Chapter 19A

Cross-Examination of Defendant's Traumatic Brain Injury Expert

IV. Deposition of Defense Neuropsychologist—Deposition Excerpts

I. Introduction

§19A:01 Degrees of Brain Injury

Brain injuries are typically classified by neuropsychologists and neuropsychiatrists as belonging to one of three categories: (1) mild, (2) moderate, or (3) severe.

A person who has a moderate to severe brain injury has a multitude of physical and mental disabilities that would be readily apparent and observable by any juror. In such cases, the defense cannot credibly argue that the plaintiff is not brain injured. The defendant might argue that he did not cause the brain damage, but once causation is established, the debate often focuses around the cost of caring for the injured plaintiff and whether there is any prospect for neurologic or cognitive recovery.

By contrast, a person who has a mild to moderate TBI might seem ostensibly normal to others. This is particularly true where others only observe the plaintiff for short periods of time. However, he or she may experience problems with cognition (thinking, memory, and reasoning), sensory processing (sight, hearing, touch, taste, and smell), communication (expression and understanding), and behavior or mental health (depression, anxiety, personality changes, aggression, acting out, and social inappropriateness).

§19A:02 Challenges of the Mild to Moderate TBI Case

This chapter will primarily address cross-examining defense experts in the most difficult of the above discussed contexts—the mild to moderate traumatic brain injury case.

In cases of mild to moderate TBI, the defense will often argue that the plaintiff does not have a brain injury. In order to support this contention, the defense may argue that (1) the plaintiff is a malingerer (i.e., faking her symptoms), (2) the plaintiff had pre-existing cognitive limitations or impairments, (3) the plaintiff's symptoms are a byproduct of pre-existing emotional problems or mental illness, or (4) the plaintiff's symptoms were admittedly caused by the injury or accident which is the subject of the lawsuit but are simply a form of post-traumatic stress or depression and will pass with time.

In a mild to moderate TBI case, Plaintiff's counsel will frequently be confronted with a neurologist and a neuropsychologist or neuropsychiatrist who he must cross-examine on the issues of causation and damages. As with all cross, if performed effectively, counsel can devastate his adversary's case. Conversely, if performed poorly, counsel may devastate his own case.

[§§19A:03-19A:09 Reserved]

II. Preparation for Cross in TBI Cases

§19A:10 What You Need to Learn and Know

A trial lawyer's prospects of prevailing at trial in a TBI case are far greater if he can conduct a crushing cross-examination of the adverse experts. As with the cross-examination of any expert, knowledge is power. And, it takes special knowledge to successfully do battle with experts in brain injury cases. This is especially true in cases where the issue is whether the plaintiff actually has a brain injury. Success in cross is the union of rigorous preparation, well-honed technique and at least a touch of artful inspiration. But, a successful cross begins with rigorous preparation. The cross-examiner must ready his arsenal because even the most divinely inspired and skilled advocate cannot make an empty weapon fire.

Preparation for cross-examining the defense neurologists and neuropsychologist experts requires the advocate to:

- Understand the brain [*see* §19A:11].
- Learn the language of the experts [*see* §19A:12].
- Understand each test in the battery of brain injury tests [*see* §19A:13].
- Understand the limitations of tests and medical exams in proving the existence of brain injury [*see* §19A:14].
- Know your client's medical and personal history better than the defense [*see* §19A:15].
- Know the book on the defense expert [*see* §19A:16].

§19A:11 Understand the Brain

You must learn the pertinent anatomy of the brain and the physical or cognitive functions that are controlled by the various parts of the brain that were injured. Today, Internet research allows the devoted

advocate to learn this anatomy quite easily by studying medical illustrations and reading about the brain's discrete structural forms and their functions. Your own experts are also an invaluable source of information and can and should give you tutorials on all medical aspects of your case.

§19A:12 Learn the Language of the Experts

You cannot do combat with neurologists, neuropsychologists, and neuropsychiatrists unless you can speak their language. It is imperative that the expert not be able to speak over your head. An opinion that you do not fully understand, for lack of preparation, will be far more difficult for you to undermine. However, so long as you understand the expert, when he tries to speak over the heads of jurors, you can punish him for doing so. At trial, the more the jurors identify with you and your clients and the less they identify with the other side, the better. Also, the more the defense looks like they are obfuscating and evading, rather than illuminating the truth, the more likely you are to win over your jury. Simple questions—"Doctor, we're not experts in neuropsychiatry, so you'll have to explain what you mean by that technical term?"—tend to ingratiate you while alienating the defense expert from the jury.

§19A:13 Understand Each Test in the Brain Injury Battery of Tests Performed

It is imperative to understand what each test purports to show (i.e., what brain function it was designed to test), how each test was actually administered (e.g., whether a particular test asked the plaintiff to connect numbers to letters by drawing lines on a page or, instead, to recall flashing symbols on a computer screen), whether the test was normed for age and education (does it establish a statistical normal range of performance that takes into account a person's age and educational level) and whether each test and the battery of tests, taken as a whole, have been peer reviewed and "validated" (demonstrated to be a valid and reliable way of measuring what the tests purport to measure).

Spend time allowing your expert to show you how the various tests are administered and discussing the purpose and validity of each test as well as the interplay of the various tests in the overall battery. For general information, *see* Chapter 22 Psychological, Neuropsychological and Neurological Testing.

A lawyer trying brain injury cases must have a firm command of the brain's anatomy including its physical form and function. Counsel must also have a firm grasp of the inter-relationship between the portions of the plaintiff's brain that were injured, plaintiff's poor performance on multiple neuropsychological tests, and how his visibly impaired brain function corresponds to both his anatomic injuries and his test performance. A trial lawyer can then persuasively show a jury, through witnesses and demonstrative aids (e.g., medical illustrations, charts, diagrams, videos, etc.), how these abnormal results and real world symptoms of disability correspond to the injured parts of the brain responsible for controlling those demonstrably impaired functions.

§19A:14 Understand the Limitations of Medical Exams and Tests in Proving or Disproving Brain Injury

An MRI or a CT scan may show bleeding in the brain following head trauma. However, a year later, a plaintiff with a mild or perhaps even moderate traumatic brain injury will often have a completely normal scan. That is because the neurons of the brain are microscopic and unless a large, concentrated mass of brain tissue is destroyed, the damage to discrete neurons cannot be seen on scans. Yet, the diffuse destruction of these neurons may dramatically impair brain function. Indeed, autopsies have shown lesions on brain tissue viewed under microscopes even though the lesions were invisible on MRI's or CT scans taken during the brain injured person's lifetime.

Despite these well established medical facts, defense experts may seek to use negative CT scans or MRI's taken long after the accident to fallaciously support their opinion that the plaintiff does not have a brain injury. If you understand the medicine, you can easily expose these illegitimate conclusions to the jury and can often extract telling concessions from the defense expert. Again, remember that knowledge is power.

Another example of a medical fact, frequently relevant in TBI cases, is that neurologists do what is called a "gross neurological exam" in their offices as part of their normal workup on a patient. However, this exam usually can identify only fairly severe brain injuries that manifest themselves in overt physical or neurolog-

ical impairments or profound cognitive deficits. These exams are not at all sensitive to many more subtle but, nevertheless, real and debilitating manifestations of brain injury. These more subtle injuries often can only be diagnosed by administering an extensive battery of neuropsychological tests. Such batteries are often administered over the course of two to three 6 to 8 hour days of testing as compared with the neurologist's 5 to 15-minute exam in which the neurologist asks questions that are not much more complicated than having the patient count backwards from 100.

§19A:15 Know Your Client's Medical and Personal History Better Than the Defense Expert

Many experts are lazy and falsely assume that their expertise and experience alone will carry the day during counsel's cross-examination of them. Prove them wrong!

You can score major points during cross-examination simply by gaining a thorough command of the deposition testimony, medical records, employment records, school records, psychological records and any other records pertinent to your client's pre-accident versus post-accident cognitive and emotional condition and performance. For sample cross-examination questions based on medical records, *see* §19A:41.

In mild to moderate TBI cases, for example, it is critical to consider the statements and depositions of "before and after" witnesses who can provide first-hand knowledge of changes in the plaintiff. These witnesses—friends, family members, teachers and employers—will often share observations such as:

> Before the accident, John had a great memory. Now you have to remind him of a conversation you had with him over and over again. He's just not the same person!
>
> John had such an even keeled temperament before. Now, he gets angry for no reason. He can't seem to control his emotions anymore!
>
> John used to read voraciously. He was a really fast reader and would remember everything he read. Now, he has to read the same thing over several times and has difficulty understanding and remembering a lot of what he just read.

For sample cross-examination questions using deposition testimony, medical records, and observations of other witnesses to expose the adverse expert's lack of knowledge of your client's situation or deliberate choice to ignore it, *see* §§19A:40-19A:42.

§19A:16 Know "the Book" on the Defense Expert

As with any expert, you must learn all about him. Read his pertinent articles and depositions to identify opinions consistent with those of your experts in the present case. Also look for prior statements or testimony that is inconsistent with the testimony or opinions being offered in the instant case.

Finally, look for ammunition to impeach the opposing expert with a forceful collateral attack. Look at prior testimony, jury verdict reports, trial lawyer list serve information, etc., in order to, among other things, determine:

- Whether the defense expert belongs to an expert service.
- How often he testifies.
- What percentage of the time he testifies for the plaintiff versus the defense.
- What he charges for each aspect of his expert work.
- How much he earns annually and has earned over the course of time doing expert work.
- Whether the expert has some credibility damaging problem in his professional or personal history (e.g., was declared incredible as a matter of law by a judge, was convicted of a crime, perjured himself in a divorce or other legal proceeding, was sanctioned by a professional organization for ethical violations, has been repeatedly found liable for malpractice, has had his privileges to practice revoked at any institution or has had his license suspended by a state professional regulatory agency, among other adverse facts or events).

Some states do not permit you to specifically ask in discovery what the expert's income is. Florida, for example, only permits you to ask what portion of the expert's income is from expert work as compared to non-medico-legal work. However, if counsel obtains the expert's fee schedule and then elicits through deposition or interrogatories how much expert work the witness does per week, month or year and over time, the witness can be confronted with your often staggering calculations during cross.

On the other hand, you will typically have an expert who is also being paid for his time so collateral attacks standing alone often are not very persuasive. They must be combined with an effective attack on the substantive issues of the case. For more on collateral attacks and sample questions to use in launching a collateral attack, *see* §§19A:44, 19A:61-19A:63.

[§§19A:17-19A:29 Reserved]

III. Cross-Examination Techniques and Sample Questions

§19A:30 Trial vs. Deposition Strategy

There are no absolutes with respect to the shape and structure of your cross-examination of the defense neurologist, neuropsychologist or neuropsychiatrist. Your approach, however, should certainly vary from deposition to trial (*see* §19A:38). At trial you are not trying to discover adverse opinions; you are trying to destroy them. At deposition, you can cross as you would at trial or you can spend some time simply discovering what the adverse expert plans to say at trial in order to lock him in to opinions which you can prepare to effectively cross-examine.

Even where permitted, you may elect not to take the expert's deposition in certain cases. If you are a confident and experienced cross-examiner and clear on what the expert will say from his report or his prior writings or testimony, you may not want to prepare him for your blistering cross at trial. This decision ought to be made on a case-by-case basis.

If you plan to take the defense doctor's deposition, decide in advance what it is you want to achieve by taking her testimony. Do you want to simply discover and commit the expert to all relevant opinions and the bases for those opinions that the expert intends to offer at trial? If so, you need not know the answers to the questions you ask in advance of propounding them. Do you want to demolish the expert with a powerful cross-examination, very much as you would at trial, so that by the time of trial the expert has become a defense liability as opposed to an asset? Or, do you want to find some middle ground between the two approaches? Your objective will give rise to the general shape and structure of your deposition.

However, as always, listen to the witness. Something the witness says may require that you alter your plan during the deposition. You may, for example, find an opening created by a silly statement from the witness on which you may be wise to immediately pounce. Capitalize on golden opportunities when they present themselves, unless you are sure that the opportunity will still be there come the time of trial.

§19A:31 Overall Structure

The shape and tenor of your cross will vary from case to case. There are no absolutes as to where you should begin. However, you must have a structure in mind even if you ultimately vary it based on what the witness says on direct or in response to your cross-examination questions. Many lawyers like to begin cross-examining with a collateral attack of the defense expert (*see* §§19A:44, 19A:61-19A:63). Again, when the defense expert is exceptionally vulnerable in this area as contrasted with your expert, this can be a good place to begin. However, it is often more effective to proceed in the following order:

- Likely concessions.
- Cross on the more contentious matters.
- Collateral attack that demonstrates why the expert is disagreeing on these critical matters.
- Opinions with which the expert's own findings, testimony, prior testimony or writings, as well as other evidence being presented at the trial, are inconsistent.
- Concluding questions, including hypothetical questions, that summarize your case.

§19A:32 Defense Expert's Exam

At some point during the examination—and usually early on—it is important to go through the defense expert's exam of your client and elicit all the positive or abnormal findings or client complaints that reinforce the testimony being offered by your own experts, treating physicians and lay witnesses. Again, this requires medical knowledge of what is an abnormal finding, because the defense report may not spell that out. It may, for instance, provide "raw data" scores on neuropsychological tests and not explain in the narrative section of the report that these scores were abnormal. In fact, they may only be abnormal when normed for age and education (e.g., your client, a well-educated engineer, should have performed far better than the average person, and the expert said your client was normal because he had an average score on the test). Your own expert can help you interpret the report.

§19A:33 Circling the Wagons

Regardless of where you begin your cross, cross-examining with the "circle the wagons" approach is almost always effective. "Circling the wagons" means starting with general premises or propositions and gradually working your way to more specific propositions that logically follow from those established premises. In other words, if you can get the witness to admit that fact A is true, he must logically admit fact B and from there he must admit fact C, and perhaps a series of other facts, or lose his credibility. Once you get the witness to the final point, any answer he gives will help your case. Either he provides a key admission or he discredits himself. The witness should be boxed into a position where a denial of the ultimate point is not believable since an affirmative answer was logically dictated by his earlier answers. Good cross-examination involves a repeated series of logical progressions of this type that enable you to establish fact after fact that supports your case. Then, on summation, you can argue as to each essential point that (a) even the defendant's hired gun was forced to admit this all important point or (b) in light of the expert's testimony on points A through C, "we know that he was not telling the truth when he denied point D."

But, remember not to "pull the trigger" too early in your inexorable march toward your ultimate target points. Some transitional or set up questions are required to place matters in context and foster a sense of factual security in the witness. It is also helpful to intersperse some questions that simply amplify, explain or highlight prior answers that were helpful. Moreover, the logical chain will sometimes have numerous links before reaching the final link. The ultimate target point may be D, J or Z for that matter. How quickly or gradually you arrive at your conclusion in a given line of attack will usually depend on (a) how difficult or combative you consider the expert to be or (b) how small the bites of information need to be, based on the topic's level of complexity, for easy comprehension by the jury.

§19A:34 Sample Questions: How to Circle the Wagons

Below is an example of using the "circle the wagons" technique in the context of a mild traumatic brain injury case with a negative CT scan following the trauma. The defense neurologist claims that your client sustained no brain damage based on the CT scan. Note that the form of questioning makes it difficult for any halfway legitimate defense expert to disagree, and simultaneously educates the jury or reinforces their knowledge as to these critical facts that form an essential part of plaintiff's case. Building gradually to the ultimate point might involve the following example:

(Text continued on page 19A-8.)

Point A:
Q. Doctor, the brain is gelatinous in composition, isn't it?
A. Yes, it certainly is.
Set Up/Transitional Questions:
Q. The brain sits in cerebrospinal fluid, isn't that right?
A. That's correct.
Q. And, it's encased by a person's skull, correct.
A. Yes.
Point B:
Q. The inner surface of the front of a person's skull has irregular, sharp, bony protrusions, does it not?
A. It does.
Point C:
Q. When a person suffers a traumatic blow to the back of the skull, the brain can be thrust against the sharp bony protrusions at the front of the skull, right?
A. That's true.
Amplifying and Further Explaining Point "C":
Q. This can cause what's known as a contrecoup injury to the brain, right?
A. Yes.
Q. That's where the brain is damaged on the side opposite the primary traumatic injury to the skull, right?
A. Yes.
Point D:
Q. When the brain is thrust against these sharp bones inside the front part of the skull, it can cause shearing and tearing of the neurons or nerve cells in the brain, correct?
A. Yes, that can happen.
Point E:
Q. This is an example of what physicians call "traumatic brain injury," isn't that right?
A. Yes, it is one example.
Point F:
Q. Neurons are microscopic, aren't they?
A. Yes.
Amplifying F:
Q. Doctor, the shearing and tearing of each individual neuron, therefore, occurs on a microscopic level, doesn't it?
A. Yes, it does.
Point G:
Q. Doctor in a case where someone has sustained mild traumatic brain injury, you would not expect there to be a large, concentrated area of damage to the brain, would you?
A. No, not necessarily.
Point H:
Q. Unless there is a large concentrated area of damage, CT scans are not sensitive enough to view microscopic damage to discrete neurons, correct?
A. That's accurate.
Point I:
Q. So, Doctor, someone can have actual damage to her brain that is not visible on a CT scan, isn't that true?
A. Yes, that's true.
Point J:
Q. So, Doctor, my client's negative CT scan does not rule out damage to her brain, does it?
A. Not completely.

Note that the logical progression demonstrates that when a person suffers a blow to the head, the soft, gelatinous brain can be thrust against the hard or sharp skull and suffer microscopic damage that won't be seen on a CT scan, even though the person actually has a brain injury.

PRACTICE TIP

During cross at trial, there will be instances when getting to the important concessions more quickly will be necessary and more dramatic. This is where depositions come in. If you can go through this progression at a deposition and get a bunch of ultimate concessions, then you can "cut to the chase" more swiftly at trial. If the witness denies one of these already made admissions, simply impeach the expert with his prior deposition testimony. Of course, if you get enough admissions during depositions of the adverse expert, you may never get to trial since the defense may be clamoring to settle.

In sum, the circle the wagons approach to cross involves making tighter and tighter concentric circles around your ultimate target point until the witness has no wiggle room and must admit what he can now no longer credibly deny.

§19A:35 Employ Good Logical Reasoning and Brace Yourself If You Don't

Although touched upon above, sound logical reasoning is so critical that it deserves its own discussion. You will be unable to narrow your hostile witness's escape routes if you cannot set up a logical progression of concepts. This takes careful and often time-consuming planning. It also takes patience in questioning. If you break the logical progression because of impatience and get the witness to admit an early point in the progression and then jump to your conclusion without connecting the links, you will often get burned by the defense expert.

In the example above, don't do this:

Q. Dr, even though my client had a negative CT scan, it's possible that he still had a brain injury.
A. Well, anything is possible but it is extremely unlikely.
Q. But, it's possible.
A. Possible but not likely.

Wow, that manner of questioning is going nowhere fast! Do not count on adverse experts to be good guys who will just make reasonable concessions out of a higher sense of fairness and justice. Some might but many, if not most, will not. So, brace yourself for the onslaught.

It is safer to assume that the adverse experts are getting well paid to hurt your case, and every time they take the stand they are auditioning for the next high paying case. Think of them as assassins who you need to terminate or they will kill your client's case. Know, though, that being forewarned is forearmed. Understand that you must obliterate the adverse expert with facts, encased in shells of impregnable logic fired down the well-aimed barrel of cross-examination. In other words, fire—but only when ready!

§19A:36 Use Leading Questions Almost Exclusively

Controlling the adverse expert should be your paramount concern during cross-examination. This is accomplished first and foremost by asking leading questions. These are, of course, questions that suggest the answer to the witness. An assertion of fact is made and the witness is simply asked to agree with the assertion.

The rules of cross favor the examiner, not the witness. Surrendering this advantage is extremely dangerous. Asking open-ended questions, even if you think the answer can't hurt your case, is often foolhardy. The plaintiff's case faces even more jeopardy when the defense expert—and this is often true—is a highly educated professional witness who has both a wealth of technical knowledge and a magnetic personality he uses to win over the jury if given the opportunity. The best and, perhaps, the only way to control such a witness is to use one leading question after another. See the examples of this technique provided throughout this chapter.

§19A:37 Use Short Declarative Sentences That Seek Assent to One Fact

Break your questions up into little, tiny morsels that can be easily understood by the witness and easily digested by the jury. Getting the witness into a "yes" mode to your questioning will be easier this way because you can keep up a rapid, smooth pace of questioning where no one question seems inordinately significant or threatening. Furthermore, in so doing

you are providing little ambiguity and, therefore, little wiggle room for the expert to pick apart your questions. Your questions will also be insulated from form objections involving vagueness, ambiguity, or an assertion that you are asking a compound question. The exception to this rule arises when you are asking hypothetical questions (*see* §19A:46).

§19A:38 Know the Answers Before You Ask the Question

This is a trial maxim that should only be departed from in rare instances. If you know that no matter how a witness answers your question, he cannot do harm to your case, then ask away. But, a skilled expert can frequently find ways to do damage to the unwary.

For instance, at trial it would be unwise to ask, for the first time, why the expert failed to perform a particular neuropsychological test on a witness only to be zinged with an answer that the test had been completely discredited in a recent peer reviewed journal article. Discovering such facts are what expert reports, interrogatories and especially depositions of experts, in states where they are permitted, are for.

§19A:39 Listen to the Adverse Witness

Good cross creates its own opportunities. Poor listening by the cross-examiner squanders them. Always listen carefully to maximize success during your cross. Failing to listen to the witness leads to larger failures in your case as a whole.

Most of the rules outlined in this discussion apply with equal force to any cross-examination. The listening rule applies to your examination of any witness—adverse or not. Even your own client will often surprise you during direct examination, so be sure to listen to anyone sitting in the witness box!

When crossing the defense doctor, who can really hurt you by inserting subtle facts into his answers, failing to listen carefully can wreak devastation on your case. You can only control the witness if you know whether you are truly being given the answers that you seek. Furthermore, you may have worked hard during cross to back the witness into a logical corner from which the witness could not otherwise escape only to lose your prey due to a moment of distraction. Or, even worse, your failure to focus like a laser on your prey may allow him to turn around and take a bite out of your case from which it will not soon recover. Accordingly, failing to listen will, at best, impede progress and, at worst, obliterate it!

§19A:40 Beat the Defense Doctor Based on Your Command of the Medical Issues

How can you hope to cross-examine the defense doctor in a traumatic brain injury case if you don't know the relevant anatomy of the brain, what physical or cognitive functions the injured parts of the brain control or what tests can be performed on the patient to diagnose her injuries? The obvious answer is that you cannot hope to be successful without this knowledge and, as already discussed, much more.

On the other hand, knowing basic, incontrovertible medical facts until they become part of your vocabulary makes cross of the defense doctor a whole lot easier! Not knowing these facts makes doing so impossible!

If you study long and hard, you will find that in many cases you actually understand the narrow medical issues pertaining to that case almost as well as the defense doctor. You might even know a series of particularly poignant points better than he does. Beating the defense expert on the medicine will get you well on your way to a successful verdict.

Of course, knowing the medicine is essential for all aspects of any personal injury trial. You cannot explain the full extent of your client's damages or how the defendant caused them if you do not fully understand these issues yourself. But if you do have a full command of the medical issues and the ability to clearly and compellingly explain them to the jury, your jury will trust and listen to you.

§19A:41 Beat the Defense Doctor Based on Your Command of the Medical Records

As touched on earlier, you must have fully digested your client's medical history. Doing so will enable you to maximize the good facts and minimize the impact of the inevitable bad facts. If you have not done so, prior to your cross of the expert, she will beat you to the punch by minimizing the good and maximizing the bad. Making up for this at summation is not an option likely to result in success. Most jurors decide the case well in advance of summation. Learning the general principles of medicine applicable to your client means little if those principles are not actually applied to your cross of the defense expert.

It is certainly effective to juxtapose the defense expert's opinions with the medical records or opinions of plaintiff's treating or expert physicians and psychologists who usually come before the jury with more credibility.

Q. Dr. X, the plaintiff's treating psychiatrist, Dr. Bond, concluded that John's family and friends are observing these problems in his ability to function because John is, indeed, brain injured, didn't he? That's stated right in his records, on January 15, 2005, isn't it?
A. Yes, I believe I saw that there.
Q. Doctor, you read the civil complaint in this case didn't you?
A. I was provided with a copy of it, yes.
Q. So, you know that this lawsuit was commenced on February 25, 2005, true?
A. Yes, I saw that.
Q. So, Dr. Bond drew his conclusions before this lawsuit was commenced, correct?
A. It would appear so.
Q. On the other hand, Doctor, you never saw John before this lawsuit began, right?
A. That's right.
Q. Instead, you were hired by the defense in this lawsuit, right?
A. That's accurate.
Q. You are being paid by the defense, true?
A. That's true.
Q. In fact, you're being paid $1,000 per hour by the defense, to be here today, right?
A. I am paid $1,000 per hour for my time, yes.
Q. And, unlike Dr. Bond, you are not treating John, right?
A. That's right. I'm not one of his treating doctors.
Q. Doctor, when you were first hired by the defense to provide opinions about John, you knew that your involvement would only be related to litigation, isn't that right?
A. That's correct.
Q. And, Doctor, you've got plenty of experience, in fact 20 years of experience, as a litigation expert, don't you?
A. I've served as a forensic expert for 20 years, yes.
Q. And, Doctor, in all your years of experience, the defense has never called you to come in and testify at $1,000 per hour when your opinion was that the plaintiff has a brain injury, have they?

***** The witness's answer doesn't matter *****

Q. Dr. Bond determined that John has problems with short-term memory didn't he?
A. I think he did.
Q. Dr. Bond determined that John had problems with attention and concentration, didn't he?
A. I believe he did, yes.
Q. Dr. Bond also determined that John had problems with mental processing speed and comprehension, true?
A. I believe that's true.
Q. Dr. Bond observed other problems as well, correct?
A. Yes.
Q. And, as we've agreed, these problems can be consistent with a person having a permanent brain injury, true?
A. That's possible.
Q. Although you disagree, Dr. Bond concluded that all of these problems are the result of a brain injury suffered in the accident of March 10, 2004, isn't that true?
A. Yes, that's his opinion.

§19A:42 Beat the Defense Doctor Based on Your Command of Lay Witnesses' Observations

When defense experts ignore lay witness observations they do so at their peril. Sometimes, defense counsel fails to provide the expert with critical information in an imprudent effort to bury it. However, most jurors are inclined to believe family members, friends and acquaintances of the plaintiff over a hired gun expert. It can be very effective to confront the defense expert's claims that the plaintiff is not brain injured with his failure to consider this critical evidence.

Q. Doctor X, you would agree that observing a brain injured person over an extended period of time can be extremely valuable in identifying the existence and extent of a brain injury?
A. Sure; that can be helpful.
Q. And, wouldn't it be fair to say that when someone has a brain injury, you would, in fact, expect family members and friends to observe changes in the brain injured person's daily behavior and ability to function?
A. You would, yes.
Q. And, you would expect family members, friends and employers to have observed changes in the brain injured person such as memory problems, comprehension problems and difficulty controlling emotion among other potential problems, fair?
A. That's fair, but these problems can also have an emotional or psychological basis.
Q. Understood, Doctor, but a brain injury can, in fact, cause these changes in a person, true?
A. That's true.
Q. So, it would be important for a neuropsychologist to take into account the observations of friends and family members in seeking to reliably determine the existence or extent of brain injury, fair to say?
A. Yes, that's fair.
Q. But, Doctor, at the point that you issued your report which you referred to as your "final opinions" in this case, you had not read the deposition of the plaintiff's employer, Mr. Jones, had you?
A. No, I had not.
Q. And, you also failed to read the deposition of the plaintiff's closest friend, Mr. Toms, isn't that right?
A. That's true.
Q. Nor had you even read the deposition of the plaintiff's wife, correct?
A. That's correct.
Q. Doctor, don't you think it would have been helpful to know what these people all had to say about the problems they've observed every day in the plaintiff.
A. Yes, it might have been helpful.

Then, read or summarize lay witness observations, such as the three included above, one at a time and ask the witness, after going through this testimony, questions tying your case together such as:

Q. Doctor, can a brain injury cause loss of short-term memory?
A. Yes.
Q. And, based on what this witness said, my client is having problems with short-term memory never observed before the accident, right?
A. According to this witness, right.
Q. And, Doctor, you reviewed my clients medical records, didn't you?
A. Yes.
Q. And, you observed that she had bleeding of the brain in the area of the prefrontal lobe, correct?
A. I saw that, yes.
Q. So, we have objective evidence that the prefrontal lobe was injured, don't we?
A. Yes.
Q. And, the prefrontal lobe plays an important role in allowing for good short-term memory, doesn't it?
A. It does play a role, yes.
Q. And, by the way, Dr. X, Dr. Y gave my client the Wechsler Memory Scale Prose Passages Test and the Benton Visual Retention Test, didn't she?
A. She did.
Q. And, my client scored in the mildly impaired range on the Wechsler test, true?

A. Yes.
Q. And, the moderately impaired range on the Benton Visual Retention test, right?
A. Yes, when Dr. Y gave the test.
Q. Well, Dr. X, aren't all these things—(1) objective trauma to the prefrontal lobe, (2) witness testimony indicating problems with short-term memory two years after the accident, and (3) impaired performance on neuropsychological tests—consistent with permanent brain damage that is impairing my client's ability to learn and remember things?
A. It could be. It's possible.

§19A:43 Ask About Specific Neuropsychological Tests Focusing on Findings of Impairment

As described above, this line of questioning can be followed by questions regarding the specific neuropsychological tests performed by plaintiffs' expert neuropsychologist. The questions should focus on how the plaintiff's performance on a particular test placed him in the "impaired category."

Here, again, there are categories of "mildly impaired," "moderately impaired" and "severely impaired" in terms of performance. If the plaintiff came out as "mildly impaired" in most of the tests, one might simply ask the defense expert, initially, if the plaintiff's performance placed him in the "impaired" category and let the defense doctor look like he's trying to minimize the injury by pointing out that the plaintiff was only "mildly impaired."

It must be remembered that no one, including each and every juror, would want even a mild degree of brain damage!

For example:

Q. When Dr. Doright, the plaintiff's neuropsychologist, tested John, he came out as impaired on the finger tapping test, didn't he?
A. He was mildly impaired.
Q. Doctor, "mildly impaired" isn't normal, is it?
A. No, it's not.
Q. It's still impaired, right?
A. It is.
Q. Doctor, wouldn't it be fair to say that even mild brain damage can be very debilitating? (*Defense expert is now more likely to make this objectively true concession so as not to provide further evidence of jury alienating insensitivity.)*
A. Yes, that would be fair.
Q. Well, John also came out as impaired on....

Go through the litany of tests on which your client was found to be impaired and have the defense expert admit to the specific brain function (e.g., memory, attention, mental processing speed, abstract thinking, etc.) that the test indicates is abnormal.

If your client came out as "moderately impaired" or "severely impaired" on one or two tests, given the expert's earlier attempt to minimize the "mildly impaired" results, he should be slammed with this more serious test result.

Q. Doctor, a little while ago during my questioning of you, you sought to emphasize that John only came out as "mildly impaired" on the finger tapping test, do you recall that?
A. Yes, I was just seeking to clarify an important distinction.
Q. Well, Doctor, on the Boston Naming test given by Dr. Doright, my client came out as moderately impaired, didn't he?
A. That's what Dr. Doright found, yes.
Q. That's considerably below normal, isn't it?
A. It is, yes.
Q. And, on the California Verbal Learning Test given by Dr. Doright, my client came out as severely impaired, didn't he?
A. Yes.
Q. Severely impaired brain function is as serious as it gets, is it not?
A. If that's an accurate result, yes.

§19A:44 Unleash Your Collateral Attack When You Really Need It!

Some lawyers prefer to begin their cross with a protracted collateral attack with the idea that this places everything else the Doctor has to say in the context of his bias. Collateral attacks standing alone, however, rarely score a big knockout blow. It also makes the witness immediately uncooperative, even on points where you might elicit concessions without a fight. Finally, too much collateral attacking is often viewed as obnoxious to jurors. Giving the jurors reason to doubt the word of the adverse doctor by bringing out testimonial inconsistencies or the illogic of his testimony, before then highlighting the bias that explains these shortcomings, is often most effective.

Instances where the defense doctor is being particularly uncooperative, or has made a statement that you believe is inherently lacking in veracity but needs to be rebutted, may provide a good opportunity to attack collaterally. At the right time, attack the fallacy of the "independent" medical exam. While some lawyers make motions to preclude the use of the word "independent" as misleading, it may be better not to preclude it and to, instead, cross the expert on his bias and lack of independence as demonstrated above.

If the defense has hired an expert who has testified over and over again for the defense and makes a ton of money doing so in the process, after going through the mathematical breakdown, it can be compelling to culminate in questions such as these:

Q. Doctor, you've been paid over $4 million dollars testifying for the defense over the past seven years, isn't that true?

A. If that's what your math shows, I guess that's true.

Q. Doctor do you think that the defense would have called you in to testify at $15,000 per day in this case if your opinion had been: "Yes, the plaintiff has brain damage and he will be disabled for the rest of his life."?

Defense Counsel: Objection! Argumentative.

Plaintiff's Counsel: That's fine, your honor. I'll move on.

Note: The objection is fine with plaintiff's counsel. The point has been made.

§19A:45 Cross With an Eye Toward Summation

The old rule about being careful not to ask one question too many still holds true. Asking a smart defense expert to agree with you on certain super ultimate facts—the ones around which your case revolves—may not be easily achieved. It is sometimes better to elicit all the predicate facts through the defense expert's necessary concessions that lead inexorably to the case winning conclusions you want the jury to draw. In summation, it is time to persuade the jury to draw that inescapable conclusion.

The medical principles and facts the defense expert conceded can provide the framework for your summation on damages. Proving your case through your experts is essential, but proving it through the defense expert is overpowering. When you can tell the jury that even the defense expert was forced to agree with these facts that form the heart of your case, you have gone a long way towards getting a big verdict in your client's favor.

§19A:46 Use Hypothetical Questions to Sum Up

With hypothetical questions, you can violate the one fact per question rule. The defense doctor often will not admit that your client showed certain signs or symptoms when examined by him. In such a case, you may ask the expert to *assume* that your client has exhibited certain signs and symptoms that, in fact, precisely track your client's symptoms or complaints as manifested to treating physicians or others. The signs and symptoms you select to inquire about should be textbook signs and symptoms of the condition you are trying to prove your client has (e.g., moderate traumatic brain injury). They should also be signs and symptoms that, in your cross on general medical principles, the adverse expert agreed can, in fact, lead to the diagnosis you are trying to prove.

You can then conclude a segment of your cross, or your entire cross, by asking the expert to assume that your client is experiencing those signs and symptoms, and to admit that if these facts were true, the expert would agree that your client likely has the disputed medical condition. When doing this, you can feed the expert all the powerful evidence in your favor from the record including what may have come out through other medical witnesses, lay witnesses and your client herself.

For example:

Q. Doctor, I ask you to assume the following facts as true: Michael Jones fell backwards on a wet floor and landed on the back of his head on March 18, 2009. He lost consciousness and had to be taken to the Ryder Trauma Center where he remained for one week, and a CT scan on the day of arrival showed bleeding in the brain in the form of a subarachnoid hemorrhage in the area of his frontal and left temporal lobe. I want you to further assume that since the day of his fall, he has had daily headaches, problems with attention, memory and the ability to learn and understand new information. Numerous psychological tests have shown him to be cognitively impaired. His friends and family have observed him to be ... Doctor assuming all these facts to be true, would you agree that all of these findings are consistent with Michael suffering from permanent brain damage?
A. Yes.
Q. And, Doctor, wouldn't you agree that brain damage manifesting itself in this way can be extremely debilitating?
A. Yes, it can be.
Q. And, it would make it extremely difficult for a person to continue working as an engineer, assuming that this is what he did before being brain damaged.
A. Yes, it would be unlikely for him to continue in that line of work, assuming these facts to be true.
Etc., etc.

So, feed the adverse expert as many favorable facts as possible once you have persuasive record evidence of them and use the witness to sum up within your cross itself. Then, in summation, you can sum up again on the same evidence.

§19A:47 At All Costs Use These Techniques to Control the Witness

If you use the preceding techniques, you should be able to not only control the defense doctor, but also the outcome of your case. If you decimate the defense through cross, don't be surprised when you receive a whopping verdict in your favor!

[§§19A:48-19A:59 Reserved]

IV. Deposition of Defense Neuropsychologist—Deposition Excerpts

§19A:60 Background Information

Below are excerpts (some of which are slightly edited for the sake of clarity and brevity) from an actual deposition of a neuropsychologist who teaches at a university and testifies frequently for the defense. The expert, who is referred to as Dr. Myra Brown, tends to give highly qualified verbose answers at deposition. This can be controlled more easily at trial in the presence of a judge and jurors, none of whom would tolerate her obvious obfuscation. The challenge at deposition was to pin down her opinions and get some concessions to be used at trial.

The names of the expert and parties are changed for purposes of the following illustration. However, the plaintiff in this case, who we refer to as Dan Snead, was a marine biologist who worked for the State of Florida. One day, he was coming home from work when he was rear-ended by a tractor-trailer propelling his truck into a concrete power pole. The front of his car caved in on him and he suffered massive facial fractures requiring reconstructive surgery of his face. He lost consciousness for a period that ranged from several minutes up to 15 minutes and was in an altered state of consciousness for many more minutes. Plaintiff contended that he had also suffered a mild traumatic brain injury. A CT scan taken at the hospital, post-accident, demonstrated diffuse edema (swelling) of the brain which resolved within a couple of days.

The defense hired multiple experts who claimed that Mr. Snead did not have a permanent brain injury.

The case was tried in Key West, Florida and settled for a confidential seven figure amount several days into the trial.

§19A:61 Collateral Attack: Medical Literature Relied on by Expert

Q. Is there any medical literature that you relied on or reviewed relative to this case?
A. Specific to this case only, no.
Q. In light of your response, is there any medical literature that you think supports any of your opinions in this case that you can cite me to specifically?
A. No.

COMMENT

The expert does not want to be impeached with any "authoritative" literature. But, these questions lock her into having no literature to support her opinions.

§19A:62 Collateral Attack: Expert's Publications

Q. In the past year have you published any medical or psychological literature as a primary author?
A. No.
Q. How about during the past three years?
A. No. Most of the publications have come out from students, and I am often the last author now.
Q. Have you published anything on the topic of how people recover specifically from traumatic brain injury?
A. No, not specifically on that topic.

COMMENT

These questions demonstrate that she has the title of professor but is less serious about academic pursuits than expert pursuits.

§19A:63 Collateral Attack: Past Work as Defense Expert

Q. During the past three years, on how many legal cases were you retained as an expert?
A. I have no idea.
Q. Can you give us an average of how many cases per month or year for each of the last three years you were retained?
A. About two cases per month on average.
Q. So, about 24 per year?
A. Maybe 20.
Q. And of these what percentage has been for defense firms?
A. It used to be about 70 to 80 percent defense, but I've been doing more plaintiff work lately than I used to.
Q. Do you keep a list of the plaintiff or defense firms that you are doing or have done work for?
A. No.
Q. Do you keep a list of the cases in which you have given either deposition or trial testimony?
A. No.

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Q. Have you testified for the defense firm in this case or in other cases?
A. Yes.
Q. How many times?
A. I can't recall?
Q. Did you testify for them in every case where they hired you?
A. I doubt it.

Q. Can you recall how many times they've hired you in the past?
A. No, I can't recall exactly. I don't keep any records of that.
Q. Do you know if it was more or less than 10?
A. Oh, I don't know, but I would imagine that it would be less than 10.
Q. But, the actual number of times is not documented anywhere, is that fair to say?
A. That's true.
Q. By the way, you've been asked before, in many cases, for a list of cases in which you've given testimony, haven't you?
A. Of course...I'm sure that I have.
Q. But, you still have chosen not to keep a list of those cases, is that accurate?
A. That's accurate.

COMMENT

In Florida, unlike federal court, experts need not maintain a list of the cases in which they have testified. This extraordinarily practiced witness is consciously deciding to remain ignorant of facts that she should know. There are jurors who will not trust her.

§19A:64 Neuropsychological Testing Employed by Expert

Q. Now, you use what is commonly called a flexible battery, is that right?
A. No, my battery is a core fixed battery, and I will add tests depending on whether or not the person needs additional testing in an area that we don't feel that we have sufficiently sampled. Sometimes we will take a test out that we believe a person cannot handle, for example, due to limited education.
Q. With respect to that core group of tests that you select, has that core ever been validated as a combination of tests to assess brain injury?
A. No, not in the way that you mean.
Q. And, with regard to the specific tests that you gave my client, has that combination been validated to assess brain injury?
A. No. It's not supposed to be.
Q. My question is: has it been?
A. It has not.

COMMENT

These questions set up the argument to the jury that this expert picks and chooses the tests she wants, rather than using a validated battery of tests, in order to support the conclusion she seeks to obtain.

§19A:65 Concessions Regarding Insignificance of Negative CT Scan

Q. A person can have neuropsychological impairment due to brain damage even though the injury is not visible on a CT scan, right?
A. There are cases where you can, yes. I mean, I'm not a neurologist. Neurologists talk about brain structure. Neuropsychologists deal with behavior.

COMMENT

Ordinarily, the witness would be right but counsel knew that when it served her ends, the expert had used negative scans to bolster her opinions in other cases.

Q. But, you have given opinions for defense firms to the effect that a plaintiff did not exhibit any evidence of brain damage, true?
A. Yes, based on testing and evaluation.
Q. But, Dr. Brown, you've also used the negative results of CT scans and MRI's to support your opinions that a person did not have brain damage, haven't you?
A. Yes, there have been cases where I've had that opinion.
Q. And, in this case, you reviewed a CT scan report from the Ryder Trauma Center for Mr. Snead, right?
A. Yes.
Q. And, you'd agree that the radiologist's report reflected a positive or abnormal result suggesting diffuse edema or swelling of the brain, correct?
A. Yes, I saw that.
Q. And, from your experience, that would be consistent with the existence of trauma to the brain, true?
A. Again, I'm not a neurologist but yes, it would be consistent.

§19A:66 Expert's Lack of Knowledge of Observations and Opinions of Lay Witnesses

Q. Now, in terms of whether someone has any functional impairment from trauma to the brain, it is important to get the most complete picture you can of what the person was like before the trauma as compared to after the trauma, true?
A. Yes. We try to be as thorough as possible.
Q. And, in your effort to be as thorough as you can, it would be important to review information from spouses, close friends, family and employers, true?
A. We consider all the relevant information we can get our hands on.
Q. And, what those most familiar with how a person behaved and functioned on a daily basis, both before and after head trauma, have to say would be relevant, wouldn't it?
A. It would be helpful, yes.
Q. Well, Doctor, before providing your opinions in this case or at any time up to the present day, have you read the deposition of Mrs. Snead?
A. No, it was not given to me.
Q. Have you read the deposition of Mr. Snead's work supervisor, Mr. Colver?
A. No, I didn't.
Q. Did you read the depositions of Mr. Snead's close friends, Chris Hitchens or John Krump?
A. No.

§19A:67 Concessions Regarding Serious Effects of Mild TBI

Q. Doctor, would you agree that someone can have a mild traumatic brain injury that has a serious impact on the way they function in life?
A. Yes.
Q. And that would include the way they function both in their private life and also in their professional life, true?
A. Yes.

§19A:68 Concessions Regarding Plaintiff's Lack of Malingering

Q. Do you have an independent recollection of Dan Snead?
A. Yes.
Q. Would you agree that he was a very nice guy?
A. Yes, he was. We remember the nice guys.
Q. And did you find him to be a credible person?

A. Yes.
Q. In fact, you conducted a test to determine whether he was a malingerer, is that right?
A. Yes.
Q. And malingering refers to a conscious intent to deceive?
A. Yes.
Q. You found no conscious intent to deceive, is that right?
A. That's right. That's correct.
Q. You also found that he was engaged in the testing and seemed to be trying hard?
A. Yes.

§19A:69 Concessions Regarding Consistency of Plaintiff's Complaints With TBI

Q. And you would agree with me that Mr. Snead does have complaints that can be consistent with brain injury?
A. Yes.
Q. And, in that regard, he made complaints about memory problems, true?
A. Yes.
Q. He made complaints that are consistent with processing speed problems or that it takes him longer to do things, true?
A. Yes.
Q. He made complaints about headaches, is that right?
A. Yes.
Q. He made some complaints about inability to pay attention to things or focus on things, true?
A. Right.
Q. All of those things can be indicia of brain injury, correct?
A. Yes, they can be.

§19A:70 Concessions Regarding Treating Physician's Test Findings

Q. There were some tests that Dr. Doright performed and that you also performed where you, like he, found that Mr. Snead was in a category that would be considered mildly impaired, correct?
A. Yes, that is correct.
Q. Generally, you would agree that problems with word finding, verbal memory, and reading comprehension tend to suggest problems in the left hemisphere as opposed to the right hemisphere if we assume there is some brain damage?
A. Not necessarily, but generally it's true.
Q. Doctor are you aware that Mr. Snead sustained more extensive fractures and trauma to the left side of his head?
A. I don't recall but whatever the medical records say.
Q. When Dr. Doright gave the Boston Naming Test, Mr. Snead had a raw score of 30, correct?
A. That's what he wrote.
Q. Would you agree that even before adjusting for age and education, he came out as mildly impaired?
A. Yes.
Q. And, when you adjust for age and education, he comes out as even more impaired, true?
A. Yes, based on his interpretation.
Q. In fact, once you adjust for age and education, based on Dr. Doright's testing, Mr. Snead's performance would place him somewhere in the bottom 2 to 5 percent of the population, correct?
A. Again, based on his testing, yes.

§19A:71 Concessions Regarding the Practice Effect

Q. You performed some of the same tests as Dr. Doright, correct?
A. Yes, some the same and some different. I did perform the Boston Naming Test and he did fine for me.
Q. Doctor your tests were performed only nine months later than Dr. Doright's, correct?
A. Yes.
Q. The "practice effect" refers to a testing patient's tendency to learn and perform better on the same neuropsychological test when re-administered as it was here in less than a year?
A. Yes.
Q. And, there is a substantial body of literature indicating that there is a significant practice effect with the Boston Naming Test, true?
A. Yes, there is literature to that effect.
Q. Could the practice effect have contributed to an improvement in his performance on the Boston Naming Test from Dr. Doright's administration to yours?
A. It could have.

COMMENT

This is a critical point. You should do neuropsychological testing on your client before the defense does. And, you must understand that if the defense's testing occurs too soon after your expert's, it may be invalidated based on the phenomenon known as the "practice effect."

§19A:72 Concessions Regarding Plaintiff's Pre-Injury Intelligence

Q. The vocabulary subtest of the WAIS III, which you gave, is generally considered a good indication of pre-morbid intelligence, true?
A. Yes, pre-morbid intelligence, verbal intelligence anyway.
Q. And, it measures well-learned information, right?
A. Yes, that's fair to say.
Q. Would you agree that, generally, well-learned information is not readily compromised by mild to moderate head trauma?
A. Yes.
Q. And, you found his pre-accident verbal intelligence to be in the high average range?
A. Yes.
Q. And, his pre-accident perceptual skills were in the superior range?
A. According to certain tests, yes.

COMMENT

Counsel got these concessions to set up a contrast with all the testimony in the case that he was performing poorly in these areas, with the exception of well-learned information, post-accident.

§19A:73 Expert's Failure to Consider Critical Information

Q. Based on the records you reviewed as evidenced by your report, you are aware that Mr. Snead's vehicle was struck in the rear by a much larger 18-wheel tractor trailer?
A. Yes.
Q. You are aware of the fact that Mr. Snead's' vehicle was thrust off the roadway and into a concrete power pole?
A. Yes.

Q. You read, didn't you, that the front end of his vehicle caved in on him?
A. Yes.
Q. You learned from the records that he suffered major trauma to his face and head crushing many bones in his face, correct?
A. I saw that, yes.
Q. Are you aware of the fact that lay witnesses at the scene have now testified that Mr. Snead, throughout the time that they observed him, which was over 15 minutes, did not move, open his eyes or speak throughout this time? Are you aware of that?
A. I can't remember whether I read that or not.
Q. Did you review the deposition of Paul Dean?
A. No.
Q. You also didn't review the deposition of Ms. Gonzalez who was another eye witness, true?
A. No, I didn't.
Q. I ask you to further assume that witnesses who observed Dan Snead for the15 minutes before Fire Rescue arrived testified that Dan was unconscious throughout this time. Assuming that to be true, would that be an important factor to consider in assessing the severity of brain trauma?
A. It's an important factor to consider, among others.
Q. But, it is one of the important factors you consider?
A. Yes.

COMMENT

The witness had previously testified that the absence of any loss of consciousness provided some evidence that a person's brain was not injured.

Q. Are you aware of the fact that Mr. Snead's trauma surgeon, Dr. Boyd, testified at deposition that he believes the facial fractures Mr. Snead suffered were severe enough to reach down to his brain?
A. I don't remember reading that, but he had severe injuries.
Q. Did you read Dr. Boyd's deposition?
A. No.
Q. Did you read the treating neurologist, David Salter's, deposition?
A. No, but I read his report.
Q. If Salter testified at his deposition that he believes Mr. Snead sustained brain damage, would that be a factor that you would take into account in determining whether Mr. Snead suffered brain damage?
A. Yes, I would take it into account.

COMMENT

Counsel was highlighting in several of the above excerpts the expert's failure to consider critical information. Counsel also knew that the expert knew and respected the treating neurologist.

§19A:74 Results of Expert's Testing of Plaintiff

Q. On the WMS-III—Wechsler Memory Scale, Mr. Snead had delayed recall of word pairs which you found to be below average?
A. That was a problem.
Q. So, you would agree that this was impaired?
A. It really is mildly impaired. I would say there was a typo and would call it mildly impaired.
Q. What is that supposed to be a test of, what cognitive function?
A. It's one test. It's not—see, that's the problem. It doesn't measure a function. It's one measure that assesses the ability to learn word pairs over repeated trials. So it's a verbal learning test of word pairs.

Q. How would you expect a person with his age, education and his professional background and your estimate of his pre-accident IQ to perform absent injury?
A. I would like to see him in the 37th percentile and above.
Q. And, how did he do?
A. The standard score of 9, 37th percentile on immediate, but delayed, recall that should have been the same was not. It was 6.
Q. So, that put him in the 9th percentile?
A. Yes.
Q. In other words, 91 percent of the population did better than him, right?
A. Yes.
Q. And, you would consider this mild impairment?
A. Yes.

COMMENT

Plaintiff's expert will explain and the jury will likely understand that when 91 percent of the population do better than the plaintiff, who was a high performer pre-accident, this provides compelling evidence of brain injury. Defense expert's definition of "mild impairment" is clearly that of a biased advocate.

Q. Doctor, it is not unusual for someone who actually has mild traumatic brain injury to perform inconsistently on these tests, better on some, worse on others, is it?
A. Right, but that doesn't mean that a person has brain damage because they score poorly on one test.
Q. I understand, but—
A. Inconsistency, it could be observed in such a person, yes.
Q. Now, Mr. Snead scored poorly on more than one of the tests that you administered, didn't he?
A. He scored mildly impaired on some and average on others. That's true.
Q. And, he performed poorly on a number of tests that Dr. Doright administered, true?
A. Yes, that's what his report says.
Q. Would you agree that the results of your testing do not absolutely and unequivocally rule out Mr. Snead having a brain injury?
A. The tests taken in isolation do not absolutely, unequivocally rule it out.

§19A:75 Hypothetical Question

Q. One scale of the MMPI-2 that you gave was the hypochondriasis scale, which you said was elevated at 73, right?
A. Yes.
Q. Hypochondriasis as defined by this scale is not used the way a layperson uses it, right?
A. Correct.
Q. It measures the degree of concern that a person is showing with regard to body functions, isn't that right?
A. That's correct.
Q. Let me ask your opinion as a neuropsychologist and ask you to assume the following facts as true: Dan Snead had a serious accident where he was unconscious for a period of time. His face was crushed in various places and the skin over his face was peeled down from the top of his forehead so that his face could be surgically reconstructed. I am asking you to assume that he has scarring and persistent visual problems, including double vision at times. He has concentration problems and is acutely aware of them. He has word fluency and word retrieval problems. Dan has nerve pain in his face. He has a greatly diminished sense of smell and taste. He can't feel his lips when he kisses his wife or his children. He can't feel his limbs the same way. He has difficulty enjoying his food. Dr. Levin, assuming all these facts to be true, would you expect Dan Snead to have some distress over the objective physical problems he suffers from due to this tractor trailer crash?

A. Yes.
Q. That would be normal, wouldn't it?
A. Yes.

COMMENT

This hypothetical was used to demonstrate that any assertion by the defense that Mr. Snead's complaints were exaggerated was without merit. Anyone having severe, life altering injuries would have an emotional reaction to what they have lost.

As one can see, cross-examination skills are essential to achieving success in trial or when taking depositions in traumatic brain injury cases. There is some magic, which often just happens spontaneously, but there is a lot of method. Hopefully, this chapter has provided a beginning framework for the method part of the equation leading to successful cross-examinations in brain injury cases.

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