

Psychotherapist Testimony in Personal Injury Cases: Coping With the Stealth Evaluation

By Eric G. Mart, Ph.D., ABPP

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It is only in recent years that the serious and sometimes chronic negative effects of psychological trauma have come to be recognized by the mental health professions. For decades, trauma-related symptoms were thought to be the result of intrapsychic conflicts and unconscious processes. In the last decade, however, mental health professionals have begun recognize and understand the effects of both chronic and acute trauma. Patients who in an earlier time would have been diagnosed as having borderline personalities, depressive neuroses or phobias are now seen as suffering from the sequelae of their traumatic experiences.

In the face of this new understanding, the legal system has changed the way in which injuries are compensated. In addition to punitive damages and compensation for pain and suffering and loss of income, courts have begun to allow compensation for the intentional or negligent infliction of psychological distress. Claims for emotional distress have become common, both as a component of personal injury cases and as the sole basis for actions.

Unfortunately, not all claims for compensation are valid, and the legal system's recognition of psychological trauma has opened the door for cases of dubious merit. Post Traumatic Stress Disorder (PTSD), for example, has become the "junk back" of the 90's. The symptoms of PTSD are widely known (the DSM-IV is available at most bookstores) and relatively easy to malingering. While many individuals are genuinely traumatized by experiences beyond normal human experience, a certain percentage of psychological trauma claims are false.

The court's problem of sorting through psychological damage claims to separate the bone fide from the bogus is complicated by certain types of expert testimony by mental health professionals, what I have heard referred to as the "stealth evaluation." Understanding the difference between this type of testimony and legitimate testimony requires some explanation.

In most jurisdictions, the testimony of a mental health professional is required in order to authenticate claims of psychic trauma. This means that a mental health professional who is qualified by the court must testify that the plaintiff is traumatized and that the proximate cause of the trauma was the act of negligence or malice in question. The assessment of this type of trauma by a forensic psychologist or psychiatrist is a complex undertaking, requiring specialized assessment skills, techniques and training. Even with the aid of these skills, the diagnosis of bone fide trauma and assessment of proximate cause is a challenging task.

The stealth evaluation is often an attempt to circumvent this process while increasing the probability that the psychic damage claim will be seen as bone fide. This is done in the following manner: After hearing the plaintiff's version of the alleged traumatic events, the plaintiff's attorney suggests that therapy is needed to help the plaintiff cope with the traumatic experiences and symptoms. The plaintiff sees a therapist for some length of time for therapy before the trial. At the trial, the therapist testifies that the plaintiff has symptoms consistent with PTSD and that

the cause of these symptoms was more likely than not the actions or negligence of the defendant. What makes this a stealth evaluation? It is the fact that it is not an evaluation at all, but rather advocacy masquerading as assessment. Assessment and diagnosis are processes in which all plausible hypotheses are formulated and then rigorously investigated to see which one best fits the data. In any case involving the negligent or intentional infliction of psychological distress, there are at least four logical possibilities to explain the plaintiff's symptomatic presentation:

1. The symptoms are bone fide and are directly related to the alleged traumatic events.
2. The symptoms are present but exaggerated.
3. The symptoms are falsely imputed to the alleged traumatic incident. That is, a patient has genuine symptoms, but they may have existed before the alleged incident and are now being attributed to the incident which is the basis of the lawsuit.
4. The symptoms are malingered.

In a forensic evaluation, the mental health professional who performs the assessment examines each possible explanation for the patient's symptomatic presentation. Data is collected and each hypothesis is weighed in the light of supportive and disconfirming data. None of the possibilities should be given precedence in the initial stages of the process. At some point, the evaluator forms an opinion and uses the data to support his or her formulation in court.

When psychotherapist testimony is used to establish the presence of psychological injury, the circumstances are very different. In virtually every case, the patient presents his or her history and symptoms to the therapist, who generally accepts the account at face value. No attempt is made to test or disconfirm the implicit hypothesis that the patient's account of events is accurate. The basis of successful psychotherapy is a trusting relationship between therapist and client. Since any attempt by a therapist to verify or disconfirm the patient's version of events would probably destroy this trust, treating therapists rarely attempt to assess the possibility of false imputation or malingering.

Psychotherapy becomes a stealth evaluation when the therapist's impressions of the client's mental state and the proximate cause for these symptoms are presented in court as though they constituted a forensic evaluation. This type of testimony has a certain logic or face validity that can appeal to a jury, who may assume that the treating therapist knows the patient well and is in a position to understand the case. The difference between an evaluation and psychotherapy may be difficult to explain to a jury of laymen.

There are several strategies which may prove helpful in dealing with this problem. One is to become familiar with the ethical standards and guidelines for psychologists which govern forensic activities. Section 7.02(a) of the Ethical Principles of Psychologists and Code of Conduct states that "Psychologists' forensic assessments, recommendations and reports are based on information and techniques (including personal interviews of the individual where appropriate) sufficient to provide appropriate substantiation for their findings." This means that treating therapists who testify that their clients have been traumatized by a defendant's alleged actions or negligence may actually be acting unethically if they have not made efforts to

corroborate the story, substantiate the existence of symptoms, or rule out symptom exaggeration, malingering and false imputation.

Additionally, section 7.02(b) states that "Except as noted in (c), below, Psychologists provide written or oral forensic reports or testimony of the psychological characteristics of an individual only after they have conducted an examination of the individual adequate to support their statements or conclusions." Finally, section 7.02© states that "When, after reasonable efforts, such an examination is not feasible, psychologists clarify the impact of their limited information of the reliability and validity of their reports and testimony, and they appropriately limit the nature and extent of their conclusions and recommendations." It should be noted that this last admonition appears to impose an affirmative obligation on the psychologist testifying in these cases. When the only source of data has been the patient's self-report and the therapist's observations during therapy sessions, it is not enough to respond honestly to questions about methodology. The therapist must make the limitations of his or her data clear by prefacing any remarks with a statement such as "let me say before I begin that I am basing my conclusions entirely on my patient's version of the events and description of symptoms. I made no attempt to assess the veracity of this version of the events, nor did I attempt to rule out malingering or symptom exaggeration." Failure to do this may be unethical.

It is probably also a good idea to educate the judge and jury about the techniques available for the assessment of these issues. There is a substantial body of empirical research devoted to these types of assessments. While these studies are sometimes contradictory, it is clear that there are protocols, procedures and tests which can and should be employed in psychological injury assessments. These techniques are rarely used by treating therapists. Making it clear that these techniques are readily available but were not utilized can further undermine any unwarranted conclusions put forward in the therapist/s testimony.

Finally, many confident psychotherapists will attempt to brush these concerns aside and claim that their experience and clinical judgement make it possible for them to draw diagnostic conclusions which are reliable and valid. In these cases it is important to be familiar with the extensive literature on the lack of reliability of clinical judgement. There is a great deal of empirical evidence which makes it clear that clinical judgement is notoriously unreliable, particularly when malingering and deception may be involved. Of particular interest is research that makes it clear that individuals generally thought to have the ability to detect lying and deception, such as psychologists, psychiatrists, judges and police officers, are no better than anyone else at spotting deception. Particularly surprising is the fact that the confidence they attribute to their judgements about deception has no relation to the correctness of these judgements.

Making this information available to the judge or jury in a case can go a long way toward counteracting unsubstantiated therapist testimony. It has been my experience that most attorneys, judges and, regrettably, most psychologists, are unaware of the implications of the ethical standards and guidelines governing forensic activities for psychologists. However, these guidelines are logical, and they help to counter the seemingly logical position that the psychotherapist is in the best position to understand and testify about the existence and extent of a patient's symptoms. One of the best ways to develop an appropriate cross-examination or deposition of the treating therapist is to obtain the services of an appropriately trained forensic psychologist to consult on the case, give rebuttal testimony, or both. The issues involved in these

types of evaluations are certainly understandable to attorneys, but the ethical and methodological questions raised can be confusing and arcane. The assistance of an appropriately trained and experienced forensic psychologist can frequently be invaluable in countering stealth evaluation testimony. ■