

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

1

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.

2

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.

3

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.

4

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."

5

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

6



7

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

8

Opening Statement by Mr. Haynes

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

9

Opening Statement by Mr. Reich

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

10

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.

11

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

12

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 2½ years in his program

13

Below chance performance

Dr. Pollock offered these explanations:

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

But not malingering

14

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.

15

Reading of Deposition Transcript of Dr.
Cynthia Bailey Taken Pre-trial by Mr.
Staines

Role	Player
The Court	Judge Purdom
Witness: Dr. Cynthia Bailey	Catherine Marreiro
Plaintiff Attorneys: Mr. Haynes, Mr. Staines	Paul Kaufmann

16

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)

17

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

18

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: Dr. John Thompson	Bradley Axelrod
Plaintiff Attorney: Mr. Zehl	Paul Kaufmann
Defense Attorney: Mr. Plunkett	Nancy Hebben

19

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

20

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."

21

Direct Examination of Dr. Kevin Greve 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

22

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 Florida
- 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

23

Neuropsychological Findings

Test	Score	Probability	Comparison Sample
Rey-Osterich Complex Figure	10	0%	TBI, chronic pain (n=3)
Digit Span Scaled Score	3	0%	TBI, chronic pain
Wechsler Memory Scale	11	2%	overall clinical sample
Word Choice	11	2%	overall clinical sample
Logical Memory II Recognition	17	20%	overall clinical sample
Visual Pattern Assoc. II Recognition	12	2%	overall clinical sample
Visual Reproduction II Recognition	0	2%	overall clinical sample
Reliable Digit Span	5	10%	overall clinical sample
Overall Combined probability	35/100%	0%	overall clinical sample Ind TBI
Overall Combined probability	55/100%	0%	overall clinical sample Ind TBI
Neuropsychological Assessment Summary			
Attention Index	58	0%	TBI
Language Index	58	0%	TBI
Speed Index	21	<10%	TBI
Basic Functions Index	63	1%	TBI
Guiness' Continuous Performance Test			
TBI Reaction Time SD	12.6	1%	
For Orientation	59	0%	mod-severe TBI
Memory Card Sorting	1.5	2%	mod-severe TBI
Rey-Osterich	1.5	2%	mod-severe TBI
Trail Making	1.5	2%	mod-severe TBI
Figure Copying Task	1.5	2%	mod-severe TBI
Combined	1.5	2%	TBI
Overseer	1.5	2%	TBI
Non-dominant	27.4	9%	full clinical sample

- Performed worse than 92% of those asked to feign memory deficits
- Consistent under-performance noted on multiple measures
- Patterns noted across 3 examinations
- Malingering?

24

Forced Choice Findings

Test	(1) score/ trials	(2) % wrong	(3) probability by guessing*	(4) probability in brain damage
Portland Digit Recognition Test (PORT)				
"Easy"	10/36	72%	0.0057	0%
"Hard"	4/36	89%	0.00000097	0%
Test Total	14/72	81%	0.00000008	0%
Test of Memory Malingering (TOMM)				
Trial 1	21/50	58%	0.1611	<5%
Trial 2	19/50	62%	0.0595	0%
Retention	10/50	80%	0.00001	0%
Test Total	50/150	67%	0.00003	--
Word Memory Test (WMT)				
Immediate Recognition	10/40	75%	0.0011	0%
Delayed Recognition	8/40	80%	0.00009	0%
Consistency	25/40	40%	ns	<10%
Test Total	42/120	65%	0.0006	--
Grand Total	106/242	69%	<0.000000000001	--

*Exact binomial calculation (1-tailed probability) using the binomial calculator at <http://www.psychstat.com/binomialcalc.html>

- Collective 31% 'guessing' 1/trillion
- Performance well below chance levels
- Deliberate intention to provide wrong answers
- Malingering?

28

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

29

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

30

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.”

31

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.

32

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.**

33

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.

34

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, Diplomate in Forensic Psychology
- Courts increasingly use neuropsychology experts to assist in resolving legal questions about brain-behavior relations and mental state. The growth of forensic consulting in neuropsychology is well documented (Sweet, et al., 2002; Heilbroner, 2004; Kaufmann, 2009), including pediatric populations (Sherman & Brooks, 2012). Braun et al. (2011) noted a 6% average rate of annual growth in legal cases referencing neuropsychology from 2005 to 2009, and an unprecedented 20% increase in 2010. No other area of neuropsychology practice has documented such consistent expansion. Lawyers increasingly seek consultation from neuropsychologist experts because clinical neuropsychologists apply a scientific approach (Larrabee, 2012) that meets judicial standards for expert testimony (Kaufmann, 2012). See Figure 1 for updated comparisons of related disciplines through 2011.

35

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.

36
