A Defendant's Guide To Approaching Head Injury Cases

--by James P. Hanratty, Marshall Dennehey Warner Coleman & Goggin

Law360, New York (February 08, 2013, 12:56 PM ET) -- In the past several years, the incidence of brain injury claims has increased dramatically. A review of most sports pages or television broadcasts reveals that head injury and brain trauma are much more a part of the collective consciousness of our society today. The Centers for Disease Control and Prevention estimates that 1.7 million Americans will experience some form of traumatic brain injury (TBI) each year. The vast majority of TBIs diagnosed involve concussion and other mild forms of injury.

Although, in the past, most reputable physicians would not diagnose a TBI without a loss of consciousness, it is generally now accepted that a TBI may occur even without direct trauma to the head or a loss of consciousness. Either as a result of increased diagnostic tools, awareness or opportunistic plaintiff's lawyers, the modern defense attorney must be able to investigate and defend these claims. The primary area of dispute when assessing head injury claims surrounds neuropsychological testing. In the typical TBI case, the plaintiff is being treated by a neurologist and a neuropsychologist. The neuropsychologist generally administers the tests upon which the diagnosis is based. Evaluating these tests can be an important part of discrediting the plaintiff's expert on cross examination.

Validity of Neuropsychological Testing

> "Pick a number between one to ten. Now, pick the number that you think I picked you to pick." Jarod Kintz, This Book Title Is Invisible.

Plaintiff experts rely on various neuropsychological tests to fortify their conclusions regarding the existence of a TBI. However, while these tests are generally considered to be standardized, examination of the expert often reveals that only parts of the entire test battery are administered to the patient. Further, often the administration of these tests are delegated to staff rather than the qualified psychologist. In Florida, this is a violation of the Administrative Code. Chapter 64B19-18.0004, Florida Administrative Code, Psychology describes regulations involving the use of test instruments.

Florida Administrative Code requires that, unless testing is being performed by a resident or student in training, which the psychologist supervises, the psychologist must meet face-to-face with the person being assessed. As a result, the tester must meet in person with the plaintiff and be involved in the testing for the results to be valid and for the expert to be in compliance with Florida law.

> (4) In performing the functions listed at subsection (2) of this rule, the psychologist must meet with the test subject face-to-face in a clinical setting unless the psychologist has delegated the work to a psychological intern, psychological trainee or psychological resident in a

doctoral psychology program approved by the American Psychological Association.

(5) It shall be a violation of this rule for a psychologist to sign any evaluation or assessment unless the psychologist has had an active role in the evaluation or assessment of the subject as required by subsection

(4) of this rule. A psychologist may not sign any evaluation or assessment that is signed by any other person unless the psychologist is signing as a supervisor, in conjunction with an evaluation or assessment performed by a psychological intern, psychological trainee or psychological resident, or as a member of a multidisciplinary diagnostic team.

This requirement recognizes that the procedure by which the test was administered can alter the test results. Discovery depositions of plaintiff's experts must include an evaluation of the propriety of the method of testing, not just the results.

Obtaining Neuropsychological Test Results

Neuropsychological testing is not objective testing. It requires the plaintiff's expert to interpret the raw data to come up with a diagnosis. In order to evaluate the opinions, the defense attorney and defense experts must examine the raw data. It is often a challenge to obtain the raw data from the testing performed on the plaintiff. In fact, Florida controls the release of data, protocols and questions from the tests. Rule 64B19-18.0004, F.A.C. states in part as follows:

(3) A psychologist who uses test instruments may not release test data, such as test protocols, test questions, assessment-related notes, or written answer sheets, except to (1) to a licensed psychologist… (2) after complying with the procedures set forth in Rule 64B19-19.005 F.A.C., and obtaining an order from a court …

(3) when the release of the material is otherwise required by law…

This is another reason for defense counsel to retain a psychologist as an expert early in the litigation.

Florida Limitations on Psychological Testimony

"Don't become a mere recorder of facts, but try to penetrate the mystery of their origin." Ivan Pavlov (1849-1936)

Although each side of a TBI case will likely have a psychologist conduct and interpret neuropsychological tests, in Florida, the psychologist **may not testify** as to causation of the conditions revealed by the tests. In *Grenitz v. Tomlian*, 858 So.2d 999, (Fla. 2003), the Florida Supreme Court confirmed that psychologists lack the medical training to testify as to the cause of a brain injury or psychological condition. For this reason, defense counsel must be prepared to object to such testimony and must also be prepared to have a medical expert of their own to testify to alternative causes if the case warrants.

Faking For Profit

"Science is as corruptible a human activity as any other." Michael Crichton, Next.

The lack of objectivity in psychological testing invites exaggeration or flat-out malingering. In a 2007 Spanish study, the researcher found that fifty percent of litigants in her study who took neuropsychological tests were likely to be malingering. "Detection of malingering in a Spanish population using three specific malingering tests," Archives of Clinical Neuropsychology , 2008;22(3):379-388. Although the researcher admits that the test sample was too small to be conclusive, she notes that her results were nearly the same as results from similar research performed in the United States.

This certainly does not mean that half of the plaintiffs are faking, but it establishes the need to conduct an aggressive counter-analysis of the information and opinions coming from the plaintiff. It also shows that testing, or opinions that do not acknowledge the effect that litigation or the opportunity for secondary gain may have on the plaintiff's performance, are likely invalid or based in part on motivation that has nothing to do with diagnosis or treatment.

Summary

As in the defense of any other injury claim, the best weapon is to be prepared. All of the typical sources of medical and historical information on a plaintiff are used in TBI claims. However, with a brain injury claim, the data may be used slightly differently, and important data may exist in non-typical places. Often, experts are brought in only to interpret the facts gathered during investigation. In a TBI case, it is important to work with experts early in the case to assist the defense attorney with the **investigation** of facts rather than merely their interpretation.

*Jim Hanratty is a shareholder in the Jacksonville, Florida, office of Marshall Dennehey Warner Coleman & Goggin.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.