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Traumatic Brain Injury Litigation Group

PROVING BRAIN INJURIES AND CONVINCING JURIES OF THE LASTING EFFECTS OF TBI[1]

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I. Understanding Traumatic Brain Injury (TBI)

A traumatic brain injury (TBI) is commonly and most basically defined as an alteration in brain functioning, or the emergence of evidence of brain pathology, caused by an external force.[2] Simply stated, TBIs often result from a violent blow or jolt to the head or body. When discussing injuries in terms of a "concussion," "head injury," or "brain injury," the attorney should understand that each incident falls under the umbrella of a TBI. The severity of the person's injury is categorized into three classes: mild TBI, moderate TBI, and severe TBI.[3]

A TBI can appear as a focal (localized) or diffuse (widespread) injury. Some persons exhibit both. A focal injury results when bleeding, bruising, or a penetrating injury is isolated to a portion of the brain. A diffuse brain injury occurs when brain tissue suffers more widespread damage, often resulting from acceleration and deceleration forces. Impact of the head against another object can cause focal brain injury under the skull at the site of impact, and at a site on the opposite side of the head. *The most common form of TBI is caused by a combination of impact and acceleration and deceleration forces, such as those occurring in high-speed motor vehicle crashes*.[4]

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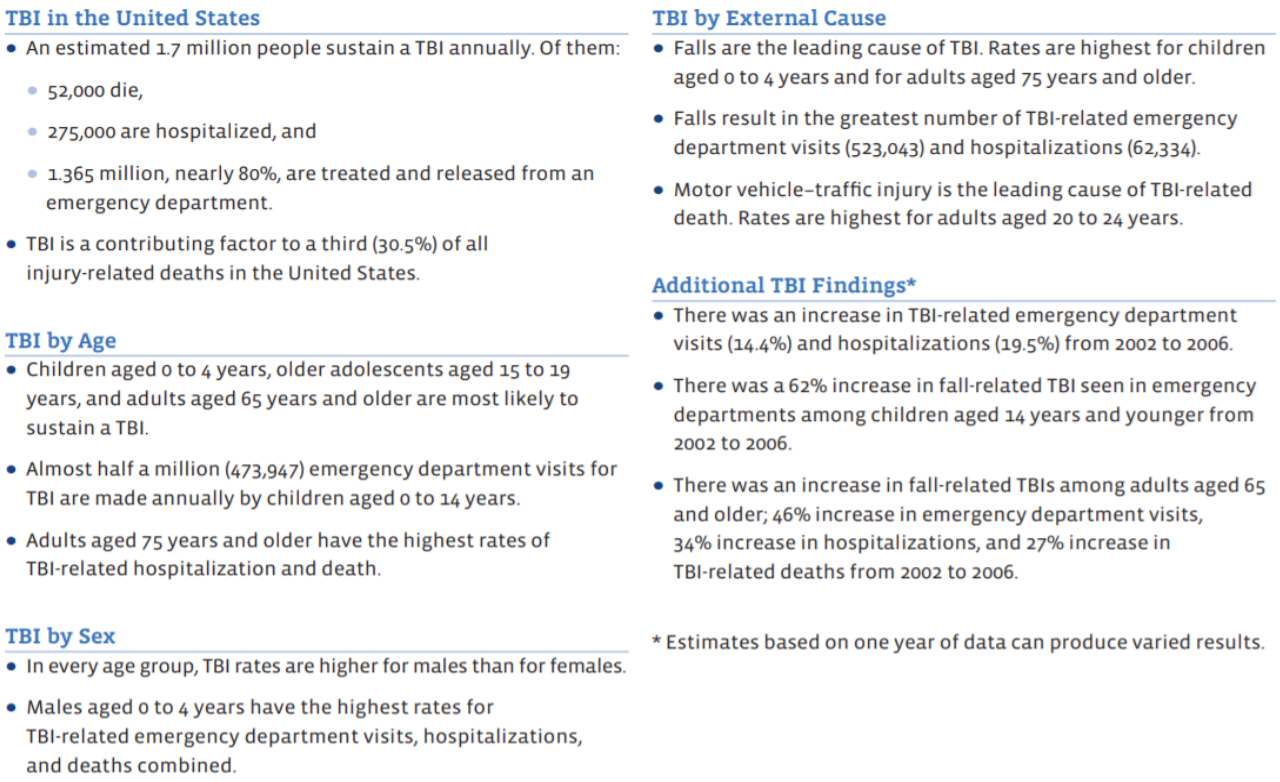
[1] [1] This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Winter Convention*, New Orleans, LA February 2020.

[2] D.K. Menon, et al., *Position Statement: Definition of Traumatic Brain Injury*, 91 Arch. Phys. Med. Rehabil.,1637, 1640 (2010).

[3] CTR. FOR DISEASE CONTROL& PREVENTION & NAT'L CTR, FOR INJURY PREVENTION AND CONTROL, REPORT TO CONGRESS ON TRAUMATIC BRAIN INJURY IN THE UNITED STATES: EPIDEMIOLOGY AND REHABILITATION (2015).

[4] *Id*.

Statistics from the Centers for Disease Control (CDC)[5]



TBI in the United States

- An estimated 1.7 million people sustain a TBI annually. Of them:
  - 52,000 die,
  - 275,000 are hospitalized, and
  - 1.365 million, nearly 80%, are treated and released from an emergency department.
- TBI is a contributing factor to a third (30.5%) of all injury-related deaths in the United States.

TBI by Age

- Children aged 0 to 4 years, older adolescents aged 15 to 19 years, and adults aged 65 years and older are most likely to sustain a TBI.
- Almost half a million (473,947) emergency department visits for TBI are made annually by children aged 0 to 14 years.
- Adults aged 75 years and older have the highest rates of TBI-related hospitalization and death.

TBI by Sex

- In every age group, TBI rates are higher for males than for females.
- Males aged 0 to 4 years have the highest rates for TBI-related emergency department visits, hospitalizations, and deaths combined.

TBI by External Cause

- Falls are the leading cause of TBI. Rates are highest for children aged 0 to 4 years and for adults aged 75 years and older.
- Falls result in the greatest number of TBI-related emergency department visits (523,043) and hospitalizations (62,334).
- Motor vehicle–traffic injury is the leading cause of TBI-related death. Rates are highest for adults aged 20 to 24 years.

Additional TBI Findings*

- There was an increase in TBI-related emergency department visits (14.4%) and hospitalizations (19.5%) from 2002 to 2006.
- There was a 62% increase in fall-related TBI seen in emergency departments among children aged 14 years and younger from 2002 to 2006.
- There was an increase in fall-related TBIs among adults aged 65 and older; 46% increase in emergency department visits, 34% increase in hospitalizations, and 27% increase in TBI-related deaths from 2002 to 2006.

* Estimates based on one year of data can produce varied results.

Between 2006 and 2010, there were 138,223,016 (unweighted) Emergency Department (ED) visits in the Nationwide Emergency Department Sample database (NEDS), of which 1.7 percent received a diagnosis of TBI. By 2010, there were an estimated 2,544,087 (weighted) ED visits for TBI.[6]

II. Utilizing Advances in Medical Technology to Identify TBI

The attorney representing a client with a TBI would be better equipped to advocate for the client by becoming familiar with the available tests that help diagnose TBIs. Advances in the medical field have created new and more advanced tests to help reveal injuries to the brain that were previously difficult to show with older technology. The following is an inexhaustive list of some

[5] *See* M. FAUL, ET AL., CTR. FOR DISEASE CONTROL AND PREVENTION, TRAUMATIC BRAIN INJURY IN THE UNITED STATES: EMERGENCY DEPARTMENT VISITS, HOSPITALIZATIONS AND DEATHS 2002–2006 (2010).

[6] Jennifer R. Martin, et al., *Trends in Visits for Traumatic Brain Injury to Emergency Room Departments in the United States*, JAMA (2014), www.jamanetwork.com/journals/jama/fullarticle/1869198/.

of the tests available to help diagnose TBI, which could ultimately help a jury understand the injuries related therefrom.

- *A computerized tomography (CT)* scan combines a series of X-ray images taken from different angles around your body and uses computer processing to create cross-sectional images (slices) of the bones, blood vessels, and soft tissues inside your body.[7] This test is neither sensitive nor specific enough to identify individuals who have sustained a mild TBI. Studies show that only a small percentage of patients with a mild TBI demonstrate visible signs of injury like fractures, contusions, and hemorrhages on a CT.

- *Magnetic resonance imaging (MRI)* uses a magnetic field and radio waves to create clear and detailed cross-sectional images of your head and body.[8] Like a CT scan, an MRI is not sensitive or specific enough to identify individuals who have sustained a mild TBI.

- *Diffusion tensor imaging (DTI)* has four times improved sensitivity over CT scans for detecting non-hemorrhagic diffuse axonal injury (DAI), and can evaluate for other intracranial pathology as it is twice as sensitive as a CT scan for detecting contusions.[9] This method has become the preferred method to evaluate DAI associated with mild TBI.

- *Functional magnetic resonance imaging (FMRI)* measures brain activity during specific cognitive or motor tasks.

- *A positron emission tomography* (PET) scan is an imaging test that helps reveal how your tissues and organs are functioning. A PET scan uses a radioactive drug (tracer) to show this activity, and provides images that illustrate the functional cerebral metabolism.

- *Electroencephalography (EEG)* measures the brain's spontaneous electrical activity over a short period of time.

- *Susceptibility weighted imaging (SWI)* has improved localization of a hemorrhage.[10]

- *Biomarkers*: there are emerging advances in the use of biomarkers for the diagnosis of a mild TBI.[11] These new advances in biomarkers show that neurons and supporting cells are damaged during head trauma. This damage leads to the release of specific proteins

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[7] *See* MAYO CLINIC, www.mayoclinic.org (last visited Jan. 2, 2020).

[8] *Id*.

[9] Hana Lee, et al., *Focal Lesions in Acute Mild Traumatic Brain Injury and Neurocognitive Outcome: CT Versus 3T MRI*, 25 J. NEUROTRAUMA n.9 (2008).

[10] Z Kou, et al., *The Role of Advanced MR Imaging Findings as Biomarkers of Traumatic Brain Injury*, 25 J. HEAD TRAUMA REHABIL. 267 (2010).

[11] PK Dash, et al., *Biomarkers for the Diagnosis, Prognosis, and Evaluation of Treatment Efficacy for Traumatic Brain Injury*, 7 NEUROTHERAPEUTICS 100 (2010).

into the cerebrospinal fluids.[12] Furthermore, if the blood brain barrier is affected, these proteins may be released and found in the peripheral circulation.[13] Many proteins are released after brain injuries. New research is attempting to measure the serum or cerebrospinal fluid concentration of biomarkers released after brain injury.[14]

Understanding the capabilities and limitations of these tests is crucial in a TBI case to prove the injuries caused by the incident involved in the client's case. It would be advantageous to provide visuals to the jury of the results for every test performed on your client. Opposing counsel will likely argue that the injuries claimed are unrelated to the incident, and that no proof exists to show how the incident and the client's injuries are related because, in many cases, the plaintiff will show no outward signs of injuries.

III. Picking Your Team to Explain Diagnosis, Symptoms, and Test Results to a Jury

When the time comes at trial to explain to a jury how your client's incident led to their TBI, and how the TBI resulted in injury that may or may not be obvious, it is best practice by the attorney to have a team of experts and non-experts to help explain to the jury how your client's TBI has affected their quality of life.

- *Neurologist*: has specialized training in diagnosing, treating, and managing disorders of the brain and nervous system. Would review your client's health history and their current condition.

- *Neurosurgeon*: provides surgery on the brain or skull. If a neurosurgeon is needed, then it would be difficult for the opposing side to dispute the damages of your client's injuries.

- *Neuropsychologist*: would study the relationship between the brain and your client's behavior. From this testing, conclusions about the structural and functional integrity of your client's brain can be assessed.

- *Neuroradiologist*: medical subspecialty that deals with the diagnosis and treatment of brain, spinal cord, head and neck, and vascular lesions, using X-rays, magnetic fields, radio waves, and ultrasounds. Can help interpret for a jury diagnostic tests performed on your client and provide objective evidence of a TBI.

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[12] RP Berger, et al., *Neuron-Specific Enolase and S100B in Cerebrospinal Fluid After Severe Traumatic Brain Injury in Infants and Children*, 109 PEDIATRICS (2002).

[13] B.J. Blyth, et al., Validation of Serum Markers for Blood-Brain Barrier Disruption in Traumatic Brain Injury, 26 J. NEUROTRAUMA 1497 (2009).

[14] *Id.* at footnote 11.

- *Physical or Occupational therapist*: would help the jury understand your client's difficulty in performing day to day activities since suffering the TBI.

- *Lifecare planner*: a professional that helps create long term care plans for patients who need medical care for the rest of their lives due to serious injuries. Such an expert witness would explain to a jury how the TBI is likely to affect your client's future and the related costs associated with the injury.

- *Vocational rehab specialist*: aims to place to your client back into the workforce. Evaluates client's work capacities, providing assistive technology services and administering tests to determine vocational aptitudes, interests, abilities, and potential of clients. Studies show that persons who have suffered TBI have significantly lower rates of employment, which ties into your client's earning capacity.

- *Economist*: this expert will explain to the jury what your client's economic losses are for the past and future. Depending on your expert's qualifications, he or she may provide helpful testimony about lost wages, diminished earning capacity, and future medical costs to the jury.

- *Non-expert witnesses*: testimony from family, friends, coworkers, and other persons known to your client before the TBI could be useful to explain the changes in your client's life and behavior since the TBI.

Your team of experts and non-experts will help prove your case by showing that your client did in fact suffer injury as a result of the TBI. Even in cases involving an mTBI, the effects of the injury can be permanent, but undetectable by merely looking or even talking with the injured person. This is why it is crucial for the attorney to develop their client's case through such witness testimony so that the jury can understand the extent of your client's injuries. Brain injuries often lead to a client suffering from a myriad of issues, ranging from memory loss, depression, anxiety, diminished motor skills, or other symptoms that are not easily identifiable. Some of the symptoms to look out for in mTBI are:

1. Physical symptoms[15]

    - Loss of consciousness for a few seconds to a few minutes

    - No loss of consciousness, but a state of being dazed, confused, or disoriented

    - Headache

    - Nausea or vomiting

[15] *See* MAYO CLINIC, www.mayoclinic.org/ diseases-conditions/traumatic-brain-injury/symptoms-causes/ (last visited Jan. 2, 2020).

- Fatigue or drowsiness
- Problems with speech
- Difficulty sleeping
- Sleeping more than usual
- Dizziness or loss of balance

2. Sensory symptoms

    - Sensory problems, such as blurred vision, ringing in the ears, a bad taste in the mouth, or changes in the ability to smell
    - Sensitivity to light or sound
    - Cognitive or mental symptoms
    - Memory or concentration problems
    - Mood changes or mood swings
    - Feeling depressed or anxious

3. Moderate to severe traumatic brain injuries

    Moderate to severe traumatic brain injuries can include any of the signs and symptoms of mild injury, as well as these symptoms that may appear within the first hours (or in some cases even years) after a head injury:

    - Physical symptoms
    - Loss of consciousness from several minutes to hours
    - Persistent headache or headache that worsens
    - Repeated vomiting or nausea
    - Convulsions or seizures
    - Dilation of one or both pupils of the eyes
    - Clear fluids draining from the nose or ears
    - Inability to awaken from sleep

- Weakness or numbness in fingers and toes
- Loss of coordination
- Cognitive or mental symptoms
- Profound confusion
- Agitation, combativeness or other unusual behavior
- Slurred speech
- Coma and other disorders of consciousness

IV. Caselaw

- *White v. Deere & Co., et al*, No. 13-cv-02173, 2016 WL 462960 (Dist. Ct. Colo. Feb. 8, 2016): a federal judge has once again upheld the introduction of diffusion tensor imagining (DTI) in an mTBI case, rejecting defendant's motion to exclude the DTI findings. In *White*, plaintiff filed a product liability action arising out of an incident that occurred while plaintiff was operating her Deere Model 4600 compact utility tractor and Model 460 loader. Plaintiff asserted that she sustained a traumatic brain injury as a result of a hay bale falling onto her head while she was operating the tractor.

- *Peach v. RLI Insurance Company*: County court upheld the admissibility of DTI after defendants moved to exclude the testimony of Plaintiff's doctor and related testimony regarding the admissibility of diffusion tensor imaging.

- *Marsh v Celebrity Cruises, Inc*, No. 1:17-cv-21097 (S.D. Fla. 2018): in this case, the plaintiff was injured when she fell on a puddle of water on the solarium floor of a Celebrity cruise ship. As a result of the fall, plaintiff sustained an mTBI. The United States District Court for the Southern District of Florida ruled that diffusion tensor imaging (DTI) satisfies the *Daubert* standard for admissibility.

How to Manage Your TBI Client and Family

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This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Best of the Best: Mastering the Fundamentals for a Traumatic Brain Injury Case*, Las Vegas, NV April 2019.

Further TBI Client Checklist

1. Prior medical—PCP, prior injuries and treatment, prior head injuries, physicals
2. Prior psychiatric, counseling
3. Alcohol and drug history
4. Medication pre and post mortem
5. Full employment history including post mortem
6. Military service and discharge
7. Credit history
8. Criminal history
9. Prior lawsuits
10. Full explanation of injury and effect
11. Family check list identifying members
12. Interpersonal history—friends, coworkers
13. Sexual history pre and post mortem
14. Recreation pre and post mortem
15. Activities and hobbies pre and post mortem

Review the TBI Client's Specific Issues

1. The type of brain injury
2. The specific symptoms the client has
3. The client's demeanor—agitated, rude, forgetful, what to expect
4. How to reach the client—phone, email, family members, guardian, who best to deal with
5. Any other issues specific to that client

Managing the Family Goes a Long Way Toward Managing the TBI Client

- Family can include—spouses, partners, adult children, parents, other relatives, and in some cases guardians
- The family makes the best caregivers and are necessary to manage the TBI client and case
- The family must understand that the TBI client is now a different person and must be helped in such a way that deals with the symptoms
    1. Cognitive issues—confusion, memory, decision making, multitasking
    2. Emotional changes—irritability, anxiety, depression, anger, lack of a filter
    3. Social changes—loss of independence, trouble with relationships, inappropriate behavior, isolation
    4. Physical issues—headaches, pain, fatigue, vision

Managing the Family Goes a Long Way Toward Managing the TBI Client (cont.)

- The TBI client-member of their family is not the same and interaction must be different than before the injury
    1. What is the level of responsibility?
    2. Organization and keeping appointments
    3. Handling finances
    4. Ability to drive, do things on their own

- The family caregiver becomes the prosthetic part of the TBI client's brain

Family Caregivers Can Help With

1. Arranging medical appointments and transportation;
2. Attending medical appointments to understand the issues and treatment;
3. Helping TBI patients remember and practice therapies;
4. Keeping lists of questions for the medical providers that the TBI patient may not remember;
5. Handling finances;
6. Being a companion, handling difficult situations, and staying optimistic.

The Child TBI Client

- A child's brain is more vulnerable to a TBI than an adult's brain because it is still developing.
- The TBI has immediate and long-term consequences.
- The TBI causes immediate cognitive problems. This multiplies into long-term problems as the child gets behind in school and develops learning delays and also loses development with fellow students in terms of advancing and regular activities.
- In addition to the normal family support and caregiving, the family will need help.
- Dr. Ron Savage, an expert in this field, has written books and pamphlets on this subject can be ordered online. Dr. Nadia Webb is another expert in this field.

The Child TBI Client (cont.)

- Special education when the child returns to school is usually necessary—
    1. IEP—Individualized education program as mandated by the Individuals with Disabilities Act (IDEA), covering students with special education needs
    2. 504 Civil Rights law—covers students that don't meet the criteria for special education but still need accommodations that must be made in the classroom
- Meetings are done in the local school to put together the needs of the child
- Concerning an IEP meeting, the parents get together with a regular education teacher, a special education teacher, and someone that can interpret the medical and evaluation results. I recommend that the lawyer on the case is there as well
- Prior to his retirement Dr. Ron Savage attended an IEP meeting with me in Rhode Island and he wrote the IEP plan
- The Center for Parent Information and Resources: 35 Halsey St. 4th Floor, Newark, NJ 07102, (973) 642-8100

Challenging

1. Manage the TBI client.
2. Use the family to help manage the TBI client and act as caregiver.
3. Manage the frustrations of the family.
4. The TBI client is a different person with continuing symptoms and new and undesirable personality traits.
5. Regular meetings with the TBI client and family member-caregivers over and above support groups to review problems and progress.

Challenging (cont.)

6. Coordination of problems and progress with the medical providers by coordinating the family member-caregivers and medical providers.
7. The family member-caregivers encourage
    - Rest
    - Reasonable physical activity
    - Hobbies
    - Relationships
    - Work or schooling
    - Maintain a daily routine
    - Use of calendars for organization
    - Provide structure and normalcy to daily life
8. Meetings manage both the TBI client and family member caregivers and diffuse problems.

Cross-Examination of the Defendant Expert Using Prior Trial and Deposition Testimony, and So Forth[1, 2]

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[1] Please see Attachment I (Plaintiff's Motion in Limine to Exclude Testimony of Defendant Expert Witness Nancy Hebben, PhD) in connection with this PowerPoint.

[2] This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Annual Convention*, Boston, MA July 2017.

Research

- Google (images, videos, dissertations)
- DuckDuckGo
- TrialSmith
- American Association for Justice (AAJ) Expert Witness listserve
- State trial lawyers
- Public record search (LexisNexis)
- "Better Call (Saul?)," no call Dorothy Sims

Defense Expert's Credentials

- Contrast with:
  - Time spent in defense medical examination (DME) with plaintiff
  - Objection to recording
  - Objection to observer
  - Last time treated
    - Anyone
    - Anyone in this condition
  - Thesis

Using Defense Expert's Credentials

- "The Joint Commission stated that communication failures are the leading cause of harm to patients in hospitals (2007) . . . . Because children in the pediatric intensive care unit (PICU) are so fragile, they are more vulnerable to changes in their condition that can be caused by errors. Children can decompensate very quickly . . ."
  - Defense expert's thesis

Using Expert's Deposition

- "[A]ny part . . . of a deposition, so far as admissible . . . may be used against any party . . . for the purpose of contradicting or impeaching the testimony of deponent as a witness"
  - ALA. R. CIV. P. 32

Using Audio Visual Deposition?

- "Endorsement on motion for audio *I* visual deposition (27.0): of deft., Michael Looney allowed further the trial judge will decide on the use of the video portion of the deposition"
- *See Karosy v. Summerlin Hospital*, Case No. A-12-660815-C (Clark County, Nevada D.C., 2016).

Attacking the Disclosure with MILs

- Disclosure: "Counsel for *** referred Mr. ** to this office for an independent medical evaluation."
- MIL: "The word 'independent' or words, 'Independent Medical Examination' do not appear in NRCP 35." (exclude anyone, document referring to "independent")

Attacking the Expert's Disclosure and Methods

- "A[n] . . . expert may testify in the form of an opinion . . . if . . . the testimony is the product of reliable principles and methods . . ."
- FED. R. EVID. 702.

Expert Witness Disclosure and Methods

- "The existence of the stressors listed above at the time of the accident may have served as an independent causal factor in his psychological state at the time, including his expressed daily worry prior to the accident about being killed on the job. Their presence may also explain why Mr. ** . . . ."

Attacking the Disclosure

- Disclosure: "Although the respiratory event on 06/26/2008 is reported by various practitioners in the records, the most accurate description would be provided by the health care providers actually in attendance."
- MIL: "A testifying expert does not have carte blanche to offer any opinion testimony she wishes. Rather, her opinions must be grounded in scientific method and procedure."

Expectations in Cross-Examination

- Not a religious conversion
- Obtain agreements
- Add another “grain of sand”
- Agree with words of plaintiff’s expert

Reviewed?

- Records
  - Medical records
  - Educational records
  - Employment records
  - Military records
- Discovery documents
- Plaintiff medical examination (PME)
- Meet before and after witnesses

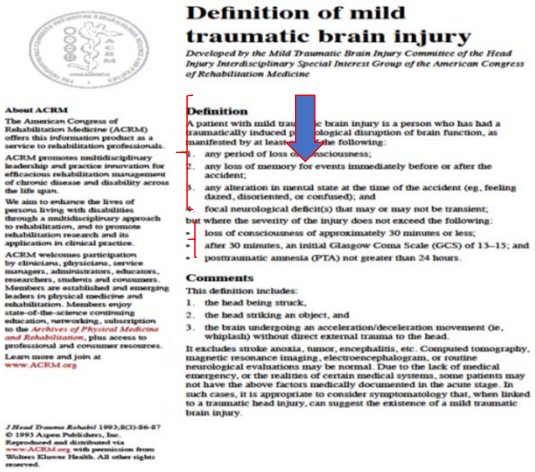
Expert's Basis

- "Ask those who know the patient (parent, spouse, friend, and so forth) about specific signs of the mild traumatic brain injury (MTBI) that they may have observed. These signs are typically observed early after the injury. Record their presence or absence with a checkmark."
- *Heads Up: Facts for Physicians About Mild Traumatic Brain Injury (MBTI*), DEP'T HEALTH HUM. SERVICES (2017).

Reviewed?

- Emergency medical technician (EMT) or fire department include run records
- Emergency room
  - Head injury warning sheet
- Educational
- Surveillance
- Military
- Employment
- Discovery

Definition of Mild Traumatic Brain Injury



About ACRM

The American Congress of Rehabilitation Medicine (ACRM) offers this information product as a service to rehabilitation professionals.

ACRM promotes multidisciplinary leadership and practice innovation for efficacious rehabilitation management of chronic disease and disability across the life span.

We aim to enhance the lives of persons living with disabilities through a multidisciplinary approach to rehabilitation, and to promote rehabilitation research and its application in clinical practice.

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J Head Trauma Rehabil 1993;8(3):86-87

Definition of mild traumatic brain injury

Developed by the Mild Traumatic Brain Injury Committee of the Head Injury Interdisciplinary Special Interest Group of the American Congress of Rehabilitation Medicine

Definition

A patient with mild traumatic brain injury is a person who has had a traumatically induced physiological disruption of brain function, as manifested by at least one of the following:

1. any period of loss of consciousness;
2. any loss of memory for events immediately before or after the accident;
3. any alteration in mental state at the time of the accident (eg, feeling dazed, disoriented, or confused); and
4. focal neurological deficit(s) that may or may not be transient;

but where the severity of the injury does not exceed the following:

- loss of consciousness of approximately 30 minutes or less;
- after 30 minutes, an initial Glasgow Coma Scale (GCS) of 13–15; and
- posttraumatic amnesia (PTA) not greater than 24 hours.

Comments

This definition includes:

1. the head being struck,
2. the head striking an object, and
3. the brain undergoing an acceleration/deceleration movement (ie, whiplash) without direct external trauma to the head.

It excludes stroke anoxia, tumor, encephalitis, etc. Computed tomography, magnetic resonance imaging, electroencephalogram, or routine neurological evaluations may be normal. Due to the lack of medical emergency, or the realities of certain medical systems, some patients may not have the above factors medically documented in the acute stage. In such cases, it is appropriate to consider symptomatology that, when linked to a traumatic head injury, can suggest the existence of a mild traumatic brain injury.

Neuropsychological Report

"He has difficulties with compound division and multiplications, and major difficulties with fractions, decimals, and percentages."

Would You Agree?

- Centers for Disease Control and Prevention (CDC) checklist
- American Congress of Rehabilitation Medicine (ACRM) definition
- Brain injury as a chronic disease checklist
- Anatomy

Agreement List

- Anterograde and retrograde amnesia
- Statements versus memory
- No reported loss of consciousness (LOC), then reported LOC
- Vomiting, nausea, dizziness
- Combative behavior
- Inappropriate behavior

Signs and Symptoms

- Signs and symptoms of MTBI generally fall into four categories: physical, cognitive, emotional, and sleep, and may include:

Physical	Cognitive	Emotional	Sleep
• Headache • Nausea • Vomiting • Balance problems • Dizziness • Visual problems • Fatigue • Sensitivity to light • Sensitivity to noise • Numbness/tingling • Dazed or stunned	• Feeling mentally "foggy" • Feeling slowed down • Difficulty concentrating • Difficulty remembering • Forgetful of recent information or conversations • Confused about recent events • Repeats questions	• Irritability • Sadness • More emotional • Nervousness	• Drowsiness • Sleeping less than usual • Sleeping more than usual • Trouble falling asleep

A. Injury Characteristics

1. **Injury Description.** Ask the patient (and/or parent, if child) about how the injury occurred, type of force, and location on the head or body where the force (blow) was received. Different biomechanics of injury may result in varied symptom patterns. For example, an injury that occurs to the posterior aspect of the head may result in visual changes, balance problems, and fatigue. The force to the head may be indirect, such as with an individual being struck in the body resulting in the head accelerating forward and then backward quickly (e.g., whiplash).

2. **Cause.** The cause of the injury may also help ~~to estimate~~ the force of the hit or blow the patient sustained. The greater the force associated with the injury, the more likely the patient will present with more severe symptoms. Conversely, significant symptoms associated with a relatively light force might indicate an increased vulnerability to MTBI (especially among patients with a history of multiple MTBIs or pre-existing history of migraine) or the presence of other physical or psychological factors contributing to symptom exacerbation.

3. **Amnesia (Retrograde).** Determine whether amnesia (memory loss) has occurred for events *before* the injury and attempt to determine the length of time of memory dysfunction. Research indicates that even seconds of amnesia may predict more serious injury.[19]

4. **Amnesia (Anterograde).** Determine whether amnesia has occurred for events *after* the injury and attempt to determine the length of time of memory dysfunction. Anterograde amnesia is also referred to as post-traumatic amnesia (PTA).

5. **Loss of Consciousness (LOC).** Inquire whether LOC occurred or was observed and the length of time the patient lost consciousness. (Note: Research indicates that up to 90% of concussions do not involve LOC.)[19,20]

6. **Early Signs Observed by Others.** Ask those who know the patient (parent, spouse, friend, etc) about specific signs of the MTBI that they may have observed. These signs are typically observed early after the injury. Record their presence or absence with a checkmark.

7. **Seizures.** Inquire whether seizures were observed (although this is uncommon).

“Doctor, Let’s Take a Walk”

- Q. What’s a diffuse axonal injury?
- A. It’s a theory about the mechanism of degeneration of symptoms after head trauma.
  - (Kelly Dep., 33:6-33:8, Jan. 7, 2004.)

“Doctor, Let’s Take a Walk” (cont.)

- Q. And what is the theory that you’re familiar with?
- A. That in the process of acceleration or deceleration, such as automobile accidents, or in some people’s minds fighters who get repeatedly hit in the head and that the brain accelerates and then decelerates inside the skull, that that causes, among other things, quote, diffuse axonal injury and traumatic brain injury.
- Q. Do you not agree with that, as you characterized it, that theory?
- A. I understand it as a theory. I am not—I have not yet been convinced of its solid scientific basis.

“Doctor, Let’s Take a Walk” (cont.)

- Q. Do you agree that if an axon is torn that—in some cases that axon is permanently torn?
- A. Yes.
- Q. You would agree, would you not, that an axonal injury can be permanent?
- A. Yes.
- Q. You would agree, would you not, that an axonal injury that is permanent would not show up on a computerized axial tomography (CAT) scan, MRI, or x-ray of the skull and brain, correct?
- A. An axon, correct.

“Doctor, Let’s Take a Walk” (cont.)

- Q. And when that occurs, that sort of jostling, that’s sort of what we refer to as an acceleration, deceleration injury to the brain, correct?
- A. Some people describe it that way, yes.
- Q. Right. And it’s described that way in the medical literature, is it not?
- A. Correct.
- Q. And you would agree with that, would you not?
- A. Correct.

“Doctor, Let’s Take a Walk” (cont.)

- Q. And if the force is sufficient, there are axons in the brain that can be torn by the acceleration, deceleration of the brain and then hitting the ridges of the skull, correct?
- A. If it’s very severe, yes.
- Q. Would you agree, Doctor, that axons in the brain are connections?
- A. Yes.
- Q. And if those connections are torn or sheared or twisted, those connections can be permanently destroyed, can they not?
- A. The ones that are torn can be.
  - (Kelly Depo., Jan. 7, 2004)

Show Agreement Applies

- Q. And when her head was struck by the bus and then struck by the ground, her brain got jostled, did it not?
- Defense Attorney: Objection.
- A. Possibly.
- Q. Well, it’s more likely than not when she—when her—When she was struck by the bus and then her head struck the ground, it’s more likely than not that her brain got jostled?
- A. Correct.

Show Agreement Applies (cont.)

- Q. Well, it's more likely than not when she—when her—When she was struck by the bus and then her head struck the ground, it's more likely than not that her brain got jostled?
- A. Correct.
- Q. And when that occurs inside the skull, there are ridges in the interior bottom of the skull, are there not?
- A. There are.

Show Agreement Applies (cont.)

- Q. All right. And if those axons are torn, that can disrupt one's functioning of the brain?
- A. Yes.
- Q. And, in some instances, the tearing of an axon can be permanent?
- A. Yes.
- Q. And, Doctor, a brain injury, a traumatic brain injury can be a serious injury, right?
- A. Yes.
- Q. And it can result in serious and permanent impairments?
- A. Correct.

Questions I Like to Ask

- “My question was a little different . . .”
- “What were you thinking when . . . ?”
- “Treat or care for patients?”
- “We are here, where are you?”
- “Shortened life expectancy?”
- “Agree plaintiff was ____ before treated [struck] by defendant and is now _____ after treated [struck] by defendant.”

“No head injury is too severe to despair of, nor too trivial to ignore.”—Hippocrates

Neuropersuasion™: Using the Art of Science in the Courtroom[1]

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[1] This PowerPoint was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Neuropersuasion: Using the Art of Science in the Courtroom Webinar*, Aug. 2017.

A Moment in Time

- Roughly 95 percent of human thought is rooted in the subconscious
- Human thinking is expressed in metaphors—we experience the world around in metaphorical processes
- Metaphors and re-presentative thought processes help us tap into the witnesses' deep emotions and experience spaces
- Metaphor: understanding and experiencing one kind of experience in terms of another

Metaphors

- Step 1: Listening
- Step 2: Four types of metaphor
- Step 3: Clean language questions

Step 1: Listening

- Listening is giving a speaker your undivided attention
- Listening is not the time between speaking to plan what you want to say

Step 2: Four Types of Metaphor

- Gestural—body movements (e.g., thumbs up or peace sign)
- Overt—"like or as" (e.g., it was like a roller coaster ride of emotions)
- Embodied—relates to a body part (e.g., thinking outside the box; "on the one hand . . .")
- Embedded—woven into the fabric of speech (e.g., get over disappointment, do not waste time)

LOOKING FOR METAPHOR PATTERNS
IN DEPOSITION TRANSCRIPTS

Deposition Plan of the Shooter

- Police officer shoots a 19-year-old girl in the back
- Q: You kind of characterized your relationship with Jeremy Dear as a bromance of sorts, that you would spend time together outside of work with one another's families
- A: Yes

Deposition Plan of the Shooter (cont.)

- Q: Other than spending time together with your families, did you ever go out drinking together?
- A: Oh, I wish. It was maybe like once a month kind of—you know, we always gave each other, you know, a—you know, did you get your permission slip signed tonight, you know, and all—I believe actually we went for—did we do a massage? I took him to go eat. I think we probably went to the Famous Hooters—not famous, but I think we went to go eat lunch. I took him to go—you know, help keep his mind off of everything, so we went to go eat and then we went for a massage after

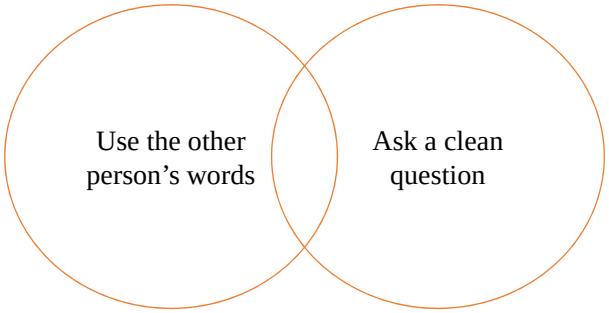
Deposition Plan of the Shooter (cont.)

- Q: What is your current relationship with Jeremy Dear?
- A: We talk seldomly. I'll call him or text him or he calls me. It's just kind of—our . . . our schedules don't really match right now. When we worked graveyard we were on the same schedule so, you know, I would—he would be sleeping and I was sleeping, you know. So . . . But now it's we're completely opposite.

Deposition Plan of the Shooter (cont.)

- Q: Did you ever come to learn that Jeremy Dear had chased Mary Hawkes east down Zuni?
- A: Maybe through investigation. You know, information gets leaked out. I don't recall
- Q: What information was leaked out during the investigation to you?
- A: Well, not leaked out, but just—you know, I mean, like just . . . you know, I mean it—like nobody should know—you know, I don't . . . I don't know, you know. When there's usually an officer-involved shooting we don't know much information. I think just by word of mouth, you know, about the incident. I don't—it's hard to say

Step 3: Clean Language Questions



Classically Clean Questions

Where is … ?

Location

Whereabouts … ?

Then what happens?

Sequence after

What happens next?

What kind of … ?

Attribute

Is there anything else about … ?

What happens just before?

Sequence before

Where does … come from?

That's … like what?

Metaphor

When to Use Clean Language

- Minimizing the introduction of your own metaphors and constructs
- Developing the metaphors that arise naturally in discourse
- Drawing attention to case critical moments
- Eliciting your client's desired outcomes

Minimise the Introduction of Your Own Metaphors and Constructs

- Interviewer: How has this memory affected your life? What kind of impact has it had on your life?
- Interviewee: My dad's girlfriend's apartment or my grandmother? Both?
- Interviewer: The first memory. How has this impacted, what impact has it had on your life?
- Interviewee: . . . it definitely has a very large impact

Develop the Metaphors That Arise Naturally During Discourse

- Interviewee: I want to pin him down so he will listen, and understand
- Interviewer: What kind of pin him down?
- Interviewee: One that holds his attention long enough for him to realise that I think he has a responsibility to me and for him then to either 100 percent refuse it or 100 percent accept it and do something useful

Draw Attention to Case Critical Moments

Drilling down

Two Core Clean Language Questions

- Is there anything else about . . . ?
- What kind of . . . is that . . . ?

Practical Application for Law

1. Read transcripts and circle metaphors to see established patterns

1. Test assumptions during depositions

2. Explore opinions in focus groups

1. Facilitate testimony on the stand

2. Reduce bias during questioning

3. Client management and counseling

Elicit Your Client's Desired Outcome

And what would you like to have happen?

MOTIONS IN LIMINE THAT MUST BE FILED IN YOUR TBD CASE[1]

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We see a lot of TBD cases (traumatic brain damage) in our offices since we primarily handle big commercial motor vehicle cases. When clients are hit by a tractor-trailer, bus, dump truck, or the like, the delicate structures in the brain are often irreparably harmed. We often have to deal with nasty *Daubert* motions on the science and over reaching defense experts. Ironically, we do not have "form" motions in limine for brain damage cases. We do have a kitchen sink motion, but the motions in limine have, for the most part, been very case specific. Therefore, I reached out to a number of the best trial lawyers I know from across the country and Canada and asked them what they did, as well as the common issues they faced.

Interestingly, we all set up the basis for most of the motions in limine in depositions. Knowing what you want, and do not want in trial *prior* to taking your first deposition is critical. Taking *trial* depositions (getting facts for the trial story, *Daubert*, accident reconstruction, appellate proof, agreement or disagreement to rules and standards, and so on, as opposed to asking random questions) remains a critical skill.

These days I find defendants are filing massive motions in limine on topics such as:

1. Exclude diffuse tensor imaging under *Daubert*

2. "Reptile trial strategies"

3. Any rules, standards, or regulations such as the FMCSR

Generally, courts are reluctant to grant motions in limine, often refusing to rule until trial. This is frustrating, because once the cat is out of the bag, a curative instruction is of little use. However, since the ruling is only an advisory opinion indicating the way the court is leaning, judges should be freer in addressing these matters early. For example, a federal court in Ohio held:

> A motion *in limine* is a pre-trial mechanism by which this Court can give the parties advance notice of the evidence upon which they may or may not rely to prove their theories of the case at trial. *See Luce v. United States*, 469 U.S. 38, 41

[1] [1] This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) Best of the Best: Mastering the Fundamentals of a Traumatic Brain Injury Case, Las Vegas, NV April 2019.

n. 4, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). To obtain the exclusion of evidence under such a motion, a party must prove that the evidence is clearly inadmissible on all potential grounds. *See Ind. Ins. Co*., 326 F. Supp. 2d at 846; *Koch*, 2 F.Supp.2d at 1388; *cf. Luce*, 469 U.S. at 41. Additionally, "[u]nless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Ind. Ins. Co*., 326 F. Supp. 2d at 846.

Any ruling on a motion *in limine*, however, is "no more than a preliminary, or advisory, opinion that falls entirely within the discretion of the district court, and the district court may change its ruling where sufficient facts have developed that warrant the change." *United States v. Yannott*, 42 F.3d 999, 1007 (6th Cir.1994). Therefore, this Court will entertain objections on individual proffers of evidence as they arise at trial, even though the proffered evidence falls within the scope of a denied motion in limine. *See id.; see also United States v. Connelly*, 874 F.2d 412, 416 (7th Cir.1989) (citing *Luce*, 469 U.S. at 41)).

Laws v. Stevens Transp., Inc., No. 2:12-CV-544, 2013 WL 4858653, at *1 (S.D. Ohio Sept. 11, 2013)

Here are the results for your consideration and use, credit given (where known) to the attorney(s) who shared the information with me:

I. Todd Gardner and Peter Meyers, Washington

1. *The Court should require defense counsel to advise each defense witness of the Court's pretrial rulings*.

   Plaintiffs request a Court order instructing the defendant and defense counsel to carefully advise each defense witness, before his or her testimony, of the Court's rulings on these motions.

2. *Exclusion of lay witness or expert witness opinion testimony concerning the credibility of other witnesses or whether another witness is "mistaken" or lying*.

   In Washington, it is prejudicial error to allow any witness, whether lay or expert, to offer opinions directly or indirectly regarding the credibility of another witness.[2] "A lay opinion is not 'helpful' within the meaning of evidentiary rule 701, because the jury can assess credibility as well or better than the lay witness. An expert opinion will not 'assist the trier of fact' within the meaning of evidentiary rule 702, because there is no scientific basis for such an opinion, save the polygraph, and the polygraph is not generally accepted

[2] Karl B. Tegland, WASH. PRAC. EVIDENCE LAW AND PRACTICE § 702.46 (6th ed. 2016); Fed. R. Evid. 608; Fed. R. Evid. 401; Fed. R. Evid. 402; Fed. R. Evid. 403.

as a scientifically reliable technique."[3] "An expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility."[4] It is error to allow any witness to offer an opinion on another witness' credibility because such testimony "invades the province of the jury to weigh the evidence and decide the credibility of witnesses."[5] It is therefore "improper to invite a witness to comment on another witness' accuracy or credibility by asking whether the witness was mistaken or lying."[6]

3. *Exclusion of evidence, testimony, argument, or suggestion through direct examination, cross-examination or otherwise, concerning whether a doctor or medical expert can "rule out with 100 percent certainty" other causes.*

Similarly, defense counsel should be prohibited from asking cross-examination questions of medical professionals or medical experts whether they can be "100 percent certain" or whether they can "rule out with 100 percent certainty" other causes or whether it is "possible" there is another cause of harm. Such questions have been a habit of defense counsel during discovery depositions, but they are impermissible at trial in front of a jury. As an example, defense counsel asked plaintiffs' neonatology expert, Dr. William Rhine, causation-related questions framed with "[c]an you say with a hundred percent certitude that . . . ."[7]

The burden of proof is by a preponderance of the evidence—more likely than not.[8] The medical or legal standard for an expert's confidence in his or her conclusion is equally well established: "reasonable medical probability."[9]

A party with the burden of proof in a civil case can obviously establish "reasonable medical probability," even though the medical professional offering an opinion on

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[3] *State v. Carlson,* 80 Wn. App. 116, 906 P.2d 999 (Wash. Ct. App. Dec. 18, 1995) (citations omitted).

[4] *State v. Fitzgerald,* 39 Wn. App. 652-57, 694 P.2d 1117 (Wash. Ct. App. 1985) (*citing* Karl B. Tegland, WASH. PRAC. EVIDENCE LAW AND PRACTICE , § 292 n. 4 at 39 (2d ed. 1982), *United States v. Samara,* 643 F.2d 701, 705 (10th Cir. 1981), *cert. denied,* 454 U.S. 829, 102 S.Ct. 122, 70 L. Ed. 2d 104 (1981)).

[5] *See, e.g., State v. King,* 131 Wn. App. 789-97, 130 P.3d 376 (Wash. Ct. App. 2006), *as amended* (Mar. 7, 2006), *publication ordered* (Mar. 7, 2006) (citation omitted).

[6] *State v. Walden,* 69 Wn. App. 183-87, 847 P.2d 956 (Wash. Ct. App. 1993).

[7] Meyers 12-20-2017 MIL Declaration, *Exhibit 17* (Rhine Dep. 29, Sept. 12, 2017).

[8] WPI 21.01—Meaning of Burden of Proof—Preponderance of the Evidence, 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 21.01 (6th ed.)

[9] *See, e.g., Driggs v. Howlett,* 193 Wn. App. 875-905, 371 P.3d 61 (Wash. Ct. App. 2016), *review denied,* 186 Wn.2d 1007, 380 P.3d 450 (Wash. Ct. App. 2016).

causation cannot "rule out" all other possible causes.[10] "The evidence is sufficient to prove causation if, from the facts and circumstances and the medical testimony given, a reasonable person can infer that a causal connection exists."[11]

Therefore, whether a medical expert or other medical professional can rule some other cause out to a "hundred percent certainty" is irrelevant. Such questions should be prohibited in this trial, both because any response is not helpful to the trier of fact, and because it would not be relevant to any issue in this case.[12]

4. *Exclusion of evidence, testimony, argument, or suggestion concerning the amount or nature of Luke or Patricia Penner's past medical expenses or other past economic damages*.

Plaintiffs are not asserting a claim for damages for past economic damages in this case. Therefore, the amount or nature of any past economic damages is not relevant for any purpose. Such information should be excluded, and any argument concerning it prohibited.[13]

5. *Exclusion of evidence, testimony, argument or suggestion concerning any collateral sources as to any future expenses.*

Plaintiffs are not seeking damages for past medical expenses or other past economic losses. The only economic damage claims plaintiffs assert are for future expenses. Plaintiffs have filed with these motions a separate, Supplemental Memorandum in Support of Motions in Limine re: Collateral Sources and "Obamacare," which they incorporate here for reference and upon which this motion relies.

Washington law requires an order precluding the defense from making any mention, comment, question, argument, or other reference whatsoever to the fact that plaintiffs *will* receive, *will become entitled to receive*, or *might receive in the future* benefits of any kind or character from any collateral source, including, but not limited to (1) collateral health

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[10] *See, e.g., Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 654-55, 833 P.2d 390 (Wash. Ct. App. 1992). ("A physician's opinion as to the cause of the claimant's disease is sufficient when it is based on reasonable medical certainty even though the doctor cannot rule out all other possible causes without resort to delicate brain surgery) (*citing Halder v. Dep't of Labor & Indus.,* 44 Wn.2d 537, 543-45, 268 P.2d 1020 (1954).

[11] *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 655, 833 P.2d 390 (Wash. Ct. App. 1992) (*citing Douglas v. Freeman,* 117 Wn.2d 242, 252, 814 P.2d 1160 (Wash. Ct. App. 1991); *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 636-37, 600 P.2d 1015 (Wash. Ct. App. 1979)).

[12] Fed. R. Evid. 401; Fed. R. Evid. 402; Fed. R. Evid. 403; Fed. R. Evid. 702.

[13] Fed. R. Evid. 401; Fed. R. Evid. 402; Fed. R. Evid. 403. *See also* Plaintiffs' Supplemental Memorandum in Support of Motions in Limine re: Collateral Sources and "Obamacare" (filed with these motions).

insurance coverage; (2) publicly-available benefits of any kind; (3) social legislation benefits; (4) welfare; (5) free or discounted social services; (6) benefits in the form of medical or other care from any public agency, firm, or organization of any kind; or (7) free or discounted services from any church, school district, or charitable service. The court's order in limine should specifically exclude reference to alleged future insurance benefits and reference to the Affordable Care Act or "Obamacare." Further, the court should specifically exclude testimony or opinions in any form from defendants' life care planner and economist that involve any reduction in future medical expenses based on anticipated or alleged insurance benefits of any kind, or any other collateral source.

Consistent with these principles, Washington courts generally exclude *every* type of collateral source, including, for example: (1) *all forms of government benefits* (social security benefits,[14] veterans benefits,[15] veterans' pensions,[16] welfare benefits,[17] Medicare payments,[18] payments under the Crime Victims Compensation Act, RCW 7.68)[19]; (2) *all forms of public and private insurance benefits*: (future insurance benefits under the Affordable Care Act ("Obamacare") in a medical negligence case in Washington,[20] TRICARE benefits in in a medical negligence case in Washington,[21] collision

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[14] *See Pancratz v. Turon*, 3 Wn. App. 182, 185, 473 P.2d 409 (Wash. Ct. App. 1970); *Stone v. City of Seattle*, 64 Wn.2d 166, 172, 391 P.2d 179 (Wash. Ct. App. 1964).

[15] *Pancratz*, 3 Wn. App. at 185.

[16] *Stone*, 64 Wn.2d at 172.

[17] *See Diaz v. State*, 175 Wn.2d 457, 465, 285 P.3d 873 (Wash. Ct. App. 2012) (*citing Mazon v. Krafchick*, 158 Wn.2d 440, 452, 144 P.3d 1168 (Wash. Ct. App. 2006)).

[18] *Ciminski v. SCI Corp.*, 90 Wn.2d 802, 807, 585 P.2d 1182 (Wash. Ct. App. 1978). ("[w]e hold that Part A Medicare payment made to respondent is payment from a collateral source and may not be used to reduce the jury's assessment of damages against appellant").

[19] *See Sebastian v. State, Dep't of Labor & Indus.*, 95 Wn. App. 121, 126, 974 P.2d 374 (Wash. Ct. App. 1999), *aff'd and remanded*, 142 Wn.2d 280, 12 P.3d 594 (Wash. Ct. App. 2000).

[20] *See Alexander v. United States*, Case No.. 3:14-cv-01774-RJB (W.D. Wash. May. 19, 2016) (Order on Plaintiff's Motion to Strike Evidence of Future Collateral Source Benefits) (Meyers Dec. 20, 2017 MIL Declaration, *Exhibit 39*); s*ee also Carpenter v. United States*, No. 13-5633 RJB, 2014 US Dist. LEXIS 105690 at *15 (W.D. Wash., July 31, 2014) (Order on Defendant's Motion for Partial Summary Judgment dated July 31, 2014) (emphasis added) (*Exhibit 34*); *Merrell v. Group Health*, King County cause no. 12-2-02010-8 SEA (Order on Future Collateral Source Benefits dated July 28, 2013 (*Exhibit 41*); *Lee v. Willis Enters*, Grays Harbor County cause no. 12-2-00891-1 (Judge Mark McCauley's Order on Plaintiffs' Motions in Limine dated Feb. 2, 2014) (*Exhibit 40*).

[21] *See Alexander v. United States*, Case No.. 3:14-cv-01774-RJB (W.D. Wash. May. 19, 2016 (Order on Plaintiff's Motion to Strike Evidence of Future Collateral Source Benefits) (Meyers Dec. 20, 2017 MIL Declaration, *Exhibit 39*).

insurance,[22] accident insurance,[23] life insurance,[24] health insurance, [25] insurance provided pursuant to a lease agreement,[26] industrial insurance and workers' compensation benefits,[27] personal injury protection (PIP) benefits,[28]); (3) *all forms of free medical care* (free medical services from a hospital,[29] gratuitous payment or reduction in the outstanding debt by a health care provider[30]); and (4) *all forms of employment-related benefits* (disability pension benefits,[31] disability benefits that are a "fringe benefit of employment,"[32] unemployment compensation,[33] and sick leave.[34]

6. *Exclusion of evidence, testimony, argument, or suggestion concerning defense expert opinions not disclosed by 5:00pm on Friday, December 29, 2017.*

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[22] *Reutenik v. Gibson Packing Co.*, 132 Wash. 108, 121, 231 P. 773 (1924).

[23] *Heath v. Seattle Taxicab Co.*, 73 Wash. 177, 186, 131 P. 843 (1913).

[24] *Id.* at 186.

[25] *Hayes v. Wieber Enters, Inc.*, 105 Wn. App. 611, 616, 20 P.3d 496 (Wash. Ct. App. 2001) (even when the medical provider accepts less than the amount billed from the health insurer: "[t]he fact that the doctor accepted the first party insurance carrier's limit for his services does not tend to prove his charge for these services was unreasonable").

[26] S*ee Consolidated Freightways v. Moore*, 38 Wn.2d 427, 430, 229 P.2d 882 (Wash. Ct. App. 1951).

[27] RCW 51.4.100 ("[t]he fact that the injured worker or beneficiary is entitled to compensation under this title shall not be pleaded or admissible in evidence in any third-party action under this chapter. Any challenge of the right to bring such action shall be made by supplemental pleadings only and shall be decided by the court as a matter of law"; *Johnson.*, 134 Wn.2d at 804 ("[w]e hold the collateral source rule also bars evidence of collateral benefits from workers' compensation proceedings"); *Cox v. Spangler*, 141 Wn.2d 431, 441, 5 P.3d 1265 (Wash. Ct. App. 2000), *opinion corrected*, 22 P.3d 791 (2001).

[28] *Lange v. Raef*, 34 Wn. App. 701, 705, 664 P.2d 1274 (Wash. Ct. App. 1983), *dismissed* (Nov. 28, 1983).

[29] *See Carabba v. Anacortes Sch. Dist. No. 103*, 72 Wn.2d 939, 952, 435 P.2d 936 (Wash. Ct. App. 1967).

[30] *See Moceri and Messina, supra*, 7 Gonz. L. Rev. at 312-315; *and* Annot., 77 ALR 3rd 366 (1977); 7 ALR 3rd 416 Section (a) (1966).

[31] *Sutton v. Shufelberger*, 31 Wn. App. 579, 583, 643 P.2d 920 (Wash. Ct. App. 1982).

[32] *Xieng v. Peoples Nat'l. Bank of Wash.*, 120 Wn.2d 512, 525, 844 P.2d 389 (Wash. Ct. App. 1993).

[33] *Hayes v. Trulock*, 51 Wn. App. 795, 804, 755 P.2d 830 (Wash. Ct. App. 1988) ("we hold that the trial court erred in reducing the back-pay award here by the amount of unemployment compensation received by each employee").

[34] *Fleming v. Mulligan*, 3 Wn. App. 951, 954, 478 P.2d 754 (Wash. Ct. App. 1970).

If a party fails to disclose witnesses, evidentiary facts, or other tangible evidence in response to proper discovery requests, such evidence may be excluded by the court at the time of trial.[35] The court should exclude and prohibit reference to any expert opinion that has not been disclosed in discovery without proper and complete supplementation on or before 5:00pm on Friday, December 29, 2017, and pursuant to CR 26(e)(1)(B) and CR 33.

7. *Exclusion of reference to the CR 35 Examination in this case as an "independent examination" and prohibit the suggestion that it was in any way "independent."*

Defendants frequently like to refer to CR 35 examinations as "independent medical examinations." They are anything but "independent." First, nowhere in CR 35 are examinations performed in accordance with this rule described as "independent" or "IME's." Further, the parties in this case entered into a stipulation that "[t]he examiner shall not use in any report or in trial testimony the term 'independent medical examination,' 'IME' or any other term not specifically used in CR 35."[36]

The term "independent" would suggest, and a juror may reasonably infer it to mean, that the examining physician was appointed by the court, or is a treating physician who was not selected by counsel for either party. Neither inference is true. The CR 35 examiner was selected by the defense. It is a defense medical exam. Defense counsel should be prohibited from calling it an independent exam or using the acronym "IME."

8. *Exclusion of evidence, testimony, argument, or suggestion concerning expressions of apology or remorse.*

All apologies or expressions of remorse are both irrelevant and prejudicial to the plaintiffs.[37] Sympathy may not be considered by the jury. The jury will likely be provided jury instructions both before and after trial consistent with WPI 1.01 and WPI 1.02. Near the conclusion of WPI 1.01, jurors are instructed at the commencement of trial: "You must reach your decision based on the facts proved to you and on the law given to you, *not on sympathy*, bias, or personal preference."[38] Similarly, WPI 1.02, frequently given to the jury at the conclusion of the trial, provides an identical directive to

[35] CR 37; *Sather v. Lindahl*, 43 Wn.2d 463, 261 P.2d 682 (Wash. Ct. App. 1953); *Lampard v. Roth*, 38 Wn. App. 198, 684 P.2d 1353 (Wash. Ct. App. 1984).

[36] Meyers, Dec. 20, 2017 MIL Declaration, *Exhibit 2* (Stipulation and Agreed Order for CR 35 Examination of Luke Penner dated Aug. 9, 2017 at p. 6, Paragraph 19).

[37] Fed. R. Evid. 402; Fed. R. Evid. 403.

[38] *See*, WPI 1.01 (emphasis provided).

the jury: "You must reach your decision based on the facts proved to you and on the law given to you, *not on sympathy*, bias, or personal preference."[39]

The only purpose of a MultiCare apology or expression of remorse, either through defense counsel or through defense witnesses, would be to gain the sympathy of the jury for defendant MultiCare. It is an implied request that it be "given a break" or "held less accountable" financially for the harm caused to Luke Penner and his family, because they have "taken responsibility" for their own negligence. Nowhere in the law is there any suggestion that less compensation is owed because a defendant apologizes or expresses remorse.

9. *Exclusion of evidence, testimony, argument or suggestion inviting jury nullification.*

"Jury nullification" is a juror's knowing and deliberate rejection of the evidence or refusal to apply the law, because the result dictated by law is contrary to the juror's sense of justice, morality, or fairness."[40] Washington law does not allow jury nullification and, therefore, "[a] juror who engages in jury nullification may be excused."[41]

A good example of the types of arguments reflecting impermissible jury nullification is described by the Nevada Supreme Court in a 2008 case, *Lioce v. Cohen*,[42] interpreting RPC 34(e) (identical to Washington's RPC 34(e). There, the court found the defense attorney's argument in a personal injury case impermissible for its attempt at jury nullification. The defense attorney argued, in part:

> Ladies and gentlemen, at some time, at some point in time, we must say enough is enough.
>
> People must accept responsibility for their lives and their actions and not blame others for life's challenges and setbacks.

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[39] *See*, WPI 1.02 (emphasis provided).

[40] *State v. Nicholas*, 185 Wn. App. 298, 301, 341 P.3d 1013 (Wash. Ct. App. 2014) (*citing State v. Elmore*, 155 Wn.2d 758, 761 n. 1, 123 P.3d 72 (Wash. Ct. App. 2005) (*citing* BLACK'S LAW DICTIONARY 875 (8th ed. 2004)).

[41] *State v. Nicholas*, 185 Wn. App. 298, 306, 341 P.3d 1013 (Wash. Ct. App. 2014) (*citing State v. Morfin*, 171 Wn. App. 1, 7-8, 287 P.3d 600 (Wash. Ct. App. 2012), *review denied*, 176 Wn.2d 1025, 301 P.3d 1047 (Wash. Ct. App. 2013)). *See also State v. Elmore*, 155 Wn.2d 758, 780-81, 123 P.3d 72 (Wash. Ct. App. 2005).

[42] *Lioce v. Cohen*, 124 Nev. 1, 11, 174 P.3d 970, 976, 2008 WL 151849 (2008) (Meyers Dec. 20, 2017 MIL Declaration, *Exhibit 42*).

> * * *
>
> You see, under our system of justice, each plaintiff must prove that he or she is injured. They cannot just say it and receive money. The buck stops here with you, ladies and gentlemen. You are in the position to say enough is enough.

Emerson [the defense counsel] later continued by discussing frivolous lawsuits and the public's dim view of the legal profession. Emerson again expanded the argument, saying:

> You are probably wondering why I spent so much time and energy defending this case. It's not a high-profile case. You are not going to see it on the news. You are not even going to see it in the paper.
>
> But, you see, I have a real passion for cases like this, because it's cases like this that make people skeptical and distrustful of lawyers and their clients who bring personal injury lawsuits. And it's a big factor as to why our profession is not as honorable a profession as it once was in the eyes of the public.
>
> But the only way that people and their lawyers will stop bringing cases like this is if juries start saying: No. Enough is enough.
>
> It has always been said that the American jury system is the conscience of our society; that when a jury speaks through its verdict, it's a reflection of society's values and beliefs and what justice is or should be.
>
> This jury, you, have a tremendous responsibility here. Like I said, it's not a high-profile case, but your responsibility here is no less. You have the opportunity **976 here with your verdict to say enough is enough.[43]
>
> * * *
>
> Ladies and gentlemen, life for all of us is full of ups and downs, successes and failures, achievements and setbacks,

[43] *Id.* at 975-76.

> the difference is that most of us, most of us accept our problems, without trying to blame someone else.
>
> Accidents, things just happen, TMJ [Temporomandibular Joint Dysfunction], growth disturbance, hereditary issues, we take responsibility for our own lives instead of looking for an excuse to sue someone at the drop of a hat. There is a conventional school of thought prevalent now that Americans have become a society of blamers. * * *[44]

The Nevada Supreme Court concluded:

> As set forth above, Emerson made arguments that these cases wasted taxpayers' money and jurors' time. Emerson also argued that the cases were examples of people "looking for an excuse to sue someone at the drop of a hat" and that society now believed that "Americans have become a society of blamers." Defendants contend that these arguments are not misconduct and, instead, that the arguments implied that it was a waste of time and resources to bring cases that do not have an adequate basis in fact and law to prevail. Th[e] comment[s] w[ere] supported by the evidence that showed that [the defendant] was not negligent in this case and was affirmed when the jury reached a defense verdict in this case.
>
> We disagree and conclude that Emerson's arguments amounted to impermissible jury nullification.[45]
>
> In the present case, MultiCare has a right to a fair trial. It does not have a right to a successful defense, and its attorneys cannot under Washington law make any argument that invites the jury, however subtly, to render a defense verdict based on anything other than the facts admitted in evidence during trial and the law as instructed by the Court. While speculation, improper hypothetical questions, cross-examination without foundation, the prohibition against "Golden Rule" arguments and similar matters touch generally upon jury nullification issues and are addressed separately in these motions, the Court should

[44] *Id.* at 976.

[45] *Id.* at 983.

explicitly bar defense counsel from inviting nullification at any stage in this trial.

10. *Exclusion of argument or suggestion that the plaintiffs' exercise of their constitutional right to file this lawsuit, their claims, evidence offered, or arguments made on plaintiffs' behalf, or the allegations against MultiCare are "offensive" or "insulting" (or that defense counsel is offended).*

A review of transcripts from his other trials show that MultiCare's lead trial counsel has the habit of telling juries during closing argument that the plaintiffs' lawsuit, claims, evidence, or argument is "offensive" or "insulting" or that he is "offended." He often broadens this statement to describe a plaintiffs' case as "offensive."[46] An attorney's opinion in this context is not relevant, and it is unethical to include it in argument to a jury.[47] Such argument is also an obvious effort to appeal to the jurors passion, prejudice, and for jury nullification.

Such argument or comments have no place in a Washington courtroom. Plaintiffs have a right under both the federal and Washington state constitutions to a fair trial, and to have a jury decide this case. There is nothing offensive about their use of this court for that important purpose. A suggestion by the defense that any aspect of this process is "offensive" can only be for the purpose of appealing to the emotions of the jurors, to create bias against a party exercising a constitutional right, contrary to this Court's most basic jury instructions.[48] Defense counsel's personal sensibilities about what is or is not "offensive" are not relevant, and are not admissible at trial.[49] The Court should therefore exclude such argument.

11. *Exclusion of argument or suggestion that an award of damages "will not make the pain go away" or "will not heal Luke Penner," or similar arguments.*

For similar reasons, defendants should be precluded from arguing that an award of noneconomic damages will not "make plaintiffs' pain go away," that money will not compensate plaintiffs' loss, or that it is futile for the jury to award compensation under these circumstances because money will not repair the injury. Similarly, defendants should be precluded from arguing that the plaintiffs are not entitled to a significant award because of the time that has passed since the events the resulted in this case. Such remarks are an invitation for jury nullification, as they suggest to the jury that it may

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[46] Meyers 12-20-2017 MIL Declaration, *Exhibit 21* (Transcript of Jury Trial, Volume I, *Powell v. Advent Health-Thompson et al.*, Superior Court of McDuffie County, Georgia, Civil Action No. 13CV0218 dated 06-20-2016 (argument of attorney John Hall) at pp. 1533, 1544, 1545, 1561).

[47] *See, e.g.*, R3.4; R8.2, Comment [3].

[48] *See, e.g.*, WPI 1.01.

[49] Fed. R. Evid. 401; Fed. R. Evid. 402; Fed. R. Evid. 403.

decline to award general damages, even if it finds that a plaintiff was injured due to the negligence of a defendant.[50]

12. *Exclusion of evidence, testimony, argument or suggestion concerning any undiagnosed medical condition, including any undiagnosed prenatal condition.*

Defense counsel deposition questions, particularly to Josh and Patricia Penner's family and friends, suggest a propensity to inquire about undiagnosed medical conditions. Such questions are simply an invitation to the jury to speculate about medical conditions that do not exist in this case and, therefore, have nothing to do with the facts of this case. For the same reasons preexisting conditions should be excluded, the court should prohibit the defense from asking such questions at trial, or offering evidence of any undiagnosed medical condition.[51]

13. *A requirement that both parties give meaningful notice, before court adjourns for the day, of every witness they intend to call the next day.*

Plaintiffs request an order requiring all parties to provide notice of the witnesses whose testimony they intend to present the next day. Plaintiff requests that such notice be given in the afternoon, before the parties leave the courtroom for the day. Such an order will assist in trial preparation and make for more efficient use of court time.

14. *Prohibition against cross-examination lacking foundation.*

Cross-examination questions, just like hypothetical questions, must have some factual foundation. Otherwise, witnesses are subjected to what are colloquially known as, "When did you stop beating your wife" questions. In short, a question that infers facts for which there is no evidence.

The court is always at a disadvantage when an objection is made for lack of foundation for questions on cross-examination, often leading to overruling the objection on the basis that the court assumes that counsel must have some evidence upon which to base the question. Plaintiffs respectfully request that if there is an objection for lack of foundation on cross-examination, that at the next break the examining attorney be required to identify the evidence that provides a foundation for asking the question. If such evidence cannot be identified then, when the jury returns, the court should instruct the jury that the question and answer at issue have been stricken.

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[50] *See Lundgren v. Whitney's, Inc.*, 94 Wn.2d 91, 614 P.2d 1272 (Wash. Ct. App. 1980); *Bitzan v. Parisi*, 88 Wn.2d 116, 558 P.2d 775 (Wash. Ct. App. 1977); *Freeman v. Intalco Aluminum Corp.*, 15 Wn. App. 677, 552 P.2d 214 (Wash. Ct. App. 1976).

[51] Fed. R. Evid. 401; Fed. R. Evid. 402; Fed. R. Evid. 403.

15. *Prohibition against hypothetical questions lacking a legally proper foundation.*

A hypothetical question at trial must comply with the following rules:

a. The hypothetical question must be based upon facts of record; if the question is not supported by facts of record, it is objectionable.

b. It should be phrased so as to fairly and comprehensively cover the facts upon which the answer will be based.

c. If the answer assumes the existence of conditions or circumstances not shown by the evidence, its validity dissolves and it should be stricken.

d. While the facts upon which the question is based may be subject to conflicting evidence, the answer is not rendered inadmissible if the question fairly incorporates the facts supported by evidence under the examiner's theory of the case.[52]

Basically, a hypothetical question must be based upon evidence in the record. If not, it is objectionable, and the question and any subsequent answer should be stricken. The court should rule, *in limine*, that every hypothetical question must comply with these rules.

16. *Prohibition against defense counsel asking, in front of the jury, to use any of the plaintiffs' visual aids or demonstrative exhibits.*

Plaintiffs request an order in limine requiring defense counsel to make any request to use any plaintiffs' visual aids or demonstrative exhibits in advance and outside the presence of the jury. While plaintiffs' counsel intends to cooperate with the defense, there is no obligation for the plaintiffs to share the use of visual aids and demonstrative exhibits with the defense during trial. Any such request by defense counsel in front of the jury can put opposing counsel in an unnecessarily awkward position. These issues can be addressed efficiently by the court outside the presence of the jury, allowing plaintiffs' counsel an opportunity to evaluate the request without the risk that jury members may not understand the rights of the party and the procedural issues involved.

II. Tom Doehrman and Dan Buba, Indiana

17. *No testimony, evidence, or reference regarding any past medical history, injuries, or conditions without expert medical testimony in support thereof.*

Even though precluded from introducing any expert opinions that have not been disclosed, Defendant may try to elicit testimony from a lay witness, such as Jon

[52] *Helman v. Sacred Heart Hosp.,* 62 Wn.2d 136, 150-51, 381 P.2d 605 (Wash. Ct. App. 1963).

Williams, about medical or other expert issues, such as Jon's diabetic condition and the effect it may have on his life expectancy. Indiana law is clear that when the issue of a medical condition and its causal connection to an issue is not normally within the life experience and understanding of the jurors, then the testimony of an expert witness is required:

> Ordinarily, however, the question of a causal connection between a permanent condition, an injury, and a pre-existing affliction or condition is a complicated medical question. When the issue of a cause is not within the understanding of a lay person, testimony of an expert witness on this issue is necessary [citations omitted]. An expert, who has the ability to apply principles of science to the facts, has the power to draw inferences from the facts which a lay witness or jury would be incompetent to draw. *Daub v. Daub*, 629 N.E.2d 873, 877-78 (Ind. App. 1994).

The mere existence of a pre-existing condition, without more, is insufficient to make the evidence admissible. This is so, whether the evidence is offered in the form of certified medical records, or witness testimony. It is only competent medical expert testimony that makes a pre-existing condition relevant to the issue of causation, and thus, admissible.

The foregoing rationale for requiring expert medical testimony to support the relevance of a pre or post injury medical history was recently adopted in *Muncie Indiana Transit Auth. v. Smith*, 743 N.E.2d. 1214 (Ind. App. 2001):

> According to the Arizona Court of Appeals, the "obvious reason for this rule is that lay persons are no better able to testify concerning the functioning of the human body than they are able to treat its infirmities." [citations omitted]. The Court further explained that although "most lay persons have opinions and theories of their own as to how the human body functions, our courts have decided that, in order to recover compensation, a standard of expert evidence on the subject is required where the injury is not apparent to the layman." [citations omitted].

When the cause of the injury is not one which is apparent to a layperson, and multiple factors may have contributed to causation, expert evidence on the subject is required.

18. *No improper claims regarding plaintiffs' burden of proof.*

Any reference that any evidence or opinion testimony concerning any element of Plaintiffs' cause of action must be expressed in terms of certainty or near certainty. *See, e.g., Noblesville Casting Div. of TRW v. Prince*, 438 N.E.2d 722, 731 (Ind. 2001). ("[N]o threshold level of certainty or conclusiveness is required in an expert's opinion as a

prerequisite to its admissibility. The degree of certainty in which an opinion or conclusion is expressed concerns the weight to be accorded the testimony, which is a matter for the jury to resolve").

20. *Alleged statements given by plaintiff in any of her medical records are inadmissible and may not be used for impeachment purposes.*

Any reference to any statement allegedly given by the Plaintiff in any of her medical records which have been produced to the Defendants by the Plaintiff through discovery, or which have been obtained by the Defendants through third-party subpoenas which they have utilized in the discovery process in this case, are inadmissible. The statements or comments of health care providers in medical records about a patient's comments are hearsay, and are not admissible as either substantive evidence, or for the purposes of impeaching the Plaintiff. The Plaintiff cannot be impeached by inconsistent statements of a third person. *See Burt's Wrecker Serv., Inc. v. Eusey*, 464 N.E.2d 23 (Ind. Ct. App. 1994).

III. Morgan Adams, Tennessee And Washington (As Well As Unknown)

20. _____ *is a clinical psychologist, and not a medical doctor. as such he is not qualified to render opinions relating to the diagnosis of a medical condition.*

_____., is a clinical psychologist (Deposition of _____, Ph.D.: 3:7-17). _____'s curriculum vitae attached hereto as Exhibit "A." He is not a medical doctor, has no medical degree, and is not licensed to practice medicine in Tennessee or anywhere else. (Deposition of _____: 89:24—90:5)

As a general rule, the causation of a medical condition must be established by testimony from a medical expert. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991). The field of Doctor of Medicine covers all human illnesses and diseases and their diagnosis, treatment, and prevention. *Ison v. McFall*, 400 S.W. 2d 243, 55 Tenn. App. 326 (Tenn. Ct. App. 1964).

Consistently, the practice of medicine is defined in the Tennessee Code Annotated:

> *63-6-204. "Practice of medicine" defined*
>
> "1) Any person shall be regarded as practicing medicine, within the meaning of this chapter, who treats, or professes *to diagnose*, treat, operates on or prescribes for any physical ailment or any physical injury to or deformity of another."
>
> *63-11-204. Restrictions on methods of treatment*

> (a) Nothing in §§ 63-11-201-63-11-203 shall be construed as permitting the use of those forms of psychotherapy which involve the administration or prescription of drugs or electroshock or in any way infringing upon the practice of medicine as defined in the laws of this state. (b) The psychologist or psychological examiner or senior psychological examiner or certified psychological assistant who engages in psychotherapy must establish and maintain effective intercommunication with a psychologically-oriented physician, usually a psychiatrist, to make provision for the diagnosis and treatment of medical problems by a physician with an unlimited license to practice the healing arts in this state. (c) *A psychologist or psychological examiner or senior psychological examiner or certified psychological assistant must not attempt to diagnose, prescribe for, treat or advise a client with reference to problems or complaints falling outside the boundaries of psychological practice.*
>
> (Emphasis supplied)

Hence it is clear that psychologists are not permitted to engage in medical practice in Tennessee, as defined by inclusion in T.C.A. § 63-6-204 and by exclusion in T.C.A. § 63-11-204(c) above.

21. *Malingering and secondary gain*

Any claim by any defense lay witness or expert witness, including any defense medical examiner (DME) or any defense psychological examiner (DME), or by counsel for Defendant, that Plaintiff is untruthful, exaggerating Plaintiff's accident injury signs, symptoms or deficits, malingering, seeking secondary gain, and similar comments, constitutes improper character, impeachment, and credibility evidence not permitted under F.S. 90.404 and F.S. 90.608-610 which set forth the rules to be followed at trial regarding character, impeachment, and credibility of witnesses.

A doctor's opinion that plaintiff is "a malingerer and motivated by financial gain" "create[] a serious danger" and goes "beyond the scope of proper expert testimony." *Nichols v. Am. Nat.*, 154 F.2d 875, 884 (8th Cir. 1988). *See also U.S. v. Adams*, 271 F.3d 1236, 1245 (10th Cir. 2001)("[T]he credibility of witnesses is generally not an appropriate subject for expert testimony."); *U.S. v. Beasley*, 72 F.3d 1518, 1528 (11th Cir.1996)("[E]xpert medical testimony concerning the truthfulness or credibility of a witness is inadmissible); *U.S. v. Whitted*, 11 F.3d 782, 785-86 (8th Cir. 1993)("A doctor . . . cannot pass judgment on the alleged victim's truthfulness in the guise of a medical opinion"); *U.S. v. Jannotti*, 673 F.2d 578, 598 (3d Cir.1982)(en banc)("Credibility determinations are for the jury."); *U.S. v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991)("Credibility is not a proper subject for expert testimony; the jury does not need an

expert to tell it whom to believe, and the expert's 'stamp of approval' on a particular witness' testimony may unduly influence the jury."); *Greenwell v. Boatwright*, 184 F.3d 492, 496 (6th Cir. 1999)("[T]estimony regarding the credibility of eyewitness testimony was improper."); *Johnson v. Baker*, 2009 WL 3486000 (W.D. Ky. Oct. 23, 2009)("Expert testimony regarding witness credibility is generally considered improper."); *Halcomb v. Washington*, 526 F. Supp. 2d 24, 29 (D.D.C. 2007)(Expert's statements he was "inclined to accept the Plaintiff's version of events" implied defendant was untruthful and were inadmissible).

As stated by the Eighth Circuit:

> The challenged testimony impugning Nichols' psychiatric credibility and suggesting that recall bias, secondary gain, and malingering had influenced her story was not a proper subject of expert testimony under Fed.R.Evid. 702.6 The record does not show that these theories met the Daubert criteria, and in her testimony Dr. Pribor sought to answer the very question at the heart of the jury's task—could Nichols be believed? She testified that she needed "to interpret and weigh" what Nichols said or she could "get a very skewed and inaccurate view of what actually happened" and that Nichols was a malingerer motivated by financial gain. Opinions of this type create a serious danger of confusing or misleading the jury, see Fed.R.Evid. 403, causing it to substitute the expert's credibility assessment for its own common-sense determination. *See U.S. v. Kime*, 99 F.3d 870, 884-85 (8th Cir.1996), cert. denied, 519 U.S. 1141, ——, 117 S.Ct. 1015, 136 L.Ed.2d 892 (1997). Dr. Pribor was permitted to comment on Nichols' reliability "in the guise of a medical opinion," *U.S. v. Whitted*, 11 F.3d 782, 785-86 (8th Cir.1993), and this "impressively qualified expert's stamp" of untruthfulness on Nichols' story went beyond the scope of proper expert testimony. *U.S. v. Azure*, 801 F.2d 336, 340 (8th Cir. 1986).
>
> *Nichols v. Am. Nat. Ins. Co.*, 154 F.3d 875, 883 (8th Cir. 1998)

22. *Regarding defense expert testimony outside TRCP 26 disclosures.*

Comes now the Plaintiff, and respectfully moves this Court in limine for an Order precluding: (1) defense experts from testifying to opinions held other than those set forth in the Rule 26 disclosure, served upon Plaintiff on _____, in accordance with the Tennessee Rules of Civil Procedure and the Scheduling Order in place in this

case; and (2) defense counsel from stating to the jury that defense experts have any opinions which would be outside the defense Rule 26 served upon Plaintiff.

Rule 26.02(4)(A)(i) of the Tennessee Rules of Civil Procedures provides:

> [A] party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter, substance of, or the facts and opinions to which the expert is expected to testify and a summary for the grounds for each opinion.
>
> Plaintiff sent the attached interrogatory (Exhibit _____) to defendants, _____, in which Plaintiff requested defendants the identify for each of his experts; the subject matter on which the expert was expected to testify; the substance of the facts to which the expert was expected to testify; and the substance of the opinions to which the expert was expected to testify and a summary of the grounds for each opinion, which Plaintiff is permitted to do pursuant to Rule 26.02(4)(A)(i).

Rule 26.02(4)(A), Tenn. R. Civ. Pro. provides a party with two means of discovering the opinions of expert witnesses: interrogatories or depositions. Specifically, the rule provides as follows:

> Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and *to state the substance of the facts and opinions to which the expert is expected to testify* and a summary of the grounds for each opinion.
>
> (ii) A party may also depose any other party's expert witness expected to testify at trial. (emphasis added)

Rule 26.05(1), Tenn. R. Civ. Pro. requires a party to supplement answers to interrogatories served pursuant to Rule 26.02(4)(A):

> A party is under a duty seasonably to supplement the party's response with respect to any question directly addressed to . . . (B) the identify of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, *and the substance of that testimony*. (emphasis added)

The purpose of Rules 26.02 and 26.05, i.e., the discovery of expert witnesses and their opinions, "has two goals: first, promoting fairness through full disclosure of all relevant information and second, encouraging counsel to be fully prepared." *Southside Leasing Co. v. Matlock*, 1989 WL 128506, *2 (Tenn. Ct. App. 1989) (citation omitted) (copy attached). Likewise, "[t]he rules concerning discovery were promulgated to allow the parties to ascertain relevant facts pertaining to their case, thus narrowing the issues in order to reach a decision on the merits without 'trial by ambush.'" *Austin v. City of Memphis*, 684 S.W.2d 624, 632 (Tenn. Ct. App. 1984).

After receipt of defendants' Rule 26, Plaintiff elected, as she had the right to do, not to take the discovery deposition of the defendants' experts, but to stand on the Rule 26 responses provided to Plaintiff, which Rule 26.02(4)(ii) permits her to do. As already noted, Plaintiff has elected not to depose the Defendant's non-party experts. Instead, Plaintiff has chosen to rely on Defendant's Rule 26 Disclosures to determine the opinions which are going to be offered at trial by each expert. In doing so, Plaintiff is relying on the fact that the Defendant has complied with its affirmative obligations to disclose the *opinions* which each expert holds and the *substance of the testimony* which the expert is expected to offer. Obviously, allowing the Defendant's experts to testify or be questioned beyond the scope of the disclosures would prejudice the Plaintiff and the ability of her counsel to appropriately prepare to cross-examine the Defendant's experts. It would punish the Plaintiff for her good faith expectation that the Defendant would comply with its obligations under the Tennessee Rules of Civil Procedure and would result in the Defendant being allowed to ambush the Plaintiff with new, non-disclosed opinions and substantive testimony. Therefore, this court should enter an order directing the Defendant's expert witnesses to confine their testimony to the substance and opinions contained in the Rule 26 disclosures.

23. *Defendants' burden of proof is the same as the plaintiff's burden*

Defendants are held to the same burden that plaintiff is held to regarding causation. *See Parshall v. Buetzer*, 195 S.W.3d 515, 521 (Mo. App. W.D. 2006) (recognizing that before a jury can assess an affirmative defense, all of the legal elements of the defendants' claim must be presence, including causation). A party must have substantial evidence supporting an affirmative defense in order to admit the same. *See* M.A.I. 32.01; *see also Romeo v. Jones*, 144 S.W.3d 324 (Mo. App. E.D. 2004). As such, defendants must produce expert testimony linking a previous act to the herniated discs at issue in this case to submit such evidence. *Mueller v. Bauer*, 54 S.W.3d 652, 657 (Mo. App. E.D. 2001) (holding when an expert witness testifies that a given action or failure to act "might" or "could have" yielded a given result, though other causes are possible, *such testimony is*

devoid of evidentiary value). The ability to link a herniated disc to a specific injury or issue is a technical matter that is not within the ordinary understanding of a jury. Since defendants do not have *any* expert testimony connecting any of the "possible causes" of a herniated disc to Gina Woolard's herniated discs, defendants have failed to lay the proper foundation to admit such testimony.

24. *Irrelevant past traumas are inadmissible without expert testimony*

This precise issue was decided by the Missouri Supreme Court in *Sampson v. Missouri Pacific Railroad Co*., 560 S.W.2d 573 (Mo. banc 1978). In *Sampson*, the railroad attempted to admit evidence regarding the plaintiff's history of alcoholism, smoking, and heart issues. The railroad claimed that such issues could possibly affect the plaintiff's life expectancy. The railroad did not have any testimony linking the alcoholism or heart issues to the plaintiff's life expectancy, and claimed it was a matter of common knowledge. The trial court excluded the evidence, holding that connecting the unrelated issues to the plaintiff's life expectancy is a technical matter that requires the foundation of expert testimony. The Supreme Court affirmed, holding:

> The question remains, however, as to whether defendant laid a proper foundation for the admission of said evidence. Standing alone, evidence of plaintiff's heart condition was of little use to the jury. It was evidence which required the connection of an additional fact to substantiate its relevancy, to wit: the relationship between heart conditions of the kind which was Sampson's and life expectancy . . . . While our common understanding may be that heart insufficiency is not a matter of good health, the calculous of disability and life expectancy into which factors of severity and physical condition must be incorporated is a matter which we believe to be of technical medical knowledge beyond the ken of average jurors . . . . Defendant was required to show in his offer of proof some connection to the issue damages based upon the opinion of an expert.
>
> *Id.* at 596.

A similar issue regarding questioning the plaintiff on unrelated medical evidence was considered by Missouri Courts in *Senter v. Ferguson*, 486 S.W.2d 644 (Mo. App. 1972). In *Senter*, defense counsel attempted to cross-examine plaintiff concerning a history of prior unrelated medical conditions, including prior hospitalizations, a previous car wreck, a thyroid operation, previous back surgery, and previous falls. Defense counsel contended that the evidence was admissible to rebut plaintiff's claim that she was in good health before the accident at issue. The Court of Appeals, however, held that evidence of injuries or medical conditions unrelated to the injuries claimed, was irrelevant,

immaterial, and inadmissible. *See also, State ex rel. Stecher v. Dowd*, 912 S.W.2d 462 (Mo. banc. 1996) (holding that even discovery of unrelated medical conditions is prohibited); *State ex rel. Brown v. Dickerson*, 136 S.W.3d 539 (Mo. App. 2004) (prohibiting defendants from engaging in discovery on plaintiff's unrelated medical conditions). The Court found that the record showed the previous injuries and various ailments were not "even remotely connected with the injuries pleaded." *Id.*

If defendants wish to contribute "possible" other causes of plaintiff's herniated discs, they must have expert causation testimony on the subject. *Senter v. Ferguson*, 486 S.W.2d 644 (Mo. App. E.D. 1974). Expert testimony regarding causation is required so as to prevent jurors from entering the "forbidden realm of conjecture and surmise." *Delisi v. St. Luke's Episcopal-Presbyterian Hosp., Inc.*, 701 S.W.2d 170, 177 (Mo. App. E.D. 1985); *see also Seippel-Cress v. Lackamp*, 23 S.W.3d 660, 668 (Mo. App. W.D. 2000) (holding that expert testimony as to causation is required so as "to guard against the danger of permitting lay jurors to establish arbitrary standards relative to matters beyond their common experience and knowledge and to decide crucial issues upon nothing more than speculation, conjecture and surmise"); *see also see also Sampson v. Missouri Pac. R. Co.*, 560 S.W.2d 573, 589 (Mo. 1978) (holding that issues that are not linked to the incident with expert testimony are properly excluded as lacking foundation). *Reasonable scientific certainty or probability is required. Schiles v. Schaefer*, 710 S.W.2d 254, 262 (Mo. App. E.D. 1986).

25. *Unnecessary treatment*

That any of the medical treatment rendered to Plaintiff was inappropriate or unnecessary, performed in an inappropriate manner, or that any of Plaintiff's symptoms in the past or future are the result of such inappropriate or unnecessary treatment. *Dungan v. Ford*, 632 So.2d 159 (Fla. 1st DCA 1994) and *Emory v. Florida Freedom Newspapers*, 687 So.2d 846 (Fla. 4th DCA 1997).

26. *Learned treatises*

Prohibit any expert to bolster his opinion by referring to authoritative texts, papers, publications, or treatises. The general rule is that authoritative publications can only be used during the cross-examination of an expert, and cannot be used to bolster the credibility of any expert or to supplement an opinion. *Erwin v. Todd*, 699 So.2d 275 (Fla. 5th DCA 1997); *Costanzo v. Agency Rent-A-Car, Inc.*, 560 So.2d 265 (Fla. 4th DCA 1990); *Chorzelewski v. Drucker*, 546 So.2d 118 (Fla. 4th DCA 1989); *Quarrell v. Minervini*, 510 So.2d 977 (Fla. 3d DCA 1987); *Medina v. Variety Children's Hosp.*, 438 So.2d 138 (Fla. 3d DCA 1983).

27. *Improper use of medical records*

That Defendant, through his expert, cannot begin reading other physicians' medical reports, as the other reports are hearsay, and he cannot be used as a conduit to place otherwise inadmissible evidence before the jury. This would be a blatant attempt by the

defense to get the evidence in "through the back door." *Kelly v. State Farm Ins.*, 720 So.2d 1145 (Fla. 5th DCA 1998); *Ross Dress for Less, Inc. v. Radcliff*, 751 So.2d 126 (Fla. 2nd DCA 2000); Section 90.803(6), Evidence.

28. *Arguments unsupported by medical evidence*

Plaintiffs move that the Court exclude any claim, argument, or other statement that any prior or subsequent injuries, problems or conditions associated with plaintiff's back, jaw, shoulder, or any problems related to psychological stress the plaintiff may have suffered in the past are in any way related to his present injuries, unless such statement is first established by testimony of someone having sufficient and appropriate medical training and such statements are supported by medical records. Such an unsupported statement cannot be made without sufficient proof. *See Eberhart v. Morris Brown Coll.*, 181 Ga. App. 516, at 518-19 (1987); *Thomason v. Willingham*, 118 Ga. App. 821, 165 S.E.2d 865 (1968). Any testimony, argument or questioning as to these matters should also be barred unless and until medical proof is first presented.

The author submitted the following in connection with his presentation:

- Attachment I: Thomas Harding, Plaintiff's Application to Prohibit Trial by Ambush, *Lester v. Alley*, 2016 BCSC.

- Attachment II: Kenneth B. Goldblatt, Plaintiff's Motion to Preclude DTI Testimony, *Wood v. Lowe's Home Center, Inc.*, (Sup. Ct. Albany County, Index No. 901767-17).

- Attachment III: David Randolph Smith, Plaintiff's Motion *in Limine*, *Buchanan et. al v. Theresa T. Morrison, M.D., et. al.*, (E.D. Tenn. No.C08-00083, Oct. 17, 2012).

Theme, Voir Dire, and Opening in Traumatic Brain Injury (TBI) Cases

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This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Best of the Best: Mastering the Fundamentals for a Traumatic Brain Injury Case*, Las Vegas, NV April 2019.

Theme

- Core Truth

Theme—Overall

- Short and simple
- Distillation of your whole case
- Will move the jury

Choosing a Theme

- Primary rule defense broke
- Target the defendant you most want to blame
- Fact specific
- Be flexible enough to change a theme

Resonate with the Jury

- Why should the jury care?
  - Threatens their family
  - Makes their community less safe
  - Makes the jurors mad
  - Puts the jurors in the shoes of the plaintiff

Invoke Something the Jurors Know

- Famous quotes
- Idiomatic expressions
- Fables and fairy tales
- Famous sons
- Movies or TV

Sub-Themes

- Should support your main theme
- Illustrate more specific points:
  - Secondary rule violations
  - Defendant cover-up
  - Damages
- Tie to the main theme

Using the Theme

- Start developing the theme in voir dire
- Use the theme often
- All evidence and every witness should support the theme

TBI Themes

- *Losses*
  - Dignity
  - Sense of self
  - Family
  - Autonomy
  - Relationships

The *Theme* Must Fit the *Case*

Examples

- The lights are on, but nobody is home
- He is lost in the woods, and the breadcrumbs are gone
- When it comes to human dignity, we cannot make compromises

Supporting Evidence

- Diminished capacity
- Self-care
- Basics tasks
- Conservatorship
- Treating physician
- Family members
- Primary caregiver
- Therapists
- NDL contacts

Voir Dire

Jury Is Tribal—
They Care About Their Own

What Does the Jury Have in Common With . . . ?

- Geographic proximity
  - Wreck on local road?
  - Treated by local doctors?
  - Defendant a major employer in the area?

What Does the Jury Have in Common With . . . ? (cont.)

- Local culture?
  - Foreign defendant?
  - Defendant a corporation?

Ask Who Could Not . . .

- . . . follow preponderance
- . . . award non-economic damages
- . . . award money to an injured person
- . . . award money for an invisible injury

If They Cannot . . .

- Likely have attitudes that make them bad jurors for TBI cases
- *Strike for cause*

The Burden of Proof

- Ask the question in a couple of a different ways
  - Tie into TBI attitudes
    - Concussion—NFL
  - Tie into case theme

Supplemental Jury Questionnaire

- Little time for lots of data
- Strikes for cause
- *One page*

The Invisible Injury

TBI Symptoms

Obvious	Invisible
Speech	Depression and fatigue
Paralysis	Decision-making
Tremor	Memory
	Sleep

Medical Evidence

- Imaging
- Medical records, emergency medical services (EMS), emergency room (ER) — loss of consciousness (LOC) and Glasgow Coma Scale (GCS)
- Obvious head injury — scar

If not . . .

Would You Award Damages . . .

- . . . For brain damage you cannot see?
- . . . Only based on a doctor's testimony?

The Jury Challenge Is to
Prove Causation

They Will Blame It On . . .

- Getting older
- Existing disease
- Malingering

Juror Bias—Accidents Happen

- Will not sue for accidents
- Need higher burden of proof?
- Need intent; will not follow negligence?

Absent Plaintiff

- *"Will you hold it against Joe if his doctor does not want him in the courtroom?"*

Juror Bias—The Money Will Not Do Any Good

- Cannot fix the brain
- Person messed up for the rest of their life
- Money will not provide for a better life

"Would you be unable to award money to someone who has a brain injury?"

Juror Bias—Better Off Living at Home

"Would you be unable to award money for future custodial care if the evidence showed that was in the best interest of a patient?"

Juror Bias—Delayed Onset

- Some brain damage takes months to fully develop

"Would you be unable to award damages to a person if it took months for the effects of their brain damage to become obvious?"

"My Mother" Approach

- Effective way to ask questions without jurors feeling attacked

"My mother/uncle/daughter-in-law once told me they could not . . . who here agrees with them?"

Dangerous Question!

"Who here has had a concussion?"

- MTBIs are common
- Most concussions do not leave lasting damage
- Most MBTIs resolve themselves
- "I had a concussion a couple years ago. My head felt fuzzy for a couple months, but I am fine now."

Opening

Tone

- Somber?
- Accusatory?
- Aggressive?

Tell the story

Plaintiff's advantage

Opening—Introduce Your Rule

- Tell a story
- Facts speak for themselves
- *Save the arguments*

Introductions—Who We Are Suing and Why

- Safety rules the defendants violated
- What is dangerous about violating the rule generally
- What is dangerous about violating the rule specifically

Effect of Breaking Rules

Brain Injury Physical Injury	Life-Changing	Emotional Injury Damage to Family

Address Weaknesses and Defenses

- Invisible injury
- Symptom-specific injuries
- Pre-existing
- Aging plaintiff
- Defense experts

Explain the Brain Injury

- How it happened:
  - Direct trauma
  - Diffuse axonal injury
  - Damage done

Explain the Damage

- Client's story
- Small things?
- Big things?
- Use specific imagery

Specific Imagery

- Post-it notes to help with memory
- Inability to do simple math
- Lost job
- Constant headaches
- Loss of control
- Sleep deprivation

What Was Lost

- Income
- Happiness
- Relationships
- Golden years
- Youth
- Dignity

Before and After

Then	Now
Brilliant engineer	Unable to understand a dry-cleaning bill
Active and social auto mechanic	Unemployed shut-in
Taking care of children	Being taken care of by children

Road to Recovery or Permanent Damage

- Surgery
- Therapy
- Constant home care
- Placed in a facility

Money

- Plaintiff had to wait for closure . . . life on hold
- What now seems like a large sum will be proper based on the evidence
- *Then sit down*

Closing Thoughts

- Be visual—attention spans are short
- Be neutral—your facts should tell the story
- Do not advocate—let the jurors reach their own conclusion
- Every fact should be attributed to a witness

Five Rules for Closing Argument in a TBI Case: *Martin v. Six Flags*[1]

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[1] This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Annual Convention*, Boston, MA July 2017.

"World's Largest Regional Theme Park Company"

$35 Million Verdict

- 92 percent apportioned to Six Flags
- Eight percent apportioned to attackers

Rule One: The Defendant's Choices Pre-Litigation Provide You with the Moral Authority to Ask for Damages

Moral Authority

- "Moral authority comes from following universal and timeless principles like honesty, integrity, treating people with respect."
- True leadership is moral authority. Leadership is a choice. The choice is to follow universal timeless principles, which will build trust and respect.
  - Stephen Covey

Six Flags' Employee Locker Room

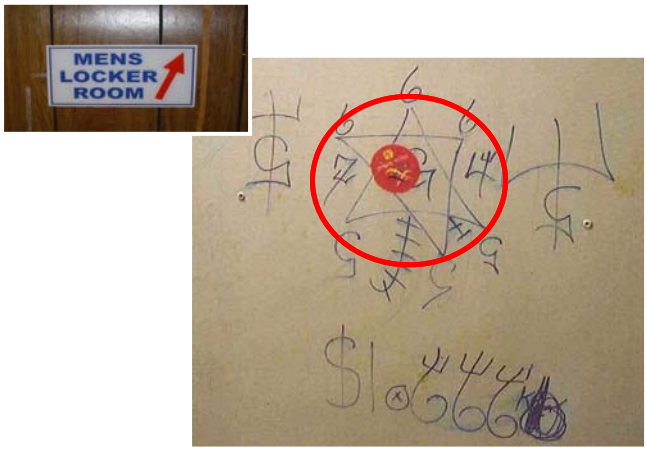
YGL =
Young Gangster
Living

Six Flags' Employee Locker Room (cont.)

Six Flags' Employee Locker Room (cont.)

Six Flags' Employee Locker Room (cont.)

Six Flags' Employee Locker Room (cont.)



Six Flags' Employee Locker Room (cont.)

"The *majority* of people that works at Six Flags was in a *gang*."

- *Six Flags Employee*

Gang fighting at the bus stop was a common occurrence

August 7, 2002

- *Assault*—large group of *employees* at MARTA bus stop *threaten patrons* and becomes physically abusive.

Six Flags' Choices Pre-Litigation

- Choice to ignore "hot spots"
- Three employees shot at the bus stop a year before
- "Please don't talk about that to the media"
- Bus stop moved off of Six Flags' property
- Knew in-house security guards were inexperienced and underpaid
- Choice not to use police 24 hours a day, seven days a week

Six Flags' Choices Pre-Litigation (cont.)

- Choice to hire gang members
- Choice to ignore gang graffiti for years in the employee locker room
- Choice to tolerate gang members
- Choice to ignore gang fighting at the bus stop

Rule Two: The Defendant's Choices During Litigation Provide You with the Moral Authority to Ask for Damages

The Defenses We Encountered

- "I would have done something if only I had known."
- Security cameras "broken" (but no repair invoices)
- Pointing the finger of blame
- Bad things happen (but no warnings needed)
- Personal responsibility! (just not corporate responsibility)
- "Not our property"
- "Beautify" (but do not fortify)

Rule Three: Your Moral Authority Empowers You to Attack Defendant's Position on Damages

Attack Defendant's Position on Damages

- There are tens of thousands of doctors but the defendant did not bring one to you
- Instead, the defense lawyer argues that the plaintiff "shouldn't take so much medicine."

“Is it intellectually honest to suggest that a normal CT scan means no injury?”

“. . . principles like honesty, integrity, treating people with respect.”—Stephen Covey

Attack Defendant’s Position on Damages (cont.)

- Josh fought his way through to a general education degree (GED) despite the injury
  - (They could not take his toughness and his desire to be someone)
- I think he will go to college or make something of himself
  - (That is the kind of guy I would bet on . . .)

Attack Defendant's Position on Damages (cont.)

- Josh still works, making $13,000 a year, stocking shelves at Target
  - ("That just shows this kid wants a life. He wants to do everything he could.")

Rule Four: Your Moral Authority Empowers You to Ask the Jury to Respect *All* of the Harms and Losses

"Now I need to talk about damages . . . "

". . . This is *the hardest thing* I have to do as a lawyer."

Traumatic Brain Injury (TBI) Cases Are Like Wrongful Death Cases

- "The evidence in this case is that Josh Martin's life—the Josh Martin that existed on July 3rd of 2007 is gone, and we can't bring him back."

What Are We Asking for?

- Past medical
- Life care plan
- General damages

The Life Care Plan

The need to keep Josh safe.

Life Care Plan

- The best options cost $7 to 8 million
- Life care plans help hire experienced people with knowledge how to help brain injured folks
- “There is no cushion. No fluff. No room for getting sick. No room if he lives another five years.”

Diminished Earning Capacity

- Not an exact figure
- This is Josh Martin and who he was, and what his innate abilities were that he was given by God, or nature, or however you want to view the world
- Those abilities were taken from him

General Damages—The Present Sense of the Attack

- He must have thought—well I am at Six Flags—there must be some security
- He tried to get away—he fought to get away, to survive, but he could not
- What fear did he have during those minutes of hell where he fought to survive?
- Ask for a number to respect that kind of terror? *Millions of dollars*.

General Damages—After the Attack

- Two years post-attack—described by psychiatrist "soiled and almost incoherent"
- How must those two years have felt for Josh?
- "He was a young guy who wanted to be on his own, like young guys want. He wanted a life, like young guys want. He couldn't do it. And if I had to ask for just those two years, I'd ask for *millions of dollars*."

General Damages—The Future

- The next 50 years
- We do not get to come back in the future if something bad happens
- Not likely to have a relationship with a woman
- Does not have insight into his own emotions. *Josh cannot read others' emotions*

Things That Matter

- Does not matter if he would have been a butcher, a baker, or a candlestick maker—family is important
- If you come from a family that is not stable—you have a hope. Some day, you will not have the same fears you did as a child
- Your own home
- Your own family
- Your own purpose

Things That Matter (cont.)

- Someone to have your back
- Someone who you will have their back
- A place where we fit in
- That is the biggest loss I can think of

Those Are the Harms

- When I have to think of 50 years of knowing you cannot do what you want—and losing the opportunity to pursue it, that number is *millions of dollars*

Adding the Buckets Together

- Start with the $8 million to take care of Josh
- $1 million what his lost wages could have been
- “Then we have to respect all that hell, and future, and when I put those numbers together, I think it’s 30 million dollars, and I know that is a lot of money”

Adding the Buckets Together (cont.)

- The verdict is for 55 years
- It is for things we hold sacred in this country
- You may think that is too much
- You may think that’s not enough
- It is your number, and your verdict, and your discretion

Rule Five: Your Moral Authority Empowers You to Empower the Jury to Do Justice

Empower the Jury Generally

- You received a summons, not an invitation
- You answered the call
- You met your civic duty
- What you do next is make some decisions
- The evidence is in a box
- Examine the evidence and decide individually, then as a group

Jurors are the heroes, not the lawyers.

Empower the Jury with Moral Authority

- As we get older, we get cynical
- But heroes still exist
- Heroes do not let the bad guys win
- We believe in them
- Jurors have the power to make things right

Five Rules for Closing

1. The defendant's choices pre-litigation provide you with the moral authority to ask for damages
2. The defendant's choices during litigation provide you with the moral authority to ask for damages
3. Your moral authority empowers you to attack defendant's position on damages
4. Your moral authority empowers you to ask the jury to respect all of the harms and losses
5. Your moral authority empowers you to empower the jury to do justice