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The “Eggshell Plaintiff” Revisited: Causation of Mental Damages in Civil Litigation

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The legal concept of the “eggshell plaintiff,” when explaining the causation of a plaintiff’s claimed psychological injury, may be an archaic and a misleading paradigm. The “thin skull” or “eggshell plaintiff” rule—often described as the “defendant takes the victim as found”—protects the rights of individuals whose preexisting fragility makes them particularly susceptible to injury. This rule provides that when a defendant’s tortious conduct causes harm that, due to the person’s preexisting physical or mental condition, is of a greater magnitude or different type than might reasonably be expected, the defendant is liable for all harm caused by the tortious conduct. Plaintiffs must demonstrate that the defendant’s alleged conduct was *the* cause of, or at least a *substantial contributing factor* to, the harm.^[1]

However, relying substantially upon this rule in cases alleging intentional or negligent infliction of emotional distress leads the trier of fact to ignore other important contributing and preexisting causes of the plaintiff’s claimed damages. When a plaintiff has a preexisting condition, it is necessary to distinguish between emotional distress caused by the defendant’s tortious conduct and emotional distress that would have developed regardless of the defendant’s actions due to the natural course and history of the plaintiff’s preexisting mental illness. Making an accurate differential diagnosis of mental disorders and assigning causation requires a comprehensive independent evaluation of the plaintiff.

The Role of Independent Forensic Psychiatric and Psychological Experts

Often, the presentation of testimony by treating psychiatrists, psychologists, or other mental health professionals confuses, rather than clarifies, issues related to causation. Their role is to help the patient understand, cope with, and hopefully modify his or her behavior. Empathizing with the patient’s point of view is the cornerstone of the psychotherapeutic relationship. According to the Hippocratic

Oath, treating physicians are ethically enjoined from harming their patients (*primo non nocere*). Thus, treating doctors are placed in an ethical dilemma when they must opine about diagnoses and causation in a way that may harm their patients' litigation interests. Their data is drawn heavily, if not exclusively, from the patient's self-reported reality and experience. Rarely, if ever, do treating doctors examine the wealth of collateral, non-subjective data that surrounds the patient's life in an effort to determine what is, or is not, objectively true about the patient's complaints.

In contrast, independent forensic psychiatrists and psychologists seek to obtain and review all of the available documentary evidence concerning a plaintiff (i.e., treatment notes, psychological test data, deposition transcripts, past litigation history, and medical, employment, military, and police records) in order to assess all of the potential factors—preexisting, concurrent, and subsequent to the alleged incident or injury—that may cause or contribute to the plaintiff's mental disorder(s), functional impairment(s), and subjective complaint(s), which together constitute the "psychological damages." Their role is not to advocate, but rather to explain and to educate the trier of fact by presenting testimony based upon the most reliable and valid scientific evidence. If an independent expert finds that a preexisting condition explains the plaintiff's symptoms, he or she is duty bound to account for that evidence, even if it opposes the plaintiff's interests.

Consequently, in order to determine all potential causative factor that may account for some or all of the plaintiff's psychological damages, comprehensive psychological and psychiatric investigation should be routinely permitted to obtain all of the facts, not just those that the plaintiff or the defendant wishes to reveal. However, due to misunderstandings about the nature and cause of mental illness or to strategic litigation decisions, plaintiffs' attorneys often argue for, and judges frequently grant, arbitrary constraints upon the nature and scope of independent psychiatric examinations. Such constraints may prevent an expert from obtaining the best possible scientific data to present to the trier of fact.

Newtonian Physics and the Biopsychosocial Model

The "eggshell plaintiff" paradigm is based upon an analogy—borrowed from Newtonian physics—in which one is asked to predict what will happen to the plaintiff's skull as a result of the defendant's tortious conduct if one knows the thickness of the plaintiff's cranium, as well as the physical force being applied to it. Such a calculation is similar to predicting the behavior of billiard balls. If you know their location, mass, acceleration, and force, you can predict the effect of one ball

hitting another. However, the calculation of action and reaction in the human body and mind is not at all like the “closed” system of billiard balls. The brain and body are “open” systems, with multiple variables continuously interacting to produce an action or reaction.

Similarly, in the contemporary biopsychosocial medical model of diagnosis, the “causation” of mental events is explained from the perspective of multiple interactions between biology, psychology and the social milieu. From the biopsychosocial perspective, *all* of the potentially interacting causes (preexisting, concurrent, and subsequent) that may explain a particular mental injury must be investigated in order to arrive at a comprehensive and valid understanding of the alleged mental damages. It is an example of the logical fallacy of *post hoc* reasoning to assume that the defendant’s conduct, simply because it preceded the plaintiff’s injury, caused or substantially contributed to that injury—that is, to confuse subsequence with consequence. By viewing “causation” of mental symptoms as being the net result of a complex set of behavioral interactions, we may achieve a far more accurate model of the circumstances under which the plaintiff’s alleged injuries may have occurred.

Posttraumatic Stress Disorder and the “Eggshell Plaintiff”

According to the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*,^[2] Posttraumatic Stress Disorder (PTSD) may develop 30 days or so after a person experiences a life-threatening event that engenders extreme feelings of helplessness, fear, or horror. PTSD is the only psychiatric diagnosis where causation is *implied* by the diagnosis, that is, the condition is *assumed* to be a reaction to the life-threatening event that preceded it. Consequently, it is one of the few psychiatric conditions where the concept of a mentally fragile plaintiff possessing particular vulnerabilities or “risk factors” may indeed apply.

A person, who previously developed PTSD following a prior life-threatening event and was subsequently challenged by a new trauma of similar or greater intensity, may be more vulnerable than a non-previously traumatized individual to a recurrence of that condition. It is also known that within a given population of traumatized individuals, the nature of the actual trauma influences the likelihood of producing PTSD symptoms. As many as one of two victims of violent rape will develop PTSD, while only one in 10 New Yorkers who witnessed the collapse of the World Trade Centers on September 11, 2001, subsequently developed the condition.^[3]

However, even among persons legitimately diagnosed with PTSD, the “eggshell plaintiff” notion is inadequate to explain the complex constellation of interdependent factors that contribute to actual, as well as merely alleged, mental damages. Not everyone who suffers a life-threatening trauma develops PTSD. This condition, in fact, only occurs among a minority of people who are exposed to a profoundly stressful event.

Furthermore, a diagnosis of PTSD does not *ipso facto* “prove” that the allegedly traumatic event forming the basis for the plaintiff’s lawsuit *caused* the PTSD. Although some event must be causally linked to the subsequent PTSD, it may or may not be the event alleged in a lawsuit. For example, a person may claim to have developed PTSD as result of a minor motor vehicle accident, yet careful forensic evaluation reveals that they exhibited symptoms of PTSD *prior to* the accident, following a rape or a closed-head injury or an earthquake. Nor does such a diagnosis “prove” that the allegedly causative event actually occurred. For example, in *Spencer v. General Elec. Co.*,^[4] a Virginia federal district court stated:

The issue presented, novel for this jurisdiction, is whether plaintiff, an alleged rape victim, may introduce expert testimony that she suffers from “post-traumatic stress disorder” (PTSD) to prove that a rape actually occurred. The Court holds that such testimony is inadmissible because (i) evidence of PTSD is not a scientifically reliable means of proving that a rape occurred, and (ii) the probative value of such evidence is outweighed by its unfair prejudicial effect. Rule 403, Fed. R. Evid.^[5]

It should also be noted that in most instances the psychological injury allegedly caused by a traumatic event is actually caused by the victim’s *appraisal* of the stressors (i.e., by his or her unique perception, motivation, and history), and only rarely by the stressors themselves. Numerous studies of victims of large-scale disasters have shown that people exposed to the exact same stressor have widely varying responses. Both the meaning of a stressful event and the individual’s resilience to stress depend upon a person’s prior history with similar stressors, as well as other inherited dispositional factors such as temperament and personality.

Determining Causation

Plaintiff and defense attorneys in civil cases alleging intentional or negligent infliction of severe emotional distress should routinely consider utilizing the complementary skills of both a

forensic psychiatrist and a forensic psychologist. Furthermore, they should request sufficient time for the experts to do a proper and complete evaluation. Without a thorough and careful investigation of a plaintiff's life course and developmental history prior to, during, and after the allegedly injurious event, it is extremely difficult to ascertain whether the plaintiff's damages are primarily the product of a prior illness, or have developed *de novo* or worsened after the defendant's conduct. By viewing "causation" of mental symptoms as being the net result of developmental biological, psychological, and social factors that interact with the an alleged stressful event, experts may achieve a far more scientifically accurate model of the causation of mental injuries, thereby better serving the interests of justice.

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[1] Restatement (Third) of Torts: Liability for Physical Harm §30 (Tentative Draft, No. 2, 2002).

[2] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders-Text Revision* 467 (2000).

[3] See Sarah E. Ullman & Henrietta H. Filipas, "Predictors of PTSD Symptom Severity and Social Reactions in Sexual Assault Victims," 14 *J. Trauma Stress* 369-89 (2001); William E. Schlenger et al., "Psychological Reactions to Terrorist Attacks: Findings from the National Study of Americans' Reactions to September 11," 288 *JAMA* 581-88 (2002).

[4] 688 F. Supp. 1072 (E.D. Va. 1988).

[5] *Id.*

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