

# UNDERSTANDING MILD TRAUMATIC BRAIN INJURY : BEFORE AND AFTER WITNESSES

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## INTRODUCTION

Taking the time to effectively interview jurors after a trial is an invaluable tool in trial preparation. That is when you learn where you went right and where you went wrong. This author commits to writing a list of at least five things he could have done better for purposes of self improvement. However, sometimes not seeing the forest for the trees is not so much about knowing about trees as about knowing when you are in a forest. The purpose of this article is to assist attorneys who are trying to demonstrate mild traumatic brain injury to insurance adjusters, defense lawyers, juries, and to other people they do not know.

## THAT WAS THEN THIS IS NOW

The job of the lawyer in proving the “unseen” injury of traumatic brain injury is to provide a believable before and after comparison of the injured person’s abilities. Those abilities become the planets in a once familiar galaxy which is now misaligned and, at times, on a collision course with other planets. Creativity is key. Following is a list; not an exhaustive list; but a potential list of abilities that a person may have had change as a result of brain injury.

1. Job Skills
2. Job Socialization
3. Job Success or Promotion
4. Recreation
5. Social Skills
6. Partner Skills –

- Spouse/Significant Other
7. Initiation
8. Civic Responsibility
9. Spiritual Commitments
10. Sporting Activities

These are all potential skills that a person may have affected as a result of traumatic brain injury. It is important to note that a person need not suffer alteration in skills in all of these areas. That is something that a person who would like to believe there is no injury will point out. In other words, if a person can still attend church and go to Sunday school, then the fact that they have been fired from their job due to insubordination, for instance, would make the person unaffected by any potential brain injury. (We will cover this concept in detail below)

## HYPOTHETICAL

For purposes of this article we will consider three individuals; the first will be a 52 year old construction worker; the second will be a 26 year old waiter; the third will be a 56 year old comedian.

Try to think of what types of, for instance, job skills (from the list previously mentioned) you would expect from a 52 year old construction worker; a 26 year old waiter; and a 56 year old comedian.

For the construction worker you might suggest an ability to read blue prints or follow instructions. For the waiter you may suggest the ability to remember multiple orders, the ability to add numbers for purposes of the check, the ability to be personable to diners, etc. For the 56 year old comedian you might suggest an ability to remember jokes, an ability to deliver them with the appropriate timing, the ability to think quick on one’s proverbial feet, etc. These would be good suggestions. Of course an in depth conversation with the actual hypothetical client is absolutely necessary. Moreover, a

conversation with the hypothetical clients' friends, family, significant other, or other person, is necessary. A similar exercise could be conducted for any one of the items listed above in terms of what one would expect from these three individuals. Each of these needs to be explored, dissected, and interpreted for expression to the jury, insurance adjuster, defense lawyer, or any other person.

### **PROCESSING THE INFORMATION**

I have found, and imagine all of us have, that for every opinion there is a counter opinion. This is certainly true in the areas of mild traumatic brain injury litigation. Where one expert says the result of a test is "white," another expert will come in to say it means "black." During the course of litigation it becomes clearer what the "non-believing side" is going to use to support the position that no brain injury exists. Likewise, the "believing side" owes it to their client to present all evidence supportive of the fact that it does exist.

This author recently resolved a mild traumatic brain injury case that was set for trial in less than one month via mediation. It had become apparent during the course of that litigation that the defendants were going to use videotapes which had been produced in discovery showing the plaintiff doing his "business" – comedy. This actually comes from the third hypothetical we have been using involving a 56 year old comedian. The defendants thought, by showing the jury 144 videotapes of the plaintiff performing his radio talk show that they would convince the jury, since he was able to do that, that he was not brain injured. In fact the videotaped talk show had been produced a year *after* the injury and indeed showed the Plaintiff hosting two hour radio shows everyday. There were 144 videotapes. It all seemed pretty compelling for the defense.

However, as the "believing side", and the plaintiff's attorney, I knew that the truth of the matter was not being told by simply putting those tapes in the VCR. My client's job skills had changed. In fact, when we reviewed those 144 tapes we saw consistent and definite errors conducive with the symptoms of mild traumatic brain injury. Things like: forgetting dates, sponsors, guests, story information, having to keep notes, forgetting the telephone number of the talk show. To show this to the "unbelieving side" we compiled 144 tapes in such a way showing the consistency in the problems the plaintiff had hosting the talk show. Additionally, we interviewed the production manager and the production assistant involved in the producing of the radio talk show. They both were very specific in pointing out that the plaintiff did not behave as "you or I would on tape." The taped interviews, the outtakes of the 144 tapes, along with an interview with a popular comedian who knew the plaintiff, were used to make the mediator and insurance company understand the very real impact of mild traumatic brain injury on my client. This in turn resulted in a significant award.

The point is that it is incumbent on the plaintiff's attorney to dispel the myths propagated by the "unbelieving side" so that the people making the decisions (insurance companies, a defense attorney) can be properly apprised of the truth.

### **BEFORE AND AFTER WITNESSES**

What attorneys call "before and after witnesses" are those witnesses who can attest to the behavior and personality of a person before an injury and after an injury. Of course locating these individuals is not an easy thing to accomplish. For instance, there may be someone who knew the injured party in high school but has not seen them for sometime after the injury. On the other hand, there maybe someone who the injured

party met *after* the injury but did not really know them *before* the injury. In any case, these witnesses are crucial to proving how the injured party was *before* the injury and how the injured party was *after* the injury. Where you can find people, for instance siblings, spouses, or others, that knew the person both *before and after* the injury makes for a more complete presentation.

## **WHEN LESS IS MORE AND WHEN MORE IS MORE**

Less is more when you are putting the witness on the stand. Be concise and precise. Know in advance what particular areas the witness will be able to assist you with in helping the jury to understand how your client has been impacted by mild traumatic brain injury. Do not try to get more out of the witness than can be had. These witnesses typically last between five and fifteen minutes. They typically do not involve long cross examination since this is where the defense can only look bad trying to beat up on an otherwise honest witness.

More is more regarding the number of before and after witnesses you have. Sometimes, I list as many as twenty-six before and after witnesses in pre-trial so the defense can learn as much as there is to learn about my client's changed condition before trial.

I advise my clients at the initial interviews that I absolutely need the names of between five and ten people who knew or know the client and the changes that have resulted since the injury. This is crucial. I explain that this is not an option. In other words, without these people, I cannot represent them in a mild traumatic brain injury case. Over the course of the first few weeks of my representation I obtain the names of people, contact information, and have them interviewed. This is where I began to learn a lot about my clients from other people.

I frequently, get a defense motion to exclude multiple witnesses (before and after witnesses) based on redundant testimony. I have never had this type of motion succeed since I am always able to tell the trial Judge that the testimony anticipated will be unique from the witnesses' perspective of how and where the plaintiff exhibits a change in personality, job skills, etc. In other words each witness will have unique testimony of observations supporting brain injury.

## **CONCLUSION**

In order to make another person understand mild traumatic injury, a lawyer needs to consider factors other than medical opinions, neuropsychological opinions, psychiatric opinions, and the defense experts' opinions. The trial lawyer needs to go deeper into the life and times of the client. The lawyer needs to examine, analyze, find out, and use the testimony and evidence provided by people who can share changes they have observed with the injured party.

In my humble opinion, this is understanding mild traumatic brain injury.

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