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**fpamed Newsletter 5: Mass Tort Litigation**

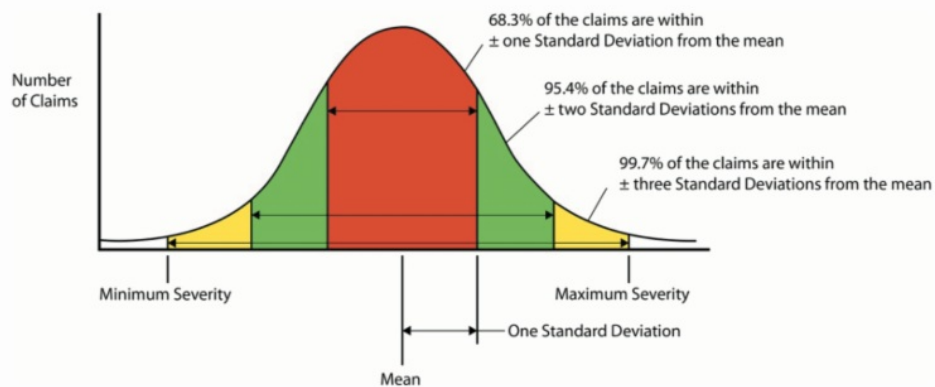
**THE TEAM APPROACH TO  
FORENSIC PSYCHIATRIC ASSESSMENT  
IN MASS TORT OR MULTI-PLAINTIFF COMPLEX LITIGATION**

There are key advantages to employing a “Single Team Approach” to assessing emotional damages claims in a mass tort population.

Whether part of a class action, consolidated individual claims, multi-district litigation, or another procedure, a large population of claimants seeking emotional damages due to a single event, circumstance, or cause presents an opportunity to contrast and compare factors within the group that increase the accuracy and the credibility of the expert’s diagnoses, opinions and conclusions about damages and causation.

Certain characteristics and group dynamics often characterize mass tort litigation. These include, but are not limited to, the following:

1. First, a **Bell Curve, or Gaussian (Normal) Distribution Curve** (see below), of emotional damages best describes the impact of a catastrophic or other damaging event affecting a large population of litigants, as contrasted to a single litigant whose relative position on the probability curve of damages is more difficult to discern. Using the standard of a Bell Curve for the distribution of damages, it is probable that 68 percent of the population falls between the mean and one standard deviation above or below the mean. That is, approximately 2/3 of the population experiences averages damages, or only slightly more or less. 14 percent of the population falls between one and two standard deviations above or below the mean and only 2 percent of the population falls more than two standard deviations above or below the mean, i.e., in the so-called “tails” of the distribution curve. **Thus, in a large enough population of affected individuals, it is extremely unlikely that any given individual is either entirely unaffected or irreparably damaged by the event or condition.** Thus, if this principle were applied to the distribution of damages in a mass tort matter, it is more likely than not that in the population, approximately 2% have sustained no damages whatsoever, 82% have sustained mild damages or less, 14% have sustained moderate damages, and only 2% have sustained severe damages.



2. Second, mass tort litigation offers a unique opportunity to compare and contrast damages among individual plaintiffs who, although subjected to a common trauma, possess both unique emotional vulnerabilities, as well as resiliency factors.

3. Third, if individual plaintiffs are represented by different attorneys, a natural tendency develops among the majority of the plaintiffs' attorneys to present their clients as residing in the "long tail" of the Bell Curve where the most vulnerable and least resilient emotionally damaged plaintiffs are found. However, these are statistically the least likely characteristics of any individual plaintiff.

4. Fourth, counsel can achieve an economy of scale when employing a single, experienced team of psychiatrists and psychologists to assess an entire population of litigants involved in a multi-plaintiff lawsuit where there are allegations emotional damages. For example, initial screening methodology can be used to determine who among the sample population does (and who does not) require more extensive (and thus more costly) assessment.

5. Fifth, over time, such teams develop experience and procedures for managing assessments of alleged emotional damages in mass tort litigation. Teams have developed protocols for using specific psychological tests to screen particular populations for emotional damages, which allows the team to efficiently and consistently assess those individuals who are indeed damaged. A team also brings methodology for efficiently managing the logistics of assessing an entire sample population.

#### The Team:

An assessment team may include a number of psychiatrists, trained and board certified in forensic psychiatry, along with experienced forensic neuropsychologists, who can employ psychometric tests to assess personality and emotional issues, as well the neurocognitive impairment, if any, that may result from head trauma, exposure to toxins, or degenerative neurological processes. Each member of the team should contribute unique additional subspecialty expertise. Relevant areas of subspecialty expertise may include: child and adolescent, as well as adult, psychiatric assessment skills and experience; assessment of emotional trauma and PTSD; gender, ethnic or age discrimination and harassment; psychopharmacologic issues; substance abuse and addiction; psychiatric inpatient care including current national standards, policies and procedures of psychiatric inpatient hospital practice and management; traumatic brain injury assessment of neurocognitive dysfunction from head trauma, toxic or degenerative causes; as well as pediatric psychological and neurocognitive assessment.

Among team members, a diversity of background, gender and expertise is important because each individual member of a mass tort population brings a unique personal history and background combined with individual emotional and physical vulnerabilities, as well as resiliency factors. Plaintiffs may also suffer from pre-existing psychiatric illnesses such as depression, anxiety, substance abuse or even psychosis that cloud the picture when assessing the causes of emotional damages that are noted following a particular incident or alleged condition. Whether a particular plaintiff's pre-existing emotional problems render that individual more or less vulnerable to psychological injury is a key question at the heart of the forensic psychiatric opinions and conclusions offered by a retained expert. Therefore, **employing a multi-specialty team of experts, each bringing to the team diverse knowledge and expertise, will ultimately produce the most accurate, evidence-based opinions and conclusions for the trier of fact.**

#### The Assessment Approach:

A team must develop an approach to assessment that is standardized and consistent for every examinee within a group of litigants. Such an approach applies to both the diagnostic interview methodology employed by an examining psychiatrist, as well as to the selection and administration of psychological test instruments utilized during the (neuro)psychological testing assessment.

#### Psychological Testing:

Psychological and neuropsychological testing involves test selection, administration, scoring, and analysis. But at its core, all psychological testing answers a single "membership question," namely,

based upon the examinee's responses to a particular test instrument, *which group of independently diagnosed individuals does the particular examinee most closely resemble?* Consequently, when assessing a population with particular characteristics, it becomes very important to use only psychological tests that have been standardized with normative data from a population similar to the individuals who are being tested. Verbal ability, reading and language levels, cultural and ethnic factors, physical and mental health, as well as medication can each influence the data produced from psychological testing.

For example, a test instrument that has been standardized with normative data from a Caucasian, middle class population of college graduates may not be an appropriate test instrument to use when assessing an economically impoverished, inner-city, minority population, most of whose members did not graduate from high school. Thus, the "base rate" of a symptom or behavioral characteristic is the probability of finding that characteristic within the population whose normative data was used to standardize the test. In order to ensure that a psychological test collects data that can be meaningfully interpreted, the base rates must be similar between the population whose normative data was used to standardize the test and the population being examined.

Hypothetically for example, assume that the normative base rate for clinical depression in the middle class, Caucasian population of college graduates described above, used to standardize a particular psychological test, is 6 percent. Now assume that this same test instrument is used to measure depression within the economically impoverished, inner-city, minority population described above. Finally, assume that the actual base rate for clinical depression within the inner-city population examined is 24 percent, i.e., four times higher than the population upon whom the test was normed. The data generated from using this test with the inner-city population may thus "falsely" indicate that the level of depression endorsed by a member of the test population is in the extreme tail end of the normal distribution curve for clinical depression, making that finding appear to be statistically less probable, i.e., more exaggerated, than it actually is. In fact, due to the much higher incidence of depression and trauma within groups similar to the tested population, the occurrence of depressive symptoms is more common for that population of examinees. When test subjects' responses to a psychological test instrument appear to indicate that they have extreme levels of depressive symptoms, when the original norms for incidence and severity of depression was established based on a different population, the high depression scores may unfairly raise validity questions inaccurately suggesting exaggeration or even malingering by the examinees. However, because the base rate for depression in the tested population is actually 400 percent greater than the test's normative or "base rate" population, the test conclusions of exaggeration or malingering by a particular tested individual may be unjustified and incorrect. For this reason alone, proper test selection is critical.

### **Which Tests to Administer?**

A typical battery of psychological tests includes several tests. No single test will adequately support or challenge a clinician's diagnoses. A typical psychological test battery may include: one or more scales from an intelligence test, such as the Wechsler Abbreviated Test of Intelligence (WASI); one or more endorsement-type personality tests, such as the Personality Assessment Inventory (PAI) and the Minnesota Multiphasic Personality Inventory-2nd Ed. (MMPI-2); a projective test such as the Rorschach Ink Blot Test, which is extremely helpful in forensic evaluations because due to the amorphous nature of the stimuli, i.e., 10 standardized inkblots, and more likely to get "under the defensive radar" of a plaintiff undergoing a forensic psychological testing examination; and finally, an "effort" test such as the Structured Interview of Reported Symptoms 2nd Ed. (SIRS-2) to assess whether an examinee may be intentionally exaggerating or even misrepresenting his or her alleged symptoms. In cases involving claims of impaired cognitive functioning, such as memory or concentration difficulties, a skilled forensic neuropsychologist will administer an additional battery of neurocognitive tests to assess specific cognitive functions, as well as additional "effort" testing employing instruments such as the Test of Memory Malingering (TOMM) or the Victoria Symptom Validity Test (VSVT).

### **Psychiatric Interview:**

With each member of the assessed population, the psychiatric interview should include a similar questioning approach encompassing similar questions or a similar scope, if possible. Each interview should cover the same general areas of history, even if an interviewer must simplify his or her language and vocabulary or slow his or her pace of questioning to accommodate an examinee with limited English skills and education or cultural differences. The general topics covered in a forensic psychiatric interview examination include personal and family history from birth through adulthood; medical history; psychiatric, psychological, and trauma history; educational history; employment history; marital or sexual history; recreational history; substance abuse history; criminal or civil legal history; economic history and circumstances; and military service history. In addition, a forensic psychiatrist should ask an examinee in detail about his or her experiences that resulted in the litigation, in what way have the alleged events and/or circumstances affected the examinee personally, what acute symptoms of emotional distress did he or she experience immediately after the stressful event resulting in the lawsuit, and what lasting symptoms does the plaintiff continue to experience? A forensic psychiatrist will carefully review medical, psychiatric, and psychological records regarding treatment that the examinee may have received both before and after the circumstances that lead to the litigation. Finally, an interviewer should carefully inventory and

investigate other contemporaneous life stressors, as well as historical traumas. When assessing a sample population of individuals who all share a common experience, it can be helpful to attach a photo to the examiner's notes, taken at the time of the interview, in order to better recall and differentiate the individual examinee from co-litigants, both when writing reports or subsequently when the expert is preparing to testify.

As mentioned above, a forensic psychiatrist should record the interview electronically, at least the audio portion, although video recording, if permitted, may provide a fuller record of clinical data potentially usable at trial. Electronic recording also helps the expert recall the examination more accurately when preparing for deposition and/or trial months or years after an interview occurred. It also provides both sides with an accurate record of what was (or was not) said by either party during an interview examination.

Finally, the process of examining a sample population of individuals affected by a common stressor provides a wealth of *collateral* information not generally available when examining a single plaintiff. This is due to the obvious fact that each examinee is not only a subject of assessment, on his or her own, *but is also a collateral informant* for many or even all of the other litigants.

#### **Team Structure:**

A team unit consisting of at least one forensic psychiatrist and one forensic (neuro)psychologist should pursue a uniform approach to gathering relevant data about plaintiffs. Team tasks should include the following:

- **Review all available medical, psychiatric, psychological, and legal documents, including the complaint, interrogatory responses, and relevant deposition transcripts with exhibits.** Counsel should obtain comprehensive medical and psychiatric records, including records from before the stressor as well as all medical records of diagnosis and treatment following it.
- **Review all reports from opposing experts, including “raw data” from all psychological testing of each individual plaintiff.** “Raw data” consists of any computer scoring sheets from administered tests, the actual notes, a computer data printout, and computer-generated reports. Distinguish between a computer-generated reports and written reports created by the examining psychologist, which may refer to the data selectively but almost never includes a comprehensive data set. Not infrequently, an opposing expert psychologist's report, or a psychological test report prepared for clinical or purposes other than litigation will stress some findings and omit others. Only by the retained psychologist thoroughly reviewing the complete “raw data” set, and perhaps even rescoring the computer answer sheet, can a forensic psychologist determine the completeness or inaccuracy of another psychologist's conclusions.
- **Transfer any “raw data” from psychological testing.** This is either transferred by a treating or opposing expert psychologist directly to the retained psychological expert or through attorneys. However, if this data is to be transferred through attorneys, ethical psychologists will usually require a “protective order” attesting that the information will only be used within the litigation and that all original data and any copies will be returned at the conclusion of the matter to the psychologist who provided it. This requirement is due to proprietary and other ethical concerns addressed by the American Psychological Association. (See Am. Psychological Assoc., *Ethical Principles of Psychologists and Code of Conduct*, (2002); Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 *Law and Human Behavior*, 655-65 (1991).)
- **Obtain collateral interviews or declarations from percipient witnesses.** As already mentioned, to some extent plaintiffs examined by forensic psychiatrists in mass tort cases actually become collateral informants for every other litigant. However, whenever possible interviewing plaintiffs' family members, significant others, employers, supervisors, or co-workers can be informative.
- **If necessary, distribute history questionnaires to examinees prior to interviews to streamline psychiatric examinations and the global assignment of assessing an entire sample population.** When using a history questionnaire, the interviewer must be familiarized with an examinee's responses before conducting the interview so that specific facts of the examinee's history can be explored and amplified during the examination.
- **Administer a battery of at least three widely employed, standardized, personality tests to each plaintiff.** For psychological testing only, in the absence of any indication of neurocognitive functional impairment, the test battery should include both endorsement tests, the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), or the Personality Assessment Inventory (PAI), as well as a standardized projective test, such as the Rorschach Inkblot Test (Rorschach). All tests used should contain validity scales and indicators. These are scales built into the structure of the test that are essential for determining test data “validity,” that is, whether the test data obtained is meaningful, or not. An experienced forensic psychologist should select, administer, score, and analyze these tests. Using the Rorschach, in particular, requires considerable

training, supervision, experience and expertise employing the Rorschach Performance Assessment System (R-PAS). In a 2005 white paper, the Board of Trustees of the Society for Personality Assessment affirmed that the Rorschach Inkblot Test possesses reliability and validity similar to that of other generally accepted personality assessment instruments. The Board also stated that responsible use of the Rorschach in personality assessment is appropriate and justified. (See The Status of the Rorschach in Clinical and Forensic Practice: An Official Statement by the Board of Trustees of the Society for Personality Assessment, 85 J. Personality Assessment, 219– 37 (2005).)

- **Administer a standardized battery of neurocognitive tests if there is any question about a plaintiff suffering impaired neurocognitive functioning, either unrelated to or as a result of the incident or trauma.** The neurocognitive battery should also include one or more “effort” or “malingering” tests, such as the Test of Memory Malingering (TOMM). It is also important that the neuropsychologist generally use the same neurocognitive tests with plaintiffs who belong to a specific population of litigants so that their interpretation of the examinees’ data is based upon their consistent experience performing assessments upon similar subjects.

If you have additional questions about the forensic psychiatric and psychological assessment of populations of litigants involved in mass tort litigation, please do not hesitate to contact me with your questions.

Thank you for reading this latest fpared Newsletter.

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