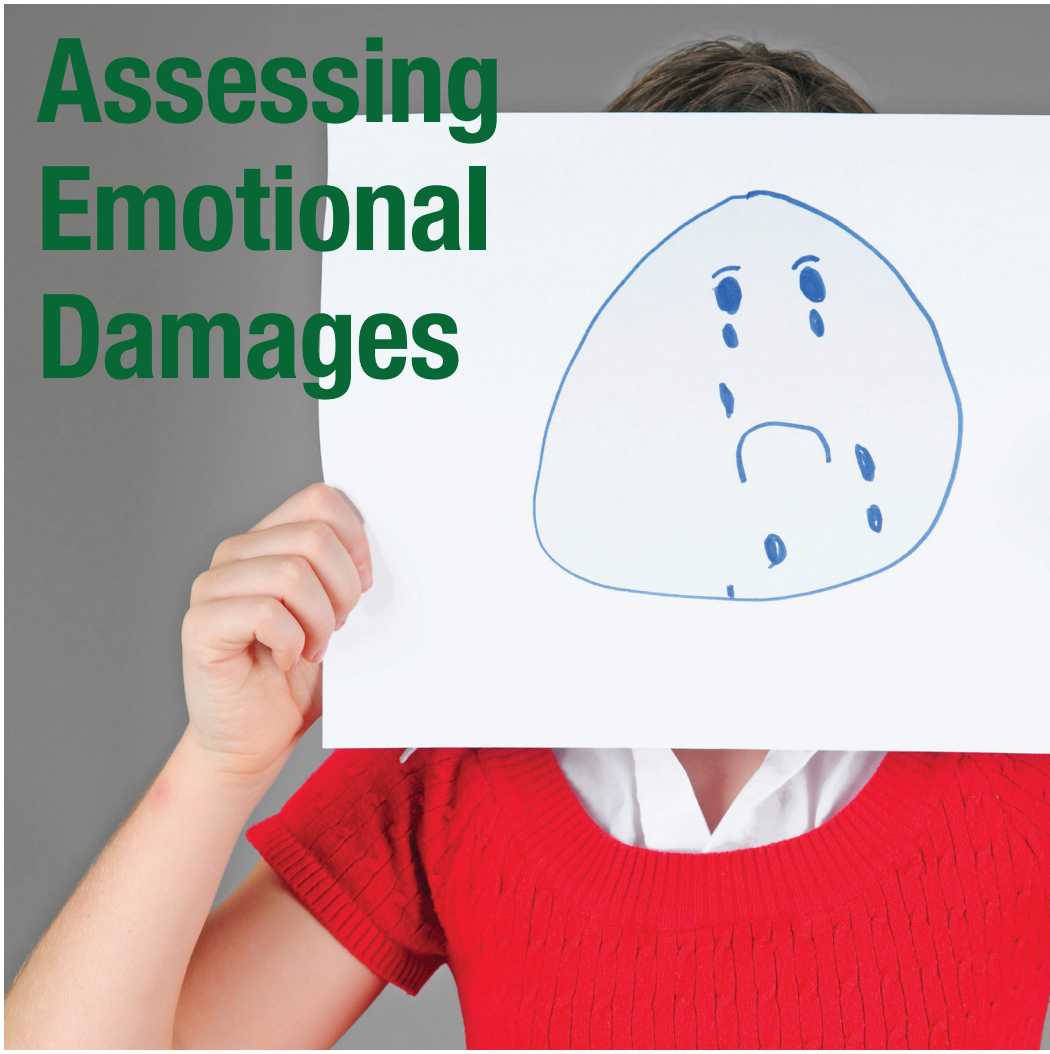
The Team Approach

Assessing Emotional Damages



By Michael J. Larin
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Forensic psychiatrists and forensic psychologists are best equipped to distinguish bogus mental injury claims from the real ones.

An hour earlier, a commuter train with 180 passengers struck a sport utility vehicle left on the tracks—an aborted suicide attempt. The parking lot adjacent to the tracks is filled with people dazed and confused. Some are in obvious pain, some are dead. Some are lawyers and cappers seeking to sign people up. Paramedics are in triage mode. That was the scene in Glendale, California, on January 26, 2005.

About 150 of those passengers and their families sued Metrolink, Southern California's commuter rail carrier. Train accidents, gas line explosions, air crashes, concert stampedes—the list of fear- and horror-inducing accidents that produce multiple claims is endless. It is no coinci-

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dence that a large percentage of claimants from such events allege mental injury, including traumatic brain injury (TBI), post-traumatic stress disorder (PTSD), or some form of depression. Some of the mental injury claims resulting from catastrophic accidents are quite real, but some are quite bogus. Skilled forensic mental-health professionals, namely forensic psychiatrists and forensic psychologists, are best equipped to evaluate mental injury claims.

The discovery process in every jurisdiction allows a mental examination when a plaintiff claims a psychological injury, though each varies in the number of hoops that a party seeking examination has to jump through. The law in many states follows Federal Rule of Civil Procedure 35, though not all have adopted every feature, such as whether anyone other than a licensed physician or licensed psychologist may conduct the examination. *See* Joseph M. Desmond, *Mental and Physical Examinations in Cases Involving Brain Injuries and Psychological Injuries*, 90 Mass. L. Rev. 2 (2006). This article will discuss issues pertaining to conducting mental health examinations and why retaining a single, mental-health expert team composed of at least one forensic psychiatrist and at least one forensic psychologist to evaluate multiple plaintiffs alleging multiple mental injuries due to a single accident or circumstance can prove beneficial.

Mission, Methods, and Ethical Duty of Forensic Psychiatrists

An independent forensic psychiatrist's mission in civil matters alleging psychiatric damages is to determine objectively whether a plaintiff suffers from a mental disorder, and if so, to ascertain what relationship exists, if any, between the disorder and the defendant's alleged wrongdoing. In addition, a forensic psychiatrist's job is to carefully assess causation and, if possible, the credibility of a plaintiff's statements, and to inform the trier of fact of his or her clinical assessment of the plaintiff's statements. He or she does not, however, usurp the trier of facts' role. An independent forensic psychiatrist as a clinical historian seeks to determine, on the basis of all available evidence, the most probable diagnosis, the most probable cause, the most probable impairments, and the credibility of a plaintiff. If asked, a forensic psychiatrist may also offer treatment recommendations or cost estimates.

A forensic psychiatrist reviews all available data, such as medical records and legal documents, including deposition transcripts, and examines a plaintiff to develop independent, evidence-based opinions and conclusions that are offered to a court. Although as experts forensic psychiatrists are subject to cross-examination for bias favoring those who retain them, ethical forensic psychiatric and psychological practice demands that these experts develop opinions and conclusions independent of bias to the best of their ability. The expert is neither an advocate nor an adversary; his or her ethical obligation is to serve the trier of fact, not the attorneys for a plaintiff or a defendant. A forensic examiner, regardless of training, should make this independence clear from the start by including a statement such as the following in an engagement letter:

> Please be advised that the doctor's opinions will be based on evidence, science, logic and clinical judgment. Thus, after evaluation of all the facts, it may be that his opinion is unfavorable to one or more positions that you or your client espouse.

A treating clinician's mission contrasts starkly to that of a forensic psychiatrist's. A treating clinician's purpose is to alleviate a patient's suffering. A treating clinician attempts to understand a patient's *subjective* experience of mental anguish. To understand a patient's experience, he or she must establish a positive, therapeutic relationship with the patient, which generally necessitates accepting, without undue skepticism, the patient's self report of his or her experiences, history, symptoms, suffering, and sometimes if applicable, presumptions about causation. Most treating clinicians do not seek extensive documentary or other objective evidence to determine with reasonable medical probability the accuracy or credibility of a patient's self reporting.

However, skeptical analysis is a critical function of a forensic psychiatrist seeking to determine as objectively as possible an accurate diagnosis, as well as to understand causation in a particular dispute.

Thus, a treating clinician invariably and properly has a "biased," supportive perspective, or empathy, for his or her patient, which may contribute to implicit, if not explicit, advocacy for a patient. Although this attitude is important both in initiating and maintaining a positive therapeutic relationship, advocacy by a medical expert nevertheless has no legitimate role in civil litigation. A forensic psychiatrist's task in litigation is to objectively evaluate a plaintiff's symptoms, his or her claims of emotional damages, and the attendant issues of proximate causation.

To accurately arrive at correct medical diagnoses and assess damages and causation, a forensic psychiatrist conducts an in-depth, personal interview or interviews with a plaintiff that may last a total of six to eight hours. Typically a forensic psychiatrist gathers detailed data from an examinee about all aspects of the person's life,

history, and experience. A diagnostician must learn as much as possible about the full panoply of an examinee's life to make an accurate assessment and, if applicable, diagnose the person's mental condition.

It is essential that a forensic psychiatrist examine an examinee privately. A third party's presence, particularly a legal advocate's, may influence or constrain the environment, restricting the flow of information and affecting the nature of data obtained, which can ultimately make a diagnosis based upon that data less accurate. Therefore, to accommodate a litigant and his or her counsel's need to have an accurate record of what actually transpired during a forensic psychiatric examination, it is best to record the interview, preferably on videotape, and make the record available to both sides through normal discovery. California Code of Civil Procedure, §2032.530 specifies the right of the examiner or the examinee to have the session audio recorded. The statute is silent regarding video, so an attorney should seek a pre-examination stipulation.

The tests that a psychologist or neuropsychologist administers do not duplicate those of the forensic psychiatrist.

In *Golfland Entertainment Centers, Inc. v Superior Court of San Joaquin County (Nunez)*, 108 Cal. App. 4th 739 (Cal. Ct. App. 2003), the California Court of Appeal found that a mental examination can be recorded but refused to allow counsel to be present. The court found that while counsel may be present during a physical examination, counsel's presence during a mental examination was not authorized under the applicable California discovery statue. Relying on *Edwards v. Superior Court*, the court quoted from that decision:

> Unlike a physical examination, which consists of little or no analysis of the examinee's mental processes, a psychiatric examination is almost wholly devoted to a careful probing of the examinee's psyche for the purpose of forming an accurate picture of his mental condition." It noted that the "basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject." Also, the presence of counsel "may largely negate the value of the examination. Surely the presence and participation of counsel would hinder the establishment of the rapport that is so necessary in a psychiatric examination. "[A] psychiatric examination of a party in a *civil* case should ordinarily be conducted without counsel if the examination is to remain an effective and meaningful device for ascertaining the truth.

549 P.2d 846, 848–49 (Cal. 1976) (internal citations omitted).

This precept applies in other jurisdictions as well. In *Morrison v. Stephenson*, 244 F.R.D. 405, 406 (S.D. Ohio 2007), the court stated,

> There is a substantial body of case law from both federal and state courts dealing with the question presented here. It has been common for parties, especially those who have advanced claims of mental or emotional injury, to request that their attorney attend a psychological examination requested by the defendants, or that the examination be either videotaped or that an audiotape recording be made. Several decisions have canvassed the state of the law on this issue, noting that there are cases supporting each side of the issue and that, to date, the cases disallowing the presence of either a third party or a recording device at a psychological evaluation outnumber the ones which have allowed such procedures.

It is very important to exclude opposing counsel from the examination room, but it also has been held that he or she should be nowhere near the examination. In a case published on November 9, 2010, the California Court of Appeal overturned a trial court's order allowing a plaintiff's counsel to listen to and monitor an examination in an adjoining room. In *Toyota Motor Sales, U.S.A. Inc., et al. v. The Superior Court of Los Angeles County* (*Braun*), 2010 WL 4457450 (Cal. Ct. App. Nov. 9, 2010), the court found the plaintiff had not shown a compelling need to protect privacy or potential abuse by the examiner. Rejecting the plaintiff's argument, the court found that "absent evidence to the contrary (and there is none), it must be presumed that the examiners will act appropriately." *Id.* (citing *Vinson*, 740 P.2d 404 (Cal. 1987)). Moreover, the court acknowledged that interference with an examination could occur even during breaks if a plaintiff and counsel were permitted to consult. Relying on *Edwards*, the court found that preserving the examination's integrity and the rapport between the examiner and the examinee during the personal interview, referred to as "the basic tool of psychiatric study," was paramount. *Id.*

Nothing requires an examiner to complete a personal interview in a single session. However, a plaintiff's attorney may be unwilling to stipulate to several shorter interviews on different dates rather than a single examination, unless a plaintiff cannot sit through a long interview for some reason.

The defense should be able to complete a battery of psychological tests, and in cases involving cognitive impairment complaints, neuropsychological tests, on one day. Then on a subsequent day a forensic psychiatrist will complete a detailed, psychiatric interview of the plaintiff. We will discuss the "team" approach that we employ more below.

A forensic psychiatrist should routinely inform an examinee at the outset of an interview that its purpose is to learn as much about his or her history, past, and current problems as is reasonably possible to arrive at an accurate, independent understanding of his or her diagnosis, prognosis, and possible treatment. A forensic psychiatrist should tell each examinee that the interview is not a stress test nor intended to cause him or her undue duress or fatigue or to break down psychological defenses. Although some topics may be difficult for an examinee to discuss, a qualified psychiatrist will use his or her full clinical skills and abilities to minimize the examinee's distress. To further minimize any anxiety that an examinee may experience during an interview, a forensic psychiatrist should say that they will take regular breaks throughout the inter-

view, and if at any time the examinee needs to take additional breaks for any purpose, he or she should feel free to do so without need for explanation. A forensic psychiatrist should tell an examinee that unlike sworn testimony in a deposition or at trial, he or she is the subject of a medical examination and thus *free to choose not to answer questions*. Although a forensic psychiatrist may ask an examinee why he or she refuses to respond to questions and may note refusal, it is entirely the examinee's prerogative to respond or not respond to the questions. Further, a forensic psychiatrist should inform an examinee at the outset of an interview that although the examiner is a doctor and a psychiatrist, he or she is not a *treating* doctor, no treatment will occur, and the conversation *is not* confidential as it generally would be with the examinee's treating clinician. Only then should a forensic psychiatrist ask for permission to proceed, awaiting the examinee's consent before beginning the actual interview.

At the end of the clinical interview, after reviewing all available documents, including the complaint, medical records, deposition transcripts, police reports, investigations, and other relevant documents, a forensic psychiatrist will develop a list of working hypotheses of possible diagnoses in descending order of importance and probability—the "differential diagnoses."

Although a plaintiff, his or her attorney, or treating clinicians may stress one particular symptom complex as more important than others, a forensic psychiatrist needs to *accurately diagnose* what, if any, mental disorders the plaintiff currently suffers and what causal relationship, if any, the disorders may have to the alleged wrongful conduct of the defendant. Since functional impairment is a critical variable in assessing a monetary remedy for possible damages sustained by a plaintiff, a thorough evaluation should assess the plaintiff's psychological functioning. As mentioned, this complex diagnostic task requires a meticulous and careful history and careful examination of a plaintiff.

A Proper Examination Requires Two Mental Health Professionals

To narrow the list of differential diagnoses, a forensic psychiatrist should also seek clinical data from an entirely different source. Specifically, a plaintiff should undergo psychometric testing by a clinical forensic psychologist specifically trained and experienced in the administration and interpretation of psychological test data with clinical and forensic populations. If a plaintiff has alleged compromised cognitive functioning such as memory or concentration difficulties, he or she should undergo a battery of neuropsychological tests by a forensic neuropsychologist.

The tests that a psychologist or neuropsychologist administers do not duplicate those of the forensic psychiatrist. Rather, the work relationship is entirely analogous to how a neurosurgeon works with a neuroradiologist: the neurosurgeon, after taking a history and conducting a physical examination, refers a plaintiff to a neuroradiologist for X-rays, an MRI, a CAT-scan, and possibly other neuroimaging studies. It is also analogous to how an internal medicine forensic expert works with a clinical pathologist, using the clinical pathologist to analyze blood tests, a biopsy, or other chemical assays. The goal of the psychiatrist-psychologist collaborative effort is to achieve an accurate, evidence-based diagnosis to ultimately better inform the trier of fact.

In *Shapira v. Superior Court*, 224 Cal. App. 3d 1249 (Cal. Ct. App. 1990), this precise issue was before the court. The plaintiff sued a dentist for malpractice because she suffered a seizure and brain damage from medication. In dispute were the cause of the physical problem, the cause of the claimed cognitive loss, the measure of the deficits, whether the deficits had an emotional component, and whether malingering was involved. The appellate court found that the trial court had improperly considered the element of good cause for multiple examinations by simply holding that the applicable discovery statute only permitted one examination.

The opinion found good cause existed by recognizing the roles of the different doctors. The thrust of the opinion is that a trial court should consider "that a neurologist's examination is limited to physical conditions, and a neuropsychologist only administers clinical psychometric testing;… only a psychiatrist can synthesize the findings of the two other experts and evaluate the extent to which real party's behavior and test results are the result of emotional or psychiatric factors." *Id.* at 1254. In Footnote 3, the court cites previous case law specifically recognizing the qualification issue:

> In this circumstance, the capacity of the psychologist is to provide data for the psychiatrist to use. His [or her] position is analogous to that of an X-ray technician taking X-rays for a physician to examine or a medical technician taking a patient's blood pressure and reporting the findings to the doctor.

Id. at 1255 (citing *Reuter v. Superior Court*, 93 Cal. App. 3d 332, 339 (Cal. Ct. App. 1979) (internal citations omitted).

Discovery of mental injury claims requires a team consisting of professionals from different disciplines. The psychiatrist not only brings all the issues together; the psychiatrist is the medical doctor that some state statutes require. *See Reuter v. Superior Court*, 93 Cal. App. 3d 332, 338–39 (Cal. Ct. App. 1979). *See also Barrett v. Nextel Communs.*, 2006 U.S. Dist. LEXIS 11146 ("*Fed. R. Civ. P. 35* provides that the notice to appear for a mental examination 'shall specify the time, place, manner, conditions, and scope of the examination and the person *or persons* by whom it is to be made.' (emphasis in original). The Rule clearly allows a party to notice a mental examination by more than one mental health professional.").

The Advantages of a Single Team Approach to Assessing a Mass Tort Population

Catastrophic events or other situations commonly arise from which a large number of claimants allege that they have sustained severe emotional damages. Whether a class action, a multidistrict litigation, or another procedure to consolidate individual suits, a large population of claimants seeking emotional damages due to a single event, circumstance, or cause presents an opportunity to contrast and compare factors within the group that increase the accuracy and the credibility of the diagnoses.

Certain key characteristics and group dynamics often characterize mass tort litigation. These include, but are not limited to, the following.

First, a Bell Curve, or Gaussian (Normal) Distribution Curve, of emotional damages best describes the population of litigants, as

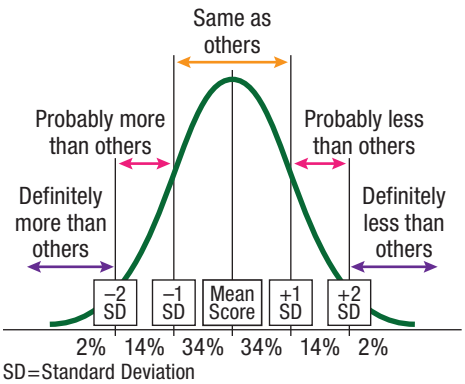
contrasted to a single litigant whose relative position on the probability curve of damages is more difficult to discern. Using the standard of a Bell Curve for the distribution of damages, it is probable that 68 percent of the population falls between the mean and one standard deviation above or below the mean. Fourteen percent of the population falls between one and two standard deviations above or below the mean and only two percent of the population falls more than two standard deviations above or below the mean, *i.e.*, in the so-called "tails" of the distribution curve. Thus, in a large enough population of affected individuals, it is extremely unlikely that any given individual is either entirely unaffected or irreparably damaged by the event or condition.

Thus, if this principle were applied to the distribution of damages in a mass tort litigation, it is more likely than not that approximately two percent of the population have sustained no damages whatsoever, 82 percent of the population have sustained mild damages or less, 14 percent have sustained moderate damages, and only two percent have sustained severe damages.

Second, mass tort litigation offers a unique opportunity to compare and contrast damages among individual plaintiffs who, although subjected to a common trauma, nevertheless possess unique emotional vulnerabilities and resiliency factors.

Third, if individual plaintiffs are represented by different attorneys, a natural tendency develops among the majority of the plaintiffs' attorneys to seek to present their clients as residing in the "long tail" of the Bell Curve where the most vulnerable and least resilient emotionally damaged plaintiffs are found. Unfortunately, however, these are also statistically the least likely characteristics of any single plaintiff.

Bell Curve, or Gaussian (Normal) Distribution Curve



SD=Standard Deviation

Fourth, defendants can achieve an economy of scale when single, experienced, teams of psychiatrists and psychologists assess an entire population of litigants involved in a multi-plaintiff lawsuit in which plaintiffs claim emotional damages.

Fifth, over time, such teams develop experience and methods for managing assessments of alleged emotional damages in mass tort litigation. Teams have developed protocols for using specific psychological tests to screen particular populations for emotional damages, which then allows them to assess more efficiently and consistently those individuals who are indeed damaged.

The Team

An assessment team may include a number of psychiatrists, trained and board certified in forensic psychiatry, each of whom should bring to the team unique subspecialty expertise. Also included may be highly experienced forensic neuropsychologists who can assess personality and emotional issues, as well as neurocognitive impairment that may arise from head trauma, exposure to toxins, or degenerative neurological processes. Relevant subspecialty expertise can include emotional trauma and PTSD, gender, ethnic or age discrimination and harassment, forensic child and adolescent psychiatric assessment, substance abuse and addiction, psychiatric inpatient care, including current standards, policies and procedures of psychiatric inpatient hospital practice and management, traumatic brain injury, neurocognitive dysfunction from trauma, toxic or degenerative causes, and pediatric psychological and neurocognitive assessment.

A diversity of expertise is extremely valuable because each individual member of a mass tort population brings to a common event or condition a unique personal history, as well as individual emotional and physical vulnerabilities and resiliency factors. They also may have preexisting psychiatric illness such as depression, anxiety, or substance abuse disorders.

Whether a particular plaintiff's preexisting emotional problems, if any, render that individual more susceptible to emotional injury is at the heart of the forensic opinions and conclusions that are developed by a team of forensic psychiatrists and psychologists. Therefore, employing a multispecialty team of experts, each of whom brings to a team unique knowledge and expertise, will obtain the best assessment results and the most accurate, evidence-based diagnoses and opinions.

The Approach

A team must develop an approach to assessment that is standardized and consistent for every litigant within a group. Such an approach applies to both the choice and the administration of psychological test instruments as well as to the range of issues covered during the diagnostic interview conducted by an examining psychiatrist.

Psychological Testing

Psychological and neuropsychological testing involves test selection, administration, scoring, and analysis. But at its core, *all psychological testing answers a single "membership question"*: based upon the examinee's responses to a particular test instrument, which group of independently diagnosed individuals does the examinee most closely resemble.

Consequently, when assessing a population with particular characteristics, it becomes very important to use only psychological tests that have been standardized with normative data from a population that includes people similar to those who are being tested. Verbal ability, reading and language levels, cultural factors, physical and mental health, and medications can all influence the data produced from psychological testing. For example, a test instrument that has been standardized with normative data from a Caucasian, middle-class population of high school and college graduates may not have any relevance when applied to an economically impoverished, traumatized, inner city, minority population, most of whose members did not graduate from high school.

The "base rate" of a symptom or behavioral characteristic is the probability of finding that characteristic within the population whose normative data was used to standardize the test. Hypothetically, assume that the normative base rate for clinical depression in the middle-class, Caucasian population of graduates described above, used to standardize a par-

ticular psychological test, is six percent. Now assume that this same test instrument is used to measure depression within the economically impoverished, inner-city, minority population also described above. Finally, assume that the actual base rate for clinical depression within the inner-city population examined is 24 percent, four times that of the normative population. The data generated from using this test with the inner-city population will falsely indicate that the incidence of depression endorsed by the test population is in the extreme tail end of the normal distribution curve for clinical depression, making that finding *appear to be* improbable. However, in actuality, due to the much higher incidence of depression and trauma within groups similar to the tested population, the occurrence of depression may be more common *for that population of examinees*. When test subjects' responses to a psychological test instrument appear to indicate that they have extreme levels of depressive symptoms when the norm for the test of the subjects was established based on a different population, the high depression scores may raise validity questions and suggest exaggeration or even malingering. However, because the base rate for depression in the tested population is actually 400 percent greater than the test's normative population, the test findings of exaggeration or malingering are not justified and are, in fact, incorrect. Thus, to ensure that a psychological test collects meaningful data, the base rates must be similar between the population whose normative data was used to standardize the test and the population being tested.

Which Tests to Administer

A typical battery of psychological tests includes several tests. No single test will adequately support or challenge a clinician's diagnoses. A typical psychological test battery may include one or more scales from an intelligence test such as the Wechsler Abbreviated Test of Intelligence (WASI). One or more endorsement-type personality tests are also administered such as the Personality Assessment Inventory (PAI) and the Minnesota Multiphasic Personality Inventory-2nd Ed. (MMPI-2). A projective test such as the Rorschach Ink Blot Test is extremely helpful in forensic evaluations because due to the amorphous nature of the stimuli, 10 standardized inkblots, the Rorschach is more likely to get "under the radar" of a plaintiff's psychological defenses in a forensic examination. Finally, an "effort" test such as the Structured Interview of Reported Symptoms-2nd Ed. (SIRS-2) should be administered to try to assess whether an examinee may be intentionally exaggerating or even misrepresenting his or her alleged symptoms.

In cases involving head injury or toxic torts with claims of impaired cognitive functioning, such as memory or concentration difficulties, a skilled forensic neuropsychologist should administer an additional battery of neurocognitive tests. In addition to assessing a variety of specific cognitive functions, such testing usually includes other "effort" tests such at the Test of Memory Malingering (TOMM) or the Victoria Symptom Validity Test (VSVT).

Psychiatric Interview

The psychiatric interview with each member of the assessed population should take a similar approach to and have a similar scope, if possible. Each interview should cover the same general areas of history even if an interviewer must simplify his or her language and vocabulary or slow his or her pace of questioning to accommodate an examinee with limited English skills and education, or who is from a different culture. These areas generally include personal and family history from birth through adulthood, medical history, psychiatric, psychological, and trauma history, educational history, employment history, marital or sexual history, recreational history, any substance abuse history, any criminal or civil legal history, economic history and circumstances, and military service history, if applicable.

In addition, a forensic psychiatrist should ask an examinee in detail about his or her experiences that resulted in the litigation, in what way have the alleged events and circumstances affected the examinee personally, what acute symptoms of emotional distress did he or she experience immediately after the stressful event that caused the plaintiff to file a lawsuit, and what lasting symptoms does the plaintiff continue to suffer? A forensic psychiatrist will also want to carefully review medical, psychiatric, and psychological records regarding treatment that the examinee may have received both before and after the circumstances that lead to the litigation, as mentioned above. Finally, an interviewer should carefully inventory and investigate other contemporaneous life stressors, as well as historical traumas.

It is good practice to ask for photo identification of each examinee at the beginning of the meeting and attach a photo that may be taken at the time of the interview to the examiner's notes to better recall the individual, both when writing reports or subsequently when preparing to testify.

Employing a multispecialty team of experts, each of whom brings to a team unique knowledge and expertise, will obtain the best assessment results and the most accurate, evidence-based diagnoses and opinions.

As mentioned above, a forensic psychiatrist should record the interview, at least on audiotape, although video is preferable, if permitted. It helps recall when preparing for trial months or years after an interview and provides an accurate record of what was said and what was not said during an interview.

Finally, the process of examining a population of individuals affected by a common stressor provides a wealth of collateral information because each examinee is not only a subject in his or her own right but is also a collateral informant for all of the other litigants.

Team Tasks

A team anchored by at least one forensic psychiatrist and at least one foren-

sic psychologist should pursue a uniform approach to gathering relevant data about plaintiffs. Team tasks should include the following:

- Review all available medical, psychiatric, psychological, and legal documents, including the complaint, interrogatory responses, and relevant deposition transcripts with exhibits. Subpoena comprehensive medical and psychiatric records, including records from before the stressor as well as all medical records of diagnosis and treatment following it.
- Review all reports from opposing experts, including "raw" data from all psychological testing of each individual plaintiff. "Raw" data consists of any computer scoring sheets from administered tests, the actual notes, a computer data printout, and computer-generated reports. Distinguish between a computer-generated reports and a written report created by the examining psychologist, which may refer to the data selectively but almost never includes a comprehensive data set. Not infrequently an opposing expert psychologist's report, or a psychological test report prepared for clinical or purposes other than litigation will stress some findings and omit others. Only by thoroughly reviewing the complete "raw" data set, and perhaps rescoring the computer answer sheet, can a forensic psychologist retained as an expert determine the completeness or inaccuracy of another psychologist's conclusions.
- "Raw" data from psychological testing is either transferred by a psychologist directly to your psychological expert or through attorneys. However, the latter usually requires obtaining a "protective order" stating that the information will only be used within the litigation and that the original data and all copies will be returned to the psychologist who provided it, at the conclusion of the litigation. This requirement is due to proprietary and other ethical concerns addressed by the American Psychological Association. *See* Am. Psychological Assoc., *Ethical Principles of Psychologists and Code of Conduct*, (2002); Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 Law and Human Behavior 655–65 (1991).
- Whenever possible, obtain collateral interviews or declarations from percipient witnesses. As already mentioned, to some extent plaintiffs examined by forensic psychiatrists in these cases actually become collateral informants for every other litigant. However, whenever possible interviewing plaintiffs' family members, significant others, employers, supervisors, or co-workers of the plaintiffs can prove informative.
- Sometimes distributing printed history questionnaires to examinees before forensic psychiatrists interview them can streamline subsequent psychiatric examinations. Administer a questionnaire to each examinee during the psychological testing session that usually precedes the psychiatric interview. Nevertheless, if the team uses a history questionnaire, the interviewer must diligently familiarize him- or herself with an examinee's responses *before* conducting the interview so that he or she can explore specific facts about the examinee's history or clarify confusing information.
- An experienced forensic psychologist should administer to each plaintiff a battery of at least three widely employed, standardized, personality tests. For psychological testing only, in the absence of any indication of neurocognitive functional impairment, the test battery should include both endorsement tests—the Minnesota Multiphasic Personality Inventory-2, "MMPI-2," or the Personality Assessment Inventory, "PAI"—as well as a standardized projective test such as the Rorschach Inkblot Test, or "Rorschach." All tests used should contain validity indicators. These are scales built into the structure of the test that are essential for determining test data "validity," that is, whether the test data is meaningful or not. An experienced forensic psychologist should select, administer, score, and analyze these tests. Using the Rorschach, in particular, requires considerable training, supervision, and experience with the Exner Rorschach scoring system. In a 2005 "white paper," the Board of Trustees of the Society for Personality Assessment affirmed that the Rorschach Inkblot Test possesses reliability and validity similar to that of other generally accepted personality assessment instruments. The board also stated that responsible use of the Rorschach in personality assessment is appropriate and justified. *The Status of the Rorschach in Clinical and Forensic Practice: An Official Statement by the Board of Trustees of the Society for Personality Assessment*, 85 J. Personality Assessment 219–37 (2005).
- If there is any question about a plaintiff suffering impaired neurocognitive functioning, either unrelated to or as an alleged direct result of the defendant's conduct, it is imperative that an experienced forensic neuropsychologist administer a standardized battery of neurocognitive tests. The neurocognitive battery should also include one or more "effort" or "malingering" tests, such as the Test of Memory Malingering or "TOMM." It is important that the neuropsychologist always use the same neurocognitive tests with plaintiffs who belong to a specific population of litigants. For example, one or more individuals within a multi-plaintiff lawsuit that includes older adults may have suffered a stroke or some degenerative neurocognitive condition such as dementia. These individuals should receive neurocognitive testing because certain types and degrees of neurocognitive impairment may directly affect performance on the other psychological personality tests, possibly rendering the results invalid.
- Determine which clinical findings are unique to a particular individual and which are common to, and frequently present among, the majority of plaintiffs. For example, among a group of individuals alleging that they suffer from post-

No single test will adequately support or challenge a clinician's diagnoses.

traumatic stress disorder (PTSD) as a result of a common, potentially life-threatening experience or event, many may not meet the DSM-IV diagnostic criteria for PTSD, but a few may. A forensic psychiatrist with knowledge of the range of psychological findings among various members of the plaintiff group will be in a much stronger and more credible position to explain to the trier of fact which litigants are legitimately damaged and which are not because he or she evaluated the entire population of litigants.

Finally, in our opinion, symptom checklists such as the Beck or Hamilton Depression and Anxiety Rating Scales, or any other symptom checklists, *have no place* in forensic psychiatric assessments. This is because they specifically lack validity scales. Although they have a useful function within a clinical treatment context, they have no utility as part of the psychological assessment of a litigant who may have complex and multiple motivations for endorsing particular symptoms on any of these checklists.

Case Examples

Now we will explain how the tactic that we propose, enlisting a single team composed of at least one forensic psychiatrist and at least one forensic psychologist to evaluate a population of plaintiffs seeking emotional damages due to a single event or circumstance, can benefit a defense with two examples.

Victim's Relatives and Survivors of a Workplace Shooting Spree

One morning in 1999, a paranoid repair technician working for Xerox Corporation in Honolulu came to work armed with assault weapons and rounds of ammunition. He shot and killed seven of his coworkers and emotionally traumatized others. Following the criminal trial 35 family members of the victims and one survivor of the shooting filed separate lawsuits alleging, among other claims, symptoms of severe emotional distress resulting from the shooting deaths. The forensic psychiatric co-author of this article was retained by Xerox Corporation's outside defense counsel and given the task of evaluating approximately 20 of the 35 plaintiffs. Together with a forensic psychologist colleague, they tested and examined all of these individuals. By examining the entire group, they learned many things that would probably have been missed had they been asked to assess only one or two individual litigants. For example, they learned from the diversity among the plaintiffs examined that Hawaiian society is stratified among a number of different cultural and socioeconomic class groups. Someone's relative position within this uniquely stratified Pacific "melting pot" culture had a direct bearing upon how the individual plaintiff managed the loss that he or she had suffered. After completing the 20 evaluations, they were able to differentiate within the population those litigants who had suffered the onset of PTSD or exacerbation of preexisting mental illness from those who had experienced normal bereavement. Among the population of 20 plaintiffs who underwent psychiatric assessment, one individual, an actual survivor of the shooting who witnessed the repair technician shoot people in the head execution style on each side of his workspace, developed bona fide PTSD. Several other plaintiffs reported mild to moderate symptoms of depression. Several plaintiffs had preexisting mental conditions such as schizophrenia and personality disorders. Surprisingly they were not significantly traumatized by the tragic event. Some plaintiffs only showed evidence of simple bereavement, a normal, a non-pathological response to the loss of a loved one.

Within contemporary behavioral research literature, it is well established that the likelihood of developing PTSD increases with the severity of the stressor. A driver involved in a $200 fender-bender is far less likely to develop PTSD following that event than a victim of a violent crime such as rape. Among rape victims, approximately 50 percent develop PTSD. Perhaps even more interesting is that 50 percent *do not*. Why a particular individual develops a serious emotional response to a traumatic event while another does not has been the focus of increasing scientific study. Similar to molecular biologists studying the immune system, psychologists have begun to identify and differentiate among vulnerability or risk factors that increase the likelihood of developing PTSD following a traumatic event and resiliency factors that protect against it.

Based upon a consistent battery of tests administered to each plaintiff, combined with a careful and detailed psychiatric examination, the team was able to show that a typical Bell Curve distribution of damages existed among the population of 20 examined plaintiffs. The majority of individuals in the group, however, suffered only minor mental effects in addition to their uncomplicated bereavement. At each "tail" of the distribution curve, a few were unscathed and one or two had significant mental injuries.

In mass tort litigation, if each plaintiff's attorney argues that his or her client is among the most seriously "wounded," it is helpful for an expert to be able to differentiate the few who may be seriously injured from the majority who are not. Not only does this broad perspective add to the credibility of a forensic psychiatrist's testimony, but this evidence-based opinion far more accurately informs the trier of fact.

Survivors of a Commuter Train Crash

In another case involving a train crash, the defense counsel retained a team consisting of the forensic psychiatrist co-author of this article and a forensic psychologist to examine the sub-population of litigants who were passengers on the commuter train and also claimed that they had suffered severe emotional trauma. The team evaluated approximately 18 of the passengers. One person had suffered a depressed skull fracture with slight internal hemorrhaging. Others had experienced minor head trauma but were alleging traumatic brain injury. Others claimed PTSD and serious depression.

The findings were both enlightening and surprising. The one individual with a depressed skull fracture did suffer some limited cognitive impairment consistent with a diagnosis of mild traumatic brain injury. However, he also evidenced considerable emotional overlay, as well as a strong suggestion of secondary gain motivation.

Other passengers who claimed to have suffered some degree of head trauma showed no objective signs of any actual brain injury, nor any signs of significant emotional damage. The team discovered

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that one individual suffered from a factitious disorder, also known as Munchausen Syndrome, causing her to seek serial treatments from doctors, including actual surgery on several occasions, based upon specious symptoms that she cleverly feigned, not primarily to obtain compensation but rather to assume the role of a seriously ill patient as she had done on numerous prior occasions during her life. Invariably, factitious disorders reflect longstanding patterns of maladjustment in which a patient equates medical care with "love" and "nurturance." Patients with factitious disorder are so motivated to be sufficiently ill to justify receiving treatment that they may do serious harm to themselves in order to achieve that goal. The disorder has its own natural course. In this case the symptoms were a "convenient focus" to seek treatment and bore little or no causal connection to the train crash. The assessments illuminated other noteworthy findings that directly affected the final outcome of damages claims. One plaintiff's actual presence on the ill-fated train was seriously doubted. There was some reason to believe that he had witnessed the crash then had jumped on the train to file a claim. During the psychiatric examination, which can be far more open ended than a tightly structured and defended deposition, the forensic psychiatrist learned that he had a criminal record including a conviction for fraud. The team concluded that he was probably malingering his so-called "signs" of emotional injury.

Conclusion

Evaluating emotional damages requires an ethical, scientific approach whether a case involves a single plaintiff or is a mass tort case. Many psychiatrists, psychologists, or related health professionals qualify as experts to testify before a judge or jury. However, defense counsel should consider in deposition or in trial cross-examination exploring an expert's qualifications to render an opinion of a plaintiff's mental health based on his or her own interpretation of test results. Consider exploring to what extent an expert blindly accepted a plaintiff's history or otherwise approached the task as a "supporter," rather than as a forensic examiner. Inquire about the thoroughness of a psychiatric or psychological examination using the elements of the approach discussed in this article. To assure the most accurate result, make sure that your experts have all available information about an accident and the claimant. Further, keep in mind that in mass tort litigation, forensic psychiatrists and forensic psychologists have a unique opportunity to assess members of a claimants' group globally, as well as individually, which can not only add support to their opinions and conclusions, but also can result in economies of scale. FD