

Traumatic Brain Injury Case Selection

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Introduction

People who study surgery but get faint at the sight of blood can do little for their patients. Similarly, lawyers who are inept at converting injury and damage into money do a disservice to their clients. A lawyer's skill with that conversion begins with selecting proper cases. This is especially true in traumatic brain injury (TBI) case selection. Liability, injury and coverage (*LIC*) must be determined. Getting to know a client is crucial. Those and other considerations are discussed here.

Initial Considerations

Compassion, caring and feeling sorry for another person's poor condition are valid reasons to want to help. Lawyers have the power to offer those things to their clients and they should. A lawyer must transport a client's condition from poor to better. Money is the carrier. Lawyers must have a comfort level creating money, to make someone's life better, or they will end up like a surgeon who is afraid of the sight of blood.

The three legged stool

LIC – Liability, Injury and Coverage – is a three legged stool. All three must exist for the stool to stand. Questions of liability, damage and coverage can make any case undesirable: so much more for TBI cases. Brain injury damages can be enormous and coverage can limit the best liability case and often does. Consider the numerous instances of minimum auto policy limits (\$15,000 in the state of Nevada) and severe injury. Even large auto limits are confining. Consider the costs of litigating a questioned liability or damage case with \$100,000 limits. Astute insurers will break the bank, so to speak, hiring experts

to refute a case, making it impractical to respond and forcing a smaller settlement.

Weigh the cost

Investing your time and money in a TBI case is humbling. Initial investigation can easily cost several hundred, even thousands, of dollars. From there expenditures increase steadily and by the time you are ready to start trial, costing an estimated \$35,000, you've already spent \$50,000. If you lose, you are writing off \$85,000 and hours, days and weeks of your time.

Invest wisely

Analyze the liability. If there is a chance of no liability or 50/51% apportionment, consider the matter very carefully. Do not be seduced by a significant injury and lots of coverage when liability is reasonably disputed. Do not let a horrible injury or big corporate insurance cause you to overlook liability. The costs will still be there and, in the end, you and your client may have more to lose.

Getting to know the client

Once you establish a comfort level with your initial investigation of liability, injury and coverage (*LIC*), you can begin developing one of the most significant relationships your client will ever have; the relationship with their lawyer. Your client may not appreciate the importance of the relationship at first. A client with TBI, many times, does not appreciate the consequence of their injury initially. A lawyer can help bridge the gap. Many TBI clients have questions about their condition. Many times a lawyer is the first one to identify and discuss cognitive impairments with the client. A lawyer can help, initially, by listening and explaining. Later, and throughout the case, the lawyer should meet regularly with the client

First Interview

When first you shake hands with the person who has come to see you in your office, you are both strangers. Two things should be immediately apparent. First, you are analyzing the client and second, the client is analyzing you. The lawyer must earn the client's confidence and trust, and the client must present honestly. To achieve both of these goals, the lawyer can allow the client to explain why she has come and what she perceives the problem is. By now the circumstances of Liability, Injury and Coverage (*LIC*) are known and focusing on the client's presentation is desired. After a brief time, the lawyer can make more formal introductions followed by an explanation of the merits of the case. Then a discourse should take place addressing what the client can expect in terms of representation and future care.

A first interview should be a coordinated effort taking at least an hour, maybe more. The time spent will help bring out many things that might not otherwise be learned. Explain why prior education, employment, tax and medical records need to be collected. Is that a problem? Why? Get the names of prior doctors, information about prior injuries and car accidents and health insurance. Get the names of people who interact with the client so you can check with them regarding changes in your client. Get all family names and addresses since the defense will obviously want to know this basic information. Is that a problem?

Finally be sure to agree on a manner in which the client will obtain the information in the next few days. If this is important to them, it will not be an issue. Convey to your client that you require their assistance in their case by helping to get information and locate witnesses. Client cooperation can reveal a lot about a client's motive.

Second Interview

It is a good idea to schedule the second interview during the first and usually within a couple of weeks. This keeps information flowing and investigation moving. Ask to meet the spouse, kids, parents, or significant other.

Get people who are involved in your client's life to participate early on. They will certainly be deposed by the defense later. Help them to understand how TBI affects people closest to the client. Explain the likelihood of their serving as guardian ad litem for the client. Are they willing? Is their support for the client?

More Considerations

There are variable considerations in selecting a TBI case. The following is a list of some them.

Date of Injury

It may be important to consider the date of injury. The best scenario is selecting cases with recent dates of injury. This follows standard thinking that the further the date of injury the harder it is to prove. For TBI cases this is especially true. TBI clients are not always diagnosed until months after the injury. Hospital emergency rooms do not typically conduct specific neurological or neuropsychological testing. After weeks and months pass, the person with TBI begins to suspect something more is wrong and finally consults with a doctor. The process may eventually lead to a neurological finding.

A case with an impending statute of limitation should always draw consideration. Why has the case not been filed or properly handled previously? Has the person been receiving medical and psychological evaluations? Or has the person simply been going to chiropractic and acupuncture physicians? What has the person been doing with their life since the injury?

Self Reporting

Is the person self reporting signs, symptoms and consequences of brain injury? This is important to consider. Valid TBI clients do not self report problems as they typically lack insight into their problems. Spouses and others usually observe changes more than the client reports them.

Has someone told the client that they have TBI: A chiropractor or friend? Are they familiar with terms and conditions that they have no reason to know of

save how they are suffering from them? These are important things to consider and look into by investigating a case.

Lawyer Shopping

It is always important to know if the potential client fired their last attorney. There is usually more to the story than the client's version. And be especially concerned if there is any discussion about suing former counsel. This is a sure sign of a litigious client who may eventually turn on you. The reasons for terminating former counsel can be valid but this is surely a red flag. Make some calls to the other lawyer. If your potential client is uncomfortable with that then you might best be uncomfortable with the case.

Work Status

Is the person working? Many people with mild to moderate brain injury do continue working after the injury. It is not an easy sell for the jury however. If a person is working then they really can't be *that* bad. Of course that is not always the case. What about a person's ability to stay employed? If they are fired, will they be able to find a new job?

What is the person's job? Is she the owner of her own business? Is she a manager? Is he a blue collar or white collar worker? These are all very important things to consider in selecting a case involving TBI.

Marital Status

Is there a disgruntled former spouse? Is there a supportive spouse? Are their kids from a former marriage? Is the relationship good? Is she a good wife? Is he a good husband and father? All these things are important areas to go over with the client.

Has the injury hurt the marriage or relationship with the kids? Will she consider counseling? Why not?

Prior Injury

Has there ever been a concussion or head injury? Defendant's love prior "car accidents"; whether they were serious or not. Consider every injury and accident the client experienced. Go over all medical procedures they ever had, whether or not related to the case. Is there any psychological history? Defendants love abusive childhoods or family deaths to make your client's condition antedate the injury.

Conclusion

Traumatic brain injury case selection involves careful planning and attention by the attorney. Anything less can be very costly. The process should continue through the first few interviews, medical evaluations, and weeks of investigation. A lawyer should keep an open mind about reassessing a case if during litigation information bears it out. That is why getting as much information as early as possible is crucial to good case evaluation and selection.

Initial considerations should be establishing *LIC*, liability, injury and coverage. Getting to know the client in interviews is crucial. Client participation in locating information is important. Other considerations include date of injury, self-reporting, prior representation, work status, marriage status, prior injuries, prior medical care, and prior lawsuits. Beyond these considerations, a lawyer must keep an open mind to re-evaluate a matter if information is revealed during discovery to support it.