



Brain Injury Quantum Assessment **2006 Update**

Overview of the Decisions in 2006

There were six trial decisions in 2006 that considered quantum of damages for individuals that had suffered a brain injury. The quantum of non-pecuniary damages awarded ranged from a low of \$110,000 to a high of \$275,000. There were a variety of experts utilized by both the plaintiff and the defence to deal with the issues of whether a brain injury had been sustained and the extent and impact of the brain injury. The decisions considered quantum in a broad variety of cases, from a “minor” traumatic brain injury to a case with devastating physical consequences which overshadowed the effects of the ongoing problems associated with a mild traumatic brain injury.

All of the trial decisions were judge-alone trials. There may have been jury trials in which a brain injury was considered but, unfortunately, none of the counsel involved advised of such decisions. Therefore, this paper does not comment on the trends now being seen in jury trials in which a brain injury is considered. The 2005 decision in *Lee* and the manner in which the Court of Appeal dealt with that decision is the only information relevant to jury trials.

A review of these cases provides an insight into the kind of evidence that will assist in establishing the existence and consequences of a brain injury. In this paper, I will also address what may be common errors that plaintiff counsel make when presented with a potentially brain-injured client, as well as provide a list of questions to assist in determining whether further investigation is necessary to establish the nature and extent of a brain injury. Given the nature of the solicitor/client relationship and the discussions that counsel for plaintiffs have with the friends, family and co-workers of their clients, a lawyer acting for a plaintiff may be the first individual to recognize the existence of a brain injury. I recommend a thorough reading of those six brain injury cases, to all counsel working in the field of personal injury, as they are sure to provide you with insight into the many and various symptoms and complaints which may accompany a brain injury, as well as the evidence that will assist you in proving your case.

Quantum of Non-Pecuniary Damages Awarded

The six trial decisions concerning brain-injured individuals in 2006 were classified as follows: one minor traumatic brain injury, four mild traumatic brain injuries and one complicated mild. What follows is a summary of the quantum awarded for non-pecuniary damages in each of those cases. As can be expected, all of the individuals suffered physical injuries in addition to the brain injury. The decision in *Izony* related



more to the devastating physical consequences of the injury than to the mild traumatic brain injury. I know that three of the six decisions have been appealed by the defence. I have indicated, in the summary, where the decision is under appeal. One decision (*Stevens*) has been sent back for retrial by the Court of Appeal.

1. Minor Traumatic Brain Injury

The plaintiff in *Maillet v. Rosenau* [2006] B.C.J. No. 18 was diagnosed by Dr. Hunt to have suffered a minor traumatic brain injury in addition to significant muscle and ligament injuries. Dr. Hunt's opinion was that most of the brain injury was to the frontal lobe, resulting in depression, sleep disturbance, ringing in the ears, memory disturbance, headaches and problems with word-finding ability. Dr. Hunt emphasized that the existence of the traumatic brain injury contributed to the problems the plaintiff had in coping with her other injuries. Non-pecuniary damages awarded were \$110,000.

2. Mild Traumatic Brain Injury

Stevens v. Platcha [2005] B.C.J. No. 2775 is a decision that was overturned on appeal and sent back for retrial. The trial judge found that the plaintiff sustained a mild traumatic brain injury in two motor vehicle accidents, only the first of which concerned the trial. Mr. Justice Burnyeat accepted the opinions of Dr. Krywaniuk, Dr. Lysak and Dr. Hunt that the plaintiff had sustained a mild traumatic brain injury in both motor vehicle accidents. Mr. Justice Burnyeat further found that the cognitive problems complained of were primarily due to the first motor vehicle accident, with 15% of the neuropsychological problems being attributable to the second accident. The ongoing problems accepted by Mr. Justice Burnyeat included: a weakened ability to recognize or interpret abstract concepts or form generalizations at high levels; weakness in visual sequencing; difficulty with attention, concentration and short-term recall; decreased motor speed in her right hand; and difficulty in verbal fluency. A total non-pecuniary damage award of \$178,500 was made with \$110,000 of this award attributed to the brain injury. The \$110,000 award was then reduced by 15% to account for the effect of the second motor vehicle accident.

Stevens was appealed by the defendant and the Court of Appeal ordered a retrial. The appeal related to the manner in which causation for the injuries, in relation to the second motor vehicle accident, was addressed. The Court of Appeal concluded that various rulings made by the trial judge, during the trial, resulted in a trial that was fundamentally flawed and therefore it could not be said that the result of the trial would have been the same had these procedural errors not been made. There was not a comment made as to the quantum of damages awarded.

The plaintiff in *Izony v. Weidlich* [2006] B.C.J. No. 1986 was found to have suffered a mild traumatic brain injury in addition to serious physical injuries. The ongoing cognitive difficulties included: memory problems; difficulty concentrating, planning and



organizing; and an inability to multi-task. The most serious limitations in this case were the physical ones, including a resulting inability to walk due to his injuries. Non-pecuniary damages of \$275,000 were awarded.

Madame Justice Baker concluded that the plaintiff in *Watt v. Meier* [2006] B.C.J. No. 2046 had suffered a mild traumatic brain injury which, by the time of trial, she had made a good recovery from. Madame Justice Baker concluded that although the plaintiff's level of cognitive functioning had originally been impaired by her traumatic brain injury, she had – by the time of trial, six years later – improved to the point that she was functioning as well as she did prior to the accident. She remained more susceptible to fatigue due to her brain injury, continued to experience dizziness which was not disabling and had occasional episodes of vertigo. She was also at a 10 – 15% greater risk of seizures in the future. Non-pecuniary damages of \$115,000 were awarded with Madame Justice Baker commenting that the range of non-pecuniary damages for a mild traumatic brain injury was between \$75,000 - \$120,000. The defendant's have filed a Notice of Appeal regarding this decision.

Lines v. Gordon 2006 BCSC 1929 is the final decision of 2006 in which the plaintiff was found to have suffered a mild traumatic brain injury. Mr. Justice Lander concluded that there had been a 180-degree change in the plaintiff's behaviour patterns and his ability to function on a day-to-day basis, as well as in his ability to be competitively employable. Mr. Justice Lander concluded that the effects of the mild traumatic brain injury were permanent and included: severe and constant headaches with vestibular dysfunction; visual difficulties; fatigue; sexual dysfunction; depression; and impairments of higher cognitive function and capacity, such as memory, concentration, organization and decision making. The effects of the brain injury were described by Mr. Justice Lander as being "profound." Mr. Justice Lander concluded that the plaintiff's enjoyment of life had been virtually destroyed. He awarded \$225,000 in non-pecuniary damages. A notice of appeal has been filed by the defendants.

3. Complicated Mild Traumatic Brain Injury

Roussin v. Bouzenad [2005] B.C.J. No. 2682 is a decision in which the injury suffered by the plaintiff was classified as a "complicated mild traumatic brain injury." This classification was given by Dr. Hugh Anton, a physiatrist. Dr. Anton cited the existence of axonal damage as resulting in this classification and indicated that the prognosis for resolution of a complicated mild traumatic brain injury is the same as for a moderate brain injury. In other words, the prognosis for resolution was poor. Non-pecuniary damages of \$200,000 were awarded.

The Trends



The one clear trend that can be identified is the appeal of these cases by the defence. *Stevens* was appealed due to procedural rulings throughout the trial and a new trial ordered. Quantum in both *Lines* and *Watt* have been appealed.

In *Watt*, Madame Justice Baker indicated that the cases suggested the range of non-pecuniary damages for mild traumatic brain injury was between \$75,000 and \$120,000. Expect to be faced with this conclusion if you are running a mild traumatic brain injury case. As can be seen from the above summary, the cases from 2006 at least indicate that the range for non-pecuniary damages in mild traumatic brain injury cases is much higher than indicated by Madame Justice Baker and should depend more upon the impact on the individual plaintiff than on the classification attached to the brain injury. The importance of the classification to the assessment of damages, however, is highlighted in the decision of Mr. Justice Kelleher in *Roussin*, where at paragraph 81 he states as follows:

Brain injuries are commonly categorized as mild, moderate or severe. The categorization is significant in determining prognosis. Moderate and severe brain injuries have permanent effects. Mild brain injuries do not always result in permanent harm.

In all of the decisions, the trial judge appears to simply accept the expert's classification of the brain injury as being minor, mild or complicated mild. As can be seen from the above review of the mild traumatic brain injury cases, the impact of the injury upon the individuals varied greatly, with Mr. Lines being at the extreme end, suffering what was called a profound injury and virtually destroying his enjoyment of life. Regardless of the classification attached to the level of brain injury, the impact upon the individual was obviously the primary determinant of the level of damages awarded. Though Mr. Justice Lander found that Mr. Lines had suffered a mild traumatic brain injury, his injury garnered greater damages than those awarded to Ms. Roussin, presumably due to the evidence from the lay witnesses in particular, showing the absolutely devastating effect the injury was having upon him.

The importance of the lay evidence to the ultimate outcome of the damage award cannot be overemphasized. Although the medical diagnosis, particularly to establish the causation link, is of obvious importance, providing the judge with the evidence necessary to truly understand the impact of the injury upon the individual and the judge's acceptance of that evidence appears to have made the difference in the award of non-pecuniary damages being above \$200,000.

The Evidence of Brain Injury

All six of the trial decisions were cases where different counsel acted for the plaintiff. Therefore, it is not surprising that the evidence led regarding the existence of brain injury



varied from case to case. The following lists some of the evidence referenced in the decisions:

- Glasgow Coma Scale of less than 15
- Period of loss of consciousness
- Lack of awareness of events surrounding motor vehicle accident and the time period immediately during or after the motor vehicle accident
- Seeing stars
- Physical damage to the motor vehicle in the area behind the head
- Spotty recollection of events between the time of arriving and leaving the hospital
- Abrasions/bruising to the head
- Blackened eyes
- CT scan showing swelling of the brain

The Complaints Attributed to Brain Injury

A review of the 2006 decisions is striking due to the great variety of symptoms found to be attributable to brain injury. A review is of assistance to counsel acting for plaintiffs who have suffered a brain injury as it may assist in leading to a train of inquiry that will help prove the loss suffered by the plaintiff. Some of the symptoms attributed to the existence of brain injury include the following:

- nausea and dizziness
- decreased concentration
- impairments of speech including slowness and word-finding difficulties
- balance difficulties
- vertigo
- impaired ability to read
- emotional lability
- poor concentration
- change in sense of smell and taste
- blurred vision
- flashing lights in vision
- ringing in the ears
- problems with coordination and balance
- tremors or shakiness
- numbness
- headaches
- fainting spells
- periods where there is a “loss of time”
- Memory difficulties
- Distractibility
- Trouble telling right from left



- Depression
- Anxiety
- Anger
- Loss of interest
- Difficulties with attention
- Memory problems
- Difficulty with organization
- Difficulties with self-monitoring
- Difficulty setting goals and priorities
- Inability to multi-task

The Evidence that was Persuasive

The lay evidence painting the before and after picture of the plaintiff's functioning is referred to throughout the decisions. Anecdotal evidence of functioning was persuasive in all decisions.

In reviewing the decisions, it is evident that when time is spent on the qualifications of your experts – particularly those with experience treating brain injuries – the likelihood of their evidence being given greater weight is greatly increased. This may seem self-evident, but a not uncommon practice is to simply have the defendant accept that the expert is an expert in the field. Though I would not have expected it, a physiatrist's evidence was relied on more heavily than that of a neuropsychologist, a psychiatrist, a neurologist or a neuroradiologist in defining the level of brain injury suffered in *Roussin*. The evidence of the qualifications of Dr. Anton included in the decision of Mr. Justice Kelleher included that he had extensive experience in treating brain-injured patients. Mr. Justice Kelleher commented that "he brings a balanced and neutral approach and provides the benefits of his experience of having treated a large number of people like the plaintiff in the process of rehabilitation."

Dr. Hunt in *Maillet* was qualified as an expert in neurosurgery and the diagnosis of mild traumatic brain injury. Mr. Justice Powers gave considerable weight to the opinion of Dr. Hunt in reaching his conclusions regarding the injuries suffered by the plaintiff, noting that Dr. Hunt had done significant studies into mild traumatic brain injury and concussion. Regarding Dr. Hunt's evidence, Mr. Justice Powers said the following at paragraph 43:

Dr. Hunt's examination and review of the evidence was very thorough. The injuries and affects upon Ms. Maillet are complex, as is the development of her complaints. I am satisfied that Dr. Hunt gave an objective opinion of a complex problem. His thoughtful and logical opinion carries considerable weight.



The above illustrates the significant benefit of taking the time to lead evidence regarding the specific qualifications of your experts. Being thorough in this area can help to ensure that the trial judge gives appropriate weight to the various experts heard in a case.

The Appeals

There were two appellate decisions considering quantum awards in cases where a component of the injury suffered by the plaintiff was a brain injury in 2006.

In *Lee v. Dawson* [2006] B.C.J. No. 679, the jury's award was reduced by the trial judge to the upper limit. This award was upheld on appeal. In addition to the brain injury, the plaintiff suffered serious facial disfigurement and other physical injuries causing permanent, constant and disabling pain. Leave to Appeal to the Supreme Court of Canada was denied.

The trial judge's award in *Stevens* was overturned on appeal and a new trial was ordered. The non-pecuniary damage award at trial was \$178,500. Injuries suffered by the plaintiff included a fractured nose, facial scarring, spinal fractures in four of her lumbar vertebrae and a brain injury. In this case, the evidence of the brain injury arose during an assessment done by a psychologist hired by the plaintiff to perform an assessment for the purposes of the litigation. The psychologist diagnosed the plaintiff as having suffered from a mild traumatic brain injury with ongoing sequelae at the time of trial, including difficulties with attention, concentration, memory, organization, self-monitoring, verbal fluency and cognitive flexibility. Additional evidence regarding the nature and extent of the brain injury was provided by Dr. Hunt, Dr. Krywaniuk (psychologist) and Dr. Hanna Lysak, a clinical psychologist and neuropsychologist who had been hired by the defendant. As indicated above, due to various procedural rulings during the course of the trial, a new trial has been ordered by the Court of Appeal.

A notice of appeal has also been filed in *Watt and Lines*.

The Objective Evidence

In *Watt*, the CT scan showed a small mid-temporal hemorrhagic contusion with some mild swelling on the left side of the brain, but no significant mass effect. The plaintiff suffered a seizure the day after the motor vehicle accident and the CT scan done following her re-admittance to hospital showed that the area of bruising had markedly increased in size and that the areas of hemorrhage within the contusion had slightly increased in size. Three days later, the plaintiff suffered a further seizure while in hospital and the CT scan following that seizure showed that the area of edema surrounding the contusion had slightly increased in size. An EEG done that same day showed severe non-specific disturbance over a fairly widespread area of the left temporal region.



A CT scan in *Roussin* showed evidence of shear hemorrhaging on the frontal and parietal lobes. An MRI was also conducted. It was reviewed by a neuroradiologist who concluded that the plaintiff had suffered a significant closed-head injury.

Dr. Hunt in *Maillet* testified that the lack of any demonstrable abnormality on an MRI will not rule out a mild traumatic brain injury. Dr. Hunt explained that an MRI will not show damage to the axons, which can be damaged in a head injury.

Neuropsychological testing was done in most of the 2006 cases.

The Plaintiff's Experts

A variety of experts were retained by plaintiff counsel in the 2006 cases. What follows is a listing of the experts hired by the plaintiffs, as well as their area of expertise and the case in which they were hired. I have intentionally not listed treating practitioners, nor have I listed experts that were hired to provide an opinion regarding the injuries not related to the brain injury.

Neurologists

Dr. P. Teal (Watt)
Dr. Brian Hunt (Stevens, Maillet, Lines)
Dr. Donald Cameron (Lines)

Psychiatrists

Dr. Deryck Smith (Roussin)
Dr. O'Breasail (Lines)

Physiatrists

Dr. Hugh Anton (Roussin) (Lines)
Dr. Travlos (Maillet)
Dr. Van Rijn (Izony)
Dr. Nairn Stewart (Watt)
Dr. M. Bayley (Watt)

Neuropsychologists

Dr. James Schmidt (Watt)
Dr. Diane Russell (Lines)
Dr. Ursula Wild (Roussin)

Otolaryngologists



Dr. Neil Longridge (Roussin) (Watt)

Psychologists

Dr. Krywaniuk (Stevens)
Dr. Peter Joy (Izony)
Dr. Spellacy (Izony)
Dr. C. Ford (Watt)

Neuroradiologists

Dr. Gary Stimac (Roussin)

Neuro-Ophthalmologist

Dr. Duncan Anderson (Roussin)

The Defence Experts

A variety of experts in a variety of speciality areas were used by the defendants to provide opinions regarding the existence and extent of brain injury. The following lists, again, only those experts who provided opinions regarding brain injury and excludes the witnesses called to testify regarding the physical injuries suffered by the plaintiff.

Psychiatrists

Dr. Vallance (Maillet)
Dr. J. Smith (Watt)

Physiatrists

Dr. Mark Crossman (Lines)

Psychologists

Dr. Hanna Lysak (Stevens)

Neurologists

Dr. Prout (Watt)
Dr. Jeff Beckman (Roussin)

Neuro-Psychologist



Dr. R. Freeman (Watt)
Dr. Vernon Wilkinson (Lines)

NeuroPsychiatrist

Dr. Andrew Howard (Lines)

With respect to the consideration of the defence-hired expert's evidence, the evidence of Dr. Vernon Wilkinson in *Lines* was rejected as not being sustainable on all the evidence.

The evidence of Dr. Hannah Lysak, in *Stevens*, was rejected by Mr. Justice Burnyeat.

The Lessons

A number of mistakes can be made by counsel acting for individuals who have suffered a brain injury – in particular a mild brain injury, which does not impair a client in an obvious way. The first hurdle is identification of the existence of the brain injury. It is beneficial to keep in mind the definition of “mild traumatic brain injury” as defined by the American Congress of Rehabilitation Medicine, which defines it as follows:

- a. A physiological disruption in brain function and is manifest by at least one of the following:
 - i. any period of loss of consciousness;
 - ii. any loss of memory for events immediately before or after the accident;
 - iii. any alteration in mental state at the time of the accident (example, feeling dazed, disoriented or confused);
 - iv. focal neurological deficit(s) that may or may not be transient; and

- b. In order to keep the designation “mild,” the injury should not exceed any of the following criteria;
 - i. loss of consciousness of approximately 30 minutes or less;
 - ii. a Glasgow Coma Scale of 13 – 15; and
 - iii. a post-traumatic amnesia of not greater than 24 hours.

With the above in mind, the following list is meant to highlight some of the mistakes that can be made by plaintiff counsel in determining whether they are dealing with a client who has suffered a brain injury. It is not meant as a critique of counsel involved in the cases reviewed. On the contrary, it represents lessons learned from the fine counsel work exhibited in the reviewed cases:



Mistake #1 - A normal or near normal GCS means no brain injury

When you review the cases that were decided in 2006, a striking fact in common is that the GCS was often normal or near normal. This normal or near normal GCS can lull a plaintiff's counsel into not investigating whether in fact a brain injury has occurred. The lesson in the reviewed cases is to look beyond the GCS and to not use the GCS as an exclusionary tool when deciding whether further investigation of the existence of a traumatic brain injury is warranted.

GCS was not intended as a tool for diagnosing a brain injury, rather it was a tool to enable doctors and ER personnel to quickly and effectively communicate some basics regarding a patient's condition. Dr. Alan Bass presented a paper written by Dr. Rubin Feldman at the recent TLABC Medical/Legal Conference in Cabo San Lucas. In this presentation, the inability to diagnose the existence of a brain injury, based on the GCS, was emphasized. Dr. Feldman defined a traumatic brain injury in accordance with the definition developed by the American Congress of Rehabilitation Medicine (quoted above), which specifically includes individuals with a GCS of 13 – 15, with 15 being normal.

Mistake #2 – Thinking that evidence of a period of loss of consciousness is a necessary requirement to having sustained a brain injury

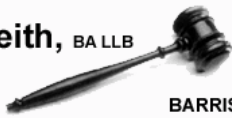
Of the six brain injury cases in 2006, four concerned a plaintiff where there was no documented period of loss of consciousness. In three of those four cases, there was a period of “spotty” memory following the accident. In the fourth, the plaintiff was noted to be alert and oriented shortly after the motor vehicle accident.

Mistake #3 – Thinking that there must be objective or hard evidence in the form of an MRI or CT scan to support the existence or extent of brain injury

Dr. Anton, in *Watt*, indicated that much of the brain damage is microscopic and therefore cannot/will not be picked up by an MRI or CT, which leads to the possibility that the extent of brain injury will be underestimated. In *Mallet*, Dr. Hunt testified that with a brain injury, the axons may be injured and that this damage will not show up on an MRI.

What Role has the Upper Limit had on Assessment of Damages in the 2006 Cases?

Comments on the upper limit and how it applies to the assessment of non-pecuniary damages were made in two cases, *Roussin v. Bouzenad* and *Izony v. Weidlich*. In *Roussin*, the upper limit was sought by the plaintiff. Mr. Justice Kelleher described the role that the upper limit has in assessing damages at paragraphs 90 – 92, where he states:



The task of a trial judge is not to compare a plaintiff's injuries with those suffered by the plaintiffs in the trilogy. Rather, "severely injured plaintiffs" are entitled to maximum non-pecuniary damages: Blackstock v. Paterson Estate (1982), 35 B.C.L.R. 231, [1982] 4 W.W.R. 519 (C.A.).

The Court of Appeal in Boyd v. Harris (2004), 24 B.C.L.R. (4th) 155, 2004 BCCA 146 made it clear that the trier of fact must assess non-pecuniary damages appropriate to the circumstances of the particular plaintiff, uninfluenced by the legal limit. The legal ceiling acts like a governor on an engine to limit that amount:

Just as the operator of an engine may choose a speed appropriate to the circumstances, uninfluenced in that choice by the governor until the speed limit is reached, a trier of fact, be it judge or jury, must assess non-pecuniary damages appropriate to the circumstances of the particular plaintiff, uninfluenced by the legal limit. The legal ceiling, a rule of law and policy, operates, like a governor, to limit the amount of the judgment that may be granted for damages assessed under that head.

(Boyd, at para. 32)

Moreover, the court was critical of reasoning by trial judges that begins with a categorization of the injury as neither devastating nor catastrophic. The use of these conventional descriptors leads to an assessment of non-pecuniary damages based on a comparison of the injuries of the plaintiff with those of the plaintiffs in the trilogy.

In *Izony*, the plaintiff's counsel argued that this was a limits case, arguing that although the plaintiff was not rendered a paraplegic in the motor vehicle accident, he did suffer from many of the problems associated with paraplegia and as well suffered the cognitive difficulties associated with his brain injury. In this case, the physical difficulties were seen to be more significant than the cognitive difficulties. In considering this argument, Mr. Justice Masuhara commented that the upper limit applies equally to a plaintiff with a serious brain injury but little physical impairment, as it does to a plaintiff rendered quadriplegic with no cognitive impairment. Mr. Justice Masuhara awarded the plaintiff \$275,000 for non-pecuniary damages, stating that the plaintiff had suffered a mild traumatic brain injury and his cognitive abilities had been impaired. The physical injuries suffered by this plaintiff were significant and included limited use of his legs and reliance on a wheelchair. Mr. Justice Masuhara stated specifically that the plaintiff had a clear appreciation of the loss that he had suffered and will continue to suffer in the future. In terms of the purpose of non-pecuniary damages, Mr. Justice Masuhara confirmed that the award was intended to provide the injured party with reasonable solace for their misfortune. The cap at the time of the decision, after taking into consideration increases due to inflation, was \$307,000.



Identification of Brain Injury

A plaintiff's counsel has a unique opportunity to identify the existence of a brain injury in their client. Typically, they will be in a position to spend a great deal of time with the client to find out about the changes the client has experienced since the motor vehicle accident. Conversely, treating practitioners will not have the opportunity to spend as much time with the client or be able to question them in such detail. Another tool available to plaintiff counsel that is not available to treating practitioners, generally, is the opportunity to talk to the people near to the client and find out their impressions of the changes they have seen in the client, since they were injured.

A good starting point for the opinion evidence may be to have an assessment done by a psychiatrist, but point out in your letter of instruction that it is your understanding the client has been exhibiting certain symptoms and that these symptoms have you concerned that the possibility of a brain injury exists. Don't risk or rely on the expert to tease out the evidence. If you are aware of it, bring it to the attention of the expert tasked with assessing your client.

At the TLABC Medical Legal Conference in Cabo San Lucas, the paper referred to above (which was presented by Dr. Bass and written by Dr. Feldman), recommended a series of questions to consider while assessing whether a traumatic brain injury has been suffered. Those questions are as follows:

1. The determination of whether a decrease in short-term memory (post-accident) exists is probably the most valid factor which one can identify as indicating that further investigation would be necessary. This should be coupled with a question relative to how much of the history obtained from this individual resulted from his/her memory of the incident and how much was actually information provided by somebody else involved in the accident;
2. The determination as to the presence or absence of vertigo (dizziness) and tinnitus;
3. The continuing presence of headaches;
4. The possible decrease in concentration; and
5. The development of a change in personality with intolerance to stimuli which would not have been a problem, pre accident;



6. Due to the severely negative effect of post traumatic stress disorder (PTSD) on the evolution of recovery from a traumatic brain injury, the individual should be asked about the presence of nightmares, the re-living of the accident, as well as the effect of being in heavy and light traffic, either as a passenger or a driver in a car.

Dr. Feldman indicated that lawyers are often the first individuals to recognize the existence of a brain injury. The above questions provide a guide for your discussions with your client and their friends, families and co-workers to assist with determining whether further assessment into the existence of brain injury is necessary.

The Expert Evidence to Obtain and the Questions You Want Addressed by Your Experts

If you have identified the possibility of the existence of a brain injury, or if you are building your case for damages for an individual who has suffered a brain injury, consider asking your experts to address the following:

1. What factors lead to the categorization of this particular brain injury as mild, moderate or mild complicated?
2. Whether the objective evidence in the form of a CT and/or MRI accurately and fully demonstrates the extent of injury or whether there are elements of the injury that will not be visualized and thus the possibility that the extent of injury may be underestimated?
3. Any experience/qualifications that make your expert more able/qualified to assess brain injury and the sequelae of brain injury;
4. Identification of the particular area of the brain that has been injured and the expected deficits arising from such an area of injury;
5. Prognosis for recovery and how this is dictated by the elapsed time between the injury and the date on which an assessment is being conducted;
6. Cumulative nature of brain injuries;
7. The effect that a brain injury may have on the ability to cope with other physical injuries sustained in a motor vehicle accident;
8. The Glasgow Coma Scale and its significance or otherwise in diagnosing either the existence or extent of a traumatic brain injury. If the GCS was normal, why this does not matter in diagnosing the existence or extent of traumatic brain injury;



9. A period of loss of consciousness following a motor vehicle accident and the significance or otherwise of this in diagnosing the existence and extent of a traumatic brain injury;
10. The interplay between psychological injuries and traumatic brain injuries;
11. Vulnerability to deterioration in function with illness, fatigue, stress and aging due to a traumatic brain injury;
12. The plaintiff's appreciation of the loss that he has suffered despite the existence of the brain injury;
13. The interplay between fatigue and frontal lobe injuries;
14. Basis for the diagnosis of traumatic brain injury;
15. If narcotic medications have been used, what impact if any they may have on cognitive functioning and whether this impacts the diagnosis of the existence of a traumatic brain injury;
16. Causation for the various cognitive complaints, including headaches and fatigue, as being related to the traumatic brain injury.

I am hopeful you will obtain something of benefit from this review of the 2006 brain-injury decisions and that this review will assist you in the identification and presentation of brain-injury cases.