



the british
psychological society
division of neuropsychology

GOOD PRACTICE GUIDELINES

Guidance on the recording of neuropsychological testing in medicolegal settings

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STATEMENT OF CONFLICT OF INTEREST

As Senior Practitioners members of the Advisory Working Group we are all engaged in medicolegal reporting for Claimant and Defendant Instructing Parties. Independently and collectively we have no conflict of interest to declare.

GUIDANCE ON THE RECORDING OF NEUROPSYCHOLOGICAL TESTING IN MEDICOLEGAL SETTINGS

These guidelines are aimed at qualified clinical neuropsychologists however, the guidance may be applicable to a wider audience including Clinical, Counselling, Forensic and Occupational Psychologists who routinely employ neuropsychological or cognitive tests as part of their medicolegal practice.

The core purpose of this document is to provide guidance in a medicolegal context, with patients in litigation. The guidance is not intended to influence NHS clinical practice. However, brain trauma patients will generally

present in multiple clinical settings and clinicians assessing patients in an NHS setting will have access to this guidance. We therefore believe that psychologists working outside the medicolegal field may find the contents of this document of interest.

INTRODUCTION

Advances in technology and uptake of remote assessment may further facilitate recording of neuropsychological assessment such that it occurs more frequently than in the past. Alongside this, there has been a notable trend in recent medicolegal contexts towards litigants either requesting or attempting recording of neuropsychological testing. We wish to highlight potential implications of such developments for the assessment process to those who employ neuropsychological testing as part of their routine clinical or medicolegal practice. This document has been prepared following careful consideration of the issues.

Recent legal proceedings (Mustard and Flower judgement^{1,2}) have highlighted the issue of recording of neuropsychological examinations, both within the interview and within any formal cognitive testing that typically comprises such processes. In some cases, recordings have been made covertly without the permission or awareness of the clinical neuropsychologist undertaking the assessment.

There is increasing awareness within healthcare settings generally that patients may choose to record clinical encounters with healthcare staff. This can be beneficial to patients in many circumstances. Benefits include the use of a recording as an aide mémoire to support enhanced psychoeducation, discussion and decision making with service users. Recordings may be further employed to explore and clarify any misunderstandings about the purpose and interpretation of an assessment. However, there are potential negative implications of recording such as threats to the validity of the assessment itself or, in the case of covert recording, to violation of trust within the

relationship between the psychologist and the individual undertaking the assessment.

The validity of a clinical testing depends on the basis of trust and open communication by both parties. The essence of these guidelines is honesty and openness that serve both the claimant and expert. The validity of a formal testing is dependent on adherence to a set of standard conditions relating to both test methods and the testing environment. Significant variation in those conditions, such as the use of recording, may adversely influence the quality of the interaction and therefore the validity of the assessment. There are further considerations within a clinical testing such as where the recording of confidential clinical tests could expose both the patient/client and the clinician to additional risk. In cases where recording is undertaken covertly such risks cannot be fully understood by either party. These issues are increasingly the source of debate by professional bodies such as The British Psychological Society and the General Medical Council.

These potential risks and benefits of recording neuropsychological testing should be carefully considered by all parties with reference to the purpose of the assessment. Such discussions should take place in an open and informed way. If practising psychologists follow the recommendations outlined below then they can minimise the need for outside agencies (for example, the Court) to pursue further independent review of recording practices in relation to neuropsychological assessments.

KEY CONSIDERATIONS

1. PSYCHOLOGISTS ARE EXPECTED TO PROVIDE RELIABLE AND VALID EVIDENCE-BASED ASSESSMENT

Every effort should be made to ensure that assessment processes meet the highest of standards. Any report should provide adequate details of a comprehensive interview and report the contents in a reliable manner. In respect of the administration of neuropsychological tests, it is the responsibility of the examiner to ensure that such tests are administered in accordance with the instructions provided by the test publishers to minimise the influence of extraneous variability and confounding influences on the assessment process. All the most commonly used tests have manuals that provide clear guidelines on the administration process and scoring of tests.

Those who conduct neuropsychological assessments should ensure that they are familiar with the detailed procedures administration and scoring of such tests. Members of The British Psychological Society's Specialist Register of Clinical Neuropsychologists (SRCN) have undertaken extensive supervised practice with a range of commonly used neuropsychological tests during postgraduate clinical training. We note further that:

- a. The Health and Care Professions Council (HCPC) requires that members access CPD to maintain their competence. Thus, all psychologists undertaking neuropsychological assessment must ensure that they are adhering to the published guidelines and any revised guidelines on the administration and scoring of tests routinely used.
- b. The BPS provides a range of courses to support maintenance of practical skills which includes administration, scoring and interpretation of routine neuropsychological tests.

- c. That members are expected to actively engage in accessing professional development. Members are also expected to maintain competence in applying and administering routine neuropsychological tests, which we recommend as part of this continuing professional development.

2. THERE IS A POTENTIAL BENEFIT TO TRANSPARENCY IN RECORDING NEUROPSYCHOLOGICAL ASSESSMENTS WHICH FORM PART OF A LEGAL OR CLINICAL PROCESS

Such recordings have a potentially significant function in training and professional development. Transparency may afford protection through the ability to undertake scrutiny of the fidelity of test administration, and the consequences for the validity of assessment data. In some circumstances, recording may proceed if agreed with all relevant parties and if threats to relationship, test validity and copyright restrictions are not infringed.

3. THE PRESENCE OF A RECORDING DEVICE OR THIRD PARTY CAN INFLUENCE THE EXAMINEE'S TEST PERFORMANCE

For example, audio recording has been shown to be associated with poorer performance on memory tests. A similar effect on cognitive performance has been reported for video recording. The influence of third-party observation affecting behaviour or test performance is not trivial. This effect is made clear in neuropsychological test manuals. For example, the test instructions for the Wechsler Adult Intelligence Scale – Fourth Revision (WAIS-IV) emphasises the concept of freedom from distractibility and instructs the examiner to provide a physical environment, 'free from distractions and interruptions' and stresses that 'external distractions must be minimized to focus the examinee's attention on the tasks

presented and not on outside sounds or sights, physical discomfort, or testing materials not in use'. The use of recording devices may contribute to such distractions.

4. NEUROPSYCHOLOGICAL TESTS WERE NOT STANDARDISED WITH A RECORDING DEVICE OR A THIRD-PARTY OBSERVER PRESENT

Such facilitation can promote effective performance through alleviation of anxiety or may be detrimental to the assessment performance through a sense of additional scrutiny.

The 'social facilitation' effect is well understood in the social psychological literature. Namely, that the presence of others can change behaviour or performance and we regard this as an established effect in psychological science. As such, any third-party observation may violate the standardisation and limit the validity of tests. It is recognised that reasonable clinical considerations should be given to the potential benefits of third-party observation, such as having an interpreter present or other clinical considerations applicable to specific patients. For example, it is sometimes appropriate on clinical grounds to have family members or other professionals present during the interview and very occasionally during testing.

5. RECORDED CONTENT COULD BE MISUSED OR DISSEMINATED MORE WIDELY

Test security may be compromised, as recording or observation may allow test materials intended for restricted use to find their way into a non-clinical or public

domain. There is an associated risk of compromising the psychometric properties of neuropsychological tests and hence their diagnostic efficacy. Potentially, individuals undertaking tests could determine their responses in advance of an examination, and repeat testing could be compromised by inflated practice effects due to exposure to a recording of a baseline examination. This effect potentially compromises the psychometric properties of the tests in terms of determining change in brain function (both improvement and deterioration). Psychologists have a professional responsibility to safeguard test security.

6. TEST MATERIALS ARE SUBJECT TO COPYRIGHT LAWS AND ARE PROTECTED IN THE INTEREST OF TESTS PUBLISHERS

Copyright laws may be violated in the recording of testing processes. The position taken by clinical test publishers, such as Pearson, who publish many of the neuropsychological tests commonly used in clinical practice, is that that, *'audio or videotaping or other non-standard conditions may invalidate the use of norm-referenced scores... any scaled score that results from a non-standard administration should be interpreted with caution. Additionally, an audio or video taping of an administration where any test materials are recorded is a reproduction under copyright law. If done without our written permission, such acts may be an infringement of the assessment's copyright.'*

COVERT RECORDING

Deliberate covert recording is inappropriate and any form of recording should be considered in light of potential threats to the validity of an assessment. Undertaking such recordings is likely to undermine the validity of information collected. Furthermore, risks to both parties in managing the recording process cannot be properly considered in the context of covert recording. The position paper of the US National Academy of Neuropsychology (2009) stipulates that neuropsychologists should not encourage, condone, or engage in covert recording of neuropsychological interviews or testing. Similarly, the position of the American Board of Professional Neuropsychology (2016)

takes a broader view that it is incumbent on neuropsychologists to minimise variables that might influence or distort the accuracy and validity of neuropsychological assessments. Recording, alongside observation may adversely influence the validity of neuropsychological assessment without conferring benefit. It is therefore the recommendation of the American Board of Professional Neuropsychology that neuropsychologists should resist requests for third party observation (including recording) and should educate as to the ethical and clinical implications of such practices.

SUMMARY

1. In accepting instructions for medicolegal assessment, instructing solicitors should be informed that both deliberate covert and unregulated overt attempts to record the formal neuropsychological assessment do not represent best practice and potentially invalidate any assessment conducted. If assessments are recorded, this should also be made clear in any subsequent report produced for the Court.
2. Psychologists have a duty to maximise the validity of tests administered such that their intended purpose can be safeguarded and to:
 - a. ensure that clients are not given opportunities to practise or familiarise themselves with test materials beyond the stipulation of manualised and standardised approaches;
 - b. and to minimise the risk that test scores are either positively or negatively influenced by the act of recording.
3. Psychologists have a duty to protect the security of tests administered and recognise that recording potentially facilitates test processes being disseminated within public domain. Such dissemination has the potential to reduce the reliability and validity in the testing of the wider population.
4. Psychologists have a duty to minimise the risk that copyright is violated and to take reasonable steps to prevent distribution of test materials wider than the audience directly benefiting from test administration.
5. Deliberate covert recording of the neuropsychological assessment is not acceptable under any circumstances and steps should be taken to prevent this (asking the patient/signed contractual document etc.).
6. Recording neuropsychological testing by the claimant is not usually advisable and steps should be taken to prevent this (asking the patient/signed contractual document etc.) other than when it is agreed that the benefits significantly outweigh the risks. The decision to proceed or not with recording should be made on clinical grounds for a range of claims that might include: traumatic brain injury, mental health, child assessment, pain e.g. by the expert responsible for administering the testing.
7. Psychologists should ensure that clients/claimants and any accompanying persons are clearly advised of The British Psychological Society's advice on recording prior to the assessment. The clinician should explain that such recording is contrary to professional guidance for neuropsychologists and may well infringe legal copyright.
8. Psychologists should utilise established protocols to deal with such issues including the completion of a signed document by the client claimant to agree that they will not record any aspect of the procedure without prior consent.
9. If the clinician becomes aware of deliberate attempts at covert recording, they should ask the client politely to stop recording, to delete the record and discontinue any formal assessment should the client refuse to accede to this request.
10. Neuropsychologists in legal medical practice have a duty and responsibility to work ethically, adhere to the code of conduct of their professional and/ or regulatory body, protect copyright of the test materials and to ensure patient safety.

REFERENCES

1. <https://www.bailii.org/ew/cases/EWHC/QB/2019/2623.html>
2. Mustard and Flower judgement 2019 EWHC 2623 before Master Davidson



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