A·D·C VERITAS

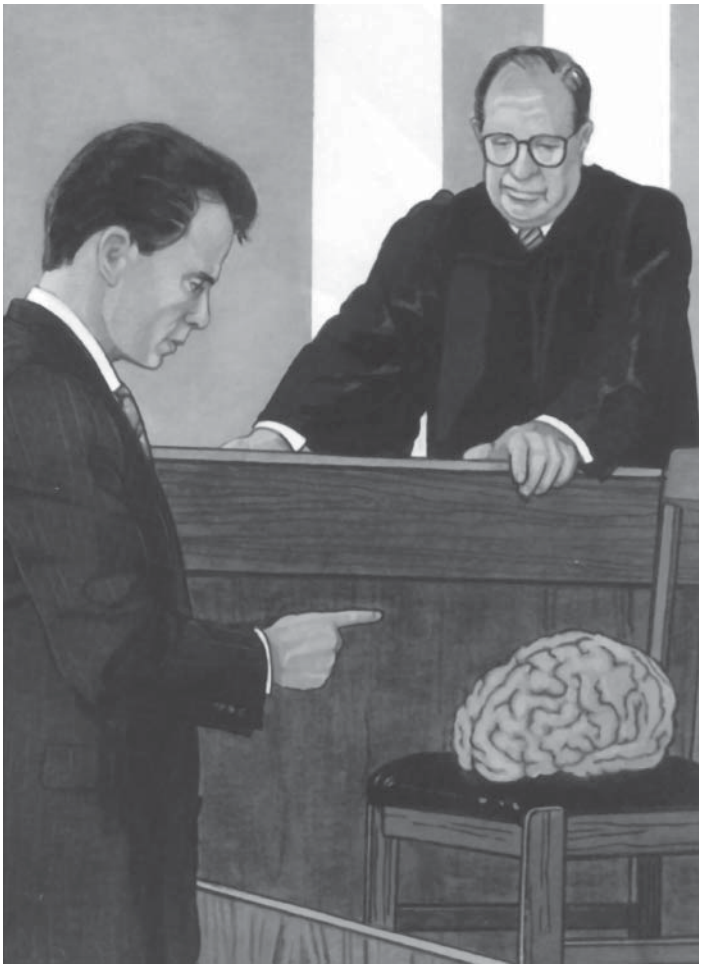
DEFENSE COMMENT

Association Of Defense Counsel Of Northern California And Nevada

VOL. 19, NO. 1 / SPRING 2004

In This Issue:

Unwarranted Restrictions on the Independent Examination of Emotional Damages



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Plaintiffs alleging emotional damages often seek judicial review to restrict, or to eliminate, independent psychiatric and psychological examinations performed by experts retained by the defendant. From our point of view, engaged in the practice of forensic psychiatry and psychology, when independent examina-tions are excessively restricted or disallowed, the defendant's ability to assess emotional damages, to investigate other causes, in addition to defendant's conduct that may be just as proximate in contributing to emotional distress, and the ability to assess the plaintiff's credibility, are all severely compromised. As a result, the trier of fact may hear no independent scientific testimony about damages or causation, a problem that is compounded when plaintiff relies exclusively on treating doctor's reports.

Our goal in writing this article is to call attention to the negative consequences that may follow when the courts place arbitrary limits on the scope of independent psychiatric and psychological defense examinations. We believe there is widespread confusion in our society, about the nature of emotional distress and mental disorders, about the purpose and procedure of independent psychiatric and psychological exams, and especially about the difference between examinations conducted by doctors who treat the patient versus forensic experts. We hope this article encourages discussion and debate about these issues.

PLAINTIFF'S OBJECTIONS TO INDEPENDENT EXAMS

Plaintiffs argue that psychiatric exams invade their privacy, are too arduous and stressful. For example, plaintiffs assert that it is irrelevant or too stressful for an adult alleging sexual harassment to be interviewed about child development, about sexual or other trauma during childhood and about sexual development.

Plaintiffs often object to being evaluated by a psychiatrist and also being tested by a psychologist, claiming it is duplicative and unnecessary. Plaintiffs claim that since they have been treated and sometimes tested on their own, why should they have to undergo these stressful, invasive procedures again?

What is most troubling from our point of view is that virtually identical cases involving these issues have been resolved in opposite ways by the courts. In some cases we have been permitted to conduct comprehensive examinations; in others, our examinations have been so truncated or even worse disallowed, that the only information presented to the trier of fact came from the plaintiff's treating doctors. It is a sad irony that the Supreme Court has mandated that only generally accepted scientific testimony be presented in the courtroom, yet the unintended effect of judicial restrictions on independent exams is to eviscerate the testimony that *Daubert* presented to the trier of fact. [1]

Some plaintiffs in recent years have asserted they suffered only "simple" or "garden variety" emotional distress, relying upon the provisions of Code of Civil Procedure §2032. This statute provides that a court may not

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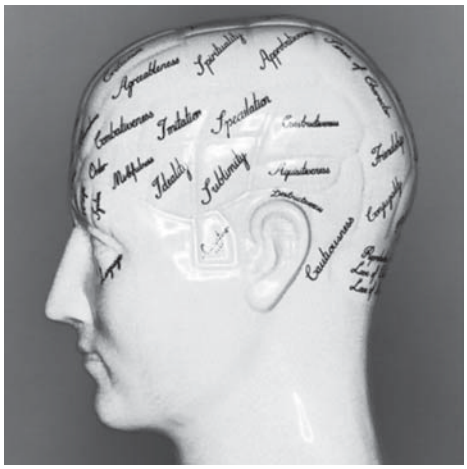
order a physical or mental examination if a party stipulates that "(1) no claim is being made for mental or emotional distress over and above that usually associated with the physical injuries claimed; and (2) no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages" except in "exceptional circumstances."

The *Doyle v Superior Court (Caldwell*)[2] decision has recently been invoked to support restrictions on psychiatric examination. The plaintiff sued for sexual harassment, including a claim for emotional distress. "…Caldwell claimed that Doyle's assertions that he had sexually harassed her were false and sued for defamation…Doyle filed a cross-complaint against Caldwell and unnamed Doe defendants seeking damages for Caldwell's sexual harassment of her and creation of a "hostile working environment." *Id.* at 1880. She alleged that she "has suffered and continues to suffer lost income and benefits, severe emotional distress and mental anguish…." *Id.* at 1880. At her deposition, Doyle had testified that she was experiencing stress from two miscarriages and a pregnancy during the period of time that she was being sexually harassed by Caldwell. *Id.* at 1880-1881. Later, Doyle was granted leave of court to amend her cross-complaint to delete her allegation of ongoing mental distress.

Caldwell brought a motion to compel a mental examination and sought sanctions for Doyle's refusal to submit voluntarily to such an examination. Doyle opposed the motion on the grounds that (1) her mental condition had not been placed "in controversy" because she was seeking only "garden variety" emotional distress damages for past [i.e. neither current nor ongoing] mental distress."[3] Specifically, the court found that Cindy Doyle "should not be compelled to undergo a mental examination under Code of Civil Procedure section 2032 because her allegation that she had suffered emotional distress arising from Caldwell's alleged sexual harassment of her, which was not ongoing and had ended…did not place her 'mental condition' in controversy in her sexual harassment action against Caldwell." *Id.* at 1882.

The *Doyle* decision stands for the proposition that claims of so-called "garden variety" emotional damages do not justify an examination of the plaintiff for evidence of these alleged mental damages. This decision, in our view, is seriously flawed in a number of respects.

Although Doyle later changed her litigation claims, stating she suffered *past*, but not present (or continuing) mental distress, there is no way to tell whether distress is past or current *without* an examination, any more than one would rely on a plaintiff's assertion that they no longer have an infection or even an elevated white blood cell



count without appropriate medical and laboratory examination.

It is also illogical to say Doyle's mental condition was not "in controversy," given that she was seeking compensation for mental injuries attributable to sexual harassment. To throw a blanket over any examination whatsoever into past events at issue prevents a defendant from providing critically important and scientifically validated information to the trier of fact.

Doyle appears to be premised upon the court's belief that you can draw a line between "simple" sexual harassment cases and other (i.e., more "complicated" or "complex" cases). From a psychiatric perspective, that is a kind of abstract, meaningless semantic sleight of hand. When does emotional distress become, or cease to be, "garden variety"? Nowhere in the *Diagnostic and Statistical Manual of the American Psychiatric Association, 4th Edition* are the words "simple," "complex" or "garden variety" used to characterize a mental disorder. Where else in personal injury case law is the term "garden variety" used to modify a medical symptom or condition? Does the court speak about "garden variety" fractures in orthopedic surgery, "garden variety" chest pain in cardiology, "garden variety" failure to thrive in pediatrics, "garden variety" inflammation in rheumatology, or "garden variety" headaches in neurology? With the concept of "garden variety emotional distress" the courts have introduced a scientifically meaningless concept – exactly what the courts want to prevent under *Daubert* and *Frye*.[4] Furthermore, this unfortunate decision prohibits the investigation of critically important questions: for example, what *other* emotional factors may have been as proximate a cause of the plaintiff's alleged emotional distress as the defendant's alleged misconduct? Could the plaintiff's psychiatric symptoms have been part of the natural course of another mental condition, itself entirely unrelated to the actions of the defendant?

An extreme hypothetical example would occur when a person already suffering from schizophrenia is the victim of a motor vehicle accident and then claims that his subsequently experienced but limited psychotic symptoms (hallucinations and delusions) were *caused* by the motor vehicle accident. Just because the motor vehicle accident *preceded* the manifestation of some of his mental symptoms, doesn't logically mean that they *caused* his subsequent symptoms. This is a classic example of confusing subsequence (the symptoms appearing after the accident) *with consequence* (therefore, the accident *caused* the symptoms). In this case, the plaintiff's self-report or treating doctor's opinions based on plaintiffs self-report would provide a very self-serving, unbalanced, and unscientific conclusion to the trier of fact.

Plaintiffs who claim emotional damages should not be permitted to self-diagnose their injuries as "garden variety" to prevent forensic examination of their alleged emotional damages. "Garden variety emotional distress" is a meaningless and unscientific

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term that should have no place in a court of law.

A more recent California decision, *Golfland Entertainment Centers, Inc. v Superior Court of San Joaquin County (Nunez)*[5], clarifies the limitations that a court may impose upon a compelled mental examination.

When David Nunez was only 10 years old, he almost died in an accident that occurred while riding a "bumper boat" on the premises of Golfland Entertainment Centers, Inc. David's mother, the Guardian ad Litem, filed a lawsuit alleging personal injury and emotional distress. A neuropsychologist concluded that the boy suffered from brain damage due to oxygen deprivation during the near-drowning incident.

In the course of discovery, the defendant demanded that David submit to a mental examination by a neuropsychologist of its choosing. Because the parties could not agree on the ground rules for the examination, petitioner filed a motion to compel compliance with its demand. The trial court entered an order providing "(1) Dr. Eppersor [defendant's neuropsychologist], may take a history…but may not require or elicit narrative responses; (2) Plaintiff's counsel as well as [petitioner's] counsel may attend the examination, but no third parties, including relatives, counsel or persons other than the neuropsychologist and his staff may be within eyesight of [plaintiff] during the examination. Additionally, the [petitioner] shall provide a court reporter to take down only [plaintiff's] oral responses during the examination; (3) there shall be no physically invasive testing; and (4) plaintiffs' counsel shall receive a copy of defendant neuropsychologist's report." Id. at 742

The appellate court granted writ relief barring the presence of counsel and the court reporter and requiring that the entire examination be recorded on audio tape. The court also directed the trial court to modify its narrative response prohibition as follows: "[Defendant's neuropsychologist] may take a history from [plaintiff], but…shall not ask him questions regarding the facts and circumstances of the accident to the extent those matters were already stated by [plaintiff] in his deposition or in his interview with [plaintiff's neuropsychologist]." Id. at 746.

The appellate decision added "that we do not suggest a limitation such as that imposed by the trial court on the examining expert (even as modified by this court) is a preferred procedure that should be used by trial courts. We hold only that the trial court's order, as modified, is within the "broad" discretion of the trial court (*Greyhound Corp. v. Superior Court, supra,* 56 Cal.2d 355, 378)." Id. at 746.

This decision shifts the balance to a more reasonable position between protective

needs of the plaintiff and discovery needs of the defendant. However, from our point of view, the court continues to err by restricting the asking of plaintiff "questions regarding the facts and circumstances of the accident to the extent those matters were already stated by [plaintiff] in his deposition of his interview with [plaintiff's expert]." By equating deposition testimony with an independent clinical examination, *Golfland* assumes that an attorney's elicitation of narrative facts obviates the need for a psychologist obtaining the presenting complaint and history directly from the plaintiff. It is an unwarranted assumption that an attorney's elicitation of the history can provide sufficient information to the trier of fact. Even as modified, *Golfland* bars the defendant's expert from learning important information that may only be discerned by observing the *retelling* of the narrative of emotionally laden experiences and events.

THE NECESSITY AND SCOPE OF INDEPENDENT EXAMS

Defendants should argue that independent examinations provide the essential method to evaluate plaintiff's emotional distress, to consider issues of proximate causation and to assess the credibility of the plaintiff.

Defendants should clarify for the courts the purpose of independent examinations including:

1) To arrive at a differential diagnosis, that is, to determine what mental disorders, if any, are most probable and what disorders are unlikely;
2) To determine the onset and developmental history and course;
3) To determine the relationship in time (proximate causation) between a mental disorder and defendant's conduct;
4) To assess the credibility and motivation of the plaintiff, i.e. is the plaintiff open and straightforward, defensive, or prone to exaggeration?

To fulfill this crucial purpose and to be able to present scientifically acceptable testimony to the trier of fact, independent experts should be able to employ the generally accepted scientific procedures of their profession to answer the questions and to form opinions to be presented to the court.

To arrive at a medical diagnosis, a physician considers all the plausible biological and psychosocial factors that may contribute to a physical disorder. Using a knowledge of the natural history of disease, a physician forms a series of diagnostic hypotheses (differential diagnoses) about the nature of the examinee's medical condition. The expert then systematically reviews and examines the evidence and tests the hypotheses against the data in order to arrive at the most plausible diagnosis and to rule out other plausible alternative explanations for the patient's symptoms and condition.

Data from psychological tests are often the only objective evidence that can be introduced in a question of disputed emotional

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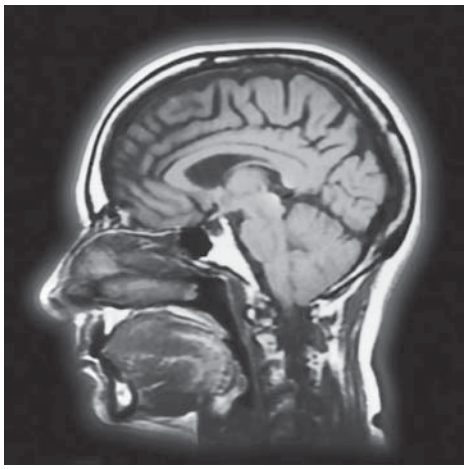
damages. Medical or psychological testing introduces objective evidence into disputes that are heavily colored by the subjective biases, motivations and adversarial needs of both plaintiff, defendant and their respective advocates. Such disputes inevitably place the trier of fact in a difficult position of assessing who is more credible.

Psychological assessment shares much in common with medical testing: standard tests are performed, that is the same procedure or test stimuli is presented to every individual and the data and coding of test responses is objective, and can be duplicated by another evaluator. For most diagnostic questions multiple tests employing different methodologies (a blood test and CT scan in medicine, a self-report test and an observation of performance of a task in psychology) provide incremental knowledge that improves diagnostic specificity and sensitivity. Psychological assessment differs from medical diagnosis in the broader range of contextual factors that must be considered; the interpretation of a score on the Beck Depression Inventory may be affected by the subject's motivation and fatigue; the interpretation of their blood chemistry panel may not be.

In a comprehensive review of over a thousand studies[6], the authors documented the sensitivity and specificity of psychological assessment, especially when multiple tests, applying multiple methods were employed. The diagnostic specificity and sensitivity of psychological assessment in general is as good as medical assessment — for example neuropsychological testing can be as accurate as MRIs in detecting dementia.

Although other professionals (teachers, physicians, counselors, psychiatrists) can administer a self-report questionnaire like the MMPI and integrate the findings from a computer generated report into their evaluation, other professionals cannot independently interpret the meaning of the test scores and use multiple tests for the differential diagnosis of personality, cognitive and emotional functioning.

Psychological testing involves the administration and interpretation of standardized tests. Psychological testing is of great value in the forensic assessment of emotional damages and in the assessment of exaggeration and malingering for the same reason a blood test or x-ray is valuable to a physician — the examinees test data can be compared to the data on thousands of subjects. For example during an interview a psychiatric examiner can usually tell whether or not an examinee is depressed. But different interviewers will form, based on their own clinical experience and the kind of relationship they establish with the examinee, different impressions about the severity of the depression, and to what extent the examinees complaints are exaggerated — or minimized — or average compared to the general population.



In contrast to interview data, a psychological test like the MMPI-2 yields quantitative data which compares the examinee to hundreds of thousands of subjects. When a plaintiff takes a psychological test like the MMPI, it is scored by computer; no observer's clinical subjectivity is involved. The results of the test when properly interpreted allow psychologists to make inferences about whether a particular plaintiff is — or is not — like other plaintiffs who are prone to exaggerate their symptoms, or is or is not like other individuals who suffer from severe major depression. The examinees score is converted to percentiles and the pattern of scores is utilized (across tests using different methods as well) by comparing it to data from other sources. Rather than duplicating a psychiatric exam, psychological testing provides quantitative comparisons about the examinee and various reference groups. For example, one examinee may test over the 90th percentile on both depression and the tendency to exaggerate — which means the examinee endorses items on the test that indicate more depression and more tendency to exaggerate than 90 percent of the population. That depressed individual is quite different from another depressed individual who scores in the 90th percentile for depression but the 50th percentile (the numerical mean or average for the population) for the tendency to exaggerate.

When psychological examination is eliminated or severely restricted the trier of fact may be deprived of critical information about mental disorders and causation that can only be obtained from a comprehensive test battery employing different methods to check and cross check conclusions.

Although the procedure and logic of an independent psychiatric and/or psychological examination is essentially the same as for an Independent Medical Examination (IME) the courts often treat them differently. For an independent psychiatric and/or psychological examination medical and other records are reviewed, a detailed history about the plaintiff's status, before during and after the alleged proximate cause of the distress is taken, a comprehensive developmental history including medical, behavioral, educational, sexual, occupational, legal, family, marital, and treatment medical and behavioral is taken. Just as blood tests and imaging studies add objective information for medical diagnosis, psychological tests add objective information about the assessment of emotional distress, functional impairment, and pre-existing and concurrent causes that may be just as proximate as the one alleged by the plaintiff. Psychological assessment is often vital for assessing the credibility of the plaintiff, information that may be overlooked by treating doctors and independent experts retained by the plaintiff.

All of this information is considered in light of normal development and with regard to the natural history of mental disorders (psychopathology) in order to determine the most probable diagnoses. The independent expert then rules out alternative explanations for the examinee's symptoms (including consideration of pre-existing or co-existing

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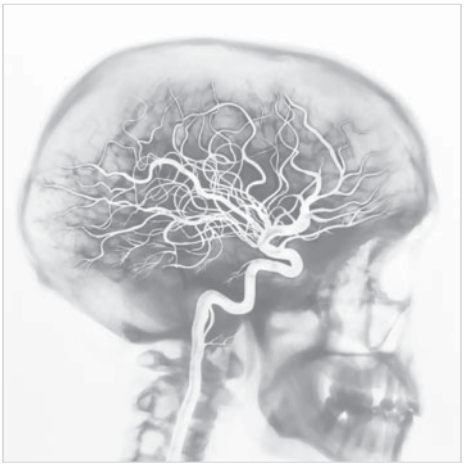
conditions, as well as non-psychiatric medical diagnoses), considers all the potential (proximate) causes for the emotional distress and assesses the examinee's credibility.

Whether diagnosing medical pathology or psychopathology the reference point is always normal development (physiological and psychological). To disallow interviewing about a plaintiff's sexual development and history in a claim involving sexual harassment makes no more sense than disallowing a developmental history for assessing cognitive impairment.

Although the methodology and logic of medical and psychiatric diagnosis are the same, the courts often apply a different standard to psychiatric examination and psychological assessment than is applied to medical examination and pathology studies. If a plaintiff brought a complaint of damages regarding a bone fracture, it would not be considered an "invasion of privacy" for an independent doctor to physically examine the plaintiff. Nor would it be seen as "duplicative" or a "fishing expedition" or inappropriately "invasive" to have another doctor analyze blood tests and imaging studies. The courts do not presume that a neurological exam and neuroradiological studies are duplicative, intrusive or oppressive. Yet on these same grounds, the courts frequently curtail or even prohibit full and complete psychiatric and psychological examinations.

We were retained as experts in a case where the plaintiff's treating psychiatrist, also serving as an expert, performed only one psychometric test. The judge, presumably in an effort to be even-handed, only allowed the defense retained psychologist to give the same test, even though the psychiatrist had no training whatsoever in the selection, administration and interpretation of psychological tests. This would be analogous to instructing an orthopedist hired by the defense to only use the same examination procedures used by the plaintiff's general practitioner. In other words, there are "experts" and "experts." The trier of fact is entitled to the best quality evidence available, not the lowest common denominator.

The generally accepted scientific standard in the field of psychological assessment is that test data presents hypotheses to be confirmed or disconfirmed with respect to the context of the overall case. Acting in the role of consultant, the psychologist learns about the context in which the test was given, and evaluates not only the relevance of the computerized statements to the case but evaluates the raw data (the test scales, their pattern and interrelationship) and arrives at an individually appropriate set of hypotheses for a particular case. Although psychiatrists and other professionals present statements from psychological tests, unless they have had graduate study in statistics, psychometric theory (reliability and validity of test data) and have ad-



ministered batteries of tests under supervision they are not equipped to independently interpret the raw data of the test as it pertains to the particular individual case. This issue is important for the courts to consider because, plaintiffs sometimes argue that an independent psychological examination or consultation is unnecessary because the psychiatrist who performed an independent exam (sometimes it was not an independent exam it was for treatment) administered an MMPI and therefore the defendant should be restricted to the same type of exam. If the courts accede to this line of reasoning, they would be approving testimony that does not adhere to generally accepted standards for psychological assessment. The unintended consequence would be exactly what *Daubert* cautions against – the admissibility of scientifically unreliable evidence.

Independent psychiatric and psychological experts provide opinions and testimony regarding damages (diagnosis) and causation. Based on generally accepted scientific methodology, experts conduct a thorough and comprehensive examination involving a comprehensive interview and history of the plaintiff which takes between four to six hours. A comprehensive psychiatric examination involves an inquiry about: 1) the plaintiff's current mental status and their view of causation; 2) mental status prior to the alleged events; 3) mental status immediately after and up to the present; 4) developmental history, inquiry about family of origin; 5) education; 6) history of behavioral, psychiatric and medical illnesses and treatment, including review of current and prior medications; 7) occupational history; 8) history of relationships; 9) marital and parenting history; 10) drug and alcohol history; 11) current and prior involvement with the legal system. Within the fields of forensic psychiatry and psychological the generally scientifically accepted standard involves a comprehensive evaluation; when the scope of the evaluation is arbitrarily reduced there is a danger that the validity of diagnostic inferences and opinions may be affected.

How can the credibility of the plaintiff's account be assessed without an independent examination? Wouldn't it be useful to the trier of fact to know whether or not, the plaintiff exaggerates symptoms on objective psychological tests? What cognitive capacities does the plaintiff possess — or lack — which would directly influence the accuracy and credibility of a self- reported narration of events and the allegedly resulting symptoms of emotional distress? Is there a history of faked or malingered symptoms in other contexts, or identical complaints in other environments and lawsuits, that would raise serious doubts about the credibility of plaintiff's claims in the current litigation? Who will investigate these issues and present scientific testimony to the trier of fact if defense experts are prohibited from examining the plaintiff?

Psychiatric examination and psychological examination are often portrayed as duplicative and unnecessary. However, psychological testing is no more duplicative of a psychiatric interview than is a blood test and a

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CT scan duplicative of a medical history and physical. Medical and psychological tests have the same purpose: to provide a different and often more objective source of information to complement interviews and histories to improve the precision and sensitivity of a diagnostic impression.

The courts do not generally limit a radiologist's time nor prescribe which imaging studies are allowable when a radiologist is following standard procedure. The court does not restrict an internist to ordering only half a panel of blood tests or to choosing between a blood test or radiographic studies, but not both. Such restrictions would be a gross interference and considered negligent by the standards in the field. It makes no more sense to limit a physician to the physical examination of a bone fracture but not to allow radiological studies than it does to limit a psychiatrist to interviewing a patient about his depression but to prohibit the psychiatrist from ordering objective standardized tests of depression.

We consulted in the evaluation of a plaintiff (whose deposition lasted for 11 days), in which the court restricted the defense expert's examination time to *either* two hours of psychiatric interviewing *or* 2 hours of psychological testing. In another case, the employee/plaintiff's complaint of emotional damages from alleged racial discrimination was supported exclusively by the "expert" opinion of a sociologist. The defense requested that the court compel the unwilling plaintiff to be examined for emotional damages by a board certified psychiatrist. The court ruled that the defendant may not utilize a psychiatrist and/or a psychologist to examine the plaintiff; instead the defense was restricted to using only a sociologist! This ruling reflects a gross misconception about what kind of expert who is qualified to testify in court about a specific individual's damages — the purview of sociology is the group not the individual and certainly not whether a particular individual suffered as a result of a particular defendant's conduct. This ruling is based upon erroneous reasoning equating "fair play" or "a level playing field" with both sides utilizing the same type of expert, even if the expert hired by one side is unqualified to provide scientific testimony to the trier of fact. Ironically, such inappropriate constraints on expert examinations result in "junk science" being presented to the trier of fact – exactly what the courts have stated they want to avoid.

THE DIFFERENT ROLES OF TREATING AND FORENSIC PSYCHOLOGISTS & PSYCHIATRISTS

Having been involved in both the clinical treatment of mental disorders and forensic evaluation we are well aware of the very different roles we play in these situations – and we avoid playing both roles simultaneously. Like all clinicians, when we are evaluating and treating a patient our primary ethical obligation is to the patient — to relieve suffering and above all to "do no harm." When treating a patient it is not our custom to review all available data and provide independent objective evidence regarding the full spectrum of the plaintiff's mental disorders and their causation, natural course and probable prognosis. When we are engaging in treatment we are dependent upon the patient's subjective self-report and we assume that the patient is motivated to

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obtain help and will tell us (as accurately as they can) what is troubling them and why.

In contrast to our role when treating patients, when we are acting in a forensic role we are neither the plaintiff's nor the defendant's advocate; rather, our ethical obligation is to provide reliable and accurate testimony to the trier of fact. When we assume the role of forensic expert we want to review all the available data including legal documents, deposition transcripts, all medical, psychiatric, and psychological data, educational, employment and military records and prior litigation records to provide testimony regarding the plaintiff's mental conditions (which may or may not include evidence of damages). In contrast, when treating patients we are under no obligation to seek or to review all the possible data. Another crucial difference is that plaintiff's motivations are entirely different than patients in psychiatric treatment and undergoing psychotherapy for emotional problems. In every forensic case we have to consider several plausible alternatives – the plaintiff is an open and accurate reporter of events or the plaintiff may exaggerate symptoms, minimize their own responsibility and other potential causes for their emotional distress, or motivated to extract as much compensation as they can. In a forensic evaluation each of these ideas has to be tested against the sum total of the evidence from the examination, the history, the records and the test data, an exercise that is simply not relevant when conducting most treatments.

An independent expert offers an opinion, based on all the available data about the diagnosis of mental disorders, functional impairments and symptoms and their causation. Forensic experts seek to understand if the plaintiff's distress can be explained by a pre-existing mental disorder, if any, and which conditions are most likely a result of the defendant's alleged conduct. Therefore the forensic expert in personal injury litigation is primarily concerned with assessing causation and damages. A treating clinician may be interested in causation but in a very different way; not to assign responsibility or determine "proximate causation" for a problem but to be able to empathize with the patient and to intervene to help the patient.

CONCLUSIONS

- Disallowing independent psychiatric and/or psychological exams may have the unintended consequence of having one-sided or scientifically unacceptable testimony be presented to the trier of fact.
- "Garden variety emotional distress" has no accepted scientific meaning, and provides a spurious rationale for plaintiff's who want to avoid independent examinations.
- The lack of clear standards and guidelines from the courts encourages plaintiff and defense to use their clients and the court's resources to argue about the legitimacy and scope of discovery rights in any claim involving emotional damages. As a result, the same arguments and counterarguments are repeated in every new case with large discrepancies among different judges even in very similar situations.
- Certain decisions from appellate courts (Doyle and Golfland, for example) sometimes have, in our opinion, the unintended and unfortunate negative consequences of precluding the trier of fact from accessing the best available scientific evidence in a particular case.

RECOMMENDATIONS

- Clarification about what constitutes generally accepted standards for independent forensic psychiatric and psychological exams should come from the relevant professional organizations (The American Psychiatric Association, The American Academy of Psychiatry and the Law, The American Psychological Association and the American Academy of Forensic Psychology). These organizations have promulgated ethical guidelines, it would be helpful for them to promulgate forensic practice guidelines to aid the courts in deciding the nature and scope and admissibility of psychiatric and psychological exams in claims of emotional distress.
- Defense counsel should vigorously assert the need for psychiatric and psychological experts to conduct examinations that follow the standards of their specialties. By doing so, defense counsel are not just advocating for their clients discovery rights; they are advocating for the principle enshrined in Daubert and Kelly-Frey that only generally accepted scientific methods be presented to the trier of fact. Defense counsel should appeal adverse rulings that unnecessarily restrict discovery rights and reduce scientific testimony presented to the court. We understand defense counsels' concerns that they don't want to irritate the judge, that appeals on these issues are expensive and that clients don't want to pay for them. However, if defense counsel (and their clients) do not stand up for legitimate discovery rights — who will?
- We believe that legislative remedies should be sought at the federal and state level. Many segments of our society decry the direct and indirect costs of litigation; resolving this issue will reduce costs in several ways. If the parties knew what to expect when emotional damages are claimed, the same battle about privacy vs. discovery rights would not have to waged in every (virtually identical) case of emotional damages.
- Finally, plaintiffs who feel psychiatric questioning is an intolerable invasion of their privacy always have the right during an examination to not answer any question that they choose.

In summary, we believe that the current procedures for dealing with disputes about discovery rights in claims of emotional damages are having negative consequences that add to the time and expense of litigation and reduce the quality of scientific testimony presented to the trier of fact. Defense and plaintiff counsel, the judiciary and the professions should engage in the necessary discussions to provide standards and guidelines for psychiatric and psychological examinations in claims of emotional damages and devise an educational strategy to better inform the judiciary about these modern standards.

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[1] *Daubert v Merrill Pharmaceuticals, Inc.* 509 U.S. 579, 592-593, 113 S.Ct. 2786
[2] *Doyle v. Superior Court (Caldwell)* (1996) 50 Cal.App.4
th 1878 , 58 Cal.Rptr.2d 476
[4] *Frye v United States* , 293 F.2d 1013 (D.C. Cir. 1923)
[5] *Golfland Entertainment Centers, Inc. v Superior Court of San Joaquin County (Nunez)* 108 Cal.App.4
th 739, 133 Cal.Rptr.2d 828 (2003)
[6] Meyer et al 2001, Psychological Testing and Psychological Assessment, *American Psychologist*, 56,No 2, 128-165