

Defending Claims of Mild Traumatic Brain Injury by Defeating the Plaintiff's Neuropsychologist

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Introduction

Claims involving allegations of mild traumatic brain injury continue to abound with mixed results throughout the United States. Neuropsychologists are increasingly being used to detect subtle brain injuries where no hard neurological evidence exists to support a claim of brain damage. Many neuropsychologists are willing to testify that permanent brain injury is possible even in the absence of direct trauma to the head. Armed with the "expert" opinion of the neuropsychologist, plaintiffs seek to transform otherwise garden-variety "whiplash" cases into high-exposure brain damage cases. Aggressive defense tactics in defending these claims will most often expose exaggerated claims and lead to favorable results for the defense.

Neuropsychologists purport to assess brain damage based on the results of a battery of neuropsychological tests. The most common tests used for evaluation are memory tests, intelligence tests, and personality tests. The test results are measured against an alleged "norm" of what non-brain injured people score. On its surface, neuropsychology appears complex and scientific in diagnosing brain injury. A closer examination reveals that neuropsychologists are unqualified to render opinions concerning the cause of brain injuries. Rather, forensic neuropsychologists can be debunked as "practicing a science that does not yet exist." D. Faust, "Forensic Neuropsychology: The Art of Practicing a Science That Does Not Yet Exist," *Neuropsychology Review*, Volume 2, No. 3, 1991 at 205.

Obtaining the Neuropsychologist's File

Obtaining the expert neuropsychologist's complete file is the first key to successfully defending claims of mild traumatic brain injury. It is essential to obtain a complete

copy of the raw neuropsychological test data, including scoring sheets and test booklets. In addition, defense counsel should be aggressive in obtaining all claimant information, including medical records and education records often never seen by the plaintiff's neuropsychologist. This information will frequently provide effective fodder for cross-examination of the expert.

Neuropsychologists uniformly resist the production of their underlying test data. Many cite the Ethical Principles of Psychologists and Code of Conduct promulgated by the American Psychological Association in resisting the production of their raw data and file information. Some claim that the information is proprietary and therefore privileged, while others refuse to share the neuropsychological data with "non-professionals" (i.e., defense attorneys) in the absence of a court order.

The production of the neuropsychologist's entire file may be compelled in several ways. First, while the ethical rules promulgated by the American Psychological Association require psychologists to use "reasonable efforts" to maintain the security of the neuropsychological tests, the same organization acknowledges that forensic psychologists have an obligation to make their data available subject to a court order. Individual state licensing boards also promulgate regulations governing psychologists that require psychologists to disclose their files given the appropriate court order. Furthermore, in jurisdictions that follow the Federal Rules of Civil Procedure, the plaintiff may be compelled to produce the data or a written authorization to permit defense counsel to obtain the data as it is subject to the possession, custody, or control of the plaintiff. Because the concept of control embraces the legal right to obtain the information, defense counsel may compel

Continued on page 8

Defending Claims of Mild Traumatic Brain Injury by Defeating the Plaintiff's Neuropsychologist

Continued from page 7

the neuropsychological test data directly from the plaintiff, who may obtain the information from his own psychologist with an authorization. Accordingly, a plaintiff may be compelled to produce the complete file or face the alternative sanction of exclusion of the neuropsychologist's opinion as a result of the failure to produce the records.

Neuropsychologists are reluctant to disclose their files and raw data as it is often the most effective weapon against the expert in the hands of defense counsel. Defense counsel can point out that the neuropsychologist made simple scoring errors or failed to follow the scoring method outlined in the test manual. Moreover, a close examination of the test data may reveal the subjective nature of the scoring. For instance, the neuropsychologist may have failed to award full credit for a seemingly correct answer based upon a hyper-technical requirement. Additionally, the neuropsychologist may unilaterally stop a particular test and not permit the claimant to answer the remaining questions on a subtest if several consecutive questions are answered incorrectly as subjectively judged by the neuropsychologist. This artificially deflates the claimant's score and becomes a basis for the neuropsychologist's conclusion that the claimant suffered a brain injury.

The test data and test booklets can be used to show a jury how simplistic the tests are and how subjective the scoring is. The hyper-technical nature of the questions may be illustrated by putting the test questions to the expert neuropsychologist. Without the aid of the scoring book, the neuropsychologist may be unable to answer each question and receive full credit for each answer. This permits counsel to inquire as to whether or not the neuropsychologist has also suffered a mild traumatic brain injury. Other specific questions will lead a jury to conclude that the test is simply ridiculous.

The raw test data permits other effective areas of cross-examination. By obtaining the file, the defense lawyer can discover whether the neuropsychologist's report

intentionally disregarded test scores that tend to refute the plaintiff's claim of brain injury. The report may completely disregard a subtest that reveals that the claimant performed particularly well in an area that would most likely be impaired, such as speed of information processing. These types of test results are consciously overlooked by the neuropsychologist when it does not support the ultimate conclusion of brain injury. Additionally, the expert's file may reveal that the expert's report is misleading. The neuropsychologist may simply state in a report that the claimant scored lower on one test than another test, implying that the low score on one test is indicative of brain damage. However, the neuropsychologist may have failed to make the required calculation as to whether this discrepancy constitutes a "statistically significant" scoring difference according to the test manual. These types of attacks based upon the neuropsychologist's own file may lead a jury to conclude that the neuropsychologist assumed a brain injury, and worked backwards through the subjectively scored tests to prove it.

Finally, the expert's file is significant for what it does not contain. A neuropsychologist may often accept the claimant's assertion of his or her pre-accident capabilities without reviewing the claimant's prior medical, education, and employment history. Rather than conducting an independent evaluation of the claimant's pre-morbid level of functioning, neuropsychologists often make gross assumptions that drastically undercut the expert's credibility and suggest that the neuropsychologist is nothing more than a "hired gun" to establish a conjured brain injury.

Challenge the Reliability of the Neuropsychological Testing

Defense counsel may launch successful attacks against the reliability of the neuropsychological testing given the lack of a standardized battery of tests. Jurisdictions

that have adopted the approach suggested by the United States Supreme Court in *Daubert versus Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), may argue that the neuropsychologist's opinion based upon neuropsychological testing is inadmissible. In order to be admissible, expert testimony must be grounded in accepted scientific practice and validated by peer review. This threshold requirement for admissibility is applicable to all experts since the Supreme Court's holding in *Kumho Tire Co. versus Carmichael*, 119 S. Ct. 1167 (1999). At the very least, an artful cross-examination will persuade a jury that the neuropsychological test results are not scientifically supported or reliable.

Neuropsychologists will generally concede that there is no standard battery of neuropsychological testing that has been validated by peer review. Rather, neuropsychologists choose from a large menu of available subtests. Surveys indicate that aside from the Weschler Intelligence Scale (used by 90 percent of practitioners), the only tests used by more than 50 percent of practitioners are the Wide Range Achievement Test and portions of the Halstead-Radian Battery. Accordingly, the neuropsychologist may be forced to concede that the battery of tests used in a given case has not been generally accepted by either the American Psychological Association or the local state board issuing the license to practice psychology. Moreover, the expert may be forced to concede that the particular battery of tests selected in a particular case has not been subject to peer review. Many neuropsychologists use a different battery of tests each time they conduct an evaluation, affirmatively demonstrating the lack of standardized tests.

Contrary to the practice of many neuropsychologists, the *Standards for Educational and Psychological Testing*, authored by the American Psychological Association, demands that the psychologist be able to cite to specific literature supporting the battery's validity. In the event that no such literature exists, the psychologist must report his or her conclusions as "hypotheses for future verification rather than probabilistic statements that imply some known validity."

This is compelling evidence that may be used to convince the trial judge that the testing administered by the neuropsychologist is simply unreliable.

In addition to the lack of standardized testing, several other factors impact the reliability of the test results. Drug use, common among accident victims taking prescription medication, will adversely affect performance. Similarly, alcohol and non-prescription drug use can affect test scores. Further, unreliable test results can be caused by physical pain, distraction caused by the stress of litigation, marital discord, financial problems, etc. All of the above can cause abnormal test results in a non-brain-injured individual. Notwithstanding, few, if any, neuropsychologists evaluate such influences.

The test results are also subject to manipulation by the claimant. Certain tests such as memory, intelligence, and personality are susceptible to some degree of control by the examinee who can make deliberate errors, be inattentive, produce poor quality drawings, or pretend to forget in order to score poorly. Regardless, the neuropsychologist assumes that the test results reflect the claimant's best possible performance despite the claimant's knowledge that the test results are being generated to substantiate his or her subjective claims of cognitive impairment.

Lastly, the basic premise of neuropsychological testing can be questioned as unreliable as there is almost never a pre-accident battery of tests completed by the claimant that may serve as a point of reference. Rather, the neuropsychologist simply compares the score of the claimant to the performance expected of the statistically "average" citizen in the population. Therefore, each score that falls below the "average" score provides the neuropsychologist with a basis to conclude that the claimant sustained a brain injury. This assumption obviously overlooks the fact that not all people are "average" prior to the traumatic accident that serves as the basis of their lawsuit.

It should be noted that neuropsychologists only use the hypothetically "average" person as a barometer when it supports their conclusion that the claimant sustained a brain injury. When the claimant scores in the

Continued on page 10

Defending Claims of Mild Traumatic Brain Injury by Defeating the Plaintiff's Neuropsychologist

Continued from page 9

"average" range in a post-accident test, the neuropsychologist is likely to conduct an ex-post facto evaluation of pre-accident functioning. In those cases, the neuropsychologist will subjectively use the claimant's higher level of education and/or job performance to establish a higher than average pre-accident baseline level of functioning, even though there is no standard formula to make such a determination.

Challenge the Neuropsychologist's Qualifications to Render an Opinion on Causation

Neuropsychology is a term invented by psychologists to self-designate themselves as having expertise in diagnosing brain injuries. In fact, such psychologists have no special license or degree in "neuropsychology." Importantly, neuropsychologists are not medical doctors, cannot admit patients to the hospital, cannot order diagnostic testing of the brain such as MRIs, CT scans, or EEGs. In most states, psychologists are not licensed to prescribe medications. Moreover, neuropsychologists will generally concede that they have absolutely no expertise concerning the variety of potential medical causes of the claimant's symptoms.

Additional material to demonstrate the neuropsychologist's lack of medical training can be found by obtaining the neuropsychologist's application for a license to practice psychology. The licensing authority may have copies of the neuropsychologist's graduate training, which may prove that the proposed expert's training is in developmental rather than clinical psychology. This investigation may reveal that the purported "expert neuropsychologist" has extensive coursework in classes such as "Freud and His Interpreters" and "The Psychology of Language."

Neuropsychologists are generally permitted to testify concerning the tests administered, the test results, and an interpretation of the results. While neuropsychologists often describe

symptoms such as weakness in concentration, memory loss, susceptibility to distraction, and impaired speed of information processing as being identified as deficits through neuropsychological testing, the neuropsychologist is not trained in the differential diagnoses of these symptoms. Specifically, the neuropsychologist may not be qualified to rule out other medical causes, such as hypertension, age-related dementia, impaired cerebral circulation, and side-effects of medication as the cause of the identical symptoms. Therefore, the neuropsychologist may be precluded from testifying as to the cause of the deficit as well as the future prognosis.

Jurisdictions are split as to whether neuropsychologists may testify on the issue of causation. Several trial courts have precluded neuropsychologists from testifying as to the cause of the symptoms identified through neuropsychological testing. In these cases, trial courts have precluded the neuropsychologist from testifying as to the cause of the claimant's symptoms as beyond the scope of the neuropsychologist's expertise. Other jurisdictions have permitted psychologists to testify as to the cause of an alleged brain injury. Whether the neuropsychologist may testify on the issue of causation is a matter that is generally left to the discretion of the trial judge on a case-by-case basis. It is therefore important to emphasize the many other potential causes of the claimant's symptoms that the psychologist is not qualified to diagnose and which the psychologist has absolutely no training in whatsoever.

The failure of plaintiff's counsel to recognize the need to have a qualified medical doctor to testify as to the cause of the plaintiff's cognitive impairment may render the testimony of the neuropsychologist inadmissible. Until the plaintiff establishes the cause of the symptoms with the proper medical foundation, the opinion of the neuropsychologist as to the alleged areas of cognitive impairment are arguably irrelevant.

Defense Experts

In defending claims of mild traumatic brain injuries, the defense should proffer experts in traditional medicine such as neurologists, neurosurgeons, and psychiatrists in appropriate cases. The presentation of traditional medical experts contrasts sharply with the "junk science" relied upon by neuropsychologists. Appropriate defense experts will be licensed to practice medicine, have training in neuroanatomy, and usually have been present during brain surgery. While it is useful and oftentimes necessary to retain a consulting neuropsychologist to assist in the interpretation of the raw data preparation for the cross-examination of the plaintiff's neuropsychologist, the defense should generally not bolster the credibility of neuropsychology by offering its own neuropsychologist. Rather, the defense should utilize the generally accepted medical practitioners to explain the "hard" medical evidence that refutes the plaintiff's claim of cognitive impairment.

Most neurologists agree that no significant and lasting brain injury will result in the absence of a traumatic injury that results in loss of consciousness of greater than five minutes with post-traumatic amnesia lasting for at least 12 hours. It is further accepted among neurologists and neurosurgeons that permanent traumatic brain injury will generally manifest itself by some objective evidence on MRI or CT scans. The absence of this factual evidence as presented by appropriate medical experts is immeasurably more persuasive to a jury than the neuropsychologist's explanation based upon word association tests and other neuropsychological tests.

It should be noted that the mere existence of an abnormality on a MRI or CT scan does not necessarily signal a traumatic brain injury. In some instances, abnormal results on diagnostic tests are the result of some chronic medical cause. In these cases,

it may be necessary to retain a neuroradiologist to interpret the films to evaluate whether there is evidence of a traumatic injury, or whether the abnormality is likely related to some underlying medical condition. For instance, abnormalities may be caused by chronic hypertension or other disease process. This determination may be made by the qualified neuroradiologist, who may quickly and credibly dismiss the possibility of a traumatic event in light of the absence of ruptured blood vessels in the affected area of the brain.

In all cases of alleged neuropsychological injury, the defense must be aggressive in compiling as much pre-accident data concerning the claimant as possible. This includes all pre-accident medical, employment, school, or military records, income tax records, and divorce and probation records. An exhaustive pre-accident history will permit the defendant's medical experts to fully evaluate the claimant and identify alternative causes of current cognitive impairment. Lastly, video surveillance of the claimant should be considered to refute the claimant's claim of brain damage by showing the claimant engaged in everyday activities such as driving, shopping, and yard work. This "complete picture" of the claimant will support the medical expert's conclusion that no brain injury occurred.

Conclusion

Mild traumatic brain injury cases present potentially large exposure. The exposure may be reduced or eliminated where the claimant relies solely upon neuropsychology as the centerpiece of the claim. When defending such claims, insurers must strive to eliminate the effectiveness of a neuropsychologist by educating the jury on the "science" of neuropsychology and presenting credible medical testimony on behalf of the defense. ■