

# Arguing Damages in TBI Cases

By Michael A. Kelly

Our brains make us unique among all the inhabitants of the animal kingdom. It is the single most important organ in our body, controlling our breathing, heartbeat, emotions, movements, relationships, speech, vision and information processing. Our brains keep us safe. They enable us to have memories and relationships and to experience all the things which make life worth living. When an injury compromises, limits or eliminates our brain's ability to do all of the foregoing functions, a part of our humanity is lost.

When crafting a final argument in a TBI case, we need to highlight all of the ways the plaintiff has been changed to remind our jurors of the magnitude of the loss that has occurred. Comparing and contrasting the plaintiff's pre-injury personality, independence, energy, relationships and plans for the future with their post injury state is especially

critical when the client has no outward signs of disability.

Many clients who have sustained a TBI complain that "I look the same, but I feel like someone else." That concern should be foremost in your mind because there is always a risk that jurors will be thinking the same thing. Jurors must be made to understand that seeing is not always believing. An analogy involving a car makes that clear: Would you rather own a car with a badly smashed driver's door, or one with a cracked engine block that is hidden beneath the hood? Exterior damage can always be fixed – but an engine block cannot. Like the engine block, once the brain is damaged it no longer functions as it did before injury.

Oftentimes, there is no indisputable test or scan to definitively show the extent and nature of brain injury. Your job in that circumstance is to find friends, coworkers and community members who can testify

to specific character traits and behaviors that are different now than they were before the event which produced the injury

This problem of judging the extent of injury or damage on the basis of appearances is one that spouses and partners regularly experience. In physical injury cases when a spouse suffers a physical injury, the people around them can adapt. But when personality and character change, it's a different ballgame altogether.

Without normally functioning long- and short-term memory, TBI victims are lost; unable to operate in the present or to plan for the future.

Imagine someone waking up in the morning next to their husband or wife to whom they have been married for 15 years, and finding a different person lying next to them. They went to sleep and their spouse was 5 foot 11, had blond hair and brown eyes. When they woke up, the person next to them was redheaded, 5 foot 6, and has blue eyes. How troubling would that be? There's no question that a major change has taken place. Now imagine that when they went to sleep their spouse had a personality that was warm, thoughtful, polite, organized and loving – and when they awoke all of those traits were gone. They



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are now married to someone else – angry, unpredictable, mercurial, and incapable of caring for themselves. When a loved one’s personality and uniqueness is removed and the qualities that made a spouse say I want to spend the rest of my life with you are gone, jurors quickly understand the magnitude of the loss and harm that has occurred.

In addition to relationship changes, memory impairment is also a disability that jurors can appreciate and empathize with when it is illustrated by real life examples. TBI memory deficits are much more than forgetting where someone has left their mobile phone or car keys. Without normally functioning long- and short-term memory, TBI victims are lost; unable to operate in the present or to plan for the future. Memory frames the past and gives us guidance on what to do and how to behave tomorrow. If we cannot rely on past experience, we don’t know how to behave or respond in previously familiar surroundings and circumstances. Without a functioning memory, we cannot learn anything new. Memory is the continual process of information retention, a central part of human behavior. In allowing us to recall and rely on past events, we understand who we are and how to behave. The

absence of a functioning memory becomes the enemy of TBI victims. Physicians, family members, co-workers and social acquaintances are all powerful witnesses to the problems and pain caused by impaired or nonexistent memory.

The power of analogies in arguing damages is a critical tool in TBI cases. Peter Pearlman, a Hall of Fame trial lawyer with a host of seven and eight figure verdicts analogizes modest brain injuries to priceless objects, stressing the significance of modest injuries. Peter argues: “The defendant says that Mr. Andersen is fine because he has only a small injury to his brain. But that is like saying a Van Gogh painting is equally valuable where there is a small tear in the canvas: or that a nuclear power plant is safe with just a tiny amount of radiation in the cooling pond. Next the defendant will try and tell us that boats with small leaks and drinking water with just a pinch of lead are nothing to worry about. Ladies and gentlemen, there is no such thing as a little bit of injury to your most important organ.”

Ben Rubinowitz of New York City, a member of the Inner Circle of Advocates uses an analogy that is even simpler: “Ladies and gentlemen, living with a brain injury is like trying to drive on a four-lane

freeway at commute time with three lanes closed.”

And finally, Kathleen Flynn Peterson of Minneapolis, a past president of AAJ talks to jurors about the brain’s importance as follows: “Our brains can’t be replaced. As we age, our other body parts start to wear out. When our eyesight is no longer

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as good as it was, we have our cataracts removed or new intraocular lenses implanted. When our knees and our hips and our shoulders are painful, we get artificial joints. We can even replace our kidneys or our lungs or our hearts. But we have only one brain for life. There is no opportunity to get it replaced or repaired. If our brain is broken or damaged it stays that way for the rest of our lives. There’s no medication, or lotion, or surgical procedure to make it better.”

That is the message to give jurors so they understand the impact of your client’s injury on your client and their family. ■