A LEGAL ANALYSIS INTO POOR VALIDITY TESTING WITHIN NEUROPSYCHOLOGICAL ASSESSMENTS - MALINGERERS OR MISUNDERSTOOD

By: Matthew Sutton and Daniel Garas

It is often agreed that validity testing should be completed as part of any neuropsychological assessment involving injured parties (see *Fraser v Persaud*, [2023] O.J. No. 959, for example).

When looking at negative validity scores, collateral evidence must be considered, including whether there is:

- symptomology that impacts the results (for example, brain injury symptomology like increased irritability or impatience);
- a language barrier affecting comprehension;
- negative response bias (otherwise known as a "cry for help")[1]; and,
- cultural factors (for example, cultural social stigma attached to mental health).[2]

TORT: Court Recognition of TBI Impacts on Validity Scores

The Court is starting to recognize that negative validity scores do not automatically mean that the Plaintiff is trying to exaggerate their injuries (or secondary symptomology) in order to secure a more favourable outcome.

A helpful case is the 2017 Court decision in *Kwok v Abecassis*.[3] In *Kwok*, the Court agreed that failed validity testing shows that the individual did not perform to the best of their ability, however, they go on to determine that failed testing does **not** mean the absence of a brain injury.[4]

Looking specifically at how brain injury sequalae may lower validity scores, the Court in *Kwok* states that a:

> *"…lack of engagement and being unable to sustain attention on the task will affect the results, as will impatience, low frustration tolerance and fatigue….[the Plaintiff] was not motivated to do the testing, so did not give it much effort. Being fed up and thinking of the exercise as unimportant are likely the main reasons that the testing resulted in invalid scores."*[5]

At trial, validity test scores typically go to the reliability of the expert's opinion and/or the weight of their opinion[6] rather than to admissibility. However, in some decisions (mostly outside of Ontario), Courts have excluded evidence involving low validity scores or have limited the testimony of the expert relying on the results of that assessment (for example, by preventing the expert from commenting on general credibility). [7]

---

[1] *c*, 2023 ONLAT 21-004152/AABS.
[2] *16-002234 v Unica Insurance Inc.*, 2017 ONLAT 16-002234/AABS at para. 28.
[3] *Kwok v. Abecassis*, 2017 ONSC 164.
[4] *Ibid* at para. 111.
[5] *Ibid*.
[6] See *Elbakhiet v. Palmer*, [2012] O.J. No. 4470; and, [*The Applicant] vs. Portage La Prairie Mutual Insurance Company*, 2019 ONLAT 18-001837/AABS [where little weight was given to the report at paragraph 15].
[7] See *Brough v Richmond*, 2003 BCSC 512; *Gagnon v Black*, 2004 NBQB 202; *Sovani v Jin*, 2005 BCSC 1854; *Makara v. Weihmann*, 2005 BCSC 1667; and, *Hornick v Kochinsky*, [2005] O.J. No. 1629, [2005] O.T.C. 292.

ACCIDENT BENEFITS

The Licence Appeal Tribunal ("LAT") has also ruled in favour of Applicants that have scored poorly on validity testing.

For example, in *Ratnam v Primmum Insurance Company*, the LAT found the Applicant was catastrophically impaired despite invalid testing that the insurer relied upon from the neuropsychological insurer's examination. Despite finding that the Applicant was deliberately attempting to frustrate the efforts of the IE assessor[8], it was determined that the Applicant's assessor's two different assessments (completed years apart) outlined a striking deterioration in the Applicant's condition.[9] Here it is evident that the LAT reviewed all relevant collateral evidence notwithstanding the poor validity score.

In another decision, *Nguyen v TD Insurance Meloche Monnex*, issues with validity testing were overcome by the fact that the Applicant was found by the Tribunal to be a credible witness through their consistent testimony.[10]

HELPFUL TIPS

Where an injured person scores low on validity testing lawyers should consider:

- Relying on observations made by family and friends that support the impairments raised by the Plaintiff (practical application includes "Will Say" Statements);
- Comparing test results to a "baseline" (including testing, observations of friends, family, co-workers and others, documents and self-reporting);[11]
- Comparing the Report to the Plaintiff's medical records from their family physician and other practitioners;[12]
- Arguing that the different neuropsychological tests completed (if available) illustrates a difference in the person's cognitive and psychological impairments; and,
- Contrasting these scores with the results of the Plaintiff's reported symptoms and other testing completed by that same assessor.[13]

HELPFUL RESOURCES TO CONSIDER

- Oatley-McLeish Guide to Personal Injury Practice in Motor Vehicle Cases;
- Mild Traumatic Brain Injury: Symptom Validity Assessment and Malingering by Dominic Carone;
- Validity Assessment in Clinical Neuropsychological Practice, Evaluating and Managing Noncredible Performance, Edited by Ryan W. Schroeder and Phillip K. Martin; and,
- Assessment of Feigned Cognitive Impairment, A Neuropsychological Perspective, Edited by Kyle Brauer Boone.

---

[8] *Ratnam v Primmum Insurance Company*, 2021 ONLAT 19-006706/AABS.
[9] *Ibid* at para. 43.
[10] *Nguyen v. TD Insurance Meloche Monnex*, 2023 ONLAT 19-012682/AABS at para. 39.
[11] Oatley-McLeish Guide to Personal Injury Practice in Motor Vehicle Cases, "The Importance of Established a Baseline", s.146:6.
[12] G.*F. vs. Aviva Insurance Company*, 2020 ONLAT 18-007850/AABS at para. 16.
[13] *Ahmed v. Security National Insurance Company*, 2024 ONLAT 22-009000/AABS at para. 30.