



## Environmental Toxins - Part II: The Lit. Process

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In Part One of this series (featured in the August issue), the medical aspects of lead paint were discussed. A brief review of topics included the history of lead paint, famous people with possible lead intoxication; locations of lead paint and other materials associated with possible elevated levels of lead; government regulations and agencies involved with assessing and enforcing elevated lead levels, as well as the testing procedures with an XRF device. Finally, the medical diagnosis and treatment were discussed.

To evaluate a childhood lead paint claim, the attorney and designated staff need to investigate all possible environmental and medical causes for the elevated blood lead level (BLL) and the resulting neurological impairment(s). The first step is to inspect the premises involved in the claim. This would include a history of both landlord and tenant. Is there a Section 8 financial resource? Was the property checked for lead prior to the plaintiff moving in? Are there documentation logs for routine maintenance, painting and repairs; and do those logs contain signatures from both the landlord and the tenant? These are just some of the items the legal staff would assess during the initial claim process, prior to the LNC's involvement.

The team, especially defense counsel, also needs to investigate how a landlord handles a complaint by a tenant. Is there written documentation or recollection of verbal communication involving cracked or peeling paint? It is important to obtain specific dates rather than approximations, as even one day can affect the outcome of the claim. Remember, as in healthcare, if it is not documented it's not done.

In developing a plaintiff history, the infant child cannot be apportioned a degree of fault in the causal relationship to the injury. Instead, it is the parents and/or guardian who may be at fault. Keeping this in mind, the parental and/or guardian's background is very important in developing a case, for either side. In some states, the verdict award may be influenced by the contributory negligence of these individuals.

Each side needs to assess the questionable property but also the immediate surrounding environmental area. Is the resident located near a smelting mine, gas station or a previous residence that had been abated nearby? Is the residence located in an older part of town, where houses were built before 1976? Check with the building inspector as to any prior building violations. Look for testing criteria from state and/or county health departments, preservation agencies, housing or community renewal programs. It would be advisable for someone who is deciding to purchase a specific property to make these inquiries, to determine if a future claim could be made.

### The Discovery Process

A summons and complaint is issued to the defendant. The pleading should incorporate who is suing, the exact location of the property in question, and dates the plaintiff was in residence. The complaint will also allege the cause(s) of action of notice and knowledge of children in the home, notification of possible lead paint in specific areas of the residence, appropriate warning and removal of the lead paint. The complaint should allege the method of intoxication and whether or not actual or constructive notice posed a health risk to the children, the alleged injuries suffered by the child or children, the biopsychosocial impact of the alleged intoxication, the prior condition of the child(ren) and the future impact on educational and employment status. Finally, the complaint will allege the statutes and regulations, which were violated in the state, county and local housing laws.

Once the summons, complaint, and Verified Bill of Particulars (VBOP) has been generated and received, the LNC will start the medical discovery process. The LNC needs to review the documents carefully for clues as to (a) method of intoxication, (b) date and time of incident (since the ingestion could be either acute or chronic), (c) date of actual notice, (d) the living areas involved in the claim, and (e) the injuries sustained by the infant plaintiff (elevated lead levels, extreme hyperactivity, behavior and/or disciplinary problems and any other problems identified which generally include cognitive disorders related to lower IQ). The pleading will name health care providers in the evaluation of the child(ren), whether or not the child was confined to a health care facility or home. In addition, the following will be listed: expenses claimed as special damages; any occupation with employer information (when applicable), as well as claim for lost wages; loss of consortium, and; the need for special schooling facilities. Of particular importance is the constructive notice to the landlord, especially the date of notice by the Department of Health (DOH). A copy of the actual notice and/or actual property lead screening done by the Health Department may be used as an attachment to the pleading. This will play a part in the trial proceedings. The experienced LNC will include the above information in the medical chronology.

The medical discovery process includes obtaining the HIPAA compliant authorizations for the following medical and educational records of the child(ren) involved, the parent(s), especially the mother, and other related agency records:

- mother's prenatal records
- infant-plaintiff birth records
- pediatric/hospital and dental records, including all radiographic and laboratory diagnostic studies
- records related to the diagnosis and treatment of lead intoxication
- records from state and county DOH and other community agencies who may be involved with the plaintiff
- records from state, county and/or local regulatory agencies relating to inspection and testing of the property site
- educational records to include day care, preschool, etc. (academic and health)

The LNC is the most valuable person to review and develop a chronological order of events for the attorney. Due to some local jurisdictions, it may be more feasible to develop more than one chronology. There may be a chronology of the mother, father and infant plaintiff. These records need to be scrutinized very carefully for any possible confounding variables.

Once all the medical and educational records have been obtained, reviewed and analyzed, the LNC is generally asked to locate a medical expert to review the current discovery material and provide initial opinions. The medical expert should be a board-certified pediatrician with a subspecialty in neurology or toxicology. To locate an expert, check on verdict searches or court cases within the jurisdiction in which the case is being tried. Mealey's also offers newsletters on lead paint litigation. Other resources may be IDEX or DRI. The medical expert should review the Summons and Complaint, Verified Bill of Particulars (VBOP) and any subsequent VBOP. The expert should contact the attorney with their impressions, prior to rendering a written report. The LNC may be a part of the teleconference to facilitate clear and concise communication, and inclusion of all pertinent questions.

The deposition date has finally arrived and the LNC should expect some standard questions, such as:

- background information of parents
- medical and academic history of the child(ren) and parents
- prenatal history of the mother, i.e., activities or medical problems encountered during pregnancy, the birth process, etc.

- developmental milestones
- daycare and schooling
- governmental assistance programs, i.e., WIC
- childhood diseases
- prior living residences of married/separated parents
- toys and other household goods utilized by the infant plaintiff
- psychological examinations of the infant plaintiff.

Other potential witnesses could include the Department of Health Sanitarian, landlord, public health nurses, educators, or any others who had contact with the infant plaintiff. Any information obtained may expose a possible third party involvement. Some LNC's may be asked to develop deposition questions to either confirm the information or obtain additional information, which is all part of the discovery process.

## **Independent Medical Examinations**

Once the litigation team, along with the LNC, review additional medical discovery gained through depositions, an independent medical examination (IME) of the child(ren) may be performed. A neuropsychological examination is most appropriate for determination of cognitive deficits claimed from lead paint poisoning. Generally, a pediatrician, with a subspecialty of neurology, or a neuropsychologist will conduct the IME with experience in examining small children. It is important to make sure the expert has testimony experience, but is not a "hired gun". In other words, they historically provide testimony for both defense and plaintiff. If the IME is done close to the time when the elevated blood level is apparent, an independent blood sample may be obtained to confirm the plaintiff's readings. Unfortunately, either side may claim contamination, and the results could be deemed invalid if it can be shown that proper testing protocol was not followed.

The LNC's responsibilities in this process can be numerous. We may be asked to locate the expert and coordinate the IME. Be sure this professional possesses experience, academic credentials, board certification, and is published.

There are standards of care and ethical guidelines that should be followed for an unbiased, relaxed evaluation. There should be no interference by either party. The child may easily become distracted and the accuracy of the testing results skewed. Testing will generally involve more than one day. A complete neuropsychological evaluation should be consistent, which means the evaluation should not differ based upon whether it was plaintiff or defense retaining the expert. This renders the physician less vulnerable to counsel's cross-examination at trial on the issue of bias. Components of a complete neuropsychological evaluation include:

- Structured, detailed interview of the plaintiff
- Formal psychological and neuropsychological testing
- Review of medical, educational, employment and any other records deemed relevant from both pre and post injury status
- Interviews of family members, employers, teachers and any other third parties, i.e. health care providers

The LNC should communicate with the attorney regarding any problems with the IME and/or subsequent report. Does it follow the components mentioned above? Was there a third party observer, who may have tainted the testing procedure?

## **Record Review by an Expert**

The scope for the physician expert's involvement is generally dictated by the attorney who retained them, with variables such as cost, legal strategy, and the stage of litigation coming into play. The attorney may opt to request only a record review from the neuropsychologist.

This process should include review of medical records, educational transcripts and records, employment records, etc. The expert should review any prior neuropsychological evaluations to determine if standards were maintained as outlined above. For a complete unbiased assessment, all testing materials including the raw data are required.

## **Research**

Part of the LNC's consultation may include doing research on lead paint. This may include resources from both medical and legal sites. If there is evidence of confounding variables within the medical discovery, the attorney will need to support those variables with medical literature. You may ask the medical/neuropsychological experts what literature they would recommend, especially if they have been involved in other lead paint litigation. From the research, the LNC should develop an authoritative bibliography, especially if further lead paint litigation is done with the firm.

Confounding variables have the potential to play a big part of the defense strategy. "The mere fact the child tests positive for lead poisoning does not mean any and all problems the child(ren) experiences are attributable to his/her elevated blood lead levels. The confounding variable may help to provide other sources for the child's problems" (Kaminsky, 1996). Children are considered a product of two sets of genes and the environment; thus literature indicates there is a potential for multiple causes for the alleged cognitive deficiencies and other conditions, which are normally attributed to lead poisoning. By virtue of our education and experience, we are best suited to research and analyze the records for other variables that may be the true etiology of the alleged damages. These variables may be compared to siblings, should there be the history of multiple marriages or if the siblings are tested for elevated blood levels.

### **Maternal variables:**

- prenatal difficulties
- intrauterine growth retardation (IUGR)
- smoking
- use of prescription and/or recreational drugs
- alcohol usage
- depression either during pregnancy or postpartum
- birth trauma

### **Infant/plaintiff variables:**

- frequent episodes of otitis media
- iron deficiency anemia

### **Miscellaneous variables:**

- socioeconomic (SES) issues
- parental academic difficulties
- bilingual language in the home
- family history of criminal behavior

The LNC may educate the attorney and/or litigation team on governmental agencies, the history of lead paint, and the timeline during which the Center for Disease Control (CDC) adjusted what they considered to be toxic blood lead levels. Recall from the first article in this series, 10 mcg/dl was not always considered to be a toxic level. An experienced LNC may be

asked to develop a graph of the BLL readings and or EP levels. Sometimes the medical expert may do this as part of his initial review of the medical records. This information may be placed in a graphic display, and enlarged for use as a demonstrative exhibit at trial.

As the litigation process proceeds, either side will provide a list of expert witnesses. The LNC may be involved in researching the credentials of all medical experts. This will include licensure and disciplinary verification, board certifications, employment history and any literature listed during a complete review of the curriculum vitae. This information may be important if the attorney is considering impeaching or discrediting the expert witness.

## **The Trial**

As the trial date approaches, the LNC's role will expand to coordinate with the paralegal in developing discovery needed by the attorney at trial. The LNC may be asked to develop a list and/or issue Subpoena Duces Tecem for the medical records necessary to be presented during trial. Also, the LNC is part of the trial preparation to determine witnesses and their role in the plaintiff's claim to enhance either side's strategy.

The LNC must remember there are differences between legal and scientific methods and goals in the judicial process. During a trial, each side presents its expert witnesses, who support the scientific research for their opinion. The law will conceive the expert witness' role as an unbiased educator, especially when addressing the jury. Unfortunately, over the years there has been some controversy regarding the use of scientific research in litigation. There were the Federal Rules of Evidence: 702 and 703, derived from *Frye v. United States* (1923) that held that prior to introduction of testimony based on a novel scientific method, it must be established the technique has "gained general acceptance in the particular field in which it belongs". If the scientific technique was generally accepted, admissibility of evidence was ensured regardless of whether the technique would be accepted by members in a particular field. Then along came *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993).

*Daubert* brought about a change in scientific evidence. The Supreme Court ruled that the judge must be sure any and all scientific testimony or evidence admitted is not only relevant but also reliable. At the judge's discretion, he/she may decide which scientific evidence to admit in testimony, and determine if the scientific validity of the evidence is accurate. In other words, the testability of theory and/or techniques, peer-review publications and consideration of the known or potential rate of error and general acceptance is assessed. Although this ruling directly applies to the federal court, it will be up to the state court to determine if this standard will be adopted.

Depending on the jurisdiction, the LNC may be granted the ability to review the subpoenaed records for any additional information that was not provided during the discovery process either via authorization or from the other side. The LNC can attend the other side's expert witness testimony to point out discrepancies or other testimony which could be questioned on re-direct or re-cross examination. The LNC may also be available to pull out information in the medical record for the attorney to be used during questioning.

## **Impeachment**

Literature in the past twenty years demonstrates that professionals very often fail to come to valid and reliable conclusions. Fortunately, the accuracy of a professional's judgment doesn't usually surpass a layperson. With this information, attorneys are provided the means by which to diminish psychological and neuropsychological testimony. There is a long history within the adversarial system, which provides guidelines for cross-examination of the opponent's expert. This system promotes this examination because it is the best established means for insuring reasonable degree of scientific integrity, and the best solution for what is termed "junk science".

Attorneys who look to exclude testimony by a neuropsychologist should question the reliability and validity of neuropsychological tests as well as the conclusion set forth on the basis of these tests. There are resources that address the neuropsychological tests available. As part of the Daubert decision, "neuropsychologists should be prepared to demonstrate the methodologies and tests are generally accepted in the neuropsychological community, have been subjected to peer review and have been standardized". (McCaffrey, p. 122) This provides the basis for the scientific testimony to a "reasonable degree of medical certainty". This also implies the tests and methodologies utilized by neuropsychologists must be valid and reliable. The same principles can hold true for other experts, such as the economist who determines the employability of the child(ren), and an industrial hygienist who may have direct practice knowledge on lead paint testing with an XRF device and abatement procedures.

Generally, verdicts have ranged from a no cause to millions of dollars in damages. If either side determines there were problems during the trial, an appeal may be considered for the allowance of presenting confounding variables, or for procedural discrepancies in the judge's ruling during trial.

There is a place for the LNC on this legal team from the moment the plaintiff contacts the attorney. Our contributions assist the attorney in gathering the necessary documents, organizing facts, identifying and locating experts, performing research, and providing trial support to litigate or defend the suit.

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