ACQUIRED BRAIN INJURY

THE HIDDEN DISABILITY

Identifying clients who may be suffering from an acquired brain injury is the first step towards providing them with more effective advice and representation.

By Rachael Freeland

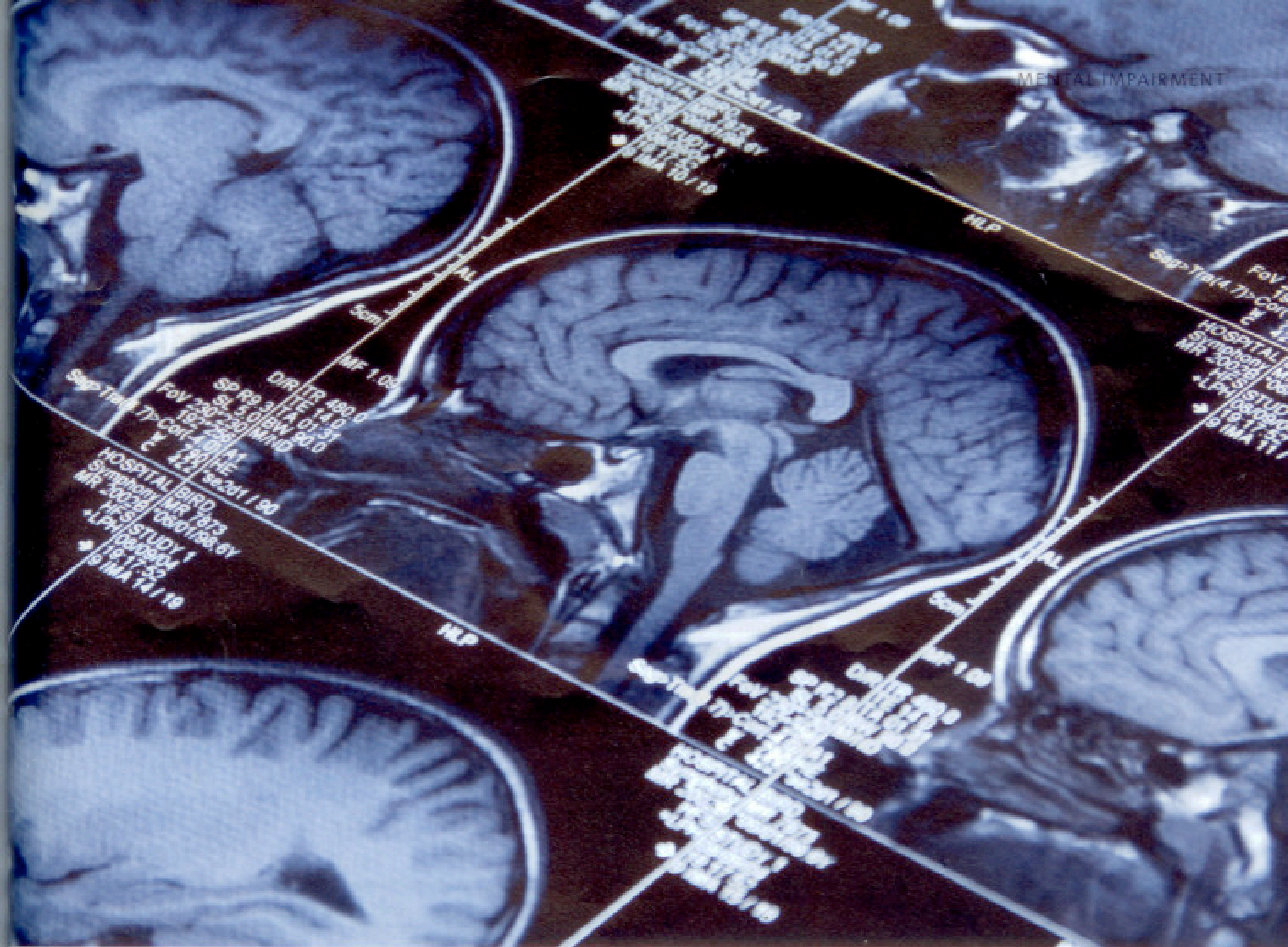
Almost 2 per cent of the Australian population has been diagnosed with an acquired brain injury (ABI) and it is believed this is only the tip of the iceberg, with many individuals remaining undiagnosed.[1] In a prison population, this figure increases to an alarming 82 per cent.[2]

Individuals with an ABI are largely over-represented in the criminal justice system, so it is highly likely that a solicitor in general practice will encounter clients with this disability. This article seeks to explain how to recognise the disability and how best to deal with a client who may have an ABI.

Recognising signs of ABI

Typically ABI refers to any injury sustained to the head that results in altered brain functioning. The specific symptoms of an ABI depend on the site and severity of the injury, and the individual's lifestyle before and after the injury. Some individuals demonstrate difficulties in each of the following areas, while with others you may only notice a select few:[3]

- missed appointments and court dates;
- repetitious conversation;
- lack of cohesion in retelling events and stories (this is called confabulation, whereby memories are fabricated in response to being unable to remember – without any awareness of having done so or any insight into the lack of cohesion with the new memory. These clients are usually believed to be lying, but they are not);
- difficulty planning and following through (clients will commit to doing something or following up on something but fail to actually do so, because the part of the brain that thinks through how to sequence events to achieve a goal does not work);
- difficulty foreseeing consequences and then learning from mistakes (these clients are often involved in crimes where they did not think through what they were doing, e.g. the presence of a camera during a theft);
- rigid and inflexible thinking (no matter how many times something is explained, the individual is convinced their view is the only right view);
- inability to concentrate or focus on one thing at a time;
- problems with initiation (difficulty thinking of what to say, starting a conversation, thinking of what to do, even getting out of bed in the morning);
- difficulty with abstract thinking (in particular, intangible concepts and complex constructs);
- spatial issues (e.g. judging distances);
- inability to appreciate time (being late to appointments not because they forgot but because they did not consider how long transport would take, etc.);
- uncertainty and lack of confidence;
- confusion and lack of concentration – this often leads to:
  - mood swings and personality changes (individuals with an ABI are often more easily upset or frustrated and quickly become angry); and/or
  - behavioural changes (difficult behaviour, acting out, inappropriate behaviour, paranoia and suspicion, and clients with an ABI usually experience difficulty changing their behaviour even when they want to);
- speech and other communication difficulties (often clients slur their words and are perceived to be intoxicated when they are not);
- difficulty in problem solving (even something as simple as how to get to court); and
- limited self awareness and insight (very often clients with an ABI do not actually grasp the nature and severity of their own difficulties).



Reading through this list, it is natural to assume that an ABI would be quite obvious. The thing about a brain injury is that while many brain functions are impaired, there are also many that remain unaffected – specifically information and skills learned prior to the injury, e.g. driving a car, making a cup of tea, doing calculations required for work, knowledge of facts and intellectual functions. These prior learnings are often used, along with a myriad of other resources, to mask these deficits from others. There are people with an ABI who appear to be successfully running small businesses, but they have colleagues and associates that manage the more complex tasks and it is not until these colleagues or associates cease providing such support that anyone becomes aware of possible problems.

When a client displays any of the cognitive indicators detailed at right and has at least one experience that fits with any of the other indicators, you should consider the possibility that they have sustained an ABI. Note that a "significant period of unconsciousness" usually refers to approximately six hours, but an injury to the brain can occur in less time.[4]

COGNITIVE INDICATORS

- Any significant changes in personality or cognitive capacity/thinking styles
- Difficulty in solving problems
- Not learning from mistakes
- Short term memory lapses
- Difficulty in learning new information
- Problems in planning and organisation
- Inability to see consequences

Added to any of the following experiences – especially if combined with a significant period of unconsciousness

EXPERIENCES

Alcohol and substance abuse:

- 10 or more years of regular (daily or regular binging) use
- Overdose
- Intoxication leading to unconsciousness

Head injury:

- Motor vehicle accident
- Fall
- Assault
- Professional fighter/regular fights
- Penetrating head wound

Psychiatric history:

- Suicide attempts
- Self harm leading to hypoxia (reduced oxygen supply to the brain) or anoxia (no oxygen supply)

Neurological/ circulatory history:

- Stroke
- Heart attack

> A comprehensive . . . report . . . can expound on the client's mental capacity for understanding what they were doing, whether they could control their actions and whether the client had the capacity to discern right from wrong.

Assisting clients with an ABI

When interacting with clients who may have an ABI, you may find some of the following strategies to be helpful:[5]

- Break down information and present one idea at a time. Long and complex information is not likely to be remembered, integrated or acted on, regardless of whether the client is nodding their head or seems to be indicating that they are understanding. A good way to impart new information is to put it into an example, or use an analogy they already understand.
- To check if the client has understood, ask them to repeat back to you their understanding of what you have just been talking about.
- Be prepared to repeat the important material, and ask them to repeat it back to you at increasingly longer intervals, checking in one last time just prior to the end of the appointment.
- Discuss or tackle one problem at a time and develop a clear plan of action.
- Encourage the client to "think" on paper – this way they make their thought processes explicit and do not overload their memory. They also have the benefit of the sheet acting as a memory aid.
- If they are required to follow up on anything, check just before ending the meeting that they remember this and ensure they have written it down somewhere. If possible, ask if there is someone (a parent, friend, partner, counsellor or case manager) who this information can be imparted to and who can act as a memory aid for them (i.e. reminding them).
- As people with a brain injury learn best by "doing", encourage your client to do a trial run to help them familiarise themselves with what is to be expected, e.g. what they may need to say or do in court, even how to get to court.
- Minimise the distractions and stressors in the environment. Try to ensure all discussions of important matters are conducted in a quiet space, free from distraction and interruption.
- Allow frequent breaks or rest periods. Sometimes people with a brain injury get quite fixed or "stuck" on a particular idea and a break, along with a little encouragement, can help them to move on to more pressing or relevant matters.
- If the client wanders off the topic, or seems to not be answering a question you just asked them (this is called tangential thinking), re-direct the conversation by repeating the question without responding to the tangents.
- Finally, and sometimes most importantly, consider how you are presenting. Clients with an ABI can be very sensitive to perceptions of people being judgmental, threatening, and/or unsupportive. So take a moment to reflect. Are you relaxed or are you frowning? Are you patient or impatient? Are you getting frustrated with them? And notice whether you are coming across as bossy – particularly when you are time limited and getting frustrated.

The clients that frustrate us and test our patience are very often the ones that we later discover have a brain injury. And while they present like anyone else, the damage to their brain prevents it from working in the way we are usually familiar with.

Criminal offences and ABI

At common law there is the presumption that every person is responsible for their own actions. The *Criminal Code Act* 1995 (Cth), s7.3.1 relevantly provides that:

"A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:

(a) the person did not know the nature and quality of the conduct; or

(b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or

(c) the person was unable to control the conduct".

Further to s1(c), the Act contains a definition of "mental impairment" in s7.3(8) as including "senility, intellectual disability, mental illness, brain damage, and severe personality disorder". A comprehensive neuropsychological assessment report detailing the nature and severity of the client's brain injury can expound on the client's mental capacity for understanding what they were doing, whether they could control their actions and whether the client had the capacity to discern right from wrong. While an ABI does not automatically bring s7 of the Criminal Code into play during a criminal trial, the brain injury, or "condition" may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility, in accordance with the *Tsiaras*

principles.[6] Finally, the presence of an ABI may have a bearing on the kind of sentence imposed, the conditions in which it should be served, and what specific deterrence would be appropriate.

Does prison help?

While many clients with an ABI can and do respond positively when they are placed in a contained and highly regulated environment, this is not necessarily the case in a prison environment. Attention deficits make it difficult for prisoners with a brain injury to focus on a required task or sequence of instructions. This mental confusion may then be misinterpreted by prison staff as an act of defiance. Any memory deficits make it difficult for prisoners to understand or remember rules or directions and regularly lead to disciplinary actions by prison staff. Impulsivity and poor anger management tend to lead to conflict with other prisoners, which in turn results in further disciplinary action. Uninhibited or impulsive behaviour, including problems controlling anger and unacceptable sexual behaviour, can provoke other prisoners, and may result once again in disciplinary action. Likewise, slowed verbal and physical responses may be misinterpreted by correctional officers as uncooperative behaviour.

Compounding this is the difficulty most clients with an ABI face when attempting to adjust back into the community. Individuals with an ABI often do not have the cognitive capacity to adapt and cope with change, nor do they always have the capacity to extrapolate any new skills they may have learned in prison into a new context. Thus, when they are released back into the community these clients are at risk of re-offending, and of thereby experiencing the revolving-door nature of the criminal justice system.

So how many clients do you work with who might have an undetected ABI?

Many individuals with an ABI do not have access to adequate support and ultimately end up, through their impulsive actions, on the wrong side of the law and in your office. The *Sentencing Act* 1991 (Vic) sets out not only "to prevent crime and promote respect for the law" but also ensure "offenders are only punished to the extent justified". Correctly identifying a person's ABI and discovering the nature and severity of their deficits through neuropsychological assessment, will not only provide context for the offending situation, and detail their culpability and degree of responsibility but will provide the details necessary to create the very support that will likely foster their rehabilitation. ●

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1. Brain Injury Australia, *Submission to the Australian Government's National Disability Strategy* (2008): **www.bia.net.au/Webpage/documents/bia_disabilitystrategysubmision_28nov08.pdf** (accessed 17 July 2009).
2. *2003-2004 survey of 200 New South Wales inmates*, cited by Brain Injury Australia, note 1 above.
3. Alcohol Related Brain Injury Australian Services (ARBIAS), *Information for People with Brain Injuries* (2008).
4. Note 2 above.
5. ARBIAS, *Assisting People with an Acquired Brain Injury* (2008), and "Counselling and Acquired Brain Injury", Brain Injury Australia workshop conducted in 2007 (presenter unknown).
6. Cited in: *R v Verdins; R v Buckley; R v Vo* [2007] VSCA 102 (23 May 2007).