

Brain and Spinal Cord Injury Cases: Confronting the Special Medical and Legal Challenges

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By L. Michael Shannon

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Introduction

Brain injury cases, and to a lesser extent cases involving serious spinal cord injuries, are some of the most challenging and interesting types of cases that a personal injury lawyer will handle. One of the toughest challenges is that often the plaintiff, who has suffered a head injury, doesn't feel that there is anything wrong with them. The plaintiff may not realize or accept that they have limitations and refuse treatment. To succeed in these type of cases requires the lawyer to be organized, creative, patient, focused, thoughtful and energetic. Ironically, they must rely on their executive functions. The same functions that the plaintiff may have had affected as a result of their traumatic brain injury.

Planning

At the very first interview with the plaintiff, counsel should be developing a strategy to move the case forward and to assist the plaintiff in receiving the treatment necessary to maximize their cognitive recovery. The goal for plaintiff's counsel is to ensure that they have a clear picture of what the future holds for the plaintiff before any thought of settlement is contemplated. This requires plaintiff's counsel to be proactive. You can not rely on the family physician to make the necessary referrals. The family physician is too busy and might feel that any referrals will be a burden on the system. The strategy is dynamic and will change depending on the circumstances and the facts you are confronted with.

Obtaining a detailed history at the first meeting is essential. In addition to getting a detailed history of the collision and the injuries suffered by the plaintiff, you must obtain a thorough family history. This ensures that you're aware of any pre-morbid problems that might be raised by defence counsel to explain or rationalize the plaintiff's current symptoms and deflect from the tortfeasor's conduct. By being aware of any potential problems, plaintiff's counsel can be prepared with an explanation to deal with it. Good defence counsel will spend a great deal of time reviewing the clinical notes and records and carrying out detailed examinations for discovery searching for any potential problem which may explain in part or fully the plaintiff's disability. There is an old saying that "if you throw enough dirt on the wall, some of it will stick". This is especially true when you have a jury. Juries do not have the experience of a Judge, and may not discount or ignore irrelevant information.

Educate the family and the plaintiff about traumatic brain injury at the first meeting. Families are often confused and don't understand that the head injury will have a life time impact on the plaintiff and the family. It is my experience that often the doctors at the hospital are too busy and have not explained the injuries and their potential ramifications to the plaintiff or their family in layman terms, so that the family realizes what they are facing. Family members often don't appreciate that even when something is characterized as a mild head injury, this can still result in a permanent personality change. This can have a serious impact on the family unit. Often I hear a spouse say that "Bob is not the man I

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married. He is now reclusive and just wants to be on his own. Before this injury he was very social and was the life of the party”. It is important that not only the plaintiff receive counseling, but also the family, to teach them how to deal with their “new life”. Family members need to receive counseling immediately. Social workers and psychologists should be retained to help educate and provide coping strategies to the family members.

Case Manager’s Role from the Lawyer’s Perspective

A solid team of health care professionals is imperative, if the plaintiff is going to maximize their recovery potential. The first thing that I do is hire a Case Manager. The Case Manager is the “quarterback” when it comes to putting together a team of healthcare professionals and ensuring that the plaintiff and their family receives assistance in coordinating appointments and answers to questions. I usually have the family interview 3 experienced Case Managers to decide who they feel would be the best fit. This is important because the plaintiff and their family will spend a great deal of time with the Case Manager, especially in the first 2 or 3 years after the injury. They will spend more time, initially, with the Case Manager than with you, so they must have input as to who they would like to hire so that it is a good fit.

The Case Manager must be experienced because they will arrange and coordinate all of the day-to-day treatment required by the plaintiff. This has to be in place prior to discharge from hospital, so that the transition is as seamless as possible. The Case Manager must be familiar with the geographical area in which the plaintiff resides, so that they can put together a team that is local. This reduces the amount of time required by the plaintiff or the health care professionals in commuting and the costs. Organizing the proper team is a very time consuming process. I like to have some input, but for the most part I leave it up to the Case Manager to organize. The Case Manager must be experienced.

The lawyer shouldn’t be micromanaging this part of the claim. Lawyers don’t have the expertise to do this, nor do they likely have the time. The lawyer should be focused on the “big picture. They should be thinking about what will be required to prove the tort case and implement the necessary strategy to attain that end. If there is not going to be a tort component to the case, then plaintiff’s counsel should be thinking about what is required to maximize the “burn rate” of the accident benefits, so that the insurer will be ready, willing and able to settle the case “down the road”.

Some of the experts that the Case Manager might enlist at the outset of a significant traumatic brain injury are the speech language pathologist, physiotherapist, occupational therapist, rehab assistant, rehab therapist, rehabilitation support worker, personal support worker, psychologist, neuropsychologist, physiatrist, neuropsychiatrist, social worker and care attendants. The victim’s family physician will have to work with the team, but in light of their extremely busy schedule, the family physician is more likely to be in the

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background. Depending on the degree of injury and whether the victim is designated CAT pursuant to the SABS; this will dictate how long the “team” continues to work on the case. If the injury is very mild and not CAT, then the length of time and the number of potential team members will be less. I feel it is important to have a team in place even if the injury is minor. Counsel should pay for the assistance of a Case Manager even if the accident benefit insurer balks. This will ensure that an appropriate team is put in place at the outset. If after a period of time the Case Manager is not required, then you can wean them from the file.

If the injured plaintiff is still in school, it is incumbent on the Case Manager to meet with school officials. If the child is still in an elementary grade they should be meeting with the child’s teacher, principal and possibly a Board psychologist. If the plaintiff is in middle or high school, then the Case Manager must meet with the guidance department in addition to the other members of the Board. The child’s file should be flagged as special needs. The school should make whatever arrangements necessary to ensure that the child is successful and can move forward. If the plaintiff is in University or College then the Case Manager should be meeting with the guidance department. Many universities and colleges have programs in place to deal with special needs students. This includes having the injured plaintiff officially recognized as a special needs’ student and providing them with additional assistance and resources. Some of the allowances often offered are note takers, permission to take less than a full course load, extended time to write exams held in a quiet environment, extended deadlines for writing essays and teaching assistants. The Case Manager and the plaintiff’s Speech Language Pathologist can assist the plaintiff with interfacing with the school and providing the plaintiff with strategies to assist in studying and writing essays.

This assistance provides the plaintiff with a better chance of success, but can lead to skewed academic results. In one case, I acted for a client who was badly brain injured. She was provided with a number of resources which were instrumental in allowing her to graduate from University. In my opinion, if the plaintiff had been left to her own devices she would not have graduated. The problem is when she graduated the “safety nets” are for the most part removed. Upon graduation she has not found a job. The supports that she received in school are of limited assistance in the working world. If she does obtain a job, she will have difficulty performing the tasks required of her and she will require an inordinate amount of assistance. Her impaired executive functions prevent her from achieving success. Short of having someone sitting beside her and providing her with immediate feedback and instruction, she probably will be doomed to failure in all, but the simplest jobs. A far cry from what she likely would have achieved but for the accident. Consequently, having all this support is a double edged sword. It is imperative that the Case Manager and the lawyer work together with the other experts to temper expectations of the plaintiff. If you do not, then the plaintiff is going to have to deal with significant

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depression issues when they recognize their “new” limitations. Expectation management is a very large part of a lawyer’s role in these types of cases.

Experts required to advance and defend the claim

From the plaintiff lawyer’s perspective, a number of the experts are already in place when one starts to focus on preparing the case for trial. That preparation starts shortly after being retained by the plaintiff. Some of the key experts are as follows:

- (1) A neuropsychologist (a psychologist who has special training in the neurobiological disorders of brain injury who specializes in diagnosing by detailed tests and the treatment of the t.b.i.) tests the plaintiff to come up with a baseline indication of where the plaintiff currently is situated. That testing should be repeated on at least one or two occasions prior to trial. The tests should not be done within 12 months of each other, due to the fact that the plaintiff might start recognizing the questions which would skew the results. It is important from both the plaintiff and defence perspective that this guideline is honoured. Depending on the neuropsychologist, I may have them continue to treat the plaintiff and work in conjunction with the speech language pathologist. This will depend on the neuropsychologist’s practice and their willingness to be involved.
- (2) A neuroradiologist (a radiologist with specialized training in dealing with injury to the brain) is also very helpful in explaining the x-ray, CT scan and MRI results. The neuroradiologist can explain the subtle differences seen on the CT scans or MRI’s that a radiologist may have missed or overlooked when they first saw the plaintiff in trauma. The initial reading might be wrong due to the fact that the radiologist didn’t have time to look carefully at the diagnostic tool or didn’t have the specialized skill to appreciate the significance of the problem.
- (3) A neurophysiatrist (a physiatrist with specialized training who will be able to comment on the brain injury and its effects on the individual) will be helpful in commenting on the impact of the injury on the plaintiff and their ability to return to work, and to activities of daily living and future treatment needs.
- (4) A neuropsychiatrist, (a psychiatrist who has training in neurology) is helpful in explaining the psychiatric component that many people with head injuries suffer. They also may prescribe medication to assist the plaintiff in controlling any anger management or other problems that they might be managed pharmacologically.
- (5) A neurologist (a doctor who specializes in the diagnosis and treatment of disorders of the nervous system) will be helpful in providing a medical overview of the injury, diagnosis, prognosis and possible future treatment.

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- (6) A vocational expert to prepare a psych-vocational assessment is critical. It is typically the only evaluation that specifically addresses the question of employability. The expert looks at the pre-morbid employment status and likely career trajectory, the current employability, and the possible earning prospects in the future, with or without additional accommodations and rehabilitation. Any future vocational prognostication only requires that it be a significant possibility as opposed to on a balance of probability. This is a lower onus of proof for the plaintiff to meet.
- (7) An expert capable and qualified to quantify future care costs is essential. This will be one of the largest components of the damage assessment. Plaintiff's counsel is not required to prove this on a balance of probabilities, only that there is a significant possibility of this occurring. The largest portion of the future care costs involving a catastrophically injured plaintiff will be for future care costs. If the plaintiff requires 24 hour supervision or care, the annual cost for the service will be approximately \$150,000. If the plaintiff is a teenager, then the damages will be in excess of \$7,000,000, even on a present value basis. An experienced, testified hardened assessor whose evidence has been accepted in the Superior Court is necessary.
- (8) An accountant/economist will present value the future care costs and future loss of income. I generally retain an accountant, unless I have a young client who is going to incur a large number of future care costs over their lifetime and an economist is necessary to provide evidence that health care costs will greatly exceed inflation. The economist then can provide a gross-up or assist a structured settlement specialist in supporting a structure based on the CPI.

Special Considerations in Acting for the Catastrophically Impaired Litigant

If you are acting for a catastrophically impaired litigant make sure that you are prepared to spend the money necessary to maximize the plaintiff's claim. To do these cases properly you have to "spend money like a drunken sailor" on experts. Not unwisely, but with the goal that your client will not be left short of money later in life. Typically to prepare these cases properly, disbursements will be anywhere from \$50-75,000, depending on the age of the plaintiff and the seriousness of the injury. If the matter proceeds through trial, disbursements could be \$100-125,000. If you can't afford to spend this amount of money then you should either refer the file to another lawyer or partner up with a lawyer who can afford to.

I can't overemphasize the importance of lay witnesses, especially in jury trials. These are the witnesses who will connect best with the jury. Jury members see lay witnesses like they see themselves. Juries feel that lay witnesses "cut to the chase". They speak in simple language that they can understand and only testify for short periods of time. In my opinion,

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lay witnesses in jury trials are as important as expert witnesses. They are able to provide a pre-morbid picture of the plaintiff and a comparison of how he is performing currently in his daily activities, work and life in general.

I believe in demonstrative evidence especially in jury cases. Pictures and videos to humanize the plaintiff are very helpful. Medical illustrations and models assist everyone, including the judge and lawyers, in understanding the significance of the injury and why the plaintiff is not functioning like they did before. I couldn't think of going to trial without a medical illustration.

School records and awards of achievement are important. They help your vocational experts with the foundation of their evidence and once again assist a jury in knowing the plaintiff and what they were like prior to the injury.

Make sure that you have thoroughly canvassed whether there is additional insurance or reinsurance available. Sometimes defence counsel has not carried out a proper investigation. Make sure you obtain an undertaking at discovery to speak to the insurer to determine whether there are any additional policies of insurance or reinsurance. This is very important to know. Likely, a badly brain damaged plaintiff's damages will exceed the primary insurance coverage and you will require more money to satisfy their future needs and requirements. Also, it is important when you are making an offer to settle that you are aware of the policy limits. You not only do not want to settle for anything less than full compensation, but it may impact a potential bad faith claim.

Mild TBI

When you are approached by someone who has suffered a mild brain injury you must do a detailed analysis as to whether the damages will justify acting for this plaintiff. If the injuries aren't serious then the case might not meet the threshold. Even if the case might meet the threshold, you are faced with dealing with an oppressive deductible of \$30,000. This deductible might "wipe out" any claim that you may have or reduce the damages, such that you are going to be working for "free". Careful consideration of each case is essential. I will often take these cases on and monitor them. At some point, plaintiff's counsel will have to carry out a cost benefit analysis to determine if it is worthwhile proceeding. Closely following the client in their activities of daily living and ability to work are helpful in providing markers for comparison and determining the degree of change in the plaintiff. Family members and lay witnesses are valuable resources when assessing a person who has sustained a mild traumatic brain injury. They are also invaluable in assisting the jury to understand this "silent epidemic".

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Conclusion

Organization and having a strategy or a blue print on how you are going to handle the file is critical. Without the necessary planning and execution, the plaintiff will not be adequately compensated or maximize their physical recovery. The plaintiff relies on you for assistance and advice not only during the time that you act for them, but also after the case has settled. Staying connected with the plaintiff after the case has settled provides them with assistance in making decisions that might paralyze them now.

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BIOGRAPHY

Michael Shannon was admitted to The Law Society of Upper Canada in 1987. He graduated from Osgoode Hall Law School with an LL.B. in 1985. He is a Partner at Cassels Brock & Blackwell LLP. He is a former Managing Partner and Deputy Managing Partner of Cassels Brock. He is recognized by Lexpert and The Best Lawyers in Canada as one of the leading lawyers in Canada in Plaintiff Personal Injury. Michael has written and lectured extensively throughout Canada on Personal Injury Issues. His practice is restricted to acting for plaintiffs who have suffered very serious injuries as a result of motor vehicle collisions, malfunctioning products, slip and falls or medical malpractice. He is a Director of the Ontario Trial Lawyers Association. He was the past Chair of the Canadian Paraplegic Ontario's Toronto Annual Wheelchair Relay. He is an avid golfer and skier. He coaches children's hockey, soccer and baseball.