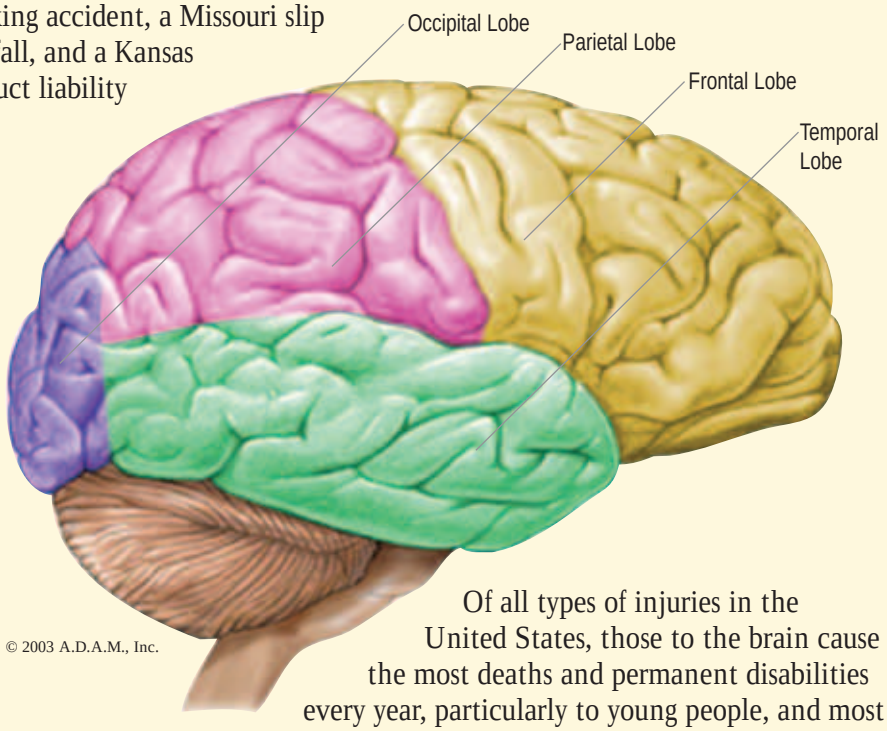
PRODUCT LIABILITY UPDATE Inside this Issue!

SHAMBERG, JOHNSON & BERGMAN

TRIAL ATTORNEYS

SUMMER 2003

TRAUMATIC BRAIN INJURIES are the common element of three cases reported in this issue – a Missouri trucking accident, a Missouri slip and fall, and a Kansas product liability case.



Of all types of injuries in the United States, those to the brain cause the most deaths and permanent disabilities every year, particularly to young people, and most of these tragedies are preventable. Brain injuries affect not only the injured person, but the entire family. Often the full extent of the injury is not recognized by health care providers, and even when it is, the resources to pay for critical rehabilitation are unavailable. Frequently, disabling impairment caused by brain injury is not discernable by the stranger, casual observer, or juror, whose first impression is important.

Representation of persons with head injuries requires an awareness of a wide range of issues, and sensitivity to the vulnerabilities of the client and his or her family. Proof of the full impact on the client's life is often challenging, and can be frustrating, but the opportunity to have a positive impact on the quality of the rest of the client's life is ever-present in these cases.

For decades our firm has regularly represented persons with head injuries and we look forward to continuing this challenging work.

Johnson County Kansas Jury Returns $8.3 Million Verdict

On May 7, 2003, Steve Six and Scott Nutter achieved what is believed to be the largest Johnson County, Kansas verdict since a $15,000,000 verdict obtained by Vic Bergman of our firm in 1984. Our client, Cory Pronold, was severely and permanently injured on August 12, 2000, when a Firestone FR410 P205 70R14 passenger radial tire developed a tread separation resulting in a rollover accident on Interstate 35 near Olathe, Kansas.

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TRAUMATIC BRAIN INJURY

Special Edition

JOHNSON COUNTY KANSAS VERDICT
CONTINUED FROM PAGE 1

The jury found that the tire failure resulted from the combined negligence of Firestone and Kansas East Youth Services ("KEYS"), a not-for-profit youth organization which failed to provide reasonable maintenance of the tire on its van. Firestone settled the product liability claim shortly before trial for a confidential amount and the trial proceeded against KEYS on the claim that it failed to provide reasonable tire maintenance and inspection, and failed to take the tire out of service when the tread was below 2/32's of an inch, in violation of Kansas law. Prior to trial, KEYS offered $85,000 to settle the case. The jury returned a verdict for $8,300,000, apportioning 27% of the fault to KEYS and 73% to Firestone. The award included $2,000,000 in past and future non-economic damages, $205,817 in past medical expenses, $3,388,245 in future medical and supervisory care, and $2,777,850 in future economic loss.

1991 Mazda MPV after tire tread separation.

The FR410 tire at issue was not part of the highly publicized recall in 2000 of the Firestone ATX, ATX II and Wilderness AT tires manufactured at the Decatur, Illinois plant. Firestone made discovery difficult, and withheld key documents until late in the case which revealed numerous other tread separation failures on FR410 tires. Separately, through many of our good friends and contacts across the United States, we received copies of Firestone documents disclosing changes in the amount of rubber used in the Firestone FR410 tire as part of the Firestone "C95 Program", which increased profits at the expense of tire safety and performance. This information led to a favorable pretrial settlement with Firestone, and the case proceeded to trial solely against KEYS.

The conditions leading to the tire failure began in March of 1999 when KEYS received a donated MAZDA MPV van to transport the children in KEYS' care to locations in Johnson County. KEYS operated the van until the tire failure in August of 2000 without providing necessary maintenance to the tires or implementing the necessary tire inspection program for its fleet of vans. Six months before the accident, KEYS replaced two of the van's tires, but one of the old FR410 tires remained in the right rear position on the van. KEYS continued using the van for the next six months without having the tires inspected, rotated or checked by anyone with special knowledge or experience in tire care. At the time the Firestone FR410 tire on the right rear wheel position developed the tread separation, it had approximately 60,000-70,000 miles of wear, some 10,000-20,000 miles past Firestone's limited warranty.

At trial KEYS asked for a comparison of fault against Firestone pursuant to K.S.A. § 60-258a and produced the

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Dangerous Iowa Work Site Causes Injury Involving Tractor/Trailer Rig

On March 7, 2000, Eric Dunlap was working on a construction project at a large grain processing plant in southeast Iowa. As he was piecing together ventilation piping on the ground near a roadway in the corn elevator area, a Rampley Transport, Inc. semi tractor/trailer veered off the roadway and ran over Eric's left lower leg, causing a severe degloving injury. Steve Six and Scott Nutter represented Eric and his family in a personal injury action against the grain processing plant, Rampley Transport and Keokuk Contractors, Inc., another construction contractor working at the job site. As the litigation unfolded, plaintiffs focused their claims against the grain processing plant on a premises liability theory rather than the negligence of the truck driver.

Extensive and protracted investigation and discovery revealed that the elevator area at the plant was an overcrowded, unreasonably dangerous work site. During the construction period, there were at least five different contractors conducting various operations in the same area with multiple work crews. In addition, hundreds of trucks were delivering grain to the plant's elevator every day. The plant safety director admitted during his deposition that he had received numerous complaints about truck drivers exceeding posted speed limits at the plant, running stop signs and driving off the road. The safety director admitted truck traffic was a "common, persistent problem" and "a huge safety concern." Discovery uncovered that, months before Eric was injured, plant documents recorded congestion and overcrowding in the elevator area caused by the volume of construction work and truck traffic as "one of the biggest safety issues" at the plant. Discovery also revealed that the plant required Eric to confine his work to a small staging area near the elevator roadway. Eric's supervisors and co-workers testified that they had complained to the plant that the staging area was too small and was located too close to the roadway. The evidence also showed that, long before Eric's injury, grain trucks were being forced to drive slightly off the roadway and into the staging area because the elevator area was overcrowded and the roadway was too narrow. Documents revealed that the plant knew grain trucks were having difficulties getting in and out of the elevator area during the construction project.

The trial theme was that the grain processing plant failed to take any

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Staging area at Grain Processing Facility.

Practice Tips

Service of Process

Kansas Law

In 2000, the Kansas legislature overhauled K.S.A. 60-303 and provided an innovative way to serve an elusive defendant with process. Pursuant to K.S.A. 60-303(c), service upon a defendant may be made by return receipt delivery. Service by return receipt delivery includes "service effected by *certified mail, priority mail, commercial courier service, overnight delivery service*, or other reliable personal delivery service to the party addressed." *Id*. To be valid, the service need only be evidenced by a written or *electronic receipt* showing to whom it was delivered, the date of delivery, the address where it was delivered and the person or entity effecting delivery. *Id*.

KTLA member Pat Neustrom related success obtaining service by Federal Express which will deliver the package directly to the defendant and require signature. The signature can be taken off the internet for proof of service.

Service was obtained by Pat on a defendant who was avoiding sheriff's service, but who was eager to receive a package from Federal Express.

An attorney suing in a Kansas federal court may also obtain service by return receipt delivery. *See* Fed. R. Civ. P. 4(e)(1) (2003). The Fed. R. Civ. P. do not independently provide for service by return receipt delivery. § 4(e)(2). However, Fed. R. Civ. P. (4)(e)(1) allows service of process "pursuant to the law of the state in which the district court is located, or in which service is effected." Because K.S.A. 60-303(c) permits service upon an individual by return receipt delivery, service by return receipt delivery is also proper in a Kansas federal court. *See, e.g.*, *Clelland v. Glines*, 2003 WL 21105084 at *4 (D. Kan. April 11, 2003).

Missouri Law

Missouri does not allow service of process by return receipt delivery, but rather requires personal service on an individual within the state to be made by delivery of a copy of the summons and petition to the individual or by leaving a copy at the individual's dwelling house. RSMo 506.150(1) (2003). Because Missouri state law does not permit service by return receipt delivery and because no independent basis for such service exists in the federal rules, return receipt delivery service is also invalid in a Missouri federal court.

Johnson County Kansas Verdict
Continued From Page 2

product liability evidence and experts against Firestone. Over plaintiff's objection, KEYS also introduced evidence that the Firestone FR410 tire was substantially similar to the Firestone recall tires (the Wilderness AT and Radial ATX tires), and therefore, was similarly defective. We believe this evidence was largely responsible for the allocation of 73% of the fault in the case to Firestone.

As a result of the rollover accident, Cory Pronold suffered fractures to his skull and right orbital socket, and severed the right optic nerve. He was in a coma for approximately two weeks and then spent the next six months at the Rehabilitation Institute where he relearned the ability to walk, talk, swallow, and be independent in the activities of daily living. Through dedicated hard work with his therapists and physicians, and with the support of his parents, Cory has made a significant recovery, but unfortunately he is left with many of the deficits associated with a traumatic brain injury, and he will face many challenges in independent living. As a matter of trial strategy, rather than make a specific recommendation to the jury as to the number of hours of care Cory will need in the future, evidence was presented establishing the nature and severity of Cory's injuries, and the things he cannot do. In closing argument, Cory's future care was placed in the hands of the jury, telling them they are the ones who would have to look out for Cory and ensure he receives appropriate care for the rest of his life. The jury awarded $3,800,000 in future medical and supervisory care.

Fall at Utilicorp Results in $1.5 Million Missouri Settlement

A company's failure to follow the advice of its safety coordinator to remedy a dangerous condition on its public stairway led to a serious fall and head injury for our client, Liesa Brown.

John Parisi and Scott Nutter represented Ms. Brown in her claim against Utilicorp alleging that the stairway was unreasonably dangerous and did not have adequate safety devices. The case was settled at mediation for $1,500,000.

On October 16, 2001, Ms. Brown, on the job as a United Way Fundraiser, was descending the stairs of the corporate headquarters of Utilicorp in Kansas City, Missouri. The large old marble stairway was slick and wet from rain earlier in the day. The stairway did not have any non-skid strips or center railing to assist someone descending the stairs. As Ms. Brown walked down the stairs, she slipped and tumbled down the stairs, suffering a traumatic brain injury.

Our firm conducted an extensive investigation. Former Utilicorp employees indicated that the dangerous condition on the marble stairway had been known to the company for some time. A former employee divulged that the Utilicorp safety coordinator had previously reported to corporate officials that the marble stairway was dangerous because the steps were slick and without a non-skid surface and the large stairway did not have a central railing. Unfortunately for Ms. Brown, this important safety issue was not addressed by the company, nor was any warning given to invitees to the business.

Under Missouri law, for Utilicorp to be held liable, the plaintiff had to prove that the company had constructive knowledge of the dangerous condition of the stairway. A company owes a business invitee the duty to: (1) exercise reasonable care; (2) disclose to the invitee all dangerous conditions which are known to the company and are likely not to be discovered by the invitee, and; (3) see that the premises are safe for a visitor, or at least ascertain the condition of the premises to give a warning so that the invitee may decide whether or not to accept the invitation, and may protect himself against the danger if he does accept it. *Preston v. Wal-Mart*, 923 S.W. 2d 426 (Mo. App. W.D. 1996) (Citing Restatement (Second) of Torts, § 343, comment b.) When a dangerous condition is so open and obvious that the invitee should reasonably be expected to discover it and realize the danger, a possessor of land does not breach the duty of care owed to invitees "unless the possessor should anticipate the harm despite such knowledge or obviousness." *Id.* (Citing Restatement (Second) of Torts, § 343, A(1) (1965)).

A second issue in Ms. Brown's case, and one that appears in most slip and fall cases, was the defendant's claim that the plaintiff was contributorily at fault for the injury, either because she was walking too fast, was not paying attention, was not using the handrail, or any other reason that could place blame for the fall on the injured party.

The damages aspect of the case presented the challenges of proof that accompany many traumatic head injury cases. Ms. Brown was injured in the scope and course of her employment, and her employer's workers' compensation carrier required that she be evaluated by separate neuropsychologists to evaluate her claim of a traumatic brain injury from the fall. The neuropsychologists tied many of Ms. Brown's deficits in short term memory and overall executive function back to the head injury from the fall. Her claim was that the head injury has severely impacted her prospects for future employment and her ability to carry out her normal activities of daily function. Common with many individuals who have suffered moderate head injuries, Ms. Brown's family and friends perceived that she changed as a result of the fall. Her personality and outlook had changed as a result of the frustration and anxiety that accompanies the struggles she faced to complete even simple tasks that she had previously taken for granted. Ms. Brown participated in cognitive rehabilitation at Truman Medical Center and has seen some improvement, although it is uncertain whether or not she will be able to return to a high level executive function that she enjoyed prior to her injury.

Truck Clobbers Car in Missouri, Causing Traumatic Brain Injury

On August 10, 1997, Christy Hughes was driving her car around a narrow curve of Old Missouri 210 Highway in Missouri City, Clay County. Coming uphill around the curve, from the opposite direction, was a 1997 International semi-trailer operated by DOT Transportation, Inc. The evidence showed that the truck crossed over the centerline and hit the Hughes vehicle.

Vic Bergman represented the Hughes family. The unusual feature of the case is that it came to our firm just before expiration of the Missouri five-year statute of limitations, and by then Mrs. Hughes had made a remarkable recovery from her initially severe injuries.

Mrs. Hughes had multiple musculoskeletal injuries including blunt chest and abdominal trauma, comminuted fracture of the left humerus, comminuted fracture of the left ulna, multiple fractures of the pelvis and pubic bone, and a hip dislocation. She also sustained a closed head injury with intracranial bleeding and swelling of the brain for which she was kept unconscious by medication. After a 37-day initial hospitalization she spent 23 days at Mid-America Rehabilitation Hospital, and then attended outpatient speech and cognitive rehabilitation. The total medical expenses were approximately $200,000.

Mrs. Hughes, who was 27 years old with one child at the time of the incident, recovered almost completely from the musculoskeletal injuries to the point where she was not experiencing any appreciable pain or discomfort, and in fact she had two more children since the collision without any problems associated with the injuries to her pelvis and hip.

The long-term consequences of the closed head injury became the challenge in the case. There was no question about the original traumatic brain injury and hemorrhage, but within 16 months Mrs. Hughes was released to go back to work. Initially she experienced stress and headaches with full-time work. Neuropsychological testing over time, however, demonstrated performance in the average range, with only mild problems noted in select cognitive functions. These testing results were interpreted without information establishing Mrs. Hughes' "baseline" functioning before her injury. There was a question about whether there was any significant deterioration in Mrs. Hughes' ability to perform her job functions. She was turned down twice for Social Security disability benefits. Before this could be resolved in the workplace, however, Mrs. Hughes had her second baby and desired to be a stay-home mother, so it was difficult to establish that she would lose more earnings as a result of the injury.

Our efforts were focused on establishing that the neuropsychological testing only showed part of the story, and that there was a dramatic transformation and diminution from baseline in Mrs. Hughes' personality, relationships, and abilities as a result of her head injury. This was done through interviews with family, friends and co-workers who knew Mrs. Hughes both before and after the collision. Through the observations of these people, we were able to identify and demonstrate that there were significant changes in Mrs. Hughes that were directly attributable to the injuries she sustained in the collision. We were prepared to demonstrate that the "normal" findings on the neuropsychological testing, while accurate, did not and could not measure the true losses that Mrs. Hughes experienced.

The case settled for $2,000,000.

This case is another example of the challenge of demonstrating the losses sustained by a person with a traumatic brain injury, who may present as "normal" to people who did not know her personally before the fact. Often the healthcare providers, who did not know the plaintiff before the injury, and have no baseline from which to measure loss, are not the best witnesses to establish the damages. Family members and close friends of the injured person are often the key witnesses on the damages questions.

Referral Relationships

We welcome referrals or will associate with you. We will be considerate of your relationship with your client.

We return referral fees in accordance with the rules of professional conduct.

Our goal is to maximize results for you and your client.

DANGEROUS IOWA WORK SITE
CONTINUED FROM PAGE 3

action to remedy the safety hazards on its property because it was more concerned about maintaining the flow of truck traffic to ensure it received a steady supply of corn for production. Near the close of discovery, plaintiffs were allowed to amend their Petition to bring a claim for punitive damages against the plant based on its prior knowledge and reckless disregard of the safety hazards posed to construction workers at the plant.

With regard to the trucking company, plaintiffs alleged the Rampley truck driver failed to keep a safe lookout, failed to keep the tractor/trailer rig on the roadway and failed to stop at a posted stop sign near the area where Eric was injured. In addition, interviews and depositions of other workers showed the Rampley truck driver had a reputation for being a careless driver who was "always in a hurry" and was often heard complaining about delays in corn delivery at the plant, especially during the construction project. Just minutes before he ran over Eric's leg, the truck driver told a grain inspector at the plant "if he could get that load dumped soon enough, he was going to try to get another load and come back before the plant closed."

The case presented significant challenges with regard to comparative fault and the extent of the plaintiffs' damages. The defendants were prepared to present evidence that Eric was working outside of his designated staging area and was actually in or within inches of the roadway at the time he was struck. The defendants also claimed Eric had been warned to be aware of truck traffic at a safety meeting just hours before he was injured. Iowa law precludes recovery where the plaintiffs' fault is found to be greater than 50%. In addition, while the plaintiffs claimed economic losses in the range of $1,500,000-2,000,000, through hard work Eric had recovered to the point that he could walk without a noticeable limp. Although Eric has permanent injuries, he had returned to work part-time and no longer required regular medical care.

Following the close of discovery, the case settled at mediation for $1,925,000. All defendants participated in the settlement, with the largest contribution of $1,000,000 coming from the grain processing plant. We would like to thank our friend and local counsel Fred James of Des Moines, Iowa for his invaluable assistance in this case.

Answers to Traumatic Brain Injury Puzzler – ACROSS: 1) ventricles 3) CSF 4) MRIScan 8) acalculia 9) acuity 10) memory 13) Decadron 18) perseveration 19) ataxia 20) Mannitol
DOWN: 2) CTScan 3) cognition 5) aphasia 6) Xanex 7) halo 11) judgment 12) dysarthria 14) cerebrum 15) Dilantin 16) hypoxia 17) pons

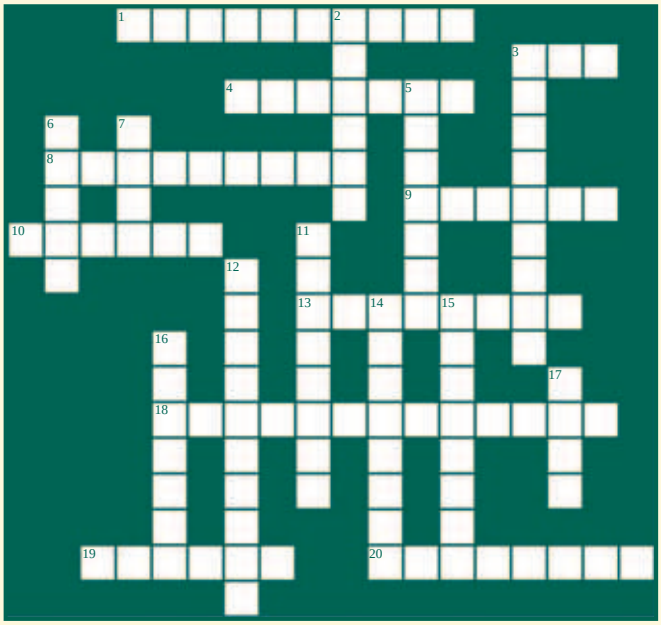
Traumatic Brain Injury Puzzler

Across

1. Four communicating cavities within the substance of the brain.
3. The abbreviation for the liquid buffer to absorb and distribute external or internal forces endangering the brain and spinal cord.
4. An instrument that develops images from biochemical operations of the brain by using a magnetic field.
8. Dysfunction or inability to perform mathematical operations, recognize numbers, or count.
9. Keenness of sensation.
10. Stored recollections about experiences, events, feelings, dates, etc., from the recent and distant past.
13. Cortiosteroid used to reduce inflammation and improve brain functioning through reduction of brain swelling.
18. Over-reliance on, or repetition of, a specific response or behavior to different tasks.
19. Dysfunction in motor coordination and balance.
20. Removes water from the brain, used to decrease intracranial pressure.

Down

2. Computerized x-ray taken at different levels of the brain to yield a three-dimensional representation of the physical shape of the brain.
3. Processes of thinking, understanding, and reasoning.
5. Loss in ability to speak coherent ideas or understand spoken language.
6. Antianxiety medication to help reduce tension and muscle activity.
7. A metal ring that helps keep the patient still and the body aligned during healing.
11. Ability for resolving dilemmas and approaching problems.
12. Disruption or dysfunction in speech articulation.
14. It is divided into right and left hemispheres.
15. Used to control or prevent seizures and convulsive disorders.
16. Reduction of oxygen supply to tissue that can result in injury.
17. It lies between the mid-brain and the medulla oblongata.



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