Posted on: October 20, 2003

EFFECTIVE DEFENCE TACTICS AT MEDIATION OF BRAIN INJURY CASES

Continuing Legal Education, November 20, 2003

October 20, 2003

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I. INTRODUCTION

As we all know the vast majority of brain injury cases will be resolved at mediation. Nevertheless, most counsel will go to great lengths to develop their trial advocacy skills but spend little time on developing the skills necessary to do effective counsel work at mediation. I hope that this paper will assist counsel in becoming more effective in achieving their client's goals at mediation.

A. BEFORE THE MEDIATION

The claim of brain injury is the "Holy Grail" for plaintiff's counsel. These are the big cases that all plaintiff's counsel salivate over. You can be sure that plaintiff's counsel will be very well prepared for the mediation. Obviously, defence counsel should be equally well prepared. Before the mediation you should:

1. Have a complete medical history including pre and post accident clinical records.
2. Have reviewed all reports from independent medical examinations and have had your experts review and provide you with critiques of comments of all plaintiff's experts reports.
3. Have interviewed or at least obtained statements from as many lay witnesses as possible.

I cannot over stress the importance of this. Often, plaintiff's counsel will defer the interview with important lay witnesses until just before trial. If you have statements from close friends or co-workers or fellow students which tend to show that the plaintiff is continuing to function better than the plaintiff is describing, the effect is over powering.

1. Have as much information as possible regarding the circumstances of the accident and the plaintiff's behaviour in the immediate aftermath.

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Believe it or not, common sense is still important. It is still very difficult for plaintiffs to convince triers of fact of significant brain injury in the face of a normal Glasgow Coma Score, no observed lack of consciousness, no evidence that the plaintiff struck his or her head, evidence of the plaintiff behaving normally at the scene, etc.

Even in the face of expert medical evidence purporting to explain how it is possible to still suffer a significant brain injury in the absence of these symptoms, clear evidence from the defence on the above points will invariably carry substantial weight with the plaintiff and his or her counsel at the mediation.

1. Obtain all before and after school and employment records and have these carefully reviewed by vocation and medical experts.

If the plaintiff's actual real world level of function at school or on the job is markedly different from his or her test results the effect is significant.

Also, these records are very important with regard to issues surrounding pre-accident earning potential and residual ability.

1. Make sure you have a thorough understanding of all terminology used in the medical reports. Also, make sure you have a good working knowledge of the relevant literature on the topic. One of the things which undermines the credibility of counsel at mediations is incorrect use of medical terminology, another is the inability to pronounce terms. This tends to reveal unfamiliarity with the concepts and will lead plaintiff's counsel to believe that you are not properly prepared to cross examine experts.
2. Should you develop a theory of the defence or should you simply use a shot-gun approach to criticising the plaintiff's claim? That is a choice that each counsel has to make depending on the available evidence in each case. Nevertheless, I am going to use this opportunity to try to persuade defence counsel that having an over all theory and presenting it clearly to plaintiff's counsel during a mediation is much more effective than simply trying to poke holes in the plaintiff's case.

We are all familiar with the classic "dog bite" defence. It goes like this:

(a) you weren't bitten

(b) if you were, it didn't hurt

(c) it wasn't my dog anyway

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In a brain injury case, that type of defence normally goes something like this:

(a) the accident was so minor you couldn't possibly have suffered a brain injury.

(b) if you did, you have made a full recovery.

(c) you're malingering.

(d) your problems are psychological.

(e) if you had gotten proper treatment you'd be better by now.

(f) you are upset about, pick one (a) losing your job; (b) losing your girlfriend; (c) male pattern baldness.

Generally, I think it is much more effective for defence counsel at mediation to be able to present a coherent logical theory as to what, if anything, is wrong with the plaintiff so that the plaintiff and his or her counsel will understand that if that alternate theory is accepted by a judge or judge and jury, the award will be much lower than what might be otherwise anticipated.

B. AT THE MEDIATION

1. "Non Evidence"

A common theme for defence counsel is to emphasize "non evidence" or absence of evidence which would indicate a brain injury. Examples of this would include the following:

(a) a normal Glasgow Coma Scale.

(b) absence of evidence of loss of consciousness or disorientation in the ambulance crew report.

(c) absence of reference to symptoms of brain injury in emergency records, GP records, etc.

Emphasize the positive. Defence counsel often dwell on positive aspects of school performance, job performance, social skills as evidence of no brain injury.

2. **Use of Computers**

Recently, defence counsel have presented power point evidence on computer screens at the mediation. This is an effective method of highlighting inconsistent reports of symptoms presented by the plaintiff to various doctors at different times.

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By juxtaposing conflicting statements of the plaintiff, defence counsel is able to make the point more convincingly than by flipping through pages of records and labouriously reading the relevant quotations.

I would encourage counsel to work to develop effective use of computer technology at mediations.

3. **Dealing with Expert Evidence**

I often hear counsel on both sides of the table saying things like, “oh, it doesn’t matter what Dr. X’s opinion is, he’s a hack. He won’t be accepted.” These types of comments in this context are completely ineffective in my view. Even if both counsel know that a doctor is renowned for holding certain beliefs, what counsel may know is not important. What is important is what a judge or judge and jury can be persuaded to believe.

The appropriate way to deal with unfavourable expert evidence is:

(a) if the doctor’s evidence has been rejected by the courts, quote specifically from cases finding fault with his or her approach, and be prepared to explain clearly why the evidence would likely be rejected in this particular case.

(b) undermine the expert’s reports by showing that the facts upon which it is based are incomplete or inaccurate. This is the most commonly used and generally the most successful method of undermining expert reports.

(c) when dealing with a plaintiff’s neuropsychologist it is very important to have your neuropsychologist review the raw test data and advise you of any apparent inconsistencies in test scores, and inconsistencies between test results and documented performance in real world situations.

C. THE IMPORTANCE OF LISTENING

I have written at length about things defence counsel should say at mediation. It is appropriate that I devote at least a little time to the subject of listening. Defence counsel should use the mediation as an opportunity to learn as much as possible about the Plaintiff’s case. Defence counsel should always listen objectively and make sure that he or she does not get caught up in believing his or her own rhetoric.

Good defence counsel will carefully analyse risk and advise the client appropriately. Listening is the key to effective risk analysis.

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D. DON'T OVER DO IT

I have seen mediations go off the rails because defence counsel have been so overpowering that the plaintiff has apparently lost faith in their counsel. If that happens, the plaintiff will refuse to continue to participate and will undoubtedly be out looking for a new lawyer the next day. As defence counsel, that is the last thing you want to have happen. It is far more effective for defence counsel to treat plaintiff's counsel with deference and respect so that the plaintiff will also feel confident in his or her lawyer and continue to participate in the negotiation.

Also, if defence counsel appears to be over zealous in its defence attitude and unwilling to acknowledge any points made by the plaintiff, the plaintiff and his or her counsel will normally conclude that they would be much better off having the case heard by an **objective** judge and jury. It is often more effective for defence counsel to acknowledge the strong points of the plaintiff's case where appropriate and to give the impression of being relative sympathetic. If the reasonable and sympathetic defence counsel is not persuaded, the case is worth a lot of money, how successful will the plaintiff be in persuading a possibly hostile judge or jury of the value of the case? That is the question you want to create in the plaintiff's mind.

Finally, you never want to lose sight of the feelings of the plaintiff. Unless the plaintiff is an out and out malingerer, I believe it is best to always treat the plaintiff with dignity. This is especially important in brain injury cases. I often recommend that the plaintiff be outside the room for parts of the discussion during this type of case. Defence counsel should always try to be aware of how his or her comments will make a plaintiff feel. If you have to be the bearer of bad news, you should always consider presenting it first to plaintiff's counsel and allowing plaintiff's counsel to convey it to the client.

E. CONCLUSION

I believe in the adversary system. It is important that both the plaintiff and the defendant have strong effective representation so that a just result can be achieved. Effective defence counsel will always recognize real risk and attempt to work toward a reasonable settlement. The defence counsel who unreasonably refuses to negotiate meaningfully in a serious case, is doing his or her client just as much of a disservice as the defence counsel who overpays on a weak or questionable case. Knowledge, preparation, objectivity and courtesy are the hallmarks of effective defence counsel at mediation.

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