The Holy Grail uncovered?

Who says your client is faking it? Methods for preemptively and scientifically validating, diagnosing, and treating injured clients' chronic pain

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Two scientifically documented online expert systems, already successfully used without challenge in numerous cases in a variety of jurisdictions, could help you get your genuinely-suffering clients the full compensation they deserve more expeditiously while reducing the number of hours you waste on clients whose complaints end up not being legitimate.

Bogus malingering tests

For years defense attorneys have been back-footing plaintiffs' attorneys through the employment of expert medical witnesses brandishing the results of 'psychological' tests with the putative ability to show which plaintiffs complaining of chronic pain and other maladies are 'fakers and malingerers'.

The December 2007 issue of Plaintiff magazine contains a comprehensive review of such tests.[1] In this article Dorothy Clay Sims explains why these 'malingering' tests are 'of dubious scientific validity' and urges plaintiffs' attorneys, when faced with attempts to introduce testimony based upon them, to give greater consideration to "motions in limine based on scientific reproducibility standards."

More recently, a March 2008 front-page Wall Street Journal article entitled *Malingerer Test Roils Personal-Injury Law focuses on the "Fake Bad" scale of the Minnesota Multiphasic Personality Inventory (MMPI)*, arguably the most notorious of the various psychological tests relied upon by defense counsel.[2]

The WSJ article points out that in May 2007 a panel from the American Psychological Association concluded that there appeared to be a lack of good research supporting the MMPI/Fake Bad scale and that, in two Florida cases last year, state judges barred its use following special hearings on whether it was scientifically valid enough to be used as courtroom evidence. The article also cites the guides Dorothy Clay Sims has written on how plaintiffs' lawyers should approach challenging the Fake Bad test.

It is encouraging that, after so many years, the battle has been widely joined against the admissibility of the MMPI and other tests as evidence of faking and malingering. That said, by the time such objections can be raised from a procedural standpoint, it is likely that many months if not years will have elapsed, that large numbers of hours and other resources will have been spent on preparing for trial, and that the injured plaintiff will still be suffering from his or her chronic pain.

A legitimate pain validity test

Fortunately, a significantly less time-consuming, less expensive, and more effective approach is now available.

To address the problem of accurately differentiating claimants with valid complaints of pain from ones who are malingering, faking or exaggerating, faculty members at Johns Hopkins University School of Medicine and another highly regarded pain clinic developed a verbal test – the Pain Validity Test – which was originally validated on 796 actual chronic pain patients, with results published in seven peer-reviewed articles in medical and other journals.[3,4,5,6,7,8,9]

As documented in the most recent of these articles, published in April 2008, the Pain Validity Test (PVT) can predict – with 85 percent statistical certainty – which auto accident, workers comp, or other personal injury claimants will have mild or no abnormalities on objective medical tests such as MRIs, myelograms, CTs, 3D-CTs, flexion-extension x-rays, electromyography, nerve conduction studies, quantitative flow-meter studies, nerve blocks, root blocks, etc., i.e. who are faking their pain or exaggerating it.

More importantly, the Pain Validity Test can also identify – *with 95 percent certainty* – which claimants will have moderate or severe abnormalities on such objective tests, i.e. whose complaints of chronic pain are legitimate.

The key concept underlying all of the "psychological" tests which Dorothy Clay Sims and a growing number of other observers so rightly decry is that they try to measure personality traits and then assume that there is a correlation between personality and medical disease. This assumption ignores the fact that medical disease and psychiatric disease are independent events.[10] Logically, it is possible for a claimant with pre-existing psychiatric problems to subsequently get a herniated disc as the result of being hit by a truck.

In fact, the actual question to be answered is: "Despite pre-existing or co-existing psychiatric disorders, does the patient/client/claimant have a real organic basis for his or her pain?"

Comprehensive searches of the peer-reviewed literature have failed to uncover a single study correlating the results of the 'psychological' tests examined by Ms. Sims with the presence or absence of organic pathology as measured by objective medical tests such as CTs, MRIs, EMGs, nerve conduction velocity studies, etc. Indeed, several articles positively document that the MMPI *cannot* predict the presence or absence of organic pathology.[11,12,13]

The PVT would thus appear to be the only test that can answer the question: "Is there real organic pathology to account for the patient's complaint of pain?" irrespective of pre-existing or co-existing psychological problems.

The PVT has already been successfully used without challenge at the pre-deposition, deposition, and trial stages in numerous cases in a variety of jurisdictions, and written confirmation of this is available from the attorneys involved.

The PVT is available online in English or Spanish and can be completed in 10 to 15 minutes over the Internet under proctored conditions at specially trained physical and occupational therapy clinics nationwide.

Dorothy and the Wizard of Odds

In addition to having been scientifically validated in numerous peer-reviewed studies, the Pain Validity Test meets all of the objections which, in the December 2007 issue of Plaintiff, Dorothy Clay Sims raised against the so-called malingering tests commonly used by defense attorneys and their doctors.

The Pain Validity Test was originally developed and validated with 796 auto accident, workers compensation, and other personal injury patients complaining of unresolved chronic pain. This sample was thus virtually identical to one of the key plaintiff groups whose veracity defense attorneys frequently use the MMPI and other psychological tests to impugn – personal injury plaintiffs with chronic pain who are not getting well.

The PVT normally takes only 10 to 15 minutes to complete and is not preceded by any other sort of test activity. This maximizes the likelihood that test-takers will stay on task and not become frustrated or angry.

In the vast majority of cases, the plaintiff 's attorney will ask the plaintiff to take the PVT. By definition, plaintiffs are thus not being forced to take a test ordered by doctors whom they do not trust.

So that plaintiffs can take it in their native language, the PVT can now be administered online in English or Spanish. It has also been translated into German, Russian, Arabic, Italian, Portuguese and French; on request special arrangements can be made for these versions to be made available online as well.

As mentioned previously, the PVT can be administered under proctored conditions at specially trained physical and occupational therapy clinics nationwide. The "neutrality" of these testing venues helps to minimize any pressure plaintiffs may feel. Proctoring of the test is carried out by specially trained employees of the clinics. If necessary, these proctors are prepared to physically assist patients who are not experienced with computers or who suffer from vision loss, carpal tunnel syndrome, or difficulty in sitting.

Finally, the objective of the Johns Hopkins faculty members, who originally developed the PVT, was to make the most effective possible use of available neurosurgical infrastructure. It did this by identifying chronic pain patients who were legitimate and would therefore be likely to benefit from surgery and weeding out patients whose pain in all probability had no objective *organic basis*.

Now get them better

A second expert system appears to have great potential for further shortening the road to satisfactorily resolving plaintiffs' suffering and obtaining appropriate levels of compensation on their behalf.

Past research reports indicate that 40 percent to 67 percent of chronic pain patients involved in litigation are misdiagnosed.[14, 15] Moreover, when evaluating the diagnosis of complex regional pain syndrome type I (CRPS I), formerly called reflex sympathetic dystrophy (RSD), one researcher found that 71 percent of the patients who were told they had only CRPS I actually had nerve entrapment syndromes and that 26 percent had a combination of both nerve entrapment syndrome and CRPS I.[16] This means that 97 percent of patients diagnosed as having CRPS I were completely misdiagnosed or only partially diagnosed.

Similarly, in another specialized diagnostic situation the overlooked diagnosis rate for people who survived lightning strikes was 93 percent, and for people who survived electrical injury the rate was 98 percent.[17] These and other errors in diagnoses prolong treatment or result in inappropriate treatment with poor outcomes.

Psychiatric problems almost inevitably arise in response to chronic pain and not the other way around as insurance companies are fond of asserting.[18, 19] For instance, 77 percent of patients seen at one highly regarded pain clinic had coexisting depression and chronic pain. However, when questioned about pre-existing depression, 89 percent of these patients reported that they had never had significant depression before the onset of their pain.[20]

The presence of psychiatric problems in chronic pain patients, even though it is a normal response to chronic pain, biases many physicians that results in less extensive medical evaluations.[21, 22] Such biases influence both the duration and the extent of an evaluation. Some physicians spend less than 15 minutes with patients,[23] while other "high volume" physicians have reduced by 30 percent the amount of time they spend with their patients.[24]

Compounding the tendency for physicians to spend less time asking questions of their patients and carefully listening to their responses is what many observers see as a decline in diagnostic capabilities. In fact, an article in the March 12, 2008, edition of the Wall Street Journal flatly states, "Diagnostic skills are in decline. A reliance on lab tests and X-rays has stunted doctors' willingness and ability to perform top-notch medical histories and physical exams."[25]

In light of these reductions in both diagnostic skills and the amount of time physicians are willing or able to devote to making diagnoses, an automated history-taking and diagnostic system (an "expert system") would be a desirable efficiency. This may improve the accuracy of diagnosis and treatment, since among other things a comprehensive questionnaire can ask questions overlooked by the time-conscious physician and also provide consistently accurate diagnoses.

One such "expert system" for chronic pain patients has been recently published. It is known as the Diagnostic Paradigm & Treatment Algorithm (DP&TA).

The DP&TA was developed with more than 7,000 chronic pain patients over a period of 30 years at the highly regarded pain clinic which also developed the Pain Validity Test and whose staff members were at the time also faculty members at the Johns Hopkins Medical School. It consists of 72 questions with 2,008 possible answers and has been able to achieve a 97 percent correlation with diagnoses given by the medical director at the clinic.[26]

In addition to providing a comprehensive set of actual diagnoses, the DP&TA generates specific and detailed treatment algorithms which begin with the least expensive and invasive tests and treatments and progress through a series of increasingly complex tests and treatments. By following the recommended course of tests and treatments, a treating physician can expect results comparable to those achieved at the clinic.

Like the Pain Validity Test, the Diagnostic Paradigm & Treatment Algorithm is available in English or Spanish. Depending on the nature and number of the patient's symptoms, it can be completed in 15 to 90 minutes over the Internet under proctored conditions at specially trained physical and occupational therapy clinics nationwide.

But does it work?

Most workers' compensation insurance carriers report return-to-work rates of less than one percent for workers' compensation claimants out of work for two years or more. In contrast, applying the unique diagnostic approaches embodied in the DP&TA to the same type of claimant, the pain clinic responsible for creating it published outcome studies reporting a return to work rate of 19.5 percent for workers' compensation cases and 62.5 percent for auto accident cases. Moreover, the clinic achieved a 90 percent reduction in the use of medication and a 45 percent reduction in doctor visits.[27]

One stone, four birds

For a surprisingly small upfront investment, the tests have the ability to help plaintiffs and their attorneys in a number of different ways. These include:

- Enabling attorneys to determine at any early state whether clients' complaints of chronic pain resulting from an injury are legitimate and thereby making it possible for them to avoid wasting precious hours on cases of little or no merit.
- Making defendants and their attorneys more amenable to 'reasonable discussion' at an earlier stage by preemptively 1) providing them with scientifically valid documentation that such plaintiffs are in fact legitimate and 2) debunking independent medical examiners' use of 'psychological' tests as evidence of malingering.
- Providing the proper and accurate diagnoses and specific treatment regimens that will achieve what is the vast majority of plaintiffs' attorneys' greatest priority: getting their clients better more quickly and at lower cost.
- Paradoxically, lowering insurance costs by reducing the expensive delaying-games defendants and their attorneys are now able to engage in, absent the virtually irrefutable scientific documentation of actual injuries, and the best way of treating them, which the two tests provide.

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