• Assisting Brain Injury Survivors to Navigate the New Legal Landscape

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Who we are at Burg Simpson

- National law firm based in Denver, Colorado advocating for the seriously injured
- 50 trial lawyers partnering with health care providers, life care planners, expert witnesses, and our clients to seek the best outcome possible for the injured victims and families
- Partnership extends to the community to support organizations that assist the injured
Craigs Hospital
Survivors of TBI and their families face ongoing challenges.
Every TBI survivor deserves great teammates . . .
...working collaboratively to assist in their recovery.

But when it comes to the legal issues, sometimes ...
...it's confusing.
There are a whole host of legal issues facing TBI survivors and their loved ones:

- Today we are going to focus on challenges inherent in obtaining just compensation for TBI survivors in lawsuits and settlements.

- For this discussion, we will assume fault (duty and breach) and causation are proven.

- That still leaves the TBI Survivor with the daunting task of communicating damages to the jury.
Presenting your case to a jury is a specific kind of challenge.
How is that jury – people you don’t know – going to understand your injury?
How does the jury understand you are not the person you were before?
And how this injury involves every area of your life.
Presenting a compelling story in court requires a multi-disciplinary approach.
Imaging and expert explanation is critical.
Diffusion tensor imaging
Diffusion tensor imaging
Just compensation comes through careful application of the legal process.
Each survivor gets one chance to be fairly compensated.
The Legal Landscape for Brain Injury Survivors is Changing
Without an Excellent Legal Navigator, It’s Easy to Get Lost
Issues for Brain Survivors Include:

- Medicare secondary payer act
- Changes to law regarding Medicaid and insurance liens
- Federal ERISA preemption
- Workers compensation exclusivity
- Statute of limitations
- Res judicata / single cause of action
- “Caps” on economic and non-economic damages
Medicare Secondary Payer Act
(aka Balancing the Budget on the Backs of Injury Victims)
Medicare Secondary Payer Act Requirements:

- Medicare payment deferred until no fault or liability insurance pays first or declines
- Typically will not consider claim for 120 days if other insurance is available
- Medicare payments “conditional”
- Must repay Medicare with any funds recovered through settlement or judgment
- Medicare set-aside: must “set aside” from a settlement or judgment an estimate of future Medicare payments
- Regulations are complex and ever-changing

Essentially, Medicare penalizes victims who are prudent enough to have their own “no fault” or uninsured motorist insurance
Health Insurance Subrogation and ERISA Pre-emption Employee Retirement Income (In-) Security Act???

- Colorado and most states have a “make whole” doctrine for insurance
  - Based on common law (common sense) – health insurance should pay for medical care, and should be reimbursed only after the victim’s other injuries and losses are fully compensated
- Recent Colorado state legislation made this into a statutory requirement
  - Must notify health insurer of insufficient insurance to make whole
  - They have the opportunity to object or they can consent to reduced or no reimbursement
  - Failure to put insurer on notice before settlement could prejudice rights
BUT – if the health insurance is employer provided insurance under ERISA, may not be able to rely on “make whole” doctrine

Irony of the situation: a federal law intended to protect employee benefits is now being used as a sword against victims
Potential Outcome of Subrogation or ERISA Claims

Clawback benefits paid, possibly without paying their “fair share” of costs and attorney fees
Workers Compensation Tradeoff

- Benefits available without the need to show fault
  - Medical expenses (past and future)
  - Temporary total disability wage loss
  - Partial or total disability wage loss
  - Permanent impairment
  - Disfigurement
- Benefits are limited
- Workers compensation is the “exclusive” remedy against both your employer and “statutory employers”
Opportunities to Avoid Limitations of Exclusive Remedy

- Third parties outside the statutory employer “chain”
- Product liability claim
- “Willful” misconduct (difficult in Colorado)
Damage Caps
Colorado Law Has “Caps” on “Non-Economic Damages”

- $468,010 which may be increased to $936,030 in certain cases
- Less in wrongful death cases
- Caps do not include “permanent disability or disfigurement”
Effective TBI rehabilitation is a challenging process.
The process of recovery from a TBI requires focused effort and purposeful teamwork.
Survivors of TBI know how important teamwork is in their rehabilitation.
Burg Simpson Eldredge Hersh & Jardine, P.C. is a law firm serving the entire country. The law firm has offices in Denver, Colorado, Steamboat Springs, Colorado, Cincinnati, Ohio, Cody, Wyoming, & Phoenix, Arizona.

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