The Lawyer and The Neuropsychologist:
Managing the Process and Each Other

Many cases are won or lost on the strength of expert testimony. A trial lawyer is unlikely to win or to maximize his client's recovery in a traumatic brain injury case without a top flight neuropsychologist. This is especially true in a case of mild to moderate brain injury. The less overt the injury, the more the jury will rely on the experts to explain what it is that the jurors cannot readily see for themselves. Therefore, finding the right expert is critical to success at trial. Yet, no matter how stellar the expert, if the trial lawyer and the expert do not learn to speak the same language and speak it well, their dialogue will never be understood or believed by any jury.

Effective neuropsychological testimony (from the plaintiff's perspective) demands that the trial lawyer learn about the brain - its anatomy and function - how the brain can be injured, how these injuries are measured by a neuropsychologist and how these injuries are likely to permanently deprive the plaintiff of her capacity to function normally and enjoy her daily life.

As with all areas of expert testimony, the trial lawyer must be well versed in the medicine and the law surrounding use of the neuropsychologist during both the discovery and trial phase of the case.

I. KNOWING THE LAW:

A. The Discovery Phase - Recording The Neuropsychologist's Examination

When your adversary requests a neuropsychological examination of your client, you may want to record it in some fashion. In most states, you need not send your client alone to a neuropsychologist's examination. A court reporter, your paralegal, secretary, law clerk or even a nurse may be sent to accompany your client. The exam can often be stenographically recorded, audiotaped or videotaped. You must, however, be prepared to argue the legal issues that frequently arise when counsel seeks to send an intruding eye or ear into the examination room. As a lawyer, it is ill-advised to attend these examinations yourself (some highly experienced trial lawyers disagree), as you do not want make yourself a witness in the action and expose yourself to the risk of disqualification or the pitting of your credibility against that of the doctor. If you lose in this credibility contest, it will taint your advocacy in every other aspect of the case.

Many neuropsychologists will endeavor to prevent opposing counsel from observing or recording the expert's exam. These experts regard counsel's efforts at documentation as a genuinely disruptive intrusion into the examination process. Counsel, on the other hand, must protect his client against the over-zealous expert who needs to be watched in order to ensure the fairness and integrity of the expert's exam. You do not want your client's case to be compromised by an unscrupulous expert's claim regarding behavior by the plaintiff that never

took place or statements that were never actually made. Counsel can also amass powerful tools with which to effectively cross examine the adverse expert by having specific, irrefutable detail regarding what occurred during the exam. Furthermore, videotaping the exam of an obviously debilitated client can buttress the plaintiff's damage case much as would a "day in the life" video.

In Florida, for example, Rule 1.360(a)(3) of the Rules of Civil Procedure provides that "upon request of either the party requesting the examination or the party or person to be examined, the court may establish protective rules governing such examination." Thus, the trial judge has the discretion to order third parties to be present, or that the examination be recorded.[1] Generally, the trial judge should allow the person examined to have a court reporter present during the examination.[2] Although the court may deny this right, the burden is on the party opposing the presence of the third person to show why they should not be permitted to attend the examination.[3] Furthermore, it is well established that Florida takes a liberal view when

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1 *See F.M. v. Old Cutler Presbyterian Church, Inc.*, 595 So. 2d 201 (Fla. 3d DCA 1992); *Motor Union Orion Ins. Co. v. Levenson*, 153 So. 2d 582 (Fla. 3d DCA 1963); *Medrano v. BEC Constr. Corp.*, 588 So. 2d 1056 (Fla. 3d DCA 1991).

2 *See Collins ex rel. Burton v. Skinner*, 576 So. 2d 1377 (Fla. 2d DCA 1991); *Stakely v. Allstate Ins. Co.*, 547 So. 2d 275 (Fla. 2d DCA 1989); *see also U.S. Sec. Ins. Co. v. Cimino*, 754 So. 2d 697 (Fla. 2000); *Broyles v. Reily*, 695 So. 2d 832 (Fla. 2d DCA 1997) (applying this principle to a videographer).

3 *Lunceford v. Fla. Cent. R.R.*, 728 So. 2d 1239 (Fla. 5th DCA 1999); *Freeman v. Latherow*, 722 So. 2d 885 (Fla. 2d DCA 1998).

determining whether attorneys or their representatives may attend examinations.[4]

It has also been noted that the potential for fraud at the confluence of the medical, legal and insurance industries is virtually unlimited.[5] However, by allowing the examination to be observed by a third party or videotaped, the potential for harm to either party is diminished. As the Second District Court of Appeals noted when discussing a Rule 1.360 examination:

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[4] *U.S. Sec. Ins. Co. v. Cimino*, 754 So. 2d 697, 700-01 (Fla. 2000) (citing *Bartell v. McCarrick*, 498 So. 2d 1378 (Fla. 4th DCA 1986).

[5] *U.S. Sec. Ins. Co. v. Silva*, 693 So. 2d 593, 596 (Fla. 3d DCA 1997).

> There is nothing inherently good or bad about the credibility function of an IME. If there is not a court reporter or other third party present at the examination, however, a disagreement can arise between the plaintiff and the doctor concerning the events at the IME. Plaintiff's attorneys are understandably uncomfortable with a swearing contest at trial between an unsophisticated plaintiff and a highly trained professional with years of courtroom experience. They have searched for ways to level the playing field on the credibility issues arising from such examinations.[6]

When ruling on an objection to the presence of third persons, the trial judge may consider unique qualifications of the examiner and the availability of experts willing to conduct the examination with third parties present. In the absence of a valid reason, the trial judge should not exclude the attorneys (or their representatives) for the party being examined.[7]

In the federal courts, Rule 35 of the Federal Rules of Civil Procedure governs compulsory physical and mental examinations. The Rule is silent, however, as to whether an attorney or other third party observer has the right to actually accompany the party to this examination. Federal courts have treated this issue in various ways, but most have denied the claimant the right to have a third party observer present during a medical examination.

The most favorable view towards allowing third party observers in Rule 35 examinations was taken by the Eastern District of Pennsylvania in *Gensbauer v. May Dept. Stores Co*.[8] Noting the silence of Rule 35 on this issue, the court was persuaded by Pennsylvania state law, as its jurisdiction over the action was based on the diversity of citizenship of the parties. Finding that state law would allow the presence of a third party observer, the court allowed the plaintiff to be accompanied during his Rule 35 examination.

This line of reasoning is not often followed by other federal courts, which usually adopt one of two reasons for not allowing a third party observer. The first reason is that these examinations are not "a continuation of the discovery process," and therefore, they are not subject to protective orders under Federal Rule 26.[9] The second reason given by the courts is that the examining expert is a professional, and that his or her professionalism diminishes the risk of giving false

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6 *Wilkins v. Palumbo*, 617 So. 2d 850, 852 (Fla. 2d DCA 1993).

7 *See Cimino*, *supra*, Note 4; *Broyles*, *supra*, Note 2.

8 184 F.R.D. 552 (E.D. Pa. 1999).

9 *See Douponce v. Drake*, 183 F.R.D. 565 (D. Col. 1998). The court's reasoning also focused on the lack of "good cause" for the presence of a third party, stating that the distraction caused by the presence of such an observer outweighed the potential for these examinations to distort the position of the plaintiff.

testimony and that any such risk is outweighed by the court's concern for the distraction caused by a third party observer being present at the examination.[10]

Because federal law is somewhat unsettled in this area, it is especially advisable to research the law of the district in which the cause of action is being heard for local authority that allows for the presence of a reporter, videographer or other representative of the plaintiff.

B. Admissibility Of The Expert's Testimony: *Daubert, Frye,* And Rule 702

For decades, courts struggled with the task of determining the reliability, and hence admissibility, of expert testimony. The first attempt to develop a clear rule occurred in 1923, when the Circuit Court of Appeals for the District of Columbia decided *Frye v. United States*.[11] The decisions established a "general acceptance" standard for the admissibility of scientific evidence, and this standard soon developed into common law. The *Frye* test, as it became known, is still the principal means of determining admissibility of scientific evidence in most states, and therefore should be understood by any attorney who will be litigating cases involving scientific expert witnesses. However, from the outset critics contended that the "general acceptance" test was too rigid, precluding the introduction of relevant evidence.

In response, the U.S. Supreme Court in 1993 attempted to "liberalize" the admissibility of evidence with its holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[12] In *Daubert*, the Court held that the *Frye* test was superseded by the Federal Rules of Evidence and that the judge should act as a "gatekeeper" in determining the admissibility of scientific evidence. In spirit, the *Daubert* decision attempted to remedy the inflexible approach of *Frye*. However, the decision resulted in arguably more conflicting opinions than its predecessor. Specifically, courts seemed at a loss to determine whether the *Daubert* ruling applied to non-scientific evidence as well as scientific evidence, and whether the criteria espoused in *Daubert* were the sole criteria on which to base an admissibility determination.

In 1999, the Court revisited the issue in *Kumho Tire Co., Ltd. v. Carmichael*.[13] In *Kumho*, the Court held that "*Daubert*'s general holding – setting forth the trial judge's general 'gatekeeping' obligation – applies not only to testimony based on 'scientific knowledge,' but also to testimony

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10 *See Romano v. II Morrow, Inc.*, 173 F.R.D. 271 (D. Ore. 1997).

11 293 F. 1013 (D.C. Cir. 1923).

12 113 S.Ct. 2786 (1993).

13 119 S.Ct. 1171 (1999).

based on 'technical' and 'other-specialized' knowledge."[14] Furthermore, the court opined that "[t]he test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts in every case."[15] In fact, the Court stated that *Daubert* makes it clear that the list of factors for determining admissibility does not constitute a "definitive checklist or test."[16] The criteria were "meant to be helpful, not definitive."[17]

In federal courts, the admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence, which was amended in 2000 in an attempt to clarify and incorporate the Supreme Court's holdings in *Daubert* and its progeny.[18] The Rule provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise-; if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[19]

The structure of Rule 702 appears to require that a court find that each prong be satisfied before admitting evidence. However, all three prongs of the test are essentially part and parcel of one another.[20] Indeed, the Supreme Court in *Kumho* applied all three prongs in their ruling, and as one commentator noted, "did what should be done in all cases – it looked at all three requirements as if there were one requirement.[21]

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14 Michael H. Graham, *The Expert Witness Predicament: Determining "Reliable" Under the Gatekeeping Test of* Daubert, Kumho, *and Proposed Amended Rule 702 of the Federal Rules of Evidence*, 54 U. MIAMI L. REV. 317, 321 (2000).

15 *Kumho*, *supra*, Note 13.

16 *Id*. at 1175.

17 *Id*.

18 Some of the more prominent cases following *Daubert* include: *Gen. Elec. Co. v. Joiner*, 118 S.Ct. 12 (1997); *Weisgram v. Marley Co.*, 120 S.Ct. 1011 (2000); and *Kumho Tire Co., Ltd. v. Carmichael*, 119 S.Ct. 1171 (1999).

19 Federal Rules of Evidence, Rule 702 (2000).

20 Graham, *supra*, Note 14, at 349.

21 *Id.* at 351.

Daubert, *Kumho*, and the many cases interpreting these holdings have set forth various nonexclusive guidelines for trial judges to apply when determining the reliability of expert testimony. The following are some of the more often cited criteria for determining admissibility[22]:

(a) whether the expert's field is a "well accepted body of learning" with reasonably well defined standards;
(b) whether the expert's theory or technique can be or has been tested;
©) whether the theory or technique has been subjected to peer review and publication;
(d) the known or potential rate of error for the theory or technique;
(e) general acceptance of the theory or technique within a relevant scientific community;
(f) the non-judicial uses made of the theory or technique;
(g) the extent to which the technique relies upon the subjective interpretation of the expert; and
(h) the expert's credibility, to the extent that it affects reliability.

Outside of the federal courts, the lawyer should be familiar with the *Frye* standard of admissibility of scientific expert testimony, as many states have not followed Federal Rule 702 on the *Daubert/Kumho* standards. *Frye* established that in order for scientific evidence to be admissible in court, the profferor must establish that the evidence has been generally accepted in the scientific community. Specifically, the Court held that:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[23]

The "general acceptance" test of *Frye* has been problematic. Courts have often manipulated the level of general acceptance required before evidence is admitted at trial.[24] Similarly, courts are

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22 Robert M. Whitney, *A Practicing Lawyer's Guide to the Application of* Daubert *and* Kumho, 23 AM. J. TRIAL ADVOC. 241 (Fall 1999).

23 *Frye*, *supra*, Note 11, at 1014.

24 Josue Vasquez, *Asserting the Trier of Fact: Rule 702 of the Federal Rules of Evidence and its Proposed Amendment*, 24 RUTGERS L. REC. 2, 5 (1999) (citing Miller, Paul S. and Rein, Bert W.,

able to redefine the "scientific community" to control the admission or exclusion of evidence.[25] However, the complaint most commonly voiced is that the "general acceptance" test is too rigid and inflexible, excluding evidence that should be admitted as reliable and relevant. Essentially, critics argue that no matter how relevant or reliable the scientific principle, the evidence and opinions cannot be admitted until this principle has achieved general acceptance. As one can imagine, the process of reaching general acceptance can take years or even decades, yet the evidence can still be reliable and relevant to the case at hand.

Neuropsychology is a relatively young and rapidly evolving field. Neither judges nor juries know a great deal about the field or its validity. To most observers this body of knowledge is at once alien and of questionable reliability. Rulings regarding the admissibility of various aspects of neuropsychological expert testimony are all over the map. The trial lawyer must therefore be aware of which standard – *Frye* or *Daubert* – controls in his jurisdiction and how that standard ought to be applied to the expert testimony he seeks to offer or oppose.

C. To What May A Neuropsychologist Testify?

While the ability of neuropsychologists to testify to the existence of a brain injury is generally accepted in most jurisdictions, their ability to testify as to the cause of the injury is less frequently accepted. Nevertheless, only a minority of state jurisdictions do not allow testimony on causation from a psychologist or neuropsychologist. These jurisdictions have concluded that only a medical doctor may testify on this issue. Therefore, before eliciting testimony from your expert, determine the permissible scope of his testimony in your jurisdiction.

The minority view – that neuropsychologists are not competent to testify as to causation of brain injury – is the rule in Florida, and has been recently upheld by the state's Supreme Court. In the recent case of *Grenitz v. Tomlian*, the Court reaffirmed that a neuropsychologist may give opinion testimony as to an existing mental condition and to existing organic brain damage, but may not give testimony regarding the medical causes of this organic brain damage.[26] The Court also reaffirmed the reasoning for this rule, stating that it "is grounded on the fundamental observation that the determination of a nonpsychological or medical cause of organic brain damage is a medical judgment" and therefore outside the purview of the neuropsychologist's knowledge, training and experience.[27]

Judges Should Resolve Scientific Disputes in Toxic Tort Litigation, LEGAL BACKGROUNDER, July 24, 1998).

[25] *Id.* at 5 (citing Hasko, Judith A., Daubert v. Merrell Dow…: *Flexible Judicial Screening of Scientific Expert Evidence Under the Federal Rules of Evidence 702*, 1995 Wis. L. Rev. 479, 480).

[26] *Grenitz v. Tomlian*, 2003 WL 21290887, 2 (Fla. 2003).

[27] *Id.*

Of course, even in states like Florida, nothing prevents counsel from eliciting testimony from the neuropsychologist that before the subject incident the plaintiff had no brain damage and from the date of the incident on, he was a mental vegetable!

Because of the split in authority among the jurisdictions, it is imperative that you be familiar with the rule in your jurisdiction. Otherwise, you will not know how to elicit key testimony. Even worse, you could be precluded from adducing any evidence to prove the all important issue of causation.

II. FINDING THE BEST EXPERT

Trials are often duels between the parties' experts. Make sure you are prepared with the best experts you can find. How can you find them? There are many ways. Below are a few preferred methods for finding an expert who is a star:

A. Don't be Afraid to Ask Your Friends And Colleagues

Your colleagues and friends are an invaluable resource. Bar association meetings can be more than a platform for pontificating or a forum for consuming bad food. They can be a source of good advice.

If your regular network fails to bear fruit, do computer verdict searches in your area for cases involving brain injury and see which experts are being used with success. Then contact the lawyers involved in those cases for a further evaluation.

B. Ask The Experts About the Experts

Neurologists, neurosurgeons, and psychologists will often have referred patients to neuropsychologists and have working relationships with potential expert witnesses. These experts know who's good and who's not.

C. Search Hospitals, Medical Schools and Medical Libraries

Exploring the websites of respected hospitals, medical schools or graduate programs conferring doctorates in psychology, among other medical institutions, may provide you with well-credentialed and extensively published neuropsychologists who can evaluate your case. However, there is a caveat: while neuropsychologists at major teaching hospitals or institutions may be talented at evaluating or treating injuries, they may not be familiar with the litigation process. You will want to screen them to ensure that you do not retain an expert witness who may be put off by the process, or easily intimidated by the opposing counsel's attempts to raise doubts as to their qualifications or their opinions in the case. Moreover, neuropsychology can be mystifying to the layperson but a good forensic neuropsychologist will be able to testify in a way

that is comprehensible and believable to jurors. Be sure, however, that you avoid going to trial with an expert witness who, through inexperience or temperament is ill-suited to persuading a jury as to the merits of your case.

You should also perform literature searches for treatises, articles and texts covering issues which relate to your case. You may want to contact the authors and see if they have or would do forensic work.

D. Get The Expert's Curriculum Vitae and List of Litigation Cases

Once you have found a potential expert to testify in your case – or a list of such experts – you should immediately secure *curriculum vitae* from these individuals. This will help you assess their qualifications in order to pick the right expert for your case. Her CV will thereafter be used to impress your adversaries, your judge and your jury as well as to prepare you to meet and rebut attacks on your expert. In this regard, review your expert's publications and litigation history often contained on a list of cases in which they have previously testified.

III. HELP YOUR NEUROPSYCHOLOGIST TO BE CORRECT

A. Get All Relevant Background To The Expert ASAP

In order to ensure the most reliable and accurate opinions from the expert , it is imperative that you provider her with all relevant background records on your client as early as possible in the litigation process. As soon as these records become available, you will want to feed them to the neuropsychologist, so that she may begin formulating opinions based on a comprehensive review of the relevant evidence. The expert becomes an easy mark when the adversary can show that the expert's opinions are based on false or incomplete information. The records which are usually provided include, but are not limited to: (a) medical records; (b) prior psychological or neuropsychological testing; (c) IQ tests; (d) school records; (e) camp records; (f) results of standardized tests; (g) employment records and job applications; (h) disability applications; and (i) any competency proceedings taken against your client. In addition, the neuropsychologist should be given all relevant discovery in the case, such as your client's deposition, before and after witness depositions (usually family members and friends), treating physician depositions and interrogatory responses regarding damage issues.

B. Do Not Speak With Your Expert Until Her Evaluation Is Complete

You are far better off not speaking to the neuropsychologist at all, or at least not in any detail, regarding your client's injuries, until the expert's evaluation has been completed. Let your expert witness tell you whether your client has suffered permanent brain injury, do not tell your expert. If this procedure is reversed, your client may pay the price for your indiscretion at trial.

C. Prepare Your Client For The Experts' Examination

At some point, both your expert and the opposing neuropsychologist will examine your client. To ensure the most thorough examination possible, prepare your client for these examinations, especially the adverse expert's, almost as you would prepare him or her for a deposition. Your client hopefully trusts you and feels comfortable talking with you. Reassure them before the experts' exams and remind your client that it is critical that she is complete, truthful and accurate when speaking to both experts. Of course, the more severe the brain injury the less necessary or feasible is this preparation.

It is helpful to give your client an opportunity to review recollections of the accident and resulting injuries with you. This may help them to get the facts out more completely at the time of the exams. If their memory is profoundly impaired – as is often the case with brain injuries – then send a spouse or other family member with the client to ensure that the plaintiff gives the expert a complete account of all of her deficits. The expert neuropsychological examination during pending litigation takes place in an artificial and often intimidating setting. Your client often gets only one bite at the apple so make sure it's a good one!

D. Carefully Read The Experts' Reports

Four eyes are better than two. After the examination, when your neuropsychologist has finalized her initial report, the lawyer should carefully read the report, noting any omissions or inconsistencies with previous complaints that the client has related. Do not just give the report a cursory look and wait for defense counsel to devastate your expert with frailties in the report of which neither you nor your expert were aware. A detailed discussion with your expert before they are deposed will prepare your expert to give the best possible explanation of their opinions. Discussing these findings should become very comfortable for your expert by the time she is deposed. In addition, there may be easily-correctable mistakes or omissions in the report of which they expert may be unaware because they had not been challenged on them until it was too late to deal with these mistakes effectively.

Look through the report's documented list of complaints, comparing that list with complaints your client has previously related to other physicians, to you, to family members or in her deposition (although, ideally, the neuropsych exam should precede the plaintiff's deposition). If you do not bring omissions to the attention of the expert, perhaps in their review of past medical records, you will unnecessarily provide ammunition to the defendant. In some cases, errors or omissions are the result of the lawyer's failure to keep the neuropsychologist up-to-date with pertinent records. If your client underwent brain surgery to evacuate a subdural hematoma, for example, your expert will need to know that. Similarly, if there was a repeat MRI or CAT scan, your neuropsychologist must be privy to these records. Constantly supplement the records that you have provided to the expert. In the paraphrased words of movie hero, Jerry McGuire: **help your expert to help you**! They will thank you for it and so will the jury.

IV. HELP THE EXPERT TO GIVE STRONG TESTIMONY AT TRIAL

A. Thorough Preparation With Your Expert Is the Key To Success

In preparing your expert witness to testify, do not be penny-wise and pound-foolish. Before the expert neuropsychologist provides any testimony, either in court or at a deposition, the lawyer must meet with the expert several times. Meet with the neuropsychologist after he or she conducts the evaluation and testing of your client, before their deposition, before your cross of the adverse expert at deposition and trial, when exhibits are being prepared and before the witness's trial testimony (of course some of these meetings can be combined).

Build a good rapport with your expert. This takes time and effort but it will pay big dividends. Doing so will maximize the expert's ability to truthfully testify in a highly persuasive manner that will serve your client's interests throughout the case. If the relationship is comfortable, you will have a better dialogue with the neuropsychologist, both during discovery and at trial. If the relationship is halting, stilted, or guarded, then the expert's testimony at trial will be similarly halting, stilted and guarded. You will not be able to persuade a jury with such tepid advocacy. So, remember that you can win or lose your case based on the performance of your experts. Make sure that they are one of the strongest links in your chain of proof and not one of the weakest.

When you meet with your expert neuropsychologist, do not immediately begin asking the questions you will ask at trial. Give the expert an opportunity to talk at length and to get comfortable discussing the facts of the case, their opinions and the bases for them. It is one thing for the expert to report findings and write opinions on paper in the privacy of the office; it is another thing to convey these opinions in a meaningful and compelling way to an audience. Your expert witness needs batting practice, so make sure you give it to him. Let him build confidence by hitting a few out of the park!

Then, be sure to prepare your expert for the likely attacks of your adversary. Here, make certain to address issues of special importance in this field. Some examples of these include test validity, how the tests were "normed" (the statistical methodology used in determining where within the normal or abnormal range a test score falls; e.g., whether the tester normed for age and educational level of the subject), "practice effect" (the tendency of a test taker to learn how to take these tests with repetition and to thereby improve their scores when re-tested), whether sub-normal test scores can reflect emotional problems rather than organic brain injury, results on psychological tests of malingering and a host of other issues that must be mastered and addressed.

B. The Lawyer Must Learn That This Is Not Psychobabble Or Gobbledygook

The trial lawyer will likely need to overcome the biases of both judges and juries to the effect that neuropsychological testimony is mere "psychobabble" or meaningless "gobbledygook." The only way to dispel this notion is to completely understand why the neuropsychological testing done in your case is valid and reliable. But, a trial lawyer who cynically and lazily expects his expert to do all the work is bound to be a loser.

The first conference with your retained neuropsychologist expert is the beginning of your education. It is your first day at school. Take every opportunity to educate yourself on the medicine. If the case warrants hiring a neuropsychologist, it warrants speaking to that person on the significant damages issues in the case until you thoroughly understand them. Whether or not your jurisdiction would allow the neuropsychologist to testify to the anatomy of the brain, these experts can teach you all about the brain.

The neuropsychologist can educate you as to the nature, extent and effect of the injury as well as why it occurred. These experts have studied neurology and may even understand the mechanism of injury as well as your neurologist or neurosurgeon does. The neuropsychologist can, by way of illustration, tell you how getting hit in the back of the head can cause a *contrecoup* injury where the soft, gelatinous brain, which sits in cerebrospinal fluid, is thrust forward against the sharp, bony prominences at the front of the skull so as to tear the brain's microscopic neurons (nerve cells). These nerve cells, the expert will explain, control the brain's ability to send and receive messages to the rest of the body. This might describe a form of mild traumatic brain injury. While this injury is real and debilitating, it probably won't show up on an MRI or CT scan but could be seen in an autopsy under an electron microscope or, thankfully, during the person's life through the aid of neuropsychological testing.

Yet, if these medical facts are not discussed, your opponent can and will exploit your ignorance of them. Similarly, the neuropsychologist can tell you what portion of your client's brain was most likely injured, and how these injuries correspond to the loss of function being complained of and being observed in your client. At trial, though, you will likely need some of the above testimony to come from a neurologist or neurosurgeon.

Remember, if you do not understand your client's injuries, there is no way that you can coherently and persuasively explain them to the jury.

C. Work to Dispel The Layperson's Skepticism Of Injuries That They Cannot See, Touch Hear or Measure for Themselves

Even if jurors and judges accept that this expert testimony is not gobbledygook, they may be skeptical of injuries that they cannot see, hear or measure with the naked eye, ear or with the benefit of a more familiar "objective" test. Jurors are probably more familiar and more trusting

of CT scans, MRI's or electro-diagnostic tests to which they, family members or friends may have been subjected in the past. However, in the case of a mild to moderate brain injury, as already discussed, there may not be a positive MRI, CT scan, or electro-diagnostic test. Alternatively, there may initially be a positive MRI or CT scan that shows bleeding or swelling of the brain, but which resolved itself within a very short period of time. This is to be expected. This does not, however, mean that your client is not seriously and permanently injured. Because the injuries may exist at a microscopic level, the mere fact that the plaintiff looks fine on the outside, does not mean that they are healthy and fine on the inside.

This is why the lawyer must learn as much as possible about the various neuropsychological tests that will be performed by the expert witness. The trial lawyer must be able to explain to the jury how these tests are even more meaningful and reliable than CT's or MRI's, which tell us virtually nothing about the effects brain injuries have on a person. The tests should be described in such a way that the jury members understand that rigorous scientific evaluation of these tests has determined their diagnostic validity.

D. Paint A Clear Picture Of Brain Injury For the Jury

Test results and the expert's opinions must be presented to a jury in a way that is engaging, logical, clear, and emotionally compelling. Avoid presenting the neuropsychologist's testimony in a manner that is too abstract or just plain boring. Make sure the expert minimizes the use of technical jargon and defines any terms that he uses. In direct examination, get to the expert's opinions as quickly as possible and when the expert is explaining the bases for these opinions, use a variety of demonstrative aids to illustrate them and to stimulate the jury. Tie the expert's opinions to a description of the forces exerted on the body during the subject traumatic event ("his head was violently snapped forward and then backward during the collision"), the findings of the medical doctors, the problems described by the plaintiff and the observations of before and after witnesses. Show how it all fits together and makes sense. Try to keep it simple.

E. Use Demonstrative Aids

Some examples of commonly-used demonstrative aids which might accompany a neuropsychologist's testimony include:

(a) Boards that summarize the results of the various neuropsychological tests performed by the expert: prepare these with the aid of your expert and a graphic artist.

(b) Depending on their legal competency in your jurisdiction, have the neuropsychologist relate the results of their tests to the various parts of the brain, either with a model of the brain or a drawing. Using an MRI, CT scan, or anatomical map of the brain, match up the brain injuries, functional impairments and various test results.

(c) If helpful, have the expert bring samples of the testing materials and tools (such as a "peg board") used on your client.

F. Order of Proof is Critical To Effective Neuropsychological Testimony

Since neuropsychological testimony is fairly novel to most people, don't start your damage case with it. This expert should only testify after the jury has looked at photos of the scene, heard substantial medical testimony on the issue of brain injury and has heard from at least some "before and after" witnesses describing the effects of brain injury on the plaintiff. These witnesses should describe any problems they've seen such as with memory, concentration, behavioral abnormalities, mental slowing, diminished ability to reason or anything else that has made the plaintiff a "different person." By the time the neuropsychologist testifies, the jury should already be thinking that the incident at issue surely did damage to the plaintiff's brain. The neuropsychologist should merely be giving them the ammunition to appreciate the full extent of that injury and how it will affect the plaintiff for the rest of his life. Defense counsel's efforts at cross will be far weaker if by the time it occurs, the jury has found that the expert simply reinforced conclusions the jurors had already reached with their own common sense.

V. USING THE NEUROPSYCHOLOGIST TO PREPARE FOR CROSS-EXAMINATION OF THE OPPOSING EXPERT

A. Preparing For The Cross-Examination

A further use of the neuropsychologist is to prepare you for your cross-examination of the other side's expert at trial. As a first step, you should go through the other expert's report in detail with your own neuropsychologist, both so that you understand the conclusions drawn in that report and so that you can identify potential bases upon which to attack it. You may not be able to obtain the raw test data upon which the report may be based, depending on the disclosure laws in your state. However, even in those states that forbid raw data disclosure, your neuropsychologist can request the raw data and study the test results. In Florida, for example, a lawyer may obtain the opposing expert's raw data by court order, or it may be supplied by one neuropsychologist to the opposing neuropsychologist. Understanding how the raw data contributed to the opinions of both experts can provide many effective avenues for attacking conclusions that are adverse to your client. Besides understanding the raw data, your neuropsychologist can assist the lawyer to prepare for cross-examination in several other ways:

(a) You may have the neuropsychologist create a chart that compares his or her results to the other party's results, explaining where the two sets of results converge and diverge. You will want to have them explain whether these results are consistent or inconsistent with each other, and the reasons why. The key is to

gain a full understanding of the implications of the other party's tests for the presentation of your case. Discuss, Discuss, Discuss!

(b) Go through the adverse party's expert's curriculum vitae with your own expert to elicit creative ways that you may collaterally attack the other side's credibility. Your expert will be able to offer insight into the other expert's background and point out qualification weaknesses that might otherwise look good on paper.

(c) Discuss with your expert what they know of the other neuropsychologist's track record, biases, and weaknesses. The two may have been pitted against each other in the past, and your expert may be able to direct you to past depositions where the opposing neuropsychologist was undermined, or cases where this expert took a position completely inconsistent with his or her opinion in the present case.

(d) Ask your expert for potential cross-examination questions, based on their superior knowledge, training and expertise in neuropsychology and appreciation for the weaknesses of the opposing expert's opinions. Beware that expert witnesses do not typically phrase cross-examination questions in the same way as a skilled trial lawyer, but can provide the substantive ammunition from which the lawyer can load his guns for cross.

CONCLUSION

No juror would want any degree of permanent brain damage. If jurors believe that a person has sustained even mild brain injury, they will often make a very substantial award in favor of the plaintiff. In complex brain injury cases, dedicated, detailed and cooperative work by both the trial lawyer and the neuropsychological expert are critical to success at trial. The absence of it is sure to be disastrous. So, put forth the effort and watch the jury give your client every dollar of lifetime compensation that she deserves.

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