

# A Closer Look

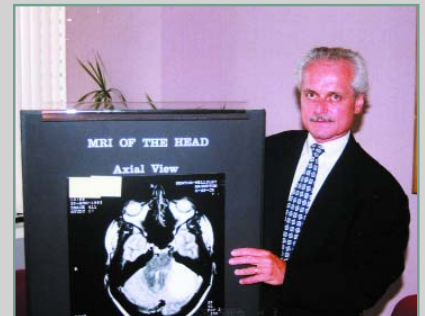
## Traumatic Brain Injury and Personal Injury Litigation An Interview with Kenneth I. Kolpan, Esq.

*By Cathy Wilson, CBIT*

Kenneth I. Kolpan, a Boston attorney for 25 years, has handled several hundred closed-head injury cases, including many involving hard-to-detect damage to the brain.

Attorney Kolpan was an Assistant Professor in Rehabilitation Medicine at the Tufts University School of Medicine and is co-chair of the "Trial Lawyers Conference" of the North American Brain Injury Society. He was also on the Editorial Board of the Journal of Head Trauma Rehabilitation where he served as medical-legal editor for 12 years. He was a member of the Board of Directors and the Executive Committee of the Massachusetts Brain Injury Association for several years.

For more information regarding Mr. Kolpan's work, please reference the website [www.kolpan.com](http://www.kolpan.com) or email at [kolpan@tiac.net](mailto:kolpan@tiac.net) or call the Law Office of Kenneth I. Kolpan, P.C. at 617-426-2558



### **MS. WILSON:**

*What are the elements of a 'strong case' in litigation after a traumatic brain injury?*

### **MR. KOLPAN:**

Probably the strongest elements involve the plaintiff: the before and after picture...how dramatically different it is. That is probably the strongest element in the brain injury litigation case. And usually that description does not necessarily come from the plaintiff or the patient, but from friends, family, and business people who knew the person before and know the person after their injury. This is because many of these clients tend to minimize what has happened to them. It is the people who knew them before and after their injury who really are able to best describe the changes. So the most crucial element, I believe, is the plaintiff, although he doesn't believe it himself.

### **MS. WILSON:**

*What is the difference in brain injury litigation vs. other types of injuries?*

### **MR. KOLPAN:**

I think that what is unique and challenging about brain injury cases is that it is an invisible injury. Brain injury is often referred to as the 'silent epidemic,' but to the jury it is 'invisible.' Other types of injuries can be seen - either they are obvious to people or can be seen on diagnostic tests - you can demonstrate what the injury is. We all know with brain injuries that unless you have positive findings on a CAT Scan, a MRI or other diagnostic tests, it is, for all intents and purposes, invisible. That makes it more unique and challenging than other types of injuries.

**MS. WILSON:**

***Is a person still eligible for government benefits when there is a lawsuit involved?***

**MR. KOLPAN:**

In regard to certain benefits which are ‘need-based,’ if they use proper trust instruments, such as special needs trusts, they can preserve their government benefits and also receive a settlement.

**MS. WILSON:**

***Are there other ethical considerations in the process, or is it pretty straightforward?***

**MR. KOLPAN:**

No, it isn’t straightforward. That is a great question. There are ethical issues. For example, when you represent someone: the evidence is that they have a brain injury and you obtain a significant settlement or recovery for that. In some states you have a legal obligation to have the court approve the settlement, which involves establishing by medical evidence that the person who has a severe brain injury is competent to make decisions about the settlement. It is one thing to have a brain injury; it is another thing to be incompetent.

Incompetence, in this situation refers to appreciating the legal ramifications or implications of settling the case. Obviously, not all individuals with brain injury are incompetent and everyone is presumed to be competent until shown otherwise. There is an ethical obligation to make sure that the person fully understands what they are doing and you may be required to present that settlement in front of the court for its approval.

**MS. WILSON:**

***A guardian or conservator may not have been appointed even though the plaintiff is not legally competent. How does such a factor affect the legal process and how are these situations best handled?***

**MR. KOLPAN:**

When decisions are made to schedule a case on behalf of a person with a brain injury and if there are questions about their competence, that should be brought to the court’s attention.

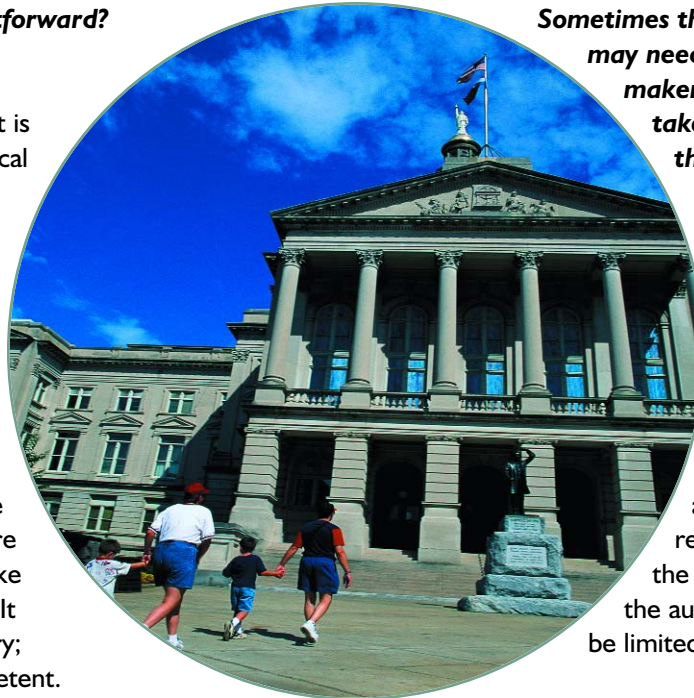
A medical examination should be completed addressing the question of competency. If the medical expert recommends that they are incompetent, then you would ask the court to appoint someone as guardian to make the decision on the settlement. Regardless, if there are questions about competence they need to be raised; they need to be addressed. As we know, people with brain injuries have deficits in different areas. It doesn’t mean they are automatically incompetent, but the question is a good one, and lawyers need to ask that when approaching settlement on behalf of a client with a brain injury.

**MS. WILSON:**

***Sometimes the individual with a brain injury may need a guardian or substitute decision maker, but the family may not want to take away their rights or at least their feeling of rights.***

**MR. KOLPAN:**

Let’s just assume in our situation, the individual with the brain injury is 18 or older - some states allow the guardian to be appointed in a very limited way. They have limited authority: i.e. placement, medical treatment, legal decisions, authority to act as their representative with respect to the settlement. In other words, the authority of the guardian can be limited.



**MS. WILSON:**

***How is the lifetime cost of future care calculated? How is life expectancy estimated?***

**MR. KOLPAN:**

In answer to the first question, a medical expert gives his opinion as to the type of future medical treatment that is required, the duration of that medical treatment, the frequency of that medical treatment, and the cost of that medical treatment in today’s dollars. That is done for each and every needed medical treatment. That opinion, that report is then given to an economist who considers the present cost of required medical treatment. Then the economist considers inflation, the growth rate, the discount rate, and arrives at a figure that represents the present value (today’s money) that is needed to buy future medical care according to the person’s lifetime needs in light of their life expectancy.

How is his life expectancy determined? There are government tables which provide figures for the life expectancy of certain

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individuals given their age. Most brain injuries themselves do not shorten life expectancies; brain injury itself is not considered a terminal condition. In very serious brain injury cases, where the person has been stabilized, what shortens someone's life expectancy are the medical complications that might ensue. For example, someone who has a severe brain injury, who has difficulty communicating, may develop fever, bedsores, or pneumonia and is unable to communicate that he/she is getting ill. So the life expectancy might be affected by the development of those medical complications; however, with proper medical care, medical supervision, or 24-hour care, those medical complications are addressed promptly. So, life expectancy for a person who has a severe brain injury should be normal assuming appropriate medical treatment.

## **MS. WILSON:**

***Do you use life-care planners?***

## **MR. KOLPAN:**

Absolutely. They are the people who do an extensive analysis of what the person's medical and rehabilitation needs are now and in the foreseeable future, meaning their lifetime. The life-care planner is the person who, in consultation with physicians, develops the plan which includes all medical supplies, medication, and treatment, describing the frequency, the duration, and the cost. The life-care planner is essential in helping jurors decide what is a fair and just amount of money to take care of the person's future medical care.

## **MS. WILSON:**

***How do pre-existing conditions like emotional disorders, substance abuse, neurological disorders, learning disabilities and such affect litigation after TBI?***

## **MR. KOLPAN:**

Another good question because there is a rule in law which says that the defendant takes the plaintiff as she finds him, meaning if a plaintiff has pre-existing conditions and the defendant is responsible for making it worse, then they are liable for that amount of money - of exacerbating the condition. Pre-existing conditions also affect the value of the case because jurors may determine that what they see now or what doctors describe now pre-existed and is not related to the incident. One very unique aspect of brain injury litigation is a pre-existing condition of prior brain injury, which may play a significant role in the present brain injury. There is literature which says once you have had a brain injury, the second one can be made increasingly worse - the second impact syndrome. So pre-existing conditions play a significant role in brain injury litigation. Often the defense will say, "Oh, the plaintiff had cognitive problems." Well they had learning problems before; they had special education before; they had difficulty concentrating before. It is the plaintiff's attorney's job to clarify for the jury what in the plaintiff's present condition is causally related to the incident and what, though pre-existing, has been exacerbated from the incident.

## **MS. WILSON:**

***What are some potential pitfalls in brain injury litigation?***

## **MR. KOLPAN:**

I think the main pitfall is that plaintiffs who have a brain injury often walk, talk, and appear to be normal.

## **MS. WILSON:**

***The "walking wounded" some people say.***

## **MR. KOLPAN:**

That's right. The courtroom is an artificial situation where there is only one thing going on at once. When the plaintiff takes the witness stand and is asked questions, he/she appears to be normal; appears to respond to questions. How, in that short amount of time do you demonstrate the cognitive problems that the person is having? So that is a major pitfall and major trap in brain injury litigation.

## **MS. WILSON:**

***How does the question of malingering affect cases?***



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## MR. KOLPAN:

There is a notion in law that when you get hurt, you have an obligation to try to make yourself better. That's one of the basic principles. You must mitigate your damages. It is a fine line between someone who is currently disabled and can't get better and someone who is unconsciously malingering for secondary gain. Often times in minor brain injury cases, the defense will contend that there is some unconscious motivation - that the person is reluctant to try to make themselves better in an attempt to increase their recovery. Though it is not medically recognized, it has been written in books and referred to by some as 'compensation neurosis,' as if to give it some medical jargon that a person in this situation would be malingering in an effort to increase their recovery. The plaintiffs who have a brain injury and are involved in litigation should, for many reasons, follow their doctor's advice as to what they can and should do - whether it should be employment, education or therapy, and that is consistent with their legal obligation for mitigating their damages. Whatever they do will affect their case, so the bottom line is they have an obligation both legally and medically to adhere to what their medical providers recommend to them.

## MS. WILSON:

***How does severity of injury affect a case? How is severity estimated?***

## MR. KOLPAN:

That is a tough one. On the medical side, a brain injury might be described as minor, moderate, or severe, which often has to do more with the duration of unconsciousness or the extent of the neuronal damage. In the legal arena the more severe cases are those which impact the person in their day-to-day living for the rest of their life. A client comes to mind who was walking down the street one day on the way to work. While he was speaking to his wife on the cell phone, he was struck on the head by a 13-pound ball that fell 120' off of a scaffolding. The ball just nearly glanced off his forehead; obviously, if it had hit him square in the forehead he would have died. This man had no idea what had happened to him and, unfortunately, was disabled from working. The severity had to do more with the consequences of what happened, not necessarily the duration of unconsciousness. The greater the impact on activities of daily living and the longer that lasts, the more severe the case is in the legal world. There are people who have been in comas who have gone on to attend major Ivy League universities. There have been others who have had short periods of unconsciousness who never ever work again. The trial I just had involved a woman who sustained a brain injury by electrocution and was unconscious for 8-10 minutes; but she will never work again in her life. This is a severe injury in the legal world that might be described in the medical litera-

ture as a mild or moderate case of brain injury. So we have a real challenge in litigation persuading people that the medical terminology means one thing and the legal terminology means something else.

## MS. WILSON:

***In one of your articles, you talk about problems that are created when health care professionals miscommunicate or underestimate the nature of the injury or the prognosis in records or conversations. How might this affect your litigation?***

## MR. KOLPAN:

What I was referring to was that most rehab professionals are really optimistic and helpful. So the words that are accepted in the rehabilitation field, "the person is recovering," "is doing well," "has a minor brain injury," "shows improvement;" those are accurate, but taken out of context and in the legal arena, one would think that the person has fully recovered. Words that are used to describe a patient's recovery and therapies are relative terms. Neurosurgeons speak of persons making a full recovery from the surgery, but they mean something else. The surgery has been successful - the person doesn't have an underlying medical problem and they discharge the person. Out of context it sounds like the person was well and able to return to their normal activity. In many cases, they are not. What I was referring to was that professionals in the medical context use appropriate language, but lawyers take that out of context to suggest it means something other than it does medically.

## MS. WILSON:

***What is "expert testimony?"***

## MR. KOLPAN:

Experts are the only witnesses that are allowed to testify and then give an opinion as to what it means. For example, a psychiatrist examines a person, treats them and reviews their medical records. Not only does the psychiatrist describe the condition, but also gives an opinion as to whether or not a person's brain injury is probably permanent. A family member (a lay witness) can come in and describe how the individual with a brain injury appears, but cannot give an opinion as to whether or not the brain injury is permanent. That is the difference between an expert witness and a lay witness.

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**MS. WILSON:**

***How do neuro-imaging results [CT, MRI, PET scans] affect the case? Neurological injury does not always show up on neuro-imaging studies: how might an attorney argue the case?***

**MR. KOLPAN:**

It makes it easier when the neuro-imaging is positive because the jurors can literally see it. Now with the technology and trial presentation software we can create 3-D imaging and animation and show it to jurors. I had that in one of my cases where a young man had sustained damage to his frontal lobe and the brain tissue had atrophied. That imaging was placed into a computer; a 3-D image was made of the image and superimposed within his facial features. Jurors can easily relate to that, which makes it easier for them to understand the extent of the injury, even though this young person walks into the courtroom and talks. We can say, 'let me show you a picture of what's going on inside his brain; he is missing this part of his brain.'

Having said that, it is more challenging when neuro-imaging does not show anything. We need experts to come in and testify and explain to jurors that one of the reasons neuro-imaging is negative is because his injury is happening at the microscopic level or below the radar screen level of these tests. A fine example of this is when there are people in hospitals and facilities who are in coma or who have had a stroke and if you did a CAT Scan or MRI of their brain, it may show nothing. So when jurors are told that negative, or normal neuro-imaging does not rule out a brain injury and here are the reasons why, then you have a better chance of convincing them that although it is an invisible injury, it is a real injury.

**MS. WILSON:**

***How do results of neuropsychological evaluations affect the case?***

**MR. KOLPAN:**

They are very helpful as long as the neuropsychologist can explain and teach jurors what the tests mean and how one can extrapolate from the test results the extent of the cognitive deficits as it relates to the real world. Then they need to relate that to anecdotes that have been told by family, friends, and business people. When you show that consistency and also present neuropsychological testing as part of the overall medical work-up, then this becomes an important part of brain injury litigation.

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**MS. WILSON:**

***Have you had cases where the neuropsychological evaluation results look great but you know the person can't function in the real world?***

**MR. KOLPAN:**

Often in such cases I have spent a lot of time with medical experts, having them teach about brain anatomy, brain functioning, and having them explain why it is you can have an injury in a certain part of the brain and have 'islands' of deficit and yet have other 'islands' of high-level functioning. And again, once jurors understand that it is possible in testing and otherwise, to have specific areas where a person is impaired, they are likely to understand that this apparent inconsistency is really an example of the brain injury.

**MS. WILSON:**

***Are pediatric cases handled differently from adult cases?***

**MR. KOLPAN:**

One of the major differences in the pediatric cases is the difficulty in getting an opinion as to the change in the child's vocational potential. When you have an adult you have a history of work and education, or at least some history of education and educational testing which demonstrates the person's pre-accident potential. The younger the plaintiff is, the more difficult it is: 1) to administer neuro-psychological testing and 2) to get a baseline for what the child's potential was for the future. So when you have a child with a brain injury and it is going to impact them for the rest of their life, what is their lost vocational potential? The younger the child is, the more difficult it becomes to prove that. That's why you have to look at the family structure, the siblings, the vocational and educational levels of the close family members, and also look very closely at whatever educational level you might have even in elementary school.

**MS. WILSON:**

***Is there an advantage in delaying the settlement process in some cases?***

**MR. KOLPAN:**

In brain injury cases in particular, there isn't a clear-cut course of recovery. Some of the deficits are readily apparent, but you want to wait on one hand to make sure that all of the deficits are demonstrated and compensated for, if possible. The problem for the attorney is that there is a statute of limitations which says that by a certain time you have to file the law suit or you can't file it any more. Also, once you file it, the case is coming up for trial and once the case is settled, you cannot

come back and reopen it. Here is an example. If a person has a brain injury with early onset of seizure, they have an increased risk for seizures in the future. We know of patients who don't have seizures until sometime down the road, which might be after the case is resolved. It is incumbent upon the attorney to ask the medical providers about the increased risk of seizures so that the jurors can consider the increased risks as an element of damages. What is very interesting now, though not proven, is that there is an association which indicates that a person with brain injury may be at an increased risk for some other conditions. There may be an association with Alzheimer's - not a cause, but an association. There is a possibility there are other complications out there that have impacted a person, but it is not known why until after the case is resolved. The plaintiff's attorney must be very careful and include all of the identified deficits and all of the increased risks of further complications before the case is resolved.

**MS. WILSON:**

***Would you consider complications like future depression or other psychiatric problems in the same light - even though it is a lot less tangible?***

**MR. KOLPAN:**

It is less tangible, but certainly you should consider these possibilities.

**MS. WILSON:**

***Is there anything else you would like to add?***

**MR. KOLPAN:**

The common acceptance of myths about brain injury (for example, if a person looks okay physically they are okay; brain injury can be cured; brain injury is not a serious disability) is the reason why brain injury litigation is so challenging. Just like treatment, it is important that the attorney be familiar with all of the subtleties of brain injury.

*Cathy Wilson has worked as a Program Director of ResCare Premier's residential rehabilitation program for adults with brain injury in Altoona, Iowa. She is certified to conduct vocational evaluations utilizing the McCarron-Dial Systems and is a Certified Brain Injury Trainer for the American Academy for the Certification of Brain Injury Specialists.*