

**PLUNKETT COONEY**  
ATTORNEYS & COUNSELORS AT LAW

## Head Games

### Defending Traumatic Brain Injury Claims

Presented by  
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## Today's Presenters

			
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## Traumatic Brian Injuries (TBI)

- Especially the mild TBI is a difficult claim to defend.
- It is controversial.
- It is subtle.
- It is dangerous.
- ... because it takes so little to convince a jury.



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## Taking CHI & TBI Seriously

- 1993 – Recall the \$79 million verdict against Domino’s Pizza when their delivery driver struck another vehicle while trying to satisfy the company’s 30-minute delivery guarantee.
- Plaintiff’s injury was based on a brain shear diagnosis.
- If this injury could produce a verdict of this magnitude 30 years ago, even as punitive damages, we can understand the present risk presented by such a claim.



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## Closed Brain Injury

- Closed brain injuries happen when there is a nonpenetrating injury to the brain with no break in the skull. A closed brain injury is caused by a rapid forward or backward movement and shaking of the brain inside the bony skull that results in bruising and tearing of brain tissue and blood vessels. Closed brain injuries are usually caused by car accidents, falls, and increasingly, in sports. Shaking a baby can also result in this type of injury (called shaken baby syndrome).

DEFINITION COURTESY OF JOHNS HOPKINS MEDICINE

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## Penetrating Brain Injury

- Penetrating, or open head injuries, happen when there is a break in the skull, such as when a bullet pierces the brain.

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## The Challenge

- Such injuries are often a challenge because there is no external wound necessary to cause the TBI.
- Is there a way to verify via objective testing?
- Is objective evidence even necessary to make a jury submissible case?



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## No Loss of Consciousness

- You can't reject a diagnosis of traumatic brain injury because there has been no loss of consciousness.
- What appears to be a minimal criteria – actual loc – has been dispensed with, reducing the threshold for claiming brain injury. How can you establish a criteria for brain injury when you discount this kind of objective symptoms?
- Also, a normal neurological examination does not rule out a traumatic brain injury. So, at this point, any professional's opinion ruling out TBI is meaningless. If accepted, this means anyone can have a brain injury correction.

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## MRI Scan

- Computed Magnetic Resonance Imaging (MRI)
- MRI uses powerful radio waves and magnets to create a detailed view of the brain.
- This test may be used after the person's condition stabilizes, or if symptoms don't improve soon after the injury.



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### CT Scan

- Computed tomography (CT) scan of the brain is a good method of investigation to diagnose intracranial lesions, but there is a disagreement about indications in MHI patients.
- A series of X-rays to create a detailed view of the brain. A CT scan can quickly visualize fractures and uncover evidence of bleeding in the brain (hemorrhage), blood clots (hematomas), bruised brain tissue (contusions), and brain tissue swelling.
- Detects Bleeding and skull fractures
- Microscopic changes at the cellular level may not be detectable.

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### Limits of Diagnostic Medicine

- CT scans and MRIs may not be sensitive enough to detect traumatic brain injuries at the mild or moderate levels.
- These concessions seriously weaken any defense based on objective evidence
- The limits of such diagnostic tools greatly limits the defense's ability to challenge the claim based on history or objective testing.
- Effectively, these limitations back the defense into a corner and forces the defense to have the plaintiff examined and even surveilled.

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### Objective Testing

- MRI and CT scans are often normal for a patient who has suffered a mild traumatic brain injury.
- MRI and CT scans are often not sensitive enough to detect brain damage.
- How mild is the injury that is undetectable?
- Should that mean it does not qualify as an injury?

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### Difficulty Defending Brain Injury Claims

- A brain injury can occur even though there has been no blow to the head:
  - Expert witnesses will offer opinions about diffuse axonal injury, the shearing (tearing) of the brain’s long connecting fibers (axons).
  - This happens when the brain is injured as it shifts and rotates inside the bony skull due to outside forces.
  - Opens the door for all kinds of claims of questionable origin.

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### Preserve/Develop Objective Evidence

- Attorneys often receive the case 1-2 years afterward and most objective evidence is gone.
- Early information gathering is crucial.
- What are we looking for?
  - Biomechanical information
    - How did the accident occur?
    - What were the forces acting on the plaintiff?
    - How could this head injury have occurred?
  - Inconsistent (or consistent) statements and actions by the plaintiff and witnesses.

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### Preserve/Develop Objective Evidence

- Contemporaneous (or near contemporaneous) evidence
  - Police report
  - Bodycam footage
  - Witness/driver statements
  - EMS reports/statements
  - Photographs/videos
  - Measurements and EDR



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### Preserve/Develop Objective Evidence

- Emergency room records
  - Triage, by definition, is a preliminary assessment to determine the urgency of need for treatment and the nature of treatment required.
  - Focused on serious ailments
  - Was there loss of consciousness?
  - What were the immediate studies (i.e., CT, MRI, EEG?)

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### Pre-Accident Evidence

- How was the plaintiff thinking/acting/feeling before the accident?
  - Employment records
  - Social media activity
  - Prior medical records
  - Prior lawsuits/testimony
  - Criminal background
  - Photos/videos



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### Post-Accident Evidence

- Notes/diaries
- Medical records – what was the follow-up treatment?
  - Evolving complaints
    - Do they track with a typical TBI?
    - Do they mimic pre-accident complaints?
    - Are they equally or more likely caused by something else?
      - General aging?
      - Previous injury or disorder?

*Continued*

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### Post-Accident Evidence

- Treatment recommendations
  - Were they followed?
  - For how long?
- Neuropsychiatric evaluation
  - Did the plaintiff's attorney request evaluation?
  - Get the raw data.

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### Case is Filed – Get it to an Attorney!

- Due diligence
  - Do I have all the documents?
  - Internet search (get to know your plaintiff)
- Reach out to clients and witnesses.
- Tailored written discovery requests
  - Be creative
  - Get authorizations for medical and employment records.

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### Case is Filed – Get it to an Attorney!

- Social media sweep
- Surveillance
  - Where and when?
- Lost wage claim
  - Type of work they were doing before
  - Is the claim supported and credible?
  - Can it be refuted?



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## Consider the Experts

- Neurologist
- Neuropsychologist
- Psychiatrist
- ENT
- Physiatrist (physical medicine and rehabilitation)
- Audiologist
- Optometrist
- Life-care planner
- Vocational rehabilitation expert
- Economist



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## Consider the Experts

- Also consider accident reconstruction and biomechanical experts.
- Is the expert testimony admissible? **MRE 702**
  - Qualified
  - Based on sufficient facts and data
  - Product of reliable principles and methods
  - Reliably applied the principles and methods to the facts



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## Picking the 'Right' Defense Experts

- Evaluate the medical records – who are the treating specialists?
- Match or exceed plaintiff's experts.
- Does the expert fit the case/venue/etc.?
- Get your "team" together early.
  - Have your expert(s) helped you prepare for depositions?

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## The Neuropsychology Evaluation

- Subjective testing – lots of room for bias
  - Reading comprehension
  - Language use
  - Attention/concentration
  - Memory
  - Motor speed and dexterity
  - Executive functioning
  - General reasoning
  - Visual / spatial skills
- Validity measures
  - Helps avoid the skewing of findings/data



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## Depositions

- Plaintiff
  - In-person or remote?
  - Depose family members and/or spouse.
  - Videotape the deposition.
  - Know the records (have your chronology).
  - Get your expert to help you prepare.
  - Prior injuries/concussions (i.e., sports, etc.)



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## Depositions

- Plaintiff's expert
  - Know the key answers you need to obtain.
    - Don't expect a smoking gun.
  - Get the concessions you can and move on!
  - Know the medical terminology and records.



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## Q&A with Dr. Schutte



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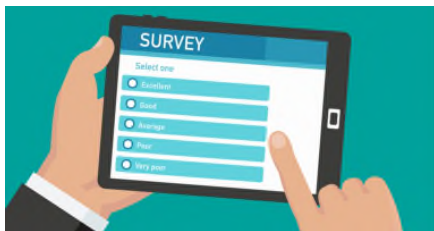
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## Online Survey



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### Post-Open and Obvious: What Property Owners Can Do to Protect Themselves

Open and obvious may be gone in Michigan, but property owners can still protect themselves in premises liability cases.

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www.cna.com/resources/articles/obligation

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