

TRAUMATIC BRAIN INJURY CLAIMS

AN INTERNATIONAL OVERVIEW

Whether by sport, by transportation, by work or by simple accident in the home, traumatic brain injury claims are rapidly evolving into more commonplace claims involving insurers around the world.

Advances in medicine and other science now appears ready to attribute common claims and maladies to brain injury. Coupled with sporting events that pursue the mantra of speed and aggressiveness, brain injury trauma is going to be a persistent feature of personal injury claims.

This paper will provide a global view on how these injuries are dealt with in the court systems of our Global Access family of firms.



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GENERAL OBSERVATIONS

Q. What are the various types of traumatic brain injuries (TBI)

A. TBI is an injury to the brain caused by some form of external trauma to the head. Road traffic collisions and workplace accidents are the most common cause of this type of injury, but there are many other possible causes, including sporting incidents, and accidents at home.

The exact nature of the symptoms can be wide ranging, and depends on the type and severity of injury. While the symptoms of brain injury can appear immediately, this is not always the case, and they might not be apparent for days, or even weeks after an accident. There are broadly three types of TBI:

Closed head injuries

This is the most common type of TBI. It is described as a closed head injury as there is no break of the skin/no visible open wound. The most frequent cause of closed head injuries occurs when the head has been forced to rock back and forth or rotate. Consequently, the brain becomes injured due to the impact on the skull, and can become twisted, stretched and torn in the process.

Open or penetrating wounds

This type of TBI is not as common. It occurs when there is an open wound and the skull is fractured and the brain is exposed and damaged. An example where this may occur is when the head collides with a sharp object.

Crushing injuries

This is the least common type of TBI. It usually occurs where the head might be caught between two hard objects, for example in a road traffic collision.

TBI presents in the following two forms:

- Objective Brain Injury
- Subjective Brain Injury

An objective brain injury is corroborated by the results of a CT scan or MRI. The imaging will demonstrate either bleeding, bruising or tearing of the brain tissue. In some cases, the CT scan can unequivocally prove a person has sustained a significant brain injury. In other situations, the imaging demonstrates the person clearly sustained a brain injury but the nature of the impairment is questionable.

Q. How are TBIs medically qualified?

A. TBI injuries are measured in terms of seriousness, ranging from minor concussions to moderate, and severe injuries.

There are various measures, which depend on one or more of the following:

- (i) the Glasgow Coma Score (GCS);
- (ii) the extent of post-traumatic amnesia (PTA); and
- (iii) the extent of loss of consciousness (LOC) following the injury.

The below table sets out an indicator of the severity.

	GCS	PTA	LOC
Mild	12 to 15	Less than 1 hr	Less than 30 mins
Moderate	9 to 12	30 mins to 24 hrs	1 to 24 hrs
Severe	3 to 8	More than 1 day	More than 24 hrs

In addition to the above, reference will be made to scan results (CT, MRI, etc).

Clinicians tend to use the Mayo classification system which separates TBIs into different categories ranging from mild through to severe.

In Canada, Medical practitioners place significant value on the Glasgow Coma Scale when diagnosing head injuries. Although not as reliable as an MRI or CT scan, the Glasgow Coma Scale (GCS) is applied by emergency personnel to determine the level of the injured person's consciousness. The 15 part observational test measures a person's verbal, eye and motor responses. The results can be skewed if the patient is under the influence of alcohol and/or drugs. Furthermore, when the test is conducted in relation to the incident is an important consideration.

Q. Is there a proliferation of TBI related lawsuits? Why now?

A. In the last decade, a tremendous amount of information has surfaced on the dangerous nature of concussions which has led to significant class action law suits in North America in relation to sports such as hockey and American football. In part due to this media attention, claims involving subjective head injuries are on the rise everywhere. In these types of cases, the person may have been diagnosed with a concussion but there is no MRI, CT scan or even a low GCS finding to suggest a brain injury of any significance.

UK

Although we have not identified any data on TBI claim numbers, anecdotally we have not noticed any change in the numbers of 'clear-cut' TBIs. What we have noticed a rise in, though, is claims for so-called 'subtle' TBI cases. In such cases all the usual indicators (GCS, PTA, LOC and scan results) may indicate the absence of injury. However, the Claimant may still present with TBI symptoms. Some clinicians will support the notion of an organic TBI, whereas others will say the symptoms are psychological in origin, and therefore amenable to treatment and resolution. These cases tend to be difficult to resolve due to conflicting medical opinion and the absence of typical indicators.

We are also starting to see a rise in sports-related concussion-type claims, often involving professional athletes and relating to incidents (or a series of incidents over a prolonged period) dating back several years.

DEFENCE, INDEMNITY AND COSTS

Q. What damages typically flow from such injury?

A. Plaintiffs will typically advance the following claims:

- General damages – compensation for pain and suffering
- Loss of income
- Loss of housekeeping capacity
- Medical cost, including hospitalisation, drugs, therapy
- Future care

UK

Damages are broken down into two elements, 'general damages' and 'special damages'. The approach is purely compensatory, rather than punitive.

General Damages – this is an award to compensate the Claimant for 'pain, suffering, and loss of amenity'. In most cases the level of award will be taken from a publication called the Judicial College Guidelines, which provides a tariff of award brackets, broken down by injury type and severity. This appears to be similar to the Canadian approach.

Special Damages – broadly speaking these relate to 'out of pocket expenses' in the past and for the future. The aim is to put the Claimant back in the position he/she would have been had the accident not occurred.

Various types of loss can be included such as:

- **Loss of earnings** – the Court will award what the Claimant would most likely have earned through to retirement, had the accident not happened. If the Claimant is capable of some employment notwithstanding the injury, he/she must give credit for that.
- **Care, assistance, and case management** – this tends to be the biggest element of a TBI claim. If friends/family provide help for free, the Claimant is nonetheless entitled to recover damages based on the extent (in terms of time) of care provided. Further, professional care including 'support workers' (who help the Claimant to manage his/her day, get them out and about, etc) and Case Managers (who oversee and administer the package of assistance) can be recovered and tends to be expensive – in some cases six-figure sums per annum, and often applicable for life.
- **Aids and equipment** – the Claimant may need equipment in order to manage activities of daily living, such as specialised/adapted technology.
- **Treatment/therapies** – e.g. counselling and, in the more severe cases, physical therapies.
- **Accommodation** – again in the more severe cases it may be necessary for the Claimant to move to a more suitable home.
- **Court of Protection** – if the Claimant lacks capacity to manage the litigation and/or his/her finances, a Court 'Deputy' can be appointed, the cost of which is payable by the Defendant, and which can get very expensive.

Q. What sort of quantum losses can we expect to see in a TBI case?

Canada

Damages: General damages for severe injury in Canada (ie pain and suffering) are fixed at a maximum of \$390,000. To this would be added loss of income, housekeeping and future care.

Loss of income in Canada was ordinarily the largest component of a claim, however, the cost of care has increased at an alarming rate. More specifically, attendant care is typically now the most significant aspect of a seriously injured person's claim.

A person requiring 24 hour attendant care in Canada will be awarded approximately \$250,000.00 annually because market rates for a care provider are now in the range of \$30.00 hourly. These costs may be awarded where the brain injury may not be as debilitating, but where the injured party requires supervision so as to be able to respond to events such as emergencies (ie fire alarms, etc).

Because Canada has a socialised medical system, each claimant is obliged to claim for a subrogated interest for the Provincial Crown health service to compensate them for medical costs expended. These are generally a fraction of US or UK costs.

UK

The range of total awards in TBI cases varies a great deal, from tens of thousands in the minor cases, to many millions of pounds in the most severe.

USA

The damages in a TBI case are typically recovered via settlement or verdict rendered by a jury. Whether by settlement or verdict, TBI damages can be extreme depending on the severity of the TBI. However, it should be noted that while damages for concussions are typically lower than for an anoxic brain injury, even the value of a concussion case can potentially be worth millions of dollars.

Each case is fact-specific and dependent on many factors including the mechanism of injury, the type of injuries sustained, the care received, the future care that may be necessary, the damages unique to the particular case, the plaintiff, and the venue. An assessment of how the TBI has affected the claimant's activities of daily living will be important. This includes evaluation of the claimant's ability to eat on their own, walk on their own, get dressed, cook a meal, drive a car, whether the claimant is in chronic pain, able to work, able to maintain relationships, etc.

Australia

Damages: The assessment of general damages in Australia differs in each state and territory. Some have caps on general damages, whereas others do not. The lowest of the caps that do exist is in Queensland which is currently set at \$400,300.

Each state and territory also allows economic loss, gratuitous care and out of pocket expenses.

Whilst economic loss claims have always been considerable, insurers are likely to see increased claims for gratuitous care given a recent superior court decision where the cost of care was assessed as the market value of those services, which was \$51.13 per hour.

Out of pocket expenses are also becoming more considerable as claims are more often including: home and yard modifications; the cost of special equipment including insurance and maintenance costs; technical equipment which may assist with memory; equipment to help with difficulties; paid nursing, respite or support worker care; costs for maintaining rehabilitation; medical supplies and pharmaceutical expenses; psychological and psychiatric support; and costs associated with managing compensation.

Netherlands

In general, apart from a few exceptions, there is no fixed maximum amount in compensation of damages. The starting point for the calculation of damages is that the injured party will – as much as possible – have to be brought back to the state and condition he/she would have been in, had the loss-causing event not occurred.

The compensation for pain and suffering awarded in Dutch civil cases is relatively low compared to other countries. Currently the highest amounts awarded in court for severe injuries as a result of an accident lie around EUR 175,000, whilst much lower amounts are not uncommon either, depending on the circumstances of the case.

Like elsewhere, loss of income is often a large component of the claim, although the (rising) costs of care and costs of housekeeping can form a big part of the claim too. One should be aware that in the Netherlands, damages can also be claimed for assistance provided by family and/or relatives, if and insofar as the assistance is of a kind that it could have been outsourced to external professionals that charge for their services. For care provided by family or friends, an hourly tariff of EUR 10.00 (net) is recommended. If the plaintiff engaged a professional to perform these tasks, hourly tariffs range between EUR 15 and EUR 30 (net). These costs can add up significantly over a longer period of time.

We also see an increase in discussions regarding the costs of suitable accommodation, amount up to hundreds of thousands of euros, if not more. We generally argue that a correction should be made for the benefit of owning a more expensive house, but this is still an ongoing discussion with relatively little case law available.

France

In an amicable or judicial framework, the principle is full compensation for brain injury without loss or profit for the victim, as for all bodily injuries. Based on this principle, the assessment of the damage will be made and will give rise to compensation for each item of damage (according to a nomenclature widely shared by all professionals).

In general, compensation for victims with TBI follows the same principles as those applicable to other victims of personal injury. However, it is important to highlight the specific nature of the damage suffered by a brain injured victim with cerebral damage, for which vigilance is required, especially for the compensation of the needs for third person assistance, professional loss, and psychological suffering, which generally have a very significant financial impact.

Compensation is individualized for each brain injured victim and is not limited by any compensation ceiling, ie such compensation depends only on the victim's previous situation and the case law, which varies according to the courts.

For example, the French Supreme Court (Cour de cassation) considers that the hourly cost for third party assistance is a matter for the sovereign discretion of the first instance courts. This rate varies on average between € 20 and 25 per hour.

There is no specific mandatory compensation scale applied by the French courts and although some medical compensation scales exist to date, they are not appropriate and not perfectly adapted to the pathologies suffered by a brain injured victim, particularly as they do not take into account the impact of the trauma on the family environment.

The assessment of the damage of the brain-damaged victim is a source of complexity because of the diversity of injuries that can occur during a head injury.

During a legal medical appraisal, the medical expert is often assisted by a third-person called "Sapiteur", who is, another doctor or a professional specialising in another medical field (psychiatrist, occupational therapist, etc.) The role of the occupational therapist is often decisive in assessing the human assistance needs of a victim of a head injury. It will assess the repercussions of the deficiencies on the victim's activities: their daily life, leisure, but also their schooling or professional life. The occupational therapist will be able, sometimes with the help of an architect, to carry out a complete assessment allowing: on the one hand, to measure the degree of autonomy and independence of the victim, and on the other hand, to determine the technical and human assistance that the victim will need to compensate for its disability.

Q. How are TBI's defended?

Common v. Civil Law

In the Common Law world, a critical assessment of the plaintiff's credibility remains an effective method of defending a TBI claim, particularly in instances in which there is no objective evidence of actual injury or the scope of such injury. The theory is that the truth will emerge out of such adversarial approaches.

Civil law jurisdictions, being more inquisitive, do not necessarily follow the Common Law approach, preferring enquiry by experts who assist the trier of fact. In this situation, some jurisdictions such as the Netherlands make surveillance subject to strict (privacy) rules and only used as a last resort. 'Preventive surveillance' is even prohibited.

The following are examples of potential Defence approaches from different jurisdictions:

CANADA/AUSTRALIA

Medical evidence

It is key to obtain as much medical documentation as possible because the records will disclose information concerning the plaintiff's functional level. Any inconsistencies between what the plaintiff claims and what has been told to doctors should assist.

The examination for discovery

A thorough examination for discovery that questions the plaintiff in a very specific manner about what they cannot do is extremely important. The more detailed their answers are noted down, the easier it might be to point out contradictions with other evidence obtained (e.g. through surveillance), especially in case of remarkable or outlandish claims.

Surveillance

Surveillance, which is a tried and tested tool in the Common Law world, is often advisable due diligence when defending a claim in which a future care or loss of income claim is being advanced in a head injury case.

We typically recommend conducting three days of surveillance initially with one day being a Saturday or Sunday. The typical cost is about \$1,000.00 a day.

Social media investigation

We have clerks and in some cases third party investigators conduct extensive social media investigations into plaintiffs. There is no better evidence than something a plaintiff has posted or said about themselves.

Defence medicals

The first decision is determining what type of expert is appropriate for the case you are handling. In a head injury claim, you will typically want to retain a neuropsychologist. During the course of the examination, the neuropsychologist will administer a number of tests including the Rey Memory and TOMM (test of memory malingering). The sole purpose of both tests is to determine whether the plaintiff is putting forth a proper effort. A person who does poorly on the Rey Memory and TOMM tests is likely doing so intentionally for the purpose of embellishing their claim.

UK

Obviously there will be the usual issues regarding liability and causation in TBI cases. Causation can be a real issue, particularly in the so-called subtle brain injury cases mentioned above. In most cases the Claimant will present his/her medical evidence, including a Neurologist, Neuroradiologist, Neuropsychologist, Neuropsychiatrist, and Care expert, accompanied by a Schedule of Loss, which sets out the claim for general and special damages mentioned above, and documentary evidence in support, such as earnings records. The Defendant is likely then to want to get

their own medical evidence in some/all of the fields in which the Claimant has provided reports, and produce a Counter-Schedule of Loss. The parties will then look to negotiate a settlement, often at a 'joint settlement meeting' or a mediation. The parties tend also to make 'Part 36' offers which can have legal cost consequences depending on how the claim finally resolves.

If settlement is not possible, the case would need to go to Court so that a Judge (alone, no jury) can determine liability (as appropriate) and the amount of damages.

USA

Defence strategy is guided by assessment of the claim. TBIs typically involve a disruption in the normal function of the brain that can be caused a number of ways from a blow to the head to the piercing of the skull. TBIs can range from mild (such as a concussion) to severe and catastrophic (such as an anoxic brain injury). TBIs can cause physical and emotional symptoms. Physical symptoms can include seizure, difficulty with coordination and ambulation, headaches, fatigue, difficulty speaking, and incontinence. Emotional symptoms can include depression, anxiety and difficulty sleeping. The defense will need to first identify the TBI such as a concussion, missed brain hemorrhage, brain bleed, oxygen deprivation, etc. Once the TBI is identified, the defense then must work to identify the mechanism of injury, such as motor vehicle accident, a fall, a stroke, sports injury, or surgery and anesthesia.

From there, the defense will need to perform robust discovery to determine the claimant's pre- and post-incident level of functioning and potential alternative causation. Robust discovery should include the gathering of all records including medical, academic, employment, military, public records, and social media with appropriate follow-up on leads identified in those records. The medical record search should include a focus on psychological issues, use/abuse of prescription, opioid and other drugs, social issues, and history of alcohol and substance abuse. These pre-incident records may reveal potential alternative causes for the claimant's emotional symptoms such as a history of substance abuse or a history of depression. The records may also reveal a prior traumatic event that could have caused or contributed to the claimant's alleged injuries. The pre-incident records could also show a history of medication non-compliance/non-adherence which could be extremely helpful to develop alternative causation in a stroke case. A thorough review of the post-incident care and treatment is also important.

Testing and imaging, lab work, history obtained can also be examined to determine if the injury sustained is consistent with the claimed negligence. In the USA, the pretrial discovery process includes depositions of fact and expert witnesses, including the plaintiff, fact witnesses for damages and liability, including physicians.

Then depending on the type of TBI and mechanism of injury, the defense will need to retain the appropriate experts. These will often include a radiologist, neuro-radiologist, neurosurgeon, neurologist and/or psychologist. Early retention is key so the experts can assist in the development of themes and defense theory, in the taking and presenting of witnesses' depositions, and ultimately to refute the claimants' experts.

FRANCE

The following are examples of potential Defence approaches:

Medical evidence

As in Canada/UK/US/AUSTRALIA, it is essential to obtain as much medical documentation as possible because the medical records will disclose information concerning the plaintiff's functional level. Any inconsistencies between what the plaintiff claims and what has been told to doctors should help the defense of the case.

Legal expert appraisal

In practice, it is common for the victim to request the setting up of a judicial medical expert appraisal in the presence of all the defendants. The Court appointed expert is a neutral and unbiased medical expert who has the task of advising the judge on specific medical issues and assessing the damage suffered. During the expert appraisal, the different parties can be assisted by their own private medical expert and legal counsel to defend their respective interests in the best possible way.

The assistance of a specialized private medical expert is very important during the expert appraisal to allow an objective assessment of the victim's damage attributable to the trauma suffered. The defendant's lawyer must ensure that the assessment of the victim's injuries is consistent and proportionate.

NETHERLANDS

Obtaining Medical Evidence and Identifying Environmental Factors

It is common to obtain the medical information that directly concerns the event causing the TBI and to seek medical advice from an expert in that respect. This can give cause to request further information regarding the medical situation of the person involved. However, in the Netherlands, it is commonly accepted that a request to supply information that does not concern the event (potentially) causing the TBI – such as medical information pre-dating the event or information regarding other conditions unrelated to the accident – should be specified and it should be motivated why such information is needed, taking into account the principles of proportionality and subsidiarity.

Furthermore, it can be helpful to identify the specific environmental factors of the injured person at an early stage of a case in order to get a clear picture of his/her situation, e.g. by means of a visit of a claims adjuster to the injured person at his/her home.

Strict rules on surveillance

Unlike in the Anglo-Saxon countries, the rules on surveillance are very strict in the Netherlands, since it infringes the privacy of the person concerned. The insurer is allowed to conduct a surveillance investigation only under strict conditions, which require (amongst others) that there is sufficient ground for a serious suspicion of insurance fraud first. Thus, insurers should be very cautious in using this method.

Social Media Investigation

Although Dutch law seems to allow a little more room for a social media investigation than for a surveillance investigation, even internet research cannot be conducted without any cause. It is only allowed under certain circumstances and there must be a specific reason, which should be weighed against the plaintiff's privacy interest and put down in writing beforehand.

Medical Examinations

In the case of a complex TBI, an examination by a medical expert (neurologist and/or neuropsychologist) is often conducted. Attention should be paid not only to the expert chosen but also to which questions are put to him and the completeness of the medical file available. In the Netherlands, the model-questionnaire by the IWMD (www.iwmd.nl) is widely used and recommended. In neuropsychological tests, symptom validity tests (such as the Rey Memory and TOMM mentioned by our Canadian counterparts) should be used to detect cases of underperformance. When a plaintiff fails these tests, Dutch case law prescribes that it cannot be automatically assumed the underperformance is intentional. It will however mean that the test results are invalid, thus making it harder for the plaintiff to prove his/her injury and/or damages (especially when combined with e.g. a refusal to provide full medical disclosure or inconsistencies in the plaintiff's story).

