



Kelly Hanker
TRIAL LAWYERS FOR JUSTICE

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2024



Revealing the untold story of traumatic brain injury

BEFORE YOU CAN REPRESENT AN MTBI CLIENT, YOU NEED A TRAUMA-INFORMED PRACTICE

Traumatic brain injuries (TBI), particularly those categorized as “mild” TBI (mTBI), are frequently referred to as invisible injuries due to their elusive and seemingly “hidden” nature. Unlike a broken bone or a visible scar, the effects of such TBIs are rarely apparent to outside observers. Yet these injuries have a profound, life-altering impact on those injured, their families, their social relationships, their ability to thrive in their careers or educational pursuits, and nearly every other aspect of their lives. As advocates for our clients, we have a critical responsibility to uncover the veiled impacts of TBIs and effectively communicate our clients’ stories to ensure

they receive just compensation and support for their physical, mental and emotional injuries and suffering.

Consequently, the process of identifying, documenting, presenting, and revealing the true nature and intricacy of your client’s TBI from initial intake to trial is essential to properly developing their case. The results of such efforts also will undeniably change their physical, mental and emotional rehabilitation and outcomes, not to mention possibly saving their relationships, careers, and ability to best function in the world given the tremendous restraints their TBI imposes on their life. By implementing the

comprehensive strategies discussed in this article you can help ensure that your client’s suffering does not go unrecognized or undercompensated.

The importance of having a trauma-informed practice

A TBI is generally defined as an alteration in brain function or other evidence of brain pathology, caused by an external bump, blow, force, assault or other injury to the brain (e.g., rapid acceleration and deceleration, or coup-contrecoup) that causes not only acute damage to the brain but also initiates a chronic *disease process* with evolving neurological consequences and associated

sequelae (or secondary effects, e.g., cognitive deficits, psychiatric disorders, and changes in personality).

The type of injury sustained affects how and where the brain is damaged. Structural changes to the brain from head injury may be gross or microscopic, depending on the mechanism of injury and forces involved. The level of gross structural damage and clinical manifestations vary significantly in severity and magnitude. It is also important to note other causes and elements that can contribute to abnormal brain injuries, such as hypoxic and anoxic brain injury (where oxygen to the brain is compromised), carbon monoxide, cleaning products, asbestos, pesticides, fuels, drugs, and exposure to heavy metals such as mercury and copper. Brain injuries caused or contributed to from exposure to such chemicals and substances can yield symptoms that can be acute, chronic, mimic TBI, Parkinsonism, cerebellar dysfunction, endocrine dysfunction second to TBI, etc.

The level of permanence or impairment of physical, cognitive, and psychosocial functioning also varies dramatically. This is in part because every brain is different, and every brain injury is different. Further, a person's access to medical treatment and rehabilitation post-traumatic brain injury can have dramatic consequences as to their outcome. Since traumatic brain injury is a chronic disorder that can persist beyond the initial acute injury, it is rarely truly a discrete or time-limited event (e.g., more recent scientific findings that all levels of TBI are associated with increased cardiovascular disease).

It is therefore essential to consider the potential chronicity of the injury (e.g., functional sequelae such as post-concussive syndrome or PTSD) as a construct rather than a single event (e.g., just the acute insult or original injury to the brain). Also crucial are considerations of the physical, mental and emotional

baselines of the person before the insult or injury occurred, and how the injury and associated sequelae (e.g., post-concussive syndrome) have altered the level of functionality for each. Accordingly, no two brain injuries or TBI clients can or should be treated alike.

Challenges in client self-detection/identification

Before delving into the strategies for developing the story of your client's TBI, it's important to understand TBI and its effects. These injuries are often overlooked because they are not easily visible and require a deeper understanding. Therefore, all injury cases should undergo thorough screening. It's crucial for every member of the legal team, from intake staff to attorneys, to be knowledgeable about these "invisible injuries." Your firm should aim to be trauma-informed and implement communication systems that recognize clients may not be aware of their own TBI symptoms due to the nature of their injury.

Challenges in early diagnosis and limitations of current technology

At the outset it is important to recognize that TBIs are a significant public health issue in the U.S. Up to 80% of concussions (a form of TBI) are not detected or diagnosed by emergency response personnel. Emergency rooms primarily focus on immediate triage, potentially overlooking TBIs, which are not only acute injuries but also ongoing medical conditions. CT scans are often used urgently to identify serious brain bleeding, sometimes necessitating surgical intervention to relieve pressure and save lives.

Moreover, while scientific and technological advancements continue, current methods like traditional CT scans and MRIs often fail to detect mild TBIs (mTBIs). Even advanced 3T MRIs, which are not universally available due to geographic, insurance, or financial constraints, struggle to consistently detect mTBIs compared to more commonly used 1.5T MRIs.

In essence, the text underscores the challenges in diagnosing and treating TBIs comprehensively, especially in cases of mild injuries, despite ongoing improvements in medical technology.

Initial client intake: the signs and symptoms

The journey of identifying a TBI and uncovering the story of your client's full range of impairments begins with the initial intake and effective communication, incorporating a comprehensive symptom questionnaire. Whether conducted by you or your staff, it's crucial that everyone involved in injury cases at your firm is trauma-informed and well educated on the nuances of TBIs and associated symptoms. Standard intake procedures and internal systems are often inadequate, leading to missed TBI cases that may only surface when symptoms become too obvious to ignore later in the case. Without thorough education, each point of contact within your firm may fail to accurately convey the client's symptoms and story, potentially leaving deserved damages unrecovered.

A useful analogy to grasp the importance of uncovering the story of your client's injuries is the tip of the iceberg. Like an iceberg, TBIs are often "invisible injuries," with outward appearances often not reflecting the full extent of symptoms – physical pain, emotional suffering, and isolation – that lie beneath the surface. Many TBI clients may not even realize they have suffered a brain injury or attribute their symptoms to it, especially in cases of "mild" TBI. This lack of awareness can stem from incomplete medical evaluations or the focus on immediate physical injuries post-incident.

Furthermore, the demands of daily life can prevent clients from fully addressing their symptoms, leading to underreporting and potential misdiagnosis or dismissal of their concerns by medical professionals. It is crucial, therefore, for law firms to implement rigorous intake procedures

that facilitate accurate symptom reporting and effective client advocacy.

Our role as legal professionals is to empower clients to recognize and communicate their symptoms and suffering effectively. This requires a deep understanding of TBIs and a commitment to trauma-informed lawyering, allowing us to support clients in navigating the complexities of their injuries and advocating for their rights. By educating ourselves and our clients, we can ensure that their voices are heard and their needs addressed, even in cases where a TBI diagnosis has not yet been established.

In essence, while the journey of understanding and addressing TBI-related impairments may be new for clients, it is our responsibility as legal advocates to provide the knowledge and support necessary for them to navigate this journey effectively and assert their rights.

Going beyond the tip of the iceberg to observe the unobserved

During the intake interview, ask open-ended questions about the client's daily life, mental and emotional state, relationships, and work performance (including before and after the incident for each). Listen carefully for any changes that might suggest a TBI; it is almost certain that the client does not think to automatically connect these changes to their injury. There are multiple reasons for this.

While some symptoms may occur immediately, many other symptoms may appear weeks or more later; symptoms may not be obvious; symptoms are highly variable between TBIs; symptoms can be non-specific; patients are instinctively motivated to *not* look for concussion or serious injury; and when clients are "cleared" by doctors, hospitals, or urgent care facilities to leave and go back to work, for instance, they don't think to get a second opinion or question their medical providers. You may be the first person to recognize these symptoms and help them get appropriately evaluated and treated.

With regard to damages, those individuals who can get the compensation they need have a much better chance at rehabilitation; the outcome for a TBI client is directly related to the support they have and receive, particularly when the client has lost their ability to be who they are: their sense of identity. It can be a terrifying experience not to recognize oneself in one's own body and mind. Add to that all the ways their impairments cause them loss of enjoyment of life. What is the value of that to them?

It is important to create a safe and comfortable environment for the client to share their experiences. Many TBI clients feel embarrassed or frustrated by their symptoms, and do not fully grasp the changes they are experiencing. Approach the conversation with empathy and patience, allowing the client time to articulate their experiences. Understand that your client may not have talked to anyone in their life about these issues. Preface your questions and conversation with information about traumatic brain injury, help them appreciate how the symptoms can affect a person, and try to normalize the effects to minimize any shame or hesitancy to communicate what's truly going on with them and their life post injury.

TBI symptoms checklist

An effective way to comprehend the importance of having a client fill out a TBI checklist and reviewing it with them at intake is the familiar proverb: How do you eat an elephant? One bite at a time. Clients can feel anxious, stressed, or overwhelmed without knowing why, making recovery after a TBI even more difficult. Walk through each of these symptoms with them after they have filled out the checklist on their own. Focus on symptoms that are consistent and sustained over time (usually weeks), and that are of sufficient severity to interfere with the client's social or occupational function and loss of enjoyment or quality of life.

1. Cognitive symptoms:

- difficulty concentrating, decreased attention or difficulty maintaining attention or concentration
- memory problems (short-term, long-term, and/or working memory)
- cognitive slowing, fatigue, processing speed (brain fog)
- confusion or disorientation
- impaired judgment or decision-making
- difficulty with planning, organization, problem-solving
- problems with multitasking
- language challenges or difficulty with articulation
- other difficulty with executive functions (goal-setting, prioritizing, self-monitoring, learning, spontaneity, and flexibility in changing actions when they are not productive)

2. Physical symptoms:

- persistent headaches or migraines
- fatigue or low energy
- sleep disturbances (insomnia or excessive sleeping)
- blurred or double vision
- ringing in the ears (tinnitus), hearing problems
- nausea
- convulsions or seizures (in more severe cases)
- bladder problems
- intimacy dysfunction
- unequal eye pupil size or dilation
- maxillofacial trauma or weakness in facial muscles
- clear fluids draining from the nose or ears (cerebrospinal fluid (CSF))

3. Emotional/behavioral symptoms:

- mood swings or emotional instability
- irritability or short temper
- depression or feelings of hopelessness
- anxiety, heightened stress, nervousness
- personality changes
- impulsivity or lack of inhibition
- apathy or lack of motivation
- social withdrawal or previously normal social functioning
- post-traumatic stress disorder (PTSD)

4. Sensory disturbances and vestibular balance symptoms:

- sensitivity to light, sound and noise

(which can cause or exacerbate headaches)

- sensory changes, such as numbness or paresthesia
- dizziness
- balance and coordination issues
- motion or mobility challenges
- unsteadiness
- changes to visuospatial abilities
- vertigo

5. Neuro-visual symptoms (cranial nerves III, IV, and VI-oculomotor):

- vision problems, such as blurred or double vision (diplopia)
- converge insufficiency (eyes that don't converge as visuals come close)
- binocular vision disorder (eyes don't track together when moving)
- horizontal or vertical heterophoria (treatment for this are prescription prism glasses that help gait, sight, etc.)
- nystagmus (condition in which the eyes make repetitive, uncontrolled movements)

6. Ear, nose and throat (ENT) symptoms:

- loss of hearing or other hearing deficits
- change in sense of smell (cranial nerve I-olfactory) and taste (cranial nerves VII-facial, provides the sense of taste to the front two-thirds of the tongue and IX-provides taste information from the back third of the tongue)
- speech or swallowing difficulties

It's crucial to recognize that many of the above symptoms may not appear immediately and often appear or evolve over time.

Examples of key questions to ask

Below are ideas of key questions to ask, consolidated in a way that is meant to be conversational, help trigger their memory, and feel more comfortable and natural for them (be informal, relatable – don't talk like a lawyer):

1. Changes since injury:

- What things have you noticed have changed for you since your injury? For instance, have you observed any differences in your ability to concentrate or remember things?

2. Cognitive and emotional changes:

- Have you noticed any changes in your ability to concentrate or remember

things? Do you feel more forgetful or absent-minded than before? How has that affected your daily life or activities?

3. Emotional regulation:

- Do you find yourself more easily overwhelmed or stressed since the incident? Have you heard about fight, flight, fawn, or freeze responses? Do you notice yourself reacting in any of these ways now, and is that different from how you used to handle stress?

4. Mood and irritability:

- Have you noticed changes in your mood, like feeling more easily frustrated or irritable? How has that affected your relationships with your partner, family, or others close to you?

5. Physical symptoms:

- Are you experiencing more frequent headaches or dizziness since the injury? How has the character or location of these headaches changed, if at all?

6. Sleep and daily functioning:

- Has your sleep pattern changed since the incident? Have others noticed any changes in your sleep habits?

7. Functional impairments:

- Do you find it more difficult to complete tasks at work or at home now? How has your ability to handle everyday activities like cooking or cleaning been affected?

8. Environmental adaptations:

- Have you needed to make any changes in your environment at home or work to accommodate your needs since the injury? How has that adjustment been for you?

9. Self-care and appearance:

- Have you encountered any challenges with personal care tasks like toileting, bathing, or grooming? Do you notice any changes in your overall appearance or how you present yourself?

10. Reflection on changes:

- What else do you notice is different about you now compared to before the injury? How do you think others perceive these changes? How has this impacted your relationships and communication with them?

By following up each question with reflective prompts and allowing the

person to share their experiences and feelings, you can help them explore the impact of their injury on different aspects of their life. This approach encourages them to reflect on their current state compared to their baseline, fostering a deeper understanding of their challenges and needs.

Investigate whether the client was using medications for any reason in the previous year as they are *more* likely to be susceptible to TBI. The same is true for clients with a pre-existing history of anxiety, headaches/migraines, ADHD, substance abuse, and depression. Keep in mind that a client who lost consciousness or experienced an altered state of mind or any altered state of consciousness very well may not remember or know that that happened to them; examine this in detail with them. Don't forget to explore loss of consortium claims and all related questions for each applicable witness.

Telling the story beyond the impact or initial injury

To truly tell your client's story, you need to look far beyond medical records and expert opinions in cases of invisible injuries. The impact of a TBI on daily life is best illustrated through real-world examples, personal stories, and testimony from those who know and love the client most. Implore the universal truths and resonant stories from your client's life that command the attention rather than indifference of the jury.

Find ways to uncover the snowball effect of their symptoms by getting the full picture of the totality and interplay between each of them: how anxiety and depression can cause cognitive effects such as distraction, which affects memory and further affects their emotions, depression, anxiety, sense of self, feeling of self-worth, confidence, etc., such that they compound on each other. Utilize the below strategies to find ways to show, not tell, how your client will never be the same.

1. Client journals

Encourage your client to keep a daily journal documenting their symptoms,

challenges, and emotional state. This contemporaneous record can be powerful evidence of the ongoing impact of the injury. Provide guidance on what to include, such as:

- physical symptoms experienced each day
- cognitive difficulties encountered
- emotional state changes and mood changes
- disruptions in sleep patterns
- activities they struggled with or were unable to complete
- interactions with family, friends, or coworkers that were affected by their symptoms

2. Before and after witnesses

There is no more important or effective way to tell the story of your client's invisible injury in a TBI case than to identify and obtain the before and after stories from individuals who knew your client well both before and after the injury. These might include: family members (spouse, children, parents, siblings), close friends, coworkers, supervisors, neighbors, religious or community leaders and teachers or professors.

As many as 90% of brain-injured victims have "normal" brain scans, e.g., no "objective" MRI findings, because MRI scans are *macroscopic* and the only way to detect a client's mTBI and *microscopic* brain damage would be to examine their brain tissue on a slide when a person passes away to see the damage to the neurons *microscopically*. So, what do you do you? You talk to their loved ones and collateral witnesses to find out what they were like before the TBI, and what they have been like after. Their observations of the changes in your client's abilities, personality, or behavior can provide compelling testimony about the real-world impact of the TBI beyond the limitations of current technology.

Prepare these witnesses to be able to provide specific examples of changes they have observed in your client and how your client is not the same person; that

there was a person before that event, and there's another person after the event. Have them demonstrate through their reflections and observations how this event has changed this person one way or the other, forever. Such observations by the people who know your client the best and collateral witnesses who have no dog in the fight serve to paint the picture that technology cannot yet and allow you to present your client's previous hopes and current harms effectually at trial. The cumulative effect of each witness' testimony can depict, in a way that no scan can, how the client's entire trajectory is changed and everyone in each of their circles is affected by it.

3. Day-in-the-life video

Consider creating a day-in-the-life video that shows your client's daily struggles. This can be particularly effective in illustrating:

- Physical limitations (e.g., balance issues, fatigue)
- Cognitive challenges in everyday tasks (e.g., difficulty following recipes, managing finances)
- Emotional difficulties (e.g., frustration with tasks, mood swings)
- The need for assistance or accommodations
- Contrast between the client's current life and their pre-injury activities

Ensure that the video is an honest representation of your client's typical day, avoiding any exaggeration or staging that could undermine its credibility and take away from the emotional impact it can convey simply on its own.

4. Employment records

Obtain and review employment records from before and after the injury. Look for changes in:

- Job performance evaluations
- Attendance records
- Disciplinary actions
- Promotions or lack thereof
- Salary or position changes (and earnings history)
- Accommodations requested or provided

- Communications between the client and their employer about their performance or health

If your client has been unable to return to work, document their attempts to do so and any medical opinions supporting their inability to work.

5. Educational records

For students or those who have attempted to return to education post-injury, compare academic performance before and after the injury. Look at:

- Grade point averages
- Standardized test scores
- Teacher comments and evaluations
- Special education services or accommodations provided
- Attendance records
- Participation in extracurricular activities

6. Hobbies and activities

Document changes in your client's participation in hobbies, sports, interests, or other activities they enjoyed or were committed to before the injury. This is often the most powerful way to illustrate the impact on your client's quality of life and convey the difference in their life before and after the injury.

7. Social media and digital footprint

Review with your client their social media presence before and after the injury. Look for changes in:

- Frequency and nature of posts
 - Social interactions
 - Activities and interests
 - Mood or tone of communications
- Do the same with email

communications, text messages, and fitness tracker data. Go over each of the above items with their friends, family, and other collateral witnesses.

Be prepared to authenticate this evidence and address any privacy concerns. However, be cautious with social media evidence, as it can easily be a double-edged sword. Ensure that you have advised your client on appropriate social media use during the litigation process.

8. Financial impact documentation

Gather evidence of the economic impact and financial toll of the TBI (even if you intend to drop economic damages as it will help you discover the story of your client and the impact of their TBI):

- Medical bills, increased expenses related to medical care or assistance and other out-of-pocket expenses
- Income changes, lost wages and benefits
- Costs of home modifications or adaptive equipment
- Expenses for hired help or caregivers
- Changes in spending patterns that might indicate difficulty managing finances

Understanding and explaining the science

To effectively advocate for your client, you must be able to explain the science behind TBIs in clear, accessible language and terms, using analogies, metaphors and stories to assist retention and interest regarding the dense science and terminology involved. This awareness will be crucial in educating the judge and jury about the nature and extent of your client's injury. Find creative ways to create demonstratives to assist, including ideas centered in the case facts, that relate to the client's life or interests, or that utilize the courtroom itself as a spatial map of the brain.

The invisible nature of mTBI

Be prepared to explain why mTBI can be so challenging to diagnose and treat:

- Normal appearance or negative results on standard imaging
- Subtle nature of cognitive deficits
- Variability in symptom presentation
- Overlap with symptoms of other conditions (e.g., PTSD, depression)

Normal cognitive decline with aging vs. effects of TBI

By utilizing normative data, identifying patterns on testing and most importantly embedding all the findings in the context of pre- and post-injury

academic, occupational, medical, psychiatric records, as well as information gathered by conducting collateral interviews.

Analogies and visual aids

Develop clear analogies and visual aids to explain complex medical concepts to a lay audience. For example:

- Compare axonal injuries to frayed electrical wires disrupting the brain's communication network.
- Use a network diagram to illustrate how damage to one area of the brain can affect multiple functions.
- Demonstrate the concept of cognitive fatigue with a 'battery' analogy, showing how TBI survivors may "run out of energy" more quickly.
- Incorporate images such as: a picture of brain and erasure (image of erasing parts of the brain to signify loss of memory, connections in life the client made that are gone forever, etc.); a bomb (like a bomb going off in the family); or thick fog (gloomy, depressing, hard to get through, dreary).

Addressing common defense tactics

Be prepared to counter common defense strategies in TBI cases:

Pre-existing conditions

Defense attorneys may argue that symptoms are due to pre-existing conditions rather than the TBI.

Be prepared with:

- Clear timelines showing symptom onset after the injury
- Expert testimony differentiating TBI symptoms from other conditions
- Evidence of the client's functioning before the injury
- Explanation and examples of how TBI can (and did here) exacerbate pre-existing conditions

Symptom exaggeration or malingering

Defendants often accuse plaintiffs of malingering or exaggerating symptoms. Counter this with:

- Objective neuropsychological test results, including effort testing
- Testimony from treating physicians about symptom consistency
- Evidence of the client's attempts to return to work or normal activities

- Explanation of why some TBI symptoms may be variable or situation-dependent

"Mild" TBI misconceptions

Be ready to educate the jury on the potentially severe impacts of even "mild" TBIs. Use expert testimony and scientific literature to support your arguments. Emphasize that "mild" refers to the initial presentation, not necessarily the long-term impact.

Alternative explanations

Defendants may suggest alternative explanations for your client's symptoms, such as stress, depression, motivation for secondary gain, or substance abuse. Be prepared to show how these may be consequences of the TBI rather than issues separate and apart from the TBI.

Failure to mitigate

The defense may argue that your client failed to follow treatment recommendations or take appropriate steps to recover. Counter with:

- Evidence of all treatments attempted
- Expert testimony on the challenges of TBI recovery, including because of the TBI symptoms themselves (e.g., challenges with motivation, isolation, depression, hopelessness)
- Explanation of how TBI symptoms themselves (e.g., cognitive issues, fatigue) may interfere with treatment adherence

In preparation for presenting your client's case at trial, focus on creating a compelling narrative with associated demonstratives that helps the jury understand the full impact and damage of the invisible injury on each aspect of the client's life. Those individuals that can get the compensation they need have a much better chance at rehabilitation, so don't leave your client's story left untold or the damages they are justifiably entitled to on the table.

Kelly Hanker is a graduate of the Gerry Spence Method trial college and a partner in Trial Lawyers for Justice, a firm founded by Nick Rowley. In addition to her own cases, Kelly also associates in as trial counsel around the country and consults on trials, client and witness deposition and DME preparation. ☒