REFUTING ALLEGATIONS OF MALINGERING IN A TRAUMATIC BRAIN INJURY CASE

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Introduction

It is a situation that every neurolawyer faces at some point in their career. Usually, it occurs in cases involving mild traumatic brain injury where there is little objective evidence of injury. However, with alarming frequency it occurs in cases involving moderate to severe brain injury. What is it? It is the claim by the Defendants that the Plaintiff is either feigning their brain injury altogether or exaggerating the consequences. It is important that Plaintiff's attorney's anticipate that this defense will be raised at some point and prepare to refute the claim of malingering from the outset of the case.

What is Malingering?

Malingering is an accepted psychiatric diagnosis. It is defined by the DSM IV (Diagnostic and Statistical Manual IV) as follows:

> The essential feature of Malingering is the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs....
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> Malingering should be strongly suspected if any combination of the following is noted:
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> 1. Medicolegal context of presentation (e.g. the person is referred by an attorney to the clinician for examination);
> 2. Marked discrepancy between the person's claimed distress or disability and the objective findings;
> 3. Lack of cooperation during the diagnostic evaluation and in complying with the

prescribed treatment regimen;

4. The presence of Antisocial Personality Disorder.

Malingering differs from Factitious Disorder in that the motivation for the symptom production in Malingering is an external incentive, whereas in Factitious Disorder external incentives are absent.

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 320, 322, 327 (4th ed. 1994). This definition of malingering provides defense experts the opportunity to find evidence of malingering in almost any MTBI case since there will often be litigation pending and rarely any objective evidence of brain injury.

Strategic Case Selection

Because of the reluctance of many jurors to find significant injury in the absence of objective physical manifestations, such as broken bones or lacerations, and because of the subtle nature of TBI, strategic case selection is critical to refuting allegations of malingering. Cases where the client reports no loss of consciousness, especially those involving minimal property damage, quickly fall prey to claims of malingering. Although I personally believe that TBI can occur in the absence of significant damage to the vehicles, I have found it extremely difficult to convince the average juror to return an adequate verdict in such cases.

There is no doubt that the current medical literature establishes that a loss of consciousness is not necessary for a person to sustain a traumatic brain injury. It is equally clear that it is much, much easier to convince most jurors that a brain injury has occurred if it can be proved that the client lost consciousness at the time of their injury. Invariably, the Defendant will argue the fact that the Plaintiff did not lose consciousness is evidence that she or he is malingering. It is therefore extremely important to accurately determine whether a loss of consciousness occurred. Loss of consciousness is frequently not properly documented in the medical records. Often, there will be conflicting statements about loss of consciousness. Someone who has recently sustained a TBI may be unable to accurately answer when asked , "Did you lose consciousness?" Many times the TBI patient will respond with "I don't know" or "I don't think so," which will be noted in the EMS records as a negative report of loss of consciousness ("no LOC"). The Emergency Department records frequently repeat information regarding loss of consciousness from the EMS records, and hence contain erroneous reports of "no LOC."

The lag time between when the accident occurs and when EMS personnel arrive on the scene may result in an inaccurate report about loss of consciousness. The injured person may regain consciousness prior to the arrival of EMS personnel or other bystanders. They may be unaware of how long they were unconscious. This is a particularly significant problem with regard to periods of confusion where there is no loss of consciousness. More often than not,

brief periods of confusion without loss of consciousness are not reflected in the medical record.

Prompt and thorough investigation is essential where traumatic brain injury is suspected. The attorney must identify everyone present at the accident scene immediately following the event. These persons must be interviewed to determine whether they noted any change in the client's level of consciousness or mental status in the first few minutes following injury. Often bystanders can establish periods of unconsciousness or confusion missed by medical personnel. Do not overlook first responders such as volunteer firemen or rescue squads who often arrive at the scene well before EMS personnel.

Careful consideration should also be given before instituting litigation on behalf of a client with MTBI who has a significant criminal history, documented past alcohol or drug abuse, poor work record or low academic performance. Refuting claims of malingering in these cases will prove extremely difficult since the diagnosis of TBI will be largely dependent on the client's credibility.

Scientific Challenges to Allegations of Malingering: *Daubert* Analysis

From roughly the beginning of the fourteenth century, courts have limited the admission of hearsay evidence, particularly opinion testimony.[1] Although its admission was generally restricted, opinion testimony was traditionally allowed where the evidence was outside the realm of common knowledge and the evidence was based on the testimony of a witness qualified as an expert by virtue of training, knowledge, skill or experience in the pertinent subject area.[2] The "Frye Rule," which held that scientific evidence could be admitted only if it had gained "general acceptance" within the particular field, marked the first substantial limitation on the admission of expert testimony. It continued to be the most widely adopted and followed rule governing the admissibility of expert testimony for the next seventy years.

The first significant change in the manner in which the federal courts viewed expert testimony occurred in 1993 when the United States Supreme Court released its opinion in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, (1993). The Daubert Court held that Rule 702 of the Federal Rules of Evidence superseded Frye as the appropriate standard for determining admissibility of expert testimony as to scientific evidence in Federal courts. Rule 702 provides:

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1 Lee, Patrick. Translating Evidence into Practice 1997 Conference Summary - Session B: Scientific Evidence and the Courts - The Daubert Case and Expert Opinion. Http://www.ahcpr.gov/clinic/trip1997/trip2.htm.

2 Id.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[3]

Thus, Rule 702 contains a two-part test for the admission of an expert's opinion: 1) Does the expert's opinion relate to a matter of scientific, technical or specialized knowledge? and 2) Will the expert's testimony be helpful to the trier of fact in determining a fact at issue in the case?

"Scientific knowledge" must be more than a mere belief; it must be fact or theory grounded in methods or procedures of science.[4] The Daubert opinion lists several factors germane to the question of whether or not proffered evidence constitutes admissible "scientific knowledge." Factors identified by the Court include: whether the evidence is based on a testable theory or technique; whether the theory or technique has been subjected to peer review and publication; the known or potential error rate of the theory or technique; and, general acceptance of the theory or technique within the scientific community. These four factors were not intended to be all inclusive. Rather, they were intended as a guide in the application of the "flexible" "inquiry envisioned by Rule 702."

The role of a federal trial judge post-Daubert has been described as that of a "gatekeeper" whenever scientific evidence is concerned. Trial judges now must not only decide whether the expert is "qualified," but they must also decide whether the expert's methodology is "reliable." In a Daubert hearing, the trial judge applies Rule 104(a) of the Federal Rules of Evidence to qualify the expert witness and make a preliminary finding as to whether the reasoning or methodology underpinning the expert's proffered testimony is scientifically grounded and can properly be applied to the facts at issue.[5] Writing for the Court in Daubert, Justice Blackmon expounded on Rule 702's departure from the stringent Frye test:

> Nothing in the text of this Rule establishes "general acceptance" as an absolute prerequisite to admissibility.... The drafting history makes no mention of Frye, and a rigid "general acceptance" requirement would be at odds with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony."[6]

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3 Federal Rules of Evidence (as amended through December 1, 1994).

4 See generally, The Expert and Daubert (Spring 1996 Issue of Mac News Letters), http://www.mac-experts.com/macnewsletters/spring96/daubert.htm.

5 Id.

6 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Daubert in the wake of *Kumho Tire*

Following the Daubert decision there was widespread disagreement as to whether Daubert applied only to scientific testimony or whether it applied to all expert testimony. There was also disagreement as to whether Daubert applied to "experience-based testimony" as opposed to testimony based on research.

Those questions were answered by the United States Supreme Court in Kumho Tire vs. Carmichael. Kumho grew out of a serious car crash that was caused by a tire blowout. The Plaintiffs contended that the blowout was caused by a manufacturing defect in the tire and offered expert testimony in support of their contention. The Defendants moved to exclude the testimony of the Plaintiffs' expert based on Daubert. The court excluded the expert's testimony and then granted summary judgment for Defendants. Plaintiffs appealed contending that Daubert did not apply to experience-based technical opinions. The Supreme Court disagreed and held that the trial judge's Daubert gatekeeping obligation applied not only to scientific testimony, but to *all* expert testimony based on scientific, technical or other specialized knowledge. The court based its conclusion on the fact that Rule 702 makes no distinction between "scientific", "technical" and "other specialized" knowledge. Thus, Daubert's "gatekeeping" requirement applies to any testimony offered pursuant to Rule 702, even experience-based testimony.

The decisions give wide discretion to trial judges to determine not only whether the proffered testimony is reliable, but also the method used to establish reliability as well. The Court held that the Rules grant a district court the same broad latitude when it decides how to establish reliability as it enjoys with respect to its ultimate reliability determination.

According to the Court, the objective of the gatekeeping role is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs the same level of intellectual rigor in the courtroom that characterizes the practice of an expert in the relevant field. Where the factual basis of the opinion, the data, principles, methods or their application is sufficiently called into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline. The trial court must determine not whether the methodology is useful or reliable in general, but that it is reliable *when applied to the specific issue involved in the case*.

Appellate review of the trial judge's decision both as to whether the testimony is reliable and how to establish whether it is reliable is pursuant to the abuse of discretion standard. It seems reasonable to assume that, just as many state courts adopted Frye and then Daubert, Kumho Tire will eventually gain widespread acceptance among most state courts.

Do Malingering Tests Meet the *Daubert/Kuhmo Tire* Criteria?

There has been a proliferation of new tests in recent years which claim to be able to detect malingering. Many recent neuropsychology journals contain articles on the topic of malingering and tests for its detection. When a defense neuropsychologist bases his or her claim of malingering on the use of certain psychological tests Plaintiff's counsel should consider filing a motion pursuant to Daubert and Kumho Tire to exclude the opinion of malingering altogether. Prior to filing the motion it is important to force the defense neuropsychologist to provide complete information about the test used.

It will be difficult, if not impossible for any neuropsychologist to establish that a particular malingering test has gained widespread acceptance within the neuropsychological community. The error rates on most tests have not and cannot be determined. Most neuropsychological tests for malingering have been validated based on "simulated malingerers." In the studies, normal subjects are told to pretend that they have been in an accident and as a result of that accident they have a brain injury. They are then told to take the tests in a manner which would establish the presence of a brain injury. There is little scientific data to support this approach. Many of the tests which claim to detect malingering have not been subject to peer review.

I have successfully used Daubert to exclude portions of a neuropsychologist's testimony that my client was malingering based on the results of the "Lees-Hailey Malingering Scale." In his deposition, the neuropsychologist admitted that the whole subject of malingering detection was "highly controversial." He further admitted that the test he used was not generally accepted within the neuropsychological community and that he was unaware of the error rate for the test. In short, he was unable to establish the reliability of the test based on the Daubert factors.

Effective Lay Witnesses: Employers, Co-Workers, Friends and Family

Much has been written about the importance of lay witnesses when proving damages in a TBI case. Lay witnesses can also be effective in refuting claims of malingering. The testimony of individuals who have had the opportunity to interact with the injured client both pre- and post-injury in professional or personal settings may be more believable to the jury than the claims of a hired gun for the defense. If possible, locate individuals who have had regular contact with the Plaintiff over a long period of time. Contrast of the amount of time they have spent with the Plaintiff to the amount of time spent by the Defendant's expert. Ask each of the lay witnesses whether the defense expert contacted them for information. Ask whether they have observed conduct by the Plaintiff which is inconsistent. Make sure that they give specific examples of behavior by the Plaintiff which illustrate the deficit areas. Make sure the jury is aware of any incidents which occurred at times or places which would be embarrassing to the Plaintiff. The Plaintiff's employer or coworkers may provide extremely valuable testimony in opposition to claims of malingering.

Preparing for the Defense Medical Exam

There is no such thing as an “Independent Medical Exam” performed by a defense expert. A more accurate description of these examinations is “Defense Medical Exam.” When I receive a request for a client to submit to a DME, I advise the defense attorney that the client will agree to submit to the examination on the following conditions:

1. We will be provided a current copy of the *curriculum vitae* (CV) of the DME physician at this time, and in no event less than 10 days prior to the scheduled appointment, along with a statement of the charge for our taking a 1 hour deposition at the physicians office at the end of a workday;

2. With the copy of the CV, we will be provided the full and correct name of the DME physician (or separate billing entity, i.e. Payee), with Tax Identification Number, so that we can comply with tax code and regulation requirements for any payment made in taking the physician's deposition;

3. The appointment is scheduled so as not to cause he client a loss of time from work, or at least to minimize such loss of time;

4. Our client may be accompanied by a friend or relative, or a registered nurse, at our client's election; this person is merely an observer and will not interfere in any way with the examination;

5. Our client, once scheduled, will be seen without undue delay, meaning within approximately 15 minutes, and in no event more than 45 minutes, of the time of the scheduled appointment (absent some emergency);

6. There will be no invasive tests, and no X-rays will be taken. Existing records will be made available for review;

7. The DME physician will write a report, and a copy of that report and a full copy of the office chart and a copy of the statement for services will be promptly provided to me, as counsel for my client;

8. The DME physician will be made available for deposition within 30 days of the rendering of written report. A **one hour** deposition may be scheduled, at our request, paying only for the hour of deposition at a normal and reasonable hourly rate, which we will be advised of in writing before the actual examination;

9. The DME physician will not use, in the report or orally in deposition or trial the term "independent" [as in "independent medical examination"], unless the physician has been selected by the court governing the case;

It is particularly important to insist that the client be accompanied to the DME by a friend, relative or registered nurse at the client’s election. Ideally, the client should be accompanied by a registered nurse or a friend or family member *with a medical background*.

An unbiased RN is preferable to a friend or family member for obvious reasons. Although the person accompanying the client is an observer who cannot participate in the DME in any capacity, they can take note of how thorough the exam is, and what areas, if any, are not sufficiently explored by the DME doctor. Testimony regarding the quality of the exam, the demeanor and methods of the DME doctor, and the attitude and comportment of the client may be very useful in refuting claims of malingering.

Conclusion

With careful case selection, thorough investigation, proper witness selection and adequate trial preparation most claims of malingering can be refuted altogether or minimized. Remember that malingering is generally not an "all or nothing" proposition. Most defense experts will admit that the client has at least some symptoms which are related to the accident. Emphasize areas of agreement. Use Daubert challenges whenever possible to exclude evidence of malingering altogether.