



When your brain-injured client returns to work

Maximizing non-economic damages in a brain-injury case when your client returns to work

By ANNIE WU

With ride, scooter and bike-share apps increasing in many cities, there seems to be an increase in injuries among professionals who are using these apps to get to and from work. As a result, we are seeing an increase in professionals suffering significant injuries due to products liability and negligence.

Many high-achieving plaintiffs who suffered a brain injury (sometimes referred to as a mild-traumatic-brain injury or MTBI) may return to work too soon for several reasons. Some do not realize how badly injured they are and continue to work while believing their symptoms will go away; others have no choice but to return to work in order to meet their financial needs. Regardless, there are ways to maximize the value of your case and reduce the risk of defendants reaping the benefits of your client's mitigation efforts.

Does a plaintiff weaken his or her case by mitigating damages?

Understand your client's profession and duties. Many professionals who carry a lot of responsibility in their roles feel compelled to return to work before they should in order to keep up with the demands of their job. It is not unusual for a plaintiff to return to work by working during the recovery period, which may worsen the injury. Despite having ongoing symptoms of memory loss, inability to focus, difficulty thinking, pain, and other cognitive deficits, a plaintiff may return to work fulltime, and in the same capacity. This exposes a plaintiff to argument by the defense that the injury had little impact on his or her ability to work,

which translates to a low evaluation by the defense of past pain and suffering.

On the other hand, if a plaintiff does not return to work after an injury, the defendant may argue a failure to mitigate damages. CACI 3930 – *Mitigation of Damages (Personal Injury)* is the jury instruction applicable in a personal injury case if the defendant claims a plaintiff failed to mitigate damages. CACI 3961 – *Duty to Mitigate Damages for Past Lost Earnings*; and CACI 3962 – *Duty to Mitigate Damages for Future Lost Earnings* may be instructive and modified. It is important to understand the tension that underlies a plaintiff's decision to return to work following a brain injury. A careful analysis should be made on how the decision may impact not only case value but, more importantly, a plaintiff's recovery.

When neuro-psychological testing indicates no impairment

Plaintiffs who have a pre-injury level of intellectual functioning in the superior range often persevere and can adjust to cognitive and behavior changes without letting the injury impact their work performance. A plaintiff can still score in the above average range on neuro-psychological testing with cognitive impairment if the plaintiff is considered to have a pre-injury intellectual functioning capacity in the superior range (92%-97%). Some treating neuro-psychologists may not have sufficient pre-injury information about the plaintiff to consider this distinction when interpreting the results of testing.

Do not give up a brain-injury claim without hiring an expert to give you a second opinion, particularly when the results of neuro-psychological testing are inconsistent

with strong evidence of a brain injury. A treating neuro-psychologist may not interpret the results of the testing to show cognitive impairment if the scores are in the high end of the spectrum. Even though there is little you can do to refute the results, you can discover evidence to refute the interpretation of the results, and thereby demonstrate cognitive impairment.

Having a second opinion to interpret the results of neuro-psych testing is crucial so that an expert can explain why scoring in the above average range may still be evidence of impairment. A treating neuro-psychologist may not take into consideration all relevant records to determine cognitive impairment. For example, obtaining school records reflecting GPA or standardized test scores will help prove the pre-injury level of intellectual functioning as a baseline. A plaintiff who scores in the 92nd to 99th percentile on standardized tests or has a GPA in the 95th to 99th percentile among their peers may still function at a high intellect and in the above-average range, even with cognitive impairment. While the level of impairment may not be viewed as severe or debilitating, any injury to the brain and change in cognition causes pain, frustration, adjustment, suffering, grief and impacts a person's well-being.

Challenges when a plaintiff earns more money after a brain injury

A plaintiff's integrity and perseverance to work while injured is almost always punished by defendants who dismiss the pain and suffering associated with a plaintiff being able to achieve their work



goals while still suffering the ramifications from the defendant's conduct.

Defendants typically overlook the struggles a plaintiff experiences in working post-brain injury, and instead interpret there to be no impact on the ability to work if there is no future wage loss. Defendants have a difficult time assigning a high value for noneconomic damages when there is no future wage loss. In cases where impairment is less severe, a plaintiff may continue to work, and even get a raise. This should not be misinterpreted to signify that the mental impairment isn't realized every day. Finding ways to prove these damages is ever more critical.

CACI 3905A states that noneconomic damages are awarded for physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress. Defendants tend to give greater value to physical pain or disfigurement from an injury – a broken bone, amputation of a limb, visible scarring, and physical limitations are a few examples.

In cases where there is cognitive impairment there is always associated pain and suffering, even if the evidence of it is less obvious. When a plaintiff appears "normal" from his or her appearance, defendants typically discount the value of non-economic damages, especially when a plaintiff has returned to work. The key to proving pain and suffering damages when your client works with an injury is finding witnesses who observe the different work habits adopted by a plaintiff in order to get by with his or her limitations.

Identifying collateral witnesses to explain the impact of a brain injury

In cases involving a traumatic brain injury, it is not uncommon for past and future medical damages to be low. A plaintiff may suffer a loss of consciousness and/or an altered state of consciousness, signifying trauma to the brain, but have

normal findings on brain imaging. Past medical treatments may include treatments in the emergency room, follow-up visits with a primary care doctor and/or a neurologist, cognitive therapy treatments, and a neuro-psychological evaluation.

Future medical treatments may include individual and family counseling, cognitive therapy, prescription medications, and repeat neuro-psychological testing. Do not be discouraged with a low-figure life-care plan. One argument to respond to low medical damages is to explain the permanency of the injury and how there is little treatment for a brain-injured plaintiff.

Family and friends are common collateral witnesses we rely on to testify about damages. Many times, we don't identify these damages witnesses until we are faced with preparing a witness list for trial. Do not wait until trial to decide who to select as collateral witnesses. Investigate and vet them. These witnesses should be interviewed and selected well before trial; in some cases they will be deposed.

Interviewing co-workers, colleagues, staff members should not be sidestepped, and do not rely solely on your client's own testimony to support the inconvenience, grief, anxiety and emotional distress that is realized by having to adjust to a change in cognition.

Identifying collateral witnesses who can testify about the change in work habits, struggles with keeping up with deadlines, and heavy reliance on staff to help stay focused with tasks, is not only essential to proving noneconomic damages, but can break your six-figure case into a seven-figure case when the economic damages are low.

Case study of an injured professor

I represented a college professor who suffered a brain injury but returned to work full time after three months. His dedication to his students, commitment to teaching, and need for income to support his family were reasons he returned to work prematurely. Sure enough,

defendants argued my client's concussion resolved when he returned to work.

My client continued working and earned more money the following year. Despite being diagnosed with a mild cognitive disorder, which defendant disputed, the defendant took the position that any future noneconomic damages awarded would be minimal because he returned to work and was earning more money. The defendant believed my client wasn't severely injured and that his concussion symptoms resolved when he went back to teaching.

Through investigative work, I identified former students who observed the changes in my client's teaching. I noticed their depositions early in the case; they testified about seeing their professor tire out, take frequent breaks, lose his train of thought, sit during lectures where he used to walk around the classroom and engage with students, and more notably, specific instances of memory issues.

I also identified his former teaching assistant who gave compelling testimony about how she had to create digital material for my client so he didn't have to lecture from memory; she was burdened with all the mundane tasks because my client would get headaches from looking at the computer screen, he had less focus during class and was obviously discouraged, and he took brief naps in between classes due to mental exhaustion.

The testimony of third-party witnesses corroborated my client's testimony about the challenges he faced by returning to work, which caused daily stresses on his work life and transferred over to his home life. His wife explained how her spouse would come home from work and go straight to bed without spending time with his family.

Even though the claimed economic damages were low, the overwhelming evidence presented through third-party witness depositions was compelling to convince the defendant not to discount my client's pain and suffering because he was able to return to work full time.



Conclusion

Brain injuries can be difficult to prove, especially when a plaintiff returns to work in the same capacity and economic damages are low. The right discovery plan, a thorough neuro-psychological evaluation, and identifying collateral witnesses early on will help maximize your client's damages.



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