Break It Down

How Methodical Investigation Can Cast Doubt on a Psychological Expert's Competence and Methodology

By Renée Welze Livingston

By picking apart the opinions of an opponent's psychological expert and exposing an evaluation's subjectivity and weaknesses, you can challenge the expert's opinions.

Unlike physical harm sustained by a personal injury plaintiff—burns, broken bones, a severed nerve, a traumatic amputation—which can be observed and objectively tested with reliable diagnostic tests, psychological injury claims involve mental illness, psychological conditions, thought processes, and brain function, all of which are not easily detectable and which are, for the most part, based on the subjective complaints of the plaintiff. One cannot "see" them or "feel" them, and someone cannot even definitively or reliably "test" for them.

For example, if a plaintiff reports having regular nightmares of an allegedly traumatic event, there is no way objectively to prove or disprove whether those nightmares were truly experienced, their frequency, or their content. Similarly, if a plaintiff reports that the effect of an earlier trauma has resolved, but the current incident resulted in "far worse" symptoms and functional impairment, it can be nearly impossible to refute that type of subjective characterization. In practice,

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because there is no objective backstop, psychological experts have greater freedom to leap to subjective and conclusory opinions about prior and current functioning, and ultimately, about psychological injury. Not infrequently, such opinions can deviate grossly from the established criteria that psychological experts use to objectify diagnoses. An ill-supported, conclusory opinion based on a subjective description of symptoms can affect a damages evaluation or jury verdict significantly if it is left unchallenged. So how can a civil defense lawyer prepare a case to test the reliability of, and challenge, a mental or psychological diagnosis?

There are two key ways to break down the opinions of a mental health expert. The first involves thoroughly investigating the expert's background, experience, and qualifications to challenge competency, impartiality, and credibility. The second confronts head-on deviations in a written report from established and industry-accepted protocols.

With proper preparation and tools, the weak opinions of psychological experts can be forcefully challenged in persuasive ways. By understanding how to position the defense case to undermine a psychological expert's competence and credibility effectively, the defense can either preclude unsupported opinions at trial or substantially undermine the effect that those opinions may have on jurors.

Admissibility of Psychological Opinions Generally

The admissibility of psychological opinion is, similar to any expert opinion, subject to the rules of evidence in the tribunal where the matter is pending. In federal court, Rule 702 of the Rules of Evidence provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

In California, Evidence Code section 720(a) provides: "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." Section 801 states:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Clearly, psychological injury, diagnosis, causation, and reasonable and appropriate treatment are subjects that require testimony from an expert to aid the trier of fact. In federal court, the trial judge is charged with the responsibility of acting as a gatekeeper to exclude unreliable expert testimony. *Kumho Tire Co. v. Carmichael,* 119 S. Ct. 1167 (1999). Nonetheless, the exclusion of expert testimony is still the exception rather than the rule. In fact, the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595.

Assuming the court, in its role as gatekeeper, allows an expert to testify at trial, a vigorous cross-examination (following, hopefully, an equally vigorous cross-examination at deposition) that highlights inadequacies or misrepresentations in experience and qualification, and/or bias and subjectivity in the administration and interpretation of psychological tests and assessments, will significantly undermine an expert's opinions and affect the jury's view of injuries and damages.

Challenging a Psychological Expert's Competence and Credibility

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Attacking the Qualifications and Competence of the Expert

Effective cross-examination of a psychological expert will begin with a deep dive into an expert's qualifications and credentials, with the goal of uncovering nuggets of information—big or small—that can be used to undermine credibility. The following discusses several places to look.

Curriculum Vitae, Resumes, and Other Professional Summaries

In almost every case, practitioners obtain current "CVs" and resumes of psychological experts. It is standard protocol at deposition to ask an expert if there are any significant additions or changes to his or her CV. Usually, there is little deviation

or discussion, and the inquiry ends there. However, if the expert has been practicing a while, it is very likely that his or her CV has been modified over the years for any number of reasons: to pursue a particular academic appointment, to reflect a shift in research or focus, or as is sometimes the case, to suit a particular case. Changes in how education, degrees, or professional activities are represented can signal prior misrepresentations. Shifts in research, publication topics, and clinical experience, or an affiliation with a particular company or medical group, can show a lack of current knowledge, bias, or expertise puffery for a particular case. In our office, for example, expert CVs are maintained on file so that changes in emphasis and claimed expertise over time can be identified and analyzed. While the inquiry should include a request for prior versions of CVs from the expert, a usually more fruitful source of information will come from defense colleagues who have crossed paths with the expert in the past.

Objective Verification of Key Training, Certifications, Degrees, and Licenses

All too often, defense practitioners accept at face value representations made on a CV or in deposition about an expert's training. This is particularly true with psychological experts who often claim to have completed supplemental training with less traditional educational providers. It can therefore be fruitful to collect copies of licenses, certifications, and degrees directly from the institutions together with published institutional requirements.

Prior Deposition and Court Testimony

We all know that prior sworn testimony of an expert, whether at deposition or trial, can be the key to the credibility kingdom. This is particularly true with psychological experts, partly because of the very subjective nature of the opinions and the tendency of psychological experts to characterize mental diagnoses across physical injury lines. For example, if you can gather opinion testimony about the many times an expert has diagnosed post-traumatic stress disorder (PTSD) in cases involving everything from auto accidents to dog bites and employment torts, this can undermine the credibility of a similar diagnosis in your case, which perhaps involves yet another type of accident. Similarly, if you can locate testimony about why a certain test was used in one case, you might be able to plant doubt about why it was not used in your case. The cross-examination possibilities are endless, but they will depend on the number and breadth of the transcripts acquired. Though this can be a time-consuming, and therefore, expensive process, it can provide the "case-breaker" areas of attack at trial. Since jurors tend to view expert testimony with skepticism anyway, even a few body blows derived from prior deposition or trial testimony can have a devastating effect on the opposing expert's credibility.

Establishing the Genesis of Referral

There is no question that a referral to a psychologist or psychiatrist for evaluation by the plaintiff's attorney is an implicitly biased process. Why else would an attorney representing a personal injury plaintiff send a client for evaluation by a psychological expert than to establish psychological injury? Experienced experts will usually deflect this type of bias with broad statements espousing their reputation, training, and integrity, which is exactly what you want to elicit as a building block for challenges to accepted protocols. The important distinctions here are that this psychological expert is not the treating provider, did not receive the engagement by medical referral, did not participate in patient–psychotherapist visits with the plaintiff, and did not implement or carry out a treatment plan. Thus, the evaluation is driven largely by the quantity and quality of the information provided to the expert by the plaintiff and the attorney. The manner and method by which such an evaluating expert receives this information is controlled by the plaintiff's attorney, which is in stark contrast to the defense psych expert, for whom quantity and quality usually carries the day. One method often used by plaintiff psychological experts to acquire seemingly "objective" data to support a psychological diagnosis involves administering the SCL-90 R, a four-page "Symptom Checklist" (a self-reported symptom-distress questionnaire) that covers a wide variety of feelings and situations on the emotional spectrum. The checklist then invites the plaintiff to rank each item on the list on a scale of 0 to 4 (0 = "not at all," 1 = "a little bit," 2 = "moderately," 3 = "quite a bit," and 4 = "extremely"). Naturally, this checklist gives the plaintiff, who is being seen by a "friendly" litigation expert, freedom to exaggerate symptoms in a way that is difficult to challenge. Not surprisingly, the written list also suggests many other symptoms that the plaintiff might not have otherwise thought of on his or her own.

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Attacking Credibility by Showing Subjective Elements of Evaluation

Many publications provide established guidelines for conducting a thorough forensic psychological or neuropsychological evaluation and for preparing the detailed written assessment. *See*, *e.g.*, G. Glancy *et al.*, *AAPL Practice Guideline for the Forensic Assessment*, J. Am. Acad. Psychiatry Law, vol. 43, issue 2 suppl. (2015); M.D. Lezak *et al.*, Neuropsychological Assessment (5th ed., 2012, Oxford

Univ. Press). Thus, when a report does not follow established protocol, it can be good fodder for challenge and cross-examination by a well-prepared defense attorney.

For experienced personal injury defense practitioners, it is not uncommon to see reports from psych experts that include broad, sweeping conclusions about psychological diagnoses and impairment without concrete reference to the actual data to support the opinions. For example, in a recent report that we received in a case involving a forty-five-year-old male with pre-incident diagnosis of sleep apnea, the psychologist stated in the report:

> Claimant shared of his ongoing ruminations and concerns about his future financial wellbeing and career options. Coupled with his depressive symptomatology and anxiety, he shared of his reoccurring thoughts, memories and visualizations regarding his industrial injury. He also shared of his physical reactivity to stress and anxiety and of a startle response to benign situations. He spent a great deal of time discussing his notable sleep disturbance that he attributes to his industrial injury, wherein he frequently and consistently awakens after several hours of sleep in mid-cycle and is unable to return to sleep, which he has found to be increasingly anxiety-provoking and distressing. He did acknowledge that he occasionally compensates with daytime naps.

In his statement of "Objective Findings and Psychological Test Results" the evaluator went on to state:

> From all of the evidence available to this consultant, *which includes the acceptance of a veracity of the history as related by the claimant* that is associated with his industrial injury, coupled with his current clinical presentation, psychometric test results, and a review of his *submitted medical records and related documentation*, this consultant opines that claimant is suffering from a Major Depressive Disorder of a Moderate Severity and a Generalized Anxiety Disorder. He also presents with the clinical hallmarks of an individual suffering from Posttraumatic Stress Disorder.

Elsewhere, the consulting psychologist concludes: "Claimant presents with pronounced psychiatric symptomatology which includes depression, anxiety, phobic reactions, ruminations, physical reactivity, which meets the clinical diagnostic criteria of a Posttraumatic Stress Disorder."

In this case, the expert spent just *two* hours with the plaintiff, one hour administering tests (including the self-reported symptom checklist), and four hours reviewing medical records and case documents *provided to him by the attorney.*

Significantly, he did not do the following: (1) review pre-incident medical treatment records; (2) interview the plaintiff's wife of eighteen years, *even though she accompanied him to the appointment,* or gather any other collateral source of information about the plaintiff's pre-incident psycho-social condition; (3) consider the implications of the plaintiff's *lifelong history of methamphetamine use and abuse* (including on the date of the incident); (4) consider the implications of plaintiff's attention deficit hyperactivity disorder (ADHD) diagnosis and prescription medication; and (5) explore the effect of the plaintiff's multi-year prior incarceration in state prison.

According to Bruce Leckart, Ph.D., a forensic psychologist and professor emeritus of psychology at California State University at San Diego, the weakest link in any psychological report is a doctor's diagnosis. *See* G.M. Filisko, *How Lawyers Can Effectively Cross-Examine Psychiatrist and Psychologists*, ABA J., July 2017. Dr. Leckart provides two key recommendations for cross-examining a psychological expert. First, do not ask the examining mental health expert about the plaintiff directly, but instead confine questions *to the report.* The reason for this is quite simple: if you ask a doctor about the plaintiff, he or she will feel free to provide information not in the report, which can be used to justify his or her opinions. For example, in reference to the report quoted above, rather than ask the examiner what the *plaintiff said* about the frequency, duration, pattern of use over time, and the effect of methamphetamine use, and what constituted "abuse," ask the examiner where *in the report* is the data set forth to support any conclusion that the prior use and abuse did not contribute to the plaintiff's current psychological condition.

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Second, stick to the criteria established in the current version of the Diagnostic and Statistical Manual of Mental Disorders (currently DSM-5). If there is insufficient data in the expert report demonstrating that the patient has met the specific diagnostic criteria, the opinion will be discounted. Thus, in reference to the report quoted above, rather than asking the doctor to identify the basis for the diagnosis of PTSD, ask where *in the report* he or she lists the specific complaints made by the plaintiff indicating that he or she met the required DSM-5 diagnostic criteria for PTSD. For each criterion, the examiner should be able to provide the qualitative nature of the specific complaint reported by the plaintiff, as well as a description of their frequency, intensity, duration, onset, and course.

Conclusion

Effective cross-examination of a psychological expert can be one of the most important skills that a trial attorney can have in his or her toolkit. It can certainly have a significant effect on a jury's view of damages and the client's financial exposure. While it may seem daunting at first, especially upon first reading a lengthy written report that has pages of seemingly "objective" criteria to support a DSM diagnosis, by methodically gathering data that can test the credibility of an expert's qualification, experience, and impartiality, and highlighting gaps in methodology as it compares to established psychological protocol, a defense attorney can effectively reduce the effect of opinions from an adverse psychological expert.