

# Damages in TBI Cases: an Indiana Overview<sup>1</sup>

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Thirty-one (31) cases were analyzed for the following survey using search terms that sought to discover a claimed and/or established brain injury.<sup>2</sup> The survey includes cases decided as early as August of 2003 and as recent as June 24, 2010. The average verdict, where one was rendered, was \$1,112,080, the average final judgment was \$424,790, and the median, was \$21,849.<sup>3</sup> These numbers do reflect statutorily mandated reductions (i.e., where the cause was one within the purview of Indiana's Medical Malpractice Act), reductions for the jury's allotment of comparative fault (either on the plaintiff or a nonparty), and pre-trial agreements contingent on the jury's determination on liability (See, e.g., *McSparin* and *Anderson*). However, subsequent remittitur or additur through an appeal or motion to correct errors was not included. Therefore, the Final Judgment on the included spreadsheet may not reflect the actual, final disposition. Fourteen (14) of the thirty-one (31), or 45% of the cases surveyed resulted in a defense verdict (i.e., either a determination of no liability and/or no damages).<sup>4</sup>

The Indiana Jury Verdict Reporter<sup>5</sup> is not always precise with its language (i.e., was the injury merely an uncorroborated allegation versus an established fact, supported by facts and/or expert opinion). Also, it tends to be fairly inconsistent in terms of depth of coverage (i.e., one case may provide information relative to settlement negotiations while another may simply provide a verdict and a skeletal set of facts). Further, since the jury's rationale cannot be established after-the-fact, the information compiled by this survey is concededly less than perfect. Certain factors and trends exist which, if identified early on in the claim process, should assist in making an informed evaluation of a claim of TBI.

## Cases

*Eversole v. H&J Trucking*

2010 WL 2889627

**Summary:** This case, tried before the District Court for the Southern District of Indiana, involved an auto accident between two commercial truck drivers. The plaintiff, while stopped (or slowly accelerating after having been stopped) at a stoplight was

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<sup>1</sup> Credit for much of this summary goes to RFPJ's newest associate Kyle R. Rudolph. As I hope I have provided him with some help over the years; his returning the favor makes it even better.

<sup>2</sup> It is important to note that the severity of head injury in the cases surveyed varied widely from the occasional migraine to the persistent vegetative state.

<sup>3</sup> First, "Final Judgment" refers to the amount eventually paid at the time of the IJVR's reporting. This accounts for the various statutory set-offs of comparative fault as well as those required by the Medical Malpractice Act. As you'll see, there were also stipulated damage judgments based on specific jury determinations (i.e., liability). Also, a \$7,000,000 verdict in *Deckler v. Cullen* was not used to calculate the Average or the Median Judgment amounts as it was unclear at the time of the IJVR report whether and how much the Patient's Compensation Fund would pay as the plaintiffs, mother and child, alleged two separate injuries. Similarly, a \$10,500,000 verdict (reduced to \$9,450,000) in *Gulley v. Main Street Center Et. al.* was not included as it was an outlier.

<sup>4</sup> Note: In *Anderson v. Watson*, the jury returned a defense verdict but, because of a pre-trial agreement between the parties, the defendants paid \$600,000, the low end of their agreed-upon settlement range.

<sup>5</sup> The Indiana Jury Verdict Reporter, "Year in Review 2009," (10<sup>th</sup> Ed., February 2010), Juryverdicts.net.

rear-ended by the defendant.

**Injury:** While on his way to the ER, the plaintiff briefly lost consciousness. He was later treated for mild brain injury and headaches. A neuropsychiatrist, from Lexington, Kentucky, Robert F. Granacher, evaluated the plaintiff, assigning him a 10% impairment associated with the brain injury. The plaintiff alleged he had been disabled since the wreck (that was his last day driving a truck), explaining he has good days and bad days. The defendant downplayed the injury, using experts who opined (1) the wreck occurred at low speeds and (2) the plaintiff's symptoms were associated with his hypertension, hypercholesterolemia, polycythemia or an unknown combination of these conditions, not trauma. Plaintiff's expert admitted his gross annual billings for medical/legal examinations are about \$1.8M.

**Disposition:** The jury found the defendant 100% at fault and returned a verdict for \$1,273,000, \$100,000 of which would go to the plaintiff's wife on her consortium claim.

*Proctor v. Simon Property*

2010 WL 2889618

**Summary:** The plaintiff, an HVAC technician on his way to service units on the roof of a mall, was struck in the back of the head when the hatch leading to the roof blew shut above him. He fell nineteen (19) feet to the ground below. The case was tried in state court in South Bend.

**Injury:** Though the ladder he used had an OSHA cage, the plaintiff suffered serious injuries including: fractures to his shoulder, thumb, a skull fracture and traumatic brain injury. He alleged ongoing headaches and personality changes. Surprisingly, the plaintiff did not make use of a testifying medical expert. Nevertheless, while only the safety expert testified, the plaintiff identified a safety expert and two vocational experts.

**Disposition:** The jury set damages at \$3,696,000; \$375,000 of which was for the wife's loss of consortium claim. The jury allocated 47.4% of the comparative fault to the plaintiff; and after a reduction, the plaintiff's award was \$1,746,846, while his wife received \$197,250 on her consortium claim (combined total judgment: \$1,944,096).

*Van Vuren v. Smeltzer*

2010 WL 2079818

**Summary:** In this case, tried before the Jasper County Circuit Court, the plaintiff, a 17-year old asserted a claim for negligent entrustment after he was knocked out in a boxing match organized by the defendant's son and hosted at their home. In addition to challenging the plaintiffs claimed damages, the defendants asserted he assumed the risk of injury by engaging in a boxing match.

**Injury:** The plaintiff utilized two experts, a neurosurgeon and psychologist, who opined the plaintiff suffered a permanent brain injury resulting in permanent memory loss of his life prior to the injury. The plaintiff also asserted the injury prompted the onset of ADHD and various cognitive disorders. The defense, with their own psychologist (among other experts) argued the plaintiff had pre-existing ADHD, two prior concussions, and whatever cognitive deficiencies arose from the incident were negligible since the plaintiff went on to Purdue University and maintained respectable grades. The plaintiff's medical expenses were \$44,787 and his parents also presented a claim for loss of their son's services.

**Disposition:** Four day trial in Renssalaer, Indiana, resulted in a defense verdict. In plaintiff's closing argument, his attorney asked the jury for a verdict of \$800,000.

*Spoa-Harty v. Hummer Transportation* 2009 WL 6316487

**Summary:** In this case, the plaintiff, driving a Chrysler Sebring in the right lane on an interstate was injured when a tractor-trailer driven by the defendant's employee in the left lane cut into the right lane and struck plaintiff's car. The impact caused plaintiff's car to spin into the guardrail and bounce back into the travel lanes where her vehicle was crushed beneath the defendant's trailer.

**Injury:** The plaintiff identified numerous experts, including two neuropsychologists, an internist and expert on vocational economics (calculated impairment of future earning capacity at \$1,107,427). Defendants conceded liability, using experts in orthopedics, economics, neuropsychology and vocational rehabilitation. Plaintiff underwent arthroscopic surgery for her shoulder; she alleged a traumatic brain injury affecting her future earning capacity. Her claimed lost wages were \$55,927.

**Disposition:** Liability was established by default. The case was tried before a jury in Porter Superior Court for eight (8) days. Despite the fact that plaintiff had been promoted since the accident, all her medical bills had been paid and her injuries had, for the most part, resolved themselves, the jury returned with a verdict in favor of the plaintiff to the tune of \$4,270,000. Her husband received \$950,000. The total judgment was \$5.22 Million.

*Cobb (Pro Ami) v. Goodwin* 2009 WL 6705868

**Summary:** This case, in front of the Floyd County Circuit Court, involved a pedestrian/auto accident wherein the defendant struck a minor in a densely residential neighborhood during dark and rainy conditions. The defendant denied liability and contended the plaintiff darted in front of him and he was unable to avoid the accident.

**Injury:** The plaintiff alleged mild brain injury with cognitive impairment, a fractured leg, internal bleeding and multiple minor abrasions. The IJVR did not indicate that any experts were used by either party.

**Disposition:** A defense verdict on liability was entered.

*Robbins, Jr. v. Leslie, Jr. & City of Gary* 2009 WL 6749165

**Summary:** Defendants, the driver of a fire truck and his municipal employer, were sued when, with lights flashing and sirens blaring, struck the plaintiff's tractor-trailer on its way through an intersection. Apparently, the defendants struck the plaintiff on account of an evasive maneuver it took to avoid hitting a nonparty. The IJVR does not indicate whether the nonparty had been a party that had settled prior to trial.

**Injury:** Plaintiff's injuries included a mild brain injury, speech impairment, a concussion, headaches, and vertigo.

**Disposition:** Though the defendants denied liability and challenged the plaintiff's damages, alleging they were preexisting, the jury returned a verdict for \$324,746. The IJVR does not indicate that any comparative fault was apportioned to the plaintiff.

**Summary:** Plaintiff and driver, Dobson, collided at an intersection after plaintiff pulled off an exit ramp from I-65 North, Dobson was traveling east and plaintiff claimed she entered intersection with a red light against her. Plaintiff also sued INDOT. Just before trial, the defendant and plaintiff settled. INDOT, surprisingly, defended on the basis that both drivers disregarded the light (i.e., were at fault) and that it did not negligently design the intersection.

**Injury:** Stacy was traveling with her young daughter, Kaylynn. Kaylynn's injuries included a leg fracture, traumatic brain injury and other neurological damage. Stacy's medical expenses were \$39,000. The IJVR did not indicate what Kaylynn's medical expenses were. There were no experts mentioned.

**Disposition:** While the IJVR was fairly sparse with respect to the facts and injury, it did indicate a defense verdict by the jury. The case was tried in Clark County.

**Summary:** Plaintiff, Richmond, and defendant, Bennett, both approached an intersection heading north – Bennett in the right lane and Richmond in the left. Just before they came upon the intersection, a car pulled in front of Bennett, causing him to swerve into the left lane, directly behind Richmond. Unbeknown to Bennett, Richmond had just stopped because a school bus in the southbound lane had stopped to let its passengers out. In the next instant, Bennett rear ended Richmond.

**Injury:** While Richmond complained of soft-tissue symptoms – pain in his lower back and right leg, stiffness in his back and shoulders – pertinent for our purposes, he also alleged neurological problems in the form of memory loss and speech deficits attributable to the crash. Experts were hired on both sides. Plaintiff, Richmond, identified a psychologist from Notre Dame who opined that Richmond, because of the crash, would live with permanent cognitive impairment. Defendant argued the back problems were due to a second, later injury rather than the crash. Bennett also rebutted the Richmond's psychologist with a psychologist and neurosurgeon of his own.

**Disposition:** Jury in Elkhart County returned a verdict of \$200,000 for the plaintiff with no comparative fault.

**Summary:** Plaintiff sued after a pre-packaged garage door fell from a shelf at Lowe's Home Center in Michigan City, Indiana. A sub-contractor stacked and restacked the shelves while doing an inventory of the store.

**Injury:** The plaintiff was struck in the head and fell to the floor. He complained of a mild brain injury as well as memory loss. His injury was confirmed by Neuropsychologist, Dr. Thomas Devine, and Neurologist, Dr. Paul Pasulka. Plaintiff's wife brought a consortium claim.

**Disposition:** Defendants, Lowe's and the sub-contractor who restacked the shelves, sought to minimize the injury, citing a normal CT scan taken on the day of the incident. Jury awarded \$35,000 in damages, finding Lowe's was 80% at fault and the sub-contractor was responsible for the remainder. The consortium claim was rejected.

*Estate of Gehrich v. St. Francis Hospital*

2008 WL 1051810

**Summary:** After suffering a heart attack, the plaintiff underwent surgery leaving her in a heavily sedated state of post-operative semi-consciousness. Plaintiff, disoriented, tried to get out of her bed several times. Her family noticed this and became concerned for her safety. They requested to stay the night but the nursing staff refused. Thereafter, the nursing staff saw the plaintiff attempt to get out of bed. They stopped her once but were not there to prevent her from doing it a second time wherein she fell and severely injured herself.

**Injury:** Plaintiff suffered a fractured right hip, injury to her right elbow and shoulder and a head injury. She underwent surgery to repair her hip. Her head injury, however, left her with brain damage that has resulted in her cognitive level as that of a child. A little more than two (2) years after the accident, the plaintiff died of an unrelated disease.

**Disposition:** After a five-day trial in Indy, the jury returned a verdict in the amount of \$1,000,000.00 (reduced to \$250,000 based upon Medical Malpractice Act).

*Sangster v. Oni, Kim*

2007 WL 4327791

**Summary:** This, a medical malpractice case, arose from a botched back surgery on the plaintiff's brother to correct his scoliosis. Several theories of liability were advanced by the plaintiff. Generally, the plaintiff argued the doctors' decisions to continue surgery in light of various indications that the boy's condition had, at some point, become dire, constituted medical negligence. Numerous experts were used by both sides.<sup>6</sup>

**Injury:** While the brother had been diagnosed with schizophrenia mental retardation prior to the injuries he sustained during the surgery (and in particular, a period of cardiac arrest/hypoxia), the surgery left him with cerebral palsy and the loss of speech.

**Disposition:** A Lake County jury returned a verdict of \$3,000,000 which was reduced to \$750,000 per the Medical Malpractice Act.

*Juretic v. Kanuru*

2007 WL 4632201

**Summary:** The defendant, an ob-gyn, delivered the plaintiff's baby after a lengthy labor. At some point, defendant made use of a set of forceps to deliver the baby which plaintiff argued caused the child to suffer permanent brain damage. The medical review panel unanimously found that defendant did not breach the standard of care; and it found that defendant's treatment was not a factor in the plaintiff's claimed damages. At trial, the plaintiff's expert, Dr. August Schwenk, Ob-gyn, Belfast, ME., testified that defendant's use of the forceps was careless, unnecessary, and the cause of the child's brain trauma. He also stated the defendant had not received plaintiff's informed consent regarding the use of the forceps and their associated risks.

**Injury:** The IJVR provides only cursory language describing the alleged injury (i.e.,

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<sup>6</sup> Plaintiffs: Michael Coscia, MD, orthopedic surgeon, Indianapolis, Ind.; David Fisher, MD, orthopedic surgeon, Indianapolis, Ind.; Dean L. Stryker, MD, anesthesiologist, Michiana Anesthesia Care, South Bend, Ind. // Defendant (Kim): John N. Flood, DO, FACOS, spinal surgeon, Lansing, Mich.; Martin Dauber, MD, anesthesiologist, Chicago, Ill. // Defendant (Oni): Harry L. Shufflebarger, MD, orthopedic surgeon, Miami, Fla. Medical review panel: David Fisher, MD, orthopedic surgeon, Indianapolis, Ind.; Dean L. Stryker, MD, anesthesiologist, Michiana Anesthesia Care, South Bend, Ind.; Michael Coscia, MD, orthopedic surgeon, Indianapolis, Ind.

“permanent brain damage” and “brain trauma”).

**Disposition:** Case put to a Crown Point, Indiana, jury which entered a verdict for the defendant.

*Minniefield v. NIPSCO*

2007 WL 1556933

**Summary:** A NIPSCO employee, operating a company pickup truck, attempted to cross a slippery intersection in snowy conditions. He was unable to cross quick enough to avoid being struck by the plaintiff who lost control while attempting to avoid hitting the defendant’s employee. The employee died from injuries sustained in the collision. NIPSCO affirmatively defended on the basis the plaintiff bore more fault than its employee; and it filed a counterclaim against her, alleging she drove negligently and caused the collision. The driver’s estate sued the plaintiff in a separate wrongful death lawsuit (this was settled before the jury trial for \$25,000). Interestingly, the plaintiff did not utilize any experts per the IJVR. The driver’s estate proffered the following experts, however: Mark V. Reecer, MD, physical medicine and rehabilitation expert, Fort Wayne Physical Medicine, Fort Wayne, Ind.; Stephan M. Neese, accident reconstructionist, Schererville, Ind.; and F. William Black, PhD, psychiatrist and neurologist, New Orleans, La.

**Injury:** The plaintiff traveled with her two children and all reportedly sustained injuries in the collision. The most significant injury was a closed head injury and subsequent brain damage by one of the children.

**Disposition:** Allen County jury returned a verdict in favor of the defendants, NIPSCO and the driver’s estate.

*Delvalle v. Rule*

2007 WL 1792038

**Summary:** Defendant rear-ended, Miller, a co-defendant who, in turn, rear-ended the plaintiffs (husband and wife) as their vehicle reduced speed on I-65 for slowed/stopped traffic. At some point before trial, the plaintiff-wife dismissed the defendant regarding her injury claims though she maintained a claim of loss of consortium from her husband. The judge ordered the jury to apportion fault between Miller and the defendant only; and that the plaintiffs were not to be considered at fault.

**Injury:** Again, the IJVR was vague with respect to sustained injuries. It states the plaintiffs “each reportedly sustained personal injuries in the collision. Among [the husband’s] injuries were injuries to the neck and back, as well as a brain injury. Experts included plaintiffs’ expert, Camille Ference, PhD, psychologist, Oak Park, Ill.; and defendant’s experts, Paul Pasulka, PhD, clinical psychologist, Chicago, Ill. and E. Richard Blonsky, MD, neurologist, Chicago, Ill.

**Disposition:** The Lake County jury returned a verdict in favor of the plaintiffs and against the defendant only (not Miller). The plaintiff-husband received \$135,118.01 in damages while his wife received \$12,500 for her consortium claim resulting in a total judgment of \$147,618.01.

*Anderson v. Jasper County*

2007 WL 2216470

**Summary:** Plaintiff was a passenger in the front seat of a vehicle traveling south on a county road in Jasper County. A second vehicle, heading east and attempting to turn

north approached the same intersection as the plaintiff. The two vehicles collided because, according to the plaintiff, vegetation had grown up around the intersection. The plaintiff blamed the crash on Jasper County's alleged failure to maintain the road and intersection in a safe condition. She named the driver as a co-defendant; however, that claim did not survive to trial. The plaintiff used two accident reconstructionists: Stephan Neese of Schererville and Larry Gillen of Marengo. According to Gillen, the intersection was obscured by vegetation and Neese opined that it was dangerous due, in part, to the presence of the vegetation. He likewise believed the lack of warning signs, grade of the road, the embankment and the 55 mph speed limit were contributing factors. Jasper County blamed the drivers, it claimed the right to set-off of any amounts the plaintiff may have received from other sources, and it argued the plaintiff's recovery should be limited to \$300,000 per the Indiana Tort Claims Act.

**Injury:** The plaintiff suffered serious injuries due to the crash, including brain injury, facial cuts, a fractured lower jaw and severe neurological damage to her right arm. She underwent numerous surgeries as a result. With reference to the brain trauma, plaintiff alleged she was left mentally disabled. Her medical expenses reached \$216,071.

**Disposition:** The case was tried in Rensselaer and the jury returned a verdict for the defendants. The plaintiff filed a post-trial motion to correct errors regarding the court's instruction to the jury on intervening cause (on the basis there was no evidence presented to support the giving of that instruction). The IJVR did not know the final disposition of plaintiff's motion.

*Johnson v. Polly's Freeze*

2006 WL 4129099

**Summary:** Plaintiff was injured when a car pulled from an ice cream store's parking lot and into his path. The motorcyclist was not wearing a helmet. Initially, the motorcyclist targeted the driver with whom he settled before trial. The second defendant was Polly's Freeze. The plaintiff's theory was that the design of the parking lot obstructed the view of motorists pulling out; and that said design was improper. The plaintiff used accident reconstructionist Joe Badger of Bloomington. Polly's Freeze defended on a number of different fronts. Primarily, it alleged the plaintiff's failure to wear a helmet and the fact he did not have a motorcycle learner's permit (because he had failed the test twice) constituted a failure to mitigate, pre-impact. Defendant utilized an expert, Dr. William Smock, ER and Anatomy, Louisville, who testified regarding the effect on damages attributable to the fact the plaintiff did not wear a helmet.

**Injury:** Beyond a skull fracture, the plaintiff complained of a mild brain injury, affecting his daily life.

**Disposition:** Jury entered a defense verdict on liability.

*Gulley v. Main Street Center, et. al.*

2005 WL 3719915

**Summary:** An employee was injured while working on the construction of a large retail shopping center in Schererville. He fell more than twenty (20) feet when he lost his balance fastening a horizontal metal beam on a roof deck project. No one saw him fall. His theory of liability centered on allegations that the defendants

allowed dangerous conditions to exist at the construction site and that there was no fall protection.

**Injury:** Plaintiff sustained extensive injuries: a skull fracture, brain injury, extensive facial injuries and disfigurement. His brain injuries manifested themselves in the permanent loss of smell and a predisposition to fatigue, depression and headaches. His medical bills mounted to \$168,494. Plaintiff estimated his past and future wage loss at \$853,442, and he quantified his past and future pain and suffering at more than \$8,000,000.

**Disposition:** After an eight-day trial, the jury returned a complex verdict wherein 80% of fault was assigned to plaintiff's employer, 10% to the general contractor/property owner, 8% to a non-party and 2% to the plaintiff. Total damages were set by the jury at \$10,500,000. These were reduced to \$9,450,000 for comparative fault.

*Trevino v. Carrasquillo*

2005 WL 3992003

**Summary:** Without much detail, the IJVR relays that in this case, the plaintiff was walking in Hammond when she was struck by the defendant.

**Injury:** Plaintiff suffered a skull fracture, including injuries to her brain and central nervous system. Her medical expenses were \$16,470.

**Disposition:** After a two-day jury trial in Hammond, the jury found the plaintiff to be 100% at fault.

*Musick (Pro Ami) v. Lampton*

2005 WL 6194471

**Summary:** Here, a seven-year-old female was struck by the defendant's vehicle while riding her bicycle through an intersection. The plaintiff contended the defendant had been driving at an excessive rate of speed and failed to keep a proper lookout while the defendant denied liability, disputed the nature and extent of the plaintiff's injuries and argued the plaintiff failed to stop for the posted traffic control sign. Defendant also asserted the plaintiff negligently proceeded through the intersection without a proper lookout.

**Injury:** Claimed injuries included a clavicle fracture, a concussion, persistent headaches and a brain injury manifesting cognitive impairment and memory loss. Her claimed medical bills were \$25,000.

**Disposition:** The Delaware County jury entered a defense verdict.

*Hebner v. Alvey*

2005 WL 4708177

**Summary:** Plaintiff, Hebner, was driving west on 226<sup>th</sup> Street in Hamilton, County. The defendant proceeded north through 226<sup>th</sup>'s intersection with Mill Creek Road. The defendant had a stop sign while plaintiff was on the through street. The defendant was only one of three originally named defendants as he had been working for DaimlerChrysler North America at the time of the accident.

**Injury:** The plaintiff reportedly sustained a brain injury in the accident which resulted in residual memory loss. He identified Gregory T. Hale, Ph.D, Carmel, Indiana.

**Disposition:** Jury awarded the plaintiff, Hebner, \$147,000. It awarded \$3,000 to her husband for loss of consortium. Thus, final judgment amount was \$150,000.

**Summary:** Plaintiff, a deer management biologist with Indiana DNR, had been out hunting in an area near Lake Monroe, just outside Bloomington. By mid-afternoon, plaintiff was finished hunting and was on the lake in a 14-foot “Jon boat,” making his way towards the boat ramp. At that time, the defendant, driving a custom \$205,000, 43-foot powerboat was headed back to their slip. He was distracted by some nearby jet-skiers and failed to notice the plaintiff. He ran over the back of the plaintiff’s boat. The plaintiff struck his head on the hull of the defendant’s boat. Plaintiff hired a boating safety expert, David Smith of Ann Arbor, Michigan, who testified that the plaintiff was in a “privileged vessel,” and that it was the defendant’s responsibility to avoid him. The defendant hired his own boating safety expert, Lt. Ralph Taylor of Fort Wayne. It was his opinion that the plaintiff should have altered his course and speed to avoid the crash. (Note: Defendant eventually abandoned this theory and simply defended on the basis he had simply been distracted by the jet-skiers and had failed to see the plaintiff.)

**Injury:** Plaintiff was treated for eight (8) broken ribs, a displaced shoulder, a back injury and a closed head injury. His medical expenses totaled \$30,205. He had no recollection of the accident. He claims the accident left him with decreased cognitive ability and impaired thought processes from which he will never recover. He held a Ph.D in analytic chemistry. Neuropsychologist, Dr. John Currie, Atlanta, Georgia, corroborated plaintiff’s claims of cognitive defects.

**Disposition:** After a four-day trial in Bloomington, the jury returned a verdict of \$639,000. It offset these damages by 10% which it believed was attributable to the plaintiff’s fault. The award came to \$575,000.

**Summary:** In this, a medical malpractice action, a woman underwent surgery to remove and replace a morphine pump which had been placed in her lower back as a result of a recent colostomy. Over the next year, the pump began protruding through her skin near the colostomy. As a result, it needed to be surgically removed and replaced. While the surgery initially seemed like a success, the evening after the plaintiff was found unconscious and seizing. She had contracted an infection, had a 107° temperature, was in respiratory distress and was described as “profoundly unresponsive.” The defendant, her surgeon, was paged three times before he arrived more than two-and-a-half hours after the first page. The next day, the plaintiff suffered a heart attack and went into a coma.

**Injury:** The effect of her medical complications left the plaintiff incompetent. Plaintiff’s identified experts included Dr. Timothy King, Anesthesiology, Valparaiso; and Dr. John Black, Infectious Disease, Indianapolis. Also, Laura Lampton of Chicago provided a life care plan for Dusza. Lampton estimated the cost of Dusza’s care for the rest of her life at between \$1.7 Million and \$3.8 Million. Defendant denied breaching the standard of care. Instead, he called his treatment reasonable, and he disputed causation. His identified experts included Dr. Ashley Classen, DO, Fort Worth, Texas; and Dr. David Pitrak, Infectious Disease, Chicago, Illinois.

**Disposition:** Though the medical review panel members did find the defendant breached his

standard of care, it did not believe this breach was a factor in the plaintiff's injuries. The Hospital was granted summary judgment. After a three-day jury trial in Hammond, the jury returned a verdict for Madison and the court entered a consistent defense judgment.

*McSparin v. Kalmbach*

2005 WL 2465587

**Summary:** Plaintiff presented to Porter Memorial Hospital with a blood clot in her lower right leg. She had a history of blood clots and had been taking blood thinning medication to help alleviate the problem. Despite this, her leg was seriously swollen. Her physicians determined that a filter should be inserted in her vein to trap the clot before it reached the heart. Kalmbach, the defendant, performed the procedure. A filter was to be threaded through plaintiff's heart. Defendant mistakenly inserted the guide wire and tube into the wrong section of the heart and caused a perforation that allowed blood to leak from the heart into the surrounding tissue. The leak resulted in a severe drop in plaintiff's blood pressure. She went into cardiac arrest, suffering a severe deprivation of oxygen to her vital organs.

**Injury:** The hypoxic event left the plaintiff in a persistent vegetative state. Panel members, Dr. Kevin Murphy, Surgery; Dr. Geilan Ismail, Cardiology, and Dr. Kenneth Stone, Cardiovascular Surgery, decided two to one against the Defendant. (Murphey was the only member who thought Kalmbach had not failed to meet the standard of care). Ismail and Stone both agreed the defendant's failure was a factor in the plaintiff's injury. Panel members exonerated Porter Memorial Hospital.

**Disposition:** Procedurally, this case was unique. The defendant filed a motion to bifurcate which was originally denied. The defendant and the Indiana Patient's Compensation Fund agreed that, upon the jury's determination that the defendant was liable; the Fund would enter a judgment of \$750,000. The court then granted a motion to reconsider the denial of defendant's motion to bifurcate. After a five-day jury trial in Valparaiso solely on the issue of liability, the jury determined the defendant was liable; and the court entered a judgment for \$750,000. (Note, during the case, the jury asked the following questions of Dr. Stone: (1) "What does it mean to be 'Board Certified' for a physician? Should all surgeons be board certified? How significant to a doctor's abilities is it to be board certified?" (2) "How does a physician get placed on the review panel?" The court's replies were not reflected in the record.)

*Gleason v. Wetzel*

2004 WL 3204497

**Summary:** Plaintiff was standing at the northeast corner of an intersection in St. Joseph County waiting for the light to turn red so he could walk across. As he waited, the defendant was driving past and tried, unsuccessfully, to make a right turn at the intersection. Plaintiff had been drinking within two (2) hours of the accident. Defendant's toxicology expert, Dr. Jerrold Leiken, Illinois, opined the plaintiff was impaired at the time and had been at an increased risk for being involved in a pedestrian-motor vehicle accident.

**Injury:** Plaintiff suffered two (2) skull fractures – one in the front and one in the back of

his head. In addition to permanent brain injury, plaintiff alleged the accident resulted in the loss of his sense of smell and taste and created a ringing in his left ear. His expert, Dr. Charles Wingarten, Otolaryngology, Glenview, Illinois, stated that the loss of plaintiff's senses of smell and taste were due to the injuries he suffered in the accident. His total medical expenses were only \$4,103.

**Disposition:** South Bend jury returned with a verdict of \$5,200 in damages. It believed, however, that fault was split evenly between both parties. Thus, Plaintiff received \$2,600. (Note, jury asked a question: "Did Defendant (Wetzel) have a breath test for alcohol?" The judge's answer was "No." A month post-trial, Gleason filed a motion to correct errors to set aside the judgment and to grant a new trial on the ground that the award of \$2,600 for Gleason's loss of smell and taste, as well as his partial hearing loss, was so small as to indicate the jury was motivated by passion, prejudice, partiality, or corruption. The motion was still pending at the time the IJVR reviewed the record.)

*Lowry v. Cherry*

2004 WL 3204396

**Summary:** This case involves an auto accident wherein multiple parties and theories of liability emerged to ultimately be abandoned just before trial. At trial, the defendant admitted fault and the only issue to the jury was one of damages.

**Injury:** While the IJVR states the plaintiff suffered soft tissue injuries, for which she followed a course of chiropractic treatment in New Albany. It also provides that plaintiff complained of persistent headaches. In fact, during the presentation of evidence, the jury asked one of her treating healthcare providers, Dr. Chris Nunier, DC, New Albany, whether "there any evidence of the ligament connecting to the brain was injured in Whitnie's case that would connect her headaches to a ligament injury[.]"

**Disposition:** After a three-day trial in New Albany, the jury came to the conclusion that defendant was completely liable for \$21,849 in damages.

*Anderson v. Watson, et. al.*

2004 WL 3204447

**Summary:** In this unfortunate case, the plaintiff's son, John, was delivered in the breech position after a pregnancy in which the plaintiff experienced various problems during the first trimester (vaginal bleeding and a UTI). John's airway was partially blocked and he immediately experienced respiratory distress upon birth. While the medical staff did initially try bag-valve-mask ventilation, what John really needed was intubation. A pediatrician arrived on the scene at 9:15 a.m. but he did not intubate John until 9:45 a.m. The theory of liability was that John's measured oxygen levels and bluish coloration should have prompted medical staff to intubate him within ten (10) minutes of birth (or 9:00 a.m.). The defendants countered with evidence suggesting John's injuries were not due to their care. Interestingly, because the hospital inadvertently neglected to pay the Indiana Patient Compensation Fund surcharge, the Medical Malpractice Act would not have limited the plaintiff's recovery. Both sides produced numerous experts to support their conditions. Plaintiff's experts: Donna Wilkins, Neonatology, Muncie; Mary Edwards-Brown, Pediatric Neuroradiology, Indianapolis; David Weaver, Genetics, Indianapolis; Alan Hill, Pediatric Neurology, Vancouver,

British Columbia; and Timothy Brei, Developmental Pediatrics, Indianapolis. Defendant's experts: Robert Clancy, Pediatric Neurology, Wayne, PA; Gary Gutcher, Neonatology, Richmond, VA; and Thomas Naidich, Neuroradiology, New York.

**Injury:** The low oxygen levels and decreased oxygen saturation resulted in John's diagnosis of permanent brain damage, including cerebral palsy. His medical expenses reached \$802,241. At the time of the suit, John was six (6) years old and had to be fed through a tube. He was incapable of either speech or voluntary movement.

**Disposition:** Jury returned a defense verdict for *all* defendants involved. Before trial, plaintiffs demanded \$5,500,000 and defendants offered \$1,000,000. They also agreed to a high-low settlement range despite the verdict. Since the verdict was zero, the defendants paid the low end of that range which turned out to be \$600,000.

*Deckler v. Cullen*

2004 WL 3204350

**Summary:** In this, yet another medical malpractice case involving the delivery of a baby, the plaintiff's child was born via C-section just over forty-five (45) minutes after an initial call was made to the plaintiff's family practitioner who had been monitoring the pregnancy. He was not qualified to perform a C-section, so he called another doctor to perform the surgery. The plaintiffs argued the doctor should have called in a surgical team immediately upon being apprised of the child's situation. The medical review panel comprised of three (3) Ob-Gyn's - Glen Dobbs, Lawrenceburg; Phillip Brittain, Bloomington; and David Schneider, Bedford - opined that the defendant had failed to comply with the appropriate standard of care. (Though at trial, Brittain claimed he signed off on the panel's conclusion only because he thought it was mandatory and that he would have done the same thing the defendant did.) Plaintiffs relied on opinions of other retained experts Ob-Gyn's: Michelle Morrison, Lincolnwood, IL; and Edwin Campbell, Indianapolis. They also used causation expert, Dr. Robert Shuman, Child Neurology, South Bend. Finally, Laura Lampton, a life care planner from Louisville, KY, valued the girl's care at between \$6.2 million and \$17.2 million. Defendant denied he breached the standard of care with the use of two Ob-Gyn's: Thomas Wheeler, Fort Wayne; and Jonathan Frances, Washington. He also retained James Rogan, III, Family Practice, Tell City. Frances particularly told the jury there was no way for the defendant to anticipate this result. He explained that upon receiving a call in the middle of the night from an inexperienced nurse, he did the right thing, rushing to the hospital.

**Injury:** By the time the baby was delivered, she had already suffered severe brain damage. As a result, she would permanently remain in a persistent vegetative state.

**Disposition:** After two (2) hours of deliberation, the jury returned a gross verdict of \$7,000,000. This included \$3.2 million for the mother, \$1.5 million for the father, and \$2.3 million for the child. It is unclear whether/how much the Defendant and the compensation fund would actually answer for in the case since the plaintiffs claimed two distinct injuries to mother and baby.

**Summary:** Six-month-old Noah Woods, born three (3) months premature, a cocaine baby, of Drena Woods, resided with his mother at the Addicted Women and Children Center (AWAC) in Fort Wayne, Indiana. He had suffered bouts of fever, diarrhea, dehydration and electrolyte imbalances followed by seizures during his stay at AWAC. One morning, around 7:00 a.m., Noah was found limp and unresponsive. It was not until 9:15 to 9:30 a.m. that AWAC staff took him by car to the ER. He was not immediately assessed, however; and a physician did not see him until 11:05 a.m. The doctor treated Noah with several medications which helped stop the seizures. Yet, the illness had a lingering effect. Plaintiff, Noah's mother, sued AWAC and the hospital. She settled with AWAC prior to trial for \$775,000. The medical review panel (Michael Blakesley, Emergency Medicine, Mishawaka; Michael Englert, Neurology, South Bend; and Debora Steegs, R.N., Fort Wayne) unanimously agreed the delay in treatment at the hospital did breach the standard of care, but it was not a factor in Noah's injuries. The plaintiff countered with the testimony of her expert, Dr. Robert Shuman, Child Neurology, South Bend. He stated that time is of the essence in treating infant seizures, and the delay probably contributed to Noah's tragic condition. Her other identified experts from Fort Wayne were Dr. Conny Joe Ottinger, Neurology; and Carolyn Hart, R.N. The defendant hospital used other experts (Dr. Audrius Plioplys, Pediatric Neurology, Chicago; Dr. Mary Edwards-Brown, Radiology, Indianapolis; and Lisa Fry, R.N., Fort Wayne) along with the medical review panel opinion to argue the thrust of Noah's problems generated with the AWAC staff's malfeasance.

**Injury:** Noah was left with permanent brain damage, resulting in total disability. He became blind, unable to use his extremities, unable to communicate except via noises only his mother can understand and he will require total care for the rest of his life.

**Disposition:** After a five-day trial in Fort Wayne and one (1) hour of deliberation, the jury returned a defense verdict for the hospital.

**Summary:** In this case, a grandfather was driving his grandson, Ayers, home to wait for his mother to pick him up. Defendant, Schneider, approached from opposite direction. Where the accident occurred, the road sat at the top of a hill where entrance into a subdivision also sits. Eisman (who settled for \$100,000 before trial) was behind the Defendant. Eisman realized too late that the defendant was stopping and swerved left, hoping to reach the subdivision intersection. She avoided the defendant but crashed hard into the grandfather and the plaintiff. Plaintiffs' expert, Joseph Badger, blamed impact on Eisman's recollection that the defendant did not use her turn signal before slowing at the top of the hill/intersection. Badger's theory: If illuminated, non-party Eisman would have either stopped or not gone left. Defendant argued her turn signal was well-illuminated; and she used accident reconstruction expert, Jerry Pigman.

**Injury:** Ayers sustained a traumatic brain injury that permanently impaired his cognitive function. IJVR indicates the record did not fully describe the injury.

**Disposition:** The case was bifurcated and the jury considered only fault. Its verdict resolved the matter as it found Eisman, the non-party, 100% at fault for the accident. There was no appeal.

*Hong v. Choate*

2003 WL 24015331

**Summary:** The plaintiff, wearing dark clothing at night, was walking to a store in Indianapolis. At the same time, the defendant was driving to work on West 38<sup>th</sup> Street near its intersection with North Moeller Road. As he approached, the plaintiff crossed 38<sup>th</sup> Street 500 feet north of the intersection at a point where there was no crosswalk. The defendant struck him. Dr. Raymond Horn, Neuropsychology, Indianapolis, quantified Hong's brain injury and concluded he was permanently disabled.

**Injury:** Hong was diagnosed with a broken leg and a fractured skull. A portion of his skull was temporarily removed to reduce swelling (though it was later replaced). The medical bills totaled \$95,256.

**Disposition:** The jury determined the raw damages were \$150,000. It believed both parties to be equally at fault. Thus, the verdict was reduced to \$75,000. IJVR learned that before trial, the defendant's last offer was a single dollar. (*Numerous* questions were asked by the jury, the IJVR reports).

*Frey v. Schuitema*

2003 WL 24015360

**Summary:** Plaintiff, driving behind the defendant, illegally began an attempt to turn right into an IGA store on the right shoulder. When the defendant also turned right, the two collided. Plaintiff's trial theory was that the defendant failed to signal his turn far enough ahead of his attempted turn and that he had failed to keep a proper lookout.

**Injury:** The plaintiff suffered a neck injury with radiating left arm pain. She delayed seeking treatment, however, until five (5) months later. Ultimately, she had a cervical discectomy that resulted in medical expenses in excess of \$98,000. She also claimed nearly two (2) years of lost income. Her daughter vomited later in the evening after the crash. She complained of a headache the next day. Despite the fact the plaintiff was a nurse, she did not pursue medical treatment for her daughter (age 6) until seven (7) weeks after the crash when she complained of migraines and recurring neck pain. Her daughter's medical expert was Dr. Clark Kramer, Pediatrics, Merrillville. He diagnosed her with migraines secondary to a mild traumatic brain injury attributable to the accident.

**Disposition:** After a two-day trial, the jury deliberated for an hour before returning a defense verdict. Prior to trial, the plaintiff sought \$155,000 and the defendant offered only \$20,000. At trial, the plaintiff requested \$470,730.

## Useful Links and Useless information:

The following link will allow you to download the spreadsheet summarizing these cases. Imbedded in the same are comments for each case which are substantially similar to the summaries provided herein. Note the spreadsheet is in 11" x 17" format. The link is:

[https://docs.google.com/leaf?id=0BxcDPIMy8\\_vgOTQ1MTE4MTQtYTdmNS00YjFILWI2NjQtZDI5ODRhZTU2NDM0&sort=name&layout=list&num=50](https://docs.google.com/leaf?id=0BxcDPIMy8_vgOTQ1MTE4MTQtYTdmNS00YjFILWI2NjQtZDI5ODRhZTU2NDM0&sort=name&layout=list&num=50)

A November 8, 2010 "Google" of the term "traumatic brain injury" provided initial results of "about" 5,750,000 :

Related sites for the initial results include:

	1,250,000	"characteristics of traumatic brain injury"
	991,000	"traumatic brain injury military"
	569,000	"closed head injury"
	5,850,000	"traumatic brain injury treatment"
	6,000,000	"traumatic brain injury children"
	50,500	"traumatic brain injury emedicine"
	1,520,000	"traumatic brain injury symptoms"
	<u>4,310,000</u>	"mild traumatic brain injury"
Total	<b>26,290,500</b>	Results (initial and related)

CDC site with links to the September 2003 Report to Congress on Mild Traumatic Brain Injury in the United States – "Steps to Prevent a Serious Public Health Problem"  
<http://www.cdc.gov/traumaticbraininjury/>

National Institute of Neurological Disorders and Stroke – "NINDS Traumatic Brain Injury Information Page"  
<http://www.ninds.nih.gov/disorders/tbi/tbi.htm>

Mayo Clinic – "Traumatic brain injury"  
<http://www.mayoclinic.com/health/traumatic-brain-injury/DS00552>

U. S. Department of Health and Human Resources, Health Resources and Services Administration – "Traumatic Brain Injury Program"  
<http://www.hrsa.gov/gethealthcare/conditions/traumaticbraininjury/>

Congressional Brain Injury Task Force  
<http://www.pascrell.house.gov/work/braininjury.shtml>

YouTube – "Living With Brain Injury" (29:11) (91,356 viewings as of November 8, 2010)  
<http://www.youtube.com/watch?v=FgtHvBF4t-E>

The San Diego Union-Tribune – "A New Focus on Brain Injuries (A concussion center at a base in Afghanistan brings a range of specialists under one roof to help treat the surge of mild brain injuries caused in battle)", September 20, 2010, Section A, page 1

<http://www.signonsandiego.com/news/2010/sep/29/marines-put-new-focus-treating-brain-injuries/>

The Wall Street Journal – “Concussions Rise Among Student Athletes,” August 31, 2010,  
Section D, page 1

<http://online.wsj.com/article/SB10001424052748704323704575461831955174258.html>

USA Today – “More troops’ concussions diagnosed under new rules,” October 27, 2010.

<http://online.wsj.com/article/SB10001424052748704323704575461831955174258.html>