



# Assessing Emotional Damages Claims of a Population in Multi-Plaintiff Litigation

**Chris DeGross, Esq.**

Co-Chair of the CDL Practice Group

**Mark I. Levy MD, DLFAPA**

Forensic Psychiatric Associates Medical Corporation  
University of California, San Francisco, School of Medicine

**Ronald H. Roberts, PhD**

Forensic Psychiatric Associates Medical Corporation

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# Effective Use of Forensic Psychiatry

- Cases with emotional distress components
- How forensic psychiatry can assist to evaluate claims
- Forensic psychiatric expert vs. treating clinician
- Psychological testing
- Remainder of IME
- Issues unique to mass torts
- Q&A

# Cases Involving Emotional Injuries

- Harassment
- Discrimination
- Toxic Torts
- Industrial Accident
- Serious injury
- Assault
- Workplace violence
- Product Liability

# Emotional Injuries

- **Pain & Suffering**
- **Annoyance & Discomfort**
- **Emotional Distress**
- **Fear of Cancer**

# Pain & Suffering

**“Non-economic damages” means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.**

Cal. Civ. Code §1431.2

# Pain and Suffering

- No claim is being made for **mental and emotional distress** over and above that **usually associated with the physical injuries claimed**.
- No expert testimony regarding this **usual mental and emotional distress** will be presented at trial in support of the claim for damages.

Cal. Civ. Proc. Code § 2032.320

# Annoyance and Discomfort

**Annoyance and discomfort damages** are intended to compensate a plaintiff for the loss of his or her peaceful occupation and enjoyment of the property ... [which] generally refers to **distress arising out of physical discomfort, irritation, or inconvenience** caused by odors, pests, noise, and the like. \* \* \* Our cases have permitted recovery for annoyance and discomfort damages on nuisance and trespass claims while at the same time precluding recovery for “pure” emotional distress.

*Kelly v. CB&I Constructors, Inc.*, 179 Cal. App. 4th 442 (2009)

# Emotional Distress

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. **Serious emotional distress** exists if an ordinary, reasonable person would be unable to cope with it.

CACI 1620 (NIED)



# Emotional Distress

**“Severe emotional distress” is not mild or brief; it must be so substantial or long lasting that no reasonable person in a civilized society should be expected to bear it. Plaintiff is not required to prove physical injury to recover damages for severe emotional distress.**

CACI 1604 (IIED)

# Fear of Cancer

## Plaintiff must prove:

- That plaintiff was **exposed** to benzene as a result of defendant's negligence;
- That plaintiff **suffered serious emotional distress from a fear** that he will develop cancer as a result of the exposure;
- That reliable **medical or scientific opinion confirms** that it is **more likely than not that plaintiff will develop cancer as a result of the exposure**;  
and
- That defendant's negligence was a **substantial factor** in causing plaintiff's serious emotional distress.

CACI 1622

# Forensic Psychiatry

**What is forensic psychiatry and how can it assist to evaluate and defend claims?**

# The Problem with Wearing Two Hats is...

The Profound Differences Between  
Treaters and Forensic Psychiatric Experts



# Mission, Method & Ethical Duty: Treating Clinician vs. Forensic Expert

## TREATING CLINICIAN:

**Mission:** To alleviate suffering (Hippocratic Oath)

**Method:** Relies almost exclusively on patient's self-report of *subjective* reality.

**Ethical Duty:** To the patient (Hippocratic Oath) – *advocates* for patient's best interests

# Mission, Method & Ethical Duty: Treating Clinician vs. Forensic Expert

## INDEPENDENT FORENSIC PSYCHIATRIC EXPERT:

**Mission:** To determine what is *objectively* true

**Method:** Reviews all medical/legal/employment documents  
**AND** performs objective (neuro)psych testing **AND** conducts  
detailed psychiatric IME interview exam

**Ethical Duty:** Provides evidence-based opinions to the trier  
of fact

# Emotional Distress Claims: Types of Mass Torts

- Natural & Man-made Disasters
- Allegations of Employment Harassment
- Allegations of Employment Discrimination
- Allegations of Hostile Work Environment
- Industrial Accidents
- Workplace Violence
- Product Liability Claims
- Toxic Torts

# Description of Psychiatric IME

## Components:

- Psychological  
(& Neuropsych if indicated)  
Testing:

- Psychiatric Examination:

## Description:

- Precedes Psychiatric Examination
- Psych (4 - 6 hours)
- Neuropsych (6 - 8 hours)
  
- Detailed Psychiatric History  
( 4 – 6 hours)
  - Including developmental, medical, psychiatric, medication, substance use, relationship, educational, employment, legal (civil & criminal), military histories & history of event.



# Issues Unique to Mass Torts

- Advantages of a psychiatric & psychological assessment team vs. assembling a panel of individual experts.
- Screening and examining a representative sample vs. entire population.
- “Normal” or Bell distribution curve of damages.
- Problems with sampling if chosen by plaintiffs’ and defense counsel – the “barbell” effect.
- Increased accuracy and credibility of forensic opinions when population is assessed by one team of experts.

# Advantages of a Psychiatric & Psychological Assessment Team vs. Assembling Your Own Panel of Individual Experts

1. Experience With Mass Tort Population Assessments.
2. Quality of Individual Experts.
3. Cohesion – Team Used to Working Together.
4. Collateral Informants – Each Examined Claimant is a Collateral Informant for Every Other Claimant.
5. Increased Accuracy and Credibility of Forensic Opinions  
When One Population is Assessed by One Team of Experts:  
Ability to Compare Uninjured Claimants With Injured Claimants.

# Screening and Examining a Representative Sample vs. the Entire Population

Issues Related to Sampling:

“Bell” Curve

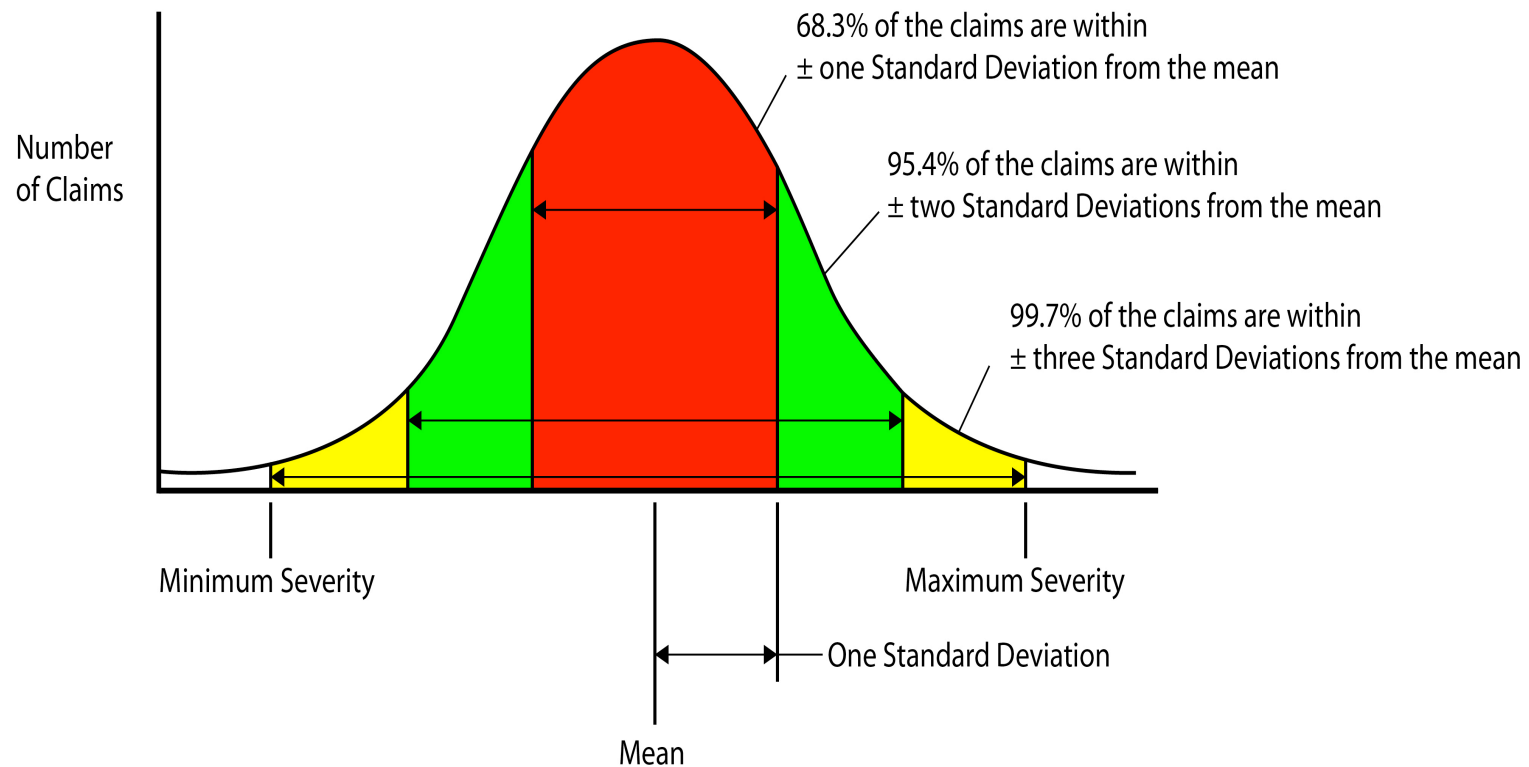
VS.

“Barbell”

# Distribution of Damages Produced by a Catastrophic Event:

## A Gaussian (Normal) or “Bell” Curve Distribution of Claims

A Gaussian (Normal) or “Bell” Curve Distribution of Claims



# Problems with Sampling, If Claimants Chosen by Plaintiffs' and Defense Counsel

## The "Barbell" Effect

Defense counsel=  
no damages

Plaintiffs' counsel =  
significant damages



# Psychiatric IME Report

- **Summary of evidence-based opinions and conclusions.**
  - Diagnoses, if any, with explanations.
  - Psych testing any any other objective data.
  - Functional impairment, if any.
  - Statement of causation.
  - Prognosis.
  - Recommended treatment and estimated costs.
  - Differences, if any, with opposing expert(s).
- **Assignment: “For whom am I working?” & questions to be addressed.**
- **Sources of information:**
  - Summaries and chronologies of documents reviewed.
  - Summary of events resulting in litigation; Plaintiff(s)’ claims.
  - Report of psychiatric examination, detailed history, symptoms, etc.

# What is a Test?

- Psychometrically Validated Instrument
- Correlated with Identifiable Disorders
- Controls for Positive and Negative Bias
- Identifies Base Rates in the General Population
- Routinely Used and Relied Upon within the Scientific Community

# What is Not a Test?

- Symptom Checklists
  - Useful for GP's or Family Doctors
  - Help Direct Referrals
  - Little Value in Forensic Examinations
  - Encourage Bias
  - Frequently Demonstrate Exaggeration
  - Relied Upon by Plaintiff's Experts



# Personality Tests Without Validity Scales

Commonly Used Symptom Checklists:

- Beck Depression Inventory I & II
- Beck Anxiety Inventory
- CAPS Clinician Administered PTSD Scale
- DAPS Diagnostic Assessment of PTSD
- SCID Structured Clinical Interview for DSM-IV
- Sentence Completion Test

All Rely upon Self-Report Only

# Personality Tests With Validity Scales

- **MMPI-2** (Minnesota Multiphasic Personality Inventory)
- **PAI** (Personality Assessment Inventory)
- **MCMII-III** (Millon Clinical Multiaxial Inventory-III)
  - Psychometrically Standardized
  - Contain Validity Measures for Positive and Negative Bias
  - Help Identify Malingering

# Rorschach

- Comprehensive System by Exner
    - Widely Used for Many Years
    - Psychometrically Based
  - RPAS Rorschach Performance Assessment System
    - Newest Scoring System
    - Cross Cultural Normative Data
- Both Supported by the Society for Personality Assessment (SPA)

# Reliability and Validity of the Rorschach

- The Society of Personality Assessment's Endorsement of the Rorschach, Published in the Journal of Personality Assessment, 85(2), 219-237, 2005
- This statement is intended for psychologists, other mental health professionals, educators, attorneys, judges, and administrators. Its purpose is to present a summary of the issues and evidence concerning the Rorschach.
- This statement affirms that **the Rorschach possesses reliability and validity similar to that of other generally accepted personality assessment instruments and its responsible use in personality assessment is appropriate and justified.**

# Neurocognitive Tests

- **WAIS-IV** Wechsler Adult Intelligence Scale-IV
- **WMS-IV** Wechsler Memory Scale-IV
- **CVLT-II** California Verbal Learning Test – II
- **WCST** Wisconsin Card Sorting Test
- **STROOP** Stoop Color and Word Test
- **COWA** Controlled Oral Word Association
- **VOT** Hooper Visual Organization Test

# Mild Traumatic Brain Injury

- PROGNOSIS FOR MILD TRAUMATIC BRAIN INJURY: RESULTS OF THE WORLD HEALTH ORGANIZATION COLLABORATING CENTRE TASK FORCE ON MILD TRAUMATIC BRAIN INJURY
- J Rehabil Med 2004; Suppl. 43: 84–105
- **We searched the literature on the epidemiology, diagnosis, prognosis, treatment and costs of mild traumatic brain injury. Of 428 studies related to prognosis after mild traumatic brain injury, 120 (28%) were accepted after critical review. These comprise our best-evidence synthesis on prognosis after mild traumatic brain injury. There was consistent and methodologically sound evidence that children’s prognosis after mild traumatic brain injury is good, with quick resolution of symptoms and little evidence of residual cognitive, behavioral or academic deficits. For adults, cognitive deficits and symptoms are common in the acute stage, and the majority of studies report recovery for most within 3–12 months. Where symptoms persist, compensation/ litigation is a factor, but there is little consistent evidence for other predictors. The literature on this area is of varying quality and causal inferences are often mistakenly drawn from cross-sectional studies.**

# Symptom Validity Tests

- **WMT** Green's Word Memory Test
- **TOMM** Test of Memory Malingering
  - Most Widely Used and Relied Upon
  - Highest Reliability and Validity
  - Helpful in Identifying Malingering

# Symptom Validity Tests

- At least 2 Symptom Validity Tests are necessary as part of any Brain Injury Evaluation

Archives of Clinical Neuropsychology, 20 (2005) 419–426

- National Academy of Neuropsychology (NAN) position paper: “Symptom validity assessment: Practice issues and medical necessity”
- NAN Policy & Planning Committee:
  - Shane S. Bush, Ronald M. Ruff, Alexander I. Troster, Jeffrey T. Barth, Sandra P. Koffler, Neil H. Pliskin, Cecil R. Reynolds, Cheryl H. Silver



# Psychosomatic Patients

## Do the symptoms = objective findings?

- Is there evidence of exaggeration in the tests?
- Does research correlate with psychosomatic explanations?
- Is there a history of vague and changing complaints that cannot be fully explained?
- Have the complaints arisen after exposure to stress?
- Is there evidence of secondary gain?

# Check Out the Data

- Do not accept opposing experts' reports without "raw data" when psychological tests were administered and summarized
  - Have "raw data" analyzed by your own psychological expert and re-scored if needed
  - Opposing experts may underplay or completely omit highly significant psychological test data from their reports

# Stipulated Protected Order

- Stipulates test data may be turned over to the other side and will not be kept as part of the public record (or will be sealed); they may not be used for any other purpose apart from the present litigation; and they will not be copied or distributed in any form outside the present litigation
- Best way to get access to test data
- Protects psychologists from ethical concerns
- Avoids conflicts between attorneys and psychologists

# Standard Procedures & Dismissal of Evidence

- American Psychological Association (APA)
- “Test Administrators should follow carefully the standardized procedures for administration and scoring specified by the test publisher”
  - **Standards for Educational and Psychological Testing of the American Psychological Association**
- Failure to follow standardized procedures may constitute an ethical violation (unless there is a compelling reason to do so)
- *Daubert* finding

# Legal and Procedural Issues

Need for Discovery

VS.

Privacy Interests

# Legal and Procedural Issues: Prima Facie Proof

- For mass torts and/or class actions, employ use of a “Lone Pine” or other case management order that requires each plaintiff to present prima facie proof of his/her emotional distress injury and its connection to the incident, with a report or declaration from a forensic psychiatrist establishing the connection.

# Legal and Procedural Issues: IMEs

- Order to conduct IME?
  - FRCP 35
  - Cal. Civ. Proc. Code § 2032.320
- Multiple examiners:
  - Does the jurisdiction permit more than one “exam”?
- Recording?
  - Audio **generally permitted**
  - Video **preferred**
- Attendance by third parties?
  - **Generally disfavored**
  - *Ragge v. MCA/Universal Studios*, 165 F.R.D. 605 (C.D. Cal. 1995)
  - *Golfand Entertainment Centers, Inc. v. Superior Court*, 108 Cal. App. 4th 739 (2003)

# Legal and Procedural Issues: Practical Considerations

- IME provides evidentiary support for claim – evidence that may not have previously existed
- Battle of the experts
- Jury misunderstands distinction between the forensic psychiatrist (objective) and the treater (subjective) – demonstrates need for an effective communicator as the expert



# Thank You

Download pdf of slides here:

<http://www.fpamed.com/assessing-emotional-damages-claims-of-a-population-in-multi-plaintiff-litigation/>

**Mark I. Levy MD, DLFAPA**

Forensic Psychiatric Associates Medical Corporation  
University of California, San Francisco, School of Medicine

[mark@levymd.com](mailto:mark@levymd.com)

**Ronald H. Roberts, PhD**

Forensic Psychiatric Associates Medical Corporation

[rroberrts@fpamed.com](mailto:rroberrts@fpamed.com)