THORSNES, BARTOLOTTA & MCGUIRE

A New Approach in Evaluating Brain Damage Victims

by Kevin Quinn, Esq.

Bob Dylan may not have needed a weatherman to tell which way the wind was blowing, but in a trial you definitely need the right expert to keep it blowing your way. This was particularly true in a recent medical malpractice action I handled involving two incidents which caused irreversible brain damage to my client.

On the surface, the facts of this case reveal a startling degree of negligence by the defendants. The first incident occurred in December of 1990 when my client, an 80 year-old woman, drove herself and her husband to the hospital for what should have been a routine outpatient barium enema. During the test, my client was positioned too close to the edge of the table and then left alone while the technician worked the X-ray machine. At that moment, my client fell from the table striking the right side of her head, shoulder and right hip on the cement floor. An emergency CAT scan of my client's head showed that she had sustained a subdural hematoma and massive brain swelling. For the next week she remained in the hospital while she was treated with diuretics to reduce her brain swelling.

On the second day of her stay the attending physician went on vacation, and her care was left primarily to a neurological resident. Despite my client's complaints of painful headaches, she was discharged by the resident after he determined from a non-contrast CAT scan that her brain swelling had subsided. Once home she immediately began to suffer from even more severe headaches and vomiting. A day later her son found her nearly unconscious and vomiting. She was rushed back by ambulance to the hospital. Again, she was given a noncontrast CAT scan which, in the attending doctor's opinion, indicated that the subdural hematoma had not decreased and that the swelling had significantly increased. She was placed back on a course of treatment by diuretics. Over the next few days my client did not improve and the family brought in their own neurosurgeon for an independent consultation. Based on his evaluation, it was determined that my client was suffering from an enlarging isodense subdural hematoma. A CAT scan with contrast confirmed his diagnosis and an emergency surgical drainage was performed.

In January my client, now suffering from persistent confusion and incontinence, was admitted to a skilled nursing facility for intensive occupational, physical and speech therapy. Confused, barely ambulatory and requiring nasal tube feedings, my client was both physically and neurologically compromised.

Unfortunately, the final act in this drama involves one more incident of neglect. In late January my client was left alone by nursing home employees. When unable to summon prompt assistance, she fell as she attempted return to her bed, once again striking her head. Another emergency CAT Scan showed a new subarachnoid bleed at the base of her brain. Originally active and able to drive herself to that fateful first appointment, my client now requires 24 hours-a-day care.

In the case just outlined, I turned for help to a relatively new group in San Diego — the Disability Assessment Program at Sharp Rehabilitation Center. In the past I have used the usual objective experts, and relied on physical evaluations to answer the questions I had in order to make my case. This time I felt that because of my client's age, and past medical history I was going to have to make a much stronger case than usual to the trier of fact in order to maximize monetary recovery. I was intrigued by the team approach that Dr. Barbara Schrock, Clinical Director of the program, uses for evaluations because I wanted to look at every possible aspect of brain damage before the case went to binding arbitration.

Traditionally, trial lawyers have relied on the physical evidence that can be worked up in brain damage cases. CAT scans, MRI, physical examinations by neurologists and an evaluation by a clinical psychologist are usually the only tests that are performed. The result is that technology may have often worked against the trial lawyer in these cases. Simply put, the over-reliance on technology has meant that an attitude of "if you can't take a picture of it, it isn't there" prevails in the courtroom. In many brain damage cases the jury has been led to accept that absence of evidence is evidence of absence. I now believe that some clients have been getting shortchanged with this approach.

Continued on next page

The brain is like an orchestra — no matter how well tuned the instruments are or how experienced the musicians, the music won't play if the conductor is incompetent. As a trial lawyer dealing with many brain injury cases, this metaphor is important to keep in mind as these cases are worked up. What most people (including many medical experts) are not aware of is that considerable brain damage can occur on a microscopic level that cannot be visualized by a CAT scan or even an MRI. This kind of damage rarely affects IQ so it cannot be diagnosed or evaluated in an academic or office setting. I feel that we have let our fascination with technology take over evaluating these patients, and it is time to get back to basics and begin to make more use of what was once the norm for brain damage evaluation — the neuropsychological assessment. In this approach, a battery of tests is used to arrive at a diagnosis. The result is a more complete workup.

This is where Dr. Schrock's Disability Assessment Team really made a difference. The comprehensive approach used by the Sharp Rehabilitation Center involves using an interdisciplinary team of trained observers and evaluators to look into the patient's problems. After reviewing medical records, a hypothesis is formed about the impact of the injury on the patient's daily life and then the team is assembled and sent out to evaluate the patient in a real world setting. The process is highly individualized and involves both clinical testing and observations made in the home and on the job. This is vastly different than other approaches because it uses medical and rehabilitation professionals with hands-on clinical experience rather than having the patient evaluated by an academician in an office setting.

The philosophy behind this approach is based on the belief that brain injuries can be subtle and are not often able to be viewed out of context of the patient's day-to-day existence. The level of practical function is the key to determining brain damage, not the results of an IQ test. Dr. Schrock, a Diplomate in Clinical Neuropsychology, firmly believes that there is a "silent epidemic" of brain damage that has been going undiagnosed because trial lawyers are relying too heavily on the results of standardized tests given in office settings. The problems with these tests, Dr. Schrock feels, is that each person is unique and that there are too many variables for any one test to evaluate properly. In her opinion, IQ after brain injury is not particularly useful in determining either the amount of damage or its impact on function. On the other hand, frontal lobe functions (called "executive skills") which tell us what to do and when to do it are not easily measured in the examiner's office, but have a tremendous impact in real life settings.

Brain injured clients experience incredible frustration. In fact, brain damage can be so subtle that many patients may not even be aware of the level of their own problem. Even family members may shrug off a client's problems as simply stress related to the accident. For example, most of us enjoy a cup of coffee in the morning. Can you imagine sitting down to breakfast, seeing and recognizing a cup of coffee in front of you, smelling it, wanting it, and not being able to put the object, the smell and your craving together in order to drink it? The inability to combine these basic sensory functions is called agnosta. For brain injured clients the sum of the parts often does not make the whole.

Left side neglect is another common result of brain injuries when the right hemisphere is injured. With this type of damage, the victim loses the ability to integrate the left side of their perceptions and functions into their conciousness. Men who suffer from this disorder will look into a mirror and shave only the right side of their faces (in a sense, this is a form of mental "blindness" even though the eyes are working fine). When asked, they will tell you that they shaved their entire face, because even though they see the left side they cannot perceive it, and to their concious mind it literally doesn't exist. If you had this disorder you would only be aware of the words from the center to the right side of this page. You would not even be aware that a "left" side of the page existed, much less be able to read it. The physical symptoms caused by a brain injury are easy to get across to a jury, but conceptual/perceptual dysfunctions like this are tough to explain unless an expert can help the attorney put them into the context of a client's daily life.

Knowing that these and other more subtle problems may be taking place, the Sharp team sets a goal to evaluate every function of the brain. The process is highly individualized and involves both clinical testing as well as observations made during the patient's regular daily life by evaluators with current clinical experience. After reviewing the medical records and interviewing both the patient and their family, 10 to 20 tests are selected and administered to the patient. This also rules out the possibility of false test results.

The team begins looking for a pattern of errors. It isn't the amount of errors detected in these tests, but the kinds of errors that will lead the team to their diagnosis. Both the volume and variety of assessments are used to provide a comprehensive picture of both diagnosis and impact. Hard to prove "intangibles" such as mood and personality changes can often be conclusively linked to a head injury in this approach.

The results of this workup can be devastating to the defense. It is almost impossible to impeach a witness who is actually involved in the rehabilitation of patients with testimony from witnesses who never leave the classroom. Sharp offers a complete litigation package and their experts hold up well under cross examination in the courtroom. How well?

The expert testimony of Dr. Schrock carried the day. The arbitrator awarded my client a binding $680,000.00.