

**The Advantage of Utilizing the
Expertise of Psychologists
Pre-Litigation**

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The advantage of utilizing the expertise of a forensic psychologist pre-litigation

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A bit about the practice of Forensic Psychology



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Forensic Psychology

- ▶ The application of the science and profession of psychology to questions and issues relating to law and the legal system. The word "forensic" comes from the Latin word "forensis," meaning "of the forum," where the law courts of ancient Rome were held. Today forensic refers to the application of scientific principles and practices to the adversary process where specially knowledgeable scientists play a role.

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Should Mental Health Professionals Be Considered Experts?

- ▶ What is Specialized Knowledge?
 - ▶ Whereas laypersons are generally limited, experts may testify to opinions, provided that the "specialized knowledge" will "assist" the trier of fact in determining a relevant issue (Rule 702 of the Federal Rules of Evidence, Article 7).

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Expert Testimony in a nutshell

- ▶ Rather the overall test, the Court stressed, is whether the expert has "sufficient specialized knowledge to assist jurors in deciding the particular issues in a case

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Jenkins v U.S.

- ▶ 1962: First Established the expertise that psychologists had to offer in the court room
- ▶ This decision recognized that psychologists with training and experience could be qualified to offer testimony on matters of mental disease or defect. Prior to this its was restricted to physicians.

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Function of the Law on Psychology

- ▶ The law regulates forensic practice through administrative licensing agencies, legal rules governing malpractice and confidentiality, and constitutional Principles
- ▶ Most important, the law establishes the guidelines that define the scope of forensic evaluation

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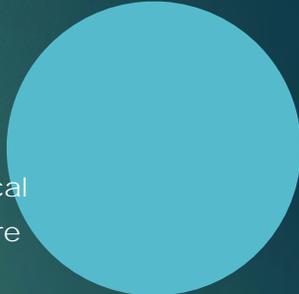
Clinical V Forensic

- ▶ Dimensions Distinguishing Therapeutic from Forensic Assessment

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Scope

- ▶ Clinical
 - ▶ Broad Issues Such as:
 - ▶ Diagnosis
 - ▶ Personality Functioning
 - ▶ Treatment to Effect Behavior Change
- ▶ Forensic
 - ▶ Narrow Issues:
 - Often non clinical
 - Clinical issues are background
 - ▶ (SO TX)
 - Forensic Examinees not Patients
 - Conceptualize and Focus on the legally relevant issues



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Importance of Clients Perspective

- ▶ Clinical
 - Client's Unique Perspective comes first
- ▶ Forensic
 - Objective data to answer the referral sources question is paramount
 - Accuracy is most important



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Voluntariness

- ▶ Clinical
 - ▶ Clinician-Patient relationship is completely voluntary
- ▶ Forensic
 - Examinees are often forced or cajoled into participating in forensic evaluations (court, attorneys).
 - May attempt to resist:
 - ▶ Prosecution
 - ▶ Intrusive Nature

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Autonomy

- ▶ Clinical
 - ▶ A collaborative process in determining the course of treatment and tools used. Highly guided by the patient
- ▶ Forensic
 - ▶ Objective and tools are in large part determined by the psycho-legal question and statutory language. Not guided at all by the subject in treatment or evaluation

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Threats to Validity

- ▶ Clinical
 - Clients seeking treatment for relief of symptoms have little motive to intentionally or unintentionally distort information.
 - Others are unlikely to be biased
- ▶ Forensic
 - Subjects have added incentive to be less than candid.
 - Custody
 - Insanity
 - External Sources may also be tainted due to interest in outcome (partner v police)

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Relationship and Dynamics

- ▶ Clinical
 - ▶ Therapeutic Alliance, Empathy, Rapport, Caring
- ▶ Forensic
 - All may be unethical in various forensic settings
 - Detached
 - Oriented to the adversarial process
 - Confrontational (PCLR, SO TX)
 - Don't take the subjects view at face value

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Pace and Setting

- ▶ Clinical
 - Long Process with multiple contacts
 - Leisurely and at clients pace
- ▶ Forensic
 - Limited contact with subject
 - Fast, Finite, and at referral sources pace

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Areas of Expertise

- ▶ General Clinical Psychology
- ▶ Educational Expert
- ▶ Neuropsychology
- ▶ Criminal Law matters
- ▶ Civil Law Matters
 - ▶ Mental Injury

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Mental Injury

- ▶ 3 Types
 - ▶ Physical Trauma causing Mental Injury
 - ▶ Mental Stimulus causing Physical Injury and
 - ▶ Mental Stimulus causing Mental Injury

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Physical Trauma Causing Mental Injury

- ▶ Easiest for decision makers
- ▶ "The existence of an objective, traumatic, work-connected physical impact or injury provides an intuitive guarantee that the mental disorder is genuine and that the employment genuinely caused it"

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Mental Stimulus Causing Physical Injury

- ▶ Such as heart failure resulting from a long period of emotional strain arising out of work is compensable, as is heart failure resulting from a sudden shock

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Mental Stimulus Causing Mental Injury

- ▶ Most Controversial
- ▶ No physical evidence
- ▶ Some states limit compensation to a sudden stimulus
- ▶ If gradual it must "exceed in intensity the emotional strain and tension normally encountered by employees on a daily basis, cannot simply be the routine stress associated with the job"
- ▶ Also often requires more "causation" than in other types of cases
- ▶ Nationally the percentage of claims doubled between 1980 and 1988 and then dropped 36% by 2003

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Preexisting Mental Disorder

- ▶ Makes the link between work and the injury more difficult, given the somewhat ephemeral quality of the concepts of acceleration and aggravation

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Mental Injuries

- ▶ The issue here is when the law should recognize an independent tort for mental injury
- ▶ The most concrete illustration of this trend is the recognition in the past several decades of the independent torts of *intentional* infliction of emotional distress and *negligent* infliction of emotional distress

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Intentional Infliction of Emotional Distress

- ▶ Liability may be imposed where a wrongdoer's extreme and outrageous conduct, intended to inflict severe emotional distress in another, in fact proximately causes that result.
- ▶ To prove a case the plaintiff must show (1) The defendant intended to inflict emotional distress, or knew that emotional distress was the likely result of the conduct (2) The conduct was extreme and outrageous (3) the conduct caused the plaintiff's emotional distress (4) the emotional distress was severe
- ▶ "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it"

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Negligent Infliction of Emotional Distress

- ▶ Elements include:
 - ▶ Duty on the part of the defendant to protect the plaintiff from injury, and a violation of the duty that proximately causes compensable injury.
 - ▶ Today, a majority of jurisdictions recognize a tort of negligent infliction of mental or emotional distress without requiring physical injury or impact as an antecedent.
 - ▶ The Torts arise most frequently in two types of situations: bystander recovery cases and product liability cases. Courts have also shown increased willingness to compensate individuals who suffer emotional distress as a result of manufacturers' negligence.

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The Predisposed Plaintiff

- ▶ If the Emotional Distress would have resulted without the defendants intervening act, the defendant should prevail

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Causation in Mental Injury Cases: A paradigm Clash

- ▶ The clinical should merely indicate whether the legally relevant incident appears to have played a role in the claimants current mental injury and should identify other contributing factors
- ▶ Stating the "cause" should be avoided

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Clinical Evaluation of Mental Injury

- ▶ The goal is to assess the possible impact of the alleged wrong by comparing the examinees pre-and post event functioning and , if changes are found, the possible causes of the changes - which may include the alleged wrong doing, but also may involve other factors.
- ▶ The examiner will also usually need to predict the examinees future adjustment and functioning, and recommend interventions that may be helpful in ameliorating negative effects that have been observed

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Scope of Evaluation

- ▶ The examiner must describe the examinees' emotional and behavioral functioning at three distinct points in time (prior to the harm, at the time of, and in the future)
- ▶ History, clinical/medical, evidence of behavioral or emotional problems, all work related information

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Structuring the Examination

- ▶ The “Total Person” must be considered
- ▶ Must consider competing explanations
- ▶ A five part format is recommended:
 - ▶ 1. Pre-allegation adjustment
 - ▶ 2. Trauma and distress
 - ▶ 3) Event Sequele (retrospective and current state inquiry into and assessment of substantial impairments the claimant may have experienced as a result of the alleged trauma.
 - ▶ 4) Proximate Cause
 - ▶ 5) Prognosis (consideration of possible future impairments and recommendations for interventions, treatments, and or/ accommodations)

Guidelines to the evaluation of permanent impairment

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Ascertaining Mental Injury

- ▶ Some states require DSM diagnosis but diagnosis and mental injury are not always synonymous. Most helpful is a rich description of the symptoms underlying the diagnosis, the likely causes of those symptoms, and an explanation of how they affect the examinee’s day to day adjustment and functioning
- ▶ Most likely diagnoses:
 - ▶ 1) Traumatic Neurosis/ PTSD/ Acute Stress Disorder
 - ▶ 2) Post-physical injury trauma (grief/sorrow)

Be wary of feigning/exaggeration, make sure to rule out alternative explanations, make sure it didn’t exist before

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Assessing the relationship between Injury and Event

- ▶ Be familiar on the literature on the relationship between particular life events and both preceding and subsequent psychological adjustment
- ▶ Structured interviews like the Life Events Scales
- ▶ Pre and Post psychological testing

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Structure proposed by Ebaugh and Benjamin

- ▶ The Trauma was the sole cause of the psychoneurosis
- ▶ The Trauma was a major precipitation factor
- ▶ The Trauma was an aggravating factor
- ▶ The Trauma was a minor factor
- ▶ The Trauma is unrelated to the emotional disorder

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Ascertaining Effects of Mental Injury

- ▶ The guidelines adhere to the DSM-IV TR criteria for determining the presence of impairment but also stress the need to address factors that go well beyond diagnostic criteria, including the examinee's motivation; treatment and rehabilitation effects; activities of daily living; social functioning; concentration, persistence, and pace; and deterioration or decompensation in work like settings
- ▶ Tort law can go broader, but still will focus on how they were diminished

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Prognosis

- ▶ Must attempt to predict its likely impact in the future and whether treatment might alleviate its debilitating effects.
- ▶ Extremely relevant in Tort as it relates to damages.
- ▶ In Workers Comp cases its important because it assists in determining the length of the impairment and ultimately the type of settlement.
- ▶ Again..... Look for secondary gain

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Getting the Forensic Psychologist involved early!

- ▶ Why?
- ▶ What types of information will we need?
- ▶ How long will it take?

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Specific to Pre-Litigation

- ▶ Benefits and Pitfalls of enlisting a forensic psychologist early on
- ▶ Assessing if there is a claim
- ▶ How much damage a client has suffered
- ▶ How well the client will hold up if the parties decide to pursue litigation
- ▶ How the evaluation may be extended if the attorney uses the forensic psychologist pre-litigation and then after (new information, costs, amending discovery and possibly opinion)

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