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Psychological harm without a physical injury

How to prove the psychological injury in order to maximize general damages

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Often we are faced with cases where there is little or no physical injury to the plaintiff or the plaintiff's physical injury has resolved. Yet the plaintiff still has emotional damage which is readily apparent or subtle. Horrific incidents create foreseeable distress at the time the incident occurs as well as into the future. More problematic are those cases where the plaintiff or the plaintiff's family and friends tell you that the plaintiff "just isn't himself" or that "she's distracted...forgetful...short-tempered." These psychological injuries are real and life changing

for the client. Proof of these emotional damages needs to be planned out during the development of your case so that the plaintiff is fully compensated for all harm she suffers.

The right to compensation for emotional damages that a plaintiff has sustained and will endure in the future are part of plaintiff's "general damages" or "noneconomic damages. A plaintiff's recovery is not only for physical pain *but also* for all resulting "fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror, or ordeal." (*Capeluto v. Kaiser Found. Hosps.* (1972) 7 Cal.3d 889, 892-893; see also CACI 3905A).

There is no limit on the amount a jury may award for emotional damages. Therefore, emphasizing your client's emotional damages is critical to maximizing recovery in civil cases. The only guidance a jury is given as to how much to award for emotional damages is that it must determine what is "a reasonable amount based on the evidence" and to use its "common sense." (CACI 3905A). And for future emotional damages, a plaintiff must also prove that he or she "is reasonably certain to suffer that harm" in the future. (CACI 3905A).

Traditionally, many attorneys relied only on the testimony of their client to establish emotional damages to the jury. Recently, however, plaintiffs' attorneys are



relying more and more on expert psychological evaluations of the client and the testimony of both expert and lay witnesses to discuss the emotional impact the injury has had on the plaintiff. An expert may not testify to the ultimate issue of the monetary value of emotional damages your client has suffered, but experts are permitted to provide very useful, and necessary, information to the jury. Given the value of emotional damages in every civil case, it is absolutely necessary that the plaintiff's attorney carefully evaluate the extent of emotional damages suffered by a client.

Role of the expert

The primary role of an expert witness is to *educate and persuade*. For emotional damages, an expert should be prepared to address the following issues:

- Test and initiate appropriate treatment, if necessary
- Define important terms (focus on terms from jury instructions)
- Discuss the plaintiff's level of functioning
- Explain the plaintiff's emotional challenges and hardships and effects on day-to-day life
- Discuss the plaintiff's future needs and costs of those needs (including hospitalizations, treatment, and medication for remainder of life)
- Explain the link between liability and damages
- In some instances, provide a foundation for overcoming statute of limitations problems, such as delayed discovery

What type of psychological expert?

In determining the type of expert you should use to detail the emotional damages suffered by your client, you should look to both professionals in the mental health field, and also to "non-professionals" or lay persons.

• *Mental health professionals*

Generally, mental health professionals fall into two categories: psychologists and psychiatrists.

Psychology is the scientific study of human behaviors and mental processes.

Psychologists are trained in the administration and interpretation of psychological tests, and are trained to provide counseling. The American Psychological Association (APA) recognizes over 54 sub-specialties of psychologists, including the following:

- Clinical psychologists
- Cognitive and perceptual psychologists
- Counseling psychologists
- Developmental psychologists
- Educational psychologists
- Engineering psychologists
- Health psychologists
- Industrial/organizational psychologists
- Neuropsychologists (and behavioral neuropsychologists)
- Rehabilitation psychologists
- School psychologists
- Social psychologists
- Sports psychologists

Psychiatrists are different from psychologists since they are trained as medical doctors and have additional training in psychopharmacology and can prescribe medications. Defendants will often bring a motion in limine to prevent a psychologist from testifying as to the need for psychotropic medications on the grounds the psychologist is not qualified. Therefore, a psychiatrist should always be considered if medications are a component of your damages claim. Both a psychologist and psychiatrist can be designated, but to prevent an objection on the grounds of cumulative or duplicative testimony, carefully separate the areas of testimony between the two experts.

There is also a specialist in the field of mental health known as a "forensic" psychologist or psychiatrist. A forensic psychologist or psychiatrist is one with special training and experience in the application of psychological or psychiatric knowledge to questions posed by the legal system, such as competency or the evaluation of a specific emotional harm, such as Post-Traumatic Stress Disorder. A forensic specialist may also have a clinical practice. However, when acting in the capacity of a forensic specialist on behalf of a plaintiff,

he or she is not providing therapy to the patient, but is instead conducting an evaluation of the plaintiff for use by a retaining attorney or court. Typically, in civil cases, the mental health professional who conducts a "defense mental examination" is identified as a "forensic" specialist. If a plaintiff has undergone therapy with a "treating" psychologist, it is most beneficial to designate both the treating professional to discuss the emotional feelings and problems addressed by the plaintiff during sessions, and also a forensic specialist to evaluate and test the plaintiff, identify the specific emotional injuries of the plaintiff, and to discuss the future needs of the plaintiff, including the costs of those needs.

• *Non-professionals/lay persons*

In addition to the testimony of a mental health professional, lay witness testimony is important to show how the emotional damages sustained from the defendant's wrongdoing has affected the plaintiff's personal and professional life. Lay witnesses are often the best people to explain the plaintiff's needs, struggles, and challenges.

Many attorneys mistakenly believe that a lay witness may never testify in the form of an opinion. Such testimony, however, is admissible if it is rationally based on a witness's perceptions, helpful to a clear understanding of the witness's testimony, or otherwise permitted by law. (See *Evid. Code, § 800.*) Courts have wide latitude in determining whether opinion testimony is admissible and generally, trial judges tend to admit lay opinion rather than to exclude it because it usually is "helpful to a clear understanding" of some issue or testimony. Opinions regarding a person's health, appearance, demeanor, mental conditions, and the pain and suffering of another is permissible lay opinion testimony. A party failing to object to the opinion testimony of a witness waives the issue on appeal. (*In re Joseph G.* (1970) 7 Cal.App.3d 695, 700.)

When considering the type of lay person who can provide testimony regarding a plaintiff's emotional damages,



the following categories of persons should be considered:

- Caregivers
- Teachers
- Co-workers
- Family Members
- Friends
- Coaches
- School Counselors
- Ex-spouses
- Spiritual Leaders and Congregants

It is important to find out the things that are, or were, most important in your client's life which have been altered. Equally important is to understand and demonstrate how the most mundane task or everyday activity has been changed or erased from the plaintiff's life.

Finding the right professional expert

As a general rule, juries give more weight to the better qualified expert or one with the most experience on a specific issue presented. Therefore, it is important to take the time to find the right expert for your case.

First, it is important to properly identify the area(s) for which expert testimony is needed, i.e., consultation, testing, or treatment, and the type of mental health professional best suited for your client's needs. Second, look for a mental health professional who has experience in treating or testing persons who have suffered similar injuries as your client, i.e., sexual abuse victims, amputees, widows. Third, it is important to consider the expected costs of the experts. Generally, psychiatrists and "forensic" specialists tend to be more expensive than a "treating" psychologist. Once these factors have been determined, the search can begin for the best expert for your client.

Often the search for an expert begins with referrals by word of mouth. However, in today's "cyber world," there is a new universe of information available to assist in finding an expert. Many experts maintain Websites or "blogs" where they

post opinions or articles on topics which may be related to your case. Audio interviews, podcasts, and lectures of many experts are also available online. Also, social networking sites like Face-book or LinkedIn can be very useful. The Internet and social networking sites should also be considered to determine if the potential expert has written or said anything that may be harmful to your case.

Often overlooked places to find an expert include universities and mental health institutions. In addition, the Los Angeles Superior Court lists, on its Website, an "approved panel of psychiatrists and psychologists" who are forensic specialists (See "lasuperiorcourt.org").

The expert witness disclosure document

To prepare for trial, each side needs to know which experts will testify for the other side and generally, the scope of the expert's intended testimony at trial. As such, either party may compel the exchange of expert witness lists and related information pursuant to Code of Civil Procedure section 2034.010 et seq.

The following information must be exchanged by each party:

(1) Expert list: A list setting forth the name and address of each person whose expert opinion that party expects to offer at trial by live or deposition testimony (or a statement that the party does not presently intend to offer any expert testimony.) (Code Civ. Proc. § 2034.260(b)). This list should include all retained experts and also every treating physician or mental health professional you might call at trial.

(2) Expert witness declaration: In addition, an "expert witness declaration" must be attached for each expert designated who is either a party to the action, an employee of a party, or "retained by a party" for the purpose of forming or expressing an opinion. (Code Civ. Proc. § 2034.210(b).) Although a non-retained treating physician or mental health professional must be on the expert list, no

expert witness declaration is required for non-retained experts.

The Expert Witness Declaration must be signed by the designating party's attorney and must contain the following information pursuant to Code of Civil Procedure section 2034.260(c):

- (a) Qualifications of the expert;
- (b) General substance of expected testimony;
- (c) Representations that the expert has agreed to testify and will be sufficiently familiar with the pending action to provide a meaningful oral deposition concerning the specific testimony the expert is expected to give at trial (including any opinion and its basis); and
- (d) Expert's fees

The "general substance of expected testimony" portion of the declaration is an essential part of the designation and the language used to describe your mental health expert's scope of opinions must be carefully considered. To be meaningful, enough facts and opinions should be disclosed to enable the opposing party to determine whether to depose the expert, and to prepare for cross-examination and rebuttal at trial. (See *Bonds v. Roy* (1999) 20 Cal.4th 140, 146-147.) Inadequate disclosure of the "general substance of expected testimony" is grounds for exclusion of the expert's testimony at trial under Code of Civil Procedure section 2034.300.

An example that could be used in a case of sexual abuse might include the following: "Dr./Mr. Smith will testify about all psychological and medical issues affecting Plaintiff and her family, as it relates to the case; causation; damages; conduct by sexual predators, including threats or directives or other conduct designed to keep the victims from reporting the assault; the reasonableness or unreasonableness of Plaintiff's conduct in response to being sexually assaulted; the delayed reporting syndrome for victims; impact of assault on victim's narrative and reporting of events; Plaintiff's



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treatment, injuries, diagnosis, prognosis, findings on examination, treatments, tests, need for future treatment, medical billings, reasonableness of medical services, reasonableness of medical charges, urgency or non-urgency of medical care; medical standards; impact of injury upon the Plaintiff; the impact of sexual misconduct on victims including Plaintiff; the long-lasting effects of sexual misconduct; and any other related matters. Dr./Mr. Smith will also respond to any opinions expressed by any expert witness called by Defendant.”

Labeling the emotional injury

How you communicate to the Court and the jury regarding the emotional damages suffered by your client is of paramount importance. You and your expert should avoid overbroad, legal terminology such as “pain and suffering” or “emotional distress” to describe your client’s emotional damages. Instead, use the terms listed in CACI 3905 (and discussed above) such as humiliation, anxiety, and inconvenience as specific,

separate items of damages. But also add others, such as shame, hopelessness, loss of identity, and fear of the future, as CACI 3905A specifically permits other “damages” to be listed in that jury instruction. Be creative. Ask your expert to define each item of emotional damage and discuss each as a separate injury to the jury.

Also, in determining a value for your client’s emotional damages, jurors are also looking to your expert to specifically identify a diagnosis of your client’s emotional injuries. Jurors like labels. Specific diagnoses of emotional injuries include the following:

- Post-Traumatic Stress Disorder (PTSD)
- Generalized Anxiety Disorder
- Phobias
- Panic Disorder
- Personality Disorder
- Dysthymia (Depressive Neurosis)
- Major Depression/Major Depressive Event

But the label isn’t the most persuasive evidence. All percipient lay-witness evidence that demonstrates the subtle

day-to-day changes or losses experienced by the plaintiff will help the plaintiff obtain a full and fair recovery.



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