

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS

DISTRICT COURT DEPT.
OF THE TRIAL COURT
SPRINGFIELD DIVISION
CIVIL ACTION NO. 1523 SC 2043
(Consolidated with 1523 SC 2044)

MEDICAL DIAGNOSTICS &)
REHABILITATION LLC D/B/A)
MVA CENTER FOR REHABILITATION,)
)
Plaintiff,)
vs.)
)
ALLSTATE INSURANCE COMPANY,)
)
Defendant.)

ORDER ON PLAINTIFF'S MOTION FOR THE ADMISSION OF ImPACT CONCUSSION TESTING AFTER A MOTOR VEHICLE ACCIDENT

INTRODUCTION

This matter began in the small claims court when the plaintiff filed a claim for \$3,270 for services rendered to a patient who was involved in a motor vehicle accident and insured by the defendant. Following a hearing before a clerk-magistrate judgment entered for the plaintiff in the amount of \$1,597.15. The defendant appealed to a jury of six in the District Court. One of the issues raised in the appeal was the admissibility of certain testing done and billed for by the plaintiff, i.e. ImPACT testing.¹ The parties agreed to a Daubert/Lanigan hearing on that issue. A hearing was held on December 8, 2016. At that hearing the plaintiff was represented by Attorney Kenneth Gogel and the defendant by Attorney James Yesu. Testifying at that hearing were Dr. Michael Cliensky, the owner of the plaintiff corporation and Dr. Arthur Safran.

FACTS

The patient, Myrta Correa, was allegedly involved in a motor vehicle accident on

¹ImPACT stands for Immediate Post-Concussion Assessment and Cognitive Testing.

November 19, 2014. On November 24, 2014 she presented to the plaintiff for treatment of injuries allegedly suffered in that accident. On December 1, 2014 the plaintiff administered to Ms. Correa an ImPACT test for purposes of determining whether she was suffering from a post-concussive disorder. The test indicated that she was. A second test, administered later in the month of December, indicated that the post-concussive disorder had resolved. The charge for the test is \$140.00.

The defendant insured Ms. Correa. It refused to pay for the ImPACT test under the personal injury protection provisions of her policy for the reason that the defendant maintains that the test is unreliable in the circumstances of this case.

DISCUSSION

In its written opposition to the use of the ImPACT test, the defendant argues that, "the use of ImPact testing several days after a motor vehicle loss, in a clinical setting and without a baseline test, to assess if a patient has sustained a concussion is not generally accepted in the medical community as a way to assess for possible concussions." The defendant also argues a lack of peer review as to the reliability of this test under these circumstances.

Defendant's exhibit #1 is a copy of a press release issued by the Food and Drug Administration (FDA) on August 22, 2016. The press release states in pertinent part that the FDA has approved ImPACT testing, "to assess a patient's cognitive function immediately after a suspected brain injury or concussion." The statement acknowledged that the test was "not intended to diagnose concussions or determine appropriate treatments" but rather, "to test cognitive skills such as word memory, reaction time and word recognition, all of which could be affected by a head injury." The release further indicates that the test results are, "compared to an age-matched control database or to a patient's pre-injury baseline scores, if available." The FDA statement goes on to state that, "[T]he manufacturer submitted over 250 peer-reviewed articles, of which half were independently conducted clinical research studies. The research publications analyzed the scientific value of the ImPACT devices including the devices' validity, reliability and ability to detect evidence of cognitive dysfunction that might be associated with a concussive head injury. The FDA concluded that these studies provide valid scientific evidence to support

the safety and effectiveness of the ImPACT . . . devices.”

The defendant’s first argument against admissibility is that use of the ImPACT test to assess a concussion several days after a motor vehicle accident is not generally accepted in the medical community. The FDA approval of ImPACT to assess cognitive skills after a suspected concussion was not limited to head injuries resulting from sports, nor does it give any time frame in which the test must be conducted.² In fact, it is used as an assessment tool for making return-to-play decisions following a sports related head injury.³ And in one study it was noted that, “the mean time between injury and when patients were tested in clinic using ImPACT was . . . 24 days for . . . MVA (motor vehicle accident) patients . . .”⁴

Secondly, the defendant contends that the test is inadmissible because there is no baseline test for Ms. Correa with which to compare her ImPACT test. However, again, the FDA approval indicates that the test results can be “compared to an age-matched control database” or a baseline test.

The defendant next takes issue with the fact that the test was done “in a clinical setting”. The FDA approval states that the ImPACT test runs on a “desktop or laptop”. If it runs on a desktop, it is highly likely that the test is given in a “clinical setting”. Several of the studies admitted in evidence were done in a clinical setting.

Finally, the defendant argues that there is no peer review as to the reliability of the test in the circumstances presented in this case. The FDA approval indicates that, “[T]he manufacturer

²Although the FDA approval states that ImPACT was being approved, “to assess a patient’s cognitive function immediately after a suspected brain injury or concussion”, studies show that it is also used to make return-to-play decisions many days after a head injury and in one study for following brain function changes after carbon monoxide poisoning. (See Plaintiff’s exhibit # 6)

³One of the articles submitted by the defendant, (Exhibit # 6) takes issue with the usefulness of ImPACT but acknowledges that, “[I]t’s client list includes every professional hockey team, and most of the franchises in the national Football league and in Major League Baseball” as well as the Department of Defense. Check Your Head by Christie Aschwanden p. 3.

⁴See plaintiff’s Exhibit # 4 Does Mechanism of Injury Play a Role in Recovery from Concussion? Ashley Seiger, BS; Eva Goldwater, MS; Eileen Deibert, MD.

submitted over 250 peer-reviewed articles, of which half were independently conducted clinical research studies.” While the approval does not indicate that the peer review studies did or did not include the use of ImPACT on patients following a motor vehicle accident, the approval is not limited to sports-related head injuries.⁵

I find that the plaintiff has shown that the use of the ImPACT test for purposes of assessing a patient for a possible concussion following a motor vehicle accident has “general acceptance in the relevant scientific community” and can be properly applied to the facts of this case. *Commonwealth v. Lanigan*, 419 Mass. 15, 26 (1994). Therefore, I find that the testimony of Dr. Clionsky regarding the ImPACT testing administered to Ms. Correa and the results thereof is admissible. The defendant’s challenges go to the weight of the evidence not its admissibility.

ORDER

The plaintiff’s proposed testimony of Dr. Clionsky relative to the ImPACT test given to Ms. Correa is admissible.

Dated: April 10, 2017



Patricia T. Pochler

Associate Justice of the District Court

⁵The defendant did present articles which challenge the reliability and/or usefulness of ImPACT testing and cite the lack of peer review studies. However, one of these articles was written in 2006, ten years before the FDA approval. (Defendant’s exhibit # 5). Two others, written in 2012, mainly address the use of the test in making post concussion return-to-play decisions in a sports context. (Defendant’s exhibits # 3 and 6). A third, from 2011, found that ImPACT was most reliable when used in conjunction with other modalities when evaluating a patient for a concussion or making a return-to-play decision. (Defendant’s exhibit # 4).