CHAPTER 1

INTRODUCTION

“I wished by treating Psychology as a natural science, to help her become one.”
—William James, *Collected Essays and Reviews* (1920)

1.1 Psychological Testimony Is Different from Other Medical Testimony

1.2 Approach to Successful Cross-Examination
1.1 Psychological Testimony Is Different from Other Medical Testimony

Psychological testimony is “slippery,” because the vast majority of such testimony is based on information given by the patient. This is particularly true of testimony by psychiatrists, who traditionally do very little testing. Self-reported patient histories are notoriously inaccurate and slanted by the patient in the clinical setting. In the litigation setting, that distortion of patient history is magnified. The goal of litigation is to win; winning usually means some form of compensation or benefit. In psychological terms, this is called “secondary gain,” and it further distorts an already difficult factual search in the litigation.

In some cases, psychological testing is administered. Psychological testing is unlike medical testing, in which most tests are objective in the sense that they are laboratory tests unaffected by the efforts of the patient. The patient cannot change a whole blood cell count or a cholesterol number on the day the blood is drawn. Admittedly, some medical testing, such as pulmonary function tests (blowing into a tube), are “effort dependent.” Physicians have methods and observational techniques to ensure that effort is made or lack of effort is noted. Laboratories have standardized procedures, which have been well established over time.

Psychological testing is different, although many psychologists might disagree. Almost all of it is effort dependent. How a patient answers questions on a personality scale test, such as the Minnesota Multiphasic Personality Inventory (MMPI), is entirely up to the patient. Although safeguards allegedly eliminate those who try to exaggerate or manipulate the testing, the fact remains that the patient’s mind shapes the results by writing or speaking its impressions; this is not a blood sample that can be analyzed in a lab. Psychologists cannot lay a brain on the table and analyze it, although certain computed tomography x-rays are beginning to explore that possibility.

Psychological testing has many critics. Unlike blood testing, standardization and even interpretation of results is less advanced because of its subjective nature and the fact that many of the tests are relatively new.¹

¹ E.g., J.N. Butcher, Personality Assessment from the Nineteenth to the Early Twenty-first Century: Past Achievements and Contemporary Challenges, 6 ANN. REV. CLINICAL PSYCHOL. 1–20 (2010);
Psychiatrists and psychologists live in a highly specialized world. They validate emotional symptoms that most laypeople consider trivial and correctable solely by the patient’s effort. Many laypeople have a bias against psychological treatment, which they feel is unnecessary and ineffective.2 Self-help techniques are viewed more positively, but in the litigation setting, the plaintiff is not seeking self-help.

Even in cases where physical injury accompanies or causes psychological damage, the plaintiff’s lawyer has a difficult burden. In a case tried in a rural county in Ohio, the plaintiff had lost several fingers in an accident and also claimed a psychological disability. The jurors, who were mostly working farmers, knew many farmers who had lost fingers in farm machinery accidents and, no matter how hard the plaintiff’s lawyer tried, he simply could not convince them that such a “minor” injury (in their view) could cause psychological problems. Fair? Probably not. But it is a burden lawyers face in many of these cases. These attitudes make the plaintiff lawyer’s task more difficult, because he must prove not only that the psychological problem exists but also that it is worthy of treatment.

The defense lawyer has it somewhat easier, although not many would admit it. Most plaintiff psychological experts will say “the right words” to get the case to the jury, but the bias against psychology is clearly helpful during jury deliberations. Once the case gets to the jury, the results are unpredictable, so the bias is of small comfort to defense trial lawyers. The “right words” usually require the psychological expert to testify about causation. The opinion testimony must include a statement that the psychological condition was “directly and proximately” caused or “substantially aggravated” by the injury or event that is the subject of the litigation.

This seems to be similar to other personal injury cases in which such testimony is necessary. However, the broad theoretical structure of psychology rarely recognizes a clear-cut “proximate cause” based on a single event in adult life (with the exception of post-traumatic stress disorder [PTSD], which, as its name suggests, requires a traumatic causal event). Rather, the most important causative factors usually are the plaintiff’s

---


personality and ability to deal with the psychological stresses of life before the event that gave rise to the litigation.

Many psychiatric theorists, influenced by the Freudian school, believe that neuroses are founded on underlying anxieties existing from childhood. When a plaintiff claims that a psychosis, such as schizophrenia, was caused or aggravated by a physical injury, psychiatric theories are undecided about causation. Theories of causation include genetic predisposition, childhood environment, and dysfunctions in neurotransmitters. Although these theories differ, most recognize that some element of prior personality development is essential in the onset of emotional problems. Freud summarized this view by noting that psychiatrists deal more with scars than with bleeding wounds.3

Because of the uncertainty of causation, the plaintiff’s history of psychiatric problems must be thoroughly known to the plaintiff’s counsel and thoroughly discovered by defense counsel. That discovery is discussed in Chapter 2 (see Section 2.3).

1.2 Approach to Successful Cross-Examination

How does one confront these “slippery” experts? How does the defense lawyer solve the problem of cross-examining an expert whose opinion is based primarily on just talking to the plaintiff? How does a plaintiff’s lawyer overcome the bias against psychology and convince a jury through cross-examination that the client has a valid psychological claim worthy of compensation? The answer is by using the tools of discovery and the techniques of cross-examination. For a more complete treatment of these issues, see my prior book (Cross-Examining Doctors: A Practical Guide, 2010). However, for purposes of setting the stage for reviewing the transcripts that follow, here is an overview.

You must confront the expert with materials obtained through preparation and discovery. Knowing the basic facts, the chronology of events, and the medical facts is essential, but you must also know psychological concepts and terms. The expert’s prior opinions, publications, and qualifications should be ascertained before the discovery deposition.

3. L.C. Kolb, Modern Clinical Psychiatry (10th ed. 1982).
Having those materials is just the beginning. How do you compete with an expert who knows the medical facts and medicine better than you can possibly know it? There are three ways:

1. You will have to obtain facts through discovery that the expert will not have, including conflicting prior medical history that has not been taken into account by the expert.
2. You get to choose which facts to emphasize.
3. Most important, you are permitted to use the techniques of cross-examination.

Those techniques include leading questions, questions with a high probability of a favorable answer, and the ability to confront a witness with materials, such as depositions, medical records, or scientific texts, that compel a favorable answer. The rest is commentary.

The goals of cross-examination are as follows:

• Getting admissions that are helpful to the case
• Discrediting the witness
• Discrediting the witness’s testimony
• Getting only what you need for argument

As you review these transcripts, keep these techniques and goals in mind and determine what the lawyers are trying to do. From time to time, I will suggest what techniques and goals are in play.