

# COGNITIVE IMPAIRMENT AND THE PRACTICE OF LAW

2016 Office of Attorney Ethics Training Conference Supreme Court

## Supreme Court of New Jersey

Princeton Junction, New Jersey

Robert B. Sica, Ph.D., FACPN, Director, Neuropsychological Rehab Services - Lifespan.

2100 Highway 33

Neptune, New Jersey 07753

Jersey Shore University Medical Center, Meridian Neuroscience Division

---

### OUTLINE

#### Identification.

1. What is Clinical Neuropsychology/Forensic Neuropsychology.
2. Neuropsychological Examination (NPE).
3. What is the biological integrity of cognitive brain functions?
4. Definition - “Objective evidence” - medical, psychological, neuropsychological evidence that exceeds merely the subjective statements of the patient or doctor.
5. Components - Performance validity testing, Symptom validity testing, organic versus psychological/psychiatric.
6. Standards of diminished capacity.
7. Suggestions for lawyers and judges.
8. How does this information apply to the State Supreme Court decisions in the matters of: “Jacob, Trueger, Greenberg, and Cozzarelli”?
9. WC, PIP cases with similar requirements except:
  - a. Jacques v. Kinsey, 347 N.J. Super. 112, 117 (Law Div., 2001).
  - b. Reid v. Apeel, 115F. Supp., 496 (M.D.Pa. 2000).
  - c. American Academy of Neurology.
  - d. Medicare.
  - e. All support the submission of the NPE as: “objective evidence” in determining the functional integrity of the individual.
10. Questionnaires
11. Intervention strategies with appendix information.
12. Takeaways

- 
- Presentation is limited to objectifying organic and/or psychological symptoms, and not the broader standards of capacity for legal transactions in: testamentary, donative, contractual, covering real estate, executing durable power of attorney, or consent to medical care.

- 
- **What is Clinical Neuropsychology: Focus is developing knowledge about human brain-behavioral relations and applying this knowledge to clinical problems.**

- Its subject matter is the psychological effects of brain lesions.

- Neuropsychologist measure intellectual, cognitive brain systems and personality deficits and relates these deficits to brain lesions, and in the broader sense, psychological/psychiatric behavior.
- It makes refined descriptions of clinical conditions in terms of brain damage, but also the probable medical and psychological conditions accounting for the abnormal behavior.
- Forensic Neuropsychology is an extension of Clinical Neuropsychology to legal questions seeking the functional expression of acquired neurocognitive or psychological changes that have occurred.
- In the organic or psychological ethics case, how well the brain works and the procedural adequacy in testing is more important than what a patient/client reports as their symptoms or inability to function.
- The essential point of the neuropsychological examination (NPE) is to evaluate each individual's brain rather than each individual's complaints.

---

## **Neuropsychological Examinations (NPE):**

- The NPE provides unique information about the patient's cognitive and behavioral functioning that is quantified and medically necessary and essential for:
  1. Diagnosis (example, mild cognitive impairment)
  2. Describes the quality of their thinking
  3. Treatment planning/program placement
  4. Identify the effects of treatment (cognitive remediation, surgery, medication)
  5. Forensic applications

- 
- ❖ What are the behavioral signs of deterioration? They are varied, but usually memory, poor reasoning/judgment, slower processing, poor multitasking, language, and personality change.

- The NPE is our CT, MRI of the brain, the “blueprint” of cognitive function. It looks at all the domains.
- 

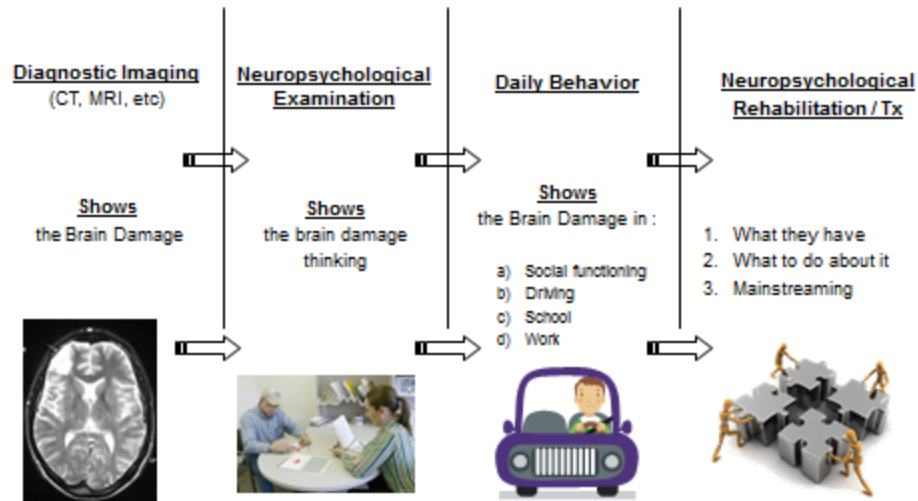
**Neuropsychological examinations evaluate the following functional domains:**

- Attention/Concentration
  - Executive functioning
  - Reasoning
  - Problem-solving
  - Abstraction
  - Insight
  - Judgment
  - Learning
  - Memory
  - Language/ Speech
  - Processing speed
  - Cognitive flexibility of thinking
  - Visual-Spatial abilities
  - Primary Motor
  - Psychomotor
  - Sensory perceptual abilities
- 

- Only the NPE can functionally define the nature and profile of the individual’s brain in terms of their capacity to efficiently adapt and function on a daily basis.
-

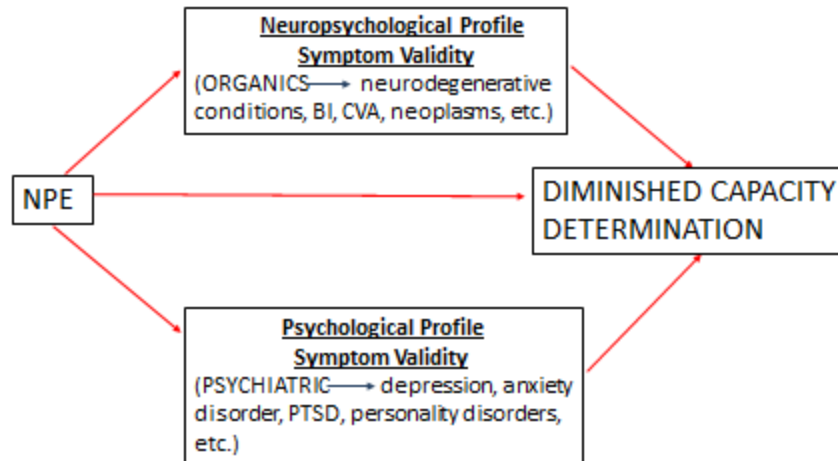
# Diagnostic to NPE to Treatment:

## Continuity of Evidence: What Happened, Is Happening, and Going to Happen



- 
- There is no one-to-one correlation between anatomy and cognitive capacity. Sometimes CT is normal, but cognition is impaired and vice versa.
  - The radiological pictures today are dramatically detailed, but they show structure, physiology, metabolism, but do not demonstrate cognitive capacity.
  - The radiological picture show **real state**, but the NPE shows who is **living in them**.
  - The use of questionnaires and MMSE and other screening measures are not sufficient comprehensive measures as the NPE, which covers both general and specific cognitive areas in its assessment.
  - Neurology, Psychiatry, and Geriatrics are limited in their assessment of cognitive brain systems. Only the NPE is a valid approach in differentiating impaired versus normal functioning producing objective evidence consistent with patterns and profiles.
-

# OBJECTIVE EVIDENCE



- 
- The NPE can produce different patterns of deficits compatible with different diagnostic conditions – acute versus progressive, different outcomes, prognosis, and treatment options.
    - Example: TBI, concussion, CVA – Acute.
    - Tumors, neurodegenerative dementias – progressive.
  - Brain changes in cognitive impairment isnot a "unitary concept". Brain change does not produce the same behavioral impairment.
-

❖ **COGNITIVE/PSYCHOLOGICAL IMPAIRMENT IN THE LAW PRACTICE ARENA.**

## Capacity versus Competency

- **Capacity** denotes a clinical status determined by a health care professional
- **Competency** denotes a legal status determined by a judge
- Burden of proof lies with alleging party

- 
- The pressures of law practice if not managed properly can easily lead to stress, emotional overreaction, anger, depression, alcohol, interpersonal relationship problems, and cognitive slippage.
  - Some forms of impairment may prevent the lawyer from recognizing his/her impairment. (ORGANIC.)

- The legal definition of impairment will vary from jurisdiction to jurisdiction.
- 

## New Jersey

- “Incapacitated individual” means an individual who is impaired by reason of mental illness or mental deficiency to the extent that he lacks sufficient capacity to govern himself and manage his affairs.
  - The term incapacitated individual is also used to designate an individual who is impaired by reason of physical illness or disability, chronic use of drugs, chronic alcoholism or other cause (except minority) to the extent that he lacks sufficient capacity to govern himself and manage his affairs.
- 

- **Impairment** – diminished ability to clearly think, utilize the skills required to solve problems, and interact in an interpersonally effective manner.
    - Impairment is not a unitary construct, comes in different forms.
    - Some forms of impairment are caused by declining cognition resulting from aging or a neurodegenerative process.
- 

- **Impairments and their Heterogeneous Nature:**

- Cognitive and/or affective decline due to aging.
- Cognitive and/or affective decline due to brain injury or stroke.
- Cognitive and/or affective dysfunction resulting from substance abuse.
- Cognitive and/or affective dysfunction resulting from acute psychological problems or situational life circumstances.
- Cognitive and/or affective dysfunction resulting from an ongoing/chronic mental illness.
- Cognitive and/or affective dysfunction due to exposure to environmental toxins.

- Cognitive and/or affective dysfunction due to physical illness.
- 

It is human nature to deny, minimize, project blame, and rationalize when impaired. Hence, the need for an objective means to determine the cognitive and psychological profiles of the individual.

---

### ❖ **COMMON SIGNS OF IMPAIRMENT ARE:**

- Change in workhabits or patterns
  - Forgetfulness or lapses in judgment
  - Lateness or leaving work early.
  - Failure to meet deadlines or to be accountable
  - Failure to appear for meetings, court dates, depositions, and diminished quality of work product.
  - Personal use of trust account funds or trust account overdrafts, personal credit problems, tax problems and liens.
  - Difficulty working with clients, colleagues, or staff.
  - Emotional unevenness, irritability, or impulsivity.
  - Signs of intoxication.
  - Increased isolation or secrecy.
- 

### ❖ **IMPAIRMENT IS AN ETHICAL ISSUE**

- An impaired attorney is more likely to breach duties. But the consequent obligation of the law firm in responding to this impairment is imperative.
- The impaired lawyer has the same obligation under the laws of professional conduct. E.g., an attorney who misses filing deadlines or court dates is not excused even if it is caused by impairment.
- The alert attorney will want to assist the impaired colleague for moral and risk management reasons. There is an obligation to report impairment in a colleague regardless of explicit ethical duties



- The primary duty of the lawyer is to protect the client.
- 

❖ **2002 revision of the ABA's Model Rules of Professional Conduct, Rule 1.14 focuses upon the client with diminished capacity.**

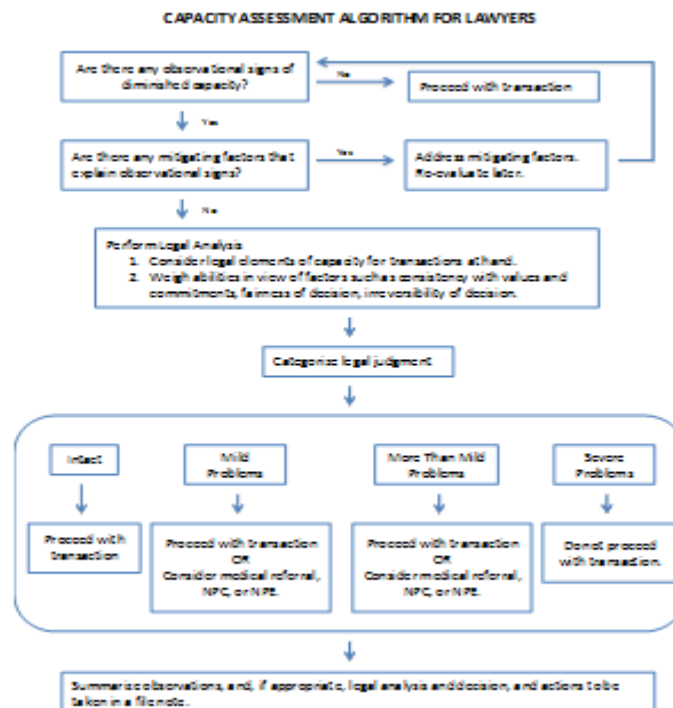
- Question: How does the lawyer or Board reach a reasonable belief that the individual has diminished capacity?
  - What are the legal standards of diminished capacity? Three facets:
    - a) Standards of capacity for specific legal transactions under statutory and case law.
    - b) Standards of diminished capacity and State guardianship law.
    - c) Ethical guidelines for assessing capacity (today's focus).
  - What signs of diminished capacity should a lawyer or Board be observing?
    - a) There is no single marker of diminished capacity, but "red flags."
    - b) Cognitive.
    - c) Emotional.
    - d) Behavioral.
  - What factors from the ethical rules should a lawyer or Board consider?
    - a) The individual's abilities to articulate reasoning.
    - b) Variability of state of mind.
    - c) Appreciation of consequences.
- 

❖ **Suggestions for Lawyers, Judges, and the Board (Taken from ABA's Model Rules of Professional Conduct, 2002 revision model Rule 1.14): Clients with diminished capacity.**

Part A of Rule 1.14 recognizes:

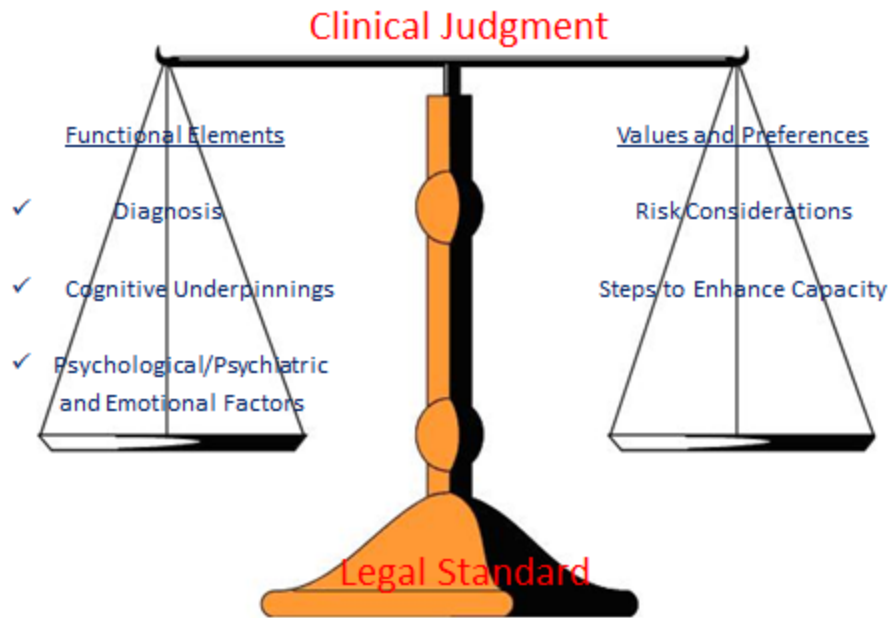
- a) Goal of maintaining a normal client-lawyer relationship in the face of diminished capacity.
  - b) Lawyer's discretion to take protective action in the face of diminished capacity.
  - c) Discretion to reveal confidential information to the limited extent necessary to protect the client's interest.
- Part B of Rule 1.14. requires 3 criteria before an attorney takes protective action:
    - a) The existence of diminished capacity.
    - b) Risk of substantial harm.
    - c) Inability to act adequately in one's own interest.
-

- Determination of the extent of the client's diminished capacity:
  - a) Client's ability to articulate reasoning leading to a decision.
  - b) Variability of state of mind and ability to appreciate consequences of a decision.
  - c) Substantive fairness of a decision.
  - d) Consistency of decision with the known long-term commitments and values of the client.
- Similarities with Neuropsychological Examination:
  - a) Comprehensive neuropsychological examination is able to determine neurocognitive and neuropsychiatric diagnoses.
  - b) Define the cognitive strengths and weaknesses and psychological profile.
  - c) Functional capacity in the environment.
  - d) Description of the individual's preferences and background.
  - e) Recommendations for treatment.



## ❖ COMPONENTS OF THE FRAMEWORK

- **Legal Standard**
- Clinical evaluations of capacity are based upon the clinician's opinion about the person's ability to make a decision or perform a task that has a specific definition in the law.



❖ Today, we will focus upon Functional Elements.

- In the context of capacity assessment, an assessment (NPE) of "everyday functioning" means an examination with consultation and neuropsychological examination (qualitative/observational and quantitative) of the individual's functioning on specific task and produces a **diagnosis**.
  - This can be neurocognitive or psychological/psychiatric.
  - Difference between capacity assessment and NPE is that the latter focuses on cognitive functioning, but also includes methods to assess the specific capacity in question using direct testing methods.
- 

**In Terms of Cognition, 3 areas of functioning are addressed:**

- a) Objective measurement of cognitive functioning (NPE).
  - b) Psychological/psychiatric/emotional functioning (NPE).
  - c) Everyday functioning in terms of adaptive capacity.
-

**In Terms of psychological/psychiatric or emotional factors:**

- a) The presence of a medical (e.g.,today's presentation in the matter of Jacob - thyrotoxicosis) does not mean capacity is impaired.
  - b) The presence of psychological/psychiatric/or emotional disturbance such as depression, thought or mood disorder, does not imply diminished capacity.E.g.,an individual can have symptoms of depression, anxiety, or psychotic disorder and still be quite capable to process information.
  - c) If significant depression, paranoia, or disinhibition is present, it can limit reasoning and judgment and therefore impaired capacity (organic).
  - d) Finally, the individual's behavior in other areas of daily functioning must be equally impaired in terms of consistency (You cannot be a little bit pregnant).
- 

**HOW DOES THIS INFORMATION APPLY IN THE MATTERS OF:**

- a) Howard L. Jacob III, argued 12/13/83 - decided 1/24/87.  
In Re: Jacob cite as, 95 N.J. 132.
  - b) Howard J C Trueger, argued 1/3/95 – decided 5/5/95, cite as, 140 N.J. 103.
  - c) Joel Greenberg, argued 9/23/97 - decided 7/17/98, cite as, 155 N.J. 138.
  - d) Frank J Cozzarelli, argued 10/21/14 – remanded October 30<sup>th</sup>, 2014 – reargued 11/10/15 – decided 5/2/16.  
(D-151-13) (074742)
- All four cases had in common subjective self report, psychological claims parroted by the psychiatrists without objective findings.
- 
- The NPE would have been able to provide cognitiveand psychologicalevidence for or against the attorney.
  - In Jacob, Supra, the court rejected the attorney’s medical condition (thyrotoxicosis) emphasizing it was seeking a causal relationship between the condition and his financial misdeed. There is no consistent cognitive profile.
  - Court further stated that the attorney had not demonstrated he suffered a lossofcompetency, comprehension, or will that could have excused his knowingly egregious misconduct.
  - Point– the ability to discern right from wrong. Consistency of impairment with all areas of daily functioning.
- 
- In Greenberg, Supra, the court rejected the attorney’s defense that his depression caused an impairment of judgment that should have allowed him to avoid disbarment for stealing law firm funds.
  - The attorney failed to demonstrate that he could not appreciate the difference between right and wrong or understand the nature and quality of his acts.

- In Trueger, Supra the court held that the attorney made false representations to clients regarding status of the case.
- The attorney submitted as a mitigating factor a psychiatric history due to his father's terminal illness . . . however, he admitted he had represented other clients diligently during the same period.
- The attorney's alleged psychiatric history did not excuse nor mitigate his unprofessional conducts since there was no evidence the attorney lacked ability to understand the nature of his acts.

- The Disciplinary Review Board (DRB) applied the JacobStandard requiring either:
  - a) An inability to distinguish between right and wrong.
  - b) Understand the nature and quality of one's acts.
- The Court was willing to consider defenses that would negate the mental state to act purposely via: mental illness:
  - a) An impaired mind that deprives the attorney of the ability to act purposely or knowingly.
  - b) Appreciate the nature and quality of the act he/she is doing.
  - c) Distinguish between the right and wrong.

- In Cozzarelli, the Office of Attorney Ethics (OAE) asserted that the respondent's mental state did not support the finding of legal insanity, or any other conditions that would satisfy the JacobStandard.
- Experts agreed that respondent did not have a mental illness that met any of the three aforementioned defenses that would negate the mental state to act knowingly.

❖ Mean profiles for Normal Controls and Exaggeration groups on the PAI full scales.

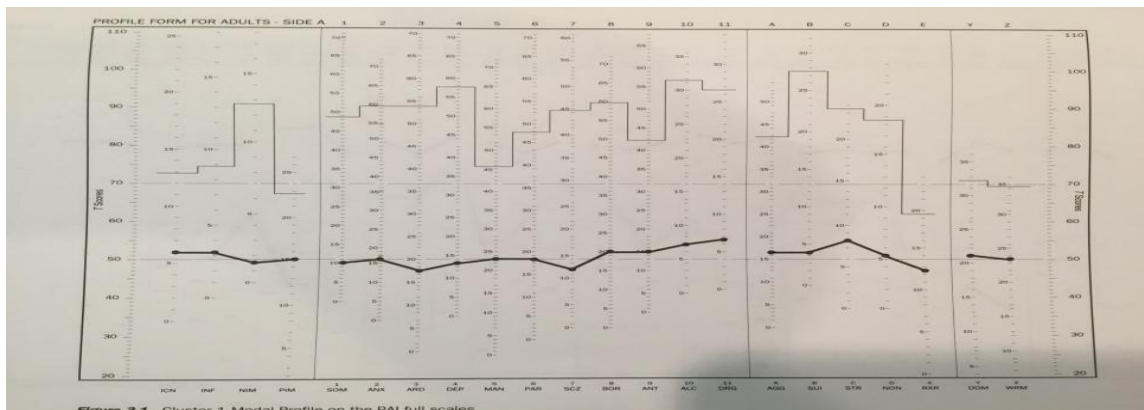
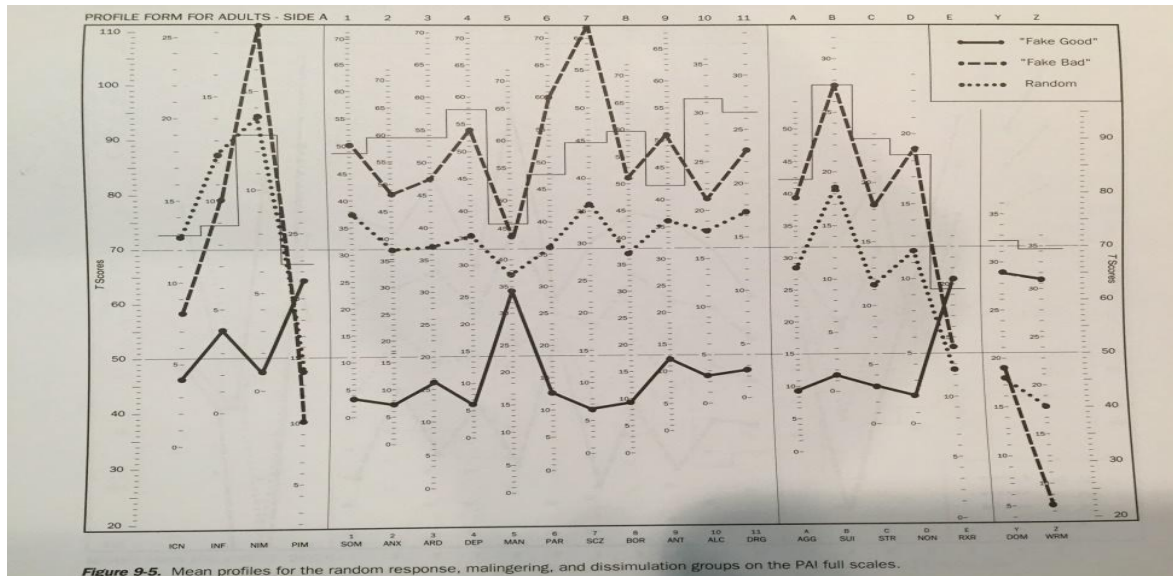


Figure 3-1. Cluster 1 Modal Profile on the PAI full scales.

**Normal Controls**



### Random Response, Malingering, and Dissimulation groups

#### ❖ The same requirement of “objective medical evidence” exists in Personal Injury and Worker’s Compensation.

- In *Granowitz v. Vanvickle*, argued 03/05/93, Supreme Court in New Jersey Law Division (Civil) Union County held:
  1. Psychiatric disorder can constitute serious injury within the meaning of the No-Fault law.
  2. Plaintiff’s alleged and psychological disorder which resulted in some temporary disability failed to submit objective, credible evidence that she had met any of the verbal threshold categories under No-Fault law.
- The Oswin Test must be applied to psychological injuries if they are to meet the verbal threshold requirements.
- In *Oswin v. Shaw*, 129 N.J. 200, 609 A. 2D 415 (1992) –Subjective complaints alone are not sufficient to satisfy the verbal threshold requirement and defeat a motion for summary judgment.
- Psychological injuries, like physical injuries must be proven by objectivemedicalevidence.

#### ❖ WORKER’S COMPENSATION

Supreme Court held in *SAUNDERLIN v. DuPONT*, Cite as, 102 N.J. 402, “The requirements of the statutory definition of permanent partial disability in N.J.S.A. 34:15-36 apply to . . . claims of psychiatric disability like those of physical disability and must be based upon demonstrable objective medical evidence.

SAUNDERLIN set two parameters for determining what constitutes demonstrable objective medical evidence of psychiatric as distinguished from physical disability:

1. The court declared that “The distinction between objective and subjective contemplated by the Legislature is not between physical and mental (body and mind) but between independent professional analysis and the bare statement of the patient.”
  2. “Demonstrable objective medical evidence” means evidence exceeding the subjective statement of the petitioner seeking to establish that he has permanent psychiatric disability compensable under Worker’s Compensation Law. . . doctor’s mere parroting of patient’s subjective statement of disability will not support award for permanent partial psychiatric disability.”
- 

### **IN TERMS OF PERSONAL INJURY:**

1. Jacques v. Kinsey, 347 New Jersey Super. 112, 117 (Law Division, 2001):

Objective Clinical Evidence is evidence based upon an examination and observation of a physician as well as the results of diagnostic tests. Testing which depends entirely upon plaintiff’s subjective response does not constitute objective clinical evidence.

2. In Reider v. Apeel, 115F. Supp., 496 (M.D.Pa. 2000):

- a) a neuropsychological testing submitted as objective credible evidence of injury is a valid and detailed means of testing for injury or illness.
  - b) Neuropsychological comprehensive objective assessment of a variety of cognitive, adaptive, and emotional responses reflect the adequacy (or inadequacy) of higher brain functions.
  - c) Neuropsychological testing is used to quantify the patient’s deficits.
- 

3. The American Academy of Neurology states that “Neuropsychological examinations have the advantage of being objective, safe, portable, and relevant to the functional integrity of the brain”.
4. The American Academy of Neurology has acknowledged that neuropsychological testing is accepted as appropriate by the practicing medical community.
5. Medicare definition for neuropsychological examination states that these tests are objective and quantitative.

- a) Medicare defines neuropsychological assessment as testing that is intended to diagnose and characterize the neurocognitive deficits of medical disorders that impinge directly or indirectly on the brain.
- 

❖ **CHECKLISTS, QUESTIONNAIRES, MEDICAL SCREENINGS, AND THE LAW:**

- Participated in the NAN development for input to the American Bar Association on Law and Aging 15 years ago.
  - Problem was a matter of performance validity measures.
  - Information gathered from the patient or attorney was subjective.
  - Person administering the measure or the individual taking it brought to the table a number of undermining variables.
  - These measures lack sensitivity and specificity regarding the nature of the diagnosis.
  - They are sufficient if one wants to initiate an entry into a critical pathway of determining what is going on – labs, radiological pictures, neuropsychological examination, leading to – what do we do now?
-



## ❖ **PERFORMANCES VALIDITY MEASURES within the NPE**

- a) Performance validity testing – measures directed at answering the validity of a person’s test performance (organic).
  - b) Symptom validity testing measures directed at answering the validity of symptomatic compliance (psychological/psychiatric).
- 

---

## **TREATMENT AND CASE DISPOSITION**

Depending on the nature of the case (organic or psychiatric), the pattern of the NPE results will determine a course of action.

- a) An organic profile, first review with the patient and the results.
- b) Determine independent living skills – driving, medication regimen, domestic responsibilities, financial responsibilities, work capacity, etc.
- c) Environmental adaptation in terms of legal performance – can the individual still work in a modified capacity, need filing deadlines?
- d) Cognitive impairment is also an ethical issue. Colleagues have the duty to report under certain conditions because the primary duty is to protect the client.
- e) Therefore,
  1. Review the cognitive status.
  2. Assess the capacity to continue or not.
  3. Make the accommodations.
  4. Refer out for treatment – medical adjustment counseling.
  5. Associated services if indicated.
  6. Plan a graceful exit.

---

INCLUDED in Appendix I are Recommendations for Capacity Worksheets and articles.

---

## ❖ TAKEAWAYS

1. Shared information regarding what Clinical and Forensic Neuropsychology is.
2. Discussed the basis of the NPE and how it functionally defines organic and psychological/psychiatric outcomes.
3. Reviewed OAE, WC, and PI cases.
4. All required objective evidence in deciding for or against the respondent's petition.
5. Finally, addressed Survey and Treatment directions.

I hope this information will be of service to you in the analysis of your various legal cases.

---

### ACKNOWLEDGEMENT

- Charles Centinaro, Director, Office of Attorney Ethics
- William Kane, Director, New Jersey Lawyers Assistance Program.
- Tracy L. Kepler, President National Organization of Bar Council

---

### APPENDIX

#### Capacity Worksheet for Attorneys

**“Neuropsychological Considerations When Preparing The Brain Injury Case”**

**“The Nature of Neuropsychological Care”**

**“It’s All In Your Head: How a Neuropsychologist and His Patients Rely on Testing”**