

When Forensic Neuropsychiatric Expertise Is Indicated, Early Retention Is Best

By Harold J. Bursztajn and Alexander Geiger

Many defense lawyers and in-house corporate supervisors make the mistake of waiting until a case is on the eve of trial before retaining the requisite expert witnesses, as a result of either inadvertent procrastination or a calculated decision to delay expert disclosure for as long as possible. Neither of these reasons is a sufficient justification to offset the benefits that accrue from retaining expert witnesses sufficiently early in the litigation process to enable the experts to assist the litigators and their in-house supervisors in making preservation of evidence decisions, in guiding their approach to discovery, and in shaping their overall litigation strategy.

Just as no self-respecting lawyer would send a demand letter, file a complaint, or serve a responsive pleading without first investigating all available factual evidence and researching the applicable law, no competent litigator should embark on the litigation process without retaining, and consulting with, the expert witnesses who will be necessary to make the client's affirmative case and to rebut the adversary's opposing case. Often, experts will

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identify lines of inquiry, approaches to marshalling evidence, and strategies for debunking the other side's fact and expert witnesses that may prove decisive at trial. If the decision to retain one's own experts is delayed until the eve of trial, such opportunities will be lost.

With no category of expert witnesses is this need to retain one's own expert early more true than with a forensic neuropsychiatrist. Of course, if the mental state of a party has been placed at issue in a lawsuit, most lawyers will turn, sooner or later, to a psychiatric witness. What many litigators do not appreciate, however, is that the thoughtful, well-supported, and persuasive testimony of a qualified and articulate forensic neuropsychiatrist not only will serve to objectively evaluate a plaintiff's claims of mental or psychological injuries, but also may serve to undermine the overall reliability of the plaintiff and the plaintiff's treating clinicians and experts as clinical, objective historians relative to the nature and extent of impairment or as purveyors of objectively arrived at insights relative to attribution of causation.

In that sense, the testimony of the forensic neuropsychiatrist may be decisive even in a case in which allegations of neurological injury, mental suffering, emotional distress, or psychological damage appear to be only tangential or derivative to the main thrust of the plaintiff's case. But the opportunity to derive the maximum benefit from the availability of testimony of a forensic neuropsychiatrist may be lost if the expert is not retained early in the litigation process.

It is a mistake to think of an expert witness as someone who shows up during the third week of the trial, testifies for a few hours, and then is never seen again. A sophisticated litigator will rely on the knowledge, experience, and insights of his or her expert witnesses to determine what evidence to collect, what questions to ask in interrogatories, in depositions, and during the trial, and what arguments are validly support-

ed by objective analysis and thus can be made to the judge and to the jury during all phases of litigation.

In the three cases described below, the decision to retain a forensic neuropsychiatrist early, the utilization of his expertise not only to objectively analyze the plaintiff's allegations but also to shape the entire approach to the defense of the claims, and the use of his expertise not only to objectively rebut the plaintiff's claims, but also to undermine the plaintiff's and the plaintiff's treating physicians' and experts' mischaracterizations and misattributions made all the difference in the ultimate outcomes of these cases. It should be noted that when considering retention of a clinical expert, it is best to retain an expert who has an active clinical practice, is academically distinguished, and has a history of retention by both plaintiffs' and defendants' counsel, ideally in close to a 50-50 ratio. Such retention allows the defense attorney to increase the likelihood that the expert not only will be objective, but also will be effective and can distinguish those claims of impairment by a plaintiff that are unlikely to be indicative of malingering and misattribution from those that are.

CARVAJAL V. MIHALEK

In *Carvajal v. Mihalek*, 2009 U.S. Dist. LEXIS 115279 (US Dist. Ct., SDNY, 2009), *affirmed*, 453 Fed. Appx. 69; 2011 U.S. App. LEXIS 25450 (2nd Cir., 2011) the plaintiff, Robert Carvajal, presented a "Bivens" claim alleging he was injured when agents of the U.S. Secret Service used excessive force in the course of executing a search warrant. The warrant was based on information provided by a confidential informant, who told the government that illegal guns were present in an apartment shared by Carvajal and his brother. According to Carvajal, in the course of executing the warrant, the Secret Service agents battered down the door of the apartment without announcing themselves first, entered the apartment with guns drawn, and started

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shooting immediately and without warning, despite the absence of any threat or provocation. Carvajal claimed that he suffered persistent cognitive impairment, chronic pain, and post-traumatic stress disorder (PTSD) as a consequence of being shot in the head, hand, and torso.

No gun was found in the apartment, although the agents claimed that someone tossed a gun out of a window. Carvajal claimed that the story of the agents with respect to a gun being tossed through the window was physically impossible, given the layout of the apartment and the positions of the various actors at the time of the shooting.

Aside from the dispute as to the existence of a gun, however, the search did yield evidence of a counterfeiting conspiracy. Carvajal eventually pleaded guilty to one count of uttering counterfeit currency. Subsequently, he sued the Secret Service agents for using excessive force in the course of executing the search warrant. The court denied the motions of two of the agents for summary judgment dismissing the claims against them, and the case proceeded to trial.

Early in the litigation process, the government retained one of the authors (Harold Bursztajn, M.D.) to serve as the forensic neuropsychiatric expert, in light of Carvajal's claims of neurological and psychological injuries. In the course of conducting the forensic neuropsychiatric examination and evaluation, Dr. Bursztajn obtained historical data concerning a prior motor-vehicle accident involving Carvajal, in which he had claimed a head injury and which he had settled for a substantial payment by the defendant. The federal court admitted evidence of this settlement at trial, which ruling was subsequently affirmed on appeal.

Furthermore, Dr. Bursztajn was able to determine, and to testify, that Carvajal's claimed symptoms of chronic pain, PTSD, and cognitive impairments were largely malin-

gered. Moreover, to the extent that Carvajal did suffer from any residual consequences of head trauma, those were more likely attributable to the prior motor-vehicle accident, for which he had previously received a substantial financial settlement.

Prior to trial, the government, in consultation with Dr. Bursztajn, filed a successful motion to limit the admissibility of medical testimony proffered by the plaintiff as to his alleged brain damage because the plaintiff-retained experts failed to consider the MVA as an alternative cause of his head trauma.

At trial, Dr. Bursztajn testified that in examination, Carvajal did not manifest the cognitive impairments and symptoms of PTSD from which he claimed to suffer. On the contrary, he displayed considerable self-command, along with an adversarial attitude and manipulative behavior. Carvajal's lack of cooperation with the examination, history of other criminal involvements, and other indications of antisocial personality traits, together with his disinclination to avail himself of medical or mental-health treatment, contributed to a picture of a person who, having dealt in counterfeit currency, was counterfeiting symptoms of neuropsychiatric impairments.

The jury returned a verdict in favor of the defendants, which verdict was subsequently affirmed by the U.S. Court of Appeals for the Second Circuit.

DOE V. NEW YORK CITY TRANSIT AUTHORITY

In *Doe v. New York City Transit Authority*, Supreme Court of the State of New York, County of New York, Index No. 100974/2009 (unreported case), the plaintiff, a 62-year-old passenger riding in a New York City bus, brought a personal injury case alleging that she was injured when the driver suddenly stopped the bus during a sharp turn. The passenger claimed that she fell out of her seat and struck her head against the back of the seat in front of her. According to records of the first responders, the plaintiff did not lose consciousness and walked

to the ambulance sent to the scene. Subsequently, she brought a civil action against the New York City Transit Authority, which operated the bus. In addition to physical injuries and disability, she claimed to suffer from a post-concussive syndrome — causing headaches, impaired vision, and memory and other cognitive impairments — that prevented her from working. Pursuant to a prior ruling on motion practice, the judge ruled that defendant NYCTA was negligent as a matter of law when the bus operator was not produced for deposition. The court did not make any ruling on the issues of causation or damages.

In support of the plaintiff's claims, the plaintiff-retained neurologist and psychiatrist made extensive reference to emerging technology for corroborating and quantifying the claim of impaired function due to the alleged chronic post-concussive syndrome and other neurologic injuries. Defense counsel retained Dr. Bursztajn to testify as a rebuttal expert. While not permitted to conduct an independent forensic examination of the plaintiff, Dr. Bursztajn did review and analyze medical records, work records, records of prior applications for disability benefits and workers' compensation payments, and deposition transcripts — data that raised substantial questions about both the extent of the plaintiff's disabilities and their alleged causal connection to the bus accident. Dr. Bursztajn opined that the data were forensically insufficient to support the plaintiff's claim to have sustained neuropsychiatric injuries and impairments as a consequence of the accident. In addition, he opined that the plaintiff-retained psychiatrist's methods of evaluation failed to meet the standard of general acceptance in the relevant professional community.

After receiving Dr. Bursztajn's report, plaintiff's counsel withdrew that part of its expert's proffered testimony that relied on the findings of quantitative electroencephalography (QEEG), a controversial form

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of neuroimaging, prior to a scheduled *Frye* hearing to determine the admissibility of such testimony. At trial, Dr. Bursztajn noted that the purportedly objective measures of neuronal function employed by the plaintiff-retained experts, such as delayed ocular evoked potentials, are easily malingered or misattributed in a forensic context and can also be affected by medication. Yet those experts failed to assess the plaintiff for potential malingering, misattribution, or medication effects.

Dr. Bursztajn also testified that prior to the accident, the plaintiff had suffered from degenerative (including neurodegenerative) conditions that could account both for her claimed impairments and for the experts' findings. For example, the evoked potentials could be slowed by any of a number of causes, ranging from lack of motivation to pre-existing or unrelated medical conditions such as diabetes or cataracts. In addition, Dr. Bursztajn was able to testify that the plaintiff hosted a prominent politician in a much publicized "Sleepover" and was by all accounts an exemplary hostess. Finally, although she quit her primary job immediately after the accident, she continued to work her second (part-time) job. This history undermined her "before and after" narrative.

Based on a comprehensive analysis of the plaintiff's claims, Dr. Bursztajn testified to his opinion that, more likely than not, the plaintiff was malingered for financial gain as well as for sick-role adaptation, and was misattributing a variety of neurodegenerative processes related to aging to what her experts claimed was a chronic post-concussive syndrome caused by the bus accident.

At the conclusion of the trial, and despite a preexisting finding of negligence as a matter of law, the jury returned a verdict in favor of defendant, awarding no damages. The jury's verdict was based on a finding that the plaintiff had not sustained

a "serious injury" within the meaning of the NYS Insurance Law, thus failing to meet the requisite no-fault threshold.

PANCHENKOVA V. CHIGIRINSKY

In *Panchenkova v. Chigirinsky*, Superior Court of Connecticut, Waterbury Judicial District, Index No. 2010-CV-126020819 (unreported case), the plaintiff, Tatiana Panchenkova, sued her ex-husband, Shalva Chigirinsky, a 65-year-old prominent Russian businessman, based on the allegation that he assaulted her on 10 separate occasions between 2001 and 2010.

Panchenkova and Chigirinsky were married in 2003 and divorced in 2009 in Russia. They have four children. After the divorce, Panchenkova moved to Greenwich, CT, and Chigirinsky followed, in order to be closer to his children, thus accounting for the venue of this lawsuit between two Russian nationals.

Panchenkova claimed that she suffered personal injuries and emotional distress as a result of beatings inflicted by Chigirinsky. The credibility of her allegations was a major issue in this case. The defense retained Dr. Bursztajn, who conducted a forensic neuropsychiatric examination and psychological testing of the plaintiff and produced an expert report.

The plaintiff moved to preclude Dr. Bursztajn's testimony, pursuant to the Supreme Court's decision in *Daubert v. Merrell Dow*, claiming (*inter alia*) that an alleged language barrier made his psychological test results unreliable (although there were data consistent with the plaintiff's having been conversant with English for years). The trial court denied the motion to preclude. Moreover, the affidavit plaintiff's psychiatric expert filed in support of the plaintiff's *Daubert* motion revealed methodological deficiencies in that expert's own forensic evaluation. Dr. Bursztajn's rebuttal, together with his expert report, not only constrained plaintiff's expert's testimony, but also gave defense attorney Charles A. Deluca a road map for his cross-examination of that ex-

pert. These pre-trial and trial developments reduced the case to one of "he said/she said," so that it was not even necessary for Dr. Bursztajn to take the witness stand after cross-examination of the plaintiff-retained expert was concluded.

After four weeks of evidence presentation and three days of deliberation, the jury returned a defense verdict.

SUMMARY AND CONCLUSION

In each of the three cases discussed here, a forensic neuropsychiatrist retained early in litigation developed an in-depth analysis that enabled defense counsel to highlight the lack of objectivity in the plaintiff-retained experts' testimony and, ultimately, to refute the plaintiff's claims. This was accomplished (pre-trial or in trial testimony, as well as in cross-examination) both by deconstructing plaintiffs' experts' mischaracterizations, including their use of neurogimmickry, and by exposing plaintiffs' misattributions and malingered. The forensic neuropsychiatrist withstood challenges to the admissibility of his testimony (pre-trial or on appeal) and cross-examination while assisting defense counsel in exposing the unreliability of the opposing attorneys' experts' methodology. By retaining such an expert early and involving the expert in all relevant aspects of case preparation, an attorney can maximize the strategic and tactical effectiveness of the expert's objective evaluation and testimony with respect to alleged negligence, causation, and damages.

Late retention, sometimes rationalized as a cost-saving measure, not only tends to be less cost-effective (in the "haste makes waste" tradition), but also makes it more difficult to get the benefits of the expert's objectivity to complement the attorney's advocacy. By contrast, early retention not only results in a less hectic pace of case development, but can lead to greater and more effective objectivity conveyed via convivial and mutually respectful conversation.

