

COURTING THE CLINICIAN PRESENTING NEUROPSYCHOLOGICAL EVIDENCE IN TRAUMATIC BRAIN INJURY LITIGATION*

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ABSTRACT

The purpose of this paper is to educate the reader about some of the issues involved in presenting neuropsychological evidence in cases where a traumatic brain injury is either obvious or suspected. Particular emphasis will be directed toward the admissibility of neuropsychological evidence and clarifying the roles of neuropsychologists as treaters and experts. Some strategies will also be presented to assist neuropsychologists in preparing to give opinion testimony.

As professional and lay communities gain greater awareness of the existence and sequelae of traumatic brain injuries (TBI), neuropsychologists are becoming more frequently involved in litigation claims brought by people with TBI. As a result, there is a growing recognition of the role and value of experts in resolving such legal claims.

Usually, a lawsuit is filed after medical and rehabilitation professionals have already begun their work with the patient, but there are times when patients or their families retain an attorney before any medical or rehabilitation efforts have begun. In some cases, it is the lawyer who is responsible for assembling and coordinating a team of professionals, especially when relevant neurobehavioral issues have been thought to have been ignored or inadequately addressed in the early stages. Previously, this process might have taken place many months or even years after the accident. Now, meetings between lawyers and medical professionals occur much earlier, even while the patient is still in a coma or when he/she has just been released from the hospital and approved to return to work. This trend will mean that neuropsychologists will become involved in the formal process of litigation sooner than may have been the case previously.

For neuropsychologists, the experience of presenting expert testimony often leaves a distaste for the legal system and a reluctance or unwillingness to become involved in future cases where litigation may result or already exists. However, in cases where a person has suffered a TBI, the patient's financial potential for maximum recovery and competent life care is often dependent on the outcome of the lawsuit. Regardless of whether the professional initially becomes involved as a health care provider (i.e., treater) or is retained as an expert witness or consultant on behalf of either the plaintiff or defendant, that person has essentially the same ethical duties and obligations. These include conducting a thorough and objective evaluation of the injured person as well as presenting the results of the evaluation in an unbiased and non argumentative manner. Any failure to be thorough or objective in the evaluation or presentation of information and/or testimony could subject the professional, whether treater or expert, to discomfiting cross-examination by a wellprepared lawyer.

The purpose of this paper is to provide neuropsychologists with guidelines for their approach to TBI cases which may result or have resulted in litigation. Emphasis will be on the admissibility of neuropsychological evidence and clarifying the roles of neuropsychologists as treaters and experts. Some strategies will also be presented to assist neuropsychologists in preparing to give testimony. Unless otherwise specified, the information contained herein is generalized for all state and federal jurisdictions throughout the United States.

ISSUES OF ADMISSIBILITY

The admissibility of testimony from neuropsychologists and other "non-medical" experts pertaining to the cause and presence of brain dysfunction and prognosis has been questioned, even by members of the neuropsychological community (Satz, 1988). Initially, this was largely because of concerns about the competency and credibility of neuropsychologists/ clinical psychologists and because of deficiencies in the education and training of some experts who testify in court about brain damage. Whereas great advances have been made toward establishing credentials and reasonable standards for the practice of neuropsychology (INS-Division 40 Task Force, 1987), some states have limited the areas of testimony deemed allowable for neuropsychologists in brain injury cases (Satz, 1988; Schwartz, 1987). Moreover, there are still those "method skeptics" who challenge the scientific basis of the field of neuropsychology and any such experts' claims to valid legal standing in litigation (Faust, Hiers & Ziskin, 1994).

A recent review (Richardson & Adams, 1992) of a large series of appellate court decisions involving the use of neuropsychologists/clinical psychologists as experts has demonstrated that each and every jurisdiction which ruled on issues of current brain functioning since 1980 has consistently allowed neuropsychologists/clinical psychologists to testify as experts on the current condition of the brain. Testimony as to the cause of brain dysfunction was allowed in 9 of the 11 jurisdictions identified where that issue reached the appellate level. The Oregon appellate court opinion in *Cunningham v. Montgomery*, cited as 921 P. 2d 1355 (Or. App. 1996) is a recent example of a judicial acknowledgement of the propriety of allowing neuropsychologists to testify regarding the causation and sequelae of TBI. These issues have also been reviewed by Rothke (1992) with specific reference to recent appellate decisions in Illinois. Generally speaking, it appears that, in most jurisdictions, courts will allow neuropsychologists to testify regarding causation and most states have taken the same approach to prognosis following brain damage as they have on the causal relationship between injury and brain dysfunction. Neuropsychologists may be well-advised to consult with counsel in advance regarding the permitted scope of their testimony in the subject jurisdiction.

NEUROPSYCHOLOGIST AS TREATER OR EXPERT

Neuropsychologist as Treater

When a neuropsychologist evaluates a patient for the purpose of providing treatment or establishing a treatment plan, the neuropsychologist is labeled as a "treater" in the legal context. This is generally true even if counsel for the patient initiates the referral or assumes financial responsibility for the services rendered. However, when the neuropsychologist is retained solely to act as a consultant and/or expert witness at trial, and in virtually all cases where the defendant or defense counsel retains the neuropsychologist, he/she is generally labelled as an "expert". In truth, these labels should have little to do with how the neuropsychologist conducts the evaluation and forms his/her opinions. However, the distinction may be important to the attorneys who must present or respond to the testimony of the neuropsychologist.

When a neuropsychologist operates as a treater, he/she has certain duties to the patient who may be the plaintiff in a lawsuit seeking to recover damages for personal injuries. One duty is the preservation of confidentiality. A treater is generally prohibited from discussing the patient's care or condition with anyone other than the patient, his family, or other professionals (including attorneys) comprising the treatment team. In most jurisdictions, this prohibition extends to attorneys opposing the patient's lawsuit, as well as any investigators and experts acting on behalf of opposing counsel. An exception exists when defense counsel formally takes the deposition of the treater. In such instances, the treater is required to answer all questions regarding the patient's condition and prognosis and the bases for those opinions, save those relating to special circumstances or imminent danger.

The issue of patient confidentiality is one of the most important and relevant of all the ethical standards of The American Psychological Association's Ethical Principles of Psychologists and

Code of Conduct (American Psychological Association, 1992) and, except for some isolated cases, the protections of patient/psychologist confidentiality have been upheld at the state and federal levels. The patient/provider privilege belongs to the patient, not to the professional, and the patient may or may not waive his/her right to this privilege. However, a patient who engages in litigation essentially consents to a thorough investigation of his/her medical and psychological history. This consent anticipates that the formal discovery procedures inherent in litigation will be directed toward all identified treaters, including the treating neuropsychologist. Once the treater receives a subpoena for the production of records or to appear for a deposition, he/she is usually required by law to comply with the terms of the subpoena. This means that he/she must produce all records, reports, etc. connected with his/her role in the case. An exception exists when the treater obtains a court order extinguishing, also known as "quashing", or -modifying the subpoena.

In cases where the patient authorizes the treater to provide records or deposition testimony, a subpoena is generally considered unnecessary. Such authorization may come either from the patient directly or from his/her retained counsel. The most prudent course for neuropsychologists to follow is to require an express authorization signed by the patient or his guardian permitting the release of mental health and psychological records (not including raw test data) to the patient's attorneys. Counsel for the patient will then have the discretion to act on behalf of their client in determining the proper recipients of those records during the course of litigation.

When a patient is involved in litigation, it is necessary for the treater to discuss with his/her patient the limits to confidentiality and the possibility that the treater may have to disclose facts or impressions that may run counter to or in conflict with the patient's legal goals. (In contrast, an expert witness should, at the outset of the evaluation, inform the patient that the rules of confidentiality do not apply and that information is sought primarily for use in the litigation.) This should be done prior to the signing of a release. Some providers take the position that patients may be incapable of consenting, or should not have to consent, to the release of confidential psychiatric or psychological information. Therefore, they may refuse to divulge or release any information (including raw test data) provided by their patients. Such refusals occur not only in response to subpoenas, but sometimes even when the patient has provided an express authorization permitting the release of information. Refusals to provide requested information are not only improper and violative of the law, they are also potentially harmful to the patient. Treaters have an obvious duty to provide a level of care which is at least equal to the standard of care required under the circumstances. That means acting in a manner that is in accordance with the patient's "best interest", but professionals sometimes overlook or ignore their role in the litigation process. This could prove detrimental to the patient's ability to prove his/her case, which could have potentially negative consequences to treatment, to the patient/ provider relationship, and to the patient's financial and emotional well-being.

The release and sharing of neuropsychological test data, particularly with non-psychologists, has been a controversial issue. In fact, APA's Ethical Principles of Psychologists and Code of Conduct (Nos. 1.02 and 2.10, APA, 1992) strictly prohibit the release of raw test results and data to unqualified persons. This is largely to prevent the potential misuse of the data and to protect it from becoming part of the public domain. State laws may also address the sharing of test data with unqualified persons. Subpoenas and requests from attorneys for the release of raw test data often place the neuropsychologist in a situation wherein legal and ethical considerations appear to be at odds. In such situations, psychologists make "reasonable efforts" to satisfy both worlds. A recommended course of action (Tranel, 1994) might be to advise the requesting party to engage the consultation of another psychologist who is qualified to receive the data (this would still have to be upon consent of the patient). The receiving psychologist could then interpret the data for the attorney. This does not automatically mean that the receiving psychologist becomes the disclosed expert for opposing counsel. In fact, defense counsel is not required to disclose the name of the receiving psychologist to plaintiff's attorneys. The records can also be sent to an impartial third party -another psychologist - who agrees to receive and forward the data to the undisclosed expert or they can be sent to

opposing counsel with a signed agreement to provide the raw test protocols to their undisclosed expert and no one else and that the records will be destroyed upon conclusion of the case. The reader is referred to Trariel (1994) for additional information on ethical and legal considerations related to the release of psychological test data.

When served with a subpoena ordering the release of raw test data, the neuropsychologist should explain why he/she cannot comply with the request and recommend an alternative action (as detailed above). One does not have to automatically respond to the serving of a subpoena by prompt compliance to the legal demands without consideration of the ethics involved. A subpoena can be resisted (through a motion to quash); a court order, by contrast, cannot be legally resisted (only appealed). In the latter scenario, the neuropsychologist must comply with the judge's demand, but he/she should make his/her commitment to the Ethics Code known and take steps to resolve the conflict in a responsible manner. This might even include educating the judge about the relationship of the Ethics Code and the law.

Since patients who have suffered a TBI often depend on obtaining sufficient compensation to provide for their medical needs and compensate for their loss of income, the treater is often asked to provide information on behalf of the patient. This availability often requires the professional to meet with and educate counsel for the plaintiff regarding the patient's present condition and prognosis. This does not necessarily mean that the treater is the plaintiff's advocate; he/she is an advocate of the facts, not of the patient's legal claims. As such, the treater informs the attorney of the clinical findings and whether or not the psychological conditions substantiate the claimed damages or whether the patient is malingering, exaggerating, or affected in whole or part by other personality disorders which may or may not be related to the TBI. Failure on the part of counsel or treater to alert each other about relevant facts from the patient's past (e.g., sexual abuse, drug use, previous head trauma, etc.), or other facts in the present, may create serious gaps in the preparation for trial. Opportunities to resolve the lawsuit by settlement may also be hampered by a lack of information available to one or more parties.

Neuropsychologist as Expert

What are the roles of the neuropsychologist as expert? Do they differ from the roles of the treater? Generally speaking, the role of the expert is to provide the judge and jury with information and opinions that are outside the common knowledge and ordinary experience of lay persons. These opinions are to be based on special skill, knowledge, education, training, and experience that the expert calls upon when examining the facts of the case and the subject of an examination. The courts are guided by statutory provisions in the matter of expert testimony. All federal courts and most state courts follow Rule 702 of the Federal Rules of Evidence (1996) or its state equivalent.

Rule 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The use of the terms "treater" and "expert" sometimes create confusion among health care professionals and lawyers alike. While a "treater" is generally defined as one who has played a role in the treatment process, an "expert" is usually a person who has been retained solely for litigation purposes, to provide consultation, evaluation, and/or testimony at trial. Despite their seemingly different roles, treaters and experts alike are permitted to provide "opinion testimony", also called expert testimony, regarding matters outside common knowledge of lay persons. Therefore, the general principles regarding opinion testimony apply to both retained experts and treaters. These principles may be summarized as follows:

1. The proffered witness must be qualified as an expert in his/her field- During direct examination, proponent counsel must establish that the proffered witness is an expert in his/her field by virtue of specialized knowledge, skill, experience, training, or education. The trial judge will then determine whether the witness is qualified to offer expert testimony.

2. The need for expert testimony must be established (or obvious). In most instances, a trial judge will allow expert testimony only if the expert's specialized knowledge will assist the jury in understanding the evidence or in determining a disputed issue. If the expert's proposed testimony bears no relationship to the issues of the case, it will likely not be admitted by the trial court.

3. The proffered expert testimony must be scientifically reliable. The testimony to be offered by the expert must be reliable and scientifically supportable. Until recently, the test governing the admissibility of scientific evidence in federal court trials was enunciated in *Frye v. United States*, 293 F. 10 13 (DC Cir. 1923). Under the "Frye test," expert testimony is admissible only if the basis for the evidence has gained general acceptance in the relevant scientific community. If the proffered testimony does not meet the Frye "general acceptance" standard, the trial judge should not admit the testimony into evidence. In 1993, the United States Supreme Court replaced the Frye test in *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993). In *Daubert*, the Court held that the Frye test was too restrictive and not in accordance with the Federal Rules of Evidence. The Court established certain criteria for federal courts in determining whether expert testimony is truly and reliably "expert": (a) whether a theory or technique can be and has been tested; (b) whether a theory or technique has been subjected to peer review and publication; (c) in the case of a particular scientific technique, a trial court should consider the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and (d) a trial court may still consider whether a theory or technique is "generally accepted". Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique that has been able to attract only minimal support within the community may properly be viewed with skepticism.

It should be noted that many state courts continue to apply the Frye test of "general acceptance" in the scientific community. In any case where testimony is anticipated, the neuropsychologist should be aware of the standards to be applied by the court in order to properly prepare to support the professional opinions to be presented.

4. The probative value of the testimony must not be outweighed by its prejudicial effect. At the outset, it should be noted that in the sense that testimony usually favors one party over another, it may be considered prejudicial to the opposing party. Therefore, all testimony may be considered prejudicial. However, in some instances a trial judge may determine that proffered testimony or evidence will unfairly or unduly prejudice the jury. In those cases, the court may bar the testimony or evidence because the prejudicial effect outweighs the probative value. For example, gruesome photographs of an accident may be barred from admission when less graphic photographs are available which tend to establish the same facts. Although the objection "the prejudicial effect outweighs the probative value" is not likely to be voiced or sustained with respect to neuropsychological testimony or evidence, both experts and treaters must be prepared to answer questions to establish the probative value of their testimony.

McMahon and Satz (198 1) cite three tasks of the neuropsychologist during the treatment phase: "... determination of the dysfunction, determination of the effect of the dysfunction on the individual, and determination of prognosis" (p. 686). These tasks are a usual and customary part of a routine neuropsychological evaluation independent of whether or not the neuropsychologist is a treater or an expert. To these three, a fourth becomes especially important when the neuropsychologist is asked to provide expert testimony: determination of the cause of brain dysfunction. Additional activities for neuropsychologists who function as expert witnesses include: conferences with the lawyer; reporting the patient's status to the

lawyer; having his/her deposition taken during discovery; and presenting direct evidence and being cross-examined at trial.

A non-treating expert witness may be retained either on behalf of the patient or on behalf of a party opposing the patient in litigation. The expert is usually retained in anticipation of providing testimony in a deposition and at trial. However, sometimes an expert may be retained initially for consultation purposes only; he/she may be asked later to evaluate a patient and/or provide testimony as warranted. In all situations, the expert must maintain objectivity while at the same time accepting compensation from a party interested in the outcome of a lawsuit. As a treater, this may be difficult to do after a relationship has already been established with the patient. Psychologists should make an effort to avoid performing multiple and potentially conflicting roles in forensic matters and clarify role expectations in advance to the extent feasible, and thereafter as changes occur. In order to avoid compromising their professional judgment and objectivity and in order to avoid misleading others regarding their role" (APA Ethics Code No. 7.03; APA, 1992).

Defense counsel may make efforts to characterize the treater as someone whose testimony has been secured for legal purposes; plaintiff's counsel aspires to safeguard the treater role to counteract against claims of the orchestration of testimony for fiscal gain. The subtle pressure on the expert to provide opinions beneficial to the party retaining him must be resisted. The expert should never become an advocate, but rather must clearly and unmistakably define the limits of his/her opinions, procedures, and his/her prospective testimony. If his/her opinions are not supportive of the party who retained him/her, the expert must unequivocally inform counsel of his/her inability to advance certain positions desired by the hiring party. The expert who becomes an advocate, and strains beyond reasonable limits in postulating opinions may ultimately damage his/her own credibility and diminish or destroy his/her own effectiveness in the present or future cases.

TREATER AND EXPERT EVALUATIONS AND REPORTS: ARE THEY DIFFERENT?

Generally speaking, there should be no difference in content or form between a report that is written by a treating neuropsychologist and one written by a retained expert. Both should mention any impairment that the patient has and should describe any future treatment that might be warranted. Written and oral opinions should be expressed with a "reasonable degree of neuropsychological certainty". When the patient's history or medical records lead the neuropsychologist to conclude with a reasonable degree of neuropsychological certainty that the subject traumatic event was a cause (not necessarily the only cause) of the patient's condition, the neuropsychologist may testify in most jurisdictions to the casual connection between the event and the condition.

When a neuropsychologist operates as a treater, the evaluation and report are usually done in the context of the patient's recovery or rehabilitation. This is usually done in advance of a meeting with the patient's attorney, although sometimes the attorney will initiate an evaluation for treatment purposes. As a retained expert witness, the neuropsychologist typically meets or consults with the attorney in advance of seeing the patient and sometimes the patient is not seen at all. In these cases, the information that the expert neuropsychologist relies upon in advance of the evaluation is provided solely by the retaining attorney. It is incumbent upon the expert to request and receive all relevant information (e.g., academic, military, psychiatric records, etc.) so that a comprehensive understanding of the facts of the case can be achieved. The attorney should be requested to follow through and provide the expert with access to all of the requested material. Reliance on data that only serves to support the plaintiff or defense position will leave the expert open to attack on cross-examination.

Once the records have been reviewed, the retained expert and the attorney should consult in advance of either evaluating the claimant or before preparing the report or opinion. It is during this time that the expert can offer his/her opinion about the patient's condition and the

suspected causal relationship between the accident and the patient's degree of functional impairment. The lawyer will then have the opportunity to describe the legal issues surrounding the case and outline the expert's subsequent involvement or non-involvement in the proceedings. It might be determined that no evaluation is to be done; or, if it is done, that no report is to be generated. In many jurisdictions, the neuropsychologist's opinions may be expressed in the form of responses to written interrogatories. If counsel has not disclosed the neuropsychologist as a retained expert, they may decide to forego the preparation of written opinions because they do not intend to present the information at mediation or trial. This might be unusual or out of the ordinary for most neuropsychologists because their training traditionally dictates that they generate some type of written report after a patient is seen for an evaluation. Indeed, in most clinical situations, a written report is the usual procedural course. But for purposes of forensic or medical-legal activities, reports or testimony can be either written or oral, provided an examination of the individual has been conducted adequate to support one's statements and conclusions (see APA Ethics Code 7.02, APA, 1992).

One of the functions of retained experts is to review and critique the reports and opinions of treaters or opposing experts. They compare and contrast their own opinions and/or test results with the opinions and results of others and attempt to explain any differences that may appear. Opposing experts may have different opinions about the nature and severity of the injury, degree of functional impairment, prognosis, and cause of brain dysfunction. Such differences of opinion are true even among other "more objective" or "scientific" disciplines (e.g., neuroradiology) where identical results may be interpreted differently depending upon the training and education of professionals, their experience with the condition in question, and the criteria that they routinely apply. Again, the expert must resist the temptation to be an advocate for one side versus the other. The sound reminder, "I am here to present (or defend) my opinion or conclusions" is a critical component in the maintenance of objectivity and professional integrity.

WHAT TO EXPECT WHEN PROVIDING OPINION TESTIMONY

When providing testimony at a deposition or during a trial, neuropsychologists should expect to be questioned on a broad range of matters which are related either to the evaluation or treatment of patients in general, TBI patients more specifically, or to the particular patient at issue. They may also be asked to defend or attack the reliability and validity of certain tests or the field of neuropsychology at large. In all cases, it is important to follow the cardinal rule in providing opinion testimony: the professional must be able to state opinions "with a reasonable degree of certainty" within his/her field of expertise. The question posed by the lawyer will usually be phrased "Do you have an opinion with a reasonable degree of neuropsychological certainty?" If asked whether one has an opinion with a reasonable degree of medical certainty, the neuropsychologist should calmly remind the attorney that his opinions are given from the neuropsychological perspective.

In forming an opinion, the professional may rely on those materials commonly relied upon by like professionals (e.g., medical records, professional literature, patient histories, etc.) as well as his/her own experience with the patient. If the professional cannot state an opinion with a reasonable degree of certainty on a particular matter, he/she should clearly state that he/she has no opinion regarding the subject. Sometimes, professionals will give opinions about subjects which are outside the limits of their training or experience. This opens them up to attack by seasoned lawyers who will highlight any willingness to talk about matters outside the scope of one's expertise. Ultimately, it has the effect of damaging the credibility of the professional regarding those matters even within his/her expertise. It also has implications for the case in question as well as any future cases in which the neuropsychologist might be called upon to testify.

One note of caution is warranted. Prior to providing testimony in a case, the professional may wish to review pertinent literature which he/she has authored and transcripts of prior testimony that he/she has given. Often, opposing counsel will review such articles or

transcripts and frame questions designed to elicit inconsistent, or even contradictory, responses. Careful review of prior comments will help to ensure that the professional does not damage his/her credibility by testifying in the subject case in an inconsistent or contrary manner. Any articles or depositions retained by the professional are subject to discovery by, and production to, opposing counsel. Familiarity with the professional literature is at least as important as familiarity with one's own works. Attorneys are fond of confronting experts with authoritative literature that purports to disagree with the expert on a key point and an expert who disagrees with an authority can be branded as defiant or oppositional.

An additional note of caution, at the conclusion of the deposition, the expert will be asked whether or not he/she wishes to waive the right to read the transcript before signing it or to reserve signature until it can be read. Most attorneys recommend waiving as a convenience to the court reporter and because it saves time for themselves. Customarily, the expert should not waive reading and signing the transcript. Indeed, psychological and neuropsychological terms can be very complex and even the best reporter makes mistakes that could have significant implications for the case at hand (i.e., .01 level of confidence written as .10 level of confidence, percentile written as percentage, etc.). For a more complete review and explanation of the separate components of deposition and trial testimony, the reader is referred to Blau (1984, Chapter 10).

CONCLUSIONS

The consummate health care professional, whether acting as a treater or retained expert on behalf of plaintiff or defense, takes an interest in the fair and thorough evaluation and treatment of TBI patients. An objective analysis is required to foster the rehabilitation of the patient, to preserve the integrity of the professional (and the profession), and to provide the parties to the litigation with an accurate assessment of the cause of dysfunction, the patient's current level of functioning, and eventual prognosis. Thorough preparation prior to the presentation of testimony will enable the neuropsychologist to provide all interested parties with the information required by them to evaluate their respective positions. It will also help the professional maintain credibility and integrity in a system which, by nature, is an adversarial one.

Whether functioning as treaters or experts, neuropsychologists can achieve maximum effectiveness and minimize attacks on their credibility through strict adherence to APA's ethical Principles of Psychologists and Code of Conduct and by complying with the rules of the court in which they are asked to function. They are well advised to remember that successful presentation of neuropsychological evidence in TBI litigation rests on thorough evaluation and objective analysis.

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