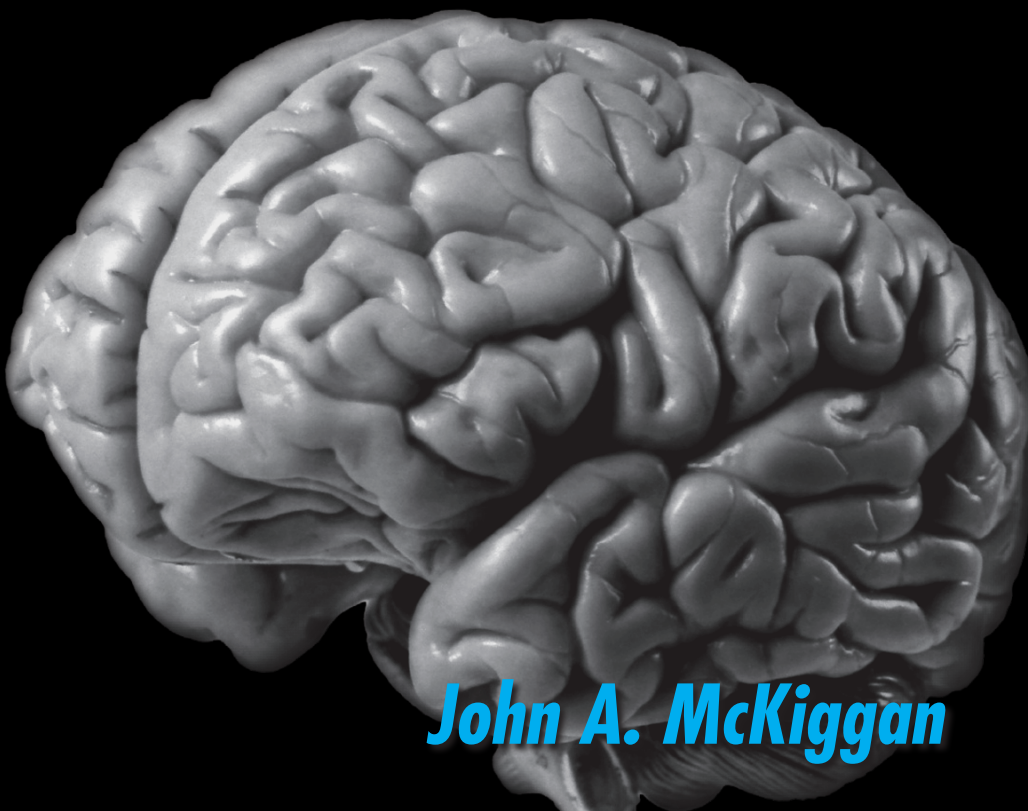
THE SURVIVOR'S GUIDE TO
BRAIN INJURY CLAIMS

Brain MATTER

How to prove the "invisible" injury



John A. McKiggan

Brain MATTER

How to prove the "invisible" injury

THE SURVIVOR'S GUIDE TO
BRAIN INJURY CLAIMS

Brain MATTER

How to prove the "invisible" injury

John A. McKiggan

WORD ASSOCIATION PUBLISHERS
www.wordassociation.com
1.800.827.7903

Copyright © 2011 by John A. McKiggan

All rights reserved. No part of this book may be used or reproduced in any manner whatsoever without written permission of the author.

Printed in the United States of America.

ISBN: 978-1-59571-706-1

Designed and published by

Word Association Publishers
205 Fifth Avenue
Tarentum, Pennsylvania 15084

www.wordassociation.com
1.800.827.7903

Table of Contents

What Some of Our Readers and Clients Have Said

"I found the Guide most helpful. I would definitely recommend the Guide to anyone seeking information; it was very informative, factual and easy to read. I would certainly recommend the Guide to anyone wondering if they have grounds for a lawsuit." *–Lynn Butler*

"John thanks a lot, you deserve to be congratulated. Without you and Ron I would have a big zero dollars. We would have never thought of a lawsuit against the doctors and hospital. Therefore I have X number of reasons to thank you. I would also like to thank your staff that worked behind the scenes. Thank them for me; you all did a great job!" *–Maurice D. re: 3.8 million dollar medical malpractice claim.*

"Paul and I found you very professional and you made us feel like people. That is not an easy attribute to find in someone. John, you did a great job and I feel you took Paul's brain injury and his challenges into account when speaking with us which means a lot to us. You were very professional while taking into account

we have feelings and you always kept us informed about how the claim was going." *–Pam R. Halifax Nova Scotia. Re: Serious personal injury claim.*

"I am aware of all of the work John McKiggan and his firm have put in on Davey 's behalf and I have no doubt that we would not have been able to get this settlement for Davey if it weren't for John's efforts." *–Heidi Paul: Mom and litigation guardian for Davey Paul re: $2.88 million dollar medical malpractice settlement.*

"Who Are You and Why Should I Listen to You?"

Thank you for taking the time to read this book. I think that the information I give you here will help you if you believe you or a loved one has suffered a brain injury as a result of some else's negligence.

I wrote this report so you can have good, solid information before hiring a lawyer or deciding whether to pursue a personal injury claim. You could get some of this information by making an appointment with a lawyer, but I want you to have this valuable information right now, so that you can read it in your home and on your own time.

My name is John McKiggan. I am one of the founding partners of ***Arnold Pizzo McKiggan, Trial Lawyers***. I limit my work to medical malpractice cases, serious personal injury claims and claims for survivors of sexual abuse.

I represent people who have been injured by the negligence of others. I have also represented families of deceased loved ones

in wrongful death cases. While each case is different, and past results cannot be used to predict future success, I can tell you that I have been privileged to help my clients and their families recover millions of dollars in settlements and verdicts in personal injury, wrongful death and medical malpractice claims.

I am member of the Board of Directors of the Brain Injury Association of Nova Scotia, Halifax Chapter.

I have seen first hand the devastating effects brain injuries due to car collisions can have on children. That is why I have volunteered to serve as Chairman of Kids and Cars – Canada, a not for profit organization that promotes public awareness of safety issues around children and automobiles.

I have been honoured to have been elected President of the Atlantic Provinces Trial Lawyers' Association by my fellow trial lawyers.

I have written papers and presented lectures in Nova Scotia, New Brunswick and Ontario on various issues pertaining to personal injury law and institutional liability to a variety of groups including the Nova Scotia Barristers' Society Continuing Education Lecture Series, the Canadian Bar Association, The Canadian Institute, and the Atlantic Provinces Trial Lawyers' Association.

I was privileged to be invited to lecture in Singapore at the prestigious International Bar Association.

You can find out more about me and my firm at ***www.apmlawyers.com***. Our web site has a lot of useful information on a variety of subjects.

Or you can visit one of my Blogs:

- *www.halifaxpersonalinjurylawyerblog.com,*
- *www.sexualabuseclaimsblog.com,* or
- *www.halifaxmedicalmalpracticelawyerblog.com.*

"Why Did You Write This Book?"

TO ANSWER THAT QUESTION, I HAVE TO TELL YOU A STORY.

Several years ago I was contacted by family members of a lady who had been injured in a car accident, I will call her Jane. Jane had been represented by another lawyer for a number of years. The lawyer was a friend of the family and had done the legal work when Jane bought her house. He was what lawyers refer to as a *general practitioner,* a lawyer who does not concentrate his practice on any particular area of the law but does a little bit of everything (property, wills, criminal defence, family matters).

The insurance company had offered Jane ten thousand dollars. Her lawyer had recommended that she take the offer. The family wanted to know if the offer was fair. They asked me to review Jane's file and provide a second opinion about whether the offer was reasonable.

After I interviewed Jane and reviewed her medical charts, I was concerned that her injuries had not been properly diagnosed.

I thought she was showing many of the symptoms of someone who had suffered a mild traumatic brain injury.

I started to dig deeper and interviewed friends that had known Jane before and after the accident. They talked about how she had "*never been the same*" since the accident.

I told Jane and her family that I thought there was evidence to indicate that Jane had suffered a mild traumatic brain injury. I recommended Jane see a neurologist and a neuropsychologist so a proper medical assessment could be conducted. After the examinations were conducted, the neurologist and neuropsychologist were both of the opinion that Jane had suffered a brain injury in her car accident.

The insurance company (no surprise) did not agree. The company denied that Jane had a brain injury. The company claimed the force of the accident wasn't sufficient to have caused a brain injury, the company hired a herd of medical experts who claimed that Jane wasn't injured or that her problems were due to pre existing injuries or that she was exaggerating. The insurance company hired the largest law firm in the Atlantic province's to fight Jane's claim.

After two and a half years of litigation the insurance company finally agreed to pay Jane almost four hundred thousand dollars.

That is why I do serious personal injury litigation and that is why I wrote this book. To provide information to people who may have suffered a brain injury as a result of an accident.

You may not have suffered a brain injury or you may not have the grounds for a lawsuit, but you need to have certain important information **to know if you have a potential claim.** You need to know what to do to protect your rights. I wrote this book so that people who may have suffered a brain injury can have this information, for free.

Frankly, this method of talking to you also saves me time. I've packed a ton of information into this book and it would typically take me 6 or 7 hours to explain to you face to face. At my normal hourly rate of $350.00 that's more than $2000.00 worth of information to help you understand the issues involved in brain injury claims. Providing this information to you, free, in this book saves me the hours of time that it would take each day just to talk to all of the new clients who call me.

Writing this book gives me a chance to tell you what you need to know so that you can decide if you have a brain injury claim that may be worth pursuing in court. Even if I do not accept your case, I would like you to be educated about the process.

Most lawyers want you to make an appointment in order to get the information that I write about in this book. I believe that you should be able to have this information, right now, and without any pressure.

Disclaimer: I Am Not Allowed to Give Legal Advice in this Book!

I can make suggestions and identify issue that you should be concerned about. But please do not construe anything in this book to be legal advice until you have agreed to hire me **and** I have agreed, in writing, to accept your case.

I CANNOT AND WILL NOT ACCEPT EVERY CASE.

Because I value personal service, I do not accept every case that I am asked to take on—I couldn't—there are simply too many. I explain this in more detail later.

Hiring a lawyer to represent you is an important decision that should not be taken lightly. I hope that this book will help make that decision easier.

Understanding How the Brain Works

In order to fully understand the challenges faced by someone who has suffered a brain injury, you must first understand the complexity of the human brain.

The human brain only weighs a few pounds but it is made up of billions of cells that must be able to communicate with one another quickly and efficiently in order for the brain, and the rest of your body, to work properly.

THE BRAIN'S BUILDING BLOCKS

The brain is made up of billions of cells called *neurons*. I have found that the easiest way to understand how a neuron works is to think of a neuron like a light switch in your house. The switch can either be turned *on* (in which case the neuron is transmitting electrical energy) or it can be turned *off* (and the neuron does not transmit electrical energy).

Each neuron has an *axon* that sticks out of the neuron's cell, sort of like an electrical wire. Electrical impulses travel from the neuron

down the axon. When the electric impulse reaches the end of the axon it creates a chemical reaction that jumps across a gap (called a *synapse*) where it triggers another neuron to send another message.

When the neurons and axons are functioning normally electrical impulses travel throughout the brain quickly and efficiently.

Consider the brain's communication system is something like a telephone system. Imagine the telephone system in New York City, a city of more than 8 million people. New York has an incredibly complex system of wires and computers that communicate information throughout the telephone system.

If you damage a small part of the communication system (for example if you cut the wires running into an apartment building) the result may only affect a few hundred people, a very small part of the city.

But if you damage a major trunk line containing thousands of telephone wires it may cut off communication to several blocks or even the entire city.

When parts of the brain are injured the neurons are not able to communicate with one another, just like cutting the wires in a telephone system.

When you consider the "telephone system" analogy you can see how an injury to even a small part of the brain could have very serious effects if the part of the body that the brain communicates with serves a critical function.

Brain Structure and Function

The effect of a brain injury depends, in part, on what area of the brain is injured.

So understanding the brain's structure and function is necessary to understand the complexities of brain injury.

The brain has two halves (called cerebral hemispheres). Each hemisphere of the brain has distinct functions.

THE LEFT HEMISPHERE CONTROLS:

- Language and speech.
- Thinking and memory involving words.
- Moving the right side of the body.

THE RIGHT HEMISPHERE CONTROLS:

- Recognizing and understanding visual patterns or designs.
- Expressing and understanding emotion.

- Nonverbal communication.
- Moving the left side of the body.

EACH HEMISPHERE HAS FOUR PARTS (CALLED LOBES).

OCCIPITAL LOBES – Located in the back of the brain, the occipital lobes receive and process visual information.

PARIETAL LOBES – Located in front of the occipital lobes, the parietal lobes process information from the sense of touch, and from body position in space.

TEMPORAL LOBES – Located on the sides of the brain, the temporal lobes are key to understanding memory and hearing. The dominant temporal lobe (usually on the left side) is important in speech and language.

FRONTAL LOBES – Located inside the front of the skull, they control voluntary movement (movement you think about and do), such as getting out of a chair. They also are responsible for organizing information, solving problems, attention span, regulating emotion and behaviour, self-awareness, memory, language and communication.

What is Mild Traumatic Brain Injury?

While there are various medical definitions of mild traumatic brain injury, the most commonly accepted definition is the one established by the American Congress of Rehabilitation Medicine (**ACRM**). The **ACRM** defines a mild traumatic brain injury as any:

> "Traumatically induced physiologic disruption of brain function"

In other words, a mild traumatic brain injury is any physical trauma to the brain that disrupts the normal functions of the brain.

REQUIRED SYMPTOMS

In addition to the disruption in brain function, the patient must have **at least one** of the following symptoms:

- Any period of loss of consciousness;

- Any loss of memory for events immediately before or after the accident (amnesia);
- Any alteration in mental status at the time of the accident (for example, feeling dazed, disoriented or confused);
- Focal neurologic deficits (for example loss of sense of smell or hearing).

How Does Brain Injury Happen?

There are a variety of ways that the brain can be injured:

- **ANEURYSM** – Ballooning of a weakened wall of a vein, artery or the heart.
- **ANOXIA** – Lack of oxygen to the body and brain tissue, which damages the cells.
- **CONCUSSION** – A temporary disturbance of brain function resulting from trauma or a blow that jars the brain within the skull. Sometimes referred to as a mild traumatic brain injury.
- **CONTUSION** – An injury on the brain's surface, like a bruise.
- **DIFFUSE AXONAL INJURY** – An injury caused by pulling, stretching or tearing of cells in the brain.
- **EDEMA** – Swelling caused by excess fluid in brain tissue. Edema can cause pressure build up resulting in cell damage and blood flow interruption.

- **ENCEPHALITIS** – A life-threatening infection or inflammation of the brain.
- **MENINGITIS** – An infection and inflammation of the central nervous system that affects the membranes and cerebrospinal fluid surrounding the brain and spinal cord.
- **HEMATOMA** – Pooled blood inside the brain tissue or on the surface of the brain. Hematomas can cause pressure that can result in brain cell damage and blood flow interruption.
- **HEMORRHAGE** – Bleeding caused by damage to a blood vessel in the brain.
- **SKULL FRACTURE** – Breaking the skull bone that covers and protects the brain.
- **STROKE** – An interruption of blood flow to the brain, caused by an artery blockage, hemorrhage or aneurysm. Decreased blood flow results in little or no oxygen delivery to brain cells.
- **TRAUMATIC BRAIN INJURY** – Any injury to the brain that results from a violent force (trauma) to the head. For example an injury from a motor vehicle accident, fall or being punched or hit.
- **TUMOR** – Abnormal tissue growth that has no function. A tumor may be malignant (cancerous) or benign (noncancerous).

The most common causes of traumatic brain injury happen when:

- The head is struck by something (for example a box falling off a shelf and hitting your head);
- The head strikes an object (for example falling and hitting your head on the floor); or
- The brain undergoes acceleration/ deceleration without direct trauma to the head. This often happens when the head whips back and forth quickly. This is commonly referred to as "whiplash".

If you or a family member have suffered a traumatic brain injury (or if you have been in an accident where you **may have** suffered a head injury) you should seek immediate medical attention. You will need to provide your doctor with complete and accurate information about the mechanics of how the accident happened, whether you struck your head, and whether you suffer from any of the signs or symptoms listed above.

Symptoms of Traumatic Brain Injury

The symptoms of traumatic brain injury can be divided into three areas:

- **Physical symptoms**;
- **Cognitive deficits** (effects on brain function); and
- **Behavioral changes**.

PHYSICAL SYMPTOMS:

The physical symptoms of brain injury can last for hours, days, weeks or months after the initial physical trauma. In some cases, the symptoms may be permanent. Someone can suffer a so-called *minor* brain injury but still have permanent and significant problems.

The physical symptoms of brain injury can include:

- Nausea;

- Vomiting;
- Dizziness;
- Headaches;
- Blurred vision; and
- Fatigue.

COGNITIVE DEFICITS:

Traumatic brain injury can have significant effects on the normal cognitive functions of the brain. In other words, a traumatic brain injury can affect the brain's ability to perform its normal role as the command center of the body.

Typical cognitive symptoms of brain injury can include:

- Having difficulty paying attention;
- Problems with concentration;
- Perception problems;
- Difficulty with short term memory;
- Speech or language deficits (for example searching for words); and
- Problems with executive functions (in other words, organization skills).

BEHAVIOURAL CHANGES:

The symptoms of traumatic brain injury can also cause changes in behavior. However, the changes may be so subtle that the brain injured victim isn't aware of the changes (or refuses to admit the extent of their symptoms).

Typical behavioral changes seen in victims with traumatic brain injury include:

- Irritability;
- Quickness to anger;
- Emotional lability; and
- Disinhibition

8 Myths Of Mild Traumatic Brain Injury

MYTH #1 – MILD TRAUMATIC BRAIN INJURY ISN'T SERIOUS:

The term mild or minor traumatic brain injury is extremely misleading. The term "mild" or "minor" refers only to the initial physical trauma or impact that causes the brain injury. Brain injuries caused by a comparatively minor physical trauma or blow to the head can result in significant long term impairment or functional disability.

I have spent the last 20 years representing persons who have been victims of serious personal injuries. In my experience, mild traumatic brain injury is one of the most serious injuries that commonly go undiagnosed.

Busy, overworked doctors may not take the time to thoroughly question patients about their symptoms. In fact, the symptoms are so subtle that the victims themselves may not realize they are suffering from a mild traumatic brain injury.

MYTH #2 – YOU HAVE TO BE KNOCKED OUT TO SUFFER A BRAIN INJURY:

Some people still think that it is still necessary to suffer a loss of consciousness (be knocked out) in order to suffer a brain injury. But more than 30 years ago the Congress of Neurological Surgeons concluded that a head injury that leads to a change in mental status (being dazed or confused) **without any loss of consciousness** is a form of brain injury. This type of injury is what is commonly referred to today as a concussion.

When I was growing up, if a hockey player or football player "had their bell rung" it was common practice for the coach to simply have the player sit on the sidelines until they were able to "shake it off". Then the player would return to the game.

Today, sports medicine specialists now recognize that "having your bell rung" or suffering a concussion is a serious injury. The cumulative effects of repeated concussions can cause lasting disability and functional impairment.

In fact, the risk of serious injury from concussion is so significant that the Canadian Medical Association has called for a ban on body checking for hockey players less than 15 years of age.

Over 10 years ago the Journal of the American Medical Association called for more education for family physicians about the effects of mild brain injury. The American Medical Association was concerned that there was a common misper-

ception that it was necessary for a patient to be knocked unconscious in order to suffer a concussion.

According to the American Psychiatric Association, mild traumatic brain injury can occur with **brief or no** loss of consciousness. Studies published by the American Psychiatric Association's *Textbook of Neuropsychiatry* confirms that patients with mild traumatic brain injury can have physical, perceptual, cognitive and emotional symptoms that collectively is now called post-concussive syndrome.

MYTH #3 – YOU HAVE TO HIT YOUR HEAD TO SUFFER A BRAIN INJURY:

In order to understand why this myth is incorrect you have to learn a little about the anatomy of the skull. The inside of the skull isn't smooth like the inside of a bowl. The base of the inside of your skull is rough with several bony ridges or spikes. These ridges can cause an injury to the brain during periods of rapid acceleration and deceleration (when the head is "whipped" back and forth).

SPONGE IN A BUCKET:

The easiest way I have found to explain how the brain can suffer an injury without the head being struck is to think of a sponge floating in the middle of a bucket of water.

The bucket represents your skull. The water is the cerebrospinal fluid. The sponge is your brain. If you swing the bucket back

and forth, the sponge will float in the center of the bucket. But if you suddenly stop swinging the bucket the sponge will bump against the inside of the bucket.

This type of injury commonly happens in rear-end or head-on collisions where the driver's or passenger's head suddenly whips back and forth. The French phrase for this type of injury is known as a "coupe - contra coupe injury". When the head whips back and forth and stops suddenly, the sudden stop causes the brain to bump up against the inside of the skull. Damage to the brain occurs at the area of impact.

MYTH #4 – A NORMAL M.R.I. OR C.T. SCAN MEANS NO BRAIN INJURY:

A C.T. scan is a diagnostic tool used to detect gross damage to the soft tissue of the body (muscles, tendons, ligaments and brain tissue). An M.R.I. (Magnetic Resonance Imaging) scan is a more sensitive test to detect damage or injury to the soft tissues of the body.

However, C.T. and M.R.I. scans can only detect **macroscopic** injury (injuries that can be seen by the naked eye). Unfortunately, mild traumatic brain injury occurs at a **microscopic** level in the cells of the brain.

The textbook *Neuropsychiatry of Traumatic Brain Injury* states that:

> "Many patients with a history of "minor" brain injury will not have abnormalities on MRI, yet can manifest clear evidence of functional impairment on neuropsychological measures."

The textbook *Medical Rehabilitation of Traumatic Brain Injury* points out that many practicing doctors mistakenly believe that a patient with a normal CT or MRI scan is in fact normal, in other words, has not suffered an injury. However, the authors of the text book point to the medical saying, "absence of proof is not proof of absence".

In other words, normal diagnostic imaging tests (CT and MRI scans) may simply mean that the tests are not sensitive enough to detect a mild traumatic brain injury.

MYTH #5 – EFFECTS OF BRAIN INJURY CAN BE IDENTIFIED IMMEDIATELY:

I have had a number of brain injury cases where the defendant's experts claimed my client did not suffer a brain injury, because their symptoms did not develop until hours or days after their initial injury.

Modern medical science now recognizes that the effects of traumatic brain injury may not become apparent until 6-12 hours after the initial injury.

The effects of traumatic brain injury can be so subtle that they do not become apparent until the victim of brain injury attempts to return to their normal daily activities or work place demands. It

is only after the brain injured person is exposed to the increased organizational demands of the work place or school that their cognitive deficits, organizational problems or memory difficulties become apparent.

MYTH #6 – CHILDREN RECOVER QUICKLY FROM BRAIN INJURIES:

Children do not lose consciousness as easily as adults. Because they didn't get "knocked out" as often as adults, it was once thought that children were not as easily brain injured as adults. Modern medical research now recognizes that younger children, particularly children under the age of five, are particularly vulnerable to brain injury and can experience significant long term challenges as a result of T.B.I.

Another myth about children and brain injury is that children are more resilient than adults and that they recover or "bounce back" faster after a traumatic brain injury.

However, Dr. William Singer, a specialist in pediatric brain injury, has been quoted as saying:

> "While children are resilient to many things, T.B.I. is not one of them. Children just don't bounce back after a traumatic brain injury"

I.Q. scores have sometimes been used to measure the effects of brain injury in children. Unfortunately I.Q. tests are not a reli-

able indicator of the effects of brain injury. Brain injury does not affect a victims I.Q.

Brain injury affects the victim's ability to organize and retain information. I.Q. tests are not a reliable of a child's learning ability after brain injury because most intelligence tests measure **prior learning.** But mild brain injury does not affect prior learning.

Brain injury affects the ability to learn, retain and organize **new information.** These skills can only be measured by neuropsychological testing.

MYTH #7 – MILD TRAUMATIC BRAIN INJURY ISN'T PERMANENT:

It was once thought that the effects of concussion, (mild traumatic brain injury) were temporary. Doctors assumed patients could recover from the effects of concussion after a few minutes or hours.

However a famous research study published in *Neurology*, the Journal of the American Academy of Neurologists, found that after one year 10% to 15% of mild traumatic brain injury patients still had not fully recovered. In fact, the study determined that many patients had **more symptoms** than immediately after the accident.

Modern medical research has found that mild traumatic brain injury can result in deficits (problems) in the speed of information processing, attention, and short term memory.

Recovery from these deficits can take several weeks or months and a small percentage of patients may never fully recover.

MYTH #8 – MILD TRAUMATIC BRAIN INJURY IS NOT DISABLING

The biggest myth of brain injury is that mild traumatic brain injuries are not disabling.

Since persons with traumatic brain injuries do not *look* obviously injured and many can function reasonable well in society, there is a common misperception that a traumatic brain injury is not as disabling as more obvious physical injuries.

However, the National Institute of Health concluded that the consequences of traumatic brain injury can include a dramatic change in the patient's life course, profound disruption of the family, enormous loss of income or earning potential and significant expenses over a life time.

The social consequences of mild, moderate and sever brain injury are significant and serious and include increased risk of suicide, divorce, chronic unemployment, economic strain and substance abuse.

The Burden of Proof

The Plaintiff (you) bears the burden of proving your case.

Most people have heard the term: *"proof beyond a reasonable doubt"*. That is **NOT** the burden that applies in personal injury compensation claims; it is the burden that applies to criminal prosecutions.

In a brain injury claim you bear the burden of proof: *"on the balance of probabilities"*. In other words, is it more likely than not that the defendant was negligent and that the negligence caused your injuries.

The easiest way to think about this is to consider a pair of scales. All the evidence FOR your claim is placed on one side of the scale. All the evidence AGAINST your claim is placed on the other side of the scale.

As long as the scales tip to the side FOR your claim, even a little bit, then you have met the burden of proof ***on the balance of probabilities***.

"What Do I Have to Prove to Win My Brain Injury Claim?"

There are three things that you have to prove in order to win a personal injury case:

STANDARD OF CARE

You will need to prove that the person that caused your injury did not meet the standard expected of a reasonably competent person. In other words, did they do something that they should not have done, or did they fail to do something that they should have done? This is what is typically referred to as "negligence."

CAUSATION

If you can prove that the negligent person breached the standard of care, you must also prove that the breach actually **caused** your brain injury (or made a pre-existing injury worse).

For example, if you had chronic low back pain before the car accident, it may be difficult to prove that a car accident **caused**

your back pain. But you may be able to prove that the accident made your pain worse.

DAMAGES

You have to prove what the consequences of the injury have been so that the court can award damages for pain and suffering, and any income loss and/or medical expenses as a result of your injury.

You will need experts like physical medicine specialists to prove the extent of your injuries; vocational experts to establish how your injuries affect your ability to work; and actuarial or economic experts to calculate your past and future income loss and future pension loss.

How Is My Claim For Compensation Calculated?

WHAT TYPES OF THINGS CAN I RECEIVE COMPENSATION FOR?

The goal of the court in any claim for compensation for personal injuries is to try to put the injured person (or their surviving family members) in the same position that they would have been in if the negligent act had not occurred.

Money can't repair the effects of a traumatic brain injury. But the courts try to provide a fair and reasonable measure of financial compensation to innocent victims who have been injured as a result of the negligence of others.

NON-PECUNIARY DAMAGES

A *non-pecuniary* claim is one that does not result in a direct out of pocket financial loss but is still considered to be worthy of compensation. Non pecuniary damages are sometime referred to as compensation for "pain and suffering" but they cover any non-financial loss.

HOW DO THE COURTS CALCULATE "PAIN AND SUFFERING"?

There is no such thing as a "pain-o-meter". An injured victim can not be hooked up to a machine that prints out the financial value of their pain. What the courts do in determining compensation or pain and suffering is use their experience and discretion to consider how the injured victims have limited their ability to function. In other words, how their injuries affect their normal day to day activities and or their ability to work?

The Supreme Court of Canada has placed a cap on the amount of compensation that injured victims can receive for non pecuniary damages for pain and suffering. If you are considering a claim for compensation for non pecuniary damages it is important to have an experienced lawyer assisting you to ensure that you provide all of the relevant information that the courts will consider when assessing your claim for "non-pecuniary damages".

PECUNIARY DAMAGES

A *pecuniary* claim is one that has (or will) result in a direct *out of pocket* financial loss. For example, the cost paying for medical treatment is a pecuniary loss. Past and future income loss is also a pecuniary loss.

COMPENSATION FOR INCOME LOSS

If you have suffered a brain injury, you may have missed a great deal of time from work or you may have lost your job. In some cases you may never be able to work again.

The Courts consider claims for loss of income two ways:

- **PAST LOSS OF INCOME:** You are entitled to be compensated for your actual income loss up to the date of settlement or trial. Usually this loss is one that is capable of being calculated fairly accurately.
- **FUTURE LOSS OF INCOME:** If your injuries prevent you from being able to work in the future you are also entitled to be compensated for that loss. Claims for future loss of income can be difficult to calculate with precision. No one knows, for sure, what the future will hold.

When valuing a claim for future loss of income the court will have to consider whether your brain injury will prevent you from being able to work for two months, two years or forever. Calculating claims for future income loss usually requires us to retain the services of an actuary or an economist who are experts in calculating past and future income loss claims.

DIMINISHED EARNING CAPACITY

In some cases, the evidence may prove that your brain injury will result in a future loss of income. However, we may not be able to calculate exactly what that loss will be. In those cases

the courts may consider awarding you compensation for what is called **"diminished earning capacity"**.

Everyone's ability to work is an asset. Your physical abilities, your education, training and experience are all assets that allow you to earn an income. If any or all of those abilities have been limited or reduced to some extent by your injuries you may be entitled to an award for *diminished earning capacity*.

Again, this type of claim usually requires us to hire experts to calculate exactly how your injuries have reduced your ability to work and to what extend your ability to earn income has been diminished.

LOSS OF VALUABLE SERVICES

Sometimes your brain injury may prevent you from being able to perform certain household duties that you were able to do before your injury. For example, I have had many clients whose injuries prevent them from being able to perform their normal housekeeping chores. We have made claims to compensate my clients for the expense of hiring housekeepers to come into their home to do laundry, wash their dishes, make their beds, etc. In other words, to perform the housekeeping duties that my clients normally performed *before they were injured*.

I have had clients who were no longer able to perform their household maintenance activities. We have submitted claims to cover the cost of mowing their lawn, shoveling their side walk, and generally maintaining their home.

The loss of valuable services covers the normal day to day physical activities that a home owner has to engage in to maintain their home and their property.

For example, I represented a single Mom who suffered an injury and was confined to a wheelchair. We were able to recover compensation for her for the cost of hiring a child care worker to come into her home to help care for her two young children until she was able to care for her children on her own.

If your injuries prevent you from being able to perform a physical duty, chore or activity that you normally were able to perform before you were injured, the court will consider compensating you for the actual financial costs of hiring someone to perform those duties.

COST OF MEDICAL CARE

Many of my clients who have been seriously brain injured have significant on going medical expenses for physiotherapy, massage therapy, medication, in home nursing care and so on.

In the case of catastrophic injuries, the lifetime cost of ongoing medical care can be enormous. For example, in a recent medical malpractice case we represented the family of a little boy who had been severally brain injured. The lifetime cost of providing ongoing medical care to the child was calculated by our experts to be more than two million dollars ($2,113,373.00). We were able to recover compensation for the family to take care of their son for the rest of his life.

OTHER LOSSES

There are other areas that the courts will consider when awarding compensation to brain injured survivors. It is important that you have the advice of an experienced personal injury lawyer to ensure that you have identified and provided sufficient evidence to properly calculate all of the losses that you, or your family, will experience as a result of your injury.

Canada's Cap on Compensation for "Pain and Suffering"

In 1978 in a case known as ***Teno v. Arnold*** the Supreme Court of Canada created an additional barrier to recovery for innocent victims who have been injured as a result of someone else's negligence. In the ***Teno*** case, the Supreme Court ruled that **no matter how seriously injured you are** the *maximum* compensation you can receive for what is commonly referred to as "pain and suffering" one hundred thousand dollars ($100,000.00).

Taking inflation into account, the cap on pain and suffering awards is currently considered to be slightly more than three hundred thousand dollars ($300,000.00). But the maximum amount is only paid to the most catastrophically injured victims (quadriplegia, paraplegia, severe brain damage and similar injuries).

Even plaintiffs that receive awards that seem large, often never see the amount decided by the judge or the jury. Many awards are drastically reduced on appeal. These reduced or vacated judgments are almost never reported by the media.

PROVING A TRAUMATIC BRAIN INJURY CLAIM AT TRIAL

A traumatic brain injury trial will usually take anywhere from two and a half weeks to a month of trial. Given the complexity of brain injury claims, the trial will include a long list of lay witnesses as well as medical experts in the field of neurology, neuropsychology, physical medicine and rehabilitation, vocational experts, future care experts as well as experts on quantifying financial loss like an economist or actuary.

In cases involving a claim of minor traumatic brain injury the defendants commonly deny that there was sufficient force generated during the accident to case a brain injury. In those cases we may retain the services of an accident reconstruction expert or a biomechanical engineer to provide evidence about the forces involved in the accident.

PROVING THE EXISTENCE OF THE INVISIBLE INJURY

Traumatic brain injury often does not show up on x-rays, MRIs, CT scans or EEG studies. Often there are no skull fractures or scars that provide visible evidence of a brain injury.

But even mild cognitive impairments can have a serious impact on the brain injury survivor's life. The brain injury lawyer plays a key role in collecting the medical evidence that will be necessary to prove the existence of a traumatic brain injury.

The survivor's health care team is an important source of medical evidence to document the deficits caused by traumatic brain injury. The brain injury survivor's health care team may include:

- The primary care physician.
- **PHYSIATRISTS** – Doctors who specialize in physical medicine and rehabilitation, including brain injury rehabilitation.
- **REHABILITATION NURSES** – Nurses with expertise in brain injury rehabilitation.
- **NEUROPSYCHOLOGISTS** – Professionals with training and expertise in evaluating and treating cognitive, behavioural and emotional changes caused by a brain injury.
- **PHYSICAL THERAPISTS** – Professionals who evaluate and treat changes in physical abilities.
- **OCCUPATIONAL THERAPISTS** – Professionals who evaluate and treat thinking and perception problems, and help learn independent living skills (for example, swallowing, eating, dressing, managing money and safety awareness).
- **SPEECH THERAPISTS** – Professionals who evaluate and treat communication problems.
- **RECREATION THERAPISTS** – Professionals who help brain injury survivors explore and participate in leisure activities.

- **SOCIAL WORKERS** – Professionals who provide information and emotional support, and help with discharge planning and management of financial and other resources.

THE SAME, BUT DIFFERENT

A traumatic brain injury case is the same as any other serious personal injury case. The injured person is looking for compensation for pain and suffering, a loss of enjoyment of life as well as any economic losses or out of pocket expenses they have suffered as a result of the injury.

In any serious personal injury case the plaintiff generally calls what is usually referred to as "before and after" witnesses who will testify what the injured person's life was like "before and after" the accident. These witnesses are used to help establish the pain that the injured person has suffered as a result of the accident, the loss of enjoyment of life, and what problems they face at home or at work as a result of the limitations they have been left with due to their injuries.

However, a mild traumatic brain injury case is different from other serious injury claims, because the injury is *invisible*. If the doctors conducted any neurodiagnostic testing, like C.T. scans or M.R.I. scans, the results are usually normal.

Unlike victims who have suffered broken bones, you can't show the judge or a jury an x-ray to prove that they suffered an injury.

In most cases the brain injury survivor looks perfectly "normal".

Therefore, in a brain injury trial the "before and after" witnesses provide the evidence that forms the very foundation of the brain injury survivor's claim.

THE IMPORTANCE OF LAY WITNESSES

A lay witness is someone who is not an expert, who is being called to testify about facts that are relevant to your claim. For example, your family, friends, or co-workers may be called as lay witnesses. Lay witnesses cannot offer opinions (only an expert can do that).

In every brain injury case, both sides will have highly qualified experts who will testify at trial. In this "battle of the experts" it is very difficult for a jury to decide which expert's evidence is most reliable.

On the other hand, lay witnesses can be very effective because they are not being paid to testify and usually have no personal interest in the outcome of the trial.

The most effective type of lay witness testimony usually comes from someone who has known the brain injury survivor for a long time, both before and after the accident. For example: a childhood friend, a co-worker or a neighbour. These witnesses can provide a jury with compelling evidence about the survivor's condition before and after the traumatic event.

FRIENDS

Friends of the brain injury survivor can provide the kind of evidence that you just can't get from a medical expert like specific examples of how the survivor has changed since the accident. This can be very compelling for a jury.

FOR EXAMPLE:

"Before the accident, Margery and I use to go shopping every weekend. I used to call her the energizer bunny. She was just go, go, go! By the end of the day, Margery would be ready to head off to the next mall.

I took her shopping with me 2 weeks ago and she just wasn't the same. After about 20 minutes she was so exhausted she had to sit down and rest. She spent the rest of the day just sitting on a bench people watching."

CO-WORKERS

Co-workers, especially those that have known the survivor before and after the accident, can be helpful in providing evidence about the survivor's deficits from their brain injury.

A defence medical exam, conducted in the quiet of the doctor's office, may not produce any evidence of disorganization or memory loss. But, a co-worker who can testify how the survivor was unable to cope with the pace of the busy office can be an effective witness.

FOR EXAMPLE:

"Brian was a great salesman. He was my top salesperson for 3 years running before his accident.

After his accident he just fell to pieces. He couldn't remember customer's names. He kept losing or misfiling paper work and purchase orders. I remember one time he ordered two fifty thousand dollar BMWs for the same customer!"

THE INVESTIGATING POLICE OFFICER

Often, the police reach the scene of the accident before the ambulance does. By the time the paramedics arrive, the survivor may not be showing any obvious signs of brain injury.

A police officer can provide compelling evidence about the damage to the vehicles and the force of the impact and whether or not the victim was unconscious when the office arrived at the scene or whether the survivor was conscious but dazed and confused at the accident scene.

Medical Witnesses

THE NEUROLOGIST

In almost every brain injury case, the survivor will have been treated by a neurologist. However, in the case of a mild traumatic brain injury all the standard neurological diagnostic tests, C.T. scan, M.R.I. scan, E.E.G., will likely be normal.

A neurologist can explain to the jury why the normal diagnostic test result does not rule out a mild traumatic brain injury.

The neurologist can explain how the brain functions and the biomechanics of how a mild traumatic brain injury happens. The neurologist can also testify why it is not necessary to suffer a loss of consciousness in order to suffer a brain injury.

Finally, the neurologist can testify about the importance of neuropsychological testing in identifying and quantifying the cognitive deficits that a brain injury person has experienced as a result of their injury.

THE PHYSICAL MEDICINE SPECIALIST:

Physical medicine specialists are trained in rehabilitative medicine. Their primary practice is devoted to rehabilitating patients who have suffered serious orthopedic or neurological injuries.

A physical medicine specialist can provide compelling evidence about the kind of functional limitations that a brain injury survivor will experience and the medical aids that they will require in order to rehabilitate and/or cope with their brain injury.

THE NEUROPSYCHOLOGIST:

Arguably, the most important medical witness in a brain injury trial is the neuropsychologist.

Because the effects of a mild traumatic brain injury often do not show up on common diagnostic tests, the only evidence that a survivor has any cognitive deficits at all comes from the testing performed by the neuropsychologist.

OTHER MEDICAL WITNESSES:

In most serious injury cases the victim has suffered other types of orthopedic injuries like fractures, or connective tissue injuries like herniated disks or serious whiplash. In these cases, your lawyer will often want to call these witnesses, not to testify that you suffered a brain injury, but to confirm that you suffered other serious injuries and the kind of forces that would be necessary to case those injuries.

BIOMECHANICAL ENGINEER:

Biomechanical engineers are not medical witnesses. But they often testify in mild brain injury cases. In low impact collisions the defendants commonly rely on what is called the M.I.S.T. (Minor Impact Soft Tissue) defence. Defence lawyers sometimes call it the "no crash, no cash" defence.

The defendant lawyer will try to convince a judge or a jury that because there was no "crash" (the impact of the car accident was so insignificant) that it is not physically possible for the survivor to have suffered a brain injury (and therefore the survivor should not receive any "cash" to compensate for their injuries).

Biomechanical engineers are sometimes called to testify by the defendant to suggest that it would not be possible for someone to have suffered a brain injury given the physical forces involved in an accident.

8 Reasons Why Brain Injury Survivors Don't Receive Compensation

REASON NUMBER ONE

THE INJURED PERSON DOESN'T REALIZE THEY HAVE SUFFERED A BRAIN INJURY:

Each year, an estimated 45,000 Canadians suffer a concussion. But since concussions are an invisible injury—the C.T. scan and M.R.I. are usually normal—doctors must diagnose the injury by relying on the symptoms described by the injured person.

Many victims are not even aware that they've suffered a concussion, wrongly believing the ***myth*** that losing consciousness is the key requirement. In fact, unconsciousness occurs in only 5 per cent of concussions. The remaining 95 per cent include any of the symptoms I have described earlier in this book, including confusion, headache, dizziness, feeling dazed, vomiting and poor concentration.

REASON NUMBER TWO

CANADA'S "LOSER PAYS" RULE:

In Canada, the courts have what is known as a "loser pays" rule. What that means is that, in most cases, the person that *loses* a lawsuit has to *pay* some of the legal fees and all the out of pocket expenses of the person that wins the lawsuit.

The theory behind the "loser pays" rule is that it is supposed to discourage frivolous lawsuits. If you know you will have to pay the defendant's legal expenses if you lose, you will think twice before filing a lawsuit that doesn't have merit.

Although the idea of this rule was to discourage *frivolous* lawsuits, in practice it actually has the effect of discouraging people with **legitimate lawsuits** from pursuing their claims.

Assume, for example, that you have suffered a brain injury as a result of medical malpractice, a car accident or a fall. You can't work, your bills are piling up, and you can't pay your mortgage. Then your lawyer tells you that if you file a lawsuit and **lose**, you might have to pay the defendant tens of thousands of dollars. What are the chances that you are going to proceed with your lawsuit? Pretty slim, right?

I have had cases over the years where impartial medical experts have advised me that my client may have suffered a mild traumatic brain injury. However, the injured person decided **not to**

file a claim because they were afraid that if they lost the lawsuit, they might be ordered to pay legal costs to the defendant.

The sad fact is that insurance companies have almost unlimited financial resources, compared to injured victims, who have almost no ability to finance the significant costs of brain injury litigation.

That is why I am **extremely selective** in the brain injury cases that I agree to take on. I will not agree to represent someone in a brain injury claim unless I am convinced their claim has merit and that the injured person has a reasonable chance of successfully recovering compensation for their injuries.

I understand that the decision to file a lawsuit is one of the most important decisions that my client will ever make. However, most of my clients who have suffered a brain injury literally have no choice. They face huge medical bills and may never be able to work. Filing a brain injury compensation claim is the only hope that they have of ever receiving compensation, ***and justice***, for what happened to them.

REASON NUMBER THREE:

THE SURVIVOR CAN'T PROVE HIS OR HER BRAIN INJURY WAS CAUSED BY THE DEFENDANT'S NEGLIGENCE:

Sometimes it is difficult to prove that the defendant's conduct was the reason why the survivor suffered a brain injury. For example, the survivor may have suffered a fall and hit their head

around the same time as the accident that was caused by the defendant's negligence.

REASON NUMBER FOUR

THE PLAINTIFF HAS NOT RETAINED AN EXPERIENCED BRAIN INJURY LAWYER:

Brain injury claims, especially mild traumatic brain injury claims, are complicated and difficult to prove. These claims require an understanding of the law but also an understanding of the principles of anatomy, medicine and biomechanics.

I believe that it is imperative that you be represented by an experienced brain injury lawyer.

REASON NUMBER FIVE

THE STATUTE OF LIMITATIONS HAS EXPIRED:

Each Province has its own statute of limitations (time limit) for filing a law suit. The length of time may be different in each Province, and the time when the statute starts to run varies as well. The length if time may be different depending on whether your brain injury was caused by an assault, a car accident or medical malpractice.

One reason that you should consult an experienced brain injury lawyer as soon as possible is to determine when the statute of limitations runs out in your case. For example, in Nova Scotia there are different limitation periods depending on whether

your injury was caused by medical malpractice, an assault or a car accident.

REASON NUMBER SIX

JURORS HAVE BEEN BIASED BY THE INSURANCE INDUSTRY:

The insurance industry has spent millions of dollars funding "research" to suggest that damage awards for personal injury claims have been increasing out of control. The real facts show that damage awards have not been increasing and insurance companies in Canada have been making record profits. (These facts and other important information can be found in my book: *Crash Course: The Consumer's Guide to Car Accident Claims in Nova Scotia*.)

This type of propaganda is the reason many provinces in Canada have passed laws limiting recovery for pain and suffering for victims of car accidents.

For example, in Nova Scotia the limit for a "minor injury" from a car accident was just two thousand five hundred dollars ($2,500.00). This "cap" was recently increased to seven thousand five hundred ($7,500.00). Because of insurance company propaganda, some people mistakenly believe that this cap also applies if you have suffered a minor traumatic brain injury.

REASON NUMBER SEVEN

THE PLAINTIFF IS NOT ABLE TO AFFORD TO HIRE GOOD, QUALIFIED EXPERTS:

You cannot win a brain injury case without several very qualified medical experts. They can be hard to find. It is becoming increasingly difficult to find doctors who are willing to stand up for what's right. It takes time and money to find the best experts for your case.

This is one area where insurance companies have a tremendous advantage. If they have a case that is particularly bad for their client, they can afford to hire as many experts as it takes to get an opinion they can use to defend the claim. Most brain injury survivors cannot afford to have several experts look at their case in order to find out which expert will give them the "best" answer.

For example, we were retained to represent a man who suffered a serious brain injury and was totally and permanently disabled as a result of the side effects of certain medication prescribed to him by his doctor. We retained the services of one of Canada's top experts in the particular medical specialty involved in our client's case.

The expert reviewed the facts of our client's case and gave us an opinion that the defendant doctor was clearly negligent. However, when we provided the expert with the name of our client, and the name of the defendant doctor, she told us she had

been retained by the defendant the year before and had already given them the same opinion! The claim eventually settled for 3.5 million dollars.

In our search for the best experts to represent our client we found, purely by luck, one of the experts that the defendant's lawyers had consulted. How many more experts did the defence lawyers consult, and how much money did they spend, in order to get an opinion they could use to defend my client's claim? There is no way to know.

REASON NUMBER EIGHT

THE BRAIN INJURY SURVIVOR CONTRIBUTED TO THE INJURY.

Any negligence on the part of the plaintiff which contributed to the injury will reduce the amount of compensation the victim is entitled to recover. Any carelessness on the part of the plaintiff is balanced against the carelessness of the defendant and damages are apportioned accordingly.

For example, I represented a young lady who was hit head on in a car accident when the defendant crossed the center line. My client wasn't wearing her seatbelt. She hit her head against the windshield when the defendant crashed into her. The defendant's lawyers argued that her compensation should be reduced because she wouldn't have suffered a brain injury at all if she had been wearing a seatbelt and had not hit her head on the windshield.

Fortunately, we were able to hire a biomechanical expert to prove that the forces in the car accident were so great that, even if she was wearing her seatbelt, she would probably have suffered a brain injury.

How Do I Find a Qualified Brain Injury Lawyer?"

Choosing a lawyer to represent you is an important but daunting task. The decision certainly should not be made on the basis of advertising alone. The Yellow Pages are filled with ads – all of which say basically the same thing.

There are online directories that you can find on the internet that offer to refer you to a brain injury lawyer free of charge. What they don't tell you is that the lawyers listed in these online directories have paid for their name to be placed on the list, just like buying a yellow pages ad.

You shouldn't even hire me until you have met me and decided that you trust that I can do a good job for you.

6 QUESTIONS TO ASK BEFORE YOU HIRE A BRAIN INJURY LAWYER

There a number of questions you should ask to determine if the lawyer you plan to hire has experience in dealing with brain injury claims. For example you may want to ask the lawyer:

1. Have you ever settled a brain injury case that required court approval?

2. Do you volunteer or sit on the Board of the Brain Injury Association or other organizations that work with Brain Injury survivors and their families?

3. Have you attended or presented at any brain injury conferences?

4. Have you ever written articles or books (like this one) about Brain Injury claims?

5. What medical textbooks or publications about Brain Injury does the lawyer have in their office?

6. Can you recommend a neuropsychologist that you have worked with on brain injury claims?

"So How Do I Choose?"

How do you find out which lawyer is the best for your case? I believe there are certain questions to ask that will lead you to the best lawyer for your case—no matter what type of claim you have. You will have to invest a bit of your time, but that's OK because the decision as to who to hire as your lawyer is very important.

The world of brain injury claims, medical malpractice, and other serious personal injury claims is complicated and new court decisions are being released by courts across the country every day. I believe that by narrowly focusing my efforts on specifics types of claims, I am better able to serve my clients. I believe that a lawyer simply cannot develop expertise in all areas of the law.

If you are represented by a lawyer who has never successfully handled a brain injury case, or who has only represented plaintiffs in car accident cases, you may not be in the best of hands.

I believe it is so important that you get into the right hands that if we do not agree to accept your case, I will give you the names

and telephone numbers of other good personal injury lawyers in our area.

Why do I give you the names of my competitors? Simple—I believe that we are all on the same side in representing innocent victims. These people are lawyers for whom I have a great deal of respect. It is my desire, above all else, that people with meritorious cases get into the hands of experienced trial lawyers.

"How Do I Find Out Who Is Good In My Area?"

REFERRAL

Get a referral from a lawyer that you do know. He or she may know someone who practices in the area you need. Most of my brain injury and medical malpractice cases come from referrals from other lawyers or from satisfied clients.

YELLOW PAGES

The Yellow Pages can be a good source of names. However, remember that placing an ad in the Yellow pages does not necessarily mean the lawyer has experience with brain injury claims.

CASE SELECTION

There are some law firms that boast about the size of their "personal injury team". But most or all of the work on the file is done by junior lawyers or "paralegals" who are not even lawyers.

Make sure that the lawyer you hire is selective enough with his or her cases that your important case does not become just one more file in the pile.

BOOKS AND REPORTS

Ask each lawyer if they have information like this book so you can find out more about the lawyers qualifications and experience **before** you walk in the door.

THINGS TO LOOK FOR

Here are a few factors to look for and question your lawyer about. Not every lawyer will meet all of these criteria, but the significant absence of the following should be a big question mark.

- **EXPERIENCE** – Obviously, the longer you have been practicing a particular area of the law, the more you will know. I believe that experience is a big factor in most cases. Ask the lawyer if he or she has achieved any significant verdicts or settlements. The larger the verdicts and settlements achieved, the more likely the defendants will respect your lawyer.

- **RESPECT IN THE LEGAL COMMUNITY** – Does the lawyer teach other lawyers in Continuing Legal Education courses?

- **RESPECT IN THE BRAIN INJURY COMMUNITY** – Have they been elected to the Board of the Brain Injury Association

of Nova Scotia or other groups that provide support to survivors of serious injuries?

- **MEMBERSHIP** – Have they been elected to serve on the Board of the Atlantic Provinces Trial Lawyers Association, or do they have a membership in the American Association for Justice?

- **PUBLICATION** – Has your lawyer written a Consumer Guide like this one or anything that has been accepted for publication at legal conferences or in academic journals? This is another sign of respect that the legal community has for the lawyer's skills and experience.

What Happens After You Decide On A Lawyer?

It is important to know how your lawyer will keep you informed about the progress of your case. In my practice, we generally send a copy of every piece of correspondence and pleadings in the case to the client. We take time to explain the "pace" of the case and in what time frames the client can expect activity to take place.

The client is invited to call or email at any time. I try to return every call within 24 hours. Sometimes that's impossible, particularly if I am traveling or in trial. If I can't call you back, one of my associate lawyers or my assistant will help you set up a specific "telephone appointment." You are also invited to make an appointment to come in at a time that is convenient to you.

Find out who will actually be working on your case. Some large personal injury firms have a staff of people that aren't even lawyers who are in charge of managing their clients' claims. In other firms, client files are handed off to junior lawyers in order to give them more experience.

Make sure that you and your lawyer have a firm understanding as to who will be handling your case on a day to day basis. There are a lot of things that go on with a case that do not require the senior lawyer's attention. But if you are hiring a lawyer because of his or her experience, make sure that that person is going to be in charge of your claim.

What Do I Do For You in a Brain Injury Claim?

In order to determine whether you have a case, we must first gather all of the relevant medical records involved in your care. Once all of the records are received, we review them to see if, based upon our experience, it looks as though there is a provable case of brain injury (I go into more detail about what happens if I think the medical files have been altered in some way).

If the case looks like it has merit, medical experts in the appropriate specialty must be consulted and retained.

Once we have retained experts who are prepared to testify on your behalf, other records, including employment records and tax returns must be obtained. This information will help us prove the damages or financial losses that have been suffered due to the defendant's negligence.

Tasks in a "Typical" Brain Injury Claim

Here is a more or less complete list of the tasks I may be called to do in your case. Remember that each case is different, and that not all of these tasks will be required in every case.

- Interview the client;
- Educate you about brain injury claims;
- Gather documentary evidence including medical records and hospital documents;
- Interview known witnesses;
- Collect other evidence, such as photographs of the injury itself;
- Analyze the legal issues, such as contributory negligence;
- Talk to your doctors or obtain written reports to fully understand your condition;

- Analyze your insurance policy to see if any money they spent to pay your bills must be repaid;
- Analyze the validity of any liens on the case. Insurance companies, social assistance benefit plans and employers may each claim that they are entitled to all or part of your recovery;
- Obtain relevant medical literature to help prove the nature and extent of your brain injury;
- Recommend whether an attempt should be made to negotiate the claim or whether suit shall be filed;
- Retain appropriate experts to review of your claim;
- If suit is filed, prepare the client, witnesses and healthcare providers for discovery examinations;
- Prepare written questions and answers and take the discovery examination of the defendant and other witnesses;
- Produce to the defendant all of the pertinent data for the claim, such as medical bills, medical records, and tax returns;
- Go to court to set a trial date;
- Prepare for trial and/or settlement before trial;
- Prepare the client and witnesses for trial;
- Organize the preparation of medical exhibits for trial;

- Organize the preparation of demonstrative exhibits for trial;
- Prepare for mediation;
- File briefs and motions with the court to eliminate surprises at trial;
- Take the case to trial with a jury or judge;
- Analyze the jury's verdict to determine if either side has good grounds to appeal ;
- Make recommendations to the client as to whether or not to appeal the case.

The Legal Process in Brain Injury Claims

In most cases today, attempting to negotiate with the defendant before filing suit is a waste of time and effort. Insurance companies use pre-suit negotiation only to find out as much about you, your lawyer and your doctor as they can. It is my opinion that many lawyers waste precious time attempting to negotiate with the defendant before filing suit.

If I accept your case it is because we believe it has merit and you deserve a trial by jury. We will usually file your suit before negotiating so that if negotiations break down, we will be able to head toward a trial date as quickly as possible.

I believe that it is a dangerous practice to wait until the Statute of Limitations has almost expired before filing suit. While there are legitimate reasons for delaying filing suit, there is no excuse for waiting until the last moment to see if the defendant will settle your case.

BRAIN INJURY CLAIMS AND LEGAL GUARDIANSHIP

Because brain injury can affect a victim's cognitive abilities, the brain injury victim may not be capable of managing their legal affairs on their own.

In cases where the proposed plaintiff is under a disability, the court will appoint a legal guardian, called a *guardian ad litem*. A guardian ad litem is someone independent, approved by the court, to represent the brain injury survivor when the survivor is not capable of representing themselves.

The court gives the guardian ad litem the right to act on behalf of the injured person and make certain decisions for him/her. The guardian ad litem has the duty to handle the survivor's legal affairs, and is obliged to act in the best interests of the survivor and to protect their welfare.

In cases involving injury to a child, the child's parents are considered by the court to be the natural guardians of their children. Usually a parent volunteers to act as the guardian ad litem for their child.

The Challenges of Brain Injuries in Children

Representing children who have suffered a brain injury present particular challenges. The brain injury lawyer must not only consider the "normal" effects of brain injury, but also how the brain injury will affect the child's developmental process.

Because the effects of traumatic brain injury can be subtle, and because children's cognitive abilities normally improve as they mature, it may appear that the child has fully recovered from a brain injury. Unfortunately the full impact of the child's cognitive deficits may not be clear until much later in the child's developmental process.

Children only are expected to function at age-appropriate levels. So the damage to a particular area of the brain may not become apparent until the child would normally be able to engage in that age-appropriate skill but is not able to do so because of their brain injury.

A thorough evaluation of paediatric brain injury must allow time for a complete assessment of the child's cognitive, motor and behavioral abilities. The impact of cognitive deficits and motor impairments from brain injury can be devastating.

But brain injury can cause behavioral issues that can complicate or prevent a return to normal functioning.

CHALLENGES IN RECOVERY AND REHABILITATION

Children face particular challenges in recovering from brain injury because they do not have the same life experience that an adult has to draw upon to aid in their rehabilitation.

Young children may be more vulnerable to the effects of serious brain injury than adults because during rehabilitation an adult is *relearning* previously acquired skills while children have to *learn new skills* with impaired cognitive or motor function.

For example, most of us have heard the expression: "It's like riding a bike." What they mean is that once you learn the skill, you never forget it, even if you haven't rode a bike for many years. Adult survivors of brain injury have an advantage because they can draw on their *body memory* of what it's like to ride a bike. But what is a brain injured child, who never learned to ride a bike, to rely on to help them in learning that skill?

After a brain injury, a child may appear to return to previous levels of functioning.

But a prudent brain injury lawyer will not try to settle the child's claim, until it is determined whether the child can acquire and store new information adequately.

An interruption or impairment in a child's ability to acquire new learning can limit future intellectual growth and academic achievement. It is obvious that an interruption in education can have long term impact on a child's future vocational and employment opportunities.

IDENTIFYING AND DOCUMENTING BRAIN INJURY IN CHILDREN

Identifying and proving the existence of cognitive, functional and motor deficits due to brain injury can be challenging. But it is essential to ensure that the brain injury survivor receives full and fair compensation.

It is common for medical records to document the existence of an initial injury that may have caused trauma to the brain. But often medical records do not document the residual effects of the injury.

Neuropsychological consequences such as cognitive, behavioural and motor deficits that commonly occur with post-concussive syndrome may be difficult to assess. The challenge can be even greater with young children who may have difficulty understanding and describing problems with memory.

"ARE THERE SPECIAL BRAIN INJURY TESTS FOR CHILDREN?"

Most common measures that are used to identify or quantify brain injury, like neuropsychological testing, the Glasgow Coma Scale, and assessment of post-traumatic amnesia and developmental and educational assessments are based on scientific testing and research performed on adults.

For example, the Glasgow Coma Scale measures changes in the levels of consciousness by documenting eye opening and motor responses. But the test assumes that the person with an injury can understand verbal commands. So the Glasgow Coma Scale must be modified for use with very young children.

Identification of memory loss to prove the existence of post-traumatic amnesia also requires the development of language skills. If a child has not developed language skills, it is difficult to accurately test memory.

There are experts who specifically work with the neurobehavioral consequences of pediatric brain injury. An experienced brain injury lawyer will know the appropriate experts to use to properly document the existence of paediatric brain injury.

Steps in a Typical Brain Injury Claim

NOTIFY DEFENDANT OF THE CLAIM

We will notify the Defendant of your claim. We will provide them with basic information about the nature of your claim.

FILE YOUR LAWSUIT WITH THE COURT:

You have to file a document called a *Notice of Claim* with the court that explains all the relevant facts that you rely on to prove your claim. You have to provide facts to prove:

- That the Defendant was negligent;
- That you suffered injuries as a result;
- A description of your injuries;
- That you suffered financial losses as a result; and
- A description of the amount of the financial losses.

EXCHANGE OF DOCUMENTS

Both sides have to provide each other with any relevant information they have about the claim.

For example, you will have to provide the Defendant with copies of your medical records about your injuries and your work-history and income records to prove the extent of your income loss.

INTERROGATORIES

Each side is entitled to send written questions, called Interrogatories, to the other side to learn what they know about the injury and how it happened.

DISCOVERY EXAMINATIONS

Each side is allowed to ask questions about what the other side is going to say at the trial. These questions are recorded and typed up into a *transcript*. Both you and the Defendant will be questioned at the discovery. Later on in this report I will explain the discovery process in more detail and provide you with some tips to help you prepare for your discovery.

Sometimes the medical experts for both sides may be discovered. Before discovery of the experts, each side must disclose to the other side what the experts are expected to say when they testify. It is possible that witnesses to the medical procedure

or operation or other people that have important information about the claim may be questioned at discovery.

DEFENCE MEDICAL EXAMINATION

The other side may request that you attend a medical exam (or exams) with a doctor of their choosing. The purpose of the defence medical examination is to help the other side prepare to defend your claim.

As you can imagine, a Defence Medical Exam is *not* like your typical doctor's appointment. Later on in this report I will explain the Defence Medical Exam in more detail and provide you with some tips to help you prepare for the Examination.

NOTICE OF TRIAL

Once discoveries are complete and you have collected all the reports and other information that you need for your claim, you file your Notice of Trial. This is a document that is filed with the court advising the court that you are ready to go to trial and including all the expert reports that you will rely on at trial.

TRIAL

If both sides are not able to negotiate a settlement that both sides agree to then a trial takes place to decide the claim. In Nova Scotia you can *elect* (decide) to have your trial in front of a judge alone or in front of a judge and jury.

The Discovery Examination in Detail

Despite being called a discovery *examination,* a discovery is not a test. A discovery is part of the legal process. You are asked questions under oath and a Court Reporter records your answers and prepares a written transcript.

The purpose of a discovery, as the name suggests, is to learn (or discover) all there is to know about the other side's case. A discovery can have a significant affect on the outcome of your case.

Sometimes the Defendant's lawyer will pick out key questions from your discovery and ask you those questions at trial. If you answer is significantly different at trial, the lawyer will use your discovery transcript to attack your credibility.

The discovery process also gives the Defendants lawyer a chance to see how you will perform as a witness.

SECRETS TO A SUCCESSFUL DISCOVERY EXAMINATION

The Defendants lawyer will try to get you to provide as much information as possible. Do not volunteer information! Although, that sounds easy to do, it is actually very difficult. But if you remember that the purpose of the discovery is to find out as much as possible about your case it will make it easier for you to remember not to volunteer information.

THE GOAL OF YOUR DISCOVERY

Your goal at discovery is **NOT**:

1. To win your case;

2. To show emotions;

3. To convince the Defendants lawyer about how good your case is.

Your goal at discovery is simple: to complete the discovery without providing the Defendant with information that can hurt your case.

ALWAYS TELL THE TRUTH

The one thing that can hurt a case more than anything else is if you do not tell the truth during your discovery.

A lawyer can win a case with bad facts but it is almost impossible to win a case when a Judge or Jury thinks that you are lying. Telling the truth is not only the right thing to do; it is in your best interest in order to win your case.

LISTEN TO THE QUESTION

Listen to the question. Answer only the question that is asked. Next to telling the truth, this is the most important rule to remember during your discovery. It is also the hardest rule to follow.

When you have been living with the effects of an accident for some time you assume that the other lawyer will ask you about the issues or facts that you think are important. You may not listen to the question that is actually being asked, which may lead to you providing more information than necessary.

Listen to the question. Answer only the question that is asked. For example if you are asked: "Do you know what time it is?" A proper answer is "Yes" or "No". A "bad" answer is to say: "Yes, it's 3:00".

Do not suggest the next question from your last answer. For example, if you are asked: "Did you go to work after the accident?" A proper answer is "Yes".

A "bad" answer is: "I went to work after the accident but I had to leave early". This will lead the Defence lawyer to ask about the reasons *why* you left work early.

DO NOT RUSH TO ANSWER THE QUESTION

After the Defendant's lawyer asks you a question, pause before answering. Pausing gives you time to think about your answer.

DON'T VOLUNTEER INFORMATION

Volunteering information is almost always a bad idea. Telling the truth does not mean volunteering truthful information that is not necessary to answer the question. Do not do the other lawyers work.

Clients will often volunteer information in an effort to show the other lawyer that they "don't have anything to hide". Resist the temptation to fill in the gaps or volunteer information.

Answer the question truthfully and directly, and then stop. If the question can be answered by "yes", you should simply answer: "Yes". You should NOT answer by saying: "Yes, *but you may also want to know about …*"

Do not volunteer to provide information. For example: "I don't know, *but I can ask my husband/wife/employer…"*

Do not volunteer to provide documents. For example: *"If you want I can get a copy of my medical records."*

If the Defendant's lawyer asks if you would be willing to provide documents or other information you can respond that you are willing to provide anything that your lawyer recommends that you provide.

There are many things about your case that you think are important and you want the other side to hear because you think it will help your case. It is almost always a bad idea to volunteer this information because it allows the Defendants lawyer the opportunity to prepare to refute the information at trial.

SPECULATION

Do not speculate. Do not explain things unless you are asked to. Do not give examples unless you are asked to. Most answers should be short and to the point.

OBJECTIONS

If the other lawyer asks a question that is inappropriate I will object. Unless the objection is based on privilege (confidential discussions between you and me as your lawyer) generally you will be allowed to answer the question.

UNDERSTAND THE QUESTION

If you do not understand the question, you should ask the lawyer to restate the question. You are entitled to have it in a form that you understand. If you do not understand the question, or a term in the question, say so.

The answer to a question you do not understand is ***almost always wrong***.

The answer to a question you do not understand can almost always hurt your claim!

PREPARATION

Finally, while it is not necessary to prepare in order to tell the truth, preparation is very important in order to be able to fairly respond and answer the questions that you will be asked during your discovery.

The Defence Medical Exam in Detail

Whenever you place your mental or physical impairment at issue in a claim for compensation, the defendant has a right under our rules of court to require that you undergo a medical examination by a doctor of the defendant's choosing. In any brain injury claim the defendant's lawyer will request that you undergo testing by a doctor (or doctors) that they have selected.

The examination is usually referred to by defence lawyers as an "independent" medical examination or I.M.E. Make no mistake; there is nothing "independent" about it!

A more accurate term is a **Defence Medical Examination** (D.M.E.).

The defendant must give you reasonable notice of the time and place of the examination and the name of the D.M.E. doctor as well as the scope of the evaluation.

The D.M.E. doctor must to provide a copy of the report to you (or your lawyer) within a reasonable time after the examination.

In exchange, you are required to provide copies of all medical office treatment notes, lab reports, consultations etc. from every doctor who has examined or treated you for the injury or impairment you are now claiming.

In addition, most defendants will also ask you for a signed authorization so that other information may be obtained before your D.M.E. date. *Do not sign anything without consulting with your lawyer.*

The D.M.E. doctor may be subpoenaed to give testimony under oath during a discovery examination, and may testify and be cross-examined at trial. Therefore, it is extremely important to be properly prepared for the D.M.E. and understand the objectives of the examiner.

The D.M.E. is a physical examination by a medical doctor chosen by the defendant (or their insurance company) for the purpose of providing medical documentation which can be used by the defendant to defend your claim.

In theory, D.M.E.'s are intended to "clarify" complex medical restrictions and limitations. In practice, the D.M.E. is a tool paid for by the defendant which supports their decision to deny your claim for compensation.

The problem is that for the most part, doctors whose practice consists primarily of conducting D.M.E.'s are not "independent medical examiners" by any reasonable definition, and are usually hired to provide testimony that supports the defendant.

D.M.E. doctors often render opinions and conclusions outside their area of medical expertise. D.M.E. doctors may also assume the role of a disability claims investigator, paid by the defence, to provide documentation adverse to you and your claim.

For example, in *Jane's* case that I talked about earlier in this book, the defence lawyer hired a well known Neurologist to do a D.M.E. to determine if *Jane* had a brain injury. The defence neurologist's report not only contained opinions in the field of neurology, but also psychology, psychiatry, neuropsychology and orthopedic medicine! All in an effort to deny that *Jane* had suffered a brain injury.

It is important to remember D.M.E. doctors are **not concerned with your medical well being!** They have a clearly defined agenda and strategy to assist the defendant's lawyer with what appears to be, credible, objective medical opinion contrary to that of your primary care physician or family doctor.

Their role is to attack your credibility by assuming that your claim is a fraud that must be exposed. It is a great deal easier to attack *your* credibility, and the judgment of your doctor, than it is to ascertain medical restrictions and limitations preventing you from returning to work.

D.M.E. doctors are provided with all the medical information you previously sent to the defendant's lawyer.

The D.M.E. doctor takes instruction from the Defendant's lawyer. Therefore, **the D.M.E doctor already knows the**

"opinion" of the defendant concerning your ability to work before you arrive for the evaluation.

It seems reasonable to conclude the D.M.E. doctor may have already formed an opinion concerning your impairment, especially when the defence lawyer is the one that hired them.

If you are not prepared for the D.M.E. your claim may be seriously damaged. Although the following suggestions won't guarantee that your claim will be successful, it will help prevent the defence doctors from unduly damaging your claim.

THE D.M.E. PROCESS: PREPARE YOURSELF

The doctor will likely conduct an interview before the medical examination. The doctor typically refers to the interview as "taking your medical history".

The purpose of the interview is to obtain facts and comments from you which may be used after the D.M.E. to show you are inconsistent with your responses. For example, if you say you can't use your hands or carry heavy objects, don't lift a large bag and drive a vehicle to the D.M.E.

Always use common sense. Remember, the defence may have arranged for video surveillance the day before, the day of, and the day after your D.M.E.

Whatever you tell the doctor about your physical capacity should be the same as what you told the defendant if you gave a

statement or what you testified to at discovery. It should also be the same as any observed activity should the company have you under surveillance before the exam.

Keep in mind when speaking with the doctor to answer only the questions asked, and then be quiet. **Never volunteer or offer additional information other than what is asked**.

SEE YOUR FAMILY DOCTOR THE SAME DAY:

When you know the date and time of the evaluation, call your family doctor and make an appointment just after the D.M.E. Tell your doctor that the defendant has asked you to submit to a D.M.E.

THIS SECOND EXAMINATION SERVES TWO PURPOSES:

1. It provides documentation of your physical condition by your family doctor **on the same day** as the D.M.E. exam, and

2. Sometimes the D.M.E. doctor may be a little rough and cause you to swell or have pain. Tell your doctor if you have pain, swelling, or any other physical symptoms as a result of the D.M.E. The documentation of your own doctor may be extremely important when pointing out inconsistent and unreasonable conclusions made by the D.M.E. doctor.

STUDY YOUR MEDICAL RECORDS:

It is extremely important that you review all of your prior medical records and history of your present disability. One way in which the D.M.E. doctor may draw suspicion to your claim is to "catch" you in inconsistencies when you talk about your prior medical history.

A simple lapse of memory by not mentioning a particular doctor, or lab test you had in the past is sufficient for the D.M.E. doctor to conclude you are trying to hide something and your claim is fraudulent. No prior doctor visit or treatment should be left out of your history, as you will certainly be asked about it at the beginning of the exam. Study your medical records before your D.M.E. date.

REFRESH YOUR MEMORY WITH THE FOLLOWING INFORMATION:

- Chronological medical history;
- A statement of the nature and extent of your disability;
- The date you first stopped working and why;
- How your disability has affected your activities of daily living (personal hygiene, meal preparation, dressing and undressing, preparation of meals etc.);
- Restrictions and limitations given by all treating doctors; and

- A complete description of your treatment plan discussed previously with your family doctor or treating physician.

Only when you are well prepared for discussing your medical history, can you avoid the "traps" of giving an inaccurate or inconsistent medical history. Skilled D.M.E doctors will make a big deal of every omitted detail no matter how insignificant it may seem.

TAKE SOMEONE WITH YOU:

Never attend a Defence Medical Examination alone. On the day of the exam, do not take part in any strenuous physical activity. Remember that the defendant's lawyer may have requested surveillance. Leave your house with someone who can assist you during the exam, ask questions for you, and/or take notes of procedures during the exam. Always request that the person who comes with you be allowed to remain with you during the D.M.E.

Nova Scotia's rules of court **do not require** that the doctor allow you to have someone with you during the examination. Some D.M.E. doctors will allow you to have someone with you, some will object. If they object, we can use that fact to question the objectivity of the examination. Ask your companion to take notes and to observe how the D.M.E. doctor treats you during the examination. Your companion is there to protect your personal needs during the exam, and document what took place.

WADDELL SIGNS

D.M.E. doctors use certain exams to trick you. One such test is referred to as **Waddell signs**, used by physicians to identify psychological factors in patients claiming back problems from trauma, chronic pain and fibromyalgia.

So-called "false positives" on these indicators are often at the root of adverse decisions documented by the D.M.E. doctor. The D.M.E. doctor will perform a hands-on examination for each test, looking for you to say "it hurts" when in fact it is impossible, given nerve or sensory distribution for it to really cause pain.

In other words, the D.M.E. doctor tries to "trick you" into saying it hurts when it really shouldn't, given the injury or diagnosis you have.

WADDELL SIGNS IN A NUTSHELL

TENDERNESS – The doctor will lightly touch or pinch your skin over a wide area beyond the normal distribution of the sensory nerves. If you say these light touches are sensitive and tender, the D.M.E. doctor will suspect exaggeration. If you say you have pain when deeply touched over a wide area beyond the area of an injury or joint, the doctor will suspect exaggeration. Usually pain is only evident in the localized area of the injury. If you have fibromyalgia and say you have pain "everywhere", the doctor will suspect your reactions.

STIMULATION TESTS – If the doctor presses down on your head while you are standing (this is called axial loading), and you report low back pain, the doctor will say you are exaggerating. If the doctor rotates your shoulders and pelvis at the same time while you are standing, and you complain of low back pain, the doctor will say you are exaggerating.

DISTRACTION TESTS – Occasionally when the D.M.E. physician finds something wrong, the doctor may try to distract you, performing another test of the same area without telling you why. If you have a negative reaction, or don't give a full effort, the doctor will suspect exaggeration.

An example of this is to ask the patient to raise one leg against resistance while lying down. If your opposite leg does not press down, for leverage, then the doctor will suspect you are not giving full effort for the purpose of exaggeration.

Sometimes, the D.M.E. doctor will just walk away from you supposedly to write something down in your chart, and then quickly ask you a question. If you "turn your head" in the doctors direction when you said you couldn't do that because of pain, the doctor will suspect all of your complaints.

REGIONAL DISTURBANCES – If you complain of excessive weakness, such as the giving way of muscles within a particular group, the doctor will say you are exaggerating. Likewise, if you claim numbness, tingling or pain over an area outside of the distribution where the nerves from the spine lead down the leg into

the toes, the doctor may suspect exaggeration. This is especially true for fibromyalgia and chronic fatigue claims.

OVERREACTION – If you cringe, grimace or otherwise show unnatural responses to sensory, motor or reflex tests (all of the above), the doctor may suspect exaggeration.

Other Types of Defence Medical Examinations

NEUROPSYCHOLOGICAL EXAMINATION:

In a brain injury case, one of the most important assessments is conducted by the neuropsychologist. A proper neuropsychological exam uses scientifically validated tests to evaluate brain functions from simple motor performance to complex reasoning and problem solving. The results of these tests are then compared with normative standards.

NEUROPSYCHOLOGICAL TESTS EXAMINE TRAITS LIKE:

- Attention and processing speed;
- Intelligence;
- Motor performance;
- Language skills;
- Sensory acuity calculation;
- Working memory;

- Vision analysis;
- Learning memory;
- Problem solving;
- Abstract thinking and judgment;
- Mood and temperament; and
- Executive functions

While C.T. scans, M.R.I.'s, E.E.G.'s and P.E.T. scans identify structural, physical, and metabolic conditions of the brain, the neuropsychological examination is generally accepted by the medical community to be the only way to formally assess brain ***function.***

Sometimes defence lawyers will often hire a doctor, who is not a neuropsychologist, to conduct a D.M.E. using these tests. The results may be of questionable reliability if the D.M.E. doctor is not properly trained to administer or interpret the neuropsychological test results.

THE MALINGERING TEST (ARE YOU FAKING IT)?

The MMPI-2 (Minnesota Multiphasic Personality Inventory) is a well-known test designed to identify if a patient is exaggerating or faking their symptoms: "malingering". The test is often used by the D.M.E. doctors.

OTHER TESTS

OTHER COMMON TESTS USED DURING A NEUROPSYCHOLOGICAL EXAMINATION INCLUDE:

- The Beck Depression or Anxiety Scales (which provide a quick assessment of symptoms related to depression or anxiety);
- The Bender Visual Motor Gestalt test (evaluates visual-perceptual and visual-motor functioning and possible signs of brain dysfunction, emotional problems, and developmental maturity);
- Dementia Rating scale, (provides measurement of attention, initiation, construction, conceptualization, and memory to assess cognitive status in older adults with cortical impairment;
- Halstead Category test, (measures concept learning, flexibility of thinking and openness to learning. It is considered a good measure of overall brain function.

There are other tests available to neurologists who generally select a combination of tests for each individual based on their diagnosis and history.

In order to be valid, neuropsychological examination results should be interpreted by a certified neuropsychologist, or psychologist. The neuropsychological tests are subject to interpretation, and of course, D.M.E. doctors can interpret the results in favour of the defendant.

FUNCTIONAL CAPACITY EXAMINATIONS (F.C.E.)

For structural injuries to the hands, bones, feet, and back and for chronic pain and fatigue issues, the F.C.E. administered by a qualified occupational therapist or doctor produces objective, verifiable, and accurate results. If you have suffered a brain injury that impairs some of your physical functions, an F.C.E. can help establish the nature and extent of your physical limitations from your brain injury.

Functional capacity evaluations include physical tests to determine how much weight you can lift or carry; your ability to use hands and feet, your ability to climb stairs, lift overhead, crawl, bend, stoop, and your physical endurance, i.e. ability to work consistently and give full physical effort.

In Nova Scotia, F.C.E.'s are generally conducted by occupational therapists (O.T.) that have been trained to properly administer, and interpret, the tests. The O.T. will attempt to categorize your functional capacity by defining your physical ability as:

- Sedentary;
- Light;
- Medium; or
- Heavy capacity.

The F.C.E. may result in a rating of full body disability usually expressed as a percentage. The defendant will ask the O.T. to give you restrictions and limitations (things you may not do

at all, and activates you may only perform at a certain level or duration).

The O.T. will state whether he/she believes you made a full effort on the exam. As I mentioned earlier these evaluations are more reasonable and produce better results for both the defendant and for the injured person.

GAF RATINGS

Global Assessment of Functioning (G.A.F.) ratings are used to show to what extent a person's injuries or illness impact on their ability function on a day to day basis.

THE GAF SCALE IN A NUTSHELL

100-91: Superior functioning in a wide range of activities, life's problems never seem to get out of hand, is sought out by others because of his or her many positive qualities. No symptoms.

90-81: Absent or minimal symptoms (*e.g.*, mild anxiety before an exam), good functioning in all areas, interested and involved in a wide range of activities, socially effective, generally satisfied with life, no more than everyday problems or concerns (*e.g.*, an occasional argument with family members).

80-71: If symptoms are present, they are transient and expectable reactions to psychosocial stressors (*e.g.*, difficulty concentrating after family argument); no more than slight impairment

in social, occupational, or school functioning (*e.g.*, temporarily falling behind in schoolwork).

70-61: Some mild symptoms (*e.g.*, depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (*e.g.*, occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships.

60-51: Moderate symptoms (*e.g.*, flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (*e.g.*, few friends, conflicts with peers or co-workers).

50-41: Serious symptoms (*e.g.*, suicidal ideation, severe obsession rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (*e.g.*, no friends, unable to keep a job).

40-31: Some impairment in reality testing or communication (*e.g.*, speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (*e.g.*, depressed person avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school).

30-21: Behavior is considerably influenced by delusions or hallucinations OR serious impairment, in communication or judgment (e.g., sometimes incoherent, acts grossly inappropriately,

suicidal preoccupation) OR inability to function in almost all areas (*e.g.,* stays in bed all day, no job, home, or friends).

20-11: Some danger of hurting self or others (*e.g.,* suicide attempts without clear expectation of death; frequently violent; manic excitement) OR occasionally fails to maintain minimal personal hygiene (*e.g.,* smears feces) OR gross impairment in communication (*e.g.,* largely incoherent or mute).

10-1: Persistent danger of severely hurting self or others (*e.g.,* recurrent violence) OR persistent inability to maintain minimal personal hygiene OR serious suicidal act with clear expectation of death.

0: Inadequate information.

Nine Tips to Help Prepare for your D.M.E.

1. Prepare for the D.M.E. in advance. Know your medical history and be consistent when telling your history to the D.M.E. doctor.

2. Let your family doctor know you have been asked to submit to a D.M.E., make an appointment to be examined by your own doctor on the same day.

3. Take someone with you to the exam that can take accurate notes of the procedures. Take pictures of any swelling or obvious physical marks in the D.M.E. doctor's office.

4. Do not exaggerate symptoms or over react when touched or prodded.

5. Remember the D.M.E. doctor is not your friend or your medical doctor. Do not ask medical questions about your treatment, and answer only the questions you are asked.

6. Remember you may be watched by a private investigator. Wear braces, use canes, or other therapeutic devices as instructed by your doctor. Limit your activities on the day before, the day of and the day after your D.M.E. examination.

7. Ask for a copy of the D.M.E. report. The doctor may or may not give it to you, but ask anyway.

8. Stay calm, and if the D.M.E. physician hurts you, say so. If the D.M.E. doctor manipulates you, or physically hurts you to the point of pain, ask for an ambulance to be called.

9. After the exam, go home and relax. Be confident that whatever conclusion the Defendant's draw from the D.M.E. report, has nothing to do with you, or how you presented yourself during the exam.

"So How Long Does All of This Take?"

You can expect the legal process to take two to four years to complete. Some cases resolve sooner than that, but I will only accept cases from clients who are prepared to take the time we need to fully prepare their claim. I do not have the time to take cases from clients who are simply looking to settle quickly in order to "make a quick buck".

Should You Hire Me?

There are many lawyers who advertise for brain injury cases. There are capable experienced lawyers in this field, but it is difficult for a client to separate the good from the bad. You need to ask your lawyer all of the questions I have outlined in this report.

Our clients get personal attention because we are **very selective** in the cases that we take. We decline hundreds of cases a year in order to devote personal, careful attention to those few that we accept. We do not make money by accepting many small cases hoping to get a small fee out of each.

What Cases Do I NOT Accept?

Because of the tremendous difficulty in obtaining a fair recovery in a mild traumatic brain injury case, most experienced brain injury lawyers will not accept a mild traumatic brain injury case unless there are significant financial damages at stake. Our court system is simply not set up to handle "small" personal injury claims.

Due to the high volume of calls and referrals from other lawyers that I receive, I have found that the only way to provide personal service is to decline those cases that do not meet my strict criteria.

These cases are expensive and time consuming. I would like to represent everyone who needs a good lawyer, but we cannot. Therefore, I generally **do not** accept the following types of cases:

- I do not accept cases where there is no evidence of a **significant injury** which was directly caused by the defendant.
- I do not accept brain injury cases where there is a **significant pre-existing injury.** If you had chronic headaches

for many years and now claim that your car accident has caused a brain injury resulting in constant headaches, the chances of a jury awarding you a substantial amount of money is just about nil. Again, I feel that it is not worth the risk to the client to pursue these cases.

- I do not accept cases where the statute of limitations will soon run out. I like to have at least four months to adequately investigate and evaluate your claim. Your delay is not going to become my crisis.

"Are There Any Cases Left?"

Yes, there are, and that's just the point. We are a small firm and accept a limited number of cases each year.

We concentrate our efforts on increasing the value of good cases—not filing and chasing frivolous ones.

I only represent clients that I believe to have valid claims. When I devote my time and resources to representing only legitimate claimants with good claims, I am able to do my best work.

How Do I Decide Which Cases I Will Take?

When someone has suffered a catastrophic brain injury, the results are immediately apparent. In those cases it is not difficult to determine if I can help the survivor.

But in cases of mild traumatic brain injury, it may take weeks or months of work, research and investigation before I am able to decide if I will agree to represent a client in a mild traumatic brain injury claim.

COLLECTING AND REVIEWING THE MEDICAL RECORDS:

The first step of the review process is to collect all of the relevant records and information about the medical treatment that you (or your loved one) received. This includes getting copies and reviewing all of your hospital records as well as the records from your family doctor and any specialists that may have treated you for your injuries.

After we have collected all the relevant medical information, I review the records to see if, based on my past experience, there are any obvious medical-legal issues that may provide the grounds for a brain injury claim.

In some cases it is obvious after my initial review of the medical information that a claim for compensation for mild traumatic brain injury is, or is not, likely to be successful.

I do not charge my clients for my initial review of their medical records.

MEDICAL SCREENING OPINION

After I review all of the relevant medical records, I have a medical specialist review the chart to point out any medical issues of concern and to make recommendations about what specific medical specialists we will need to retain (hire) in order to testify for my clients in court.

There is no charge to my clients for the review by the medical specialist.

RETAIN AN EXPERT (OR EXPERTS) FOR A MEDICAL-LEGAL OPINION:

If my review of the records indicates that there is a potential legal claim, **and** the medical specialist's review indicates that there is legitimate medical evidence to indicate that there are grounds for a mild traumatic brain injury claim, then I recommend

hiring a top notch medical expert who will testify for them if the claim goes to court.

I conduct a search throughout Canada and the United States to find an expert (or experts) who will be willing to review my clients' medical chart, provide us with a medical legal opinion, and testify for my client if the claim goes to court.

I do not charge my clients for the time involved in searching for the medical expert.

THE CLIENT CAN MAKE AN INFORMED DECISION:

If the medical expert determines that there are grounds for a brain injury claim, then my client can make an informed decision about whether to proceed with a lawsuit.

Given the financial risk that my clients undertake it is my professional obligation to take on claims where I am confident that there was medical malpractice and that my clients have a reasonable chance of proving their claim in court. I refuse to take on cases that I do not think are legitimate in the hope of getting a quick settlement.

WE TAKE ON THE RISK OF THE LAWSUIT:

When I take on a brain injury claim we carry all the legal fees and pay the costs and expenses associated with your lawsuit.

The cost of the medical experts alone for a typical brain injury lawsuit usually runs into tens of thousands of dollars.

In other words, we are aware of the risk that out clients take when they file a brain injury claim because we share the risk with our client.

I WILL CONSIDER YOUR CLAIM IF:

- You or your family member suffered a **serious** or **significant** brain injury, or
- You have been left with a **permanent** *disability* or **serious** *disfigurement*, or
- You can **no longer work** because of your brain injury, or
- You can work, but your brain injury limits your ability to earn an income, or
- You have **significant expenses** for medical treatment.

Sometimes it is immediately clear that the brain injury is going to meet my case selection criteria. It is easier to determine if someone has a potential claim they have been left partially paralyzed, seriously brain injured or have suffered serious fractures or a head injury.

However, in most cases in the days following your injury, it is not immediately apparent what the future will hold. Will you fully recover after a few days or weeks, or will your injuries result in long term disability? In those cases I consult with the client and we determine the best course of action.

When I devote my time and resources to representing only legitimate claimants with good claims, I am able to do my best work. I have found that getting "bogged down" in lots of little cases, is not good for my clients with legitimate claims.

What Can You Do From Here?

The most important thing that you can do if you think you have a potential brain injury claim is to get a complete copy of all your hospital records. Any lawyer that represents you will need to have as complete a record as possible.

Keep a journal of events, and note the date, time, and circumstances of your developing situation.

Details are very important—brain injury cases may involve looking back at years of the patient's medical history, particularly if the defendant's lawyer argues that your injury was a result of a preexisting medical condition.

Finally, you should seek an experienced brain injury lawyer to represent you in your case. As stated earlier, it is likely that the statute of limitations in your province has already started to run. The legal process does take time—you should weigh your options for lawyer carefully, but you should begin your search immediately.

Our Services

Sometimes the best advice is that you do not have a claim that can be won. If that is true, we will tell you so. If your case meets our criteria for acceptance, you can be assured that you will receive my personal attention. I will keep you advised as to the status of the case and give you my advice as to whether your case should be settled or whether we should go to trial. If we go to trial, I will be the lawyer trying your case.

Our initial consultation is free. We will fully explain all fees and costs to you before proceeding. Together, as a team, you and I will decide on the tactics best suited for your case. I look forward to hearing from you.

I hope you have found this information to be helpful. If you would like to discuss your claim, you can call us at 902-423-2050 or toll-free in the Atlantic Provinces at **1-877-423-2050**.

JOHN A. MCKIGGAN

306-5670 Spring Garden Road
Halifax, NS B3J 1H6

Office: 902-423-2050
Fax: 902-423-6707
Toll-Free: 877-423-2050

www.apmlawyers.com

WA

Brain Matter on JOHN MCKIGGAN

John McKiggan is one of the founding partners of Arnold Pizzo McKiggan. John has devoted his career to representing persons who have suffered serious personal injuries as a result of medical malpractice, car accidents and childhood sexual abuse.

He has a particular interest in representing survivors of traumatic brain injury and for many years has volunteered as a member of the board of the Brain Injury Association of Nova Scotia (Halifax).

This book is written in plain English to educate individuals who have suffered a traumatic brain injury, and their families, about the legal issues surrounding traumatic brain injury. John wrote this book to help survivors better understand the legal claims process, so that they understand their rights, and can make an informed decision about whether to pursue a brain injury claim.

For more information about traumatic brain injury and personal injury claims, you can visit John's website at *www.apmlawyers.com* or take a look at one of his blogs at: *www.halifaxpersonalinjurylawyerblog.com; www.halifaxmedicalmalpracticelawyerblog.com;* or *www.sexualabuseclaimsblog.com.*

APM·LAW
ARNOLD · PIZZO · MCKIGGAN
TRIAL LAWYERS

$16.95

ISBN 978-1-59571-706-1
51695 >
9 781595 717061

WA WORD ASSOCIATION PUBLISHERS
www.wordassociation.com
1.800.827.7903