

## Shrink in the Courtroom:

### Forensic Psychiatry and Law *from San Francisco Attorney Magazine 12/00*

By Mark I. Levy MD

This is the first in a series of articles about forensic psychiatry as it is utilized in civil litigation. In this article, I will describe how a forensic psychiatrist can be useful to trial attorneys in civil litigation whenever there are allegations of emotional damages.

### What Is Forensic Psychiatry?

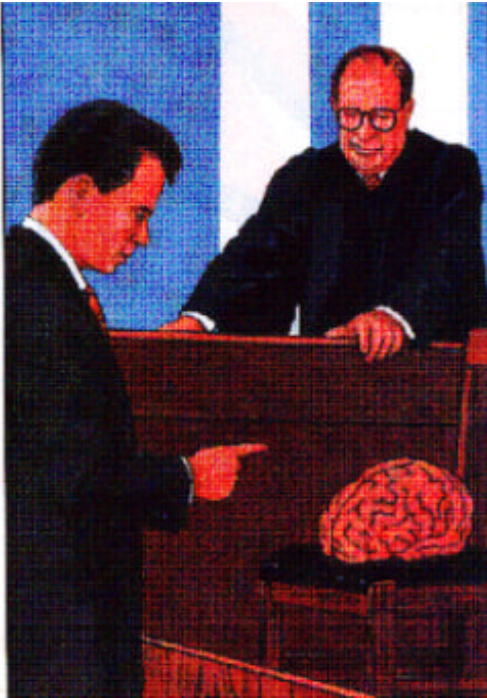
Forensic psychiatry is the application of psychiatric clinical knowledge and research to the practice of law where plaintiff's (or criminal defendant's) mental status is at issue. The forensic psychiatrist is an expert at making diagnostic and prognostic judgments that are informed by scientific research and clinical experience about whether a plaintiff's subjectively experienced emotional distress and/or functional impairment can be plausibly related to the alleged accident, injury, or tort. In addition, the forensic psychiatrist considers whether and to what degree other factors (the patient's pre-existing condition, the plaintiff's motivation to seek compensation or to punish the defendant, the plaintiff's legitimate righteous indignation at being wronged with an appropriate wish to seek justice and reparation, or some combination of any of the above) are entering into the plaintiff's assertion that (s)he has been psychologically damaged and, were it not for the defendant's action or conduct, the plaintiff would not be suffering from the particular condition that (s)he has alleged.

### Forensic Psychiatry and Civil Law: Motivation

In addition to expertise in diagnosing mental disorders, the forensic psychiatrist has expertise in assessing motivation. A plaintiff's motivation be outright malingering (faking an injury or psychiatric illness) to make money to wanting to financially and judicially punish the defendant for alleged moral wrongs. At the opposite end of the spectrum, an injured plaintiff seeks damages to obtain necessary medical care and, as much as possible, restore his or her life to its pre-injury

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status. Not infrequently, a combination of these factors are at work. Teasing out the plaintiff's motivation requires a considerable amount of clinical experience, skill, and acumen, as well as a familiarity with applicable law.

A prospective client tells you he has suffered severe emotional stress (with or without physical injury) as a result of a car accident, or his employer's actions, or his insurance company, or his doctor, or a drunk driver, or anyone who has damaged, hurt, or injured him by accident, through negligent conduct or any

other reason. If you are deciding whether to represent him, or if you are defending your client against his claim of personal injury, how do you assess whether or not

the plaintiff is indeed suffering from a psychiatric disorder or injury and, if he is, how do you assess whether it was causally related to the alleged incident or conduct by the defendant? In essence, you have questions about causation and psychological damages. How do you determine the truth?

Only a forensic psychiatrist (or forensic psychologist) has the necessary training and experience to assess the plaintiff's psychological and psychiatric status at the present time, to make inferences about the plaintiff's emotional state at the time of the accident or injury, and to determine if there is a plausible connection between that accident or injury and the plaintiff's current mental state. Among the questions usually addressed by a forensic psychiatrist I in civil liti-

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## Shrink in the Courtroom (continued)

gation are the following:

- Is this particular plaintiff suffering from a recognized mental disorder? That is, what is the diagnosis, according to the *Diagnostic and Statistical Manual of Psychiatric Disorders, Fourth Edition, Text Revision, 2000 (DSM-IV (TR))*?
- If (s)he is indeed suffering from a disorder, was that disorder caused or exacerbated by the events, incidents, or issues under dispute in the present lawsuit?
- Were there pre-existing psychological problems or psychiatric illnesses in the plaintiff's medical history that were likely to have caused present symptoms of "damages," even if the event(s) under dispute had never occurred?
- Specifically, does the plaintiff have a pre-existing personality disorder or other mental condition that predisposes the plaintiff to their current psychiatric symptoms and that may be at least as much the proximate cause of the current symptoms as were the incidents under dispute?
- Or, was the plaintiff functioning adequately prior to the event and, *were it not for the disputed incident(s) or event(s)*, would still be functioning adequately and without significant impairment?
- What is the most appropriate type and duration of treatment recommended for the plaintiff's mental disorder(s)?
- What is the likely cost of such treatment?
- To what extent (if any) and in what manner should the liability (and cost) of the plaintiff's damages and future treatment be *apportioned* among various

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### The “Crumbling Skull” Plaintiff

Paget's Disease of Bone is the prototype for the “crumbling skull” plaintiff. In Paget's Disease, a progressive, degenerative condition of the skeletal system, bones become fragile and break repeatedly in the normal course of daily activities of living, such as something as innocuous as bumping into a doorway. Consequently, whether or not the event(s) alleged to have “caused” a fracture actually occurred, the Paget's Disease plaintiff will continuously suffer broken bones over time *regardless* of what traumatic events do or do not befall them.

There are chronic, pre-existing psychiatric conditions that metaphorically mimic this bone disease. For example, a schizophrenic passenger in a bus collision may experience hallucinations and delusions after the accident. However, to argue that the accident was the proximate cause of his psychotic symptoms is to ascend a slippery and dangerous slope. In all likelihood, the chronic mentally ill plaintiff experienced similar mental symptoms prior to the accident and would have continued to do so throughout the course of his life,

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Eventually, they date and have sexual intercourse on several occasions. While an employee, she never files a complaint of sexual harassment with the firm's human resources department. However, during a period of company cost reduction, she is terminated. She sues alleging wrongful termination, sexual harassment, sexual abuse, and gender discrimination. She argues that she was fired when several male co-workers were retained due to gender discrimination, that she was subjected to a hostile work environment, and that her sexual activity with her supervisor was a *quid pro quo* that she believed was necessary in order to keep her job. The supervisor argues that she was sexually seductive toward him in her dress and behavior, that there was never any harassment the accident and would have continued to do so throughout the course of his life, whether or not the bus collision had ever occurred.

### The "Thin Skull" Plaintiff

Another bone disease, *Osteogenesis Imperfecta* (in which bone tissue is congenitally thin, fragile, and subject to easy fracture in particular places), is the prototype for "thin skull" plaintiffs.

For example, an attractive, seductively dressed thirty-something female sales employee of a large corporation is allegedly exposed to off-color sexual banter and subsequently overt sexual propositions by her middle-aged, male supervisor. Eventually, they date and have sexual intercourse on several occasions. While an employee, she never files a complaint of sexual harassment with the firm's human resources department. However, during a period of company cost

reduction, she is terminated. She sues alleging wrongful termination, sexual harassment, sexual abuse, and gender discrimination. She argues that she was fired when several male co-workers were retained due to gender discrimination, that she was subjected to a hostile work environment, and that her sexual activity with her supervisor was a *quid pro quo* that she believed was necessary in order to keep her job. The supervisor argues that she was sexually seductive toward him in her dress and behavior, that there was never any harassment or coercion, that their subsequent sexual activity was entirely consensual, and that she was terminated from her position due to her marginal sales performance. In essence, it is her word



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against his.

Defense argues that plaintiff had no objection to the sexual activity prior to being fired, that the allegations of sexual harassment and discrimination were manufactured, and that the filing of her lawsuit was either simple retaliation for being fired with cause or frank malingering in order to obtain monetary compensation. They do not retain a forensic psychiatric expert. Plaintiff's counsel does retain a forensic psychiatrist who, in the course of conducting an in-depth independent psychiatric examination, learns that as a child, plaintiff was regularly molested by her alcoholic stepfather over a period of seven years, and that she complied with his sexual demands in order to keep the peace in the family and protect her mother and younger brother from his alcoholic rages and physical abuse. The records of a child protection service investigation report on plaintiff's childhood abuse are produced during discovery.

As a result of the forensic psychiatric expert's report, plaintiff's counsel argues that his client is a psychologically "thin skull" plaintiff who was particularly vulnerable to the sexual overtures of a male supervisor because her childhood experiences had "taught" her to comply with the sexual overtures of male authority figures in order to prevent more frightening consequences from occurring. Should the defense make a substantial offer to try and settle this case? Who is a jury likely to believe?

## The Paranoid Litigant

A trial attorney once quipped to me when I was discussing my interest in paranoid litigants, "Is there any other kind?" Despite the possible truth in this somewhat cynical remark, paranoid litigants need to be identified and correctly understood in order to cautiously screen their allegations before taking them on as clients and in order to effectively defend their lawsuits. Regrettably, they may contribute to the crowding of judicial calendars, cost the courts and their communities substantial sums of money, represent themselves *pro se* and not infrequently sue their former counsel. In addition, they are also excellent examples of psychologically "crumbling skull" plaintiffs.

Paranoid and narcissistic personality disorders are a special category of psychiatric "crumbling skull" plaintiffs. Those litigants with these *DSM-IV* Axis II diagnoses have long standing, psychological difficulties, often exhibit self-defeating strategies of living, feel chronically victimized, suffer from fragile self-esteem, and consistently externalize blame and responsibility for difficulties that befall them, even when they have instigated the very conditions by which they feel victimized. A paranoid plaintiff who, while representing herself *pro se* after firing one attorney and before retaining the next, provocatively insulted the judge in a law and motion hearing by calling him "senile," but subsequently felt persecuted and enraged when the judge decided most of the motions presented in favor of the defense.

Paranoid litigants aggressively appeal adverse decisions to the highest judicial levels if permitted and consequently cost themselves, their families, and the judicial system considerable amounts of time and money. They frequently represent themselves *pro se*, at least during a portion of their litigation, and when they eventually do retain counsel, they not infrequently replace their attorneys during the course of litigation. It is not unheard of for them to sue their former counsel over disputed billing or alleged acts of legal malpractice.

When their complaints include emotional damages, they invariably cite *DSM-IV* Axis I, acute psychiatric disorders such as Post Traumatic Stress Disorder or Major Depression. They never attribute their alleged suffering to their underlying, long-standing, personality disorder. Nevertheless, it is in fact their paranoid and narcissistic personalities that inevitably drive their litigious activities. This dimension of their psychological makeup must be delineated and addressed by a forensic psychiatric expert in order to present an effective defense of their allegations.

Personality disorders are pathological, long-standing, chronic, fixed mental conditions. Plaintiffs with paranoid and/or narcissistic personality disorders may attempt to use the judicial system to seek external remedies for their own internal psychological problems. Short of declaring a plaintiff a “vexatious litigant,” the courts and public agencies are relatively helpless to defend their crowded calendars and fixed budgets against judicial abuse by paranoid litigants because of the overarching legal value that “everyone deserves his day in court.”

Unfortunately, plaintiffs who suffer from a paranoid or narcissistic personality disorder almost never seek psychological treatment for their underlying problem. Rather, they attempt to externalize blame via litigation in an ongoing quest for external restitution and vindication of their internal psychological wounds. Furthermore, these “wrongs” are frequently experienced by the plaintiff as a “moral” assault, which in turn fuels the plaintiff’s sense of righteous indignation. As trial attorneys know from bitter experience, client control can be difficult with these plaintiffs, and seeking a settlement can feel like playing against a perpetually moving goal post.

During the litigation process itself, these plaintiffs are subject to bouts of emotional instability, anxiety, and narcissistic rage whenever others, including the court itself, oppose their self-declared “just” cause, or simply do not interpret events, the law, or even reality, exactly as the plaintiffs believe they should. Paranoid and narcissistic plaintiffs tend to see the world, including the judicial world, in strictly black and white terms and have little tolerance for ambiguity, uncertainty, or even their own frustration.

It is therefore important for plaintiff’s counsel to consider these issues when seeking an evaluation of a client in order to separate those litigants who have the above personal traits, without a reasonable cause of action, from plaintiffs who may have entirely legitimate grievances as well as a pre-existing personality disorder. A plaintiff may have a paranoid personality, and may also have been *legitimately* wronged; telling the difference between that type of litigant and one who merely *believes* they were wronged and is engaged in an endless quest to seek restitution for old hurts and insults requires expert evaluation and judgment.

The forensic psychiatrist has a crucial role in civil litigation where alleged psychiatric illness and motivation are important issues. In retaining a forensic psychiatrist, counsel should look for highly experienced clinicians who are familiar with legal issues, can weigh evidence and present logical and compelling explanations for their opinions based on the evidence in the case and the background of scientific knowledge pertaining to mental disorders and human motivation.

This article is the first in a series. Subsequent articles will examine such topics as expert psychological testing and opinion; federal anti-discrimination and entitlement laws, including the Americans with Disabilities Act (ADA), The Fair Housing Amendment Act, The Age Discrimination and Employment Act (ADEA), The Individuals with Disabilities Education Act (IDEA), and the Social Security Laws; determinations of testamentary capacity; questions of civil commitment and involuntary hospitalization and treatment; evaluation of children being adjudicated within the juvenile court system; child abuse and neglect; and child custody in divorce.

I wish to particularly thank my colleague and friend Saul Rosenberg, Ph.D. for his considerable assistance with the preparation of this article.

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