mTBI Mock Trial: Battle of the Experts

The Players*:

- Nancy Hebben, Ph.D., ABPP (Defense attorneys)
- Paul Kaufmann, J.D., Ph.D., ABPP (Plaintiff attorneys)
- Honorable Judge Wayne Purdom (The Court)
- Robin Hanks, Ph.D., ABPP (Plaintiff neuropsychologist)
- Kevin Greve, Ph.D., ABPP (Defense neuropsychologist; Playing Dr. Kevin Greve)
- Bradley Axelrod, Ph.D., ABN (Defense psychiatrist)
- Catherine Marreiro, Ph.D., ABPP (playing Clinical Neuropsychologist Dr. Cynthia Bailey)
- * No conflict of interests to declare

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Learning Objectives

Participants will:

- 1: hear, understand, and recognize the limitations of neuropsychologist experts in the courtroom.
- 2: hear and understand common attacks on expert neuropsychological testimony, including expert impeachment, and learn effective professional responses to cross-examination that bolsters credibility and avoids pitfalls.
- 3: hear how practitioners take into account the race and culture of the plaintiffs when considering neuropsychological profiles and expert opinions.

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Howard v. Offshore Liftboats (2016)

- Basket transfer failed resulting in injuries.
- Alleged LOC resulting in battle of experts
- Sworn testimony of intact memory for all events before fall, recalled crawling after fall, and crew observed him go to the bathroom and "cracking jokes" in galley.
- GCS 15/15 upon docking 3.5 hours later.
- Negative CT, discharged same morning
- 6 week MRI negative, 4 month MRI 8mm microhemorrhage in right corona radiata.

Arguments against Admission

- more prejudicial than probative,
- confuses, rather than assists, the jury,
- inadmissible character evidence,
- inadmissible hearsay evidence,
- wrongfully intruding into the province of the jury, or
- not generally accepted by the relevant scientific community.

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Plaintiff seeks to exclude

Plaintiff files motion *in limine* to exclude expert opinion about malingering, noting

"methodology fails to meet the standards for the admissibility of expert testimony prescribed by FRE 702 and the Supreme Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* ...opinions with respect to "malingering" are irrelevant, constitute impermissible character evidence, and have a probative value which is substantially outweighed by the danger of unfair prejudice."

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Judge Rules

Experts allowed to testify about malingering

- does not invade the province of the jury
- is relevant to past, present and future medical condition
- is not impermissible character evidence
- probative value is not outweighed by unfair prejudice

Dr. Greve was allowed to testify at trial



Opening Statements

- The attorney's summary of the case
- A chance for the plaintiff attorney or defense attorney to present a narrative in which they begin to zealously advocate for their client
- Opening statements are NOT evidence
- Evidence consists of exhibits, witness testimony and photographs

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Opening Statement by Mr. Haynes Role The Court Plaintiff Attorney: Mr. Haynes Defense Attorney: Mr. Reich Player Judge Purdom Paul Kaufmann Nancy Hebben Nancy Hebben

Opening Statement by Mr. Reich Role The Court Defense Attorney: Mr. Reich Plaintiff Attorney: Mr. Haynes Player Judge Purdom Nancy Hebben Paul Kaufmann Paul Kaufmann

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Direct v. Cross Examination

Direct examination involves open questions posed to a witness who has been prepared by the attorney. Leading questions usually draw objections from opposing counsel.

Cross examination is less predictable, less rehearsed and may use more constrained and leading questions, intended to challenge the facts asserted in the direct exam.

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Direct and Re-Direct Examination of Dr. Larry Pollock by Mr. Haynes and Cross Examination of Dr. Larry Pollock by Mr. Plunkett	
Role	Player
The Court	Judge Purdom
Witness: Dr. Larry Pollock	Robin Hanks
Plaintiff Attorneys: Mr. Haynes; Mr. Zehl	Paul Kaufmann
Defense Attorney: Mr. Plunkett	Nancy Hebben

Larry Pollock, Ph.D.

Licensed Psychologist in Texas and Virginia

- Ph.D. (1973), Clinical Psychology, Syracuse University
- Internship at Baylor College of Medicine
- Not board certified in Clinical Neuropsychology
- Taught for 10 years at Austin State University
- Clinical Director of Project ReEntry where he conducts neuropsychological assessment, and the company provides cognitive remediation

Completed a neuropsychological examination of one of the plaintiffs and treated him for 21/2 years in his program

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Below chance performance

Dr. Pollock offered these explanations:

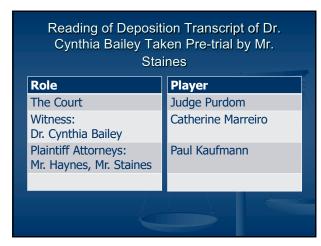
- Pain
- Limited Mobility
- Medication sedation
- Fatique
- Emotional issues
- Atypical positioning
- Upset about evaluation

But not malingering

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Expert Impeachment

- Challenging the accuracy or authenticity of expert opinion evidence.
- Expert opinion from previous testimony, when the expert erred.
- Admission of U.S. v. Stanford shows that previous courts found his expert opinions on malingering were simply wrong.
- Impeachment destroys expert credibility.



Cynthia Bailey, Ph.D, ABN

Licensed Psychologist in North Carolina

- Ph.D. (1989), University of Houston-Downtown
- Internship, Baylor University
- Clinical neuropsychologist, Vericare (2009-2011)
- Director of Neurocognitive and Counseling Services, Touchstone Neurorecovery Center (2011-2015)
- Clinical Neuropsychologist, Blue Ridge Neuropsychological Associates (2015-2020)
- Clinical Neuropsychologist, Medical Consultants Network, LLC (2013-present)

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Dr. Bailey Summary

Clarified Calvin did not need Touchstone

- Conducted a brief screening.
- Some unusual findings but insufficient information to identify malingering.
- Was unaware that Dr. Greve completed a comprehensive evaluation.
- "not overtly malingering" but would have benefitted from Dr. Greve's findings

Direct Examination of Dr. John Thompson by Mr. Plunkett and Cross Examination of Dr. John Thompson by Mr. Zehl Role Player The Court Judge Purdom Witness: **Bradley Axelrod** Dr. John Thompson Plaintiff Attorney: Paul Kaufmann Mr. Zehl Defense Attorney: Nancy Hebben Mr. Plunkett

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John Thompson, M.D.

Licensed to practice medicine in Louisiana

- Bachelor's (1982) University of Texas-San Antonio
- Medical degree (1986) University of Texas Medical-Galveston
- Psychiatry Residency including Forensic Psychiatry (1990), University of Florida
- Board Certified in Psychiatry (1992), certifications in Forensics (1994) and Addictions (1998)
- Chairman and Professor, Dept. of Psychiatry at Tulane University School of Medicine (1994-present)
- Clinical Director, Feliciana Forensic Facility

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Dr. Thompson Summary

After noting a strong consideration of malingering, from information reported

 Defers to neuropsychology and Dr. Greve on questions of malingering.

Offers other explanations, like inattention and reduced concentration due to pain.

Adding "I don't even like to think about diagnosing malingering."

Direct Examination of Dr. Kevin Greve by Mr. Reich Role The Court Witness: Dr. Kevin Greve Plaintiff Attorney: Mr. Zehl Defense Attorney: Mr. Reich Player Judge Purdom Kevin Greve Paul Kaufmann Nancy Hebben Nancy Hebben

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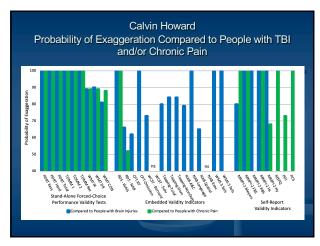
Kevin W. Greve, Ph.D., ABPP

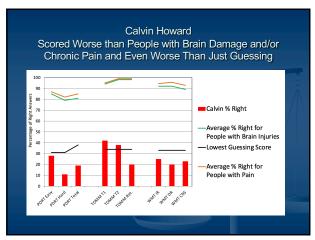
Licensed Psychologist in Louisiana, Texas, and Mississippi; Louisiana Specialty Licensure: Clinical Neuropsychology

- Board Certified in Clinical Neuropsychology (ABCN, 2004)
- Ph.D. (1991), MS (1988) Clinical Psychology, University of Elorida
- Faculty, Department of Psychology, University of New Orleans (1991 -2012), retired as University Research Professor
- Published 120 papers and chapters, over half related to malingering
- Jefferson Neurobehavioral Group, private practice since 1996
- Court accepted expert in clinical psychology and clinical neuropsychology

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Neuropsychological Findings | Table | Management | Manag

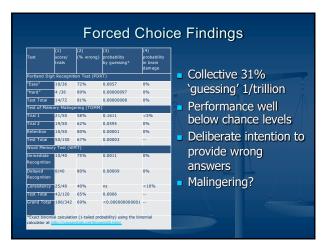




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Symptom validity

- MMPI-2 Response Bias raw scores (17, 21, and 20) extremely elevated across three separate administrations conducted by three different psychologists, scores that are only reported for individuals failing performance validity tests.
- MMPI–2 Symptom Validity Scale FBS yielded T-Scores of 109, 120, and 116, respectively.
- MMPI-2 Hs and Hy scales were also extremely elevated, consistent with a pervasive pattern of extreme over reporting of symptoms.
- Malingering?



Cross Examination of Dr. Kevin Greve by Mr. Zehl and Redirect by Mr. Reich	
Role	Player
The Court	Judge Purdom
Witness: Dr. Kevin Greve	Kevin Greve
Plaintiff Attorney: Mr. Zehl	Paul Kaufmann
Defense Attorney: Mr. Reich	Nancy Hebben

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Addressing Sociodemographic and Sociocultural Issues

- Use the best available normative comparisons for examinee's sociodemographic background
- Rely on local norms for interpretation of results of validity tests (when available)
- Significantly below chance forced-choice findings transcend sociocultural issues

Expert Opinions on Malingering

- Defense neuropsychologist Yes
- Treating neuropsychologist equivocal "not valid" but "not overtly malingering"
- Plaintiff neuropsychologist No
- Defense psychiatrist deferred as outside his area of expertise, noting testing refusal but adding "he answered my questions, so he wasn't universally uncooperative" and "I don't like to think about malingering."

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Heilbronner, RL, Sweet, JJ, Morgan, JE, Larrabee, GJ, Millis, SR, & Conference Participants (2009). American Academy of Clinical Neuropsychology Consensus Conference Statement on the Neuropsychological Assessment of Effort, Response Bias, and Malingering. *The Clinical Neuropsychologist*, 23, 1093-1129

Individuals presenting as litigants, defendants, or claimants in a criminal, civil, or disability proceeding or otherwise with motive to appear symptomatic show an increased risk of response bias or malingering. For this reason, individuals seen in a forensic context should be given measures that will assist in identifying or ruling out response bias.

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Heilbronner, RL, Sweet, JJ, Morgan, JE, Larrabee, GJ, Millis, SR, & Conference Participants (2009). American Academy of Clinical Neuropsychology Consensus Conference Statement on the Neuropsychological Assessment of Effort, Response Bias, and Malingering. The Clinical Neuropsychologist, 23, 1093-1129

When inconsistent or variable effort is shown to be present at any point during an evaluation, a reasonable and conservative conclusion is that all performances and obtained test scores may underestimate actual abilities.

Verdict

- \$ 3,262,100 and \$ 820,000 awarded.
- Receiving boat contributed more to comparative negligence (~ 80%).
- Transferring boat counsel considered this a good outcome and reported the expert malingering opinion played a significant role in lowering the award.

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Arguments against Admission Professional Issues Forensic Neuropsychology: Training, Scope of Practice, and Quality Control Paul M. Kaufmann, J.D., Ph.D., ABPP Diplomate in Clinical Neuropsychology, Practicing Attorney-at-Law Manfred F. Greiffenstein, Ph.D. ABPP Diplomate in Clinical Neuropsychology, Practicing Attorney-at-Law Manfred F. Greiffenstein, Ph.D. ABPP Diplomate in Clinical Neuropsychology, Diplomate in Forensic Psychology Courts increasingly use neuropsychology experts to assist in resthing logal questions about have relations and mental staff. Be grown of forensic constituting in recurspychology is well documented flower, and a consistent expension. Lawyers increasingly used consumed used consistent expension. Lawyers increasingly used consumed staff to produce the consistent expension. Lawyers increasingly used consumed staff to produce dependent on the consistent expension. Lawyers increasingly used consumed staff to produce the consistent expension. Lawyers increasingly used consumed staff to produce the consistent expension. Lawyers increasingly used consumed staff to produce the consistent expension. Lawyers increasingly used consumed staff consistent expension. Lawyers increasingly

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In Conclusion

Growth in forensic neuropsychology consulting is outpacing every related brain-behavior expertise, in part, because of superior methodology and the AACN Consensus Statements and Practice Guidelines.

Our methods need to be protected, not only by steps taken during litigation, but also through persistent advocacy for test security.