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The joy and satisfaction of a trial lawyer representing persons who have suffered traumatic brain injuries

by Irvin V. Cantor



It is rare for a trial lawyer, busy with the demands of an active caseload, to spend the time to reflect on why it is that he or she enjoys being a trial lawyer. Writing this article has enabled me to do just that. While it has been difficult to put my thoughts in words, the process has been quite valuable to me – actually helping me to put my life's work in perspective.

The passion for justice, the desire to stand up for the little guy, the challenge of overcoming significant obstacles, and the thirst for knowledge are common motivations for trial lawyers. Fulfilling the goals fueled by these motivations is why I have found representing persons who have suffered traumatic brain injuries to be so rewarding. I have had the privilege over the past 28 years of having represented hundreds of persons who sustained traumatic brain injuries. In so doing, I have experienced, and continue to experience, the greatest joy and satisfaction a trial lawyer can have.

Injury to the brain

The human brain is the most remarkable and intricate organ in nature. It not only controls our physical, cognitive and emotional functioning, but it is what provides the higher level abilities which separate us from all other creatures. We are what our brains permit us to be.

The brain contains a complex network of billions of neurons which communicate with other nerve cells. This communication takes place in synapses, junctions between cells, which basically convert electrical impulses into chemical signals. The brain contains: (1) gray matter, which is nerve tissue not covered by myelin, a white coating which facilitates nerve conduction and (2) white matter ("axons"), which is nerve tissue covered by myelin allowing the axons to carry nerve impulses between neurons. Acceleration forces on the brain sometimes cause shearing of layers of brain tissue, resulting

in tearing of the axons. Widespread damage to the axons is referred to as diffuse axonal injury (DAI). Moreover, nerve cell bodies do not regenerate. Consequently, the destruction of a large number of nerve cells results in permanent brain damage.

The human brain is soft in texture, having the consistency of gelatin. The skull, of course, is hard and rigid, with multiple protruding ridges. While the human brain in many ways is quite resilient, it also can be quite fragile. Acceleration – deceleration forces, such as those commonly present in motor vehicle collisions, have the propensity to cause the brain to suffer damage as it passes over and strikes the ridges of the skull. Such injuries can occur even when the victim does not suffer a loss of consciousness. Moreover, the injuries usually are not detectable by CT or MRI. Nonetheless, the injuries may be devastating to the victim.

One who has suffered a mild brain injury typically looks fine to the casual observer, with no scars, no limps, and no visible sign of impairment. Yet, the victim may have such severe problems – physically, cognitively, and emotionally – that his or her life has been turned upside down. Usually the victim cannot understand why he or she is having such a difficult time functioning, and feels quite alone and frustrated. Victims of mild brain injury are known as “The Walking Wounded.”

It is up to the trial lawyer to educate the jury about the client’s brain injury, to explain that looking “well” makes the injury even more devastating for the client, and to motivate the jury to award the client a sum sufficient to fully and fairly compensate him or her. These are among the most difficult challenges facing a trial lawyer. I have found that my clients who suffered brain injuries, more than any other injury clients, place their complete trust in me to serve as their advocate. Taking on this responsibility and helping my clients to recover for an injury that is very real to them has made me feel like what I do really matters.

Bonding with the person who suffered the brain injury and his/her family

A brain injury often causes a wide range of problems affecting almost every facet of the victim’s life: (1) physical sequelae may include headaches, dizziness, photophobia, seizures, smell and taste dysfunction, sexual dysfunction, sleep problems and fatigue; (2) cognitive sequelae may include problems with memory, concentration, attention, judgment, flexibility of thought, and problem solving; and (3) emotional sequelae may include mood disorders, anxiety, depression, and personality changes. Consequently, in order to effectively advocate for the client, it is necessary for the trial lawyer to learn how the client is doing across all areas of human functioning. This process, by necessity, requires discussion of the most personal and

intimate areas of the client’s life. It also requires spending a lot of time with the client and his or her family members. It has been my experience that if I make it through this process without getting fired for being so nosy, I end up developing a strong bond with my client and his or her family. This bond is an essential foundation for the TBI litigation process that typically follows.

Fighting for the brain-injured client

TBI litigation is often quite contentious and intrusive. Typical defense tactics include: (1) subpoenaing every prior medical or other record it can find regarding the client; (2) requesting that the client undergo defense medical examinations, by experts who usually have a track record of opining that someone’s problems are not the result of a brain injury; (3) conducting surveillance of the client by private investigators; (4) interviewing acquaintances of the client, and discussing the client’s brain injury and case with them; and (5) combining these efforts and others to find a theory, other than the brain injury, which the defense can ultimately sell to the jury to explain the client’s problems. This process makes the victim of a traumatic brain injury feel victimized a second time, often causing the client to experience self doubt and helplessness.

More than any other type of injury case, a TBI case requires the trial lawyer to be a pillar of strength and stability for the client. It is absolutely necessary for the trial lawyer to vigilantly fight overly intrusive defense tactics and to protect the dignity of his or her client. Moreover, the trial lawyer must constantly remind and reassure the client that he or she is the innocent victim of someone else’s negligence. I cannot remember a TBI client who did not need such reassurance.

Serving as the advocate, confidant and supporter for the client who has sustained a brain injury can be as rewarding for the trial lawyer as it is for the client. Such service enables the trial lawyer to focus on what is important and to avoid distractions and roadblocks in achieving the client’s goals. Very often I have found myself applying advice I gave to a TBI client to my own life. Moreover, such service provides a ballast for the client throughout the litigation process and serves to further cement the relationship between the trial lawyer and the client. It has been extremely rewarding to me to have a client say at the end of the case that he or she could not have made it through the case without my support.

Trial of a brain injury case

The trial of a brain injury case is the culmination of months of preparation, in which the client’s story can finally be presented to the jury. I like the task of taking a lot of information, much of which is quite complex, and synthesizing it so that the end result

is a case which is easy for the jury to understand and appreciate. I have learned that the most effective way to present my client's brain injury case at trial is through lay witnesses, who spend time with my client on a daily basis, as opposed to expert witnesses, who are paid to examine my client in limited sessions. I have also learned that the jurors react much better to evidence they can actually see, not just hear about. Consequently, I use demonstrative evidence in every stage of the brain injury trial, including pre and post-accident photographs and videos of my client, radiographs, brain scans, medical illustrations, and diagrams. I conduct the entire trial in Power Point and Sanction slides. I very much enjoy the challenge of combining creativity and timing to orchestrate the evidence for a brain injury trial.

The trial of a brain injury case also enables the trial lawyer to advocate passionately about the devastation caused to his or her client's life. By the time of trial, I usually have spent so much time with my client that it is easy for me to speak from the heart about my client's plight. Indeed, if it appears that I am not speaking from the heart about my client's brain injury, believe me - the jury will let me know with its verdict.

I find the trial of a brain injury case to be interesting, emotional, hard fought, and fast paced. It provides the excitement which attracted me to become a trial lawyer in the first place.

Achieving justice for the brain-injured

Success in a TBI case requires overcoming so many substantial obstacles that it is especially gratifying for the client and the trial lawyer. Some of the obstacles facing a trial lawyer, which are unique to TBI litigation, often include: (1) agreeing to take a case even though the client, who looks completely fine, was not diagnosed by his or her own doctors with a TBI until several months after the accident; (2) keeping the client focused and undeterred when he or she feels like it is not worth pursuing the case any longer; (3) convincing the jury that the client has suffered a real injury to the brain despite multiple defense experts who dogmatically testify that there is no such injury; and (4) motivating the jury to award a sufficient sum to someone who has no visible injury. Persevering through these obstacles, and others, is such a long and arduous process that the end result provides the client and the trial lawyer with a strong sense of justice achieved. By the end of almost every TBI case I have handled, my client has told me, "I feel like I've been through a war." Of course, my staff and I usually feel the same way.

The jury's award also serves as a validation of the devastating effects of the client's brain injury, which in many cases is much more important to my client and his or her family than is the money.

Success in my clients' TBI cases has enhanced my appreciation of the American system of justice. I would be remiss if I did not confess that my deep appreciation of our justice system has helped me deal with the extreme dejection and disappointment I have felt in those TBI cases I have lost.

My traumatic brain injured clients

It has been a privilege to represent so many persons who have sustained traumatic brain injuries. These folks have had their lives changed in an instant and looked to me to attempt to achieve some justice for them. I have felt honored that these clients would entrust me with such an important task and have tried my best to live up to their trust. It has been a task that has enriched my life. Along the way, I developed many close relationships with these special persons. It is extremely gratifying to hear from my clients years after their case is over to tell me how they are doing and how they are progressing with their lives. These individuals have had to continue coping with lives changed by brain injury long after their case ended, and most have bravely done so. That, of course, is what it is all about.

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