

DEALING WITH PRE-EXISTING CONDITIONS
IN THE TRAUMATIC BRAIN INJURY CASE
(The Thin Skull Plaintiff and Worsening of Disabilities)

Use with Caution/See Postscript

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Except for children, and young ones at that, most people who suffer a traumatic brain injury ("TBI ") already have one or more of a multitude of conditions and disabilities that TBI can also cause. We call these pre-existing conditions. It's just life; the longer you live, the more likely you are to experience various difficulties with your health. The potential cognitive, emotional, behavioral, and physical symptoms of TBI, represent a wide range of such difficulties. For most victims of TBI, it is likely undeniable you have experienced some similar symptoms to those caused by TBI before you suffered your TBI.

By way of illustration, most of the clients I have represented over the years had at least some pre-existing disabilities (health difficulties from which they suffered before the brain trauma). In other words, it is likely before I ever meet a particular client, he or she is already dealing with one or more of the following conditions, which are also symptoms of TBI:

Headaches, migraine and otherwise; visual disturbances; dizziness and balance issues; difficulty concentrating; reduced attention; disorganization; impaired judgment; hypersensitivity to light, sound or motion; depression and withdrawal; mood swings; anxiety; irritability; restlessness and agitation; lack of motivation or initiation; disinterest in activities; poor impulse control; anger outbursts; suicidal ideation; nausea; fatigue and sleepiness; difficulty multi-tasking; tinnitus (ringing in ears); disorientation and confusion; impaired memory (long and short term); attention deficit disorder; posttraumatic stress disorder ("PTSD"); prior brain injuries and concussions, etc.¹

¹ One recent client reported symptoms to his healthcare providers over the 10 years *before* he suffered his "mild" TBI, including: Psychological counseling in relationship to a divorce; fainting and dizziness; panic attacks; mood swings; muscle aches and increased pain in arms; back pain; anxiety attacks; nervousness; sleeping difficulties, including night sweats; poor concentration; lability; pain in foot; ear pain; shortness of breath; "spacey"; left upper extremity weakness; tingling in face; changed vision; unstable angina; neck pain and jerking movements; intermittent sharp shooting pain in left ear; hearing problems; left neck pain; drooping of right eyelid; right facial weakness and numbness; severe headaches with numbness and tingling; possible migraine with history of severe headaches; severe head congestion; loss of taste and smell; sciatica in right leg; arthritis in left leg; finger problems; and fibromyalgia.

Nonetheless, we were able to settle his case for the \$100,000 insurance policy limits because we discussed, and summarized, all of these conditions from the outset of the case, and provided statements from witnesses who knew him before and after his TBI to confirm his changes. The message to the insurance company: Your insured driver hit the wrong person (he is a thin-skull plaintiff whose pre-existing conditions were made worse by his TBI).

When these clients suffer TBI on top of one or more of such pre-existing deficits, the trauma to their brains often aggravates or worsens their underlying conditions.

The purpose of this article is to emphasize the importance in your case of disclosing the full extent of any such pre-existing conditions as soon as possible. This cannot be overstated. It is essential you be the first to tell the story of your "weaknesses." Otherwise, you can bet your bottom dollar (and you don't have nearly as many dollars as the insurance company defending against you), the defense will destroy your case with this evidence. Try to follow the advice of Michael Jordan, perhaps the best basketball player ever to play the game: "My attitude is that if you push me toward something that you think is a weakness, then I will turn the perceived weakness into strength." And you need to outdo Jordan: You must disclose your weaknesses first without the push. If you wait for the defense to "find" what you hope is a "needle in the haystack," it is likely your undisclosed pre-existing conditions will become the "elephant in the courtroom."

When you are the first one to disclose your pre-existing conditions, we can use the information to bolster your credibility in the case. As this article explains, you can neutralize and sometimes even benefit from your pre-existing conditions.

To understand how pre-existing conditions are dealt with in the law, we will use California as our jurisdiction. The law in California is representative of the law in most states. The eggshell or "thin-skull" plaintiff is uniformly protected in America. As set forth in the Third Restatement of Torts, "every United States jurisdiction adheres to the thin-skull plaintiff rule; more precisely, extensive research has failed to identify a single United States case disavowing the rule." Phys. & Emot. Harm §31 (2010). The rule has been recognized for more than a century, originating in an English case, *Dulieu v. White & Sons*, 2 KP 669 (1901). In recent decades, courts have extended the rule to psychological harm.² Plaintiffs in most jurisdictions now invoke the thin-skull rule to recover for both physical and emotional harms resulting from their pre-existing conditions.³

Certainly, the thin-skull plaintiff rule applies in California. For example, on the issue of the unusually susceptible plaintiff, the California court in *Rideau v. Los Angeles Transit Lines*

² See Steve Calandrillo & Dustin Buehler, *Eggshell Economic: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74:3 Ohio St. L.J. 376, 385-86 (2008) (See, e.g., *Tompkins v. Cyr*, 202 F.3d 770, 780 (5th Cir. 2000); *Jenson v. Eveleth Aconite Co.*, 130 f.3d 1287, 1294-95 (8th Cir. 1997); *Wakefield v. NLRB*, 779 F.2d 1437, 1438 (9th Cir. 1986); *McBroom v. Iowa*, 226 N.W.2d 41, 45-46 (Iowa 1975); *Thames v. Zerangue*, 411 So. 2d 17, 19-20 (La. 1982); *Freyermuth v. Lutfy*, 382 N.E.2d 1059, 1064 & n.5 (Mass. 1978).

³ See Aaron Twerski & James Henderson, Jr., TORTS: CASES AND MATERIALS 258 (2d ed. 2008). See generally Candice E. Renka, Note, *The Presumed Eggshell Plaintiff Rule: Determining Liability When Mental Harm Accompanies Physical Injury*, 29 T. Jefferson L.R. 289 (2007). Courts also have held tortfeasors liable for aggravation of emotional distress brought about by negligent third-party treatment of an injury. See, e.g., *Stoleson v. United States*, 708 F.2d 1217, 1221 (7th Cir. 1983); *Heims v. Hanke*, 93 N.W.2d 455, 459 (Wis. 1958).

(1954) 124 Cal.App.2d 466, 471, states: "The tortfeasor takes the person he injures as he finds him. If, by reason of some preexisting condition, his victim is more susceptible to injury, the tortfeasor is not thereby exonerated from liability."

Here is what the California judge tells the jury at the end of a case as to how the jurors must treat the thin-skull plaintiff:

The negligent defendant is responsible for all damages suffered by the wrongful conduct, "even if the plaintiff is more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered a similar injury." Cal. Civ. Jury Instruction (CACI) 3928.

The negligent party (sometimes called the tortfeasor) is also responsible for any worsening or aggravation of your pre-existing deficits caused by the TBI, even if you are not unusually vulnerable or susceptible. California juries are instructed you are not entitled to any damages for your physical or emotional condition existing before your TBI; however, if your physical or emotional condition was made worse by the wrongful conduct of another, the jury must, "award damages that will reasonably and fully compensate you for the effect on that condition." (Cal. Civ. Jury Instruction (CACI) 3927). For example, if you had headaches before your TBI, but your headaches are made worse by the TBI, you are entitled to recover for any worsening of your headaches resulting from the trauma. As stated by a California court in *Ng v. Hudson* (1977) 74 Cal.App.3d 250, 255: "Plaintiff may recover to the full extent that his condition has worsened as a result of defendant's tortious act."

The key is honesty and accountability. You must tell your lawyer about all of your life's experiences relevant to the TBI. Both you and your lawyer must be honest and appear honest throughout the case. The person whose wrongful conduct causes your TBI is fully responsible, regardless of your unusual vulnerability to the injuries (you suffer more from the headaches caused by the TBI than the "normal person"),⁴ and for any aggravation of your condition (your headaches are worse than before your TBI). The courts do not want the person responsible for your TBI to avoid accountability for the full extent of the damages. If the tortfeasor has made you worse, he or she is responsible for all of the aggravation or worsening of your condition, whether or not you are unusually susceptible or vulnerable.

In summary, if you are more susceptible than others, you are entitled to full compensation for your injuries, even if others would not have experienced the same damages (or any damages at all), from your TBI. Even if you are *not* more susceptible or vulnerable to the TBI, you are

⁴ Or, for another example, the negligent driver who strikes a motor vehicle driven by a hemophiliac who then bleeds to death, is responsible for the death, even though someone not suffering from hemophilia only needs a band-aid to stop the bleeding.

entitled to recover damages for any worsening or aggravation of your pre-existing condition. The tortfeasor is held accountable for all of your harm, whether or not she or he could reasonably anticipate the extent of the damages caused to you by the wrongful conduct.

Postscript/Caution

So long as you are honest about your perceived weaknesses, you may be able to turn them into strengths, or at least neutralize them so they do not destroy your case. But a word of caution: Dealing with the weaknesses due to your pre-existing conditions, is not the same as proving your brain injury case. You have the burden of proof (more than a 50% likelihood) both as to causation (your TBI, not your pre-existing conditions, is the substantial cause of your harm), and damages (the full amount of money compensation required to make up for your harm from the TBI). Especially when it comes to "mild" TBI, proving you are a different person now than before your TBI is necessary and difficult.

The challenge of how you deal with pre-existing conditions is potentially of greater economic consequence with moderate to severe TBI. Proving you are a different person is less complicated in these cases because such brain injuries are often apparent to the naked eye, and are always "visible," by definition, on standard radiographic imaging, such as MRI and CT scans. Distinguishing the harm caused by moderate to severe TBI, from your pre-existing conditions, is still critical. In order to obtain reasonable compensation for brain injuries likely to last a lifetime, the jury must believe you and your lawyer in all aspects of your case.

To achieve full justice for your "mild," moderate or severe TBI, the jury must be convinced of your credibility.

Several articles on my website explain how you and your lawyer can prove TBI of all kinds, "mild," moderate or severe, depending on your case.

*[How Trauma Affects Your Brain](#)

*[Traumatic Brain Injury: Signature Injury of the War in Iraq and Afghanistan](#)

*[The Silent Epidemic](#)

*["Mild" Brain Injury Litigation: Making the Invisible Visible](#)

*[What is "Mild" Brain Injury?](#)

*[Recovery of Damages for Traumatic Injury to the Miraculous Brain](#)