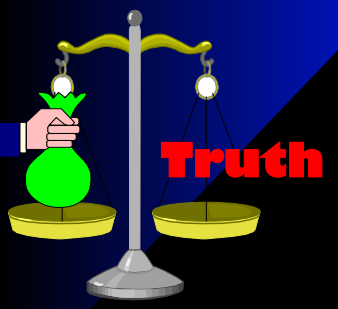
Ethics for Brain Injury Rehabilitation in Medicolegal Situations

Independent Skinnerian Examination (ISE)



PART II (of III), 1996-2004,
New Reinforcement Paradigm:
Prevention of False Positives

New York Academy of TBI, *2004*
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Surveys on Ethical Concerns of Psychologists: Pope & Vetter (1992)

Major Ethical Concerns in Clinical Psychology Practice:
APA Membership (N=679)

- #1 Confidentiality
- #2 Dual Relationships
- #3 Payment Concerns
- #4 Teaching / Training Concerns
- #5 Forensics

Surveys on Ethical Concerns of Psychologists: Brittain et al (1997)

Major Ethical Concerns in Neuropsychological Practice: NAN Membership (N=679)

Examiner Competence	64%
Inappropriate Use of Tests	61%
Conflict Between Law and Ethics	55%
Misrepresentation as a Neuropsychologist	53%
Non-Neuropsychologist Performing Evaluations	52%
Conflict Between Organization and Ethics	52%

Surveys on Ethical Concerns of Psychologists: Brittain et al (1997)

Major Ethical Concerns in Neuropsychological Practice: NAN Membership (N=679)

Professional Witness / Hired Gun	45%
Release of Raw Data	45%
Lawyer Doctor Shopping	43%
Dual Relationships	42%
Confidentiality	41%

Applying General Medical Ethics to the Medicolegal Arena

- Based on the primary ethical principle of **Respect for Others**, four core bioethical principles *(Beauchamp & Childress, 1994)*:
  - **Autonomy**: *Self-determination re: healthcare-related decisions*
  - **Non-maleficence**: *Doing no harm*
  - **Beneficience**: *Patient welfare promotion*
  - **Justice**: *Equitable distribution of the burdens & benefits of care*

ADVERSARIAL V SCIENTIFIC METHOD

Trial Attorney	Treating Clinician	Independent Examiner	Trial Consultant
Win Case Max/Min Award;	Clinical DX & TX -> Recovery	Independent DX, Infer Causation, Apportion	Assist Atty Advocacy
Adversarial Advocate	Dr - Pt Relationship Present Clin. Findings	Present Indep. Findings	Use Scientific Knowledge to Assist Atty Advocate
Best Advocacy	Competent Clin. DX & TX	Objectivty & Independence	Accurate Rep. Scientific Knowledge
Black/White Either/Or	Multifactorial	???	???

Perception Bias (magnet)

- We see what we look for. We look for what we know. - *Goethe*
- The theories we choose determine what we allow ourselves to see. - *Albert Einstein*
- We don't see things as they are, we see things as we are. - Anais Nin
- When we don't even believe that something is possible or that it exists, we fail to see it at all. - *Dorothy Otnow Lewis*
- For every complex problem there is an easy answer... And it is wrong. - *H. L. Menchen*
- "The tendency to organize knowledge around a belief system, and then to defend that belief system against challenge, appears to be a fundamental human characteristic...."

We See What We Look For,
We Look For What We Know
Goethe

Survey of Attitudes Regarding Workers Compensation

	Disability Evaluating Professionals (N=27)	Med. Psych Service (N=9)	Case Managers (N=16); 7 =W.C.	Neuropsy Psych, PM&R MDs (27)	W.C. Pts (N=22)
Question					
1: % of Injured Workers Who Exaggerate/ Malinger	19.2	24.7	28.5	19.2	35.0
2: % Injured Worker that W.C. Insurance Treats < Fairly	49.2	62.5	23.2	44.6	74.2
3: % Employers Who Treat Injured Workers < Fairly	53.5	41.2	32.7	36.7	65
4: Likelihood Employer Would Treat You (if injured) < Fairly	43.75	54.2	46.4	23.6	70.8
44.65: Likelihood W.C. Would Treat You (if injured) < Fairly	60	65.9	48.9	40.4	77.8
IV-3: Sex	66% Female	57% Female	100% Female	76% Male	75% Male

Objectivy and Bias in Clinical Practice

Martelli, M.F., Zasler, N.D. & LeFever, F. (2000). Preliminary consumer guidelines to choosing a well suited neuropsychologist for assessment and rehabilitation of accuired brain injury. Brain Injury Source, 4, 4, 36-39.

Three shades of bias:

- Plaintiff Advocate;
- Defense Advocate;
- Retaining Side Advocate
  - All = maleficence to opposing side in legal proceedings.
  - Two (plaintiff, defendent) = probably mixed.

Medicolegal Aspects of the IME

Civil Rule 35(a): IME of PI subject:

- Insurance Company Request (their selection, expense)
- Defendent (insurance) Request

Nature of Doctor Visits & IME's:

- Regular MD visits interently aversive to many (esp males, introverted, etc.)
- MD distrust (competence, interest) often high
- IME = Adversarial = Anxiogenic = amplifies Aversion, Neg Reactions, Disrtrust, Distress, Resentment...
- A Coerced Exam with a Stranger; a Non-informing, Non-accountable, Agent of Restriction

The Federal Judiciary Center Study (2000)

Johnson, M.T., Krafka, C. and Cecil, J.S. Expert testimony in federal civil trials: a preliminary analysis. Federal Judicial Center, 2000.

- Surveyed All Federal Judges, Attorneys from Docket Cases
  - 5 point Likert
    - *1=Completely Objective to 5 = Completely Biased*
  - High Return Rates
    - Average Ratings of Experts: approximately 3.85
    - Similar Results in 1990 and 2000 Studies

Compensation Seeking Status & Examiner Bias (Cont)

- *McBeath, 2000*
  - Examiner response bias in doubting sincerity or veracity of complaints
- *Chapman & Einstein, 2000*
  - Biases in the face of uncertainty in medical decision-making
- *Eylon et al, 2000*
  - Bias in arbitrators' case perceptions and award recommendations
- *Sayer & Thuras, 2002*
  - More negative clinician view of PTSD comp seekers vs non comp seekers

Compensation, Injury and Adersarialism

Longitudinal study of PI MVA litigants *(Evans, 1994)*

- Strongest predictors of successful outcome were
  - Inclusion of psychological services in the Tx plan
  - Receipt of immediate intervention, with return to work (RTW) treatment focus
  - RTW at reduced status or modified duties
- >= 6 months: uncooperativeness and delayed bill paying of medical insurance carriers (vs. medical symptoms) was most frequently reported stressor.
- Insurance carrier bill payment very strongly predicted RTW
  - Prompt (<=30 days): 97% had returned to work.
  - Delayed (> 90 days): 4% had returned to work.

Compensation, Injury & Adversarialism (cont)

Incidence & claim closure speed of Whiplash injury after change to no-fault in Saskatchawan, CA *(Cassidy, et al, 2000)*

- Claims dropped by 28%
- Time to claim settlement was cut by 54%.
- Intensity of neck pain, level of physical functioning, depressive symptoms, having attorney increased claim closure for both
- Their Conclusion: Compensation for pain and suffering increases frequency, duration of claims and delays recovery
- Note: No-fault system eliminated most court actions, income replacement and medical benefits were increased and medical care became universal, without barriers
  - Pre-injury anxiety was associated with delayed claim closure only under the tort system
- More Valid Conclusion: removal of financial disincentives and medicolegal associated treatment barriers and anxiety provocation has a facilitative effect on post-injury recovery.

Case Examples: Harm from Nonobjectivity

Case 1-3, 4-5, 6, 7-9, 10

Publication in process

Conclusions

- Overwhelming prepondenrance of Black/White, dichotomous findings; misrepresent expected natural variability, true uncertainty; "Creeping Adversarialism?"
  - Typicaly Strong Expression of Opposite Opinions in Less than Certain cases
- Numerous examples of subtle to more significant harm: delayed to denied treatment, symptom exacerbation/ complication, emotional distress, iatrogenic disability
- Examiner mistrust & skepticism, hypervigilance to secondary gain/ neglect of secondary losses, anxiety as primary reinforcement, anachronistric dualism and dichotomous thinking, frequent inadequate assessments, frequently conducted by various disciplined professionals with little to no specific treatment experience or training with particiular disorder or spectrum, illogical rehab recommendations, harmful nontreatment, exacerbation of impairment/ disability & delayed recovery
- Percentage of harm in our cases outnumbers cases of gross exxageration, probable malingering, non-injury causation, etc.
- Evidence from case studies consistent with available data on perceptions of prevalent nonobjectivity, systemic Examiner secondary gain
- Pattern seems to be increasing and parallels growth of restrictive health care & IME industry

Minimum Impact Soft Tissue (<$1000. car damage) Profile

- Claims segmented to "MIST" unit
- Carrier takes very hard line
  - Limit payment over 1k
  - Litigate All/Most Cases
  - Use Biomechanics Experts early
  - Difficult Settlements & Trial: Discourage plaintiff atty interest
  - If major injury (e.g., disc) --> low value (courtesy) offers --> Litigate with MIST experts
- Frequent Violations: *Fail to:*
  - Adopt, implement reasonable standards for prompt claims investigation
  - Pay claims (without conducting reasonable investigation)
  - Provide reasonable, prompt explanation for denial of claims or compromise settlement

Specific Impediments to Adaptation that Can Increase Likelihood of Response Bias in Pts *(& NPs???)*

- Anger or Resentment or Perceived Mistreatment (e.g., declining reimbursement from insurance companies; declining salaries, etc.)
- Fear of Failure Or Rejection/ Damaged Goods / Loss of Self-Esteem, Efficacy, Confidence Assoc w Residual Impairments (e.g. declining prestige, status, respect, productivity in changing market)
- Job Dissatisfaction (e.g., fighting for authorization)
- Insufficient Residual Coping Resources / Skills (e.g., for competing for remaining reimbursed work, finding something not in decline)
- Disuse Atrophy
- Fear of Loosing Disability Status, Benefits, Safety Net (Medicolegal = our safety net in restrictive environment where can't get regular funding)
- Perceptions of High Compensability for injury (or highly compensated medicolegal work)
- Discrepancies between Personality / Coping Style Behaviors and Injury Consequences (cf Newly Restrictive Health Env = Injury)
- Fear of Pain, Re-injury/Extension/Exacerbation (Health Reimb. inj extension)

Independent Medical Exams?

- Purchasers of Insurance Medical Exams*
  - Motivation: Reduce "Occurrences"
  - Regulators: Actuaries, Public Relations
  - Growth Factors: CEO, Board
    - Recent Trend: Preemptive PR, Lobbying Campaign
      (Confirmatory Selection; Urban Legends; Promote Revulsion of Excesses in Treaters/PTs, Atty's & Lobbysts for Tort reform, etc)
- Results:
  - Precipitous Decrease in Authorized Health Care Payments, and Regard for Health Care Treaters
  - Precipitous Increase in IME Utilization and Insurance ***Profits***, with Parallel Increase in Medicolegal Practice, Pubs, Talks, etc..
    - 11 major Insurers: Avg 47% Profit Increase, Q3, 2002
    - Premiums rise 15.4%; health costs only 12% (2003)
    - Uninsured: 7.2 M <16yo, 39.4M < 65, 2001 (20% US Pop)

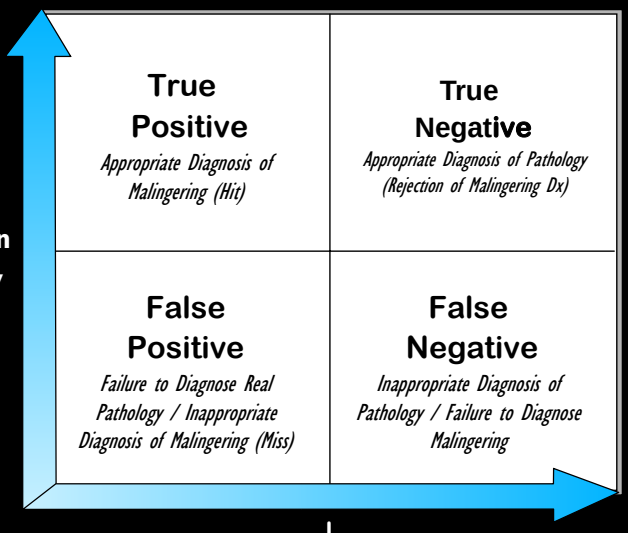
- Note: Oregon WCB Adopted this 'honest' name change

SKINNERIAN ASSESSMENT*

- Behavior is Determined by Environmental Reinforcers
- Societal / Cultural Behavior Determined by Collective Environmental Reinforcers
- Whatever Controls Environmental Reinforcers Control Society/ Culture

*Pigeons peck where pellets drop!

Decision Making Theory: Diagnostic Formulation of Malingering



DX Decision Validity

Diagnostic Decision
Accept | Reject

Considerations

- Consequences of False Positive vs. False Negative
- Cost and Availability of Treatment Resources
- Salience, Strength of Reward of Pathology Diagnosis

Compare 1985 (fear of under-diagnosis) and 2002 (fear of over-diagnosis; more restrictive health care system)

INSURANCE PROFIT & WINNING DIAGNOSES

- Malingering --> *No Payment*
- Pre-existing, Little Exacerbation --> *Little Payment*
- Psychological, Non-Organic --> *Small Payment*
- Mostly Psychological --> *Some Payment*
- Mostly Organic --> *More Payment*
- Pure TBI --> Big Payment = Profit Constrainer

INSURANCE PROFIT & WINNING* DIAGNOSES

- . ** Where the Money is...*

Primary Topics Covered In 337 Forensic Conference Presentations

Abstracted in ACN, JCEN, TCN, 1990-2000 (Title & Abstract). *Sweet et al (2002).* The Prominence of Forensic Neuropsychology. TCN, 16, 481-494

Topic	Number of Presentations	% of All Forensic Presentations
Malingering	*242*	*72*
Measures of Cognitive Abilities	14	4
Measures of Personality/Emotion	21	6
Objective	(20)	(95)
Non-specific	(1)	(5)
Projective	-	-
Pathology	13	4
Head/Brain Injury	(7)	(54)

INSURANCE PROFIT & WINNING* Neuropsych Income

- **Or, Where the Money is!*

A. Clinical Treatment Reimbursement, 1990-2000: Sharp Decline
B. Medicolegal Work, IME expenditures, 1990-2000: Sharp Increase
C. The Prominence of Forensic Neuropsychology. *Sweet et al (i2002).*

Year	Topic	# of Forensic NP Presentations	% of All NP Presentations
1990		*12*	*1%*
2000		*46**	*10%*

Year	Topic	# of Forensic NP Articles	% of All NP Articles
1990		*5*	*4%*
2000		*26**	*14%*

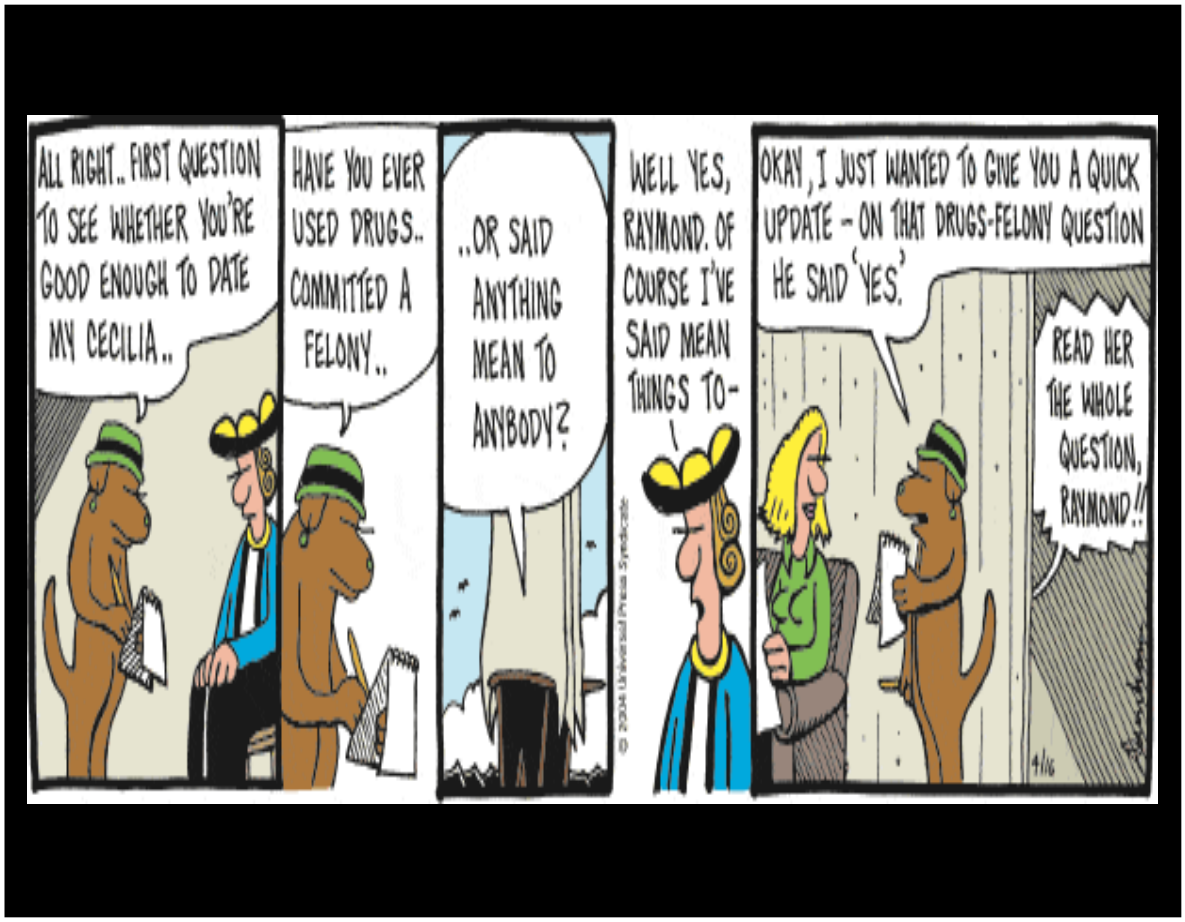
86%=Malingering

Binder, Rohling & Larabee (1997) MTBI Metaanalysis

Statistical Justification for Clinicians Rejecting most MTBI diagnoses?

... Just Say No To MTBI?

Pendulum Swing...



Analysis of a Pellet Pecker*

(List borrowed from Lloyd Cripe, in press; Title adapted from BF Skinner)

- 1. " I don't believe that a human could be significantly injured by a mild head injury and if they are, they should snap-out of it in a few weeks...
- 2. If they don't snap out of it, they are weak manipulative people and whatever problems they continue to have are due to their pre-existing weaknesses or desire to win the lottery.
- 3. Any sign of poor effort means manipulation and malingering.
- 4. If the patient shows poor effort on the one test of effort that I cherish, all the others mean nothing and the patient is most probably consciously malingering.
- 5. If the patient does okay on the effort test(s) and shows any weaknesses (variability) on the neuropsychological tests, it can only be explained by 'other factors' especially 'emotional factors.' ...

Pellet Pecker Tricks *(continued)*

- 6. ...Elevations on the MMPI are dead-ringer signs of "emotional factors."
- 7. If a patient has elevations on the MMPI, that explains everything and instantly negates any other poor test performances even though there is little or no correlation between the MMPI and NP tests.
- 8. What the patient says doesn't matter.
- 9. Self-report is useless, except the self-report on the MMPI, and my self-report!
- 10. Test scores are reality...regardless of Patient presentation and the reality of the patient....

Pellet Pecker Tricks *(continued)*

- 11. ...Anyone that is involved in medical-legal litigation is either deceiving (patient) or being deceived (plaintiff counsel and experts), except me! I am the only one that can keep my head straight in all of this.
- 12. All the treating persons that have seen this patient know less than I, have been duped and must have scrambled-eggs (or possibly shit) for brains.
- 13. How I behave in an examination has no impact whatsoever upon the patient's behavior. Only they can manipulate the outcome.
- 14. Neuropsychological test data is never wrong and is near rocket-science.
- 15. Record review is never influenced by my biases! ...

Pellet Pecker ... (continued)

- 16. ...What is written in records is solid truth, especially the parts I like and the parts that get my attention.
- 17. If you look long and hard enough, you can always find something in the history that explains away the current complaints of the patient.
- 18. Money is the only thing that matters and motivates people. All humans, except me, are money grubbing greedy bastards and will sell their souls for some bucks!
- 19. Secondary-gain means everything and losses mean nothing!
- 20. The last chapter has been written on mild head injury and I know what it says!"

Medicolegal Aspects of the IME:

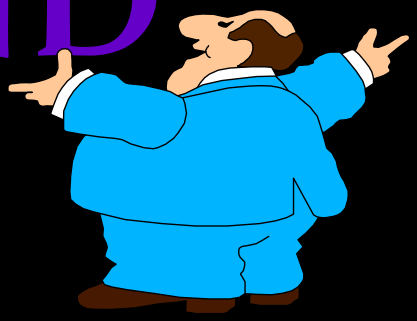
Adversarial Exam and Critical Responses*

Plaintiff Atty Arguments. *Witness Would Ensure:*

- Justice: Exam not conducted "in secret" (ind. constitutional right to open court process)
- Justice: For insurance company required exam with selected, highly paid expert accountable only to them
- No inquiries into illegitimate scope matters
- Procedure, tests, & results reported accurately
- Exam doesn't become taking of a deposition re: facts & issues
- IME examiner's attitude, tone, behavior are professional
- Minimally invasive, as possible, consistent with case nature
- Monitor what questions asked, not, tests, not, etc.
- Reassure client re: procedures/ testing to prevent misinterpretation

**Why would anyone want to invade our assessments... or sit for 8 hours of testing?*

THE END



NEXT: Part III

Possible Solutions