



## NEUROLAW: MEDICO-LEGAL ASPECTS OF ABI

Neurolaw is the new area of medical jurisprudence which deals specifically with acquired brain injury (ABI), as well as spinal cord injury. In the majority of instances, ABI results from a traumatic event. Because ABI is caused by trauma, this condition is also commonly referred to as traumatic brain injury (TBI). For purposes of this article, ABI and TBI are considered synonyms.

Events which produce neurotrauma—e.g., motor vehicle crashes, falls, violence or sports activities—often become the subject of personal injury (tort), workers' compensation or insurance litigation. Legal proceedings in ABI cases are called neurolitigation. Attorneys who represent individuals affected by ABI are designated neurolawyers. By virtue of their education, training and experience, neurolawyers have developed special expertise in the medico-legal aspects of neurological injury.

In a previous issue of this magazine, we reviewed neurolaw from the paediatric perspective. There we looked at the typical elements of a tort case—i.e., liability on the part of another (defendant), the extent of injury to the claimant with acquired brain injury in a legal case, and the ability of the defendant to pay for the injury resulting from tortious conduct. We also discussed structured settlements which are legal mechanisms for securing long-term financial benefits in brain injury cases.

Now we shall expand upon that prior discussion and I shall provide further insight into the philosophical underpinnings of neurolaw and explore the practical implications of this field for people with ABI and their families.

First, we shall examine the historical development of neurolaw. Second, we shall consider the central thesis of neurolegal practice. Finally, we shall discuss the primary principles which support that thesis.

### HISTORICAL BACKGROUND

Neurolaw was first introduced to the health care and legal communities during the period commonly referred to as the Decade of the Brain. From its beginnings in 1991, neurolaw has enjoyed the enthusiastic support of the

National Head Injury Foundation, now known as the Brain Injury Association, Inc. in the United States and other international professional groups and advocacy organizations—e.g., the European Brain Injury Society, the International Association for the Study of Traumatic Brain Injury and the Ontario Brain Injury Association.

Leading authorities often write about neurolaw in books and professional journals. Speakers at professional meetings, seminars and conferences held in the United States, United Kingdom, France and Canada address this subject regularly. From the outset neurolaw has been supported by a monthly publication—*The Neurolaw Letter*—which has worldwide circulation. Today neurolegal inquiry is viewed as the primary method for addressing ABI within the legal forum. Indeed, neurolaw is recognized as a distinct subspecialty of personal injury trial practice by the Martindale-Hubbell® Law Directory, the world’s definitive source of information for and about the legal profession.

## CENTRAL THESIS

Supporters of neurolaw acknowledge that the greatest present barrier to the development of long-term supports for people with ABI is lack of funding. For this reason, the central thesis of neurolaw proposes that financial resources obtained through remedies offered by the civil justice system contribute to improving the quality of life for persons with ABI and their families.

Using monetary awards secured through civil litigation, individuals with brain injury are able to: (1) fund costly programmes of care and rehabilitation, (2) replace earnings lost due to injury, and (3) become adequately compensated for the physical pain and mental suffering attendant to ABI. In these ways, neurolaw enhances opportunities for patient recovery following brain trauma.

## PRINCIPLES OF NEUROLAW

Four guiding principles provide background to the practice of neurolaw. Each will be discussed below. By acknowledging and employing these tenets in their daily practices health care providers and lawyers contribute to the overall well-being of their patients and clients.

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### 1. BETTER LEGAL OUTCOMES PROMOTE BETTER CLINICAL OUTCOMES FOR PATIENTS WITH NEUROLOGICAL INJURY.

Professional health literature demonstrates that clinicians measure the success of their treatment programmes in terms of the patient’s functional outcome. These outcome studies reveal that there is a significant improvement in a patient’s functional capacity after the application of rehabilitative care. In other words, improvement in quality of life for people with ABI flows directly from early, lengthy and intensive therapy. In meritorious cases, the civil justice system provides much needed money to support the overall interests of individuals with ABI and their families. In this way, better legal outcomes promote better clinical outcomes.

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### 2. SUCCESS IN NEUROLITIGATION IS DEPENDENT LARGELY UPON THE QUALITY AND QUANTITY OF EXPERT EVIDENCE.

To be successful in prosecuting their claims for money damages, people with ABI need the services of many expert professionals. Such experts comprise what is often called the multidisciplinary team. Practitioners from many disparate disciplines—e.g., medicine, psychology, social work, occupational/physical and speech therapy, nursing,

social work and neurolaw—are part of this team. The emergence of qualified neurolawyers who are complemented by expert witnesses from these different fields has led to an expansion of opportunities for the recovery of money damages during civil cases. Neurolawyers work with experts to develop the evidence necessary to persuade legal fact finders (judges or juries) on matters concerning the cause, nature and extent of acquired brain disorders. Because, neurotrauma is such a complex subject, neurolaw is the most expert-intensive area of civil law practice. To prevail during neurolitigation, claimants must produce an abundance of high quality expert testimony.

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### 3. MUTUAL COOPERATION AMONG CONCERNED PROFESSIONALS ENHANCES THE PROBABILITY OF SUCCESSFUL NEUROLITIGATION.

This principle lends credence to the fact that dealing with neurotrauma in the legal setting requires teamwork. Thus, neurolaw is designed to break down the barriers which in the past have tended to separate members of the multidisciplinary team. It encourages specialists from many fields to work together in harmony. By acknowledging the symbiotic relationships existing among members of the ABI team, practitioners put aside their professional differences and strive to work cooperatively for the benefit of their patients and clients. However, this has not always been an easy task.

During the 1980's, care providers and lawyers were separated by issues revolving around the so-called malpractice crisis. Such professional animosity had a deleterious effect upon the legal cases of claimants with ABI who sorely needed the joint services of both clinicians and attorneys. Fortunately, pressures created by that hostile environment have eased somewhat as members of both groups come to recognize that malpractice insurance premiums and health care costs were not increased by tort litigation.

Another factor which has tended to impede cooperation among health practitioners and attorneys is the clash of cultures resulting from differing legal and scientific views as to what exactly constitutes a fact. Clinicians trained in science favour an empirical view of facts based upon certainty. While attorneys are most often bound by the legal construct of probability when they seek to establish facts before any legal tribunal. Once clinicians fully accept the notion that facts in the legal setting are generally determined by a preponderance of evidence in most civil cases (i.e., by probability instead of complete certainty), this potential source of discord is removed. In this way, both clinical staff and lawyers are able to move toward greater degrees of mutual respect and cooperation.

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### 4. TO BE SUCCESSFUL, CLINICAL AND LEGAL PROFESSIONALS REQUIRE LITIGATION LITERACY.

The term litigation literacy simply means: a basic awareness of the intricacies of the civil justice system. The concept embodies a full appreciation of legal procedures, trial tactics and an understanding of ABI within the legal setting. Clinicians who apprehend the multidimensional legal process may effectively contribute their professional expertise to litigation proceedings. Lawyers who are familiar with neuroscience, medicine and rehabilitation are better equipped to make convincing presentations in neurological injury cases. Since virtually all medical and rehabilitative specialty organizations require their members to provide expert evidence in meritorious claims and since all legal jurisdictions in the United States and Canada recognize the admissibility of expert evidence, there exists no reason for care providers and attorneys to refrain from working together in ABI cases.

## CONCLUSION

Metaphorically, then, we may observe that neurolaw was formed at the confluence of the rivers of medicine, rehabilitation and law. But, in acquired brain injury cases, those rivers flow out of the dark forest of neurological injury. Supporters of neurolaw form a multidisciplinary community of natural allies that for many reasons want to understand that forest. Properly employed, neurolaw represents a synthesis of the cognate acquired brain injury disciplines which enhances the quality of life for those individuals affected by traumatic brain injury. As long as there exists a need for money to fund programmes of therapeutic treatment, individuals with brain injury and their families will require the services of concerned professionals who are united by a spirit of mutual respect and supported by principles of neurolaw.

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