experts. The first clue for us was the inconsistency between David's long successful career as a commissioned salesman and the idea that he could no longer multi-task or that he was having trouble managing his day to competently meet deadlines. David's decision to forego youth coaching was another clue to the changes he experienced. All of these small clues led to our careful questioning of David's family and co-workers. These interviews revealed that something had changed after the crash and led to the neuropsychological referral.

The Neuropsychologist

A neuropsychologist is a psychologist specially trained in the psychometric tests and clinical assessments indicative of brain injuries. A neuropsychologist tests inferentially looking for changes that indicate a change in brain function. She can find evidence of injuries that are not documented by x-rays or CT scans. The neuropsychological assessment is both qualitative and quantitative, requiring the neuropsychologist to be clinician, statistician

WORKING TOGETHER

FOR SIXTY YEARS

The Herbert H. Landy Insurance Agency has been providing Professional Liability Insurance for more than 60 years. We work with the leading insurance companies to find the most affordable and comprehensive plan best-suited to your firm.

NEW AND ESTABLISHED FIRMS | HARD-TO-PLACE FIRMS
ALL AREAS OF PRACTICE | NEWLY ADMITTED ATTORNEYS
PART-TIME, EMPLOYED AND MOONLIGHTING LAWYERS

WE ARE PROUD TO OFFER LAWYERS' PROFESSIONAL LIABILITY INSURANCE FOR MEMBERS OF THE NEW HAMPSHIRE ASSOCIATION FOR JUSTICE

LANDY
Insurance for Professionals

THE HERBERT H. LANDY INSURANCE AGENCY, INC.
77 SECURITY AVENUE • NEEDHAM, MA 02494 • 888.336.5432 • WWW.LANDY.COM

and psychometrics expert. Some use rigid test batteries normed to different populations. Others exercise judgment to develop more flexible arrays specific to the client's personal circumstances. With either approach, the neuropsychological battery will take up to a day to complete and cost generally around \$2,500.00. Testing will consider the client's intellect, emotions and control. The first is probably the most commonly considered aspect of TBIs, whether or not the client has experienced a decrease in his intellectual functioning as indicated on IQ testing or the like. The second area tests motivation and emotional lability. Testing for control issues concerns behavior related to social insensitivity or disinhibition.

Of course, the neuropsychologist must tie the results of her assessment to the injury in question and rule out other causes. Some of this is based on the testing results, some from the clinical interview. Sometimes there is a lack of clarity as to whether the cause of a problem can be pinpointed as traumatic versus some other cause.

In Jim's case, the defense blamed his declining faculties on his alcoholism. The neuropsychologist took careful histories from Jim and others and pointed out that Jim's picture of decline was not gradual as one would expect with an alcoholic. Rather, his decline was precipitous and likely tied to his suffering a brain injury.

Be careful when relying upon a neuropsychologist. Her testimony will no doubt be challenged under *Baker Valley Lumber v. Ingersoll-Rand, Inc.*⁵ Review the *amicus* brief submitted on behalf of the American Academy of Clinical Neuropsychology and the New Hampshire Supreme Court's decision in *Baxter v. Temple*⁶ for sup-

The Stanhope Group, LLC Appraisers & Consultants



*Over 40 years of
litigation support providing
real estate appraisal services
to members of the Bar
throughout New England*

Peter E. Stanhope
Certified General Appraiser

Phone: 1.800.255.1452 Fax: 1.877.748.7789
administration@stanhopegroup.com

port. Any challenge should go to the weight assigned to the expert's testimony and not to its admissibility.

Damages


Certain aspects of damages in a TBI case require specific explanation and may require expert testimony. The physician who coordinated the care your client received may be a good start, but be careful of physicians who overly objectify the hardships your client experienced. Interview the allied professionals who may be less clinical in their presentations. For example, a nurse practitioner who coordinated care may have more of a personal touch, or an occupational therapist may be able to discuss how she helped your client learn every day skills after suffering a TBI. Explaining how a client had to re-learn the use of a fork or learn basic personal hygiene skills could have significant impact on a jury.

Jim, the physicist, was eventually able to live on his own after the accident, but had to be taught to develop new skills, in particular about taking


medications. Jim could remember to take his numerous medications morning, noon and night but could not keep track of which he had taken. It was very powerful to watch and listen to Jim describe his medication routine which involved putting each of his pill bottles in a separate baggie and then placing the baggies in a plastic box. Three times a day, Jim would carefully empty the box, one bag at a time, read and follow the instructions on each pill container as he went along and place the bag aside. Only when the box was completely empty would Jim know he had taken all of his medications.

David, the salesman, had to let go of one of his major sales lines so he could focus on his remaining business and meet his core job functions with fewer customers and fewer distractions. He became very reliant on the calendar application of his smart phone and its alarm function. We were able to quantify the changes by referencing David's reduced commissions and projecting these over his expected work life.

YOU AND THE LAW



THOMAS T. BARRY, KATH C. SIMONEAU,
LAWRENCE A. VOGELMAN, DORIS L. NIXON,
LESLIE U. NIXON, DONALD P. SLAWSKY



**Nixon, Vogelmann, Barry,
Slawsky & Simoneau, P.A.**
"Good Lawyers"
77 Central St. - Manchester, N.H. 03101
Tel: 603-669-7070 or 1-800-207-7000

Conflicted? Over Your Head?

We can help; we've got decades of experience to back you up. So, if you've found yourself with a case a little too big or complicated, give us a call.
Referral Fees always honored.

Sometimes you can't handle a great case yourself, no matter how much you'd like to. Maybe you have a conflict. Maybe it's just too much for you right now. You know you can't do it, but you just aren't sure where to refer that client. You can have confidence if you call us. We've been in business over 50 years. So, we've got experience. We've also got younger lawyers, so we know how to use technology to your client's advantage. U.S. News and World Report named us a top-tier trial firm and most of our lawyers have been on lists like Super Lawyers and Best Lawyers for decades. So, if you need to refer a tough case, give us a call. We'll help and we'll honor your referral fee. Your Friends at Nixon, Vogelmann, Barry, Slawsky & Simoneau P.A. www.nixon-law.com

Elizabeth presented unique proof issues with respect to both damages and liability. Elizabeth was retired at the time of her injury. She had been an organizer of healthcare programs in the developing world. In retirement, Elizabeth planned to volunteer locally and internationally in various relief efforts. None of these would have paid her. Although Elizabeth had spoken to her friends and colleagues of her plans for retirement, she could not fully articulate them as a witness. She just knew she was too tired and lacked sufficient motivation to do much with the faith communities she had worked with in the past. Fortunately, we identified a cadre of Elizabeth's friends and colleagues who recounted her retirement plans to the jury and described Elizabeth's limitations with very personal and caring anecdotes and the jury rejected the defense request not to value this loss.

Conclusion

Elizabeth's legal case ended well. A jury awarded her \$250,000, as compared to the insurer's offer of \$10,000 at the mediation. We overcame the liability proof problem by being creative and very lucky. The defense expert claimed that if Elizabeth was hit as she began to cross the road, she was like a child who darted out into traffic leaving the driver insufficient time to react. The fault in this scenario would have been ours and our expert could not disagree. If, instead, Elizabeth had been hit near the middle of the road, the driver would have had Elizabeth in full view with sufficient time to stop. The problem was that no one could pinpoint the exact location of the crash. Was it near the curb or near the center of the road?


Fortunately, Elizabeth's bike was preserved. On careful inspection, we found a spot of yellow paint on the bike frame near one pedal. The expert tested our hypothesis and was able to

testify that the frame would not have come into contact with the road surface unless the pedal was depressed under great weight and the only place on the road surface with yellow paint was the center line. Thus, we proved that the car ran over the bike at the center of the road. It never hurts to be lucky.

The best advice I can offer to someone working with a client who has a TBI comes from the New York Times article referenced above:

If you want to connect with someone who has a traumatic brain injury, hire us, include us in conversations that regard us instead of speaking about us in the third person... instead of pressing us about what we "must"

remember... simply be present with us....⁷

Good luck to you and your clients. 

END NOTES

1. Jane Rosett, *Starting Again after a Brain Injury*, N.Y. Times, Oct. 9, 2011 at SR 9.
2. *Id.*
3. <http://www.bianh.org>.
4. <http://www.ninds.nih.gov/disorders/tbi/tbi.htm>.
5. 148 N.H. 609, 616 (2002) "The proper focus for the trial court is the reliability of the expert's methodology or technique. The trial court functions only as a gatekeeper, ensuring a methodology's reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert's testimony. *Daubert*, 509 U.S. at 592-95, 113 S.Ct. 2786. Thus, the trial court must decide whether this particular expert had sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (quotation omitted)."
6. 157 N.H. 280 (2008). The Academy supported the flexible battery approach in its *amicus* brief and argued in favor of the admission of assessments made by neuropsychologists.
7. Rosett, *supra* note, at SR 9.