

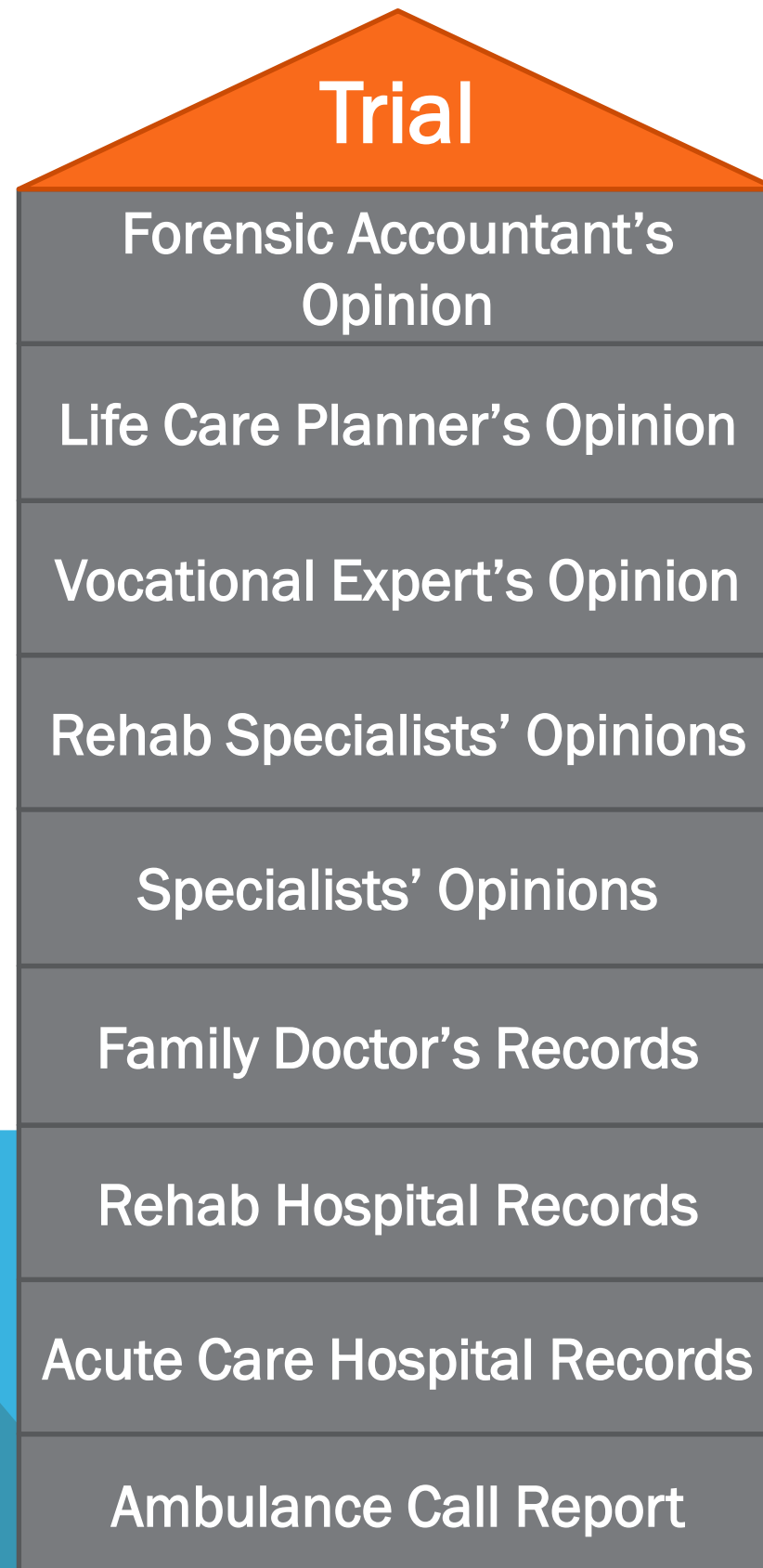
**PRACTICAL STRATEGIES FOR EXPERTS  
*TESTIFYING WITHOUT FEAR***

# ***The Law of Expert Evidence & Report Writing***

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# YOU ARE PART OF A BUILDING PROCESS



# **ASSUME THE CASE WILL GO TO TRIAL**

- Every word, phrase, line and sentence of every report will be scrutinized in minute detail by the lawyer for the insurance company
- The same with your clinical notes and records
- The insurance lawyer will do everything she can to discredit your opinion and recommendations



# WHERE ARE YOU VULNERABLE?

## *THROUGH NO FAULT OF YOUR OWN!*

As a result of the MVC, Ms. \_\_\_\_\_ sustained the following injuries:

- ~~Fracture of talus~~
- ~~Injury of multiple nerves at ankle and foot level~~
- Multiple injuries of lower leg
- Fracture of fibula alone
- Superficial Injury of lower leg
- Sprain and strain of shoulder joint
- Complete tear of peroneal tendon



# **WHERE ARE YOU VULNERABLE?**

## ***THROUGH NO FAULT OF YOUR OWN!***

- On your first report:
  - The list of injuries and symptoms you record
- The pre-accident health history you record



# WHAT CAN YOU DO ABOUT IT?

- Do not use specifics in your first report
  - *“Fractures and soft tissue damage to her left foot”*
  - *“Traumatic brain injury with associated symptoms”*
- Ask the plaintiff’s lawyer to obtain for you the important records ASAP
  - *Ambulance*
  - *Acute care hospital*
  - *Rehab hospital*

# TRAUMATIC BRAIN INJURY SYMPTOM CHECKLIST

## I. Cognitive Symptoms

**Has the head injured person or family member noticed any changes or difficulties with:**

- **Ability to think**
- **Ability to concentrate**
- **Short-term memory**
- **Ability to understand words or instructions**

- Uncontrolled crying.
- Feeling depressed or sad.
- Feeling overwhelmed.
- Childish behaviour.
- Unusual impatience.
- Feelings of aggravation.
- Feelings of fatigue or tiredness.
- Hyperactivity or increased energy.

- Speaking or pronouncing words.
- Tiredness.
- Numbness or tingling in any area (scalp, face, jaw, other).
- Sensitivity to heat or cold.
- Pain in any area.
- Weakness in muscles (facial, arms, legs, other).
- Clumsiness (dropping things, knocking things over).
- Grip strength.

# WHAT ABOUT SUBSEQUENT REPORTS?

- Include a detailed list of all the client's injuries and symptoms in your notes and reports
- But you have a problem ...
  - the client!
- You have to be prepared to dig
- Be consistent throughout in all your reports



# **WHAT MAKES A GREAT REPORT AND ELEVATES AN EXPERT WITNESS AT TRIAL?**

- **Giving examples of the client's deficits**

**... Mr. Lowe continued to be observed placing food items randomly in drawers or cupboards, and neglected to turn off the water when filling his electric kettle requiring a cue from the rehabilitation support worker**

# **AVOID WEAK LANGUAGE**

## **Strong**

- **Likely**
- **Probably**

## **Weak**

- **Possibly**
- **Might**
- **May**
- **At risk for**


# **KNOW THE VERBAL THRESHOLD**

**Substantially interferes with:**

- **Employment**
- **Education & training**
- **Most of the usual activities of daily living**

# **AND WRITE YOUR REPORTS “INTO” THE VERBAL THRESHOLD**

## **Interference with employment**

- Failed work trials
  - Going back to work part-time
  - Modified duties at work
  - Less efficient and productive at work
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# Interference with education & training

- **Changed educational plans**
- **Dropped courses**
- **Grades have dropped**
- **Accommodations**

# Interference with the usual activities of daily living

- Self-care tasks
- Household maintenance and upkeep
- Social and recreational activities

# KNOW THE CLASSIFICATION OF IMPAIRMENTS DUE TO MENTAL & BEHAVIOURAL DISORDERS


<i>Area or Aspect of Functioning</i>	<b>Class 1: No Impairment</b>	<b>Class 2: Mild Impairment</b>	<b>Class 3: Moderate Impairment</b>	<b>Class 4: Marked Impairment</b>	<b>Class 5: Extreme Impairment</b>
<i>Activities of daily living</i>	No impairment	Impairment levels are compatible with most useful functioning	Impairment levels are compatible with some, but not all, useful functioning	Impairment levels significantly impede useful functioning	Impairment levels preclude useful functioning
<i>Social functioning</i>					
<i>Concentration, persistence and pace</i>					
<i>Deterioration or decompensation in work or worklike settings</i>					

# HOW DO WE DETERMINE IF AN INJURY WAS 'CAUSED' BY AN ACCIDENT?

## Apply the “but for” test

- If you find that *BUT FOR* the collision the Plaintiff would not have suffered the injuries alleged to have been suffered by him, then you must find the collision caused the injuries.



- On the other hand, if the injuries would have occurred, *DESPITE THE COLLISION*, the defendants are not responsible for the losses arising from these injuries.
  - It is not necessary that you decide that all the injuries were caused by the collision. You may determine that only *SOME* of the injuries were caused by the collision and others were not.
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## Apply the “material contribution” test

- If you are *UNABLE* to determine causation using the “but for” test, you may go on to consider causation under the *MATERIAL CONTRIBUTION* test.
- If the collision materially contributed (and “material” is considered to be anything more than TRIVIAL) then causation is established.

# CAUTIONARY ADVICE

- Do not be an advocate
- Do not over-reach

