Evaluation for Personal Injury Claims

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In this chapter, the authors present attorneys with a best practice model of expert mental health testimony in civil litigation alleging psychological injury so that lawyers can be informed consumers of forensic mental health experts.

The Legal Context

Generally, tort law is designed to make the litigant whole or to restore the person to his or her condition prior to the commission of the tort. Thus, when the harms claimed are psychological – that is, when the litigant experiences emotional harm, cognitive impairment, or a loss of behavioral control – the courts turn to mental health professionals to advise them about the degree to which the litigant has been harmed, what can be done to restore functioning, and to compensate the litigant for his or her suffering, especially when the impairment or disability is or may be permanent.

When a plaintiff has been physically harmed, courts have traditionally had no difficulty allowing claims to be made; however, when the harm was solely psychological or emotional it has been difficult to get courts to accept these cases, until fairly recently. The concern was "that claims for psychological harm are easy to feign, difficult to verify, potentially limitless in frequency and amount, or somehow less deserving" than claims involving physical injuries (Shuman & Hardy, 2007, p. 529). Currently, however, all jurisdictions permit recovery of damages for emotional or mental injuries that are proximately associated with physical injuries (Shuman, 2005).

For many years, cases alleging psychological or emotional damages were generally allowed to proceed only if there was a physical impact (under the "impact rule," e.g., the plaintiff was hit by someone or something). This gradually gave way in the first part of the 20th century to a "zone of danger" test in which the plaintiff is alleged to have been placed in danger or fear of physical injury by virtue of the defendant's behavior. This was expanded to include a "bystander rule" under which an individual who wasn't in physical danger but who witnessed (and suffered significant psychological or emotional trauma from) a negligent action could sue for damages (Campbell & Montigny, 2004; Gabbay & Alonso, 2004; Shuman, 2005). Even so, courts still tend to question the validity of claims for psychological and emotional harm far more than those for physical harm (Shuman & Hardy, 2007). Courts may, however, welcome expert psychological and psychiatric testimony that helps the judge and jury understand mental disorders and psychological stress.

It was not until 1993, in *Harris v. Forklift Systems, Inc.,* that the Supreme Court indicated that evidence of psychological or emotional harm to an individual could be a substantial factor in determining whether an employer is responsible for sexual harassment. This was the first case in which the Supreme Court ruled that a psychological or emotional injury, in the absence of a physical injury, could be presented in the liability phase of a trial to demonstrate that a tort had occurred (Call, 2003).

Mental Health Experts

There are a number of legal issues for which an attorney may want to consider retaining a mental health professional (typically a psychiatrist or a psychologist) either as a consultant or testifying expert. For example, mental health concepts and/or opinion(s)

are often relevant in cases including, but not limited to: psychiatric or psychological malpractice; impaired professionals; boundary violations; harassment; wrongful termination; discrimination; negligent supervision and hiring; ADA claims; fitness for duty; civil rights violations; foreseeability of harm; and wrongful death. Any time a psychological or emotional issue is a salient feature of the litigation, an attorney may want to think about retaining a mental health expert.

Once counsel has identified a potential need for mental health expertise, it is important to identify whether specific credentials are required for the issue at hand. In tort litigation alleging psychological harms, three doctoral-level designations are most commonly needed: Psychiatrist, Psychologist, and Neuropsychologist. All of these professionals complete graduate education in the study of human behavior and the assessment and treatment of emotional and mental disorders. However, despite this overlap, there are important differences with respect to education, training, and licensure. *Psychiatrist* is the term reserved for individuals who have completed medical school training and specialized in psychiatry. Psychiatrists are medical doctors who are identified as either M.D. or D.O. (Medical Doctor or Doctor of Osteopathy) and are able to prescribe medication. A *psychologist* is someone who has completed doctoral level training in psychology. Psychologists are identified as either Ph.D. (Doctor of Philosophy in Psychology) or Psy.D. (Doctor of Psychology) and are primarily involved in assessment of psychopathology, personality and cognition, and psychotherapeutic interventions. A *neuropsychologist* is a psychologist with specialized training in the assessment of cognitive function, intellectual disability (formerly described as mental retardation) and brain injury.

In many cases, any of the aforementioned professionals will be qualified to address referral questions from counsel. That said, a great deal of time and energy can be saved by determining early on if a specific credential will be necessary. For example, in a standard of care matter, it may be necessary to retain an expert with analogous degree(s) to the party in question. Additionally, if the case involves a specific issue germane to one area of practice, the attorney may want to focus his or her search to a more narrow pool of experts. For example, if the case deals with psychotropic medication, the best choice would likely be a psychiatrist. If a case deals with a very specific issue, such as psychological consequences of a motor vehicle accident, the attorney may seek out a professional whose research and scholarship specifically addresses this issue.

Standards for testimony: *Frye and Daubert*

Regardless of which type of mental health expert is retained, specific parameters are in place regarding the content of testimony. For many years, the dominant standard for admitting expert testimony in American courts was *Frye v. United States* (1923). *Frye* required that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs" (p. 1014).

The U.S. Supreme Court indicated that the Federal Rules of Evidence (2009), had superseded *Frye* in its ruling in *Daubert v. Merrell Dow Pharmaceuticals* (1993). The Supreme Court also specified a number of criteria that might be used by trial courts to assess the reliability (i.e., "trustworthiness," *Daubert*, 1993, footnote 9) of expert testimony. The Court emphasized that "all relevant evidence is admissible" (p. 587),

specifically required that an "expert's testimony pertain to 'scientific knowledge'" (p. 590), and that expert testimony must "assist the trier of fact to understand or determine a fact in issue" (p. 592), among other possible requirements. In *Kumho Tire Co. v. Carmichael* (1999, p. 137), the Supreme Court "noted that D*aubert* discussed four factors — testing, peer review, error rates, and 'acceptability' in the relevant scientific community — which might prove helpful in determining the reliability of a particular scientific theory or technique." Specifically: (1) "whether it can be and has been tested… [and] can be falsified;" (2) whether the "theory or technique has been subjected to peer review and publication;" (3) that consideration be given to the "known or potential rate of error;" and (4) that there is "general acceptance of the particular technique within the scientific community" (*Daubert,* 1993, pp. 593-594).

The Supreme Court's ruling in *General Electric Co. v. Joiner* (1997) ensured that trial judges would have wide discretion in the application of the *Daubert* standard (Dvoskin & Guy, 2008). As a result of the combined influence of *Daubert, Joiner,* and *Kumho*, Rule 702 of the Federal Rules of Evidence was amended in 2000 to read Rule 702. Testimony by Experts:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if *(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case*. (Italicized portion was added to the old Rule 702.)

To the factors specified by the Supreme Court in *Daubert*, the Advisory Committee on the Federal Rules of Evidence (2000) added five additional suggested areas of consideration based on court rulings after *Daubert*:

> (1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." (*Daubert v. Merrell Dow Pharmaceuticals, Inc*., 1995, p. 1317). (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. (3) Whether the expert has adequately accounted for obvious alternative explanations. (4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." (*Sheehan v. Daily Racing Form, Inc*., 1997, p. 942). (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

The Supreme Court made it clear in *Daubert* and its two progeny (*General Electric Company v. Joiner* (1997) and *Kumho Tire Co. v. Carmichael* (1999) that trial court judges are to exercise their gatekeeping functions. It should be noted, though, that trial judges are not required to question expert testimony.

Put simply, courts applying *Daubert* are encouraged to ask two questions of experts: 1) "Why should we believe you?" and 2) "Why should we care?" The first speaks to the credibility, reliability, and validity of experts' opinions and the facts and logic upon which they are based. The second addresses the need for the expert to identify the relevance of the opinions to be offered to the specific questions at bar. Consistent

with long traditions of Anglo-American law, this probative value must then be weighed against any prejudicial effects of the opinions to be offered (Dvoskin & Guy, 2008).

Forensic experts should base their testimony on both the prevailing standards of their jurisdictions[1] and on broader bases, such as research published in peer-reviewed journals. Experts should note, however, that the Supreme Court commented in *Kumho* on the potential for some of the best research to be found in non-peer-reviewed journals, so such journals should not be excluded from the expert's search of the professional literature. Experts should also be aware of evidence that peer review is a flawed assumption of trustworthiness, despite its prominent place in the Supreme Court decisions (Kane, 2007c). The "best practice" is to critically evaluate every source, not to uncritically assume that any source is trustworthy, even if formally peer reviewed, and regardless of how prestigious the journal. An expert whose work and testimony meets the standards of the Federal Rules is likely to do well in meeting the standards of his or her own jurisdiction(s).

Attorneys calling mental health experts as witnesses would be wise to ready themselves for challenges to the credentials of their expert. Before disclosing an expert witness, attorneys should carefully review such basic items as a *curriculum vitae*, a list of cases in which the expert has previously testified, a list of publications, licensure, and disciplinary history. This will help the attorney to ensure the expert meets any statutory criteria for expert testimony and anticipate any *Daubert* challenge of proffered experts.

Professional Negligence

[1] The standard in Canada, for example is based on *R. v. Mohan* (1994), in which the Supreme Court of Canada indicated that trial judges are to act as gatekeepers for expert evidence, that evidence be relevant, that experts are to assist the trier of fact in understanding the issues and evidence, and that experts must have specialized knowledge.

If there is an allegation of negligence by a professional (e.g., psychologist, physician, engineer), the professional's conduct will be considered using two sets of standards: the standard of *practice* and the standard of *care*. According to Heilbrun, DeMatteo, Marczyk, and Goldstein (2008),

> Standards of care are judicial determinations that establish minimally acceptable standards of professional conduct in the context of specific disputes (American Law Institute, 1965). By contrast, standards of practice are generally defined either as the customary way of doing things in a particular field (the "industry standard") or as "best practices" in a particular field (Caldwell & Seamone, 2007). Second, standards of practice are internally established by the field itself. This can occur informally, for instance, when a particular practice becomes 'adopted' as the customary way of doing things. It can also occur more formally, for example, through development of practice guidelines applicable to practitioners in the specific field.

Standards of care may have a basis in statute or administrative code, and adherence is mandatory. Standards of practice, in contrast, are generally aspirational rather than required. Failing to adhere to a standard of care is considered negligence, making the professional liable to malpractice claims. Failing to adhere to a standard of practice does not automatically open the professional to legal liability, but may cause the professional to be sanctioned by an ethics committee or a state licensing board (Heilbrun et al., 2008).

The Expert's Duties

With few if any exceptions, the expert's client is the attorney, and not the actual plaintiff or defendant.[2] Shuman and Greenberg (2003) suggest that experts often receive pressure from retaining attorneys to conclude, and to state in testimony, that the data accumulated by the expert and the conclusions based on that data support the attorney's theory of the case. The expert must resist this pressure, remaining impartial and advocating for his or her opinion, not for his or her retaining attorney, as required by professional ethics and the *Specialty Guidelines for Forensic Psychology* (2011). All witnesses, including experts, are to assist the fact finder, not any particular party (Saks & Lanyon, 2007).

However, forensic mental health experts may be retained by attorneys in one of two roles: (1) as a potential testifying expert; or (2) as a consultant who is part of the advocacy team, with the goal of winning the case, but without a plan for the expert to testify. Because mental health expert witnesses have an ethical duty to strive for objectivity, it is generally inappropriate to move from the second category (consultant/advocate) to a testifying role. Expert witnesses have a duty to accurately inform the trier of fact, whether this helps or hurts the attorney's chances to win at trial. Early on, a forensic mental health expert might be asked to consult with either attorney regarding the validity of the plaintiff's claim. In the case of the plaintiff's potential attorney, this consultation might occur even before the attorney accepts the plaintiff as a client. However, experts must always be very careful to maintain their objectivity unless and until it is decided that they will not testify.

[2] Note, however, that in some cases, defense expert fees will be paid by an insurance company or the defendant organization. Identifying the client and how the fees are to be paid must be negotiated in advance.

Experts generally owe legal duties to the court, the retaining attorney, and third parties, with each involving a professional duty as well. The duty to the court is to offer testimony that is reliable, helpful, honest, and objective. The professional and ethical duty is to strive to provide assistance to the fact finder in a way that is consistent with the field's articulation of the components of good practice (see, e.g., *Specialty Guidelines for Forensic Psychology, 2011)*

The expert's duties to the retaining attorney include: Clear articulation of the referral questions (i.e., what the expert will likely be asked on direct examination at trial); Accurate and careful review of relevant facts; Formulation and clear articulation of opinions; Clear articulation of the (especially evidentiary) foundation and limitations of each opinion; Performing his or her duties at the level of the standard of practice, while aiming for best practices.

While the retaining attorney has the right to decide which questions to ask of an expert, the expert's legal and ethical obligation is to present opinions fairly and with sufficient foundation, and to resist any attempt to distort, misrepresent, or leave out information that may be contrary to the position of the retaining attorney.

Of course, absolute objectivity is impossible to achieve, as every expert brings certain biases to each case. Instead of pretending to be free of bias, experts should take steps to correct for bias so as to maximize their objectivity. These steps include: (a) transparency, or showing one's work; (b) humbly acknowledging the limitation's of one's expertise; (c) inclusion of contrary findings or authorities; (d) seeking consultation; and (e) a willingness to admit when one does not know the answer to a question (Dvoskin, 2007).

A therapist may testify in the role of a "treating expert"; however, the treating expert should not be treated as an independent or objective witness, because he or she owes a duty to the patient as well as to the court and professional standards. In our view, the treating expert is ethically required to be primarily a fact witness.

Process of a Case

A personal injury claim may be filed whenever an individual (a plaintiff) has been injured, or feels injured, by the behavior (action or failure to act) of another individual or entity (the defendant), provided that the plaintiff can assert that the defendant owed a duty to the plaintiff, that the defendant breached that duty, that the plaintiff was injured as a result, that the defendant's action or behavior was the proximate cause of the plaintiff's injury, and that the plaintiff suffered as a result of the defendant's action or failure to act.

If there is an issue of psychological damages and/or professional negligence, the attorney(s) may retain a psychologist or other mental health professional as a consultant. Professionals retained as consultants typically work under attorney work product privilege, meaning that all information is privileged unless the expert evidence is introduced as part of the claim, in which case the information ceases to be confidential and the consultant could be deposed, called to testify, or both. An additional exception in many jurisdictions is that psychologists are mandated reporters of specific acts such as child abuse, and a failure to report can lead to a licensing action against the psychologist. With the exception of mandated reports, consulting experts should be instructed to keep all work and communications related to the case confidential unless and until instructed otherwise by the retaining attorney or the court.

Forensic Mental Health Concepts

Heilbrun and his colleagues (2009) discuss, at length, principles of Forensic Mental Health Assessment (FMHA) that deal with causality, a central issue in personal injury evaluations. They note that human behavior is multidimensional and that numerous sources of information should be utilized in order to fully assess an individual. Similarly, Schultz (2003a) and Young, Kane, and Nicholson (2007) emphasize the need or integration of a multifactorial process of determining causality.

Heilbrun and his co-authors emphasize the need to address functional abilities and to place them in the context of nomothetic (group) evidence--that is, evidence empirically derived from populations that are similar to that of the plaintiff. Methods utilized must be both valid and reliable, including use of psychological instruments appropriate for the population and the individual being assessed. Nomothetic data are scientifically and empirically based upon questionnaires and tests with forensic value, as well as on base rates and outcome data. They furnish normative data on the performance of groups in various areas, providing the basis for making assertions regarding the functioning and impairment, if any, of an individual. Further, population-level research addresses the prediction of outcomes, suggesting how specific interventions may assist with the management of the course of symptoms.

In contrast, idiographic evidence addresses information collected regarding a specific individual being assessed, usually the plaintiff. The assessment of the individual should resemble a scientific study, producing the simplest explanation for the data collected that accounts for all of the essential variables in the case. The evaluator then proceeds to address all reasonably likely explanations for the data assembled in order to arrive at conclusions that make scientific sense. This usually includes addressing the

individual's personal and psychosocial history, functional capacities prior to and following the allegedly traumatic event or events, and response style, especially the possibility that the person may be exaggerating, feigning, or malingering. It is important to remember that the presence of malingering does not preclude the presence of real psychological distress or disability (Ackerman & Kane, 1998; Drob, Meehan, & Waxman, 2009; Kane, 2007a; Rogers, 2008).

More specifically, the FMHA in a personal injury context addresses: (a) any mental disorders identified, (b) the legally-relevant functional abilities affected by the allegedly traumatic incident(s), and (c) the nature and strength of any causal connection between the allegedly traumatic event(s) and the resultant functional abilities of the plaintiff (Heilbrun, 2001; Vore, 2007). One must also operationalize legal requirements into psychological terms, so that the professional literature can be searched and an appropriate evaluation conducted. Schultz (2003) suggests that best practices include: (1) applying a biopsychosocial model, (2) utilization of standardized procedures, (3) using numerous information sources, including standardized tests and other instruments and collateral sources, (4) comparing the individual with relevant group data and base rates, (5) considering iatrogenic and litigation-related factors, and (6) comparison of current and premorbid levels of functioning.

The testifying expert should do a comprehensive, impartial evaluation using a biopsychosocial approach – i.e., consideration of physical and biological factors, psychological factors, and social or environmental factors -- that considers all of the pertinent evidence, uses valid and reliable methods of assessment and interpretation,

considers the professional literature in coming to conclusions, and proffers testimony that is relevant, reliable, and helpful to the trier of fact (Kane, 2007b).

Empirical Foundations and Limits

The purpose of an evaluation in a personal injury case is to ascertain whether an individual has been psychologically injured by a traumatic event and, if so, to what extent. Broadly speaking, if there is evidence of a psychological injury, there are five possibilities: (1) the event is the sole cause of the psychological injury (rarely the case); (2) the event was the primary cause of the psychological injury (that is, the proximate cause), and *but for* the traumatic event the person would not have his or her present level of psychopathology or other psychological distress (e.g., grief; includes exacerbating a pre-existing condition); (3) the traumatic event materially contributed to the assessed psychopathology or other psychological distress but was not the primary cause; (4) the traumatic event had little identifiable affect on the individual; (5) the traumatic event had no identifiable affect on the individual (i.e., all identifiable psychopathology was due to something other than the identified trauma) (Ackerman & Kane, 1998; Melton et al., 2007; Young, 2007).

Each evaluation must be designed to comprehensively address the issues identified by the referral question(s) in a given case.[3] The issue is not the individual's current status, *per* se, but the degree to which, and ways in which, the individual differs from how he or she was before the traumatic event. To this end, the evaluator should consult multiple data sources, including records that address the individual's functioning

[3] There are, however, various models suggested by various authors (e.g., Greenberg, 2003; Grisso, 2003; Heilbrun, 2001; Melton et al., 2007; Wilson & Moran, 2004), any of which will provide a starting point for conducting an evaluation.

prior to the trauma, to create a baseline against which post-trauma changes may be assessed (Heilbrun et al., 2009; Kane, 2007b; Melton et al., 2007; Young & Kane, 2007).

Contributing factors must also be considered. Social support, the individual's perception of support from his or her employer, and the individual's overall life satisfaction are likely to affect his or her level of adjustment (Koch, O'Neill, & Douglas, 2005). These and other factors may be assessed through testing and interviews of the individual, collateral interviews, diaries, and questionnaires.

Although there are no forensic assessment instruments specific to personal injury evaluations, there are a number of instruments that are forensically relevant (see Heilbrun et al., 2009). The most frequently used forensically-relevant instrument is the Minnesota Multiphasic Personality Inventory, Second Edition (MMPI-2, Butcher et al., 2001), which has a substantial professional literature establishing patterns of responses associated with malingering, defensiveness, and numerous clinical factors that may be relevant to a specific personal injury evaluation (Butcher, 1995; Butcher & Miller, 2006; Goldstein, 2007; Pope, Butcher, & Seelen, 2006).

Clinical versus Actuarial Assessment

Psychologists have long debated the relative pros and cons of actuarial (statistical) vs. clinical assessment. Actuarial assessments are those that are statistically based, involving the "use of data about prior instances, in order to estimate the likelihood or risk of a particular outcome" (American Psychological Association, 2009, p. 8), rather than such clinical methods as unstructured interviews and some projective methods. A third alternative, structured professional judgment (SPJ), utilizes standardized lists of questions, each of which refers to a variable that has been independently and empirically

validated. The difference between actuarial and SPJ methods is that actuarial instruments require pre-assigned weights to each item, while SPJ instruments allow the evaluator to consider each item and weigh it according to the specifics of the instant case. Unfortunately, there exist no published SPJ instruments for personal injury evaluations at this time. Research comparing actuarial and unstructured clinical assessments indicates that the actuarial method is better about half of the time, while there is no difference the other half of the time. When a valid and reliable actuarial or SPJ instrument is available and appropriate, it would be good practice to use it; however, the current state of the art also calls for clinical assessment methods to be used for a significant portion of a personal injury evaluation.

Every inferential opinion must be explicitly tied to the evidence and logic upon which it is based. In other words, experts should not ask triers of fact to "take their word" for any opinion. By spelling out the evidence and logic upon which opinion is based, experts allow triers of fact to scrutinize, weigh, and evaluate the strength of the opinion for themselves.

Base Rates

A "base rate [is] the naturally occurring frequency of a phenomenon in a population. This rate is often contrasted with the rate of the phenomenon under the influence of some changed condition in order to determine the degree to which the change influences the phenomenon" (American Psychological Association, 2009, p. 49). Both diagnosis and prognosis may be made in error if relevant base rates are not considered. In other words, before an expert can opine that a particular event caused a condition, it is important to know how often that condition occurs among the general

populations, thus accounting for the relative likelihood of simple coincidence. The probative value of the expert's testimony is limited if he or she is not aware of the base rate for each problem or symptom (Fleishman, Jackson, & Rothschild, 1999).

Error Rates

"Error rates" primarily refer to the likelihood of false positive and false negative errors, respectively, though other definitions exist (Krauss & Sales, 2003; Youngstrom & Busch, 2000). Evaluators should, therefore, use multiple sources with known error rates, if possible, to assess a given individual.

Experts must not rely exclusively on "cookbooks" or computerized interpretations, or interpretations suggested by single sources. Cookbooks offer lists of statements about people who have scale scores or test protocols similar to the evaluatee, but offer little or no information regarding how those statements were obtained. Computerized interpretations tend to focus on one or, at most, a few high scores of the evaluatee on a given test, leaving out potentially essential information regarding the evaluatee from other scales. Generally, no single test by itself will support a strong conclusion regarding most characteristics of the plaintiff.

The Evaluation

Obtaining Records

It will be difficult, if not impossible, for the expert to testify to a "reasonable degree of certainty" regarding changes in the plaintiff as a result of the allegedly traumatic incident if the expert has not conducted a review of records sufficient to support the expert's conclusions. A failure to review available, relevant records may be

considered to be below the standard of practice (Ackerman & Kane, 1998; Heilbrun, 2001).

The expert's task in most cases is to advise the retaining attorney of the records that are needed for review (both records already in the attorney's possession and additional records not yet been obtained). This will include records that describe the individual's functioning prior to the trauma, in order to create a baseline against which post-trauma functioning can be assessed.

Relevant records may include medical, psychotherapy, school, legal, employment, military, personnel, pharmacy, tax, and any other records that may identify the individual's ability to function prior to and after the traumatic event. Depositions and other legal documents may also provide independent information about the individual (Wilson & Moran, 2004).

Additionally, reports or interviews with credible collateral informants, such as former employers and neighbors can also provide a good basis for comparison. The changes identified may not have been caused by the traumatic event but, rather, by other major life events. At a minimum, the records review should extend three to five years prior to the traumatic event. For many people, however, going back further will yield additional relevant information. Other information that may be of value includes evidence of lifestyle changes (e.g., through review of checkbook registers or credit card statements (Greenberg, 2003) and personal diaries (Heilbrun, Warren, & Picarello, 2003). Pharmacy records – both before and following the allegedly traumatic incident – will elucidate a physician's assessment of the plaintiff's status, as well as provide data on the direct and side effects of any prescribed medication. In addition, a review of the

litigant's medications may assist in identifying pharmacological main or side effects that are part of the clinical picture.

Differential Diagnosis

The most common diagnostic system in North America is the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision* (DSM-IV-TR; American Psychiatric Association, 2000). The strengths of DSM-IV-TR are its standardization and comprehensiveness, as well as its frequent usage in the United States and Canada. Its weakness is that diagnoses are explanatory constructs that are designed as "shorthand" to permit professionals to discuss characteristics of an individual's disorder(s). Further, each revision of the DSM was adopted by vote of a group of psychiatrists on the basis of their understanding of research, thereby representing a value judgment rather than a careful scientific analysis (Shuman, 2002; State Justice Institute, 1999). The authors of DSM-IV-TR also indicate that the inclusion of a diagnosis in the manual "does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability" (American Psychiatric Association, 2000, p. xxvii).

The most common diagnosis in personal injury cases is Posttraumatic Stress Disorder (PTSD) (Ackerman & Kane, 1998; Koch, Douglass, Nicholls, & O'Neill, 2006). Unlike other conditions, a diagnosis of PTSD requires exposure to a traumatic event and, thus, a finding of fact that is usually beyond the scope of psychological or psychiatric expert testimony and is often at issue in the case. One can avoid this conundrum by focusing on symptoms, especially disabilities, instead of diagnostic labels.

Malingering

The DSM-IV-TR defines malingering as "the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs" (p. 739). Experts must show great caution in calling someone a malingerer, a stigmatizing label that may prevent an individual from getting appropriate care. It can also directly cause psychological trauma to the individual, and could lead to the person losing disability income or employment benefits (Drob et al., 2009).

It must also be kept in mind that plaintiffs who exaggerate or show evidence of malingering may, in addition, have real, demonstrable psychological disorders. Malingering does not preclude the presence of real psychological distress or disability (Ackerman & Kane, 1998; Drob et al., 2009; Kane, 2007a; Rogers, 2008a).

One must also consider the psychological meaning of compensation. Some people seek money as compensation, but many people have additional or different motivations. Some people look for "justice" from the company or individual that caused an injury (Kane, 2007b; Resnick, 1997; Rogers, 2008b); other litigants wish to prevent similar injury to others. Yet others want to ensure that the evaluator understands the meaning and importance of the trauma and how terribly they have suffered (Resnick, 1997). In these instances, simply winning the case may be sufficient reward, whether there is money involved or not. In our experience, malingering is much more likely among those seeking only money than it is among those with other goals, for whom injunctive relief, simply winning the case, and especially the opportunity to be fairly heard (Tyler, 1984) may be ample reward.

Another factor to consider regarding the plaintiff's presentation is that plaintiffs' attorneys continually ask questions that encourage people with injuries to think about their injuries, potentially leading the plaintiff to see himself or herself as significantly – and possibly permanently – disabled. Family members, physicians, and other people may reinforce this attitude, particularly if they don't insist that the plaintiff function as well as he or she is able.

Timeline

One of the most valuable tools in a personal injury evaluation is a timeline of significant events in the plaintiff's life. The attorney should ensure that the mental health professional has records documenting all major events in the plaintiff's life, to permit the construction of a complete timeline. The timeline is most useful if it quotes sections of the records reviewed, making it a source of concrete information identified by the records that can be a reference for information in the report, in a deposition, and in court. All of the information in the timeline (and in the report) should be explicitly attributed to its source (Heilbrun, 2001).

Limits of the Evaluation Process

No assessment will answer all of the possible questions that may be relevant to a given personal injury case; therefore, the goal is to conduct a comprehensive assessment using a biopsychosocial approach. The best assessment instruments available to address the referral question(s) should be utilized, to ensure that the results of the evaluation are as accurate as possible. When further assessment appears to have diminishing returns, it is appropriate to end the assessment process. This does not preclude additional follow-up if questions occur during report writing; however, one cannot count on having access to

the plaintiff once the basic evaluation is completed, especially if one was retained by the defense in the case.

Report Writing and Testimony

Having carefully considered the legal context, forensic mental health concepts, the empirical foundations and limits of an evaluation, and having conducted a comprehensive evaluation and interpreted the resulting data, the evaluator is ready to provide the retaining attorney with an oral report. If the oral report is not favorable to the attorney's case, the mental health professional may be asked to stop working on the case and not write a formal report (Melton et al., 2007). In most cases, however, the expert will be asked to write a report of his or her findings. If the expert is not identified as a testifying expert, he or she is a consultant to the attorney, and his or her work falls under the attorney work-product privilege (Weiner, 2006). With the possible exception of "duty to warn or protect" situations or mandated reports such as including child abuse, the consultant is bound by the attorney work-product privilege.

In some cases, the oral report will suggest that the psychologist's opinion on some questions might be helpful to the attorney's case whereas, in other cases, it will not. It is acceptable for the attorney to narrow the scope of the psychologist's testimony by eliminating certain referral questions at this stage; however, the answer to each question that remains must be objective, impartial, and complete.

As a testifying expert, the mental health professional must remember that he or she is to be impartial, advocating for his or her opinion but not for either side in the case (Heilbrun, 2001; Melton et al., 2007). Although most evaluations will lead the mental health professional to conclude that the data support one side more than the other, both

sides should be presented and the expert's reasoning should be provided for each hypothesis evaluated and each conclusion drawn.

Most personal injury cases will involve one or more depositions well before a trial is scheduled to occur. The expert will typically issue a report prior to the scheduling of the deposition. The questioning, primarily by the opposing attorney(s), tests the ability of the expert to testify about the plaintiff and the specifics of the case, particularly focusing on the issue of causality. It is often an opportunity for the expert to learn of the theory of the case, as he or she will be asked to respond to questions regarding alternative interpretations of the data. Because the deposition is an opportunity for the opposing side to test the mettle of the expert, and because deposition testimony is part of the record, it is essential that the expert be as prepared as he or she would be for the trial. If the expert is permitted to review the transcript of the deposition for errors, this should always be done (Hess, 2006).

Structure of the Report

There are a number of models for writing reports (e.g., Heilbrun, 2001; Melton et al., 2007), but no specific model that must be followed; however, every report should contain a number of elements if it is to be valuable to the court.

We recommend that the report contain information in six domains:

(1) The first section should include the identifying information, the referral question, the records reviewed, the tests and other instruments utilized, and an indication of who retained the expert and the purpose for which the expert was retained.

(2) Next, we recommend a presentation and discussion of the information culled from the records reviewed. Medical, employment, school and other records that address

the functioning of the plaintiff prior to the accident or other tort provide a baseline against which the accident or other tort and its affect on the plaintiff can be assessed. This may include direct quotations or a summary of the most salient information. Pitt et al. (1999) strongly recommend that the interview be video and audio recorded, which would allow the trier of fact to view the source material first hand. If the interview is recorded, it allows production of a transcript, which can be appended to the report. However, Kane points out that research on third party observers and social facilitation strongly indicates that people respond differently to psychological testing and interviews when they know (or believe) they are being monitored or recorded, decreasing the validity and reliability of the evaluation (e.g., less openness, trying to avoid embarrassment) (American Academy of Clinical Neuropsychology, 2001; Barth, 2007; Committee on Psychological Tests and Assessment, 2007; McCaffrey, Lynch, & Yantz, 2005). Both the arguments for transparency and that for avoiding recording of interviews are valid positions; however, we believe that the pros of recording the interview often outweigh the cons and argue that the interview should be recorded whenever possible. Psychological testing, however, should not be recorded since test materials must be protected in an attempt to ensure they remain valid and reliable assessment tools.

(3) Third, the evaluator should describe the assessment process, the data obtained from the plaintiff and collaterals. It is important to describe the process of informed consent or notification used, so that it is clear that the plaintiff was appropriately informed about the considerations relevant to participating and understood the nature and purpose of the evaluation, the non-confidential nature of the evaluation, and that he or she had a right to consult with his or her attorney at any point in the evaluation. Each test or

assessment instrument should be identified, and the relevant data obtained from its administration presented. Observations by the expert should be noted, plausible interpretations stated, and all information upon which conclusions are based included. Inferences should be distinguished from facts (Heilbrun, 2001; Heilbrun et al., 2009; Melton et al., 2007; Weiner, 2006) and speculation should be avoided.

(4) Because allegations of malingering are usually part of the defense in a personal injury case, the evaluator should specify what was done to assess the possibility of malingering, and the conclusions formulated on the basis of that assessment.

(5) Statements should be made regarding the conclusions drawn, relevant to the referral question(s), including: (a) The pre-trauma psychological status of the individual; (b) Data from the evaluation (across all sources) that describe the current psychological status of the plaintiff; (c) Data relevant to whether the plaintiff was psychologically injured by the actions or failures to act of the defendant; (d) Evidence of proximate cause, if any; (e) If relevant, a discussion of "thin skulled man" issues (i.e., did the plaintiff have a preexisting condition, physical or psychological, that may have increased the degree of harm); (f) Data indicating what the plaintiff did to mitigate the damage from the accident; (g) Damages (including input, if indicated, from other experts); (h) Prognosis, including the basis for statements made regarding the plaintiff's degree of recovery to date and expected recovery in the future; (i) Treatment needs, including (if possible) duration and projected costs of that treatment; and (j) Limitations of the evaluator's opinions.

(6) A brief summary of the evaluation and the conclusions.

If the case goes to trial, a well-structured report also contributes to the ability of the expert to prepare for deposition or trial testimony and to present the evaluation and its

conclusions in a cogent manner (Heilbrun, 2001). A report that is sufficiently comprehensive and well written may facilitate a settlement of the case, eliminating the need for court testimony altogether (Melton et al., 2007).

Reasonable Degree of Psychological/Medical Probability or Certainty

Since every evaluation has some limits, psychologists and psychiatrists should generally testify to a "reasonable degree of certainty, likelihood, or probability" regarding their statements and conclusions. Regarding “reasonable degree of … certainty” Heilbrun et al. (2009) note that there is no universally accepted definition of the term. If the expert merely states that the relationship is possible, rather than the relevant phrase required under the applicable law, the court may exclude the opinion (Shuman, 2005). Heilbrun et al. (2009) suggest that opinions be based on all of the sources of information utilized in the evaluation (interviews, tests, records and so forth), in addition to a review of relevant, peer-reviewed professional literature, analysis of consistencies and inconsistencies, and consideration of alternative opinions. They also recommend that "opinions should incorporate sources with established reliability, and with validity for purposes consistent with the present evaluation" (p. 55).

Ultimate Issue Testimony

The task of the expert is to provide the trier of fact with the information that will permit decisions regarding whether the defendant owed the plaintiff a duty, whether that duty was breached, whether the plaintiff was harmed as a direct result of that breach, whether, but for that breach, the defendant would not have sustained the psychological injury that was sustained, and the damages that the expert can identify that could be assessed to the defendant if responsible for the plaintiff's injury. The expert may

reasonably state conclusions regarding his or her data and the conclusions drawn on the basis of those data, including hypotheses that were either accepted or rejected.

Mental health professionals debate whether to give an opinion on the ultimate legal issue(s). Often, the issues at bar are so clear and unambiguous that there is virtually no way to avoid exposing one's opinion about the ultimate issue. In other cases, an expert may feel quite strongly that legal questions are beyond his or her expertise, and simply refuse to provide an ultimate issue opinion. As with so many issues, this question should be discussed in some detail with the retaining attorney prior to testimony being offered. In our experience, the best course in most cases is to answer any question that is not successfully objected to, unless doing so would violate the expert's oath or ethical obligations. Sometimes, however, the only correct answer will be, "I don't know."

Base Testimony on a Well-Conducted Assessment and Interpretation

The mental health professional who has performed an appropriate assessment, and who has accurately and fairly interpreted the data from the assessment, should have no difficulty testifying about what was done, the results of the assessment, and the meaning of the results. The thoroughness of the expert's work and the reliability of the expert's opinions will be evident from the quality of the information furnished in the report and testimony, and the accuracy of the interpretation will follow from the logic of the conclusions drawn.

Conclusion

A thorough evaluation consisting of multiple methods of data gathering, including careful review of medical and other records, interviews of the plaintiff and collateral informants, questionnaires, and psychological testing provides a best practice basis for

identifying what the plaintiff experienced, what the experience meant to him or her, the degree of feigning (if any), and the long-term consequences of the trauma. This information should prepare the expert well for testifying regarding the relevant aspects of the emotional trauma experienced by the plaintiff, whether proximate cause was present, and what damages, if any, are recommended.

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