DEFENDING PSCYHOLOGICAL AND EMOTIONAL DAMAGES CLAIMS

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Instilling Doubt.

The Seventh Circuit Court of Appeals here in Chicago views claims for purely psychological and emotional damages with a "healthy" cynicism, which would be helpful to spread across all courts confronting such claims. As Justice Posner has noted:

> The law has always been wary of claims of emotional distress, because they are so easy to manufacture. For a long time damages for such distress were generally limited to cases in which the plaintiff was able to prove some other injury. *See Restatement (Second) of Torts* § 46 comment b, § 436A (1965); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 54, pp. 361-65 (5th ed. 1984); Archibald H. Throckmorton, "Damages for Fright," 34 Harv. L. Rev. 260 (1921). The courts have grown more confident of their ability to sift and value claims of emotional distress, and the old limitations have largely been abandoned; but suspicion lingers, as illustrated by two recent Supreme Court decisions, *Metro-North Commuter Railroad Co. v. Buckley,* 521 U.S. 424, 428-38, 138 L. Ed. 2d 560, 117 S. Ct. 2113 (1997), and *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994), and by cases, most recently our decision in *Alston v. King*, 231 F.3d 383, 388-89 (7th Cir. 2000), where we set a high threshold for proof of damages for emotional distress caused by a denial of due process of law. *Buckley* and *Gottshall* were both cases under the Federal Employers Liability Act, and the Court emphasized that the Act was passed before the modern era of receptivity to claims of damages for purely emotional injury.

Aiello v. Providian Fin. Corp., 239 F.3d 876, 880-881 (7th Cir. 2001). These cases continue, however, to be problematic for defendants, their insurers and for defense counsel, and pose unique challenges if favorable outcomes are to be obtained. More importantly, claims involving serious and significant exposure for psychological and emotional damages cry out for a different approach and a comprehensive understanding that differ from cases seeking recovery for a broken bone, soft tissue strains or other purely bodily injury.

Legal Elements.

Plaintiffs can seek psychological damages under a variety of different legal theories, including intentional infliction of emotional distress, negligent infliction of emotional distress and common negligence. Certain of these legal theories have specific requirements that must be met to state a valid claim for relief. For example, different jurisdictions apply a variety of different rules to claims for negligent infliction of emotional distress. Some jurisdictions require that the plaintiff suffer some level of physical contact or impact in order to state a valid claim for negligent infliction of emotional distress. *See Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1009-10 (5th Cir.

1991) (summarizing the various approaches to negligent infliction of emotional distress claims under FELA). Other jurisdictions apply the "zone of danger" rule where the plaintiff can recover damages that result "from the witnessing of peril or harm to another if the plaintiff is also threatened with physical harm as a consequence of the defendant's negligence." *Id; Schultz v. Barberton Glass Co.*,(1983) 4 Ohio St. 3d 131 (danger of fictitious claims no greater than in cases claiming physical injury). In jurisdictions following the "zone of danger" rule, recovery may be allowed to a mere bystander to a dangerous event. Even in those cases, it is typically required that the bystander must actually appreciate the danger and/or be within the "zone" and the injuries must be serious and reasonably foreseeable. *See, e.g., Paugh v. Hanks*, (1983) 6 Ohio St. 3d 72.

The differences among the different states and under statutory law can be of utmost significance and case law interpreting the applicable legal elements and standards in a particular jurisdiction must be carefully considered before embarking on the defense of the claim. Only then can appropriate motions, pleadings and discovery be prepared and the stage set for possible early disposition.

Common Defenses to Psychological/Emotional Damages Claims.

Although every claim is unique and must be approached with an open and creative (albeit skeptical) mind, certain defenses are fairly common and offer a useful analytic framework for approaching claims for psychological and emotional damages. First, the defense should consider whether the claimed condition exists in any kind of demonstrable way. Is the plaintiff lying? Does the claim mask the plaintiff's malingering? Second, is the claimed condition really as bad and debilitating as the plaintiff or his or her expert claims? Finally, these cases open the door for broad inquiry into the question of ultimate cause of the claimed condition. Is the conduct of the defendant really the cause of the condition or are there other factors in the life of the plaintiff that would explain the factors for which plaintiff now seeks recover? The unique facts of a given case will generally drive which of these strategies presents a viable defense, but each should be explored as the case develops.

It is particularly risky in cases alleging serious psychological and emotional injury to assume that the claim will go away or be relegated to minor importance as the case develops. Indeed, perhaps the most critical element of a successful defense of these claims is early and thorough preparation borne of an understanding of the nature of psychological injury and the objective criteria for identification and measurement of it. Only then can litigation tools be used effectively to begin to answer the above questions and enable an accurate assessment of the plaintiff's case.

A. Depositions

The plaintiff's deposition and written discovery submitted to the plaintiff should focus on an examination of the various elements of the alleged psychological and emotional damage. Because there is often a diagnostic framework for the injury alleged,

defense counsel should study the diagnostic criteria and determine how or if the alleged facts fit the criteria in an appropriate fashion. In addition to exploring each of the criteria of the particular injury, disorder or syndrome alleged, claims professionals and defense counsel should explore all other traumas that the plaintiff may have experienced in his or her life. Discovery may reveal that the plaintiff either has a prior history of some related illness or trauma or has exhibited symptoms of a psychological or emotional disorder that pre-date the event giving rise to the lawsuit.

Any deposition testimony of the plaintiff should be videotaped to record his or her description of the facts outside the presence of a jury or physician. Often, plaintiffs will view their deposition very differently than an examination by a physician or testimony before a jury. While a plaintiff may become overwhelmed when recounting the traumatic event before a jury or to a physician, he or she may describe the same event dispassionately to an attorney. Such a difference in affect can be used effectively before a jury or with a defense expert to demonstrate that the plaintiff is exaggerating his or her condition.

Defense counsel should establish a clear timeline of the onset and treatment of the plaintiff's claimed injury. Because emotional damages can be used to add value to cases where physical injuries either resolve or are not as severe as initially thought, the "onset" and treatment of the alleged emotional distress should be explored. In some instances, an attorney may have referred the plaintiff to a mental health provider. Accordingly, it is important for defense counsel to pin down when, by whom and under what circumstances the plaintiff was first diagnosed. The fact that a plaintiff did not receive treatment for his or her claimed emotional injury until referred to a psychiatrist by his or her attorney can be used to great effect, particularly before a jury.

Where significant emotional injury is not alleged in the initial pleadings but arises later in the case, the defense should also use discovery as a safeguard against a late-arriving claim for psychological injury. Even when such claims do not appear significantly in initial pleadings or accident reports, it is nevertheless important to consider whether such claims are likely or common under the facts presented. One effective way to prepare such a defense is to explore the diagnostic criteria with the plaintiff during discovery. For example, if defense counsel suspected that a plaintiff might later attempt to add an emotional injury claim to his or her case, it would be wise to question the plaintiff on his or her reaction to the traumatic event to establish the absence of the response required by those diagnostics. If the plaintiff should then later attempt to complain of some kind of psychological injury, his or her previous testimony can be used to undermine that allegation.

B. Medical Records

The defense should make sure to collect all of the plaintiff's prior medical records that are available, including all billing and insurance claim records. Such records may reflect facts regarding the plaintiff's condition or disclose opinions of the plaintiff's physicians that are inconsistent with either the fact or severity of the plaintiff's claimed

distress. Such facts can be effectively used to cast doubt on the existence and/or severity of the plaintiff's condition and call into question whether the plaintiff can be believed.

In reviewing the medical records, careful attention should be paid to notes or other information about the plaintiff's state of well-being prior to the events underlying the lawsuit. Such a comparison may reveal that's the plaintiff's overall condition did not change dramatically following the traumatic event.

Oftentimes, a careful review of past medical records will reveal health care providers who have not been identified by the plaintiff. By working back through the medical records, other traumatic events or symptoms of psychological damages that pre-date the events underlying the lawsuit may be identified. In addition, such records can uncover other diagnosed mental disorders or facts indicative of undiagnosed mental disorders that can provide alternate theories of causation. In addition, the medical records may reflect that the plaintiff, rather than the doctor, was the person who raised the issue of emotional distress. Records such as these raise the possibility that someone other than a medical professional suggested that the plaintiff may suffer from his or her claimed injury.

C. Other Records

Other records that claims professionals and defense counsel will want to consider and evaluate, thereby making good targets for discovery in psychological and emotional injury cases, include:

1. Financial records.
    (a) Depressed patients often have a history of credit problems.
    (b) Psychosomatic patients often don't pay doctor bills.
2. Driving records, particularly as to previous accidents and history of claims that lead to medical/psych. records.
3. School records - often there is a history of personality or mental disorders, discipline problems, "acting out", psych. referrals.
4. Employment records - discipline problems, large amounts of sick or leave time, grievances, "job hopping".
5. Insurance records - look for medical history on applications, refusal of insurers to issue a policy, receipt of medical or psych. benefits.
6. Legal records.
    (a) Other suits/claims.
    (b) Domestic relations-divorce, domestic violence, court ordered counseling.
7. Medical records.
    (a) Hospital records - pre & post injury, admission summaries, emergency room, discharge summaries, medication and nurses' notes.
    (b) Diagnostic charts, alcohol and drug tests, body chemical results,

medication orders.
(c) Physician orders, diagnoses, consultation notes, restraint or seclusion orders.
(d) Occupational and physical therapy notes.
(e) Social work/social services reports.
(f) Outpatient records.

8. Military records - discharge, disciplinary, fitness reviews, medical reports, combat experience (for PTSD).
9. Drug/Alcohol Treatment - (watch out for statutory/regulatory restrictions).
10. Private psychological/psychiatric/neuropsychological records.
    (a) Referral letters
    (b) Clinical history, mental status exam, conclusions, diagnosis, prognosis, recommendations, office notes.
    (c) Look for references to the accident in question.
    (d) All tests, including patient participation tests, answer sheets.
11. Plaintiff personal records - diary, calendar, narratives.
12. Pharmacy/prescription records.

D. Expert Witnesses

Psychiatrists and psychologists retained as experts by plaintiffs can be extremely difficult to cross-examine. Mental health professionals are highly trained and knowledgeable in their subject matter. Given the highly subjective, yet specialized nature of their substantive testimony, the opinions offered by these experts are typically easy for them to posit and difficult to disprove. In order to prepare for an effective cross-examination, defense counsel should have a thorough understanding of the field and a good understanding of the diagnostic criteria for injuries or illnesses at issue.

Although a plaintiff's experts may be difficult to cross-examine, there are several areas where defense counsel should be able to extract concessions that can limit the damage caused by their testimony. First, defense counsel should get the plaintiff's expert to concede that the information used to diagnose plaintiff's condition is subjective and largely gathered from the plaintiff and not from any independent sources. Further, the expert should be asked to concede that malingering, false reporting of symptoms or exaggeration of symptoms is difficult for mental health professionals to detect and that such professionals can be fooled by patients. The judge and jury need to be made aware that there is truly no purely objective way to determine the plaintiff's condition – there is no blood test, x-ray, MRI or other objective diagnostic test that can reveal many of the common psychological injuries alleged in these cases.

The defense should also endeavor to force the plaintiff's expert to concede that the plaintiff's condition will improve and the plaintiff will get better if he or she commits to therapy. By and large, many psychological injuries will improve with time and therapy, if the plaintiff is committed to following the treatment regimen prescribed. To the extent

that the expert concedes that the plaintiff's condition will improve, the damages are more easily limited. Should the expert maintain that the plaintiff's condition will not improve, defense counsel may be presented with an opportunity to undermine the credibility of the expert or argue that the plaintiff's own expert doubts the plaintiff's commitment to following the advice he or she is given and is not really trying to get better.

Finally, claims professionals and counsel should pay close attention to all expert reports and confront the designated experts with any stressors in the plaintiff's life that have been overlooked or ignored. In addition, defense counsel should ask the expert about all of the areas of psychosocial stressors in the plaintiff's life that were not considered or investigated when the expert formed his or her conclusion. Often, an expert or treating physician will not have all of the information that an attorney can assemble through discovery. To the extent that the expert lacked information that is significant to the plaintiff's condition, he or she should be confronted with such information in cross-examination, hopefully casting doubt on the veracity or comprehensiveness of his or her opinion.

Where a case either does or may involve a significant psychological/emotional damages component, the defense should move quickly to secure a qualified expert, preferably one who is versed in forensic psychiatry or psychology, even if only for consulting purposes. Such an expert can help guide discovery and provide recommendations on how to approach the plaintiff's claims in this highly specialized area. Consultants can prove very effective in taking in all of the available information regarding the plaintiff's condition and help identify possible alternate causes or demonstrate that the plaintiff is not as incapacitated as he or she may claim.

Finally, care should be used when deciding whether to take advantage of discovery rules that allow a defense expert to examine the plaintiff. Such procedures in the federal courts and under state law typically allow a physician retained by the defense to examine the plaintiff and explore his or her medical condition. An examination holds the possibility of revealing additional weaknesses in the plaintiff's claims of incapacity or injury. In addition, where the plaintiff exaggerates his or her symptoms, such an examination provides an opportunity to draw a strong contrast with how the plaintiff described their injury and the underlying trauma during their deposition.

These examinations, as with independent examinations, do not always have such happy endings for the defense, however. If the professional conducting the exam reaches conclusions that are positive to the defense, invocation of this procedure can be beneficial. However, defense counsel runs the risk of helping the plaintiff prove his or her case if the examiner reaches conclusions similar to those reached by the plaintiff's treating physician or expert or identifies other problems. Great care should be taken before deciding to conduct such an examination and should be avoided unless the defense can identify the likely, as opposed to the merely hoped-for, benefits of doing so.

E. Credibility

The inherent subjectivity of claims for psychological and emotional damages and the diagnostic reliance on the plaintiff's self-reporting also present a possible defense against these claims. Diagnosis is, as noted, highly subjective. A mental health provider must rely on the subjective self-reports of their patient. There is often no objective record reflecting any objective verification of plaintiff's complaints. Given this fact, the plaintiff's credibility, or lack thereof, may present defense counsel an opportunity to attack either the presence or severity of the claimed illness or injury. Such direct attacks on a psychologically injured plaintiff can, however, be difficult to mount, as objective data will not be available to disprove the theories presented and because the plaintiff's complaints are generally supported by his or her treating physician and expert.

Depending on the specific facts alleged, the defense may also consider the possibility of placing the plaintiff under surveillance. Such a defense strategy is beneficial where it is possible to observe the plaintiff engaging in activities that are inconsistent with his or her claimed distress or that directly contradict the plaintiff's sworn testimony. Juries tend to view surveillance with a great deal of skepticism and often greatly resent the intrusion on the plaintiff's privacy. Given rules requiring disclosure of surveillance video, it is dangerous to begin surveillance that turns out not to be particularly helpful. Accordingly, it is often wise to observe without recording the plaintiff's activities until such time as there is great confidence that what is to be recorded will present an open and obvious case of plaintiff's fraudulent testimony. If the allegations do not relate to a highly visible set of behaviors, so that a jury will not be able to tell from video whether or not the plaintiff has been lying about or exaggerating his or her claims, it is best to avoid surveillance recordings altogether. An abundance of caution should be used in this area in order to avoid the perception that the defendant has further heaped abuse on and caused greater injury to an already traumatized individual.

Overall, the challenges to defending psychological and emotional damages claims are numerous and significant. The defense team should carefully study the available science so that any objective and expert data or opinion that exists in the field may be incorporated into challenging the claims made by the plaintiff and the opinions offered by his or her retained experts. Claims professionals and defense counsel would do well to learn about the diagnosis, evaluation and treatment of the various maladies claimed by the plaintiff so that possible inconsistencies in the plaintiff's story can be identified and other defenses brought to bear. A defendant, insurer or defense attorney who treats a case with serious psychological/emotional damages like just another bodily injury claim does so at its own considerable and expensive peril.

Scientific Bases and Sources for Assessing Psychological and Emotional Damage Claims

A. Diagnostic and Statistical Manual of Mental Disorders. Fourth Edition, Text Revision. (Dsm-Iv-Tr)

DSM-IV-TR is a manual discussing recognized mental disorders. It delineates standard diagnostic criteria and provides opportunities to make differential diagnoses. It is divided into five "Axes," which, taken together, provide a very helpful framework for assessing mental issues. Axes I and II details criteria for all mental disorders, developmental disorders and personality disorders. Axis III describes physical disorders with emotional overtones. Axis IV considers the severity of psychosocial stressors (with a scale evaluating these stressors from no stress to catastrophic) and attempts to explain development of a new mental disorder, recurrence of a prior mental disorder or exacerbation of an already existing disorder, crucial determinations to make in a case where causation and aggravation of pre-existing condition are often highly contested issues. Axis V provides a global assessment of functioning (GAF). GAF scales allow the clinician to indicate his or her overall judgment of person's function on a scale from 1 (suicidal) to 90 (no or minimal symptoms).

B. Psychological Testing

Psychological testing is often done with the aid of the Minnesota Multiphasic Personality Inventory 2 (MMPI-2) is a true/false test consisting of questions that correspond to a number of clinical and validity scales:

(a) Clinical scales:

(i) Hyprocondriasis (Hs) - Scale 1;
(ii) Depression (D) - Scale 2;7
(iii) Hysteria (Hy) - Scale 3;
(iv) Psychopathic deviate (Pd) - Scale 4;
(v) Masculinity-Femininity (Mf) - Scale 5;
(vi) Paranoia (Pa) - Scale 6;
(vii) Psychasthenia (Obsessive-Compulsive) (Pt) - Scale 7;
(viii)Schizophrenia (Sc) - Scale 8;
(ix) Hypomania (manic) (Ma) - Scale 9; and
(x) Social introversion (Si) - Scale 0

(b) Validity scales:

(i) Question scale - (?) These are unanswered questions. Test takers are encouraged to answer all questions, so an excessive score suggests evasiveness or indecisiveness.
(ii) Lie scale (L) - These are questions most people would answer true (I get angry sometimes). An excessive score might indicate someone who wants to lie to make himself look good.
(iii) Infrequency scale (F) - Questions most people answer false. A high score here might indicate a "random" test-

taker, carelessness, confusion or lying to make oneself look bad.

(iv) Correction scale (K) - High score reflects guardedness or defensiveness in responding to psychopathology.

You may also come into contact with the Wechsler Adult Intelligence Scales III (WAIS III), which attempt to measure intelligence through use of ten subtests:

(a) information;
(b) comprehension;
(c) arithmetic;
(d) similarities;
(e) vocabulary;
(f) block design;
(g) picture completion;
(h) picture arrangement;
(i) object assembly; and
(j) digit symbol.

A plaintiff's performance on these tests may or may not be consistent with disability, impairment or brain injury but do offer objective data in the area of intelligence which can, under the appropriate circumstances form the basis for either supporting or attacking the plaintiff's claims.

Specific Allegations Of Emotional Damage

There are a number of commonly encountered disorders that typically form the basis for claims for psychological and emotional damages. Among these, Post-Traumatic Stress Disorder ("PTSD") is probably the most common allegation of emotional injury. It requires an event that is outside the range of usual human experience and that provides a subjective belief that the patient or someone else is in danger of death or serious bodily harm. Symptoms include persistent re-experience of the trauma, emotional numbing or avoidance of activities which gave rise to the trauma in the first instance and symptoms of increased arousal (sleep disturbance, concentration difficulties, easily startled). PTSD is often used as a diagnosis in patients with pre-existing anxiety or depressive disorders.

In contrast to PTSD, phobias are usually not associated with trauma. Rather, literature indicates that they usually develop in early childhood and rarely result in marked impairment. Defense teams should be highly skeptical if a plaintiff alleges or expert opines that some alleged phobia was the direct result of a traumatic and recent event.

Another commonly encountered condition is Generalized Anxiety Disorder ("GAD"). GAD is characterized by an unrealistic or excessive anxiety or worry about two or more life

circumstances. A diagnosis of GAD can sometimes be attached when the plaintiff's expert blames a single event (the injury), ignoring the requirement that at least two life circumstances be involved. It is also significant to note that diagnosis of the disorder requires ruling out other related disorders. For example, the diagnosis of GAD should not be made if the anxiety occurs only during episodes of other disorders. Also, a patient may have organic disorders which can pose as GAD, such as hyperthyroid or caffeine intoxication. For GAD to be recognized, at least six out of eighteen classic symptoms should be observed.

Often, an injured plaintiff will complain that he or she is, as a result of the incident complained of, subject to panic disorder. This disorder is marked by discrete periods of intense fear or discomfort which are unexpected. Attacks usually do not have an organic basis or cause and, as with phobias, the patient usually has experienced a long history of anxiety, fearfulness,
dependency and separation anxiety. Panic attacks often manifest in children as a school phobia, so that it may be worthwhile to obtain school records for early evidence of this condition.

Given the subjectivity of and difficulty in assessing claims of depression, it is useful to consider the differences between a depressive neurosis and a major depressive event. Depressive neurosis is characterized by depressed mood, most of the day, more days than not, for at least two years. The patient is never without the depression for more than two months. In addition to depression, the patient typically offers other symptoms, such as poor appetite, insomnia, low energy and low self-esteem. Patients suffering from depressive neuroses frequently have a history of pre-existing personality disorder(s) such as borderline histrionic, narcissistic, avoidant or dependent. By definition, personality disorders are fixed by adolescence or young adulthood and are therefore unlikely to be related to any tortuous, traumatic event.

In contrast, a major depressive event may be characterized by depressed mood, diminished interest in pleasure, fatigue, changes in weight, thoughts of death, sleep disorders and self-esteem problems. Depression can be considered in degrees. With mild depression, there are few symptoms. In moderate depression, the symptoms may be more evident but not severe. Severe depression is characterized by observable interference with occupational function, social activities and/or relationships. Severe depression with psychotic features will involve the same symptoms with delusions or hallucinations. Many patients have either a familial or personal history of depression anxiety and personality disorders and physical disorders and other illnesses may also be associated with depression. Additionally, some medication, such as anti-hypertensive (high blood pressure) drugs can also cause a depressed mood.

Many cases involve neuropsychological claims attendant to head injuries, in which plaintiffs with minor head trauma present claims for disability and damages far exceeding the expected effect. These claims are often supported by an unfavorable report from a neurologist or neurosurgeon and by negative employment evaluations and reports by family members of behavioral change. These claims should be defended

with the use of an expert in the field as juries tend to take the claims of impairment very seriously. Defenses to neuropsychologist testimony should be aggressively pursued and may, in any particular case, include:

1. Claimed injury is far beyond expected effect of trauma.
2. No loss of consciousness or other hallmarks of real head injury.
3. Plaintiff's long term symptoms and behaviors do not fit the pattern of the sequelae of real brain injury - e.g., plaintiff has continued to work, conduct family matters, etc.
4. There are other apparent causes for plaintiff's symptoms and behaviors that have not been ruled out - e.g., depression, money problems, life stressors, job problems, pre-existing mental or personality disorders.
5. Plaintiff's neuropsychological tests have been improperly administered, scored or interpreted

In evaluating claims for psychological and emotional injury, the defense should also consider the evidence that drugs, including tranquilizers, anti-depressants (e.g., (Prozac) and anti-hypertensives can cause anxiety, depression, poor memory and mental abnormalities. Discovery should certainly be used to gather all evidence of medications during relevant portions of the plaintiff's life. This information should be reviewed by an expert for any evidence of side effects and possible substance abuse. An overview of this kind of information can be obtained from the Physician's Desk Reference (PDR), which details known and expected side effects and contraindications.

Conclusion

Despite the Seventh Circuit Court of Appeals' healthy skepticism for claims alleging psychological and emotional damages, defendants face considerable exposure to these claims. Successfully defending and minimizing these claims requires specialized knowledge and understanding of the field and careful consideration of the little objective criteria that exist in what remains highly subjective. Early attention to these issues and the early involvement of professionals and consulting experts is often the best safeguard against surprise verdicts and runaway claims. In any event, claims for psychological and emotional damages should not be treated as just another damages claim but must be carefully investigated and defended through discovery, review of records and a thorough understanding of the complex and arcane world of psychological and personality disorders diagnosis, evaluation and treatment. We would be "crazy" to do otherwise.