

# THE LNC NEWSLETTER

PRESENTED BY:

## Medical-Legal Interface

### Attorneys Are Legal Experts, So How Do They Judge The Medical Options?

Robert Morrison, RN BSN

July 2005  
Volume 4, Issue 10

Inside this issue:

Latex Allergy Litigation	4
Road Rage-an all to Common Phenomena	5

For the attorney, prosecuting a medical malpractice or personal injury suit is long, and getting increasingly expensive. The opinions of a practiced, experienced medical expert can, and often will, be the deciding factor. Journal articles and opinion polls have shown for many years that juries are harder to convince, and awards are harder to come by. It is for this reason that the attorney often needs the services of a noted medical expert. And often as not, these services are being sought before the suit even comes into existence.

The attorney needs some basic

information and advice right from the start. Most attorneys will agree that every person that comes into their office thinks that their case is cut-and-dried, open-and-shut, and will be "the big one" that will make the attorney's reputation. They have no doubts, and they are expecting the attorney to say the same.

If the attorney is experienced in such cases he can develop his own initial feelings for the case. There are several things to be considered, such as the apparent damages, the basic description of the incident, and their opinion of the potential plaintiff

Cont on page 2

### Newest Member Joy Collins

We are pleased to introduce you to our newest member of the newsletter team, Joy Collins. She is president of Collins Medical Legal Consultants, Inc. She has been providing legal nurse consulting services for three years. Her background includes psychiatry, med/surg, ortho, oncology and case management. She holds two certifications in legal nurse consulting as well as forensics and is currently taking a life care planning course. She is also a published writer, haven written a monthly healthcare column for a women's web site as well as various other articles both online and in print. I hope you enjoy her first article with us and many more after this one as well.

### The Psychiatric Forensic Exam Joy Collins, RN, BSBA, CLNC, CFN, LNCC

Mention psychiatric forensic examination and someone might think that you were referring to an exam geared to answering the "Is he guilty by reason of insanity?" question that we see so often on *Law & Order*. While this is one use for such an examination, they can do much more.

Forensic psychiatric examinations are usually requested for two reasons:

- to round out the picture of the defendant or plaintiff – for example, was there a prior history of mental illness
- to educate the judge and jury with information that may not be common knowledge, i.e., to explain why something happened, or to describe the extent of the harm that was done.

Just as there are many reasons why a forensic psych exam may be requested, there are many types of exams that can be performed:

1. Civil commitment: these determine if a patient is dangerous to himself or others or gravely disabled and does he require involuntary commitment to a psychiatric facility for treatment
2. Job fitness: Is the person in question capable of performing the duties of his position?
3. Child custody and parental severance: These cases must take the best interests of the child into account when evaluating all the parties.

Cont on page 3

## Attorneys Are Legal Experts, So How Do They Judge The Medical Options?

Continued from page 1

among others. Once the attorney feels that she wants to investigate further then she has to decide whom to turn to, and know where to find them.

There are several ways to find a medical expert to review a case. A large firm may have physicians, nurses, or other healthcare providers on staff. This works well when the firm handles a lot of such cases and is in constant need of such expertise. If you don't need the opinion of a physician or nurse on a daily basis, however, that becomes an expensive option.

To reach outside experts the attorney may simply assign someone in the firm the task of locating one and getting their information to the attorney. Often this is given to Legal Assistants or less senior associates. It is often seen as a rite of passage for a younger attorney in a medium-large firm, a way to gain experience with the nuts and bolts of casework. This does, however, mean that medical information is being analyzed or approved by someone with little or no healthcare experience.

Still other firms will rely on outside sources to find experts, coordinate review and analysis of the projects at hand, and even to work with the attorney throughout the course of the case. This is becoming more common in small-medium firms that are trying to reduce their constant overhead. This works particularly well if the firm handles other types of cases than just medical litigation. They pay for the handling of the cases that need it, and not for those that

need other resources. Tailoring the resources to the situation helps keep the everyday operating expenses down, something that benefits everyone involved.

Still, the issue is, where do you find the experts I need without bankrupting the case? That is where the attorney relies on their sources of information, either in-house or outside. Medical experts can be found almost anywhere. While many people think of large metropolitan areas as the only place to find acknowledged experts, this is far from accurate. Since healthcare is practiced everyday, all over the world, the best potential expert may be found almost anywhere. The best person for the case is often different, rarely identical from case to case, and difficult to describe in detail. There are, however, many characteristics that define the appropriate medical expert.

The expert should be clinically active in the area of practice that pertains to the case. All cardiologists are not created equal, for example, and it doesn't help the attorney much to line up a diagnostician for a case involving a failed invasive procedure. Different medical and healthcare specialties are often divided into sub-specialties. Each one has its own accepted standards to be followed and its own particular body of knowledge to govern its practice. The attorney needs to make sure the expert draws from the same well as the defendant, whether they represent the plaintiff or the defense. Medical experts are found in any number of internet-based

databases. There are also bound publications that list such experts. One problem with these sources is that they include everyone who pays for the listing, or has been listed in court documents. Just by this method alone the attorney can't be confident that they have a solid, active expert whose practice area is the same as the case at hand, and who doesn't also give the impression of being a hired gun. This is where many firms feel that outside sources may perform better than their in-house counterparts. Unless the in-house staff are healthcare professionals it is hard to make sure that the specific needs of the situation are met by the specific expert that is retained. You also want to know that this is primarily a clinician who does legal consulting, not the other way around.

In this situation we are often able to give another layer of support to our clients, that of the Legal Nurse Consultant as a case manager and coordinator. The LNC can serve in a variety of roles. Initial record reviews are often done most efficiently by the LNC. This weeds out those claims that appear too weak to support the allegations, those with little or no apparent damage to claim, or those in which there appears to have been no inappropriate action on the part of the providers. The LNC is often able to give this analysis, organize the record, and have it neat and easy to read for the cost of an hour of a physician's time. In the end, it is a remarkably cost-efficient system. Cont on page 3

## The Psychiatric Forensic Exam

Continued from page 1

4. Juvenile: These evaluations may determine if the child accused of a crime should be tried as an adult or a juvenile.
  5. Guardianship and incompetency: Is the person being evaluated mentally competent to make or change a will? Is this person capable of making decisions for himself or does he need a guardian to make life decisions for him?
  6. Insurance: Psychological autopsy: These examinations are sometimes made after a death to conclude if the person being evaluated died of natural causes or was there a possibility that mental illness was involved? Was the death a suicide?
  7. Personal injury: These exams may decide what baseline functioning was to determine what, if any, damage there might be. Suits based on claims of negligence, malpractice and product liability would fall into this category.
  8. Workman's compensation: This would help to determine the extent of the injury and help assess future employability.
  9. Criminal: This includes the question of competency to stand trial but may also address the mental state of the defendant at the time the crime was committed. It will also help to guide sentencing and describe any mitigating circumstances.
- The professional performing the forensic psychiatric exam will need to know the background of the case as well as the legal issue being addressed. The psychiatric forensic exam also differs from a "routine" IME in that the psychiatrist or psychologist will usually require that no one be present from either side during the exam. While attendance by a member of the defense or plaintiff team is usual during a physical examination, this will usually taint the psychiatric exam. Video recording is usually not allowed for the same reason. In some instances, however, audio recording may be allowed. This should be discussed with the examiner prior to setting up the exam.
- The psychiatric forensic examination can be a useful tool in the course of any case that involves a question regarding behavior or mental health. The examiner can provide a snapshot of the client at the time of the exam itself and also give the requesting party an understanding of how the client's behavior may affect the case. It will explain the client's diagnosis in terms that can be used in the courtroom and assist in the outcome.

## Attorneys Are Legal Experts

Continued from page 2

There is a reason, after all, that medical providers utilize the expertise of nurses every day.

For those cases that do require testifying experts, the case manager is able to provide full service and support throughout the life of the case or just those specific services requested by the attorney. For the attorney, an experienced LNC firm provides more than just the names of a few expert witnesses.

Once the expert is retained we remain part of the process. When our expert witness is a physician, for example, we are often able to provide research assistance and coordinate support activities for the expert so that they are focused on their core function—advising the attorney. Since the consulting LNC is less expensive than the testifying nurse or physician it saves the attorney expenses for these activities. It also frees up the expert's time to do other tasks. And time is one thing there is often precious little of.

All in all, the use of expert witnesses in medical litigation is expensive, time-consuming, and most of all unavoidable. The use of technical and clinical experts in litigation has been ruled necessary by courts all over the world. Their purpose is to present the technical, detailed information in a way that is understandable to a jury that is often made up of non-technical people. To that end, the attorney needs to utilize all of the tools available to make this presentation. Whether these resources come from within or without they make the difference between success and failure.

## Latex Allergy Litigation

### Sarah McLain RN, CLNC, CLCP

Latex allergy sensitivity claims are becoming a more common phenomenon in workers' compensation systems throughout the United States. Causal relationship between latex exposure and allergic reactions, including anaphylactic shock, has led to the reporting of 23 deaths to the Federal Drug Administration between 1988 and 1995. Although most commonly associated with latex gloves, natural latex rubber is used in more than 40,000 medical, surgical and household products. It has been estimated that over 950,000 healthcare workers may become sensitized to latex protein during their careers. The purpose of this article is to report developing trends throughout the United States concerning latex allergy.

For the purpose of this article, three (3) types of diseases were considered in locating reported workers' compensation decisions. The first type was irritant contact dermatitis involving non-allergic reactions, which amounted to 80% of the disease base. Between 25% and 40% of glove wearers develop a mild irritant reaction. The second type of disease that was considered was Type IV hypersensitivity. This is a delayed reaction involving contact dermatitis producing the first inflammatory reaction in a delayed fashion, occurring at several hours and possibly up to four days after re-exposure to the substance initially. The third type of claim, the most serious, was Type I hypersensitivity, which occurs when an antigen interacts with an antibody. This type of allergic reaction produces an immediate response by the immune system that can occur within minutes or at one to two hours after exposure. Type I hypersensitivity usually presents with either localized hives, generalized hives with facial and

throat swelling, hives with asthma involvement of the nose, throat, ears, and digestive tract, or a life-threatening systemic reaction, anaphylaxis. For the purpose of this statistical analysis, only Type I hypersensitivity was utilized.

A review of the case law disclosed that 13 states had reported cases: Illinois, Mississippi, Minnesota, Montana, New York, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Virginia, Washington and Wisconsin. Of the 30 reported cases nationally, 21 were deemed to be compensable under the Workers' Compensation Acts of the various jurisdictions. A growing trend in claims from the period of 1987 through 1999 demonstrates that there has been a significant increase in those seeking benefits because of latex sensitivity. The projections demonstrate a consistently increasing number of claims for latex allergy sensitivity. The claims seem to be clustered in various jurisdictions including Wisconsin, New York, Texas, Virginia and South Dakota. Both Wisconsin and New York have dramatically demonstrated that a claim for latex sensitivity is extremely serious in nature and is indeed compensable. A significant percentage of the claims resulted in the awarding of total and permanent disability benefits to the claimant.

An orthodontic technician in Wisconsin was determined to be totally and permanently disabled on an "odd-lot" basis as she was unable to secure continuing and gainful employment due to her development of hypersensitivity. *Yannaras v. David Stangl*, 1996 WL 647561 (Wis.Lab.Ind.Rev.Com.). In another Wisconsin case, the administrative law judge held the applicant to be permanently and totally disabled based upon a physician's opinion that

additional medical treatment might be required in the future and that the individual would be unable to work until such time as there were advances in medical science that resulted in the ability to better control or reverse the injured worker's sensitivity. A registered nurse at the John Doyne Hospital was required to wear latex surgical gloves and often made frequent glove changes during one operation. Others performed similar glove changes in the operating theater. As a result, the nurse experienced latex allergy symptoms, which included respiratory difficulties. The claimant demonstrated that she was unable to engage in regular, continuous employment anywhere. *McMillan v. County Milwaukee*, 1996 WL 98882 (Wis.Lab.Ind.Rev.Com.).

In Montana, the court went so far as to award a nurse's aide total disability benefits and reviewed a need for special housing that she requested. This nurse's aide worked for the Kalispell Regional Hospital and was required to use latex gloves while working with a patient who was in isolation. During that procedure, her hands swelled up and she developed abdominal pain, nausea and vomiting. The health care worker was subsequently hospitalized, and when physicians conducted both rectal and pelvic examinations with latex gloves, her condition worsened. Finally, as a result of attempting to administer a barium enema utilizing latex equipment for the purpose of diagnosing her unexplained abdominal pain, her blood pressure began to fall and she went into anaphylactic shock. The workers' compensation hearing official considered the case so unique and the claimant's disability so severe because of its life-threatening potential that the official stated, "there may well be no equitable solution." In rendering her

cont on page 5

## Latex Allergy Litigation

Continued from page 4

totally and permanently disabled, the court also indicated that suitable housing should be located and that a price should be reached which would allow a lump sum advance of benefits. The court encouraged the parties to come to an agreement for housing adaptation. *Daniels v. Kalispell Regional Hospital*, WL 109850 (Mont. Work. Comp. Ct.).

In conclusion, it can be stated that reported workers' compensation

claims are increasing throughout the United States at a very rapid rate and that 70% of the reported decisions to date were held to be compensable by the courts. It can further be recognized that the claimants are being awarded disability benefits that are substantial in nature due to the severity of the injury and the resulting inability to return to the labor market.

Furthermore, home adaptation

is being considered because of the great proliferation of latex containing products which may be present in our everyday lives. Since workers' compensation remedies may in fact be inadequate to monetarily compensate the petitioners, the victims of latex allergies are also filing products liability claims against the suppliers, manufacturers and distributors of latex products.

## Road Rage-an all too Common Phenomena

Pattie Patterson RN, LNCC, CLCP

The other day I was driving down the road, minding my own business when I was coming up on an intersection where traffic was backed up. Since it was around 5:30 in the evening, I naturally assumed it was just from the evening traffic. As I got closer, I noticed a vehicle to my right racing up beside me. Still oblivious to what was up ahead; I just ignored the vehicle and inched along. A few minutes later, as I was sitting and not moving now I heard a commotion coming from my right. The driver in the vehicle next to me had rolled her window down and was cursing me. When I looked her vehicle's front bumper was inches from my front bumper and she was trying to push into the same spot I was in at the time. (She was actually crossed over into my lane.) Suffice to say, this behavior irritated me greatly and I refused to allow her entrance. She continued to try to push me out of the way with her vehicle, even though she could have easily gotten behind me, as there was no one there at the time. (Her reason for needing to get over was due to an accident in the right lane of the intersection, I realized as I moved forward a bit more. The police were clearing it off the road as I rode past.)

She finally gave up and

pulled in behind me, almost hitting my vehicle in the process. She then lightly "bumped" my vehicle so I moved to the right lane, out of her way. At the next stop light, she rolled down her passenger's side window and began screaming obscenities at me and calling me names. Among the things she said was that she should have just rammed my car to "make" me move. (Bright lady, huh, with the police right there. I wish she had.)

She then sped up and cut me off several times for the next 2 blocks, cutting in front of me, and then slamming on her brakes. I finally turned off and she was gone.

I give you this little scenario, as it is what prompted me to write this particular article, as I thought I might research it after the incident.

According to a study done at Colorado State University about one in four drivers had repeated bouts of anger that often led to actions like yelling, giving the finger, gunning the engine, speeding and cutting off the other car. Some of these road warriors don't think their anger is a problem, so they are unlikely to seek help or to try to defuse a situation before it boils over into violence, the scientists say.

For every extreme incident, there are thousands, perhaps millions, of angry drivers, people who are

rational until they get behind the wheel of a car. There, the scientists say, even the most mild-mannered person can be transformed into a raging tyrant.

One man told said that just the thought of driving makes him mad, and that he can feel himself getting angrier and angrier as he walks through the parking lot to his car each day.

In the study, conducted by CSU, even people who were classified having low anger, still felt hostile at times, but the frequency was about half that of angry drivers.

The hostility carries over into the workplace and into the home, and can lead to marital, family and health problems caused by the accumulated stress of hours of commuting in a smoldering state of rage.

In the study, the scientists divided a group of 153 male and female psychology students into three categories: very angry drivers who knew they had a problem; equally angry drivers who believed they did not have a problem, and low anger drivers.

The participants recorded the number of times they became angry behind the wheel, what triggered the anger, the number of times they engaged in some kind of aggression towards another driver - like swearing, flashing lights,

Cont on page 6

# Road Rage

Continued from page 5

giving the finger, and the number of times they engaged in risky behavior, such as speeding and driving while drunk.

Both high anger groups reported more than twice the number of angry episodes, about three times as many aggressive actions and about two thirds as many risky behaviors as the low anger group.

There was no difference between the amount of anger felt by men and women, but men were more likely to take aggressive and risky actions.

Those in the high anger group that did not think they had a problem were most likely to take risks on the road, such as speeding or driving while drunk.

Another anger expert at the

meeting, psychologist June Tangney of George Mason University in Fairfax, Va., says one reason driving brings out the beast in some people is the anonymity of the road.

She says, "You're not really confronted with the person. You're less likely to empathize because you are not dealing with a person with two eyes and a heart."

Another cause is the peculiar bond formed between humans and autos. "For some people, its like their car is part of them. If you threaten the car, you're threatening them. But, in a car, you've got a 3,000 pound weapon."

They predict the situation is going to get worse, as roads become more congested, the pace of life speeds up and drivers get more stressed. Earlier

research, for example, recorded a 7 percent a year increase in road rage violence from 1990 to 1995. These extreme incidents killed 200 and injured 12,000.

They are developing counseling programs to defuse angry drivers. Researchers are also experimenting with public service programs, such as billboards and radio announcements, aimed at calming motorists, or at least getting them to behave better. But these tactics most likely won't reach the hostile group that doesn't believe their anger is a problem. For them, possibly extreme measures like taking licenses and cars away from people whose angry actions repeatedly mean danger on the road.

## Medical-Legal Interface

**Pattie Patterson RN, LNCC CLCP**  
Legal Nurse Consultant-Certified  
Certified Life Care Planner  
6501 Galaxie Road  
Richmond, Va. 23228

Phone: 804-262-2991

Fax: 804-266-5701

Email: leglnurs@bellatlantic.net

*"We get to the heart of your case."*

