PSYCHIATRIC ASPECTS OF PERSONAL INJURY CLAIMS

GEORGE MENDELSON

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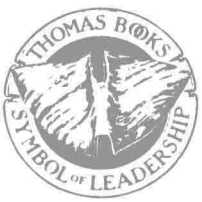

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AMERICAN SERIES IN BEHAVIORAL SCIENCE AND LAW

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FOREWORD

This book is about the practice of psychiatry relating to the assessment of personal injury claimants, where the alleged injuries have occurred as a consequence of negligence or in the course of employment.

The terms given psychiatric aspects of personal injury claims are varied, and often reflect a particular attitude toward the phenomenon. The terms that are given include: neurosis following trauma, terror neurosis, acute neurotic reaction, triggered neurosis, post-accident anxiety syndrome, post-traumatic hysteria, hysterical paralysis, social neurosis, personal injury neurosis, industrial neurosis, accident neurosis, occupational neurosis, litigation neurosis, compensation neurosis, secondary gain neurosis, unconscious malingering, or malingering. The Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association calls it Post-traumatic Stress Disorder.

At trial, psychiatric testimony is offered on the issue of causation and damage. Wholly aside from the question of how far the law should go in protecting emotional or mental nondisturbance, there are presented difficult evidentiary questions of causation and assessment of harm.

In psychiatry, a distinction is drawn between the true post-traumatic stress disorder, where a well-integrated individual suffers emotional distress as the result of an overwhelming stress, and the triggered trauma, where a borderline-functioning individual decompensates as a result of stress that would be quite inconsequential to an average individual. For the law, however, the distinction is one without a difference. In law, the tortfeasor is not entitled to complain that his victim was not a perfect specimen.

But when assessing the harm done, or damages, the functioning of the complainant before and after the defendant's act is compared. The question is: What could the person do before the accident that he could not do afterward? Considerations in evaluating the consequences of an injury include permanency, disability, disfigurement, pain or mental anguish,

inconvenience, loss of job, loss of promotion, business or professional opportunity, marriage, recreation, socioathletic lifestyle and enjoyment.

Sometimes the psychiatrist appears to be too willing to testify to the severity or the permanence of emotional symptoms. In general, testimony concerning emotional disturbance tends to provoke either hostility or ridicule. Quite often, psychiatric testimony seems arbitrary, or fanciful.

Trauma is a relative concept: stimulus in relation to capacity of organism involves not just what occurs externally but the dovetailing of external events and inner psychic organization. What may be traumatic to one person need not be to all others, nor need it adversely affect the same person at a different time.

In this scholarly book, Dr. George Mendelson of Melbourne, Australia, deals with general aspects of psychiatric assessment of litigants, the clinical syndromes most often encountered among persons seeking compensation, and the effects of injury and litigation on the individual. He evaluates psychiatric testimony in these cases. He discusses "compensation neurosis"—valid diagnosis or prejudicial label?

Dr. Mendelson's interest in the subject arose when he was being referred patients with emotional problems, from the inner-city, who had sustained work injuries, and who were not "cured by the verdict" when their cases were eventually finalized. He undertook the follow-up of these patients, which he presented in 1981 at an international meeting in Israel. As a result, he found that he was being asked to see greater numbers of such patients for treatment, and this also complemented his interest in the psychiatric problems of chronic-pain patients. He then undertook research based on the relevant literature and on the patients he was seeing, and found this the most interesting area in which to work.

Born in 1946 in Poland, he immigrated to Australia where he graduated with honors in physics and medicine. He is a member of the Royal Australian and New Zealand College of Psychiatrists and he is honorary senior lecturer in the Department of Psychological Medicine at Monash University.

This book will be especially treasured by all those working in the field.

RALPH SLOVENKO

PREFACE

This book deals with those aspects of psychiatric practice which relate to the assessment of personal injury claimants, where the alleged injuries have occurred as a consequence of negligence or in the course of employment.

The book is divided into three parts. Section I covers some of the fundamental considerations in the psychiatric evaluation of the personal injury litigant. The role of the psychiatrist in this field has expanded considerably over the past few decades, and Chapter 1 sets out some of the relevant historical background in the workers' compensation and common law jurisdictions. Chapter 2 examines one of the central issues in the psychiatric evaluation of litigants, namely the status of the so-called "compensation neurosis." The psychiatrist does not have at his or her disposal special investigations which can objectify and validate the plaintiff's complaints. It is therefore particularly important to emphasize the need for a thorough personal, medical, and psychiatric history, combined with a mental status examination. In Chapter 3, I have set out a scheme for a semistructured clinical interview. The use of several standardized psychometric tests, including a screening test for intellectual impairment, suitable for routine administration, is also described.

This book deals specifically with the psychiatric aspects of personal injury claims, and does not purport to be a textbook of psychiatry. Therefore, topics such as unconscious ego defense mechanisms are only referred to in passing, without full discussion.

Section II of this book considers the psychiatric disorders most often diagnosed among personal injury litigants. Some of these disorders develop as a direct consequence of physical injury sustained at the time of the accident. Other mental disorders may develop as a consequence of the traumatic experience of the accident, or of prolonged stress, for example in a work setting. The aim of this section of the book is to provide an overview of the relevant topics, rather than undertake an

exhaustive review of all the research in areas such as work stress in specific occupational groups, or head injuries and all their complications.

The question of response to treatment while receiving compensation, and prognosis after conclusion of litigation, are frequently matters of considerable debate and disagreement in court. Section III therefore examines the effect of compensation and litigation on medical and surgical treatment, and treatment outcome. Follow-up studies of personal injury litigants after finalization of litigation are reviewed in Chapter 16. The final chapter discusses the psychological and social effects of trauma and injury, as well as the emotional reactions of the injured person, and his or her family.

The book deals only with the issues relevant to assessment and diagnosis. Psychiatric treatment is not discussed, because this is outside the scope of the psychiatrist who is requested by an attorney to undertake the evaluation of a plaintiff. As in any other clinical situation, the plan of medical or surgical management is formulated on the basis of the diagnosis, the personality attributes of the patient, and the response to previous treatment. These aspects of treatment are well covered by many standard textbooks of psychiatry.

During the writing of this book, the diagnostic categories and criteria of the Diagnostic and Statistical Manual of Mental Disorders (Third edition) of the American Psychiatric Association (1980)—colloquially referred to as DSM–III—were used. In June 1987, when the final draft of the manuscript was being prepared, the revised Manual (DSM–III–R, APA, 1987) became available. As a consequence, the text was revised, so as to incorporate the changed terminology and diagnostic criteria of DSM–III–R.

This book therefore, wherever applicable, uses the classification and diagnostic criteria given in DSM–III–R. In some sections, however, the DSM–III terminology and descriptions are also given, because in certain disorders the former are more detailed, and provide a better characterization of the condition.

DSM–III–R includes a "Cautionary Statement" noting that "the clinical and scientific considerations involved in categorization" of mental disorders "may not be wholly relevant to legal judgments." However, it is my firm opinion that the use of the most detailed, standard and precise nomenclature is necessary if psychiatrists and attorneys are to communicate effectively, and that this is essential for the ultimate benefit of our patients and clients.

ACKNOWLEDGMENTS

My thanks are due to Professor Graeme C. Smith, Chairman of the Department of Psychological Medicine, Monash University, who made available to me the Department's facilities during the preparation of this book. The writing was completed during a period of sabbatical leave from Prince Henry's Hospital, Melbourne, and I am indebted to the hospital's Board of Management for making this possible.

I wish to thank the publishers of the journals in which some of the chapters were originally published, who gave permission for these to be adapted for publication here, as well as the publishers and authors who gave permission to reproduce several of the figures in this book.

I am grateful to my secretary, Rena Bustin, for the efficient manner in which she has managed the practice, thus allowing me the luxury of additional time during which I could work on this book.

To my wife, I express my gratitude for her constant interest and encouragement; the book has also benefited greatly from her literary advice, and legal knowledge.

To Hannah and David, I owe my appreciation of their patience during the many hours that my use of the family computer prevented them from enjoying "Olympic Decathlon" and "Snooper Troops."

CONTENTS

PSYCHIATRIC ASPECTS OF PERSONAL INJURY CLAIMS

Section I

THE ROLE OF THE PSYCHIATRIST IN PERSONAL INJURY EVALUATION

Chapter 1

AN OPENING PERSPECTIVE

As early as the fourteenth century, an English court allowed recovery for emotional distress without a concurrent physical injury, awarding damages to an inn-keeper's wife for the fright she experienced when a hatchet was thrown at her by a customer (*I de S et ux v. W de S.*, 1348). This precedent, however, was not automatically followed, particularly during the nineteenth century, when the all-too-frequent railway accidents precipitated numerous personal injury claims based on symptoms due to fright.

Claims made following railway accidents were made on the basis of negligence, whereas the case cited above involved a wilful act, that is, an intentional tort rather than negligence. Damages for emotional symptoms, in the absence of a physical injury, were denied by the courts until the early years of this century.

Writing in 1904, Hamilton, in an authoritative review of the psychiatric aspects of railway accidents, noted that:

> The history of litigation connected with personal injury shows that, until a comparatively recent time, damage suits were almost always brought for material injuries—the loss of an arm, leg, or an eye—as the result of violence, and there were usually objective appearances which were unmistakable.

It was during the second half of the nineteenth century, as a consequence of the popularity of rail travel and the frequency of railway accidents, that personal injury litigation became commonplace, and medical men of the day came to realize that many litigants complained of symptoms and disability which frequently could not be explained by "objective appearances." Cases of patients with such symptoms were described on both sides of the Atlantic, and the term *railway spine* was introduced for what was thought to be "a newly discovered affection."

The term "concussion of the spine" was used by Erichsen (1882) to refer to a condition which he believed was analogous to concussion of the brain, and which was thought to involve damage to the "organic structure" of the spinal cord in the absence of any evidence of injury to the

vertebrae. Erichsen's view of the *organic* basis for "railway spine" was challenged by Page (1885). Page discounted the likelihood of concussion as a cause of "railway spine," and argued that "nervous shock" was the basis of symptoms which constituted the condition of "railway spine." He noted that "nervous shock" was a term "applicable . . . to the whole clinical circumstances of the case," and not to any one isolated symptom.

Writing in the *Boston Medical and Surgical Journal* in October 1883, Walton drew attention to the very close resemblance between symptoms of "railway spine" and hysteria. This view was shared by by Morton Prince (1891), whereas support for the view that physical injury was responsible for the entity of "railway spine" was given by Oppenheim, who suggested that it was due to "a molecular concussion" (1901, at p. 236).

There were also those who did not accept either a "nervous" or a "physical" explanation. Among them was Judd (1889), who clearly expressed the view that "concussion of the spine" was largely the complaint of "cheats and frauds," and that as a consequence "cities and corporations are robbed of vast sums of money yearly by malingerers, aided by unscrupulous legal talent, and by ignorant or dishonest surgeons."

The polarization between those who considered "railway spine" to be due to an *organic* cause and those who judged it to be *functional*, that is, without a physical basis has, in a somewhat different form, continued to the present day. This is apparent with respect to sequelae of accidental injury, such as postconcussional syndrome, low back pain, and the ubiquitous "whiplash." This dichotomy of views was well reviewed in a recent monograph (Trimble, 1981). A further polarization has also developed between those who claimed that the litigants improved as soon as they received their monetary compensation from the court, and those who held that the award of money did not cure the plaintiff's condition. These two issues, namely the genesis of postaccident symptoms, and their eventual prognosis, are still topical, and contradictory opinions are daily expressed in our courts, and in front of tribunals.

The problems of evaluation of railway injuries were considered in detail at successive meetings of the National Association of Railway Surgeons. At the Association's sixth annual meeting, held in 1893 in Omaha, it was in the course of discussion following the formal presentations that the most strongly held and diametrically opposed opinions of the participants were expressed, before a partisan audience. Two quotations will illustrate these extreme views: