

Compass Chambers



Litigating Functional Disorders

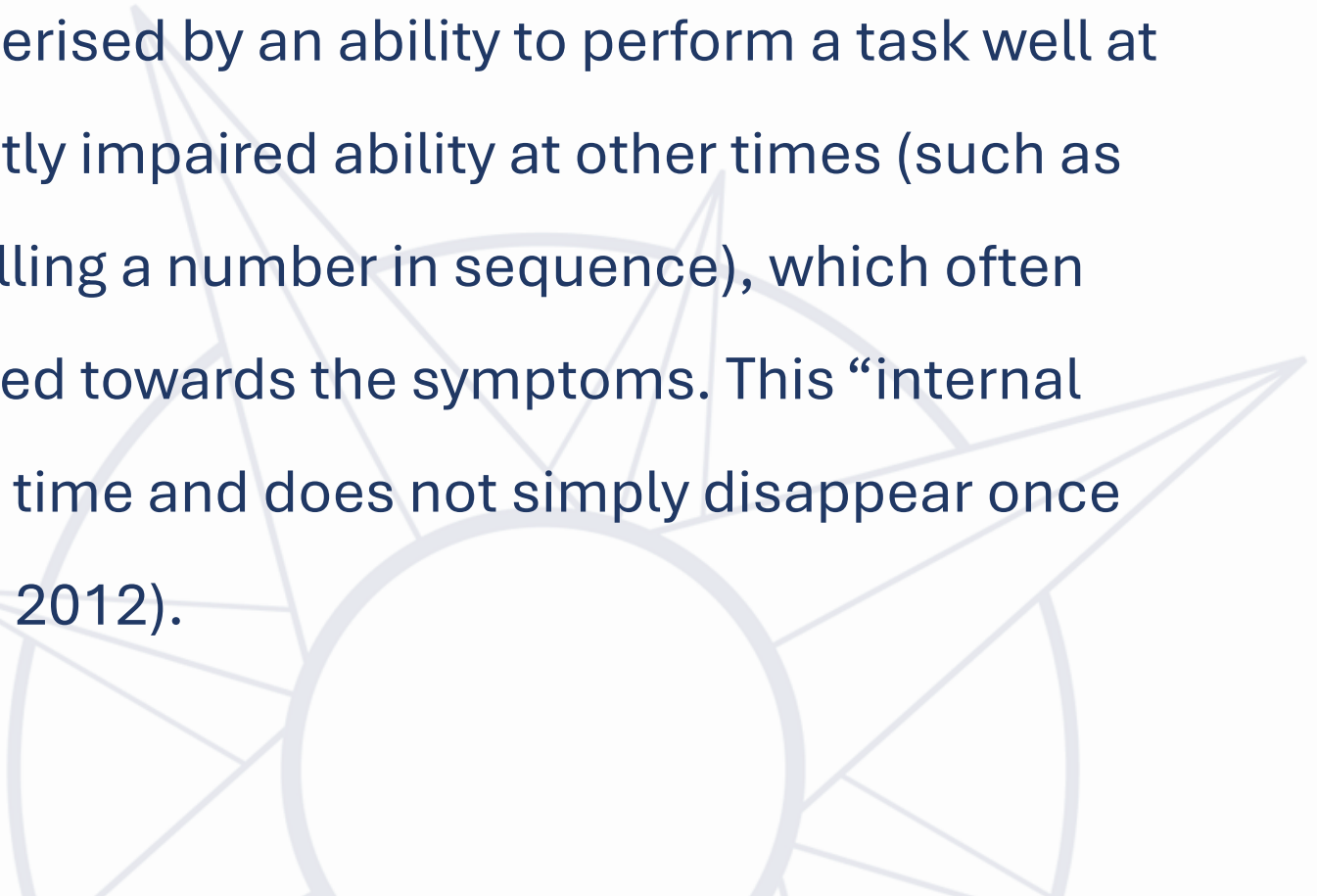
Craig Murray KC

16th May 2025



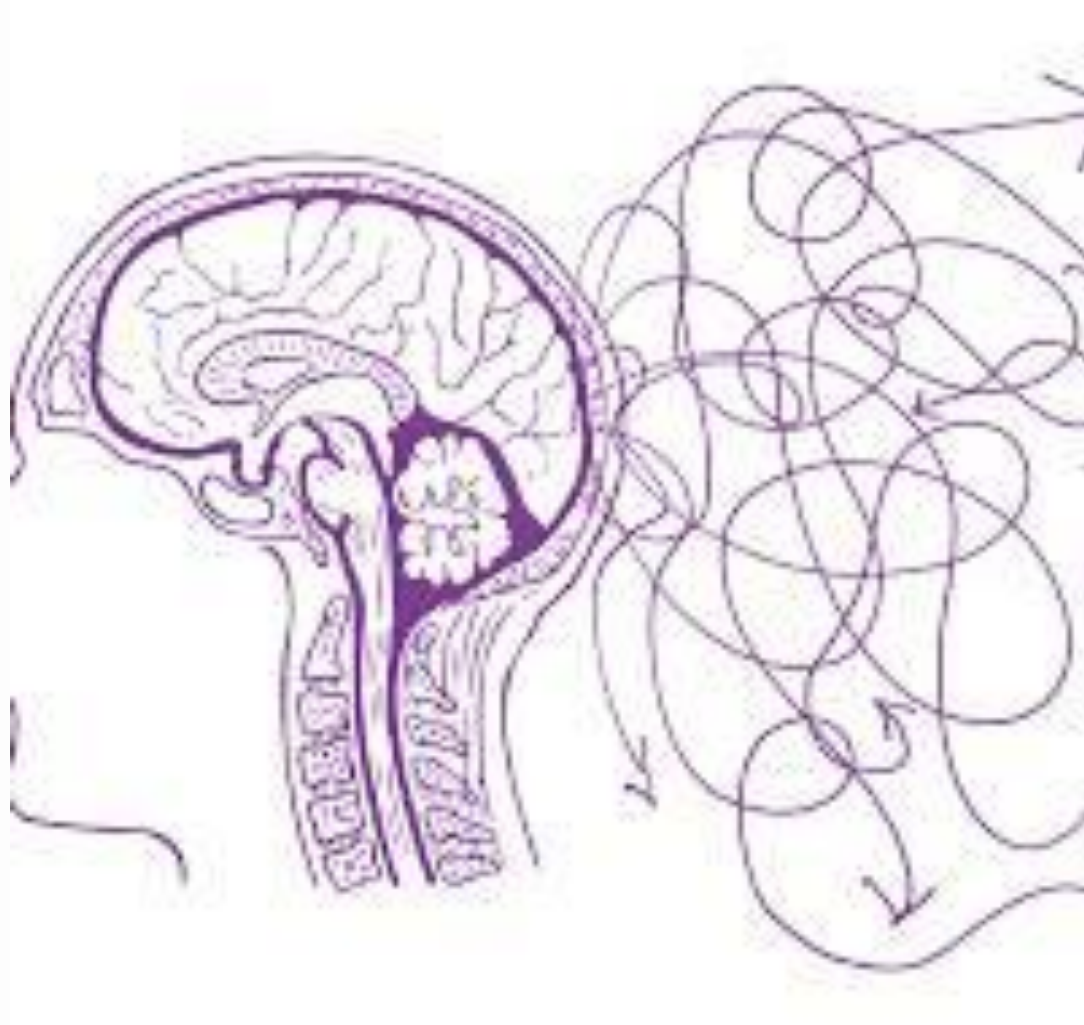
Introduction

Functional disorders are characterised by an ability to perform a task well at certain times, but with significantly impaired ability at other times (such as limb weakness, or difficulty recalling a number in sequence), which often worsens when attention is directed towards the symptoms. This “internal inconsistency” is persistent over time and does not simply disappear once highlighted to the patient (Stone, 2012).





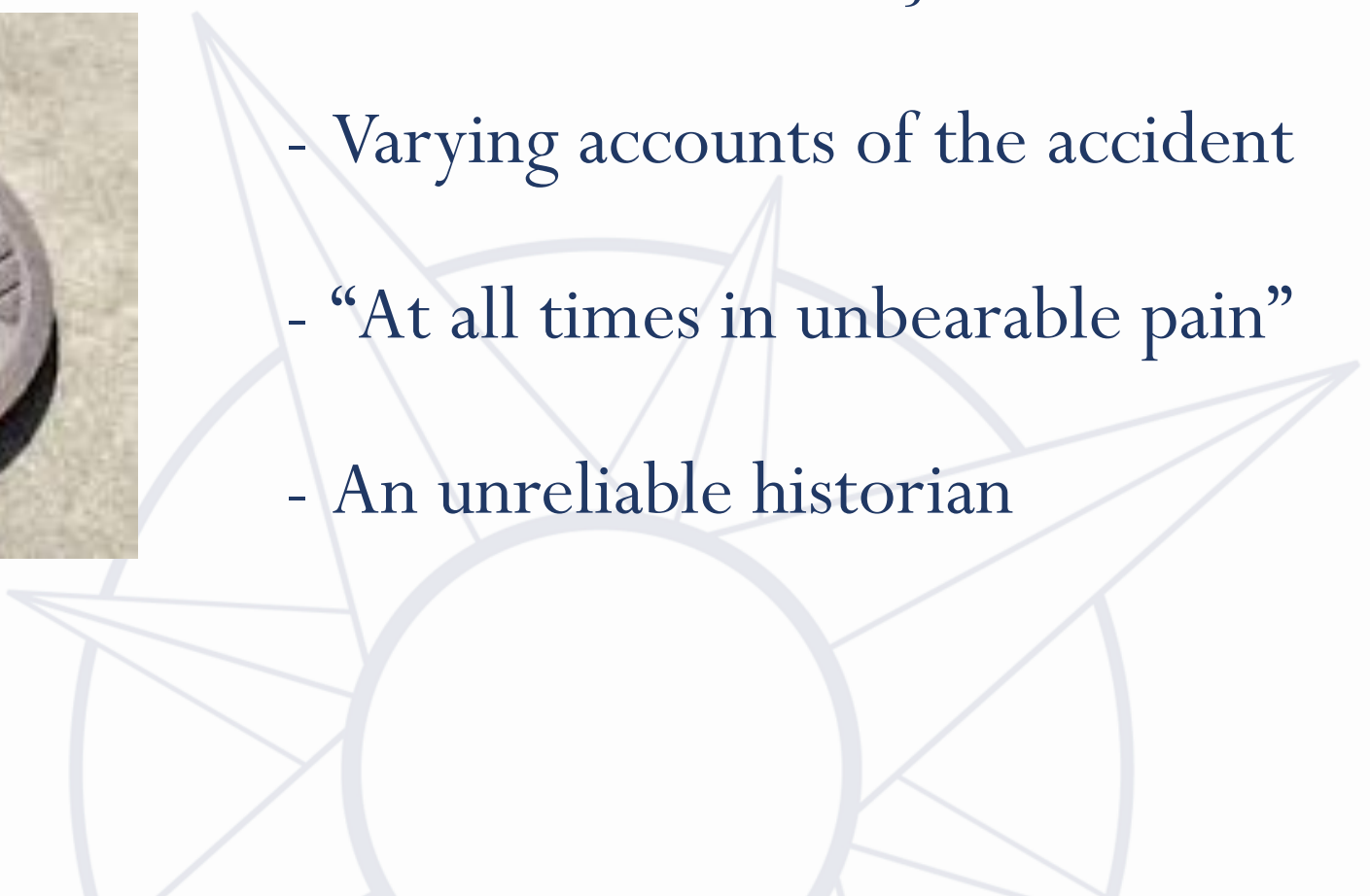
Functional neurological disorders





Sharon Cossey v Buccleuch Estates Ltd (2022) CSOH 50

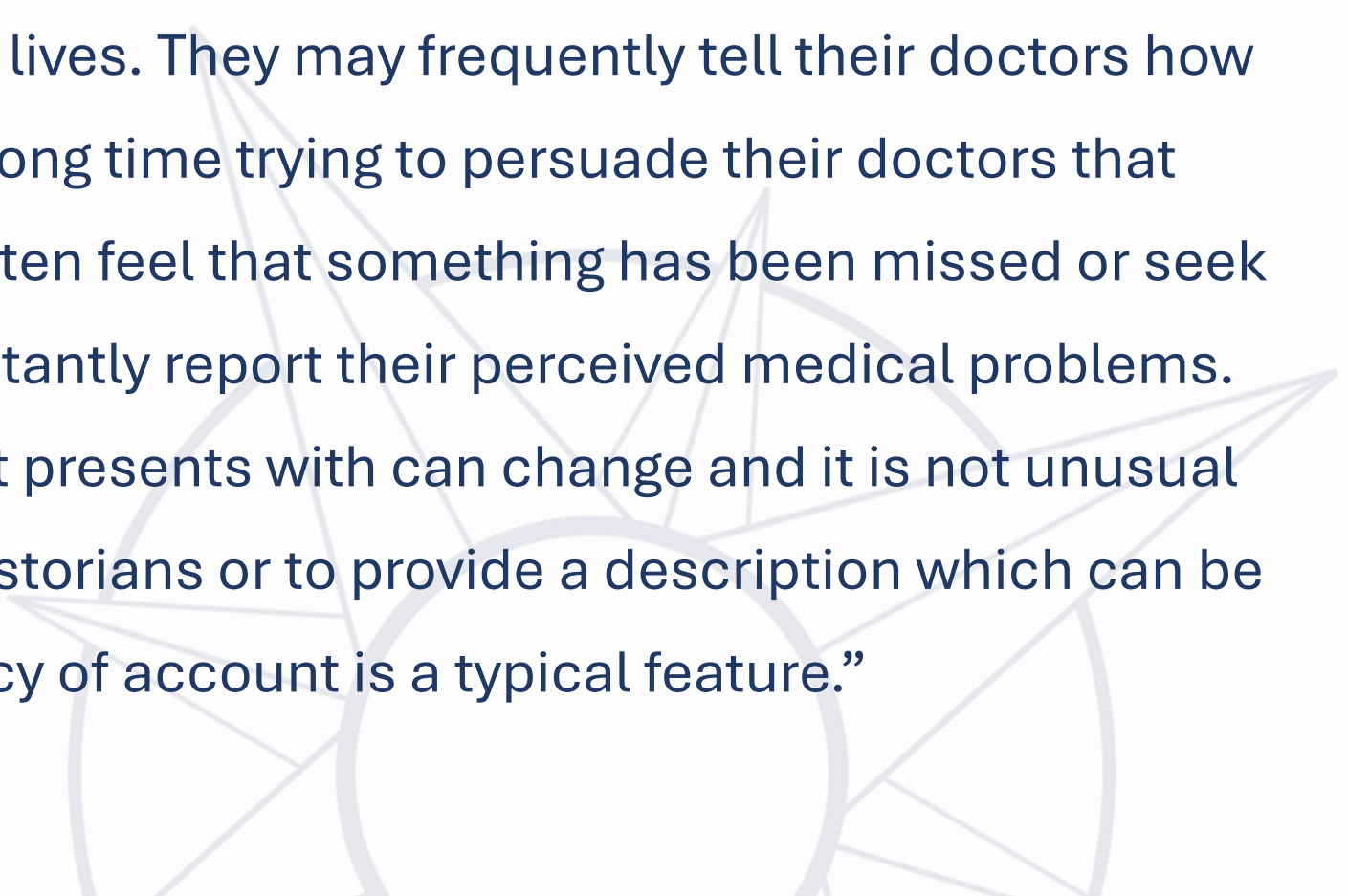


- Minor soft tissue injuries
 - Varying accounts of the accident
 - “At all times in unbearable pain”
 - An unreliable historian
- 



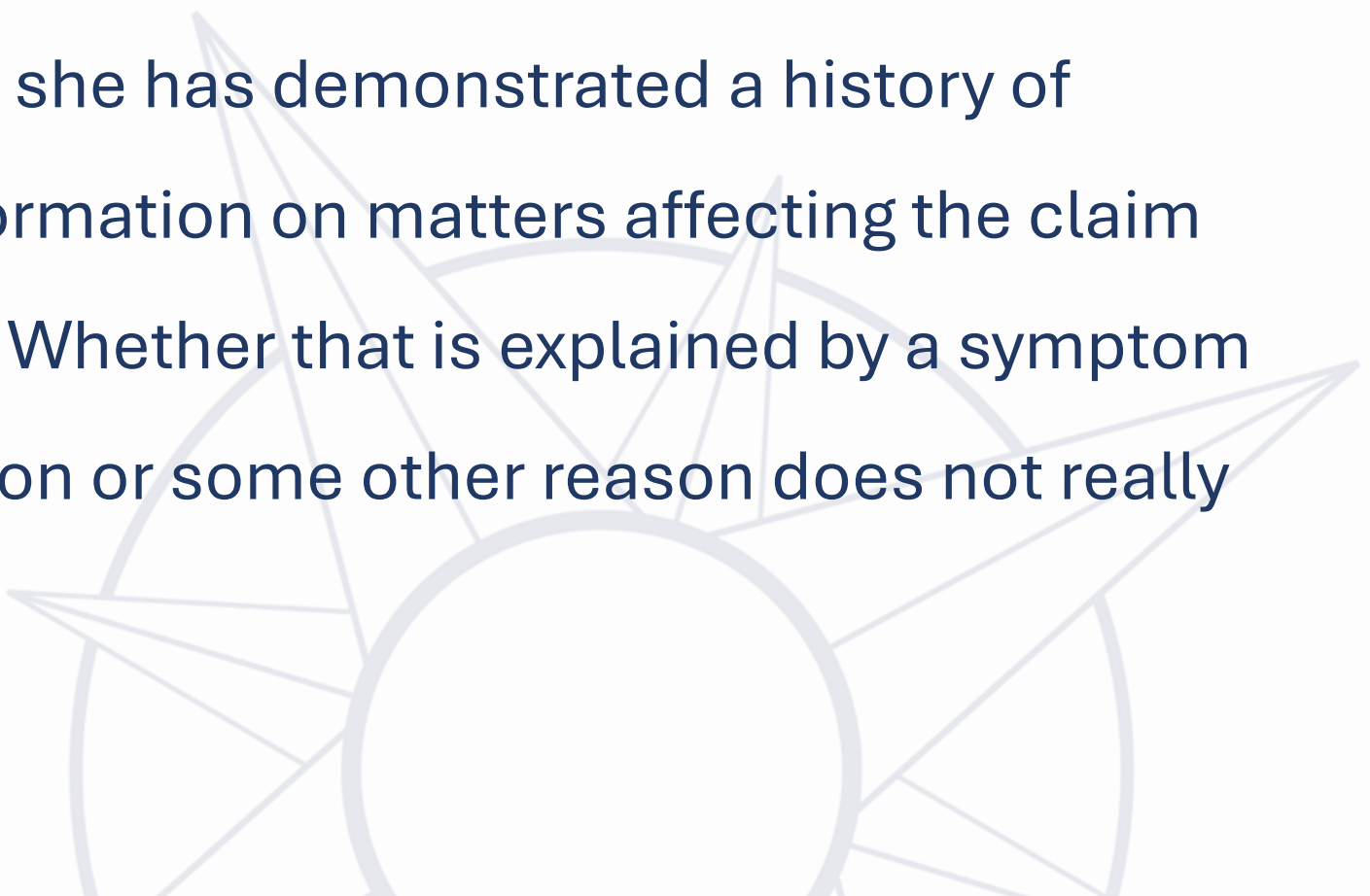
Sharon Cossey v Buccleuch Estates Ltd (2022) CSOH 50

“[68] Patients with the disorder often think the worst about their health and the symptoms can dominate their lives. They may frequently tell their doctors how bad things are and will take a long time trying to persuade their doctors that they are ill. The patients will often feel that something has been missed or seek a further opinion and will constantly report their perceived medical problems. The symptoms which a patient presents with can change and it is not unusual for such patients to be poor historians or to provide a description which can be difficult to follow. Inconsistency of account is a typical feature.”





Sharon Cossey v Buccleuch Estates Ltd (2022) CSOH 50

- “These examples, when taken along with the pursuer’s account of her accident, vouch that she has demonstrated a history of providing inaccurate information on matters affecting the claim advanced on her behalf. Whether that is explained by a symptom of her underlying condition or some other reason does not really matter.”
- 



DS v. Grampian HB [2024] SC ABE 11



- Inappropriate approach to exam by Prof Carson
- Dr Myles Connor noted previous unexplained symptoms
- Dr Connor “wedded” to FND
- No long-term difference in presentation, per Prof Carson



Functional Cognitive Disorder

“People with FCD are not ‘worried well’ but often perform poorly on tests, and have more anxiety, depression and physical symptoms than people with other cognitive disorders” (McWhirter, et al. 2022).





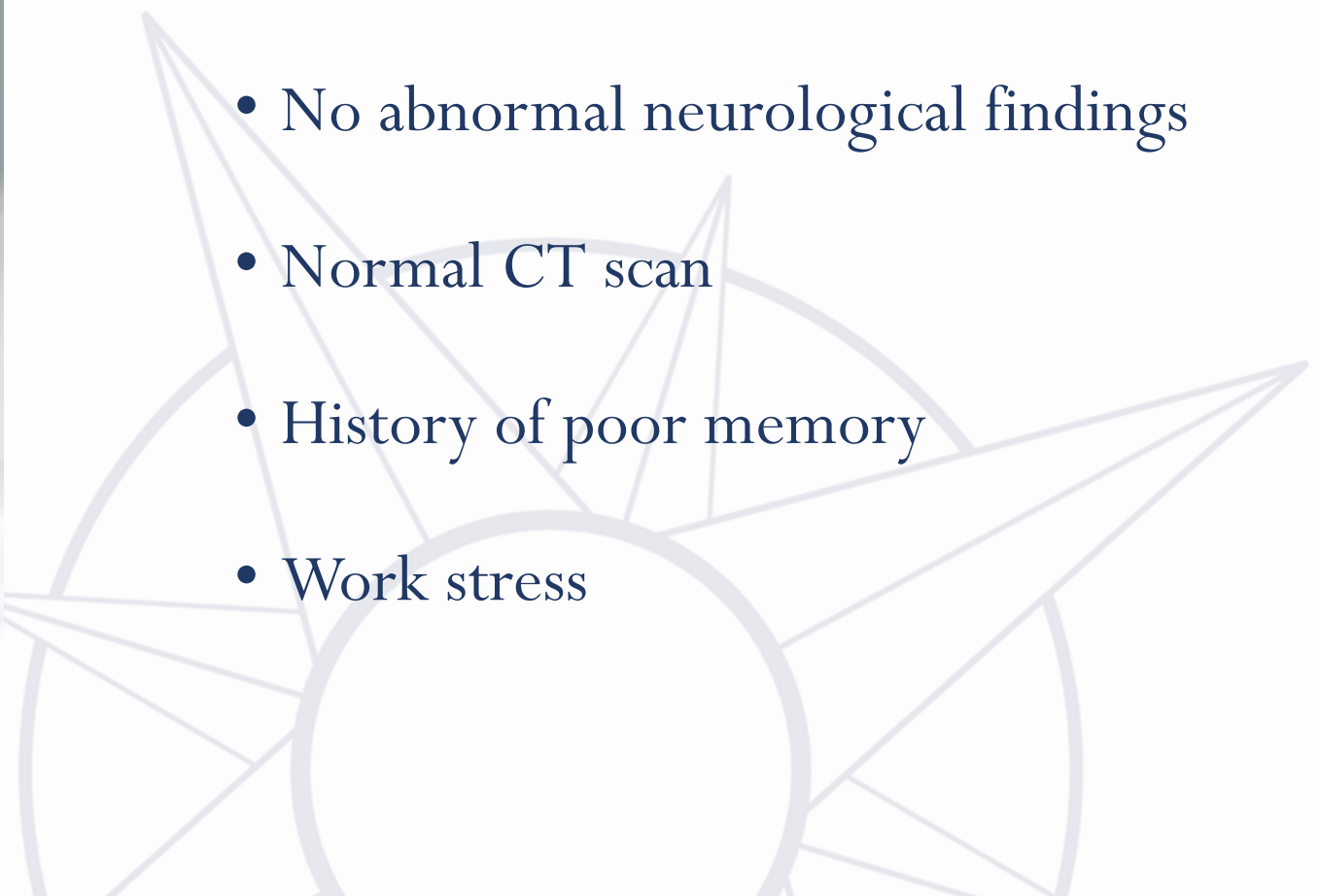
Functional Cognitive Disorder

“Functional cognitive disorder (FCD) accounts for around a third of patients attending specialized memory clinics. It is also overrepresented in patients with other functional and somatic diagnoses. So far, no long-term diagnostic validity studies were conducted, and a positive diagnostic profile is yet to be identified. We aimed to review the literature on diagnostic signs and symptoms that allow for a discrimination between FCD.” (Cabreira, et al. 2023).



Case Study



- Minor head injury, GCS 15
 - No abnormal neurological findings
 - Normal CT scan
 - History of poor memory
 - Work stress
- 



Case Study

- The cognitive problems reported by T were of an order and form inconsistent with the injury.
- T forgot basic biographical details, such as how many children he had and the date of his marriage.
- Neurologists for P and D concur in the diagnosis of probable mild TBI (using the Mayo classification) and postulate FCD.
- In the opinion of Dr Alasdair Rooney, the mild (probable) traumatic brain injury was the trigger for an exacerbation of a functional cognitive disorder ('FCD').



Case Study

Key features:

- Cognitive impairment presentation which fluctuates over time
- Pre-disposing factors (stress and dissatisfaction at work)
- Physical injury the severity of which does not explain the cognitive impairment reported

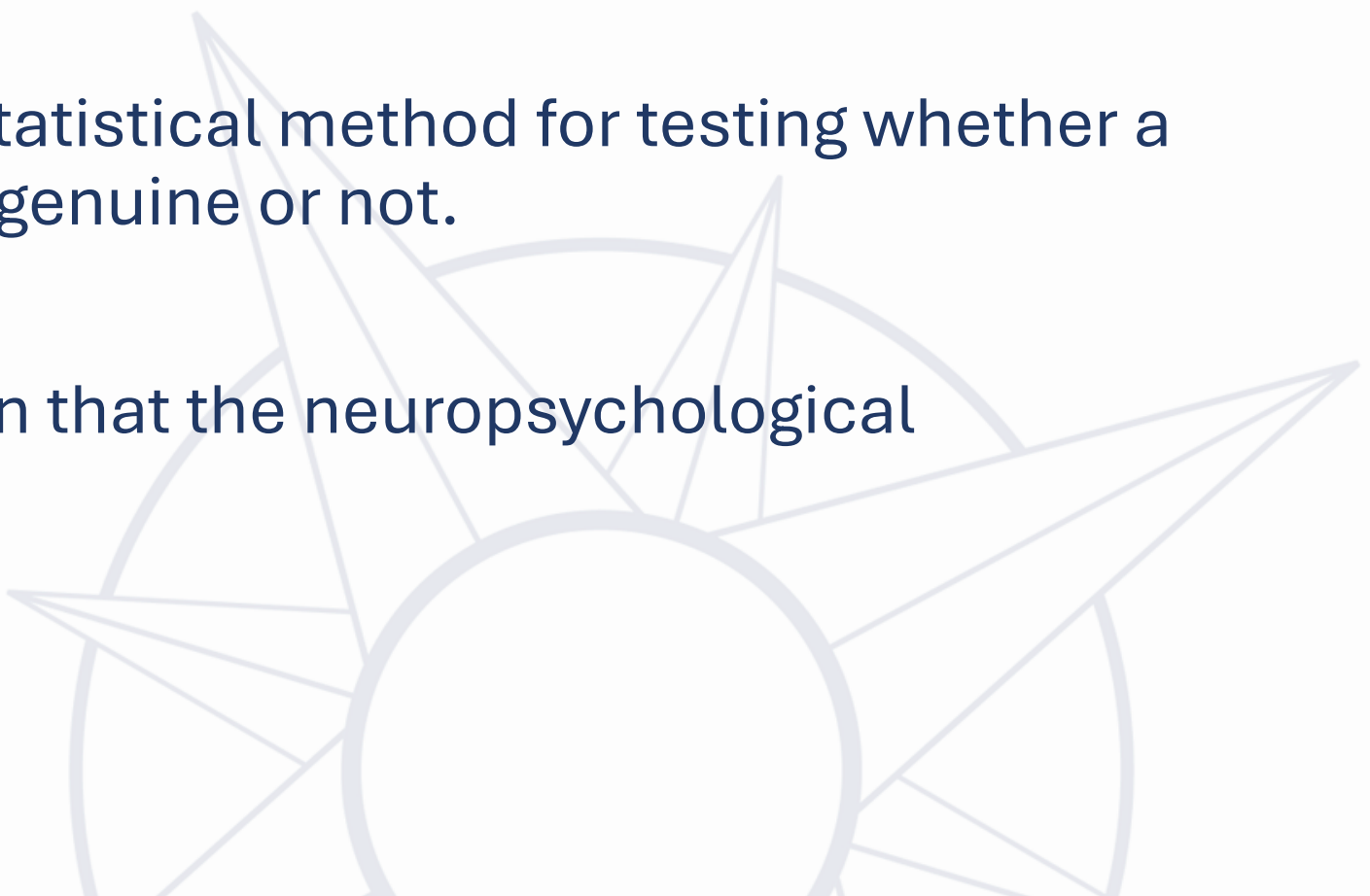


F v. Chalmers [2025] CSOH 23

- 2 prolonged episodes of serious sexual abuse as a child
- Diagnosis of Complex PTSD
- Dr Rooney diagnosed: a Functional Cognitive Disorder, which was caused by “a combination of factors, including anxiety, complex PTSD, migraines and fatigue”.
- The judge found that there was a real difficulty in drawing from the pursuer’s evidence alone the conclusion that his current mental health state was caused mainly by his experiences at primary school.

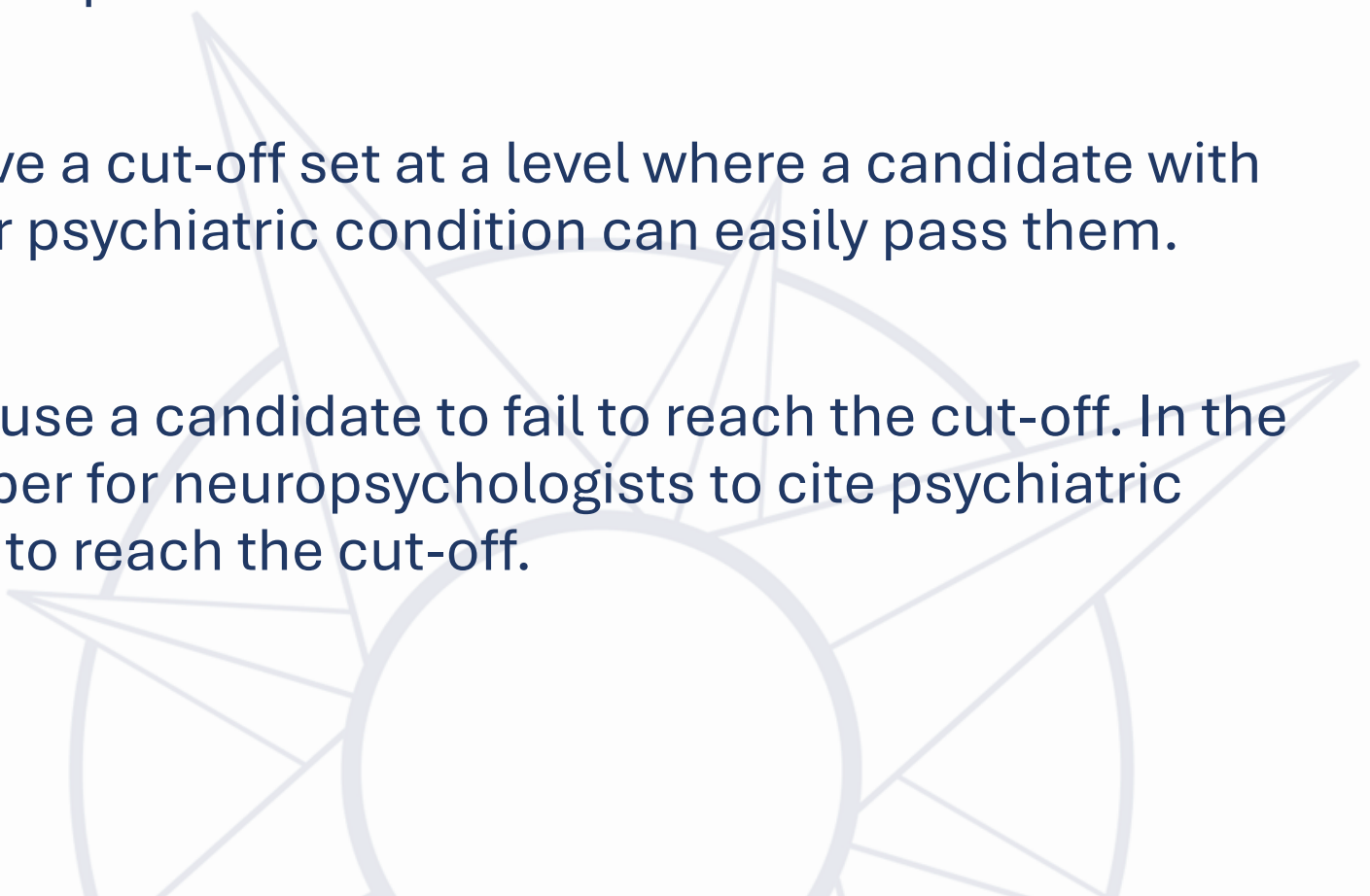


Neuropsychology Validity Tests

- Validity tests provide a statistical method for testing whether a candidate's response is genuine or not.
 - Failed validity tests mean that the neuropsychological assessment is invalid.
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What is “invalidity”?

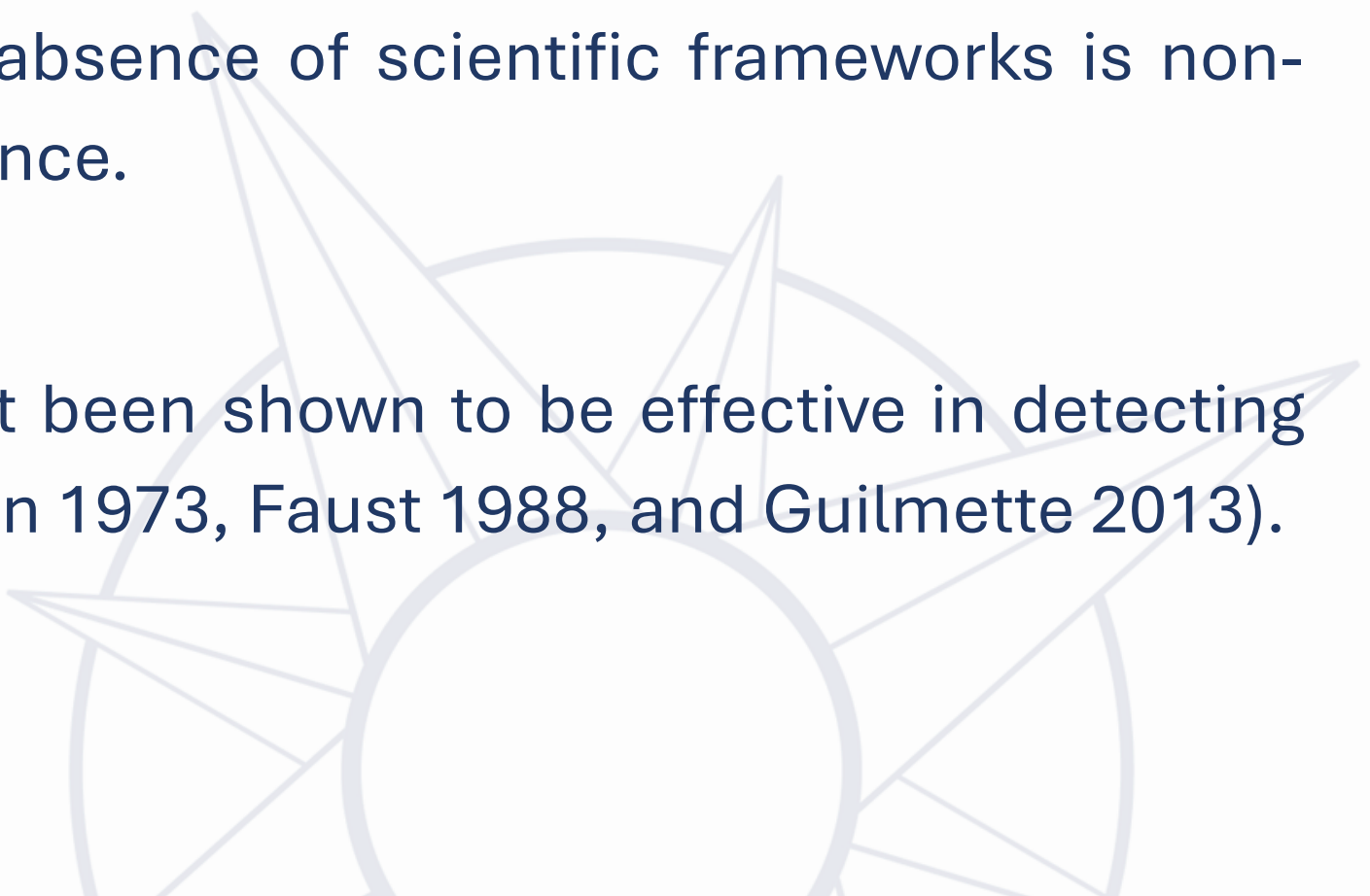
- It is a highly atypical presentation which cannot be explained by psychiatric, neurological, medical or developmental factors.
 - The tests are designed to have a cut-off set at a level where a candidate with a neurological impairment or psychiatric condition can easily pass them.
 - Psychiatric factors do not cause a candidate to fail to reach the cut-off. In the US it is professionally improper for neuropsychologists to cite psychiatric factors as reasons for failing to reach the cut-off.
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Why test for invalidity?

Clinical judgment in the absence of scientific frameworks is non-verifiable and pseudoscience.

Clinical judgment has not been shown to be effective in detecting malingering (e.g. Rosenhan 1973, Faust 1988, and Guilmette 2013).



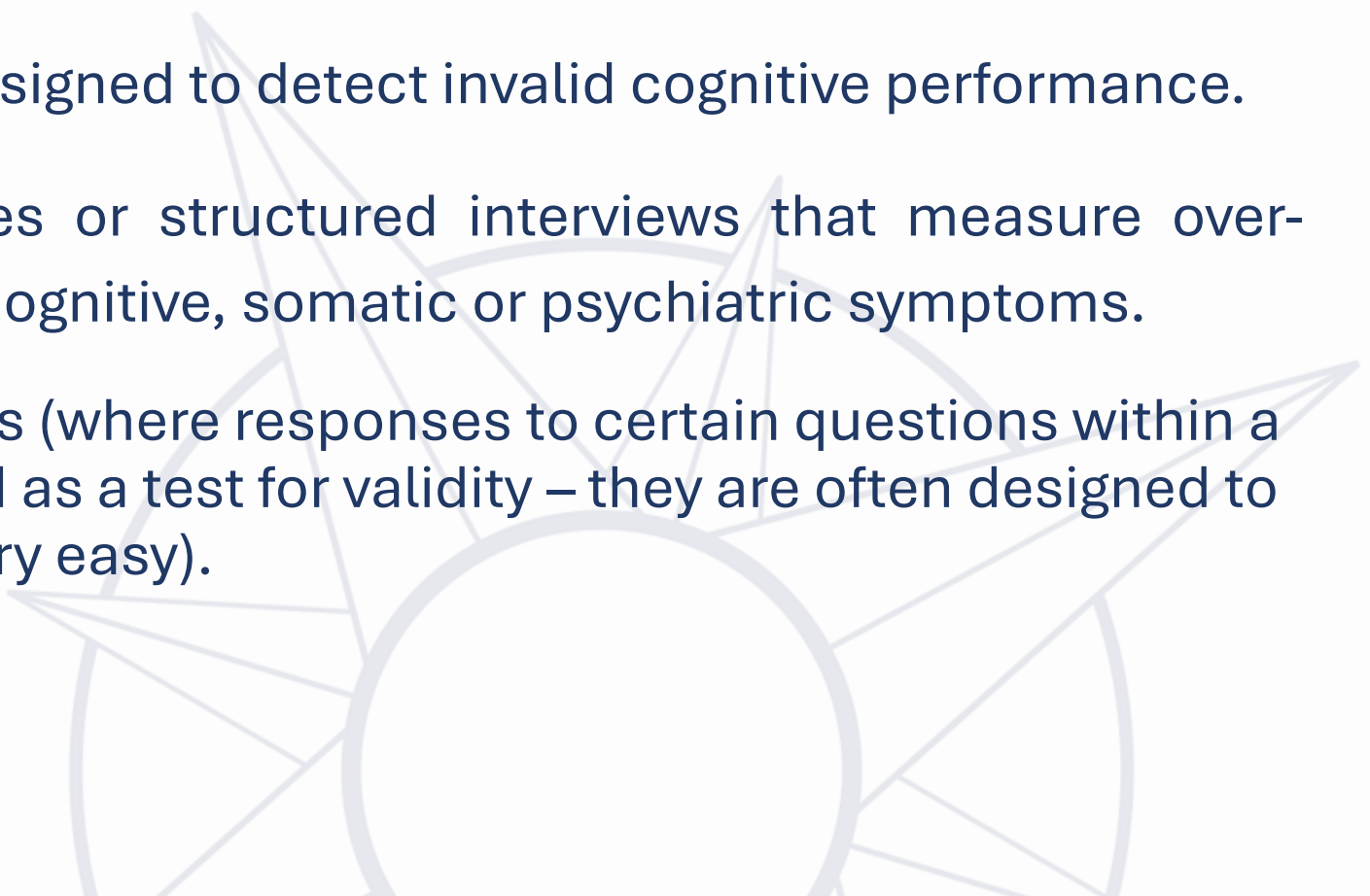


What are validity tests?

- Performance Validity Tests ('PVTs') and Self-report Symptom Validity Tests ('SVTs').

PVTs are objective tests designed to detect invalid cognitive performance.

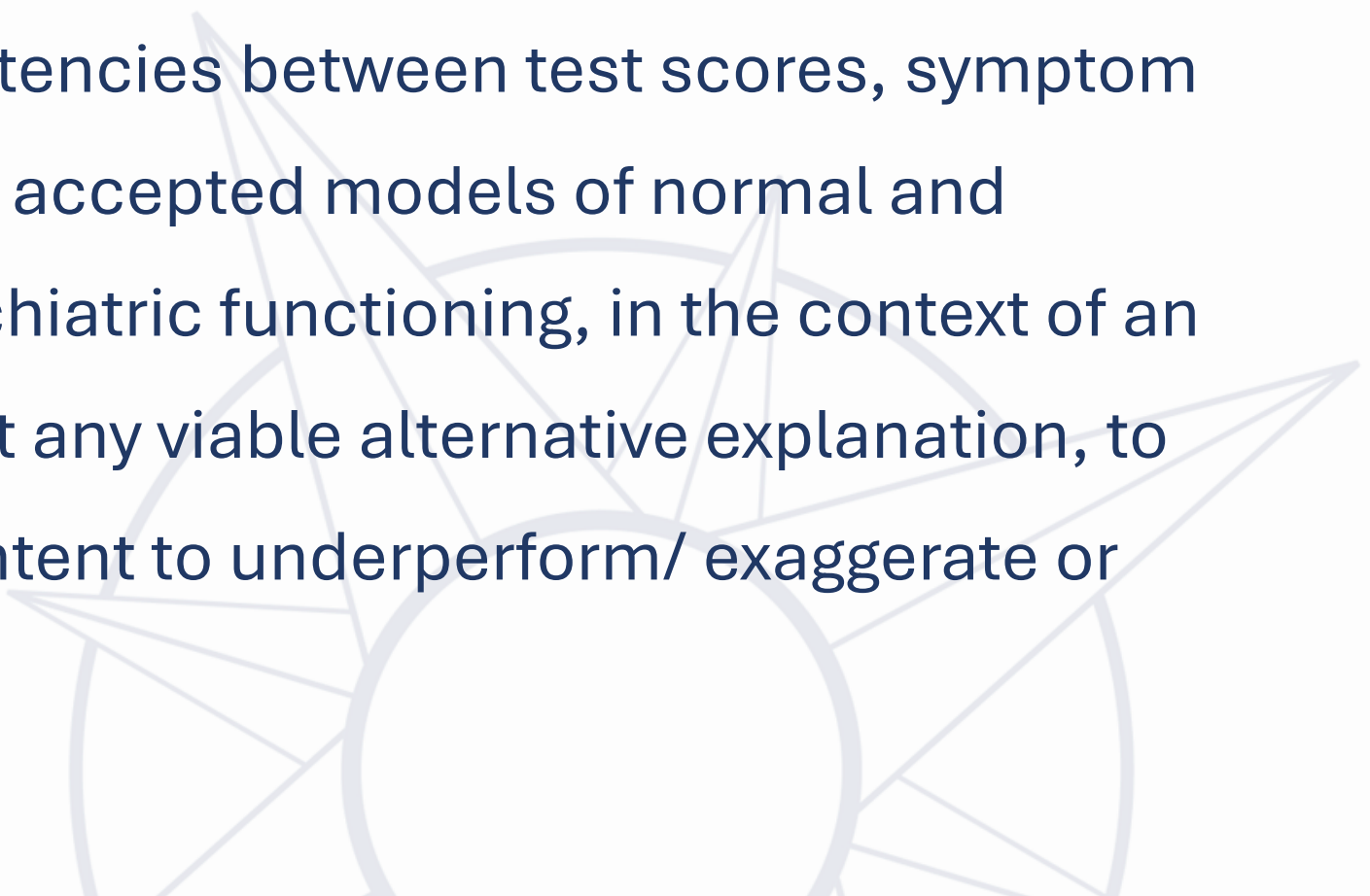
SVTs are self-report scales or structured interviews that measure over-reporting of self-reported cognitive, somatic or psychiatric symptoms.

- Embedded Validity Indicators (where responses to certain questions within a wider test can be interpreted as a test for validity – they are often designed to look hard but actually are very easy).
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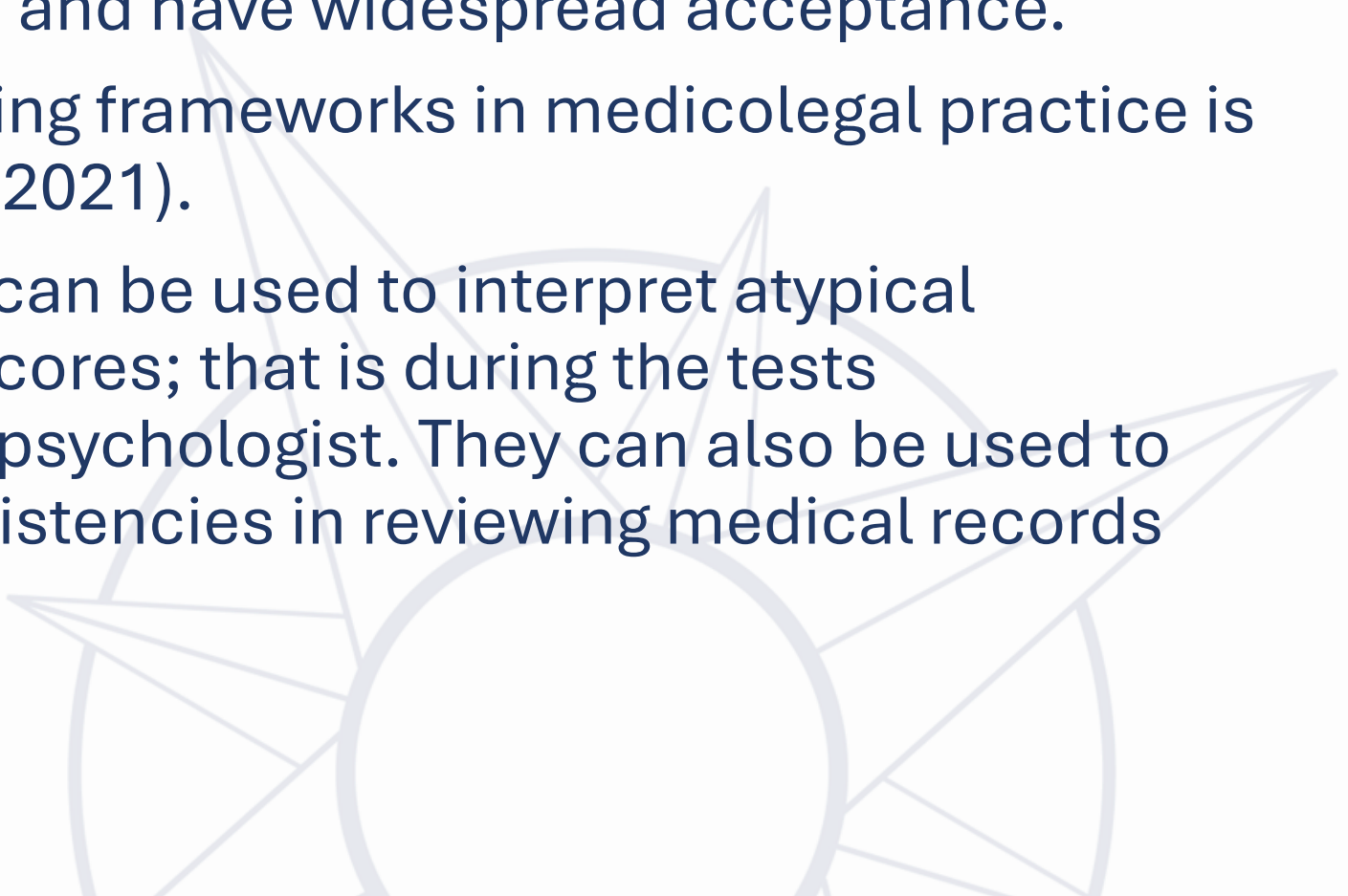
What are validity tests?

They structure evidence to provide the combined improbability of multiple atypical inconsistencies between test scores, symptom presentation, etc. and the accepted models of normal and abnormal medical or psychiatric functioning, in the context of an external incentive, without any viable alternative explanation, to establish the claimant's intent to underperform/ exaggerate or feign.



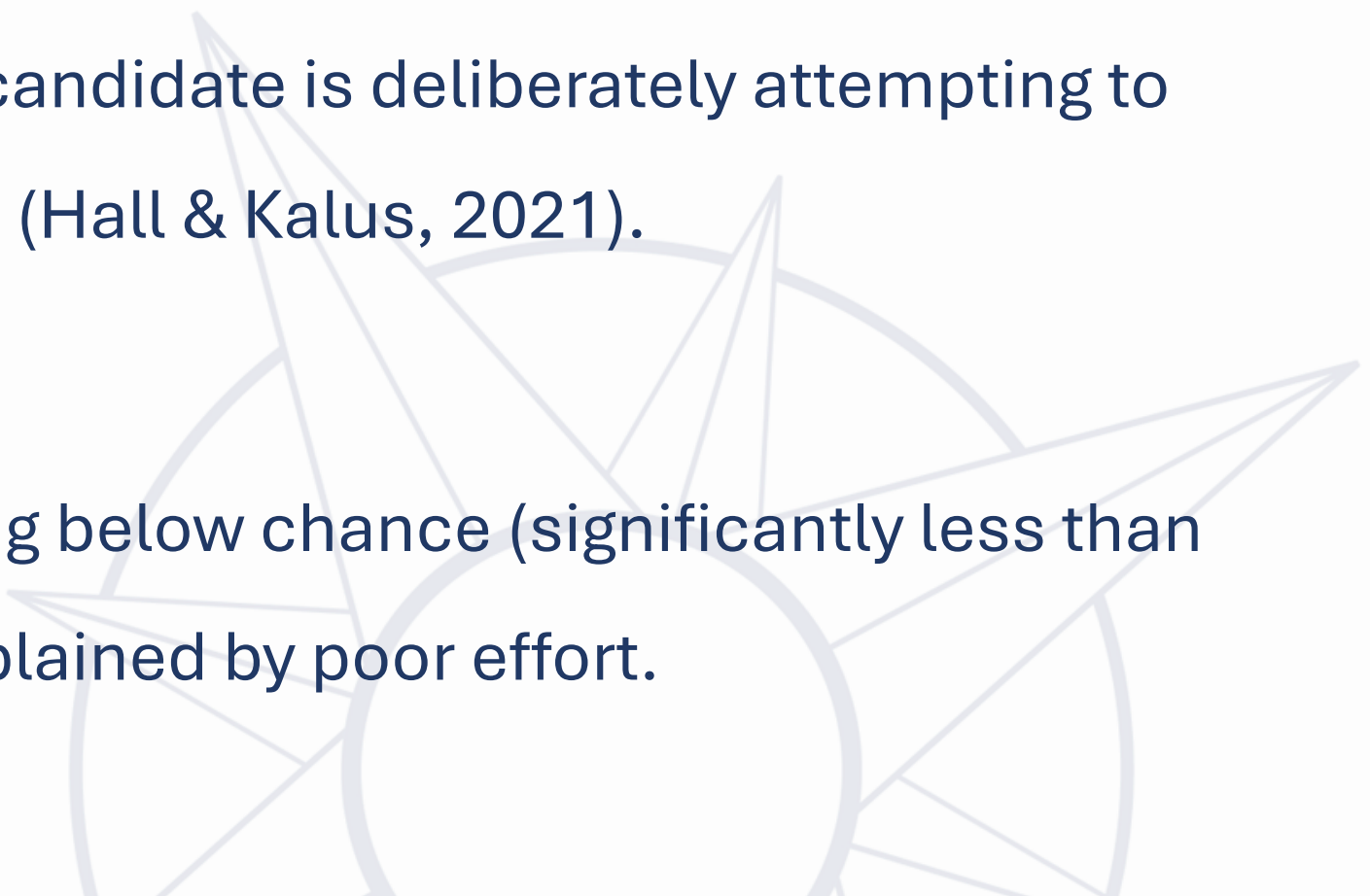


What are validity tests?

- It is important to recognise that these are diagnostic criteria, which are peer-reviewed and have widespread acceptance.
 - The utility of validity testing frameworks in medicolegal practice is recognised (Sweet et al, 2021).
 - The validity frameworks can be used to interpret atypical inconsistencies in test scores; that is during the tests administered by a neuropsychologist. They can also be used to interpret atypical inconsistencies in reviewing medical records (Chafetz et al. 2025).
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Sherman psychometric criterion (2020)

- The more failures there are and the more severe those failures, the more likely it is that the candidate is deliberately attempting to misrepresent symptoms (Hall & Kalus, 2021).
 - If the candidate is scoring below chance (significantly less than 50%), that cannot be explained by poor effort.
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Sherman (2020)

- **Criterion A:** A clearly identifiable and substantial external incentive for feigning or exaggeration of deficits or symptoms is present at the time of examination.
- **Criterion B:** On examination of the candidate, there is either (a) compelling inconsistencies indicative of deliberate exaggeration or feigning of deficits or symptoms, or (b) psychometric evidence of exaggeration or feigning of deficits or symptoms on performance validity tests (PVTs) or symptom validity tests (SVTs).



Sherman (2020)

Criterion C: Marked discrepancies.

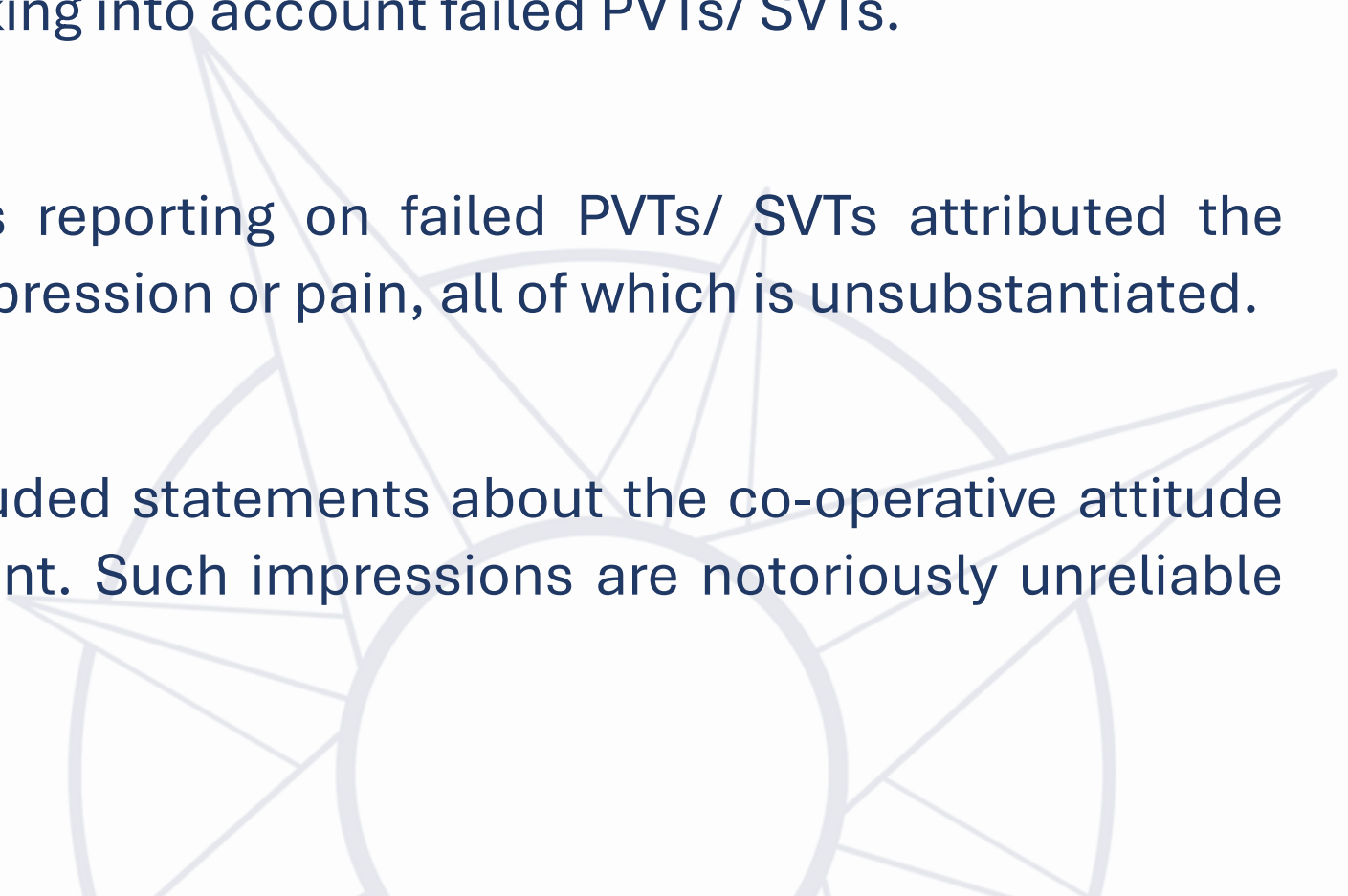
- a. Natural history and pathogenesis of the condition in question
- b. Records and other media
- c. Reliable collateral informant report

Criterion D: Behaviours meeting Criterion B are not fully accounted for by another developmental, medical or psychiatric condition.





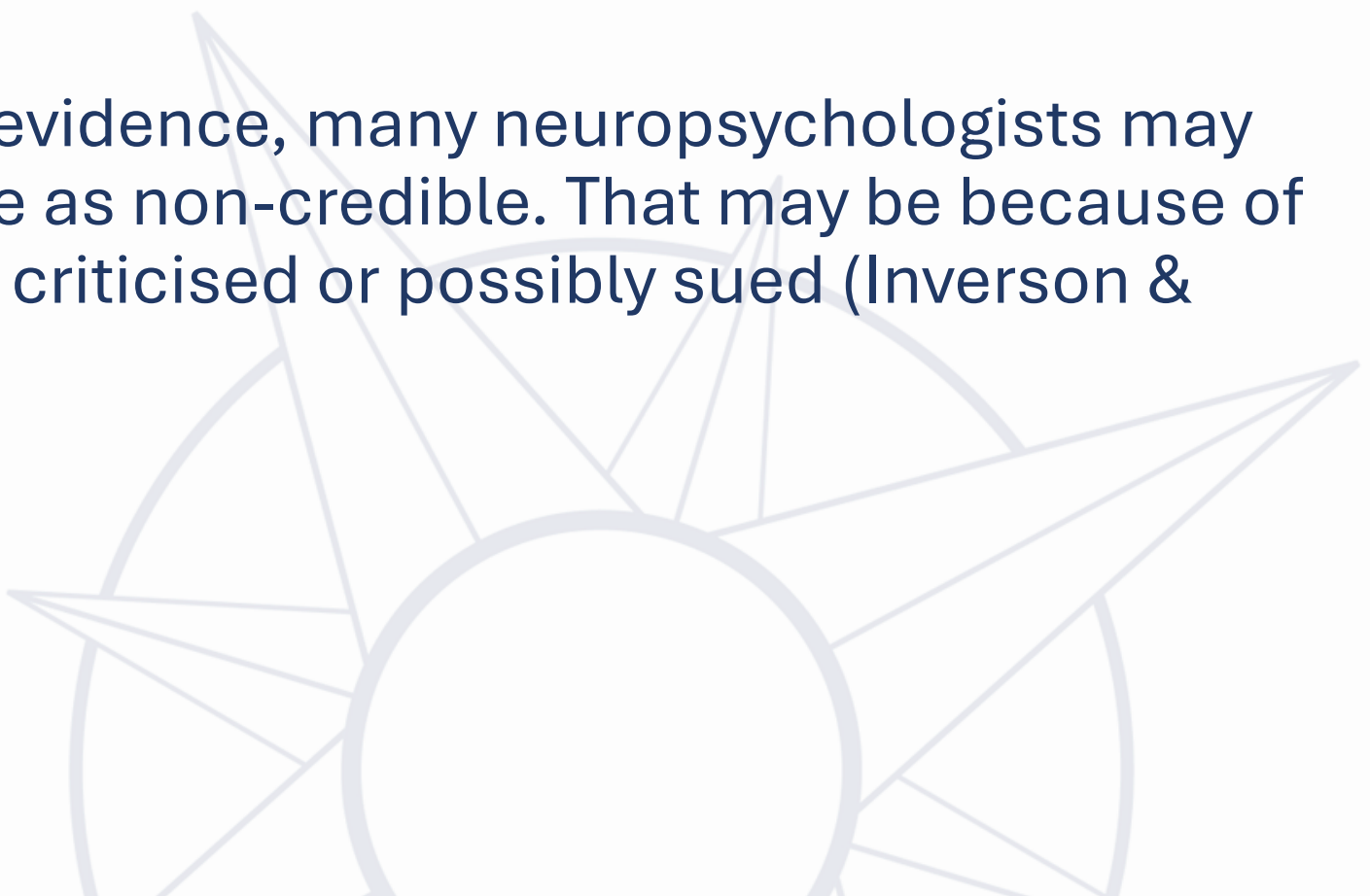
What to look out for

- Scores on standard cognitive tests and psychological questionnaires were often interpreted without taking into account failed PVTs/ SVTs.
 - Around 1/3 of practitioners reporting on failed PVTs/ SVTs attributed the failure to anxiety, fatigue, depression or pain, all of which is unsubstantiated.
 - The majority of reports included statements about the co-operative attitude and good effort of the patient. Such impressions are notoriously unreliable (Dandachi-Fitzgerald 2022).
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What to look out for

Even in the face of strong evidence, many neuropsychologists may avoid labelling a candidate as non-credible. That may be because of fear of mislabelling, being criticised or possibly sued (Inverson & Binner, 2000).





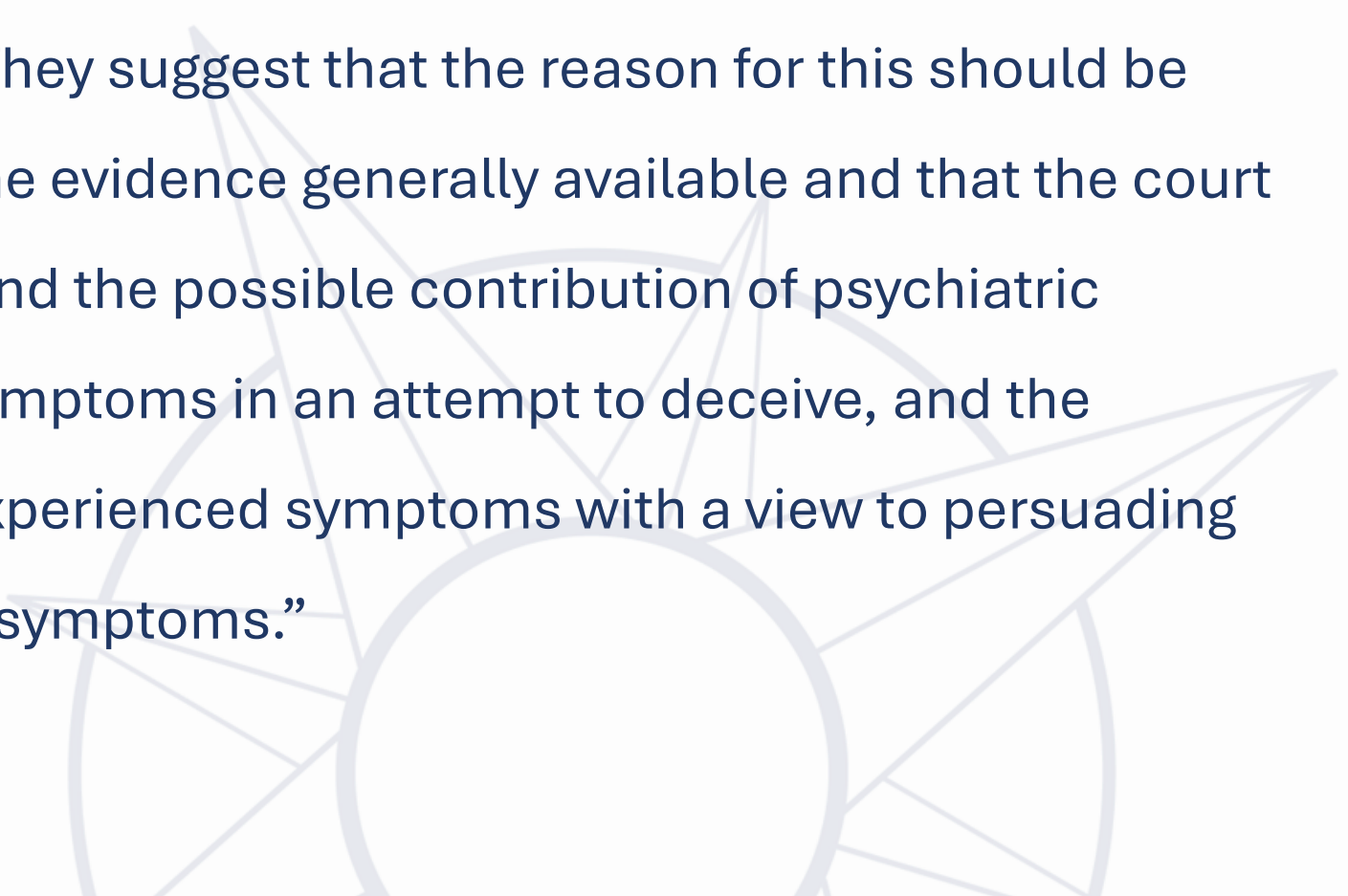
What questions to ask of your neuropsychologist?

- Lower cut-offs are required for some conditions of severe impairment, e.g. dementia.
- Are there atypical patterns which cannot be explained by genuine memory impairment?
- What are the responses to “forced choice” questions, where the results can be measured against chance ?
- What consistency is there in the results, examining the performance of easy versus hard memory tests?
- Whether postulating anxiety, depression or some other cause is in breach of professional practice guidelines. Martin & Schroeder (2021) state it is contrary to the standards of the American Psychiatric Association *Code of Conduct* to cite psychiatric factors
- Failure on multiple measures is uncommon (Sherman et al 2020). The reason advanced for this is that failure on multiple levels is likely to exceed a person’s ability to self-deceive (Boone, 2017).



Long v. Elegant Resorts Ltd [2021] EWHC 1330

“... agree that, on neuropsychological assessment, the Claimant has failed performance validity testing. They suggest that the reason for this should be considered in the context of the evidence generally available and that the court should in particular bear in mind the possible contribution of psychiatric sequelae, the fabrication of symptoms in an attempt to deceive, and the exaggeration of subjectively experienced symptoms with a view to persuading people of the validity of those symptoms.”





Williams-Henry v. AB Ports [2024] EWHC 2415

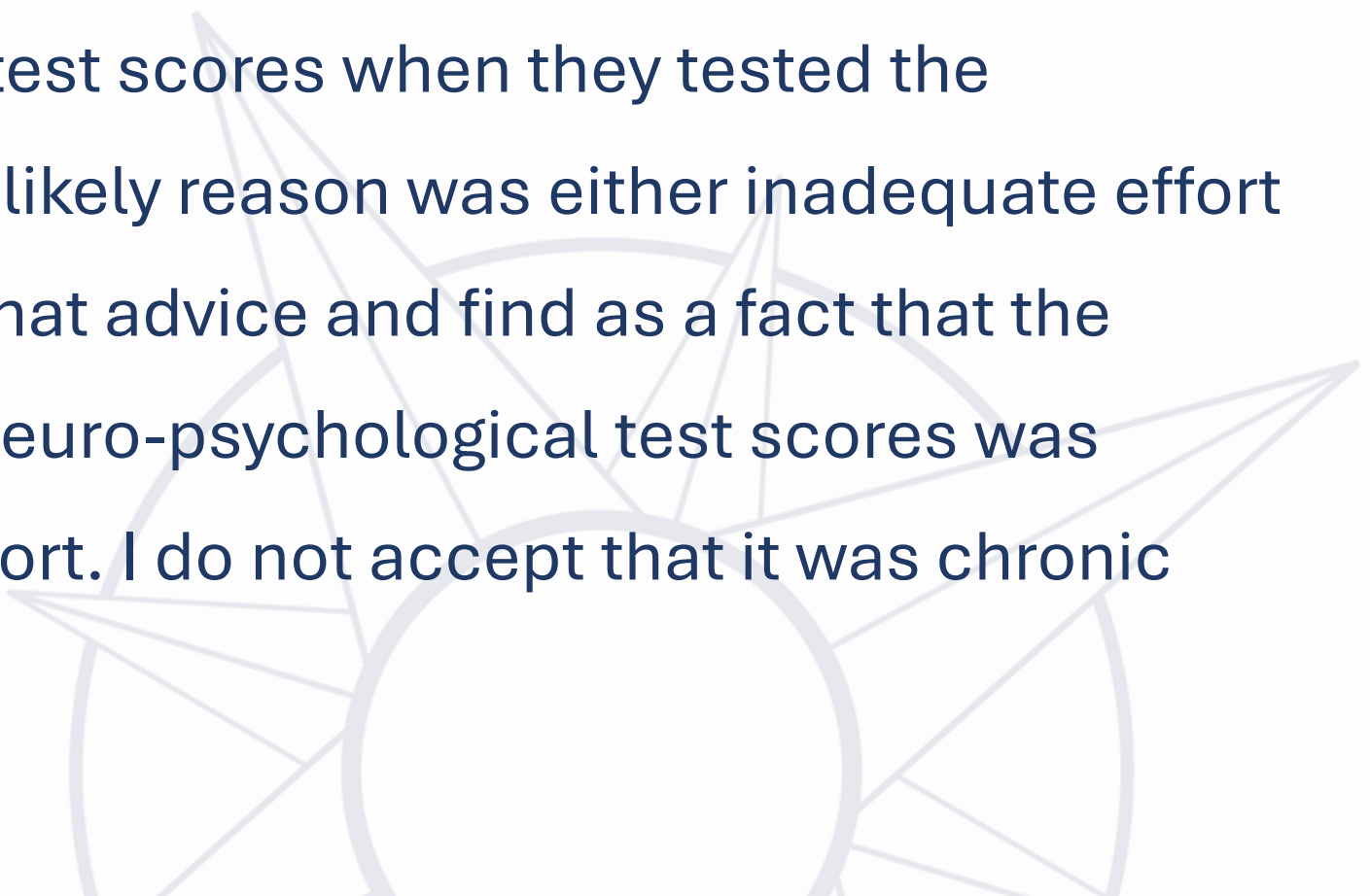


- 4-meter fall from pier
- Moderate TBI
- Highly distressed state and suicidal
- Shopping trip after examination
- Fundamentally dishonest



Williams-Henry v. AB Ports [2024] EWHC 2415

“They concluded that the TBI could not be the reason for the decline in the Claimant's test scores when they tested the Claimant's cognition. The likely reason was either inadequate effort or chronic pain. I accept that advice and find as a fact that the reason for the decline in neuro-psychological test scores was intentional inadequate effort. I do not accept that it was chronic pain. “





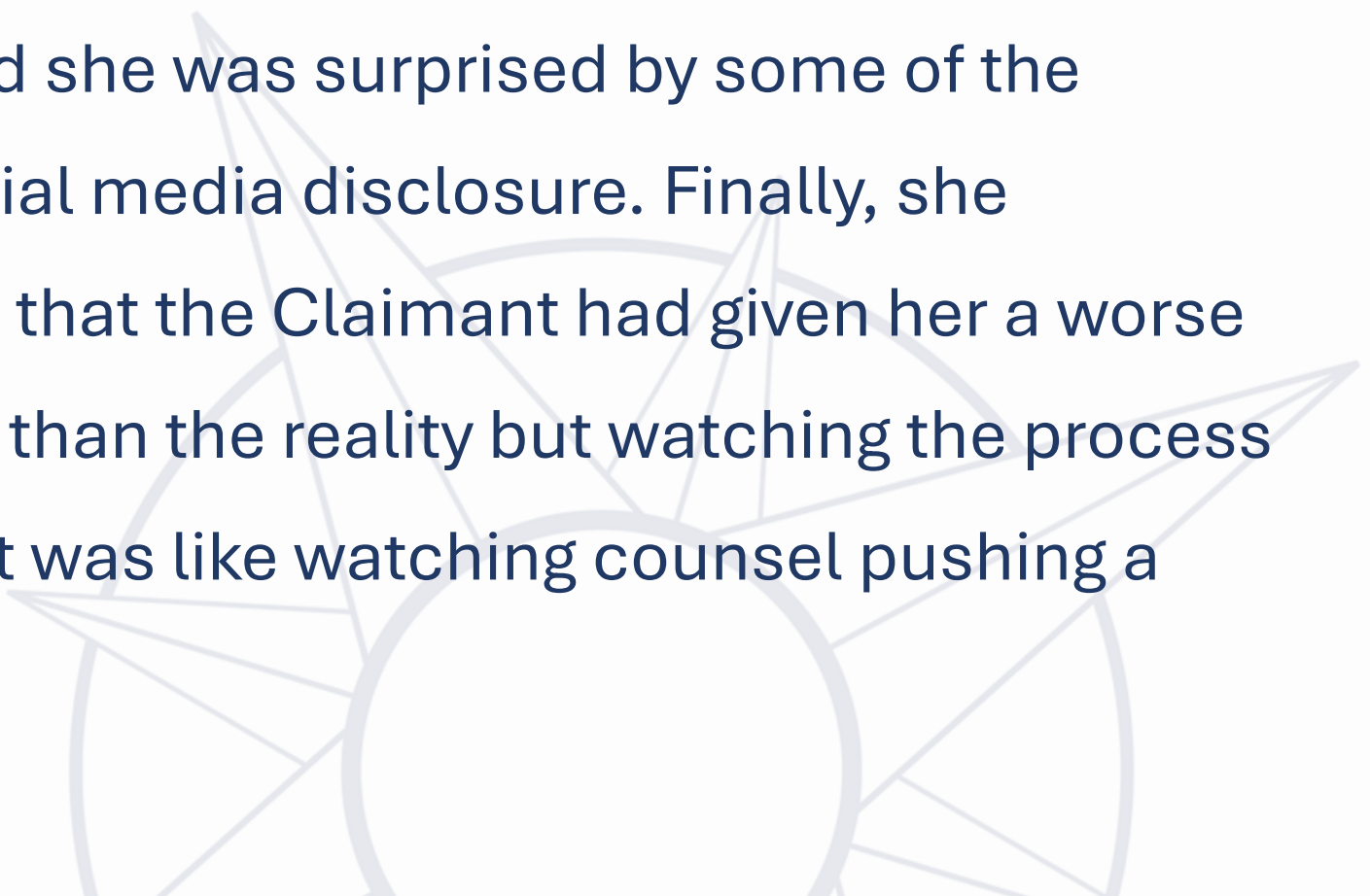
Williams-Henry v. AB Ports [2024] EWHC 2415

“Doctor Monaci noted that the Claimant failed the tests of symptom validity and accepted the tests were not a true representation. She explained this either as inadequate effort, possible over reporting or consistent with significant psychological distress, her multiple physical symptoms and cognitive problems.”



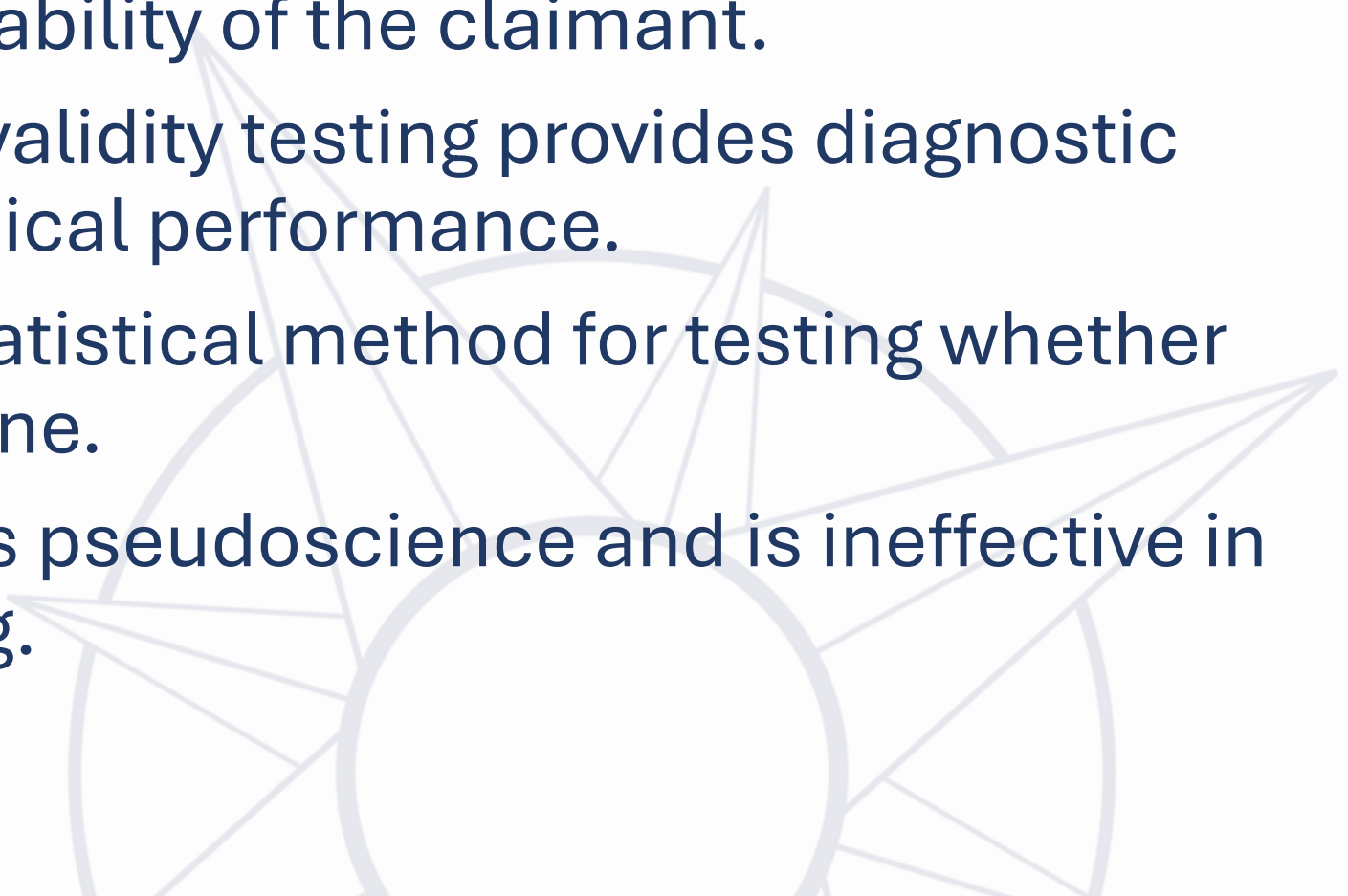
Williams-Henry v. AB Ports [2024] EWHC 2415

“When pressed by careful and professional cross examination by Mr Blakesley she accepted she was surprised by some of the matters shown on the social media disclosure. Finally, she accepted that it appeared that the Claimant had given her a worse account of her symptoms than the reality but watching the process of getting her to admit that was like watching counsel pushing a boulder up a steep hill ...”





Conclusions

- Neuropsychiatric diagnosis alone may be insufficient, as it depends on the reliability of the claimant.
 - Neuropsychological validity testing provides diagnostic criteria to detect atypical performance.
 - Validity testing is a statistical method for testing whether performance is genuine.
 - “Clinical judgment” is pseudoscience and is ineffective in detecting malingering.
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