Protecting the brain injury survivor from unscrupulous defense neuropsychologist testing

By Thomas Cecil

Brain injury survivors suffering cognitive and emotional damages are ill suited for adversarial litigation. Traumatic brain injury "survivors may well have cognitive symptoms that impair their ability to competently participate in their case." (Hornstein, *Social Aspects*, in Textbook of Traumatic Brain Injury 2nd ed. (Silver et al. edit., 2011) p. 528.)

> For example, posttraumatic amnesia may interfere with both the ability to recall events following the injury and the ability to recall appointments, names of witnesses, and documents needed …. Increased distractibility may make the coherent presentation of information problematic, especially in the face of skeptical cross-examination … survivors can thus be caught in a vicious circle, their cognitive symptoms worsening their ability to deal with litigation, and the consequent stress worsening their cognitive symptoms.

(*Ibid.*)

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The defense neuropsychological examination is a stressful and potentially damaging event for the brain injured plaintiff.

> Those experienced in the field of forensic medical examinations are well aware that a cottage industry has grown in the United States for providing so-called IMEs …. Lax (2004) argued that the IME approach can be characterized as a tool to standardize a product to be marketed to corporate clients, rather than as a precise method to assess … health conditions.

(Granacher, *Clinical Legal Issues*, in Textbook of Traumatic Brain Injury 3rd ed., (Silver et al. edit., 2019) p. 894.)

With declining clinical practice reimbursement rates, the motivation for financial gain in forensic work coupled with a lack of patient relationship and accountability provides an incentive for poor examiner performance and bias in favor of their corporate clients. Fortunately, California law provides critical protections that should be part of every agreement or court order for a defense mental examination.

Strict Standards Exist for Conducting an Involuntary Neuropsychological Examination

Mental examinations are authorized by Code of Civil Procedure section 2032.310. Due to the personally intrusive and sensitive nature of the exam, a defendant is only permitted to move for an order which "shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the person or persons who will perform the examination." (*Ibid.*) The parties can also stipulate to the terms and conditions of the examination.

In the context of an involuntary psychological examination conducted in adversarial civil litigation, the forensic neuropsychologist is not acting as a clinical treating neuropsychologist and there is no psychologist-patient relationship. The neuropsychologist is serving as a paid consultant ostensibly "to inform the attorney(s), as well as the 'trier of fact' … of the neuropsychological findings and to present unbiased opinions and answers to specific questions pertinent to the case, based on relevant scientific and clinical evidence." (Board of Directors (2007) American Academy of Clinical Neuropsychology (AACN) Practice Guidelines for Neuropsychological Assessment and Consultation, The Clinical Neuropsychologist, 21:2, 209-231.) Working in a forensic setting, the neuropsychologist must be thoroughly familiar with the legal responsibilities for an expert witness. As such, they must conform their conduct to the rules of civil litigation. Professional guidelines, customs and practices and unreasonable claims of test material security cannot stand above the law and must accommodate California statutory and case law governing civil discovery, evidence and trial. "Similarly, applicable federal and state law supersede these guidelines." (*Ibid.*)

The forensic neuropsychologist is constrained by law to provide the name of each test that will be administered, and nothing less should be tolerated.

Pre-Exam Identification of Tests, Recording of Entire Exam and Exchange of Test Data and Test Materials Stop Cheaters

Under common law, counsel is not allowed to attend the defense forensic neuropsychological examination, an examination that will include extensive and intrusive one-on-one questioning and testing of the brain injured plaintiff. Consequently, state law provides several important safeguards: prior identification of each test to be administered, audio recordation of the entire examination, and a complete exchange of all materials relied upon. That is the "bargain" the Discovery Act imposes for allowing the defense forensic neuropsychologist private and unfettered access to a represented brain injured plaintiff in an adversarial proceeding.

Don't Ask, Don't Get: Demand List of all Diagnostic Tests to Be Administered

With respect to providing a list of all diagnostic tests which will be administered, the code requires it. "An order granting a physical or mental examination shall specify the person or persons who may perform the examination, as well as the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination." (Code Civ. Proc., § 2032.320) As noted in *Carpenter v. Superior Court* (2006) 141 Cal.App.4th 249, 260 [45 Cal.Rptr.3d 821, 827] "The way to describe these 'diagnostic tests and procedures'—fully and in detail—is to list them by name." Disclosure of the tests ahead of the involuntary mental examination protects against the use of illegitimate or inappropriate tests being used to construct a biased defense opinion.

> Requiring the court to identify the permissible diagnostic tests and procedures, by name, confirms that the court has weighed the risks of unwarranted intrusion upon the plaintiff against the defendant's need for a meaningful opportunity to test the plaintiff's claims of physical or mental injury. Furthermore, the resulting specificity and clarity of the order will also aid the examiner in understanding and complying with the parameters imposed by the court.

(*Id.* at p. 261.)

When confronted with a request for a forensic mental examination, you should demand a list of the specific tests that will be administered in time to "consider whether the proposed tests are inappropriate, irrelevant, or abusive …." (*Id.* at p. 267.) No other tests should be permitted.

Unfortunately, many forensic neuropsychologists evade this requirement by providing a laundry list of possible tests they may use under the guise that they cannot commit to a list until they have interviewed the injured party. In the forensic setting, however, by the time of the defense neuropsychological examination, defense counsel will have provided the examiner with plaintiff's medical records, including plaintiff's clinical mental evaluation, past medical records, employment and education records, and sworn answers to interrogatories and deposition testimony.

With extensive records available to formulate a working understanding of the neuropsychological issues at play, the argument that the neuropsychologist will not know which tests to give until the interview is not credible. The forensic neuropsychologist is constrained by law to provide the name of each test that will be administered, and nothing less should be tolerated.

But be prepared to fight should defendant file a motion for a mental examination. A declaration from a qualified mental health consultant is necessary to provide the court with evidentiary support for the protections sought. If the defense forensic neuropsychologist is a known "frequent flyer" with a history of questionable conduct or biased views, include such evidence to illustrate the need for test disclosure, recording and materials. Otherwise, you run the risk that the court will invoke its "discretion" to simply trust the highly compensated defense neuropsychologist professional witness based on an idealistic and naïve notion that the examiner is unmotivated by financial gain and will always act ethically. Trust, but verify.

All Ears: Ensure Entire Exam is Recorded

A second important safeguard is the right to record the entire mental examination. "The examiner and examinee shall have the right to record a mental examination by audio technology." (Code Civ. Proc., § 2032.530.) Unless test conditions are

optimal, and test protocols and instructions are meticulously followed, an invalid and likely biased outcome will result.

> It is not difficult to get a brain damaged patient to do poorly on a psychological examination, for the quality of the performance can be exceedingly vulnerable to external influences or changes in internal states. All an examiner need do is make these patients tired or anxious, or subject them to any one of a number of distractions most people ordinarily do not even notice, and their test scores will plummet.

(Lezak et al., Neuropsychological Assessment, 5th Ed., 2012, p. 153.) An audio record of the entire examination safeguards the validity of the results.

To obtain valid and credible test results, test protocols must be scrupulously followed by the examiner.

> Standard conditions are prescribed by the test-maker to ensure that each administration of the test is as much like every other administration as possible so that scores obtained on the different test administrations can be compared. To this end, many test-makers give detailed direction on the presentation of their test, including specific instructions on word usage, handling the material, etc. Highly standardized test administration is necessary when using norms of tests that have a fine-graded and statistically well standardized scoring system, such as the Wechsler Intelligence Scale tests. By exposing each patient to nearly identical situations, the standardization of testing procedures also enable the examiner to discover the individual characteristics of each patient's responses.

(*Ibid.*)

The demand to record the entire examination is often met with a counteroffer to allow recordation of the interview but not the test administration due to test content security concerns. Again, in the context of a civil lawsuit, the defense neuropsychologist is not above the law which clearly authorizes recordation of the entire exam.

"Nothing in the applicable statute suggests that the right of the examiner or examinee is limited to recording only selected parts of the examination." (*Golfland Entertainment Centers, Inc. v. Superior Court* (2003) 108 Cal.App.4th 739, 750 [133 Cal.Rptr.2d 828, 836].)

Partial recording "would defeat the main purposes of the audiotaping, which are to ensure that the examiner does not overstep the bounds set by the court for the mental examination, that the context of the responses can be judged for purposes of trial, that the examinee's interests are protected (especially since the examinee's counsel ordinarily will not be present), and that any evidence of abuse can be presented to the court. [Citation omitted]" (*Ibid.*) Test publishers' security concerns are easily dealt with by a protective order not to disclose test questions.

Seeing Is Believing: Get the Test Data and Materials

With respect to the exchange of tests, instructions, protocols, answers, notes, observations, scoring materials, and test validity documentation, publishers' policies, the right to effectively prepare for trial, and to meaningfully cross-exam the forensic neuropsychologist, California legislation provides the necessary authority to obtain this documentation.

> A test's documentation typically specifies the nature of the test; the use(s) for which it was developed; the processes involved in the test's development; technical information related to scoring, interpretation, and evidence of validity, fairness, and reliability/precision; scaling, norming, and standard-setting information if appropriate to the instrument; and guidelines for test administration, reporting, and interpretation. … The information may be reported in documents such as test manuals, technical manuals, user's guides, research reports, specimen sets, examination kits, directions for test administrators and scorers, or preview materials for test takers.

(Standards for educational and psychological testing / American Educational Research Association, American Psychological Association, National Council on Measurement in Education (2014), p. 123.)

Neuropsychologists resist disclosure of their raw data and test materials based on professional guidelines and test publisher contract and copy right provisions. The

prohibitions are not absolute. In civil litigation, test data and test material security can be secured by a protective order restricting the use of the materials to the specific case and otherwise prohibiting public disclosure. Professional ethical rules as well as the positions of the test publishers acknowledge production pursuant to a protective order is appropriate. (*Id.* at p. 117; American Psychological Association, Ethical principles of psychologists and code of conduct (2017), sections 9.04 and 9.11; *Carpenter v. Superior Court*, *supra*, 141 Cal.App.4th 249, 274.)

Direct access to the test data and materials provides you with a critical opportunity to confront the defense neuropsychologist and more effectively attack the expert's opinions in ways that may not be appreciated by an assisting neuropsychologist consultant. Thus, Evidence Code section 721 specifically provides counsel can *fully cross-examine* the expert forensic neuropsychologist on the factual basis of the opinions provided.

> [A] witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

(*Ibid.*)

The right to cross-examine an expert witness is fundamental to a fair trial and the search for truth

> Cross-examination-described by Wigmore as "'the greatest legal engine ever invented for the discovery of truth'" [citations] has two purposes. Its chief purpose is "to test the credibility, knowledge and recollection of the witness. [citations] ['to sift, explain, or modify what has been said on the examination in chief, and to discredit the witness']; [citation] [¶] The other purpose is to elicit additional evidence." [citations] Because it relates to the fundamental fairness of the proceedings, cross-examination is said to represent an "absolute right," not merely a privilege [citations] and denial or undue restriction thereof may be reversible error. [citation]

(*Fost v. Superior Court* (2000) 80 Cal. App.4th 724, 733-34 [95 Cal.Rptr.2d 620, 626].)

Undoubtedly the forensic neuropsychologist's opinions will be based on the tests. Direct access to the test materials allows fuller examination to assess whether the opinions are based on novel and unreliable tests, substandard testing conditions, deviations from test protocols and instructions, unfair test sequencing, confusing word usage, mistiming, etc., all of which is relevant to test result validity and examiner bias. Thus where "the facts underlying the expert's opinion are proved to be false or nonexistent, not only is the expert's opinion destroyed but the falsity permeates his entire testimony; it tends to prove his untruthfulness as a witness." (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923-24 [184 Cal. Rptr. 393, 402-03].) Without direct access to test data and materials, the ability to effectively cross-examine the defense forensic neuropsychologist is unfairly impaired and the truth loses out.

Code Civil Procedure section 2032.610 provides another safeguard and additional support for disclosure of the test documentation in that it allows the plaintiff to request that defense neuropsychologist "deliver … a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner."

Although no California state court has directly addressed this issue, federal courts interpreting similar language have ordered test data and materials produced. "The plaintiff has also requested copies of the raw data of the test and related documents. Under Rule 35(b)(1), Dr. Cancro is required to submit to the plaintiff a 'detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions.' Furthermore, pursuant to Rule 26(a)(2)(B), ASOMA is required to disclose the raw data from the MMPI–II if it intends to call either Dr. Cancro or Dr. Maxfield as a witness at trial, since the data forms part of the basis for their expert testimony." (*Hirschheimer v. Associated Metals & Minerals Corp.* (S.D.N.Y., Dec. 12, 1995, No. 94 CIV. 6155(JKF)) 1995 WL 736901, at *5.)

More recent decisions have reached the similar results. (See generally, *Sapone v. Grand Targhee Inc.* (D. Wyo., Aug. 9, 2000, No. 00-CV-020-J) 2000 WL 35615926, at *2 [disclosure of raw data and test materials]; *Drago v. Tishman Const. Corp. of New York* (N.Y. Sup. Ct. 2004) 4 Misc.3d 354, 358 [777 N.Y.S.2d 889, 892-93] [same]; *Tibbs v. Adams* (E.D. Cal., June 25, 2008, No. CIV.S052334LKKKJMP) 2008 WL 2633233, at *2 ["Even if respondent made no Daubert claim or if that claim is bootless, he is nevertheless entitled to the materials, including the raw test data, upon which Dr. Geiger relied"); *Page v. Hertz Corp.* (D.S.D., Nov. 15, 2011, No. CIV. 09-5098) 2011 WL 5553489, at *8 [disclosure of raw data without restriction]; *Katon v. United States* (D.S.D., June 21, 2018, No. 5:16-CV-05023-JLV) 2018 WL 3079718, at *3 [disclosure of test items, instructions and administration procedures, scoring procedures, and test norms]; *Ioane v. Noll* (E.D. Cal., July 22, 2020, No. 107CV00620AWIEPG) 2020 WL 4208365, at *4 and cases cited therein [order to produce test materials directly to counsel pursuant to protective order]; and *Glennon v. Performance Food Group, Inc.* (S.D. Ga., July 23, 2021, No. 2:20-CV-38) 2021 WL 3130050, at *6 [disclosure of raw data and test materials subject to protective order]. But see, *Collins v. TIAA–CREF*, No. 3:06CV304–C, 2008 WL 3981462, at *4 (W.D.N.C. Aug.22, 2008) [disclosure to qualified psychologist]; *Taylor v. Erna*, No. CIVA 08-10534, 2009 WL 2425839, at *2 (D. Mass. Aug. 3, 2009) [tests disclosed to expert with non-disclosure agreement]; and *Detroit Edison Company v. National Labor Relations Board*, (1979) 440 U.S. 301, 320 [99 S.Ct. 1123, 1133, 59 L.Ed.2d 333] [order requiring company to disclose employee scores to Union was erroneous].)

Due to the risk of a large damage award to the brain injury survivor, insurers and corporate defendants take allegations of brain damage seriously, scale their defense budgets up accordingly and aggressively defend these cases. Often, they hire the same forensic neuropsychologists known to the plaintiffs' bar for unprofessional biased evaluations and opinions. Strict insistence on available legal protections provided by state law to obtain a detailed stipulation and protective order is critically important to protecting the vulnerable brain injury survivor's dignity, privacy and ability to obtain adequate compensation in civil litigation. ■