

# Forming a Better Picture

*CLE shows brain disease linked to contact sports informs other knowledge of traumatic injuries*

BY JULIA CARDI  
LAW WEEK COLORADO

By the end of former Pittsburgh Steelers center Mike Webster's violent football career, the blows he had taken to his head equated to hundreds of thousands of car crashes, by his own estimation. The damage precipitated a severe case of a brain disease upending the health of football players and boxers that is invisible to the eye and so elusive to current imaging technology it's not possible to even diagnose definitively in a living person.

But as a CLE session Tuesday outlined, growing knowledge about chronic traumatic encephalopathy (CTE) is providing crucial guidance for understanding other kinds of traumatic brain damage and, in turn, informing how cases about them are litigated.

"The nature of litigation leads us to think about injuries as an isolated event," said Larry Cohen, an injury and wrongful death attorney based in



Injury and wrongful death attorney Larry Cohen talked Tuesday about how research on the brain disease CTE is informing understanding of other kinds of brain damage. / JULIA CARDI, LAW WEEK

Vermont who presented the session on brain injury litigation. "As law-

yers, we want to find the event that has caused something so that we can then use that event and the behavior that led to it, typically negligence or intentional acts, and say this is the causative factor that took place here."

But, he explained further, lawyers have to consider brain injuries as dynamic processes that go beyond a simple causal relationship. And CTE is a valuable microcosm of developing knowledge about that complex web of causes and effects. Although repeated head injuries are necessary for the condition to develop, they aren't enough on their own to cause CTE. That relationship, Cohen said, shows the importance of the question for litigation about why different people can suffer the same injury and yet see very different outcomes.

"The naysayers who say you can never have any injury (from a mild brain trauma) account for that by saying whoever claims to have an injury is making it up," he said. "But in fact what CTE is showing is that you can have the injury that sets a process in motion, and yet, for some individuals, that process advances and becomes disabling cognitively and psychiatrically, whereas for others who have the same injury experience, it doesn't proceed."

He said he has come across the opinion that mild traumatic brain injuries never result in permanent brain damage and that it is still a widely held yet problematic view that the field of knowledge needs to overcome.

Cohen emphasized that although injury contributes to CTE, the condition itself is a disease. Another important characteristic of CTE as an encapsulation of understanding brain

injury as a whole field is that it can't be seen, which means its presence has to be diagnosed by looking at indicators. A key marker of CTE is ~~when~~ tau, a protein abundant in the central nervous system, accumulates in the "valleys" of the brain's soft tissue. It can accumulate when trauma to the head causes the brain to move inside the skull's protective shell, leading to tau leaking out of damaged neurons and blood vessels. The buildup of tau in the brain's valleys, called sulci, mark a key difference between CTE and Alzheimer's, Cohen explained.

A coroner first described the condition in boxers in the late 1920s in the journal of the American Medical Association, and his observations continue to influence the current school of thought about CTE. Another pathologist first gave the disease its name in the 1950s. But CTE gained infamy in the early 2000s when neuropathologist Bennet Omalu discovered former NFL center Mike Webster had advanced CTE by the time he died at age 50.

Although Cohen said it's difficult to predict how much litigation will spring up surrounding CTE, he explained there are a number of imaginable types of actions and defense arguments. The disease is now so well known that organizations sponsoring contact sports might argue assumption of risk as a defense.

But Cohen added possible causes of action might include ones such as failure to warn, misrepresentation of risk or medical negligence. Product failure is probably not a viable action, he said, because of the research show-

CONTINUED ON PAGE 21...

## FORMING A PICTURE FROM CTE

*Advancing knowledge of chronic traumatic encephalopathy can be used by lawyers to subvert traditional thinking about traumatic brain damage in general and inform how cases are litigated.*



CTE is a degenerative, damaging disease that can't be seen, a common challenge when bringing claims for brain conditions.



Repeated head injuries are necessary for disease, but trauma by itself doesn't explain CTE's occurrence.

Questions for brain injuries persist about why two people can experience the same injury and have different outcomes. Doubters have used this to say those who claim to have symptoms of damage fake them.

**WHAT CTE IS SHOWING IS THAT YOU CAN HAVE THE INJURY THAT SETS A PROCESS IN MOTION, AND YET, FOR SOME INDIVIDUALS, THAT PROCESS ADVANCES AND BECOMES DISABLING COGNITIVELY AND PSYCHIATRICALY. WHEREAS FOR OTHERS WHO HAVE THE SAME INJURY EXPERIENCE, IT DOESN'T PROCEED.**

-Larry Cohen, injury/wrongful death attorney

## OBGYN MALPRACTICE CONTINUED FROM PAGE 14...

inductions (34-36 weeks) over a period of 12 years and found that the near doubling of premiums was associated with the increase in inductions, which approximately tripled.

The drug Pitocin is used to induce labor. From 1990 to 2010, the rate of induction of labor went from 9.6 to 23.8 percent. The CDC report found that heart muscle disease (cardiomyopathy), cardiovascular complications and hemorrhage were the leading causes of death in these cases. One of the most common injuries is uterine atony, a condition where the uterus has been overworked and stressed and bleeds out. Usually the uterus must be removed to stop bleeding.

If injuries sustained during labor and delivery lead to a loss of fertility, recovery might be made to cover costs associated with adoption and surrogacy. But for women with other complications or in the event of a mother's death, Woodruff says that's not usually the case.

A process called professional review makes confidential reports and findings of medical cases and patient care. The reviews are done on all sorts of cases, not just ones in which a patient has complications or dies. But especially in cases with unfortunate outcomes, Woodruff said communications and findings from those reports are crucial.

"From what we see, it is used as a tool, at least in the litigation context, to conceal facts and prevent injured people from learning about what truly happened to them and why," Woodruff said.

Colorado's professional review law defines "record" as essentially any communication between individuals in the committee and during proceedings as well as reports and assessments of the patient care under review.

The statute, which is scheduled to sunset at the end of next year, exempts from that definition communication by "any person that are otherwise available from a source outside the scope of professional review activities, including medical records and other health information." But Woodruff said that the process is often used as a shield to obscure the facts.

"I'm in a deposition asking [the hospital representative] 'What did you learn about what time the doctor was called, what were the nurses doing?' Then they say 'If you learned that during the investigation, you don't have to answer that question.' It's not documented anywhere rather than the peer review file," Woodruff said.

Woodruff said some judges are less aware of the details in the statute, and that in some cases defense attorneys will label communications confidential that shouldn't be under the law, and therefore are unable to be used to bring a claim for a patient.

"We see that judges will sometimes just sort of fall for it," Woodruff said. "We see that some judges are very meticulous and careful and they don't fall for it, and then we can kind of pierce that veil and we can get the facts

themselves."

Kuhn disagrees. He believes the practice encourages open conversation among health care providers and leads to an overall improvement in patient care.

"The day that we stop protecting peer review is the day we see a screeching halt to our collective societal ability to encourage frank candid discussions among medical providers," Kuhn said.

COPIC counsel Mark Fogg said the statute clearly outlines that other information and facts outside the review are discoverable, noting that due process is important and the ultimate goal of the professional review process is improving health care.

"The important thing is, from everybody's standpoint, the patient and the physician, you want an objective, thorough and where appropriate, critical review. You don't want it motivated by anything other than quality of care," he said.

Fogg said professional review allows for an individual to come forward with allegations without concerns of retaliation. It also provides other options for education or restriction rather than severe punishment, depending on the case.

A 2009 American Medical Association survey found that more than 30 percent of OBGYNs said their fear of lawsuits led them to perform more C-sections.

In 2013, the U.S. rate of C-sections was 32.7 percent, double the 10-15 percent rate that the World Health Organization set as medically necessary. Fennemore Craig director Barbara Glogiewicz represents physicians and has handled many obstetric malpractice cases. She said claims in OBGYN cases are particularly concerning because of large awards.

Doctors are covered by at least \$1 to 2 million in insurance, and premiums have risen for obstetricians.

Though Glogiewicz said most of her clients try not to let a potential malpractice claim influence their decisions, many have seen colleagues go through harrowing lawsuits.

"I think the reality is that when I talk to clients, they say 'I try to do what's in the best interest of my patients,'" she said. "There's always a focus to not practice defensive medicine, but in reality, some practitioners are more liable to recommend a C-section because of risks associated with malpractice claims."

And though the cap on non-economic damages is low, Glogiewicz believes it's an important limitation to have in place to balance out the soft cap on economic damages, especially because emotion and sympathy can sway a jury.

"The problem is that's a train that when it leaves station, nobody knows where it's going to end up," she said. "The doctor in court is the one who feels the worst of all. They didn't go to medical school to hurt people. Reining in emotion is necessary for doctors to get a fair shake." •

— Kaley LaQuea, [KLaQuea@circuitmedia.com](mailto:KLaQuea@circuitmedia.com)

## EXPERT WITNESSES CONTINUED FROM PAGE 16...

Merrell Dow Pharmaceuticals put focus on whether experts apply a rigorous methodology to their opinions and that judges should be able to assess that methodology and the facts.

"What if [an opinion is] generally accepted, but based on bad science?" May said. "Well, then that shouldn't come in."

### A TOOLKIT FOR EXAMINATION

During his presentation, Cohen laid out a framework of questions for attorneys to ask when examining an expert witness who is giving any kind of scientific opinion to help decide whether his or her testimony should be admitted.

**Validity:** Does the analytical instrument an expert used to help form his opinion measure what it purports to?

Cohen used the example of a bathroom scale. "Someone says a bathroom scale works because I can stand on it and it tells me my weight," he said. "How do you know? Somewhere in time, somebody had to do some research to figure out how the bathroom scale works, such that it could tell us weight, and make the determination that it works."

**Reliability:** Does the instrument measure consistently?

Cohen explained reliability in this context differs from legal reliability for admitting scientific evidence. He said a person can examine reliability by looking at how an instrument was developed and its claims about the extent of its validity.

"You aren't going to find things out there that are valid and reliable 100 percent," he said. "The difference between the reality that's out there that we're trying to identify and the conclusion that we can draw using these instruments is referred to as a rate of error."

**Sensitivity:** How correctly can the instrument identify people with the condition it measures?

"If it's valid and reliable but not sensitive, we're back to the question of what usefulness this has in supporting an opinion," Cohen said. "If (the expert) says 'I don't know,' what's the next step? A motion in limine to eliminate that opinion, because they can't support it."

**Specificity:** Can the instrument identify the absence of the condition, and rule out other explanations?

Cohen used the example of a person who appears to have a short-term memory problem but an alternate explanation might be an attention issue that prevents him or her absorbing information.

"The instrument that you want to say detects short-term memory, is it specific to that, or is it also picking up attention?" he said.

"These are questions you can always ask, and they will always lead you to things that you can use on direct and cross-examination." •

— Julia Cardi, [JCardi@circuitmedia.com](mailto:JCardi@circuitmedia.com)

## BRAIN INJURY CLE CONTINUED FROM PAGE 15...

ing helmets do not provide protection against CTE.

Although Cohen said medical negligence for failure to identify the condition might be a lucrative legal argument to explore, the difficulty of diagnosing CTE while a person is alive presents a challenge for making it.

Cohen continued to say increasing knowledge of CTE has furthered understanding of the part trauma plays in brain damage because repeated trauma can also overwhelm the body's usual healing process.

"Plasticity allows the brain, where the injury is very modest, to overcome the fact of injury organically and to avoid the symptoms that are characteristic of a traumatic brain injury," he said. "But if the injury is more per-

**“We  
absolutely  
need to remain  
humble,  
because the  
field of brain  
function is  
truly in the  
infancy stage.”**

— Larry Cohen, injury and wrongful death attorney

vasive ... you see a presentation and a continuation of symptoms." Cohen said while genetics are thought of as a strong factor for susceptibility to CTE, there is not yet a clear answer, and science is likely a long way from providing one.

"We absolutely need to remain humble, because the field of brain function is truly in the infancy stage," he said, adding that he has heard the sentiment that the area of knowledge has progressed from infancy to toddlerhood.

Cohen reiterated the need for lawyers to come up with a framework of thinking to account for different outcomes in people who suffer the same trauma besides simply dismissing those who do suffer brain damage as malingerers.

"That's the window that I believe CTE is going to provide to understand why we see the differences we do in mild traumatic brain injury," Cohen said. "It's going to do a whole lot more, but if it did only that, it would be a tremendous advancement over where we are." •

— Julia Cardi, [JCardi@circuitmedia.com](mailto:JCardi@circuitmedia.com)