Forensic and Private Practice Issues

**TOXIC TORTS**

The toxic tort is a recent legal phenomenon. Borel v. Fibreboard, 1973 established liability for an insulation worker who was employed for 33 years installing asbestos-containing insulation. The worker developed asbestosis and malignant mesothelioma as a result of exposure. A jury agreed that the asbestos manufacturers were negligent and strictly liable for failing to warn workers of risks in handling asbestos. On appeal the Fifth Circuit ruled that the manufacturer of a product is assumed to possess expert knowledge about that product and is therefore responsible for a duty to warn of relevant dangers. The case has obvious relevance for individuals exposed to neurotoxic materials in the workplace where working conditions are unsafe, materials hazardous, or where obvious nervous system injury has occurred.

*Role of the Neuropsychologist as Expert Witness*

Toxic tort cases routinely employ experts with specialized scientific knowledge to establish or refute causation. Occupational medicine physicians, toxicologists, neurologists, and neuropsychologists are the most relevant experts to analyze neurotoxic damage. The role of the expert witness is usually to prove that a toxic substance was more probably than not significantly influential in bringing about the particular adverse health effect(s) on which the claim is based (Henderson, 1990).

Since the publication of the first edition of *Neuropsychological Toxicology*, many neuropsychologists have identified themselves as service providers for this discipline. The inextricable entanglement of forensic and health issues is common when an individual claims neurotoxic damage from workplace exposure. So-called “toxic tort” claims place special requirements on neuropsychologists to differentially diagnose toxic impairments and attribute causation. In particular, neuropsychologists wishing to apply their expertise in litigation should pay heed to the cautions provided by Foster, Bernstein, and Huber (1993) in their critique.
of clinical ecology toxic torts. Neuropsychologists should expect to have their credentials carefully examined to determine the scope of their expertise; those clinicians whose training is exclusively centered on diagnosing brain injuries will have to justify whether they are appropriately trained to diagnose and rule out more common "psychological" rule-outs of somatization disorder, conversion disorder, affective disorder, personality disorder, or malingered impairment. Neuropsychologists should expect to have to explain why their conclusions differ from the conclusions of other professionals and why their particular opinion should prevail (Foster et al., 1993). Most obvious and important, the neuropsychological expert witness must be prepared to provide reasonable explanations from scientific review and clinical expertise why a particular injury is neurotoxic in nature and how neuropsychological tests elucidate the nature and severity of that injury. Several principles discussed below can be applied to maximize the possibility of accurate and responsible diagnosis and testimony.

1. **Utilize a multidisciplinary diagnostic team.** Neuropsychologists working outside of the hospital/occupational health clinic milieu must re-create an equivalent multidisciplinary diagnostic team in the private sector. Close collaboration with occupational medicine physicians, neurologists, and toxicologists will maximize the likelihood of accurate diagnosis and effective treatment. Development of a system perspective is especially important for several reasons including (1) ruling out alternative diagnoses or impairments, (2) obtaining general medical and toxicologic evaluations in conjunction with neuropsychological evaluation, and (3) ascertaining whether other system impairments have occurred in conjunction with toxic exposure. Many neurotoxins also cause hepatic or pulmonary damage that may interact or [as Tarter et al. (1988) have shown] largely account for neuropsychological dysfunction.

2. **Obtain all of the data.** The neuropsychologist, like all other health care providers, is only as effective a diagnostician as the data allow. It is not unusual for a clinician to be presented with incomplete data by an overenthusiastic (or Machiavellian) attorney in an effort to obtain his or her cooperation in a case. Nevertheless, it is the responsibility of the neuropsychologist to obtain all possible medical, occupational, psychological, and educational records to determine whether a conclusion about neuropsychological injury is possible. One must absolutely assume that all such data will be revealed eventually by the adversarial process. It is necessary to make a proactive search for such information. There are few situations more uncomfortable to the individual and unflattering to the profession of neuropsychology than being surprised by new information in deposition or on the stand that forces retraction of otherwise carefully worked out conclusions. The axiom "knowledge is power" must guide the neuropsychologist's participation in a toxic tort case.

3. **Standard of proof.** Toxicants cannot be linked to neuropsychological test abnormalities by a simple post hoc decision rule. In other words, there must be a higher standard of proof than "patient was in the vicinity of a toxicant . . .