Chapter 14A

Strategies for Traumatic Brain Injury Cases

I. Introduction

§14A:01 Challenges and Rewards of Brain Injury Cases

A successful outcome in a traumatic brain injury case involves more than a liability verdict in your client's favor. It involves obtaining all the compensation that your profoundly disabled client needs to care for her throughout her lifetime. The damage aspects of a traumatic brain injury case are uniquely complex and challenging. There are a multitude of things that an attorney must do from the inception of the case through its conclusion in order to achieve success at trial. This chapter provides an overview, or roadmap, of the key things that must be done in order to tie the whole case together and "connect all the neurons" in a way that meaningfully improves Plaintiff attorney's prospects for prevailing at trial.

Winning a brain injury case at trial demands rigorous preparation and stellar advocacy from day one. However, if properly litigated and tried, you, as the Plaintiff's attorney, can obtain desperately needed financial and medical security for the duration of your client's lifetime. The families of brain injured clients, in such instances, often feel that their collective lives have been saved by virtue of your unrelenting efforts. There are few experiences in the work that trial attorneys do that will be more gratifying than prevailing on behalf of a brain injured client.

§14A:02 Causes of Brain Injury

Lawsuits involving brain injury most commonly arise from trauma, such as from a motor vehicle crash or a fall; hence, the term "traumatic brain injury." However, brain injury litigation can result from a variety of other circumstances and agencies, including negligence not causing physical trauma. Common examples include medical or pharmacy negligence resulting in oxygen deprivation to the brain ("hypoxic" or "anoxic" brain damage) or negligently caused exposure to chemical neurotoxins that kill brain cells. For purposes of this chapter, though, it should be understood that the terms "traumatic brain injury," "TBI," or any variation thereof, are being used as an umbrella term for brain injury cases. The commentary below would, nevertheless, apply with equal force to brain injuries resulting from causes other than trauma.

§14A:03 How Jurors View TBI Cases

No matter how severe the injury, cases involving brain damage are difficult. When the injury involves a "mild" traumatic brain injury, jurors will be skeptical about the authenticity of the injury since the plaintiff looks and sounds normal. Here, the trial attorney has his work cut out for him!

When a person suffers severe brain damage, that person's life and the lives of his or her family members are left in shambles. The extraordinary cost of caring for a severely injured person would overwhelm most of us. The total devastation to the injured victim and his or her family is too painful to imagine, and therein lays the central problem for the lawyer who represents a catastrophically injured client. People do not want to imagine the suffering of others. Indeed, blunting our capacity to experience the tragedy of others is how most people get through every dismal news day. Jurors employ the same defense mechanisms in the courtroom.

When the injury involves a "severe" traumatic brain injury ("TBI"), jurors will be tempted to withdraw emotionally from the vegetable that they see before them. They will unwittingly numb themselves to the suffering of your client who will not be capable of communicating his pain to the jury. In addition, your jury will be aided and abetted in their emotional departure from the courtroom by admonitions from the bench and the defense that this case should be decided without sympathy or emotion. They are effectively led to believe that they should decide your case with their heads and not with their hearts. Jurors will want to accept defense arguments that the plaintiff is going to get better with time, is already getting all the care that he or she needs, or has a limited life expectancy and, therefore, does not warrant a large future economic award. Here again, plaintiff's counsel has his work cut out for him!

When confronted with these obstacles to just compensation, what must the advocate do? Overwhelm the other side with dazzling scientific and technical testimony from neurologists, neuropsychologists, economists and life care planners? In part, yes. Jurors need this ammunition to pull the trigger on a large award. Yet, simply posting facts and figures will mean little if jurors experience this proof as coming from some other world in which they do not live.

The only way to break the barrier is to compel the jury to live in your client's world, and the first step to transporting your jury into your client's world is to

enter it yourself. Immerse yourself in your client's suffering in order to tell her story and convey the full magnitude of her loss. Surely, you cannot make others feel what you do not yourself feel. Nor can you speak for someone whom you do not understand.

[§§14A:04-14A:09 Reserved]

II. Screening

§14A:10 Case Choice: A Pivotal Factor

A pivotal factor in determining whether you will succeed at trial is whether you choose your case wisely. There almost is no such thing as a "ground ball" or "a cake walk" when it comes to trial work, and this is particularly true with brain injury cases. Winning and winning big is, however, not possible unless you take a case in which you can fervently believe and to which you can unswervingly commit.

§14A:11 Severe TBI Cases: An Easy Evaluation

When you meet a client with a severe brain injury, you will have no doubt about the magnitude of the injury. If you can establish liability and causation, the damage award in such a case, if properly litigated, will likely be quite large. In severe brain injury cases, you need not consult with a neuropsychologist in order to assess the extent of a client's injury before making a decision to undertake representation. By contrast, determining whether a potential client has a brain injury in the "mild" to "moderate" categories of severity involves a far more nuanced analysis.

§14A:12 Mild TBI Cases: Careful Analysis Is Required

Evaluation of a mild brain injury case—perhaps even when the potential client has some elements of "moderate" brain injury—demands a detailed interview of the plaintiff and any family members or friends who are intimately familiar with the plaintiff both before and after the precipitating events. You should ask questions designed to determine whether a person has signs or symptoms of brain injury. You are looking for evidence of cognitive deficits or neurologic dysfunction. An attorney experienced in handling brain injury cases can, with pointed questioning, often elicit evidence of brain damage of which an overwhelmed plaintiff and her family were aware but were simply unable to articulate. Determine whether your potential client has problems with, among other things, the following:

- Short or long-term memory. (Note: long-term memory is less likely to be affected in a mild brain injury case.)
- Comprehension.
- Mental processing speed.
- Attention.
- Ability to reason.
- Changes in mood or behavior.
- Impulse control.
- Sense of taste or smell.
- Heightened sensitivity to light or sound.
- Motor control, coordination, balance.
- Visual disturbances.
- Recurrent headaches.

The above list is far from all inclusive but is an example of the types of complaints that may be seen—to varying degrees—in a mild to moderate brain injury case.

Begin the interview by asking broad, completely open-ended questions, such as: *What problems or injuries have you suffered from as a result of the accident?* Assuming the plaintiff or the plaintiff's "before" and "after" witnesses—typically family members or close friends—are reasonably competent communicators, counsel's question should elicit complaints along the lines of those referenced above. Open-ended questions will help to avoid scenarios where plaintiffs consciously or unconsciously tailor their answers in a way that paints a false portrait of brain injury.

However, once some details suggesting genuine injury are related, you can develop additional detail regarding the impact of cognitive deficits by asking more specific questions, such as:

- *Has it been difficult for you to understand the news on TV, the plot of a TV show, a movie, book or the details of a conversation?*
- *Do you have to reread things several times in order to understand them?*
- *Are you finding it difficult to focus on your work?*
- *Is it taking you longer to complete mental tasks?*
- *Are you finding it unusually difficult to control your emotions?*

When a client has a brain injury, you will often receive affirmative responses to questions along the above-described lines. In response, you should ask appropriate follow-up questions to elicit supportive detail. However, the most common element to the preliminary interviews conducted in a case of legitimate brain injury is the familiar refrain by family and friend observers that "She's just not the same person! She's different!" Coming from honest observers, words to this effect tell the experienced brain injury trial attorney that the client is genuinely hurt and in need of competent representation.

[§§14A:13-14A:19 Reserved]

III. Working Up the Case

A. Prepare Case for Expert Review

§14A:20 First Obtain All Records

You have decided to take the case subject to further investigation. What now?

Once an initial evaluation leads to the conclusion that a case merits further investment of time and money, you should waste no time in obtaining all the records that will be essential to reliable evaluation by the relevant experts.

The quandary that you will confront in a damage case solely involving mild traumatic brain injury is that you will need to invest in a costly neuropsychological review before knowing whether the case merits pursuit. If the review is negative, without other injuries, then you will likely decline further representation of the client. If the review is positive for brain injury, then you already have a substantial portion of your damage case "in the can," and ready to go.

§14A:21 What to Get

In order to facilitate this expert review, you must obtain all pertinent records and review them. You are searching for anything that reflects the plaintiff's premorbid (pre-injury) intellect, aptitudes, and capacity to function both cognitively and emotionally. These documents include, among others, medical records, employment records, job applications, professional degrees, resumes, school records, camp records, and any documents reflecting previous psychological testing—especially intelligence or aptitude testing. Such records are critical to establishing a pre-injury baseline for the plaintiff. (Even when the injured plaintiff's ability to function is profoundly affected, actual IQ levels on previous intelligence tests often will remain unchanged on post-injury IQ tests. This does not negate the authenticity of the injury.)

§14A:22 Review Records and Provide Them to Retained Experts

Upon obtaining these records, immediately provide them to your retained damage experts: neuropsychologists and/or neuropsychiatrists, neurologists, neurorehabilitative care experts, vocational rehabilitative care specialists and life care planners, among others. For the experts you need, *see* §§14A:30-14A:31. These experts will then be properly equipped—after also doing their own examinations and testing of the plaintiff—to render informed, reliable and persuasive opinions regarding the extent of the plaintiff's brain injury. The appropriate experts will use these invaluable records to render authoritative opinions on both the economic and noneconomic costs and consequences of these injuries.

It is imperative that you also exhaustively review these records. If possible, do so before having a detailed consultation with your experts about the strengths and weaknesses of your client's case. Knowing your client's medical and personal history will permit you to maximize the value of the expert's case review by enabling you to ask good, factually informed questions of the expert. You can then use the expert consultation for guidance on how to build the plaintiff's entire damage case, and prepare for the damage defense that will inevitably be mounted by the other side. (*See* §14A:50, Preparing for Defense Medical Exams and Depositions.)

[§§14A:23-14A:29 Reserved]

B. Selecting Your Experts—Fields of Specialty

§14A:30 The Severely Brain Injured Plaintiff

Where the most severely brain injured are involved, psychometric testing by a neuropsychologist will not be possible. Therefore, in the most severe TBI cases, it will be unnecessary to retain a neuropsychologist to opine

on the extent of the plaintiff's brain damage. Qualified neurologists and neuro-rehabilitative care physicians will have no difficulty discussing the massive and totally disabling brain injury from which such an unfortunate client suffers. Furthermore, this catastrophically injured client will likely have a legion of treating physicians, nurses and therapists who can powerfully testify to the plaintiff's pitiful and permanent plight.

Qualified treating physicians and/or retained experts will also be asked to provide opinions regarding the plaintiff's life expectancy. Indeed, life expectancy is almost always an issue in cases of severe brain injury. Plaintiffs in this category of severity typically have a multitude of complex medical problems, are often wheelchair bound, subject to long-term intubation, use of a feeding tube and a host of other medical interventions. They are, therefore, exposed to life threatening systemic risks ranging from bed sores, to infections, to bleeding, to respiratory and cardiac failure. Accordingly, there is usually a debate between the adverse parties in the litigation regarding whether, and to what degree, the plaintiff's life expectancy departs from the standard government statistical life tables. So, be prepared to fight this battle and, if need be, retain an expert to address the issue in detail.

You must retain life care planning and forensic economic experts who would, respectively, provide testimony regarding the need and cost of future care over the course of the plaintiff's life expectancy. The value of their testimony cannot be overstated. Their opinions often provide the essential predicate for proving the largest elements of a severely brain injured plaintiff's damage award: future economic damages including future lifetime medical and supportive care expenses together with lost earnings and earning capacity over the injured person's work life expectancy.

The economist—in conjunction with the testimony of lay and expert witnesses on the issues of the plaintiff's employment history and prospects for the future had the injury never occurred—will provide critical testimony regarding the plaintiff's lost earnings and the value of his or her loss of the ability to earn money in the future.

§14A:31 Mild to Moderate Brain Injury Plaintiffs

In the context of mild to moderate brain injury cases, you will still need to enlist the aid of many of the same treating physicians and retained experts as would be required in a severe brain injury case. In many states, the law only permits a medical doctor, such as a neurologist or psychiatrist, to give opinions regarding what caused a person's brain injury. Neuropsychologists are not permitted to give causation opinions in many states. You, therefore, need to know the law in your jurisdiction with respect to the permissible scope of these experts' opinions.

In a mild to moderate brain injury case, though, it is imperative that a top flight neuropsychologist and/or neuropsychiatrist be retained. These experts are specialists in diagnosing, treating and assessing the degree of a brain injured patient's impairment. In other words, they will explain to the jury how a brain injury will affect him and impact his ability to function in his daily life.

Neuropsychologists will explain to the jury how a "mild" brain injury is really a misnomer. Such an injury can have a devastating effect on a person's ability to function in life. Certainly, no juror would want any degree of brain damage. Yet, without violating the "golden rule" by explicitly asking the jury to put themselves into the shoes of the plaintiff, these experts can help the jury understand the condition with which the plaintiff is forced to live for the rest of his or her life.

PRACTICE TIP

Finding top flight neuropsychologists is critical to success in mild to moderate TBI cases. As always, consult with your colleagues in the trial bar. Alternatively, if you know excellent neurologists or psychologists, they can typically refer you to well qualified neuropsychologists. Use online searches to locate well-credentialed neuropsychologists and then get feedback from colleagues on whomever you have found. Doing a search for verdicts or settlements involving these experts may also be helpful in evaluating their litigation related track record. Finally, be sure to interview them regarding their forensic experience, fee schedule and methodology before hiring them.

[§§14A:32-14A:39 Reserved]

C. The Neuropsychological Exam of the Plaintiff

§14A:40 A Must in a Mild TBI Case

Pursuing a case on the theory that you have a brain injured client without any evidence to support this finding is foolhardy and, potentially, costly. When the plaintiff has a mild brain injury, often the only evidence of a brain injury is a neuropsychological exam.

If an exam demonstrates that your client's purported brain injury does not, in fact, appear to exist, it would be wise to have this knowledge before filing suit based on an unsustainable damage theory. Therefore, do not predicate a case on a brain injury without having a neuropsychologist examine and test your client.

If your expert provides you with a review that confirms brain damage, and a case goes forward, both parties will ultimately have the opportunity to conduct a medical and psychological examination of the plaintiff.

§14A:41 Have Plaintiff Tested Before Filing Suit and Before Defense Does

Especially if the plaintiff has no other major injuries, make sure that the plaintiff's neuropsychological expert examines and tests the plaintiff before the defense expert does. Insurance adjusters, and perhaps jurors, are more likely to be deeply skeptical and cynical about the findings of the plaintiff's expert if they come only after commencement of a lawsuit alleging brain damage in either a complaint or interrogatory response. Such findings will appear contrived and tailored to the needs of the case.

The problem is exacerbated if the plaintiff's expert evaluates plaintiff after disclosure of the defense expert's report to plaintiff's counsel. Since disclosure of defense medical examination reports is required pursuant to discovery rules in many states, producing an after-the-fact report by plaintiff's expert that primarily rebuts the defense will likely have the air of hired gun advocacy rather than authentic medical opinion.

There are other reasons for the plaintiff to have his or her expert conduct the first examination. If any of the same neuropsychological tests are repeated during a second examination, the plaintiff's performance may improve as a result of a phenomenon known as the "practice effect." Through repetition even a brain injured person may learn, to some degree, how to perform certain tests within a test battery resulting in an improved performance the second time the same type of test is administered. Accordingly, if the defense tests first, and particularly if the defense expert is not completely forthright, the true extent of the plaintiff's injuries may be difficult to discern.

Neuropsychological exams are typically conducted over the course of a two to three day period depending on the examiner and the plaintiff's capacity to submit to a full day of testing. It usually begins with the neuropsychologist taking a detailed history from the plaintiff and sometimes a knowledgeable family member, such as a spouse or parent.

[§§14A:42-14A:49 Reserved]

D. The Defense Depositions and Neuropsychological Exam

§14A:50 Preparing the Plaintiff

No aspect of a case should be left to chance. Letting the "chips fall where they may" is a recipe for disaster in any litigation. Yet, preparing for depositions or exams is not a prescription for manufacturing testimony or medical facts. It is a critical device needed to prevent the other side from doing so. While you cannot make up the facts of a case, you do not want to assist the defense in muddying them up!

People often cannot access emotions or memories without time to contemplate their thoughts and feelings. Nor can people always find the clearest and best way to accurately convey complex detail unless they are given sufficient time in advance of being questioned to properly frame their answers. For this reason, unprepared clients or witnesses will often either fail to express essential facts or will misstate them entirely, when confronted with an anxiety producing barrage of surprise questions delivered in rapid-fire succession during a deposition or physical exam.

The incidence of muddled statements or testimony will markedly decrease with proper witness preparation. This means that you must study all documents and witness statements early in the life of a case. In the course of doing so, you should determine whether inconsistencies between the witnesses or documents can be reconciled. Has someone merely said or written something that is inaccurate? Is someone consciously distorting the truth? These and related questions must be identified and answered before the other side answers them for you in a manner that damages your case.

However, before you allow the defense to depose your client or to examine him physically or mentally, be sure that you understand your client and his injury. Study your expert's neuropsychological examination report on the plaintiff and be sure to interview key "before and after" witnesses. By taking these steps, you will be well prepared to prepare your client for either his deposition or the defense medical and neuropsychological examinations of him.

In speaking to the before and after witnesses, you will often hear stories from the plaintiff's life that compellingly depict the plaintiff's injuries. Sharing these vignettes with your client may remind him of things that he usually finds too painful to contemplate. However, discussing these historical realities will often help the plaintiff to both confront the full extent of his losses and describe them to the other side in your case.

Accordingly, after you have a firm grasp of the severity of your client's injury as well as what the lay and expert witnesses in your case will say about it, meet with your client. Review your client's physical, mental and emotional complaints with him before the exam. The client should be as complete as possible in discussing physical pains and mental impairments, and also how these limitations and problems affect his ability to perform and enjoy normal, daily activities.

The preparation for the defense neuropsychological exam is a truncated version of deposition preparation. Among other things, you should advise your client of the following:

- Don't guess or speculate.
- If you don't know something, say so.
- If you can't remember something, say so.
- If you don't understand a question, have the questioner clarify the question.
- If you're confused, tell that to the examiner or doctor.
- Beware of questions about the extent of your complaint list such as: "Have you told me everything? Is that it? Is there anything else?"

PRACTICE TIP

Questions such as those in the last bullet above, which defense attorneys always ask during the plaintiff's deposition, and defense experts sometimes may ask during their medical or neuropsychological examination of the plaintiff, are frequently used to artificially and unfairly limit the plaintiff's list of complaints and problems. It is a "gotcha" technique that, if not handled properly, will foster cross-examination at trial along the lines of: "When I asked you if you had any other problems, your testimony was that you had nothing else, wasn't it?" Yet, it is almost always true that people, not being computers, can recall only a handful of illustrations rather than an exhaustive list of their problems or how their problems impact their lives. Therefore, your client would be well advised to indicate, when asked, only that he has related everything he can recall at that moment, even though there may be other things that are problems for him. Or, he can use catchall phrases, if accurate, such as "Anything requiring me to focus for a long time is a problem for me."

If the brain injury impairs the plaintiff's ability to remember or relate his problems, he should be prepared to relate that fact to the defense neuropsychologist; if he cannot reliably do that, then counsel should include this limitation in a pleading by placing it in an answer to interrogatories. By making this disclosure ahead of time, you preempt the defense's assertions that the plaintiff's failure to complain about certain limitations means that the plaintiff does not suffer from them.

§14A:51 Attending and Documenting the Defense Neuropsychological Examination

Many defense neuropsychologists will strenuously object to anyone else, including a court reporter or videographer, being present during the examination and testing of your client. The defense expert will argue that the intruding eye or ear is disruptive and undermines the "therapeutic environment" to the point that examination results are skewed.

The reality is, however, that "therapy" is not being provided during these examinations, and it is essential to protect your client from an overzealous expert. Having a videographer, paralegal, retained nurse expert or other representative present to observe the exam can help to ensure its integrity and fairness. Furthermore, if your client is substantially impaired, his limitations will now be dramatically depicted on videotape, which can serve as a very effective exhibit at trial.

PRACTICE TIP

Not every state allows the videotaping of neuropsychological examinations or allows them only under very specific and restrictive circumstances. Therefore, it is imperative for you to know the law in your jurisdiction.

[§§14A:52-14A:59 Reserved]

IV. Preparing for Trial

§14A:60 Early Preparation, Total Immersion

Representing a brain injured client confers an immense responsibility on a lawyer. Even if your client does not have what would qualify as a "severe" TBI, he may not be able to work or care for himself and his family. He may be a mere shadow of his former self and will be struggling through every day of his life. The toll on him and his family is almost inexpressibly immense. As an advocate, you must find a way to express that toll to a jury in a way that is clear and compelling. You will never be able to put the broken pieces of this family's shattered life completely back together again, but you must do everything within your power in the courtroom to win all the compensation that this family needs in order to alleviate their suffering. You must motivate the jury to provide your clients with the critical safety net that they need to sustain them during the many difficult days ahead.

If you expect to be equal to this daunting task, waiting until the eve of trial to prepare is not an option. Total immersion in your client's life and case from day one is the only possible course of action. If you intimately know your client and how a day in his life looks, feels and sounds, then you are well on your way to transporting your jury to that often dark and difficult place. And if you can get your jury to live in your client's world for a little while, you are far more likely to gain a verdict that immeasurably brightens your client's future despite its inescapable challenges.

§14A:61 Begin With Your Closing

To litigate a TBI case effectively, like any complex catastrophic injury case, you must begin with the end. What arguments will you want to make to a jury in a closing argument? Formulating the outline of a winning summation almost from the inception of your handling a TBI case will cause every other aspect of the case from discovery through trial to naturally fall into place.

From the outset of TBI litigation, but especially when trial is only a few months away, be sure to make notes of arguments that you plan to make in your summation. Some of these facts and arguments will also be included, perhaps in a different form, in your opening statement. Consider delineating arguments that are part of your affirmative case from those that rebut the other side's defenses.

If you undertake this process early in the litigation, depositions that you take will be far more effective. All of your questions will be appropriately directed toward the goal of amassing and marshalling the evidence that will enable you to deliver a winning summation to your jury.

§14A:62 Develop a Winning Theme

In a complex injury case where the jury will be bombarded by both sides with a blizzard of competing facts, figures, arguments and technical terms, it can be easy for a jury to become overwhelmed and want to mentally "check out." Since the plaintiff has the burden of proof, if this happens, the plaintiff loses.

One critical way to combat this blizzard effect is to boil your case down to essential themes. For example, it could be: "Because of the defendant's negligence, the Jim Jones that people once knew and loved no longer really exists. Jim is still deeply loved but he is a different person today. Jim's essence was stolen from him and from his family."

Throughout the presentation of the plaintiff's case, it is essential to come back to your theme or themes. They must be supported by the evidence you admit, illustrated by demonstrative aids, reinforced by witness testimony and by everything you say during voir dire, in opening statements and during your summation to the jury. When the jury gets up from the jury box to retire for final deliberations, they should be thinking about your case themes. If your case themes resonated with the jurors, these themes will be echoing in their psyches throughout their deliberations.

§14A:63 Draft a Detailed Order of Proof

When true pretrial preparation begins within the weeks and months just before trial, you should prepare a detailed order of proof. This document will list each witness you intend to call with an outline of both the key testimonial points you intend to make with each witness as well as what exhibits you intend to admit or use during their testimony.

An offer of proof will assist you to amplify your case themes and refine your opening and closing statements. As you prepare, continuously reanalyze your order of proof to make sure that you not only make out your *prima facie* case but also present a winning case.

During trial, the order of proof will provide you with a daily checklist to ensure that all key points have been covered, and will also help you to organize your nightly preparation for the next day of trial. Orders of proof are indispensible.

[§§14A:64-14A:69 Reserved]

V. Trial

A. Voir Dire

§14A:70 Goals of Voir Dire

There are three primary goals to any voir dire: (1) eliminating bad jurors, (2) getting good jurors and (3) sensitizing jurors to the issues of the case.

"Bad jurors," simply put, will never find in your favor. No matter what the proof, these jurors will either not find in your client's favor or will not render an award commensurate with your client's damages. Chances are they are hostile to the entire civil justice system, or there may be something about you, your client or her family that they do not like. If they are overtly prejudiced or their prejudice can be exposed, they should be eliminated "for cause," without using a peremptory challenge. If they are less conspicuously biased against your client and case, then use a peremptory challenge to eliminate them if you are not fortunate enough to have the defense do so.

"Good jurors" are fair jurors. They will listen to the evidence and decide the case on its merits. They have not prejudged you, your clients or your case. If the evidence supports a large award in your client's favor, they will have no hesitation in making such an award.

§14A:71 Sensitizing Jurors in Mild to Moderate TBI Cases

In a mild to moderate brain injury case, this is also the time to sensitize prospective jurors to the fact that even a person who looks outwardly normal can be profoundly injured and disabled. It is the time to weed out those jurors who cannot accept this proposition.

If permitted in your jurisdiction, consider utilizing helpful analogies in your questions to reconcile the plaintiff's outwardly normal appearance with his cognitive dysfunction. A couple of examples follow:

- *Have you ever dropped your cell phone and noticed that even though it still looked completely normal it began malfunctioning? Maybe it dropped calls or didn't receive calls as clearly? So would you agree that, based on your experience, just because something looks normal on the outside that does not mean that it's normal on the inside?* [Then, during trial you can remind jurors of this common experience and you can tell them that the same is true with respect to the plaintiff.]
- *Would you agree that someone can have cancer and only have 6 months to live even though they look completely healthy and normal on the outside?*
- *Do you know anyone who has Alzheimer's disease? Did they look normal for their age on the outside? Agree that someone can look normal and healthy for their age on the outside but that doesn't mean that they are normal and healthy inside, does it?*

§14A:72 Sensitizing Jurors in Severe TBI Cases

In severe brain injury cases, this is the time to sensitize jurors to the fact that your client is suffering and is not getting better even though she may be unable to communicate her suffering to the jury on her own. It is also time to weed out those jurors who seem incapable of connecting to suffering of such major proportions.

In this context, analogies may tend to trivialize and fail to do justice to the truly catastrophic nature of the plaintiff's suffering. Direct questions about how the jury feels are imperative and they probably will be permitted since there is not likely to be a dispute about the severity of the injury. Nevertheless, you should be prepared to argue to the court that specific questioning on certain damage issues is necessary.

Some important questions to get answered might include:

- *This case involves a claim that my client suffered a brain injury. He will be sitting in this courtroom in a wheelchair during only part of the trial for medical reasons. Do you think that his absence will affect the way you view the fact of this case? Can you assure me that you will not, on some level, hold his absence against him or his family?*
- *You will not be able to hear my client testify for medical reasons. Do you think that will affect or influence the way that you decide this case? How so?*

PRACTICE TIP

Be careful here. You do not want to lose good jurors who say that it would make them very sympathetic, so it may be better to direct this question to jurors about whom you have greater doubt.

- *Would you automatically assume that if someone cannot speak [or move or breathe on her own] and tell you what she is experiencing, that she is not suffering? Would you be able to listen to evidence on an issue like this and decide it with an open mind?*
- *Do you know anyone who has suffered a brain injury?*
- *Do you have first-hand knowledge about how this has affected her and her family?*
- *Despite this knowledge, would you be able to keep an open mind with respect to how the plaintiff's injuries have affected my client and her family?*
- *If the evidence from the witness stand and the law as explained to you by the judge demonstrates by the end of the case that my client is entitled to damages in the millions of dollars (or a large sum of money in jurisdictions that do not permit attorneys to mention amounts), would you have any hesitation about making such an award?*
- *Can you promise to follow the law in this regard?*
- *Can you promise to decide the case based on the evidence?*
- *Assuming the law permits someone to be compensated for future medical and attendant care expenses, would you have any difficulty in making such an award if justified by the evidence?*
- *Would there be a number in terms of future care expenses that you automatically would not go above no matter what the evidence?*

PRACTICE TIP

The same question can be asked about other elements of damage such as "pain and suffering," "loss of the ability to enjoy life," or the total damage award.

PRACTICE TIP

Some questions should be open ended to give jurors a chance to talk and reveal who they really are. Although some of the above questions are not open ended, a lot can be learned about a juror by how quickly and certainly the prospective juror answers certain questions, such as the last one listed above. Additionally, affirmative answers to some key questions can be taken as promises about which jurors may be reminded during closing arguments.

§14A:73 Areas of Inquiry for All Cases

Be sure to cover the many additional areas of inquiry that should form part of your voir dire in any serious personal injury case. These include, among others:

- The background of the jurors.
- Attitudes about lawsuits.
- Whether any news stories have influenced their attitudes about personal injury lawsuits.
- How they feel about caps on damages.
- Whether they or any family members or close friends have ever been parties to a lawsuit and whether that experience positively or negatively impacts their opinions about the civil justice system.
- Whether they would be comfortable awarding damages for things such as (a) pain and suffering, (b) mental anguish or (c) loss of enjoyment of life.

The list goes on. The more you can find out about your jurors the better. However, once you know that you have a good juror, either move on quickly since you do not want to highlight this fact for your adversary or get a commitment to be fair to both sides (i.e., protect good jurors from cause challenges).

[§§14A:74-14A:79 Reserved]

B. Opening Statement

§14A:80 Purpose

Opening statements often are described as road maps or blue prints provided to the jury that outline what the plaintiff intends to prove and what the evidence will show. Certainly, they must serve this important function. However, opening statements are also so much more than that.

It has been said that "a trial attorney should sum up at least three times during a case: once in opening statements, once during cross-examination and, again, during closing statements." What this really means is that

after adopting a theme and the key supportive facts that illustrate and support that theme, you should drive that theme and those supportive facts home over and over again throughout the trial. These key facts and themes should be woven through the fabric of every witness examination and every statement you make to the jury.

Attorneys upon completing law school should know, though, that they are not permitted to make an overt argument when delivering their opening statement. However, effective advocacy demands that you do precisely that but in a form that complies with the rules of evidence.

If you have given an effective opening statement, then jurors should feel that they know everything they need to know in order to decide in favor of the plaintiff. The only thing missing is the admissible evidence needed to support the information learned during your opening statement. An effective opening tells your client's story in the most persuasive manner possible. Begin by grabbing the jury with some dramatic facts or statements that introduce the theme of the case and paint a vivid visual image of who your client is and was before sustaining his injury.

§14A:81 Opening Statement Dos and Don'ts

Plaintiff counsel's opening should, as in any injury case, at least do the following:

- Immediately grab the attention of the jurors.
- Introduce the themes of plaintiff's case.
- Introduce and humanize the plaintiff describing who he was before the pivotal events.
- Tell the story of plaintiff's case including how he got hurt, who is responsible and why.
- Introduce the key witnesses from whom the jury will hear, but don't give away every important thing they will say. Create some suspense and encourage the jury to listen carefully to certain key witnesses.
- Tell the jury how the defendant's conduct has harmed the plaintiff and changed his life forever.
- Introduce the jury to the medical facts regarding the severity of the plaintiff's brain injury. In a brain injury case, it is essential to give the jury a basic understanding of the medical issues involved. Explain the relevant anatomy, how it was damaged, and how this impacts the plaintiff's capacity to function in his daily life.
- Tell the jury that based on all of the evidence at the end of case, you are going to ask them to fully and fairly compensate the plaintiff for his life altering injuries.
- Don't be afraid to tell them that you will ask them for substantial compensation which you are confident will be justified by the evidence.

Never tell the jury (a) that your opening is not evidence, or (b) to keep an open mind until they have heard all of the evidence. The judge and, especially, defense counsel will take care of diluting the force of your words to the best of their ability. Your opening should, instead, confidently convey that after the jury has heard all of the evidence, they will have no difficulty delivering a just and fair verdict, and that based on the evidence, you will ask them to award substantial compensation to your client. *(See last bullet above which was worth repeating here as it also will be at trial!)*

Opening statements are the attorney's first chance to capture the jury's attention, imagination, emotion and mindset. When you have completed your opening statements, the jury should be ready to decide in your favor. At worst, they should be leaning heavily your way. If you can at least begin to favorably sway the jury during opening statements, your prospects for prevailing by the end of the case are alive and well.

[§§14A:82-14A:89 Reserved]

C. The Evidence

§14A:90 Plaintiff's Direct Case

A jury does not merely want you to tell them what you mean; they want you to show them. It is imperative that you transport the jurors from the courtroom to the place where your client lives. The trial attorney's job is to shepherd the jurors on this intellectual and emotional journey. Without violating the golden rule, you should make jurors feel, touch, taste, smell, hear, see and understand what your client is forced to endure on a daily basis. Each one of them should feel as if they have been transformed into proverbial flies on the wall with an inside view of your client's life.

Use your own deep knowledge and understanding of your client's condition, your ability to communicate poignantly the plaintiff's story, real evidence and demonstrative aids, credible and forceful lay and expert witness testimony, and a well-honed ability to defeat factual distortion by the defense.

In brain injury litigation, real and demonstrative evidence is critical. Use "before and after" photographs of your client and "day in the life" videotapes in severe brain injury cases so the jurors can see what the plaintiff and his family go through with their own eyes and ears. The old maxim about pictures being worth a thousand words is proven to be true in trial after trial.

Even in less severe cases, photographs of your client showing evidence of head trauma after an accident can help a jury accept that your client suffered a forceful blow to the skull that had the ability to injure his brain. Photographs of other evidence, such as the badly damaged vehicle that your client was in at the time of a motor vehicle crash, can also provide some credible evidence of likely trauma.

In any brain injury case, work with graphic medical illustrators and experts to create anatomical drawings of the brain and consider juxtaposing them with abnormal CT scans or MRI's depicting cerebral hemorrhages or swelling. Consider colorizing the areas of hemorrhage for illustrative purposes. Also consider an exhibit that explains the results of various neuropsychological tests and correlates the manifest brain dysfunction with the areas of the brain that likely sustained direct or indirect trauma.

If the plaintiff's injuries involve a mild traumatic brain injury, you may want an exhibit showing individual neurons of the brain and showing how neurons send and receive messages. This exhibit would also explain how these messages either fail to be sent or received when microscopic damage occurs.

The value and power of physical evidence cannot be overstated.

§14A:91 Defendant's Case and Cross-Examination of Defense Witnesses

Beating the defense case primarily involves a monumental degree of preparation for cross-examination of the defense experts. In this regard, please refer to Chapter 19A, *Cross-Examination of Defendant's Traumatic Brain Injury Expert.*

[§§14A:92-14A:99 Reserved]

D. Closing Argument

§14A:100 Link Up Evidence With Elements

Closing arguments are the advocate's chance to remind the jury that everything you told them you would prove has been proven. Now, the rules of evidence do not even theoretically restrict you to simply telling the story of the case without argument. Now, it is time to remind them of what evidence supported each key fact and tell them why that evidence should be believed. Be sure to discuss the proof provided to support each element of the plaintiff's liability and damage claims. And do not be afraid to tell them why the evidence justifies the large damage award you prepared them for in opening statements.

§14A:101 Attack Defenses

During your closing argument, tell the jury how defenses were destroyed and why they should be completely rejected. If you hurt the defense's case, remind the jury of just how much. Use the defense's attempt to distort facts against the defense. Do not spend time arguing over "red herring" defenses unless they can be used to demonstrate that the defense is not worthy of belief and will say anything to avoid taking responsibility for the harm that they have caused. But, especially do not fail to confront more significant defenses.

§14A:102 Return to Themes

Summation is also the time to come back to the themes to which the jury was introduced at the outset of the plaintiff's case. For example, if you are trying a medical malpractice case and have constructed a theme that the defendant's "violations of the rules of the road" are responsible for your client's brain injury, you might argue:

> *I think we can all agree that if a truck driver violates the rules of the road and drives through a red light at a high rate of speed, mowing down and killing a child walking lawfully in that intersection, that truck driver should be held*

accountable for the catastrophic harm caused by his negligent and unlawful driving. Well, the rules of the road that govern doctors are called the standard of care. And, in this case, Dr. Jones violated the rules of the road that govern doctors. In fact, Dr. Jones went through not one but several red lights. And, because of this doctor, defendant's repeated and negligent violations of the standard of care, Mary Seaver has severe and permanent brain damage. Dr. Jones is still practicing medicine, but Mary cannot just move forward with her life as if nothing happened. Her life has been totally destroyed.

Note, there is also a sub-theme that subtly alludes to the defendant's "business as usual" attitude and unwillingness to take responsibility for his negligence and contrasts that with the inescapable enormity of the plaintiff's losses.

The themes you adopt must:

- Humanize your client.
- Overcome the jury's temptation to view mildly brain injured clients as being normal or not having lost much.
- Overcome the jury's desire to recoil emotionally from the suffering of severely brain injured clients.
- Crystallize an understanding of the full magnitude of your client's lifetime losses.
- Motivate the jury to hold the defense accountable for the harm that their negligent conduct has caused the plaintiff.

§14A:103 Use Jury Charge

The summation should use the language of the jury charge (e.g., "He had a duty to do A and he breached the standard of care by doing B.") and verdict form (it is often a good idea to show the jury the verdict form and tell them how they should answer each question) in order to correctly weave fact and law together.

§14A:104 Appeal to Sense of Justice

Finally, make sure that the jury understands they have the power to right a wrong and do justice. Remind them of their solemn obligations and promises to decide this case based on the evidence and the law. Ask them to award your client all the compensation to which he is entitled based on the law and facts of the case. Express your faith and that of your clients in the members of the jury to decide this case justly and fairly.