DEFENDING BRAIN INJURY CASES

By Ryan Furgurson

Brain injury cases are a different breed of personal injury case. The injuries are unique, so the approach to defending them must also be unique. This article provides a basic overview of brain injury defense, as well as some recommendations for effectively defending these claims.

From a liability perspective, brain injury cases are no different than any other motor vehicle accident, with perhaps one notable exception. In many brain injury cases, the plaintiff will claim anything from slight confusion regarding the facts of the accident to total amnesia. Unless there are other independent eyewitnesses, this can place added importance on the physical evidence to establish the facts of the accident. This can also impact the damages side of the case, where plaintiffs often rely on photographs of the vehicles to establish the severity of the accident and thus the likelihood of a brain injury. This is particularly true in rear end collisions, where the focus will be on crush damage to the rear of plaintiff’s vehicle. Defendants can minimize this evidence with expert testimony demonstrating the lack of correlation between crush damage to the vehicle and the force transferred to the driver/occupants. Modern vehicles are designed with crumple zones for the very purpose of absorbing and/or dissipating the force caused by a collision, so crush damage can often be misleading. Experts who rely on the crush damage as evidence of a severe impact, or severe injuries, can be effectively cross examined on this issue.

The medical damages are where these cases get interesting. Brain injury claims differ from other physical injuries, because juries often award huge verdicts without a single shred of objective medical evidence establishing the injury. A credible plaintiff, along with effective “before
and after” witnesses, can overcome the lack of objective evidence. Nonetheless, the objective medical evidence is the first line of defense in these claims.

In many instances there are objective indicators of a closed head injury that can be observed (or ruled out) on physical examination. These include bruising, swelling, lacerations, and fractures. The absence of such objective symptoms in the medical records from the scene of the accident and the initial treatment records is the first step in refuting the existence and/or severity of a closed head injury.

There are also a variety of subjective complaints and symptoms that may accompany a head injury. The first and most important subjective complaint is loss of consciousness. In the vast majority of mild brain injury cases, there are no eyewitnesses or other objective evidence to determine loss of consciousness in the moments immediately following an accident. Medical personnel are trained to screen for loss of consciousness, so EMT records, nurse and ER triage notes, and attending physician notes from the initial treatment should all contain notations regarding “LOC.” Reports of “No LOC” can be invaluable in defending against a claim of severe head injury.

Another critical component of the patient’s initial medical records is the Glasgow Coma Scale (GCS). The GCS is a neurological scale that aims to give a reliable, objective assessment of the patient’s level of consciousness. The scale runs from 0-15, and a GCS score of 14 or 15 can once again provide compelling evidence of the “lack” of serious injury.

Medical providers will also note any other subjective complaints or symptoms reported by the patient. These include headache, dizziness, vertigo, tinnitus, vision impairment, sensitivity to light/sound, nausea, slurred speech, and confusion. The presence or absence of these symptoms in the first 48 hours after the accident can start to form the jurors’ opinions regarding the severity of the accident and the likelihood of longterm complications. The progress of these symptoms in the months following the accident can also help to distinguish between those with legitimate injuries and malingerers. Numerous studies show that brain injury symptoms appear within the first 48 hours post-injury, and except in the most severe cases, they generally dissipate within the first 6 months.

Those same studies show that pending litigation is the primary factor for patients whose symptoms persist or worsen beyond six months. Defendants should establish these facts through cross examination of plaintiff’s experts, or through affirmative expert testimony if necessary. There are also numerous diagnostic tests used to
evaluate the nature and extent of a closed head injury. These include MRI, CT Scan, PET Scan, and DTI (Diffusion Tensor Imaging). Some experts may challenge the usefulness of one or more of these tests, but if these tests were not performed (or better yet performed with negative results), they can help to convince the jury that little or no injury occurred.

**Witness Testimony**

As alluded to above, the medical evidence is helpful, but with the right witnesses, a good plaintiff’s attorney can build an entire case with virtually no medical evidence. The most important witnesses are the “before and after” witnesses. These are the lay witnesses who can testify regarding the plaintiff’s condition — temperament, social skills, work performance, etc. — before and after the accident. If these witnesses are credible, the jury will often look past the lack of objective medical evidence. Thorough cross examination of these witnesses is critical to establish the basis (or lack thereof) for the witness’s opinion. First and foremost, is the witness truly a “before and after” witness. How long has he known the plaintiff, and was their relationship the same before and after the accident. How often did she interact with the plaintiff before and after the accident. A co-worker might never have worked with the plaintiff prior to the accident, but joined a project team with the plaintiff after the accident, and thus had a different perspective on the plaintiff’s work than he did before the accident. Another important question to ask any before and after witness is his or her familiarity with the plaintiff’s medication regimen, both before and after the accident. A decline in work performance, or a change in personality or social behavior, could just as easily be the result of a change in medication, or even a side effect of new medication, as opposed to evidence of a brain injury.

While many plaintiff’s attorneys will boast that fact witnesses can win the case, they still spend thousands of dollars on medical experts in an effort to establish the legitimacy and the severity of a physical injury to the plaintiff’s brain. The key expert for the plaintiffs is usually a neuropsychiatrist, or another medical doctor with similar qualifications. In Virginia, only a medical doctor can testify as to the cause of a physical human injury, so the plaintiff will need one of these doctors to establish that plaintiff’s complaints are causally related to the subject accident. Cross examination of these experts should be focused on three components: the presence or absence of objective physical injury; the presence or absence of subjective complaints consistent with closed head injury; and the results of any diagnostic testing.

In most cases, the plaintiff will also retain a psychologist to perform neurocognitive testing. While this expert is not a doctor, he is trained to conduct a battery of tests to evaluate the plaintiff’s cognitive functioning. Where this discipline gets fuzzy is when the expert purports to compare the subject’s performance on the test with the “estimated” pre-injury performance. This is often based on incomplete or anecdotal evidence of the plaintiff’s education and
intellectual capabilities. Experts have even been known to “adjust” the subject’s estimated pre-injury capacity after reviewing the test results in order to demonstrate the necessary decline in performance to substantiate a brain injury. Other aspects of the testing data are also subject to multiple interpretations, and defendants should be prepared to consult with their own neuropsychologist to evaluate plaintiff’s test results. In appropriate cases, defense experts should conduct their own testing, with special emphasis on tests designed to gauge the patient’s effort, and potentially provide evidence of malingering or “suboptimal effort.”

One additional (and admittedly important) topic that this article will address only briefly is cross examination of the plaintiff. That topic is a discipline unto itself, and the approach varies widely depending on the plaintiff’s condition. Whether to “go after” a plaintiff on cross examination is largely a judgment call. Some plaintiffs will use that opportunity to further demonstrate their “deficits” to the jury, while others can be lured into overselling their injury and thus losing credibility with the jury. If nothing else, plaintiff’s cross examination may provide an opportunity to establish the lack of objective symptoms or subjective complaints consistent with brain injury, which can alleviate the evidentiary issues with authenticating and admitting hearsay medical evidence. It can also be helpful to establish when the plaintiff first hired an attorney, and if the lawyer directed his client’s medical treatment to any extent, these facts can help to sway a jury’s view of the case.

On a related note, attorneys and adjusters evaluating a brain injury claim should scrutinize the patient’s medical records, not only from his experts and treaters for the alleged brain injury, but also for other unrelated medical disciplines. Patients who are malingering or exaggerating the severity of a head injury will often forget to “act” brain injured when they see other specialists, including orthopedists, dermatologists or even dentists. These records should not be overlooked as a potential source of evidence.

Conclusion

Brain injury cases are as complicated as the brain itself, but by breaking them down into their component parts – objective medical evidence, subjective complaints, expert medical witnesses and fact witnesses – defendants can effectively defend these claims and, in appropriate cases, disprove the existence of a legitimate physical injury.