S.C. Defense Trial Attorneys' Association Volume 32 Number 1 ▸ Spring, 2004

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

http://www.scdtaa.com

Spring

TRIAL ACADEMY

April 21 - 23, 2004

Charleston, SC

Summer

JOINT MEETING

July 22 - 24, 2004

Grove Park Inn Asheville, NC

Fall

ANNUAL MEETING

November 11-14, 2004

Château Élan Braselton, GA

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President's Letter

by Samuel W. Outten

Each year, the SCDTAA organizes a Trial Academy for young defense lawyers. Its purpose is to give young lawyers both instruction and experience in trying cases, which is becoming more and more difficult. There are two days of instruction in which experienced lawyers provide insight to the students on such areas as direct and cross-examination of lay witnesses, expert witnesses, opening statement, closing argument, etc. The third day is a mock trial, which is presided over by members of our state and federal judiciary. Time permitting, these judges take the time to talk to the students about trial techniques after the conclusion of the trial.

This year's Trial Academy will be held April 21-23 in Charleston. Molly Hood Craig, along with Curtis Ott, Elizabeth Brady and others, have worked hard to have some outstanding lawyers as instructors. Also, Judge Markley Dennis has been kind enough to allow us to use six courtrooms in the Charleston County Judicial Center for the mock trials. Thanks to Judge Dennis and to all the members of the judiciary who will serve as judges for the mock trial. Thanks also to Clerk of Court, Julie Armstrong, and her staff as well. On Thursday evening beginning at 6:30 p.m., there will be a reception at the home of Bobby Hood located at 110 Broad Street. We hope that all instructors from the Trial Academy, all local judges and members of the SCDTAA will attend. No doubt this will be an enjoyable evening.

Last year, the Joint Meeting of the SCDTAA and the South Carolina Claims Managers' Association was very successful. Lawyers and claims' managers alike raved about the educational program, the quality of the facilities at the Grove Park Inn and the social events which are offered at this meeting.

Glenn Elliott and John T. Lay have been charged with a difficult task of improving on last year's meeting and they are off to a great start. The highlights of the program include handling the "high profile case" and an updated insight into tort reform and demonstration of a motion to strike punitive damages in light of *State Farm v. Campbell*. Our featured speaker will be announced in the near future. Both the state and federal judiciary will be in attendance and will participate in the program.

In addition, the entire Workers' Compensation Commission will be invited and we hope all of them will attend. A great number of the lawyers in our Association who specialize in workers' compensation will attend and there will be an extensive workers' compensation break out for both our members and the Commission. We expect that this meeting will be well-attended and exciting. Please join us in Asheville on July 22 - 24, 2004.

Attention Members:

The Expert Witness database on the Website is now available to submit information.

Please visit www.scdtaa.com for more details.

2004 Trial Academy
April 21 - 23 • Charleston, SC

by Molly H. Craig

Registration for the Fourteenth Annual South Carolina Defense Trial Attorneys' Association Trial Academy filled in record time, and we attribute the enthusiasm and excitement for this year's Trial Academy to our outstanding judges and faculty. We would like to thank the Honorable R. Markley Dennis, Jr., the Honorable Diane Schaefer Goodstein, the Honorable Jackson V. Gregory, the Honorable Thomas L. Hughston, Jr., the Honorable A. Victor Rawl and the Honorable Roger M. Young who have so graciously committed their time and energy to preside over the mock trials on April 23, 2004.

We would also like to express our sincere thanks to our speakers and breakout session leaders who have offered to help the Trial Academy students during the training sessions on Wednesday, April 21 and Thursday, April 22, 2004. Our speakers include some of Charleston's most successful trial lawyers and judges: The Honorable Walter T. Cox, The Honorable William Howard, Samuel R. Clawson, Robert H. Hood, Gedney M. Howe, Warren E. Moise, John Hamilton Smith, Mark H. Wall, and John S. Wilkerson, III. Our breakout leaders are all experienced trial lawyers who will work one-on-one with the students to assist them in preparing for their mock trials. We are most grateful for the commitment of all of our breakout leaders: Cherie Blackburn, John Blincow, Hugh Buyck, David Cobb, Walker Coleman, Jay Davis, Ben Glass, Matt Henrickson, Bobby Hood, Jr., Molly Hughes, Wilbur Johnson, Robert H. Jordan, Wendy Keefer, Ellis Lesemann, John Massalon, Amy Mathisen, Jay McDonald, Jim Myrick, Marian Scalise, Eric Schweitzer, Catherine Templeton, Morgan Templeton, Trey Thompson and Joe Tierney.

Charleston Harbor

Rainbow Row

All training sessions will take place at the Francis Marion Hotel located on the corner of Calhoun and King Streets in downtown Charleston. On Wednesday, April 21, the Young Lawyers Division of the SCDTAA will host a cocktail reception at the Francis Marion for the students of the Trial Academy.

The evening of Thursday, April 22, 2004, SCDTAA past president, Bobby Hood, will host a cocktail party at his home located at 110 Broad Street. All speakers, session leaders, students, SCDTAA members and judges from around the state will be in attendance. Please mark your calendars and plan to join us for this special event.

We are all quite excited and look forward to another successful Trial Academy. This will be our last year in Charleston as the Trial Academy will move to Columbia for 2005 and 2006, followed by a two-year stay in Greenville in 2007 and 2008. Many thanks to all our volunteers and participants!

Representing the Underinsured Motorist Carrier - The Basics

by E. Glenn Elliott
Aiken Bridges, Florence, SC

A dozen years ago I was asked to write a "how to" article concerning the representation of an underinsured motorist carrier. At that time there were no appellate decisions interpreting the relevant provisions of Section 38-77-160. Since that time our appellate courts have issued several decisions which provide guidance to trial counsel on how they should proceed in representing a UIM carrier. This article will briefly discuss those decisions and some of the finer points of representing a UIM carrier in a tort action. More complicated issues such as stacking and "rolling up" UIM coverage because of ineffective offers will be left for another day.

Initial Appearance in the Case

Section 38-77-160 gives the UIM carriers the right to appear and defend the case in the name of the defendant. When making your first appearance in the case you therefore have the option of serving a simple Notice of Appearance or serving a full-blown Answer with affirmative defenses, Motions to Dismiss, etc. *Ex Parte Allstate*, 339 S.C. 202, 528 S.E.2d 679 (S.C. App. 2000). Whichever method you choose to use for making an appearance make sure that the Notice of Appearance or Answer contains a demand for a jury trial.

A UIM carrier has rights separate and distinct from those of the underinsured motorist/named defendant. Neither the named defendant nor the liability carrier can prejudice or waive the UIM carrier's right to appear and defend any case, including the UIM carrier's right to a jury trial. *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995). For this reason, a UIM carrier can not technically be held in "default"; however, a waiver of its right to appear and defend is possible. Section 38-77-160 provides that the UIM carrier has "thirty days after service of process on it in which to appear." Therefore, if the UIM carrier does not make a formal appearance in the case within thirty days it is possible that the court could rule that the UIM carrier has waived its right to participate in discovery and other aspects of the defense of the case. It is therefore imperative that the UIM carrier make a proper and timely appearance in the case. Although the UIM carrier can not technically be held in "default", if the named defendant and the UIM carrier are served with suit papers at or about the same time, and if the defendant and the liability carrier allow the case to go into default and the UIM carrier does not make a timely and proper formal appearance in the case, an entry of default and/or a default judgment could be entered against the defendant which would be binding on the UIM carrier.

Discovery

In *Ex Parte Allstate* the Court of Appeals also interpreted Section 38-77-160 to give the UIM carrier the right to "appear and defend" in the case even though the liability carrier may still be defending the matter and therefore the UIM carrier does not have the right to "control" the defense. Therefore, when representing a UIM carrier you have the right to serve written discovery, notice depositions, serve subpoenas for documents and medical records, and proceed with any other discovery allowed by the *South Carolina Rules of Civil Procedure*. In spite of this decision there are still some Plaintiff's lawyers who will still attempt to take the position that counsel for the UIM carrier is not allowed to serve written discovery or ask questions during a deposition. This seems to happen more often with older Plaintiff's lawyers trying to bully younger defense lawyers.

In every case UIM counsel must be fully informed as to the amount of liability coverage available and whether or not excess liability coverage exists. Although you can usually count on liability counsel to fully disclose such information, the better practice is to send liability defense counsel Interrogatories and Requests to Produce designed to determine if liability coverage exists, and if so, how much, and if excess liability coverage exists and if so, how much. Whether or not the liability coverage on the accident in question has been reduced by payments to other claimants from that accident should also be explored. The document requests should seek copies of declarations pages for the liability and excess liability policies, complete copies of the policies if any exist, along with copies of settlement documents and settlement checks for any claims paid by the

liability carrier which allegedly reduced the amount of liability coverage available.

Working with Liability and Defense Counsel

In most cases both liability defense counsel and UIM counsel will have the same goals: either to defeat plaintiff's claim or to minimize its value. Although as UIM counsel you have the right to initiate discovery on your own, you will find that the best policy is to consult with liability counsel on issues such as when or if to depose a certain treating physician or crucial witness, etc. Because two heads are better than one, such cooperation and discussion can only be helpful. However, there will be times when the interests of the liability carrier and the UIM carrier may not be the same. For example, there are times when a plaintiff will not accept the tender of the liability carrier's coverage (or what remains of it). Some lawyers still do not trust the use of a Covenant Not to Execute, and there may be times when plaintiff's counsel wants the pressure of a possible excess verdict to remain on either the defendant or the liability insurance carrier. Remember, the existence and/or payment of UIM benefits does not reduce the amount of a judgment entered against a defendant. *Estate of Rattenni by and through Rattenni v. Grainger,* 298 S.C. 276, 379 S.E.2d 890 (1989).

In such a case it is possible that defense counsel will be instructed by the liability carrier not to initiate any significant discovery because it will not want to pay for a complete defense of the case when it knows it is going to pay its liability limits, anyway. In those circumstances you will simply have to pick up the ball and run with it. Remember, *Ex Parte Allstate* stands for the proposition that a UIM carrier may fully participate in the defense of the case in the name of the defendant even though it may not have the right to control the defense. Simply because liability counsel did not exercise his right to conduct discovery does not mean that UIM counsel can not do so. Conversely, the UIM carrier has no right to expect that the liability carrier or its counsel will do anything to defend a case. Although payment or exhaustion of the limits of the liability insurance policy does not by itself relieve either the liability insurance carrier of its contractual duty to defend its insured or liability defense counsel from his or her ethical duty to defend the insured, *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (S.C. App. 1997, cert. denied); *Nationwide v. Simmonds*, 315 S.C. 404, 434 S.E.2d 277 (1993), neither the liability insurance carrier nor its counsel owe the UIM carrier or its counsel any duty whatsoever. Therefore, the UIM carrier has no standing to demand that the liability carrier or its counsel do anything in defense of the case. *Nationwide v. Tate and Unisun*, 313 S.C. 444, 438 S.E.2d 266 (S.C. App. 1993).

Assuming Control of the Defense of the Case

I can not think of any circumstance in which it would not be in the best interest of a UIM carrier with coverage exposed to a claim not to take control of the defense of the case when it has the opportunity. Any UIM carrier which chooses not to retain counsel to protect its interests in such a matter does so at its own peril. However, UIM counsel's job in taking over the defense in such a case recently became more complicated as the result of the decision by the Court of Appeals in the case of *Crawford v. Henderson*, 356 S.C. 389, 589 S.E.2d 204 (S.C. App. 2003). Because this opinion is relatively new, and because the opinion dramatically affects UIM counsel's handling of these cases, a brief discussion of the *Crawford* case and its effects on the day-to-day practice of UIM counsel is warranted.

For purposes of our discussion, the salient facts of *Crawford* are as follows. Crawford and a passenger brought suit against Henderson and his UIM carrier seeking to recover damages as a result of an automobile accident. Sometime early in the litigation Crawford and his passenger settled with the liability insurance carrier, exhausting the limits of the liability insurance policy. That settlement was memorialized by use of a Covenant Not to Execute. Crawford and the passenger then proceeded with the litigation in an attempt to recover proceeds from Crawford's UIM policy. During the course of the litigation Crawford attempted to take the deposition of Henderson, the named defendant, four times. Each time Crawford served UIM counsel with a Notice of Deposition but Henderson failed to appear. Ultimately Crawford filed a Motion to Compel. At the hearing on the Motion to Compel UIM counsel informed the court that he represented the UIM carrier and that he had no control over Henderson. UIM counsel claimed that he had attempted to find Henderson in order to get her to appear for deposition but he was unsuccessful in those attempts. In ruling that Crawford would have to personally serve Henderson with a Notice of Deposition, the Circuit Court Judge reasoned, "Counsel does represent Henderson…for purposes of litigating liability and damages. But for purposes of paying money…it's very clear that he represents the insurance carrier and he made that clear." Crawford eventually served Henderson and she appeared for deposition. During the deposition Crawford's counsel asked Henderson if she had discussed the case with UIM counsel prior to the deposition and asked her to relay the substance of the conversation. UIM counsel instructed Henderson not to answer the question asserting the answer would violate the attorney/client privilege. Henderson did not answer the question and the deposition was ended. Crawford again served Henderson in an attempt to depose

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Henderson a second time but UIM counsel filed a Motion for, and was granted, a Protective Order preventing a second deposition. The case went to trial and although both Crawford and the passenger each received damage awards Crawford appealed.

Based on those facts, the Court of Appeals (Justices Connor, Anderson, and Huff) remanded the case for a new trial. The Court of Appeals included in its opinion the following language with regard to the relationship between the named defendant and UIM counsel:

> As previously discussed, case law, statutes, and ethical rules compel our holding that an attorney-client relationship is not established between a UIM carrier's attorney and a named defendant. Moreover, to hold otherwise would effectively limit the benefit that plaintiff receives when purchasing UIM coverage.
>
> To avoid the predicament alleged by [the UIM carrier], it is incumbent upon a UIM carrier's attorney to inform the named defendant of the parameters of his or her representation. Specifically, the attorney should emphasize that he or she directly represents the carrier and treat the named defendant essentially as a witness. We note that this procedure does not leave the named defendant without direct representation. Contractually, the named defendant's liability carrier remains obligated to the insured even after the liability limits have been paid. *See – Cobb v. Benjamin*, (citations omitted).
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> An attorney-client relationship is not created between a UIM carrier's attorney and the named defendant. In the absence of this relationship, a UIM carrier's attorney may not assert the attorney/client privilege to protect communications between he and the named insured.

The Court of Appeals' ruling on this issue could not be more clear. Moreover, from the wording and organization of the *Crawford* opinion it is also clear that the Court of Appeals considered this issue significant enough that it ruled that the Circuit Court should be overturned on this issue and that the case should be remanded for a new trial before even discussing the other issues raised in the appeal.

The *Crawford* decision will also have an effect on the way liability counsel handle these cases from now on. For example, even if a Covenant Not to Execute which protects the named defendant from personal liability is obtained prior to litigation or prior to commencement of discovery, the liability carrier should retain counsel to defend its insured and that attorney must appear at the named defendant's deposition and at all hearings in order to properly and completely fulfill both the contractual and ethical duties to defend. There are other ways in which the *Crawford* decision should affect the practice of liability carriers and counsel in these cases but that is the subject of another article.

As a result of *Crawford*, when dealing with the named defendant and any discovery directly related to the named defendant, UIM counsel should – at a minimum – do or remember the following:

- Send the named defendant a letter – preferably prior to their first meeting or discussion – clearly stating that while UIM counsel needs the defendant's cooperation that he or she represents the UIM carrier and not the named defendant;
- When interviewing or discussing the case with the named defendant UIM counsel must not discuss issues of strategy, work product, or matters that are confidential to the UIM carrier;
- Although it may be possible for UIM counsel to meet with and prepare a named defendant for his or her deposition without relaying strategy or confidential information, UIM counsel must remember that all conversations with the named defendant are discoverable. In a perfect world, the better practice would be to have liability

counsel prepare the named defendant for deposition but UIM counsel can not require that activity nor can he or she be present (because the defendant would then be having conversations with his counsel in the presence of someone with whom he does not have an attorney-client relationship and the privilege would be waived);

- UIM counsel can act as the defending attorney at the named defendant's deposition, UIM counsel will not have standing to object to any questions that might normally be awarded because of privilege, work product, Fifth Amendment issues, etc. UIM counsel should therefore request that liability counsel appear at and defend the deposition of the named defendant. That request should be done in writing if necessary to memorialize the circumstances;
- Request – and insist in writing if necessary – that liability counsel appear at all hearings and at trial (for all the same reasons).

In an effort to close their files many lawyers representing liability counsel (after settling with plaintiff's counsel and securing a Covenant Not to Execute in favor of the named defendant) will attempt to extricate themselves from the case by sending UIM counsel a "routine" Consent Order for Substitution of Counsel. UIM counsel should never sign any Consent Order which attempts to have UIM counsel substituted for liability counsel. Per the *Crawford* decision, UIM counsel does not and can not represent the named defendant. Although you can bet that the liability carriers will want to stop paying liability counsel as soon as possible, not having an attorney in the case who can confidentially counsel the named defendant and who can object to certain questions or discovery when necessary can be very harmful to the UIM carrier's attempt to defend the case. It is therefore in the UIM carrier's best interest for UIM counsel to never consent to allow liability counsel to be relieved from the case even if the named defendant has given his or her consent. UIM counsel should require that the hearing be held on such matters and at the hearing UIM counsel should object to liability counsel being relieved citing Crawford as support for that position.

Participation at Trial

As clearly stated in *Ex Parte Allstate*, the UIM carrier and its counsel have the right to appear and fully participate in the trial of the case. If UIM counsel has assumed control of the defense of the case, pursuant to Section 38-77-160 counsel is allowed to tell the jury that he is appearing at trial "on behalf of" the named defendant. For UIM counsel to state that he "represents" the named defendant would be incorrect and technically going too far but, hopefully, such a statement would not draw an objection. As stated previously, however, even if UIM counsel has taken over control of the defense of the case liability counsel should sit through the trial at the defending table so that he or she can make objections as appropriate.

A decision that is sometimes more difficult to make is whether or not UIM counsel should participate in the trial when the liability carrier has not settled and the liability counsel is still in control of the defense of the case. What will the jury think when two separate attorneys make two separate opening statements, one claiming to "represent" the defendant and the other claiming to be there "on behalf of" the defendant? Juries are certainly more sophisticated these days about insurance issues and the presence of two attorneys actively defending the case may well telegraph to the jury that insurance – and plenty of it – exists to satisfy a verdict for the plaintiff. Although jurors are supposed to divorce themselves from such concerns, some jurors will not be able to put those assumptions aside and in a particularly dangerous case (i.e., one involving spectacular damages, a DUI, or other reasons for punitive damages) those assumptions could affect the jury's award. In relatively small cases where there is a real question as to whether or not a jury's verdict will exceed the liability carrier's limits you may choose to sit in the back of the courtroom and simply monitor the trial or not attend at all. As for the "dangerous" case scenario, the decision of whether to participate or not should likely be made in the affirmative but that analysis will have to be made on a case-by-case basis.

Settling the Case

The UIM carrier does not have to wait on the liability carrier to act or to exhaust its limits before it can settle the case. The UIM carrier can settle the claim against it at any time. In fact, if it completes its investigation and it is satisfied that the value of the plaintiff's claim exceeds the amount of the available liability insurance limits the UIM carrier can settle with the plaintiff before the liability carrier settles. On the other hand, so long as reasonable justification exists for doing so, the UIM carrier does not have to agree to settle the case nor does it even have to hire counsel to participate in the case if it chooses not to do so. It has the right to wait for a jury verdict before paying out its coverage. However, any UIM carrier who chooses not to hire counsel to participate in the defense of the case does so at extreme peril.

There are times when a plaintiff will accept less than the full liability coverage available in order to settle its claim against the liability carrier. There are many possible reasons for doing so which we will not discuss here. However, UIM counsel must be aware – both when negotiating with plaintiff's counsel or when responding to a judgment – that the UIM carrier is entitled to a credit against the potential

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case value or against a verdict for any amount of liability coverage not exhausted in a settlement with the plaintiff. *Cobb v. Benjamin, supra*. For example, suppose a defendant has $15,000.00 in liability limits and – for whatever reason – plaintiff chooses to give a Covenant Not to Execute in favor of the defendant and the liability carrier in exchange for the payment of $14,000.00. When negotiating with plaintiff's counsel and in discussing potential case values, the UIM carrier is entitled to a set-off in the amount of the full $15,000.00 in liability limits. Suppose the carrier decides to try the case and a verdict against the defendant resulted in the amount of $20,000.00? The UIM carrier would still be entitled to credit in the total amount of the liability limits so the UIM carrier would only owe the plaintiff $5,000.00 and not $6,000.00.

Finally, there are times when South Carolina attorneys will be retained as UIM counsel to defend coverages from policies issued in another state. This scenario is very common in counties near South Carolina's border with other states or in places like Myrtle Beach or Charleston where we have a lot of tourists driving their vehicles from other states. Under such circumstances UIM counsel must make himself familiar with the UIM statutes of the state where the insurance policy originated so that he can properly protect the UIM carrier's position and limits. For example, analyzing the exposure of the UIM coverage issued under a North Carolina policy is different from analyzing the exposure of UIM coverage issued with a South Carolina policy. South Carolina is considered a "set-off" state. That is, the UIM carrier is entitled to a set-off against either the case value or the jury verdict in the amount of the liability proceeds paid to or available to be paid to a plaintiff or claimant. However, North Carolina is a "reduction" state. Pursuant to the North Carolina UIM statute, the UIM limits available on a policy issued in North Carolina are actually reduced by the amount of liability proceeds received by a plaintiff. Suppose a North Carolina resident receives significant injuries in an automobile accident while vacationing at Myrtle Beach. Further assume that the North Carolina plaintiff has $100,000.00 in UIM coverage and that the South Carolina defendant has $50,000.00 in liability coverage. Under those circumstances the amount of UIM coverage available to the North Carolina plaintiff is actually reduced to $50,000.00. Not only will the strategy for handling such a claim be different but it is likely that UIM counsel will have to educate plaintiff's counsel on the applicable North Carolina law as they will likely not want to accept – at least initially – the fact that the coverage will be reduced.

Conclusion

The day-to-day practice of representing a UIM carrier in South Carolina has become more "standardized" in the last ten years or so because of the cases cited in this article. However, the Court of Appeals' decision in Crawford v. Henderson, supra., will require both UIM and liability counsel to re-examine how they handle these types of cases.

Posttraumatic Stress Disorder and Mild Traumatic Brain Injury Claims

by David R. Price. Ph.D.
The Forensic Network, Greenville, SC

Two personal injuries often seen in personal injury litigation are the acquired brain injury, and Posttraumatic Stress Disorder claims. Acquired brain injury, often called Postconcussive Syndrome, Mild Traumatic Brain Injury (MTBI), Traumatic Brain Injury (TBI), Post-concussional Disorder or Dementia, occurs as a result of insult to the central nervous system and specifically to the brain. This occurs either through a penetrating injury, blunt trauma, or by acceleration/deceleration. By definition, an acquired brain injury is an incident specific diagnosis and disorder. Posttraumatic Stress Disorders are emotional disorders caused by an exposure to a life threatening event outside the realm of normal human experience. It, and its related disorder, Acute Stress Disorder, are the only anxiety disorder that has a stressor criterion as part of the criteria for a diagnosis. Acute Stress Disorder and PTSD are similar disorders. They have the same diagnostic criteria, except by definition, Acute Stress Disorder lasts from 2-to-28 days. PTSD disorders, along with mild traumatic brain injury, often are poorly evaluated, poorly treated, and rarely differentially diagnosed. Both acquired brain injury and PTSD occur with frightening numbers.

Each year, there are an estimated 2,200,000 new Traumatic Brain Injury (TBI) patients in the U.S.A., of whom almost 90% are classified as "mild". The true incidence of MTBI may be higher, because 20-40% of MTBI patients never actually seek medical attention. For the purposes of this paper, a Mild Traumatic Brain Injury will be one that includes a brief loss of consciousness of less than 20 minutes; a short period of posttraumatic amnesia of less than 24 hours; an initial score on the Glasgow Coma Scale of between 13 - 15; a non-focal neurological examination; and normal findings on such traditional neurodiagnostics tests such as MRI's and CT Scans.

Posttraumatic Stress Disorders are also a significant concern as Blanchard and Hinkling (1997) report that there are 2.5 to 7 million new PTSD cases in the United States of Posttraumatic Stress Disorder. Motor vehicle accidents account for a substantial proportion of the numbers of Mild Traumatic Brain Injury and motor vehicle accidents also account for a significant percentage of the cases of PTSD. Blanchard and Hinkling report in their work that "It appears that 10% to 45% of survivors of serious MVA's (defined as when one is injured sufficiently to require medical attention) may develop PTSD either acutely or within a year of the MVA.

Despite the gloomy picture plaintiff counsel may depict, the current research is quite impressive that individuals experiencing a Mild Traumatic Brain Injury should have an excellent prognosis for recovery. One can generally expect excellent recovery from a mild traumatic brain injury (Alexander, 1995; Binder, 1997; Dikmen, McLean, Temkin, 1986; Dikmen, McLean, Temkin & Wyler, 1986; Dikmen, Machamer, Winn & Temkin, 1995; Gentilini, Nichelli, Schoenhuber, Bortolotti, Tonelli, Falasca & Merli, 1985; Gennarelli, 1982; Levin, Mattis, Ruff, Eisnberg, Marshall, Kamran, High & Frankowski, 1987; Rimel, 1981). When one is faced with a case of Mild Traumatic Brain Injury in which persisting symptoms linger, then one should search for alternative explanations of the symptoms including PTSD. Gualtieri (2002) states that "The literature contains no credible descriptions of patients with MBI whose IQ has declined, or who have suffered catastrophic disability as a result of an MBI, without some significant premorbid condition or some alternative etiologic factor that is at least as credible as the link to MBI." What this suggests is that for patients who have continuing and lingering symptoms post-Mild Brain Injury, who may have experienced a postconcussive episode and who did not improve, the more credible explanation of their symptoms may be that they experienced a Posttraumatic Stress Disorder and not a Mild Brain Injury at all. If in fact they had received no loss of consciousness, or at best can report only some confusion, it is more likely that they experienced a Posttraumatic Stress Disorder than a Traumatic Brain Injury. In fact, as Gualtieri (1995) reports "It is difficult to maintain that a patient had a concussion if there was not at least a few moments of PTA. If the patient's memory of the event is detailed and unbroken, the likelihood of concussion is slim indeed." If the patient's memory of the events is clear that would increase the probability that one has experienced PTSD and not a Postconcussive Disorder.

Posttraumatic Stress Disorder implies a different

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Posttraumatic Stress Disorder...

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course of treatment than acquired brain injury. PTSD also has implications to a Worker's Compensation claim versus a brain injury. If one has symptoms persisting months after injury with no improvement, PTSD is a much more credible explanation than MTBI. Rothbaum and Foa (1993) reported that "Several studies converged to indicate that the present of PTSD at approximately three months post-trauma adequately predicts the chronicity of the disorder." This may well indicate that after 90 days symptoms will be persistent as 50% of all PTSD cases spontaneously remit within 90 days of onset. In discussing the stressor necessary to cause PTSD, Marche (1993), reported that "The empirical literature is clear that stressor dose - determined in part by life threat, physical injury, object loss, and perhaps grotesquery - is a major risk factor for the development of PTSD." In the NIMH funded study that resulted in the book *After the Crash. Assessment and Treatment of Motor Vehicle Accident Survivors,* it was assumed that the stressor necessary to cause PTSD involved an accident in which medical attention was necessary. Marche identifies characteristic PTSD stressors as the following:

- Combat
- Criminal assault
- Rape
- Accidental injury
- Industrial accident
- Automobile accident
- Hostage
- Prisoner of war (POW)
- Natural disasters
- Human disasters
- Witnessing homicide

Symptoms	Postconcussive Syndrome (PCS)	Posttraumatic Stress Disorder (PTSD)	Both PTSD & PCS
Headaches	x		
Dizziness	x		
Fatigue	x		
Irritability			x
Concentration difficulties			x
Difficulty performing mental tasks	x		
Impairment of memory			x
Depression			x
Anxiety			x
Affective lability			x
Personality change			x
Lack of spontaneity	x		
Agitation		x	
Avoidance behavior		x	
Exaggerated startle response		x	
Feelings of hopelessness		x	
Flashbacks		x	
Guilt feelings		x	
Hallucinations		x	
Hypervigilance		x	
Illusions or perception distortion	x		
Inability to maintain attention			x
Intrusive thoughts		x	
Loss of interest in activities		x	
Nightmares		x	
Numbness		x	
Outbursts of aggression or rage		x	
Recurrent recollection of distressing events		x	
Sleep difficulties			x
Inability to recall an important aspect of the trauma			x

- Witnessing sexual assault
- Sudden illness (example: acute myocardial infarction, severe burns)

Alternately, DSM-IV-TR on page 463 identifies the following stressors necessary to cause PTSD as the following:

- Military combat
- Violent personal assault (sexual assault, physical attack, robbery, mugging)
- Being kidnapped
- Being taken hostage
- Terrorist attack
- Torture
- Incarceration as a prisoner of war or in a concentration camp
- Natural or manmade disasters
- Severe automobile accidents
- Being diagnosed with a life-threatening illness

Symptoms that may be associated with Postconcussive Syndrome and Posttraumatic Stress Disorder are shown on the table on page 12, please note the symptom overlap.

It is extremely important that treatment providers or examiners provide unbiased evaluations of each and every patient in an attempt to make a differential diagnosis of these disorders. Traumatic Brain Injury Disorders should always be differentially diagnosed from the following:

- Posttraumatic Stress Disorder
- Pain Disorder
- Depression
- Unrelated neurologic conditions
- An old Traumatic Brain Injury
- Pre-existing cognitive disorders, such as learning disabilities
- Unrelated medical conditions
- Chronic substance abuse
- Stress Disorder
- Malingering
- Factitious Disorder
- Somatoform Disorder
- Orthopedic injury

It is equally important that Posttraumatic Stress Disorder be differentially diagnosed from the following:

- Normal stress response
- Acute Stress Disorder
- Adjustment Disorder
- Other Comorbid DSM-IV-TR Mental Disorders
- Mild Traumatic Brain Injury
- Malingering
- Generalized Anxiety Disorder
- Obsessive-Compulsive Disorder
- Factitious Disorder
- Substance Abuse Disorder

It is generally assumed that Posttraumatic Stress Disorder and Mild Traumatic Brain Injury are mutually exclusive disorders (Sbordonne & Liter, 1995). For example, a Mild Traumatic Brain Injury is typically characterized by Posttraumatic Amnesia while a Posttraumatic Stress Disorder is characterized by intrusive recollections of the traumatic event. Consequently, as common sense would imply, you cannot have intrusive recollections of an event you cannot remember. There are cases in which you could have Posttraumatic Stress Disorder co-occurring with Mild Traumatic Brain Injury and those include the following:

Remembers the event with no amnesia present (although this actually arguesagainst the presence of a brain injury)

- Islands of memory
- Implicit memory for the traumatic event
- Guilt regarding traumatic event
- Conditioned Anxiety
- Pseudo-memories of the traumatic event
- Being confronted with the sequelae of the traumatic event

Simon (1999) has developed a checklist to determine the prognosis for chronic PTSD. He does identify the following risk factors for the development of PTSD:

- Life threat
- Physical injury
- Violent loss
- Seeing someone hurt or killed
- Grotesquessness of the event

Someone with PTSD is at increased risk for other psychiatric disorders. Previous exposure to stress early in life such as separation from parents in childhood, sexual abuse, childhood physical abuse may place someone at higher risk for the development of PTSD. Females have a higher risk for PTSD than do males. The risk is higher among adults who are separated, divorced or widowed than those currently married.

In summary the research literature is quite strong that people with Mild Traumatic Brain Injury cases or Postconcussional Syndromes have an excellent prognosis of making an excellent recovery. PTSD also has an excellent prognosis with 50% of affected individual having remission within three months of the onset of the disorder. For people that continue to exhibit symptoms months post-injury and particularly for those who have not had any disturbances of consciousness, the diagnosis of Posttraumatic Stress Disorder should be considered as the most reasonable explanation of symptoms. Obviously this assumes that the individual does not produce nor exaggerate their symptoms voluntarily or involuntarily for primary or secondary gain for reasons.

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In either PTSD or MTBI, proper claim evaluation makes Discovery extremely important. As in all claims involving chronic symptoms and/or residual impairment, a careful examination and differential diagnosis is recommended.

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Member Profile: William Stuart Davies, Jr.

A.K.A. Meet My Dad

by Sterling G. Davies

I have the unusual task of introducing my dad to you via this article. As you become captivated by this tale of dad's intriguing life, please remember that I am by far his favorite child–or at least was until this publication. Also, before I proceed any further, I must thank Jay Courie for graciously volunteering my time towards the drafting of this profile. Now, without further delay and incase anyone is still reading, here's my dad:

William S. Davies, Jr.

First of all, Dad is getting old. He was born way back on May 5, 1942 in Greenwood, SC. No one remembers what he was like until high school, so let's just assume he got in a lot of trouble and was generally a bad kid. I can tell you from personal experience that his household growing up did not believe in the modern child-rearing practice of "time-outs" for misbehaving children--they had more direct manners of discipline which he adopted later in his life.

Dad had tremendously short hair while at Greenwood High School, where he played football for the legendary Pinky Babb. He often tells great tales of his team's state championships and its countless college scholarship athletes, but, as I remember, he was a down lineman who never played another game after 1960, when he left the friendly confines of the town claiming to have the widest main street in the world. What I do know is that he spent most of his summers with my great grandparents at Edisto Island–where he apparently developed a fond appreciation for cold beer.

Because of his short hair cut, he was a natural for The Citadel. In 1964, he graduated with high honors and low rank from the Citadel as a member of the Citadel Honorary Society. He still holds the land speed record for returning to the barracks from an Edisto Island party. He also furthered his fond appreciation for cold beer.

Dad went straight from the Bulldogs to USC Law. While at USC, Dad made the best decision of his life–he dated and became engaged to my mom (Mahalie). He managed to graduate from law school in 1967, after making the Order of Wig and Robe and serving on the Editorial Board (1965-1967) and as Managing Editor (1966-1967) of the South Carolina Law Review. He's in the record books for most elbows thrown in any season of the law school basketball league. He also further developed his fond appreciation for cold beer.

While still in school and before he married his first (and only) wife, Dad next spent two years as the Assistant to the Clerk of the Supreme Court (a fact I just learned). He made a whopping seventy-five cents an hour in that prestigious capacity. I don't think they let him drink any beer in that capacity.

After law school, Dad spent a half year teaching math to underprivileged students via the Manpower Development Training Act. Later that year (1967), and even before the movie Stripes made it cool, he joined the Army. Dad spent five years as a Captain in the Judge Advocate General's Corps. His military career was the basis for the adventurous TV show JAG. He got to keep his short hair and learned to like the warmer beers of Germany.

In November of 1972, after agreeing to a ten percent cut in pay from his Army position, Dad moved to Columbia to work for Nelson, Mullins, Grier, and Scarborough–now known as Nelson Mullins Riley and Scarborough. This happened so long ago that even Bruce Shaw was still considered a young lawyer.

In the 1970's, Dad finally let his hair--and sideburns--grow. In 1976, while celebrating the Bicentennial, Dad was the President of the South Carolina Bar's Young Lawyers Section (by that time, Bruce Shaw was no longer considered young). Dad later served on the SC Bar's Board of Governors.

Later in the 1970's, Dad learned from Ed Mullins the importance of financial security; he discovered

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Member Profile

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Mr. Mullins was directing his son Wade to get his quarters for Coca-Colas from Dad's desk drawer. Thanks to lessons like that, Dad's now a very senior partner in their Columbia office, concentrating his practice in the areas of asbestos, environmental, toxic tort, mass tort litigation and workers' compensation law.

Since the early 1980's, Dad has been extremely active with the SCDTAA. He held every officer's position, including President in 1997-1998, and served on our executive board numerous times from as early as 1982 and as recently as last year. He deserves a significant amount of the credit for ensuring the financial security of our group and enabling us to go to places like Sea Island.

Dad is a member of numerous state, local and national bars (of both the legal and non-legal variety) and other organizations. He's a member of the Richland County Bar Association, the South Carolina Bar, the American Bar Association, the South Carolina Defense Trial Attorneys' Association and the Defense Research Institute (DRI). He is the DRI South Carolina State Representative, Vice Chair of the DRI Asbestos/Silicosis Subcommittee of the Environmental and Toxic Torts Committee and a member of the Steering Committee of the DRI Industrywide Litigation Committee. He served as President of the University of South Carolina Law School Alumni Association.

Despite claims of others, Dad has a life outside the law. He has served on the Executive Committee and Board of The Harvest Hope Food Bank, the Executive Committee and Board of the Family Service Center of the Midlands and the Board of The United Way of the Midlands. He has also served as a founding member of the attorneys from the firm representing Guardians ad Litem for mistreated and abused children in Lexington County, South Carolina. He also sings softly in church, a true sign of his charity and understanding for others.

Dad's a huge history buff and knows more about what happened three thousand years ago than I know about what occurred three hours ago. According to Mills Gallivan, past SCDTAA president, Dad's on a first name basis with several park rangers at Virginia's civil war battlefields (I'm sorry Dad–I mean the War of Northern Aggression). His ability to pick out historical inaccuracies in modern movies is both amazing and somewhat disturbing.

Kidding aside, Dad truly is the best dad in the world and is working on the best grandfather award. Despite his amazing schedule and accomplishments, he always had time for us (did I forget to mention my younger brother and sister?). He puts his family first, he truly cares for others and he often picks up the tab when we go out.

As I said at his sixtieth birthday party, I hope to become half the father for my two boys that Dad was for us. If you don't know him, take the time to meet my Dad. He's a pretty good guy.

South Carolina Defense Trial Attorneys' Association
One Windsor Cove, Suite 305
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