UK P&I CLUB

WINTER 2019

BODILY INJURY NEWS

The journal of the Thomas Miller Americas' bodily injury team

Understanding traumatic brain injuries

Life care plans: the math doesn't always add up

Defending against a rising tide of PTSD claims

Witness preparation – Tips and techniques everyone should know

UK P&I CLUB IS MANAGED BY **THOMAS MILLER**

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Bodily Injury News

Bodily Injury News is the bi-annual newsletter of the Thomas Miller Americas' Bodily Injury Team.

The topics it addresses are highly relevant to all our Members worldwide given more than half of the Club's personal injury claims over $100,000 are brought in the American courts.

We welcome your feedback on the topics we cover as well as suggestions on subjects to address in future issues. Please send your comments any of the Bodily Injury Team.

The information in this newsletter is not legal advice and should not be relied upon as such.

Bagpipes, golf, and witness preparation – welcome to the winter edition

It has been another busy year for the Bodily Injury Team. Jennifer Porter recently joined Thomas Miller Americas' San Francisco office and is a member of the BI Team. She joins us after a decade of litigation practice specializing in longshore and crew bodily injury matters. She looks forward to collaborating with the team to find strategies and solutions that assist Members facing Bodily Injury claims.

As always, the annual Bodily Injury Seminar (held the day after our Charity Golf Outing) was extremely well attended by Members. It was the 14th Bodily Injury Seminar held at the TMA New Jersey offices. The theme of this year's seminar was "It's all in your head" with the focus on traumatic brain injury and post-traumatic stress claims. In this issue, the team recap what was learnt at the seminar. Advice on witness preparation – with tips and techniques everyone should know – is covered by Noreen Arralde. Julia Moore and Jim Dunlap write on life care plans. Jennifer Porter reviews defending against PTSD claims. Dee O'Leary gets to grips with traumatic brain injuries and strategies for defending them. Finally, Linda Wright provides an update on the latest Club loss prevention initiatives.

I would like to extend my thanks and gratitude to all those companies and individuals who participated in the Thomas Miller Americas annual Play for Pink golf day. This year smashed previous years' totals and raised over $206,000 for breast cancer. This is the third year we have held Play for Pink and have raised just under $500,000 for breast cancer research. Photos from this year's event are on page 15.

We welcome feedback on the topics we cover in our newsletter and invite you to suggest future topics for both the newsletter and for our Annual Bodily Injury Seminar, please email dolores.o'leary@thomasmiller.com. ■

Mike Jarrett
President & CEO, Thomas Miller (Americas) Inc.

Understanding traumatic brain injuries

Gino Zonghetti, a partner with the firm Kaufman, Dolowich, Voluck, spoke about traumatic brain injuries and how to defend them. Senior Claims Executive, **Dee O'Leary,** investigates why the number of these claims is rising.

This topic is of particular interest to all of us here at TMA as well as our Members, as we have recently seen an increase in the number of plaintiffs claiming traumatic brain injury.

A traumatic brain injury or "TBI" occurs when there is an impact to the head or some type of rapid movement or displacement of the brain within the skull. A TBI can occur when there is a blunt force trauma to the head, a fall or a striking of the head.

There are several types of TBIs:

Coup-contrecoup
A contusion at the site of impact and also at the opposite side of the brain. The damage is located both at the site of impact and on the opposite side of the head to the point of maximum external trauma. In this type of injury, the brain actually moves inside the skull.

Diffuse axonal injury
Movement of the brain inside the skull lags behind movement of the skull, causing brain structures to tear. This is usually caused by traumatic acceleration/deceleration or rotational injuries.

Concussion
Caused when the brain receives trauma from an impact or sudden momentum or movement change.

Anoxia
Complete depravation of oxygen.

Hypoxic
Partial depravation of oxygen.

The Glasgow Coma Scale ("GCS") is a 15 point scale which was developed in order to estimate and categorize the outcomes of brain injury on the basis of overall social capability or dependence on others.

First responders and emergency physicians examine the injured party and document the GCS periodically to assess the vitality of the person. The test measures the motor response, verbal

response and eye opening response, and is scored by adding the score assessed in each of the three categories.

Motor response is scored from 1 to 6:
6 – Obeys commands fully
5 – Localizes to noxious stimuli
4 – Withdraws from noxious stimuli
3 – Abnormal flexion, i.e. decorticate posturing
2 – Extensor response, i.e. decerebrate posturing
1 – No response

Verbal response is scored from 1 to 5:
5 – Alert and Oriented
4 – Confused, yet coherent, speech
3 – Inappropriate words and jumbled phrases consisting of words
2 – Incomprehensible sounds
1 – No sounds

Eye opening is scored from 1 to 4:
4 – Spontaneous eye opening
3 – Eyes open to speech
2 – Eyes open to pain
1 – No eye opening

There are three levels of a TBI:
- **Mild traumatic brain injury** (Glasgow Coma Scale score of 13-15)
- **Moderate traumatic brain injury** (Glasgow Coma Scale score of 9-12)
- **Severe Brain Injury** (Glasgow Coma Scale score of 8 or less)

Mild traumatic brain injury

Usually categorized as a loss of consciousness, but does not necessarily have to involve a loss of consciousness. The person may be just dazed or confused. Memory loss is found to last less than 24 hours and testing and/or scans of the brain may appear normal. Essentially, a mild TBI is diagnosed when there is a change in the mental status at the time of the injury. 95% of individuals with a mild TBI achieve full resolution of symptoms within 24 months and of the 5% who do not, the remaining symptoms are subtle.

Moderate traumatic brain injury

This occurs when there is a loss of consciousness that lasts between 30 minutes and 24 hours. Memory loss persists from 24 hours to seven days, and confusion lasts from days to several weeks. Physical, cognitive and/or behavioral impairments last for months or are permanent. A person with a moderate TBI can generally make a good recovery with treatment or can successfully learn to compensate for their deficits.

Severe traumatic brain injury

This is diagnosed where there is a loss of consciousness for more than 24 hours and memory loss lasts more than 7 days. Confusion can last weeks. Severe head injuries usually result from crushing blows or penetrating wounds to the head. These injuries crush, rip and shear delicate brain tissue. These types of brain injuries can be life threatening.

In litigation, most of the TBIs are mild. As stated above, most mild TBIs obtain a full recovery within two years. Of the remaining 5%, symptoms of most patients will be subtle in nature. As you can imagine, these cases are particularly difficult to defend because the symptoms are subjective.

Attorney Zonghetti highlighted some of the things to keep in mind when defending a case where a TBI has been alleged:

1. Just because the plaintiff claims that he did not lose consciousness, does not mean there is not a TBI. The absence of objective findings on an MRI or CT scan does not rule out a TBI.

2. Conversely, a positive finding on an MRI does not immediately mean that the plaintiff has suffered a TBI. In many cases, a subdural hematoma resolves in a matter of days with no cognitive deficits.

3. Discharge from care by a neurologist does not necessarily rule out an ongoing TBI. In cases of mild TBI, the symptoms can be subtle and often not diagnosed on an on-going basis by a neurologist.

4. Every effort should be made to obtain all of the medical records, including the ambulance and emergency room documents. All prior medical records should be obtained as well.

5. All medical records should be studied closely to look for GSC scale determinations, which may be inconsistent with a plaintiff's claim.

6. All of the raw testing data, office notes and charts must be requested where there has been examinations/testing performed by a neuro-psychologist.

7. Hire a private investigator to conduct surveillance of the plaintiff.

8. Conduct social media searches.

9. Obtain elementary school, high school, college and or military records, or any other records where testing might have been done.

10. Obtain criminal records.

The key is often in the medical records. It is important to find a competent neuro-psychologist and have them review all of the records obtained. If possible, have the neuro-psych attend plaintiff's deposition and plaintiff's expert's deposition. The neuro-psych should review the opposing expert's testing data to identify scoring errors, violations of test protocols, normative values of tests / the rate of validity / reliability of tests, and look at whether tests for malingering were used and the scores thereof.

It is also good practice to look at whether the plaintiff has undergone any therapy that will assist with TBIs and whether there has been any improvement. It is important to look at what parts of the plaintiff's lives have remained unchanged. What are they still doing post injury and what has significantly changed?

You should also study the life care plan and look at how these claims should be addressed. See page 5 for Julia Moore and Jim Dunlap's article on addressing life care plans.

In sum, don't be complacent. Diligence is the key to preparing a defense to a claim of TBI. It is important to line up your key experts early and obtain all of the medical records, and then study them closely. It can also very helpful to conduct surveillance. It is in the details where you may find the evidence you need to attack the claim of traumatic brain injury. ■

The math doesn't always add up

Julia M. Moore and **Jim Dunlap** examine the proliferation of attorney-driven life care plans in the US highlighted by **Gino A. Zonghetti** and **Kenneth B. Danielsen** of Kaufman, Dolowich, & Voluck during our October seminar.

Life care plans in US litigation have proliferated in recent years. Once seen only in claims involving genuine, catastrophic injuries, more and more plaintiff's attorneys now view life care plans as an essential tactic to increase their client's recoverable damages and are hiring life care planners with increasing regularity. Because life care plans project medical needs and costs well into the future, the potential for large, "economic" jury awards based on the life care planner's estimated expense figures is significant. As a result, high-value life care plans have created new challenges for shipowners, P&I Clubs and defense counsel, who need to separate the inflated, attorney-driven medical "costs" from the genuine medical needs a plaintiff may have in the future. Gino A. Zonghetti and Kenneth B. Danielsen of Kaufman, Dolowich, & Voluck recently shared some strategies for challenging a typical life care plan with our Members at the October 2018 Bodily Injury Seminar.

What is a life care plan?

Life care plans, which first developed in the context of litigation, are a way of itemizing a plaintiff's future treatment needs including future surgical care, physician visits, nursing care, medical therapy(ies), medical supplies, medications, home improvements, special diets, and medical equipment etc. and estimating the cost of that medical service or item over a period of time, typically the Plaintiff's life expectancy. The report might be prepared by a medical professional or other lay person working as a life care planner. It is not unusual to see multi-million dollar life care plans based on projections over the Plaintiff's lifetime. To bolster the projections, life care planners frequently make use of tables, spreadsheets and data which suggest that the information in the plan is medically sound, reliable or authoritative and that the information in the plan was developed in consultation with the Plaintiff's actual physicians or care givers. Our Members learned that this is not necessarily the case as Danielsen and Zhonghetti outlined some key points of attack.

Challenging the life care plan

Check the planner

First, check the credentials of the life care planner. There is no industry standard for credentialing life care planners – some have genuine medical knowledge, others simply took a weekend course on writing life care plans. Courts will examine a life care planner's qualifications in order to determine whether the Planner is qualified to make the cost recommendations or projections in the plan or to opine on medical services or care needed. Given the right circumstances, a court may exclude a Planner's opinion under the Supreme Court's rule on unreliable expert testimony in Daubert v. Merrill Dow Pharma., Inc. Danielsen and Zhonghetti highlighted a couple of those instances where courts struck the life care plan because the Planner had nothing more than a weekend course as a credential, the Planner failed to review any actual billing records in the case, or where the Planner included therapy or costs that were speculative. While some Planners will provide well researched reports, Danielsen and Zhonghetti suggest that many plans are susceptible to attack based on the lack of qualifications of the Planner.

Check the science

Second, evaluate the recommended future medical care listed in the plan to determine if the services, treatment and/or items listed are medically indicated or related to the Plaintiff's current needs and treatment recommendations. Do not assume that the Planner worked with the Plaintiff's treating physician(s). Danielsen and Zhonghetti note that the Planner frequently works with the legal team, not the medical team. Be aware of whether the life care plan includes the cost of future treatment that the plaintiff is not currently receiving. Check to see if there is an actual recommendation for the treatment or item from a treating medical professional. Question whether the Plaintiff has expressed any interest in receiving the services or items included in the plan, i.e. has the plaintiff indicated that s/he has no plans to make home modifications, or to use a wheelchair, or to have future surgery. If the answer is no, these should not be included in the life care plan.

Challenge the medical necessity and frequency of the claimed service(s) or item(s) as well as the Planner's qualifications to make the determination that particular items of care are needed. If the Planner recommends psychological counseling but has no background or credential in psychology, and the Plaintiff is not currently treating with a psychologist, the costs associated with this care may be improperly included.

Be sure that a recommended treatment or program of care is one that is generally accepted in the medical community and is not a controversial treatment that might not be appropriate in the circumstances. Danielsen and Zhonghetti highlighted a case in which a Planner's opinions were not admitted because the life care plan included a controversial course of treatment that was not medically indicated for the injured Plaintiff.

Check the math

Third, the goal of a life care plan is to create dramatically large damage numbers that will persuade the jury to award more money. Danielsen and Zhonghetti emphasize that the damage numbers in the plan are not set in stone but are subject to attack. Question whether the Member can reduce the total number by getting an off-set or credit for medical treatment or items, for which the Plaintiff was reimbursed from health insurance, long-term disability insurance or other collateral sources. Each jurisdiction applies a different approach to collateral source payments so local counsel should be consulted in each instance.

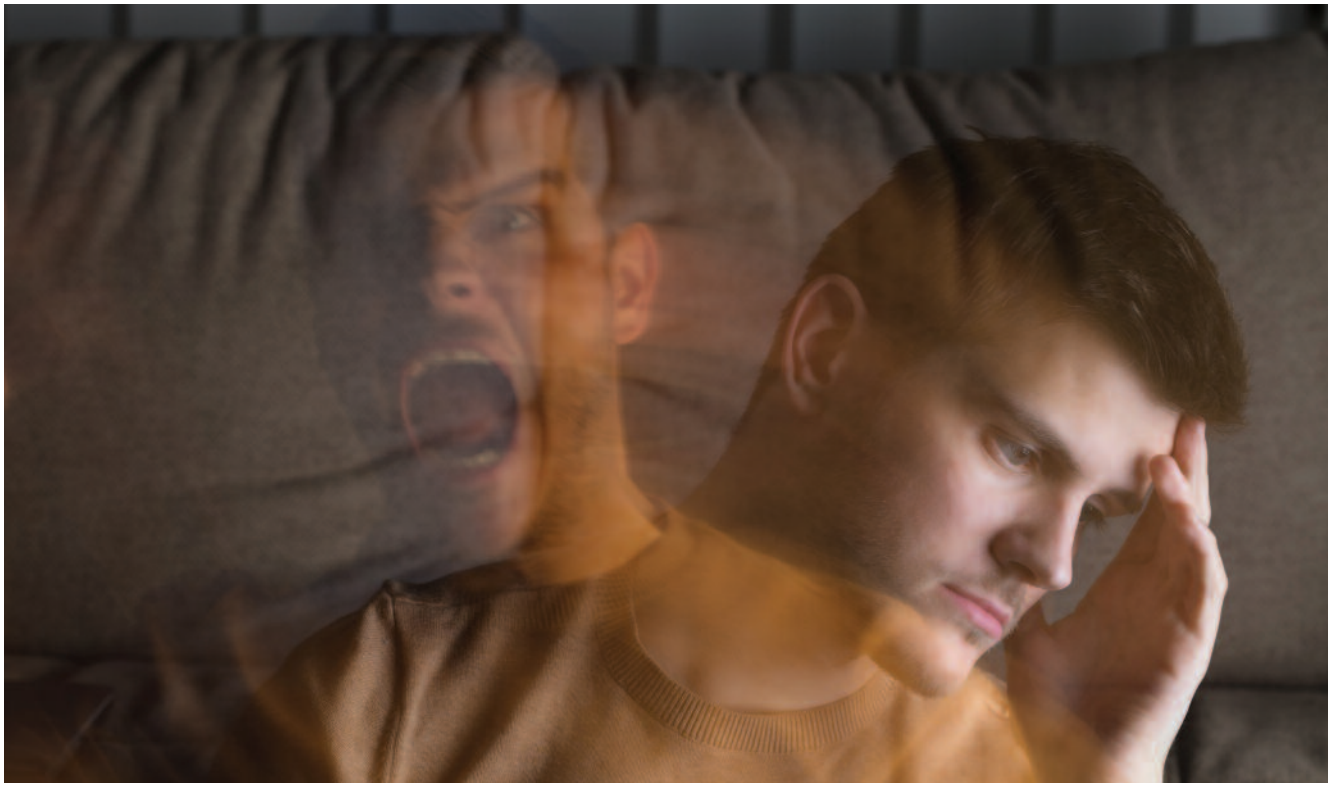
Danielsen and Zhonghetti also recommend that Members "refute the rates" by challenging the actual rates used by the Planner in the report as well as the Planner's methodology in determining what rates would be used to calculate the cost projections. Often, Planners used "billed rates" for services. Billed rates can be the worst measure of the actual cost of medical services and do not reflect how much the patient will actually pay for the services. The use of billed rates to calculate the cost of the future medical care should be challenged. Danielsen and Zhonghetti suggest presenting evidence of the actual or reasonable cost of the service or item to refute the inflated costs of the Plan. Last but not least, be sure the future expense amounts are reduced to present day value.

Final thoughts: Plan ahead, be proactive

Life care plans are here to stay. However, proactive measures taken by Members, claims executives and defense counsel may reduce the impact a life care plan will have on a settlement or damage award. Danielsen and Zhonghetti made it clear that familiarity with how life care plans are created, and how to attack the inherent high value costs and services, should be a priority for anyone handling maritime injury claims. ■

Defending against a rising tide of PTSD claims

PTSD has increasingly become a very lucrative portion of a personal injury claim. **Jennifer Porter** discusses why this might be happening, and how best to combat it.



The road to PTSD

More than a decade of war in the Middle East has shone a spotlight on post-traumatic stress disorder (PTSD) diagnoses among returning American veterans and increased the condition's coverage in mainstream media. With the public's growing awareness of its symptoms and of the potential long-term effects that certain traumatic events can have on a person, claims of PTSD are now being seen more frequently in civilian life, providing new fodder for aggressive plaintiffs' attorneys looking to increase jury verdicts. Similarly, because PTSD is now often casually referred to in popular culture, jurors, believing to have a basic understanding of its symptoms, may have difficulty identifying a genuine claim. As a result, successful PTSD and emotional distress claims have become a very lucrative portion of a personal injury claim.

In reality, medical experts believe that PTSD is drastically over diagnosed with only about 8% of Americans experiencing PTSD in their lifetime. Industry advances in technology and safety have also greatly reduced serious casualties in the maritime and transportation industries. Nevertheless, changes to the medically certified criteria of certain mental disorders have only increased the number of PTSD claims in industry. Knowing how to distinguish between legitimate and fabricated claims of PTSD as well as knowing how to effectively challenge those claims are key components to avoiding costly litigation and excessive awards in this rising tide of psychological damage claims.

Long history of PTSD

While the existence of war-induced psychological trauma likely goes back as far as warfare itself, PTSD-like disorders did not become an officially recognized mental condition until 1980, when PTSD was included in the third edition of the *Diagnostic and Statistical Manual of Mental Disorders ("DSM")*. For centuries, soldiers coming home from battle were observed exhibiting similar symptoms seen in today's PTSD victims when exposed to post-war fear or stress. For example, the Iliad described Achilles of having classic PTSD symptoms. War historians referred to soldiers

experiencing PTSD-related symptoms, such as re-experiencing, numbing and physiological arousal, as having "Soldier's Heart" (American Civil War), "Shell Shock" (World War I), "Battle Fatigue" (World War II) and "post-Vietnam syndrome."

Current standards

In 2014, the American Psychiatric Association (APA) released the fifth edition of its Diagnostic and Statistical Manual of Mental Disorders (known as the DSM-5) which contained new guidelines and criteria for various psychiatric conditions, including PTSD. The new guidelines made the symptoms even more subjective and easier to diagnose, in turn allowing questionable claims of PTSD to get in front of a jury.

Under the new DSM-5 guidelines, a person only has to prove that he or she was exposed to actual or threatened serious injury, sexual violence or death. What constitutes a sufficient trauma, however, is in the eye of the beholder. DSM-5 does not require the triggering event to be outside the range of normal human experience or to be markedly distressing to most people, just the person claiming PTSD. Furthermore, that exposure does not need to be direct. Rather, it is enough for the person claiming to have PTSD to have simply witnessed the trauma or even to have later learned that a close friend or relative experienced actual or threatened trauma.

Moreover, the four sets of symptoms included in the new DSM-5 criteria are purely subjective, making it easy to self-report and nearly impossible to challenge a diagnosis on symptomatology alone. A plaintiff need only claim to have feelings of:

Intrusion – spontaneous and upsetting memories of the traumatic event, flashbacks, emotional distress or physical reactivity when exposed to reminders.

Avoidance – distressing memories, thoughts, feelings, or external reminders of the event.

Negative alterations in mood – amnesia, overly negative thoughts about oneself or the world, exaggerated blame of self or others, decreased interest in activities, feelings of isolation, difficulty in experiencing positive affect.

Arousal – irritable, aggressive, reckless, or self-destructive behavior, sleep disturbances, hypervigilance or related problems.

In addition, symptoms must last for more than one month and be substantial enough to cause impairment to one's social or work life.

Diagnosis is relatively easy too. PTSD can be diagnosed by a psychiatrist or psychologist based on relatively limited interaction with the patient. Specifically, the Clinician-Administered PTSD Scale for DSM-5 is a detailed interview addressing 30 different areas that takes approximately 30 to 60 minutes to administer, while the PTSD Checklist for DSM-5 is more commonly used but only takes five to seven minutes to administer and only consists a list of 20 questions. With subjective symptoms and an easily established diagnosis, PTSD claims are ripe for litigation.

What to do when plaintiffs claim they have PTSD?

There are several reasons why counsel would tack on an alleged PTSD diagnosis to an otherwise run-of-the-mill

personal injury claim. First, PTSD is more concrete than "emotional distress" and holds more weight due to its growing relevance in the military and mainstream media. Such a diagnosis also allows a medical expert, family, friends and/or co-workers to "vouch" for the plaintiff's character and alleged complaints so that the jury is more likely to connect with the plaintiff. Most importantly, claims of PTSD increase damages as it justifies future medical treatment and economic damages without decreasing non-economic damages.

When made, PTSD claims are difficult to put a price on as they consist of largely subjective claims that have to be valued by competing experts and a lay jury. Indeed, the prior DSM-IV even warned that "[m]alingering should be ruled out in those situations in which financial remuneration, benefit eligibility, and forensic determinations play a role." DSM-IV at p. 467. Thus, defense counsel should be equipped with the below tools to challenge questionable claims of PTSD:

Get the facts
Unlike other civil tort regimes, a plaintiff claiming PTSD in the maritime context (longshoremen, Jones Act seamen, cruise passengers) must be found to be in the "Zone of Danger" to introduce emotional distress claims to a jury. To qualify, the plaintiff must be "in imminent risk of physical impact." If the plaintiff is not in the Zone of Danger, his or her claim for PTSD fails.

Become a detective
Even before litigation, consider surveillance and social media research to catch any post-incident activity inconsistent with PTSD symptoms. Talk to those who witnessed the traumatic event to get their take on it as well as to those who are familiar with the plaintiff before and after the incident. Conduct a civil and criminal records search for prior traumas, drug or alcohol abuse and any prior psychological issues or treatment.

Get the records
An allegation of PTSD should justify discovery into the plaintiff's psychiatric and medical records both before and after the alleged traumatic event. If the case is in litigation, parties are permitted to exchange written discovery, issue third party subpoenas, take depositions and conduct an independent medical exam and/or neuropsychological testing. Such records can be helpful in providing material to challenge the plaintiff's diagnosis as well as develop an alternative theory of plaintiff's condition. Ideally, these records could reveal pre-existing psychological issues or traumas that are not attributable to the events being litigated.

Learn about the plaintiff's diagnosis
Figure out how and when the plaintiff was diagnosed with PTSD. Was the plaintiff diagnosed soon after the traumatic event or only after an attorney got involved? How many therapy sessions did the plaintiff attend? Could the plaintiff be blaming symptoms caused by something else on the accident?

Get an expert
As mentioned above, your jurors are likely to already have a preconceived expertise on what PTSD is and how it is likely to affect the plaintiff's future. Thus, it is important to retain your own psychiatrist expert early on in the case to assist in challenging plaintiff's expert and educating the jury on the real symptoms and effects of PTSD. Make sure your expert has experience with PTSD claims, experience testifying in court and presents well in front of a jury.

Challenge the plaintiff's expert
With the help of your own expert, challenge the opposing expert's qualifications and diagnosis. Does the expert have specialized knowledge of stress- and/or trauma-based disorders? Did the expert actually treat the plaintiff and if so, for how long? Did the expert consider other mental conditions or causes?

If opposing counsel offers testimony from plaintiff's treating doctor, the treating doctor may have inadvertently stepped into the shoes of a retained expert if that treating doctor was hired by the attorney, reported to the attorney or relied on information from the attorney in forming his or her opinions about the plaintiff. If this is the case, challenge the doctor's designation and require that an expert report be produced or his or her opinion excluded.

Limit damaging testimony
Determining whether there are legitimate grounds to exclude or limit potentially damaging testimony and/or reports from plaintiff's side is key. Even if you are unable to exclude the opposing expert's testimony in its entirety, propose reasonable restrictions on the scope of that testimony. For example, it may be appropriate to allow the expert to testify about PTSD in general, but it may be too speculative to hear testimony about the future effects that the disorder may have on the plaintiff. Requiring plaintiff's experts to play by the litigation rules and set the appropriate foundation for his or her testimony can appropriately limit and lessen the damaging effects of a PTSD claim.

Know your jury
If PTSD is likely to take center stage during the trial, consider asking prospective jurors during voir dire about their views on, and exposure to, PTSD victims. Of course, counsel should always be mindful of highlighting the disorder too much in the early stages of trial.

Conclusion

While the threat of costly PTSD claims cannot be reduced until the subjectivity of its medically recognized symptoms is changed, having these practical strategies in mind when defending against such claims can at least help to manage those risks and more accurately evaluate exposure. Best-case scenario is that all of your hard work has revealed sufficient evidence to show that the plaintiff is a malingerer and does not have PTSD. However, if you cannot disprove the diagnosis or causation, embrace it and work with your expert to come up with an affordable and reasonable treatment plan to present to the jury. ■

Planning and practice prevents poor performance

Kelley Tobin of Tobin Trial Consulting gave a lively talk on the tips and techniques everyone should know when it comes to preparing to be a testifying witness at deposition or trial. **Noreen Arralde** summarizes her advice.

Planning and practice are essential to successful testimony. Every witness should plan and practice their testimony in advance. When a witness has planned and practiced their testimony, they are less likely to be thrown off by unanticipated questions. Plan what you want to say. Practice how you want to say it. This builds confidence and competence, which inspire effective testimony. A prepared witness can get the truth to the jury effectively and efficiently.

Witness goals

It is common for us to set goals in life so we can measure our performance. "I want to meet that sales target by year end" or "I want to deliver a terrific presentation to the board" are worthy goals. Testifying witnesses should do the same thing – set goals for their performance testifying.

Witnesses should set this goal, "I aim to be a C_____ witness" where 'C' stands for:

- **Caring**
- **Clear**
- **Compelling**
- **Competent**
- **Clam**
- **Confident**
- Credible

Witness preparation techniques

Effective witness preparation begins with empathy. Testifying at deposition or trial is an unfamiliar and unwelcome situation for most people. By empathizing with what the witness is experiencing, a bond can be established. "I'm sorry you are having to go through this testimony and I'm here to help" can be an effective way to put a witness at ease. Once a witness is at ease, preparation can focus on key areas, such as: listening skills, responsiveness, mindset, and avoiding non-verbal negatives.

Listening Skills

listening is a full-time activity. While listening to a question, a witness should not be thinking of an answer, reading, reviewing photographs, looking at anything else – just listening.

Responsiveness

Answers should be responsive to the question. Sometimes a 'yes' or 'no' will do, sometimes not. Witnesses should not feel bullied into giving a 'yes' or 'no' answer if, in order to be responsive, a longer answer is required.

Mindset

Witness testimony isn't a chess game. The objective is to effectively and efficiently tell the truth, not to match wits with the other side.

Avoiding non-verbal negatives
When testifying live or by video, non-verbal negatives can detract from everything that a witness is saying. No swivel chairs. No sour faces. Eyes should be moderately engaged with the questioner. Facial expression and hands should be neutral.

The oath

Good news for the witness is that the oath is the thing that the witness and the jurors have in common. Witnesses take an oath to tell the truth, jurors take an oath to decide what is true. Lawyers don't take an oath, their questions need not be truthful. The witness and the jurors also have shared frustrations. For the witnesses, unfair and untruthful questions can impede the ability to effectively and efficiently tell the truth. For the jurors, trying to decipher who is telling the truth can be challenging.

Witnesses should think of themselves as the jurors' guide to truth-telling. "I will help you, jurors, to understand the truth so you can carry out your oath, as I carry out mine."

Tension tightrope

Effective witnesses walk a fine line between:

Giving exactly right testimony – without splitting hairs or engaging in semantics

Being precise and exacting – without asking what the meaning of the word "is" is

Keeping answers short and to the point – while being open and trustworthy

Being mindful that every word counts – without appearing nervous or guarded

Defending themselves – without appearing defensive

Defending against allegations – while accepting that it is ok to have been questioned

The secret to full fair truth

For each question, a witness should ask themselves:

1. Do I understand the question?
2. Is the question fair?
3. Do I know the answer?
4. Do I remember the answer?

Before getting to, "How do I want to answer the question?" It is the witness's responsibility to make sure each question and answer exchange is a clear and fair statement of the truth. A gift for the jury. That may mean questions need to be re-stated before they can be answered. A witness can say in response to an unfair question, "If you mean to ask me this" then re-state the question in a way in which it can be answered. Witnesses can re-state questions for the jury with statements such as, "I can't agree with that," "That part's not true," "That part isn't exactly correct," and "That's not the whole truth."

Being a likeable witness

Jurors like witnesses who are:

Coherent
Direct
Good teachers
Honest
Humble
Logical
Persuasive
Polite
Responsive
Sincere
Sympathetic
Trustworthy

Jurors don't like witnesses who are:

Confusing
Evasive
Disrespectful
Sarcastic
Arrogant
Contentious
Defensive
Belligerent
Hostile
Pompous
Angry
Argumentative

Avoid defense mechanisms

Witnesses should avoid these typical defense mechanisms:

"Let me show the jury how angry I am so they will know how falsely accused I feel."

"Let me show the jury how nonchalant I am so they will know I have nothing to fear."

"Let me show the jury how smart I am so they will know I am right."

When a line of questioning feels like an attack, a witness should avoid *fight, flight* or *freeze* responses, and should instead go with the flow. This is where preparation is key. When a witness has prepared and practiced their testimony, they are less likely to slip into fight, flight or freeze mode because they can rely on their preparation to tell the truth, tell it clearly, stay calm under fire, and stand firm on important points.

Standing firm may require a witness to repeat an answer consistently and patiently even when the lawyer asking the question does not like or agree with the answer. Witnesses should be polite, not antagonistic, even when they feel like a broken record. Avoid the temptation toward sarcasm.

Know your source

Witnesses have various sources for their knowledge of events. Witnesses can testify based on their independent recollection of events, written documents created at or near the time of an event, or their standard practice, even if no written document exists. Many witnesses are uncomfortable testifying based on their standard practice, but this source of knowledge is as valid as independent recollection and written documents. Witnesses should not shy away from testifying about their assurance in their standard practice.

"Are you certain you set the alarm on this particular occasion?" "Yes, I am certain. It is my standard practice."

Witnesses should avoid 'hindsight bias.' Hindsight is not a source of knowledge. When asked a question which assumes hindsight, clarify the question before responding.

"Are you asking me based on what we knew then, or what we all know now?"

Beware of the reptile in the room

The reptile theory exploits modern society's desire for safety. If there is a safety rule that can be said to have been compromised, the jury is made to feel that community safety is at risk – their safety, their children's safety is at risk.

The theory presupposes that 'perfect world standards' exist. Classic reptilian questions include:

Would you agree that it is never okay to make a choice that needlessly endangers someone?

Would you agree that it is never okay to ignore safety guidelines and policies?

Would you agree that if you violated a known safety rule and an accident resulted that you are responsible?

Would you agree that a company is never allowed to remove a necessary safety measure?"

Each of these questions are loaded with innuendo, i.e., "needlessly endangers", yet a witness may be goaded into answering "yes" to one or all of them because to say otherwise suggests lax attention to safety.

The correct answer to all of the above questions is actually, "It depends." We do not live in a risk-free or perfect world and witnesses should not be afraid to acknowledge that. A perfectly plausible answer is: "If by effective, preventable, safe, reasonable, prudent, you mean risk-free or perfect, then I'd have to say 'no' because unfortunately, no matter how hard we strive for it, that is not always possible."

Silence bait

Silence at the end of your answer is a deadly weapon designed to get the witness to keep speaking and volunteer extra information or explanations. Practice enduring the awkward silence while waiting for the next question. Stay engaged. And remember, "Okay" is not a question. It is another form of silence bait. Do not take the bait! ■

Sharing knowledge and data gained from actual incidents

In 2018, the Loss Prevention team hosted workshops at seminars and presentations with a collective audience in excess of 4,500 crew members. **Linda Wright** reports on the Loss Prevention presentation at the Bodily Injury Seminar.

Loss Prevention Director Stuart Edmonston presented an overview of his Loss Prevention team's activities over the past year.

Stuart updated participants on the Loss Prevention department's regular participation at Members' and ship-managers' crew seminars. The seminars provide the opportunity for senior and junior officers to learn from the knowledge and data gathered by the UK Club relating to actual incidents. In 2017, the Loss Prevention team hosted workshops at 78 seminars, presentations and interacted with around 4,000 crewmembers. To date, in 2018 the team has attended 68 seminars with a collective audience in excess of 4,500 crew. The initiative is proving very popular with Members, and ensures that mutuality includes not only sharing costs of claims, but also sharing the knowledge that results from the process.

"Lessons Learnt"

Stuart informed participants about the latest safety initiative from the Club - the Lessons Learnt project. Every year, the Club deals with thousands of claims using the expertise and experience of its professional claims handlers, ex-seafarers and lawyers. With five decades of research into loss prevention issues, the Club has developed a formidable body of technical material on maritime risks. Now the Loss Prevention team aim to share the claims experience by examining real case studies and identifying lessons learnt, to assist Members in avoiding similar incidents.

The Lessons Learnt reports are regularly published on the UK Club's

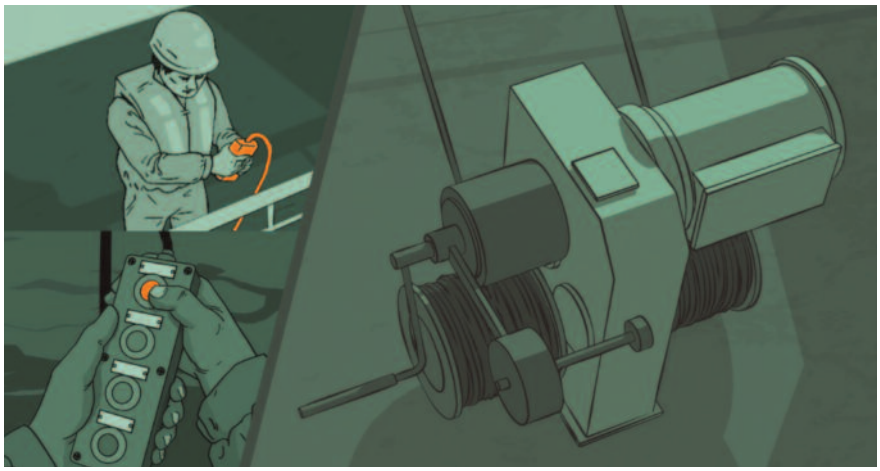
website, and deal with a broad spectrum of P&I related incidents. The reports are categorized under the headings: Personal Injury, Cargo, Navigation, and Pollution.

In addition to the written reports, the team has also launched a series of educational and informative, reflective-learning, training videos. The videos provide an interactive training experience with a focus on educating crew. The first of the Lessons Learnt videos, "Death of a Bosun" which was shown at the seminar, tells the tragic story of a Bosun who died during a routine lifeboat drill. The accident occurs due to miscommunication between staff, faulty safety devices and unclear instructions. The videos feature solutions and thought-provoking, preventative strategies to mitigate the risk of accidents, like those portrayed, happening again.

Crew Health – Fitter crews and fewer claims

A healthy crew is necessary for a healthy ship, Stuart gave a short update on the Club's Pre-Employment Medical Examination (PEME) Program. Since its beginning 22 years ago, the Program has undertaken in excess of 390,000 medical examinations on ships' crew, identifying in excess of 12,000 seafarers with pre-existing medical conditions, or 12,000 potential claims. A number of case studies have demonstrated that many illnesses would otherwise have remained unknown and untreated, so that owners, seafarers, and the Club have all benefitted directly from the Program.

Stuart reminded the delegates about "Signum", the criminal investigation arm of Thomas Miller, available to conduct investigations on behalf of the Members of the UK P&I Club, the UK Defence Club, TT Club and ITIC. The staff is made up of ex-senior detectives from the Criminal Investigation Department at New Scotland Yard, who served on squads specialized in detecting suspicious deaths, organized crime, armed robbery, hijacking, kidnapping, fraud, and transport crime. The teams' qualifications enable them to inquire into any incident which a Member may suspect has a criminal aspect. They have been called upon to investigate murder, arson, many forms of fraud, sexual assault, stowaway-related problems, criminal damage, container and general cargo crime, port based organized crime, and every conceivable type of theft. It is a unique body in the world of marine loss investigation.



Stuart's presentation concluded with a reminder about Risk Ahoy! The fun, interactive computer game available to download on Apple and Android.

Loss prevention is a vital issue for the UK Club. With the continuing efforts of Stuart and his team, we all strive to prepare our Members to forecast scenarios and prepare their crews for safe passage. ■

Play for Pink golf day

This year, the team raised $206,000 for the Breast Cancer Research charity at its annual Play for Pink golf day at the Forsgate Country Club. 112 individuals took part from across the maritime community. In the last three years, the team has raised just under $500,000 with the commitment of the UK P&I Club and TT Club Members, brokers, attorneys and industry experts in the Americas. We look forward to next year's event raising even more!

Expertise and experience

A specialist group from both the New Jersey and San Francisco offices empowered with a significant settlement authority to deal with the particularly demanding cases of bodily injury in America.

This dedicated team supports Members based both in the United States and abroad in dealing with a diverse and complex range of personal injury and illness cases. The one common factor is the influence of US jurisdiction or emergency response.

The team has handled cases ranging from suspicious death, passenger's leisure activity injuries, long-term occupational illness, engine room and cargo handling fatalities, through to shore-side accidents, loss of limbs in mooring activity and even sexual assault.

As well as supporting Member's claims and enquiries directly, the team share their collective experience through the pages of "Bodily Injury News".

Thomas Miller (Americas) Inc

New Jersey
Harborside Financial Center, Plaza Five, Suite 2710,
Jersey City, N.J. 07311, USA
T +1 201 557 7300
E newjersey.ukclub@thomasmiller.com

San Francisco
44 Montgomery Street, Suite 1480,
San Francisco, California 94104, USA
T +1 415 956 6537
E sanfrancisco.ukclub@thomasmiller.com

UK P&I CLUB

New Jersey

Dee O'Leary
Direct: +1 201 557 7402

Dee joined Thomas Miller (Americas) in December 2007 after 17 years practicing law in New York City with a firm specializing in maritime matters.

Noreen D. Arralde
Direct: +1 201 557 7333

Noreen joined Thomas Miller (Americas) in 2012 after 13 years with a US litigation firm and six years as claims manager for a global container shipping company.

Julia M. Moore
Direct: +1 201 557 7433

Julia joined Thomas Miller (Americas) in October 2015 after 27 years with various US litigation firms specializing in maritime matters.

Jim Dunlap
Direct: +1 201 557 7407

Jim joined Thomas Miller (Americas) in 2017 after earning his LL.M. in Admiralty Law from Tulane University. He has a J.D. from Gonzaga University, and is a member of the Washington State Bar.

San Francisco

Jennifer Porter
Direct: +1 415 343 0113

Jennifer joined Thomas Miller (Americas) in March 2018 after practicing law for a decade at a maritime defense firm specializing in longshore and crew bodily injury matters.

Linda Wright
Direct: +1 415 343 0122

Linda joined Thomas Miller (Americas) in May 2010. Previously, she was a P&I Club correspondent on the Pacific West Coast for 29 years.