The mental health expert in personal injury and workers compensation litigation

by

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<th>Description</th>
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<tbody>
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<td>AUDIT</td>
<td>Alcohol Use Disorders Identification Test</td>
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<tr>
<td>BDI-II</td>
<td>Beck Depression Inventory, 2nd ed</td>
</tr>
<tr>
<td>BHS</td>
<td>Beck Hopelessness Scale</td>
</tr>
<tr>
<td>CAPS</td>
<td>Clinician-Administered PTSD Scale</td>
</tr>
<tr>
<td>DASS</td>
<td>Depression Anxiety and Stress Scale</td>
</tr>
<tr>
<td>DSM</td>
<td><em>Diagnostic and Statistical Manual of Mental Disorders</em></td>
</tr>
<tr>
<td>DSM-5</td>
<td><em>Diagnostic and Statistical Manual of Mental Disorders</em> (5th Edition)</td>
</tr>
<tr>
<td>GAF</td>
<td>Global Assessment of Functioning</td>
</tr>
<tr>
<td>ICD-10</td>
<td><em>International Statistical Classification of Diseases and Related Health Problems</em> (10th revision)</td>
</tr>
<tr>
<td>IES-R</td>
<td>Impact of Events Scale – Revised</td>
</tr>
<tr>
<td>MMPI-2</td>
<td>Minnesota Multiphasic Personality Inventory – 2</td>
</tr>
<tr>
<td>MPI</td>
<td>Multidimensional Pain Inventory</td>
</tr>
<tr>
<td>MPQ</td>
<td>McGill Pain Questionnaire</td>
</tr>
<tr>
<td>PASS</td>
<td>Pain Anxiety Symptoms Scale</td>
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<tr>
<td>PTSD</td>
<td>post traumatic stress disorder</td>
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<tr>
<td>SIRS</td>
<td>Structured Interview of Reported Symptoms</td>
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<tr>
<td>SVTs</td>
<td>Symptom Validity Tests</td>
</tr>
</tbody>
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### Glossary

Like many other professions, psychology and psychiatry have their own vocabulary, either specialised technical terms or words that may be in common everyday usage but that have
particular meanings when applied in a mental health context. When attempting to understand
the meanings of particular technical terms or words it may be necessary to consult specialised
sources. For example, the Diagnostic and Statistical Manual of Mental Disorders (DSM)
contains a glossary of technical terms, and definitions can also be found in dedicated
dictionaries of psychology. However, it is advisable to consult the more recent publications
unless the historical context of concepts is important.

The following is a brief guide:

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tr>
<td>anxiety</td>
<td>a feeling of fearful apprehension in anticipation of a future threat or misfortune accompanied by bodily symptoms of tension.</td>
</tr>
<tr>
<td>defence mechanism</td>
<td>automatic psychological processes that protect the individual against anxiety. They moderate a person’s reaction to emotional conflicts and stress. They can be adaptive or maladaptive, depending on their degree of flexibility and the situational context.</td>
</tr>
<tr>
<td>mood</td>
<td>a pervasive and sustained emotion that colours the perception of the world, e.g., depression, elation, anger and anxiety.</td>
</tr>
<tr>
<td>neurosis</td>
<td>this term is not in DSM although it is in the ICD-10 and may be encountered in other literature. A neurosis is a chronic or recurrent non-psychotic disorder characterised mainly by anxiety and the symptoms reflect the attempt to manage that anxiety (e.g., obsessions, compulsions, phobias or sexual dysfunction).</td>
</tr>
<tr>
<td>personality disorder</td>
<td>a personality disorder is a deeply ingrained, long-standing and maladaptive behavioural style which diminishes functioning at home, at work or in general situations.</td>
</tr>
<tr>
<td>phobia</td>
<td>a persistent, irrational fear of an object, activity or situation that leads to avoidance or enduring it with dread.</td>
</tr>
<tr>
<td>psychotic (psychosis)</td>
<td>this term has a number of different definitions. In its narrowest sense, it refers to delusions or prominent hallucinations occurring without insight into their pathological nature. Broader definitions include the other positive symptoms of schizophrenia; earlier definitions focused on the severity of functional impairment. It has also been defined as a gross impairment in reality testing. The psychotic disorders in DSM are defined by their characteristic features. Some other disorders may present with psychotic symptoms.</td>
</tr>
<tr>
<td>sign</td>
<td>an objective manifestation of a pathological condition as observed by the clinician rather than reported by the person.</td>
</tr>
<tr>
<td>symptom</td>
<td>a subjective manifestation of a pathological condition as reported by the individual.</td>
</tr>
<tr>
<td>term</td>
<td>definition</td>
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<tr>
<td>syndrome</td>
<td>a group of signs and symptoms that frequently occur together, suggesting a common pattern of pathology, clinical course or treatment.</td>
</tr>
<tr>
<td>stress</td>
<td>a subjective sense of distress, usually associated with having to respond to a change in life events.</td>
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INTRODUCTION AND HISTORY

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[61.10] Introduction

Personal injury cases are common in modern litigation. Such injuries may be pursued within either a specific Workers Compensation Act or common law or both, depending on the context in which the injury occurred. The injury may result in physical or psychological impairment, or both, and in most cases an evaluation of the psychological/psychiatric aspects of the case will be essential.

This evaluation is needed to provide expert opinion on whether or not a psychological injury has been suffered, and if so, to describe the nature of the injury, the likelihood/timing of recovery, the need for treatment and the long-term effects of the injury.

This chapter clarifies the qualifications of a mental health expert and then explores some of the specific issues associated with work-related claims. This is followed by a review of the more general issues involved in the evaluation of psychological injury in both work and non-work-related contexts. Common diagnoses are explained. The complexity of the issues involved in a medicolegal evaluation of psychological injury is exemplified by a more detailed examination of three commonly encountered but often controversial diagnoses: Post Traumatic Stress Disorder, Post-concussion Syndrome and Chronic Pain. Readers are alerted to the nature of a competent clinical examination, with particular attention to the medicolegal setting, including the evaluation of cultural factors and possible malingering. Finally, recommendations are made regarding what to look for in a well-constructed, comprehensive medicolegal report by a mental health expert.

[61.20] Historical perspectives

In a case as early as the 14th century, English courts allowed recovery for emotional distress in the absence of any physical injury. The case concerned an innkeeper’s wife who was frightened when a patron threw a hatchet, nearly hitting her: Mendelson Elissa (1988).

By the late 1800s personal injury litigation was common, usually focused on railway accidents. In this era the term “railway spine” was introduced. Much heated debate, strikingly similar to that heard in modern times, took place about the validity of many of these claims.

In the 1870s “no fault” workers compensation law was developed in Germany and Austria. In Great Britain the Workers Compensation Act 1987 replaced an earlier and more limited Act. The intent of this new legislation was to protect workers, particularly those in dangerous trades.
By 1910 similar laws were enacted throughout Australia and the United States: Mendelson (1988).

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[61.30] The expert mental health witness

When calling an expert to testify about psychological or psychiatric injury, the lawyer will most commonly deal with a clinical psychologist or psychiatrist. An outline of their respective training and roles is in order.

A psychologist attends university, majoring in psychology, and initially receives a Bachelors degree. Most psychologists then complete a Masters degree in a specialised area. Specialisations include, for example, working with organisations, working with children in schools, studying animal behaviour, doing research on human behaviour, helping to improve sporting performance. Some psychologists will then go on to earn a doctoral degree in their specialty.

The level of qualification required for registration to practise as a psychologist varies from country to country. Australia has recently moved to a minimum 6 year level (Masters degree or higher) and is slowly phasing out the earlier “4 years +2” (Honours degree plus 2 years supervision). There is no current requirement for registration as a counsellor in Australia. In the USA, on the other hand, the title psychologist cannot be used without a doctoral degree, and counsellors are also required to be registered, with most licensed mental health workers holding a Masters degree.

Most commonly, compensation cases involve clinical psychologists, who have undertaken specialised postgraduate training (Masters or Doctoral degree) in the diagnosis and treatment of mental disorders. Education in clinical psychology typically includes training in administering and interpreting psychological tests.

Neuropsychology is an important subspecialty within the area of clinical psychology. Practitioners in this subspecialty have particular expertise in the assessment of head injury and damage to the brain. They have training in neuroanatomy, and in administering and interpreting a battery of psychological tests that have been well researched. Often these tests provide specific findings about the nature of brain injury and the degree of impairment a person has suffered (see Chapter 68, Forensic Neuropsychology).

A psychiatrist is a medical practitioner with a Bachelor of Medicine and Surgery degree, who, after several years of general medical training, undertakes training in psychiatry. Specialised study in psychiatry includes the diagnosis and treatment of mental illnesses, including training in the use of medication. (see Chapters 50 - 53 on Psychiatry)

Psychiatrists can specialise in a variety of areas. Common subspecialties include child and adolescent psychiatry, psychogeriatrics and adult psychiatry.
The terms “psychologist” and “psychiatrist” are legislatively prescribed and protected titles. Only people registered under the relevant health practitioner Acts in each State are entitled to use the title and to practise in that designated professional speciality. In this way psychologists and psychiatrists are differentiated from other generic roles, such as that of “counsellors”, who are not registered health practitioners.

Psychologists and psychiatrists are also identified by membership of professional societies that admit members on the basis of academic qualifications, thus giving public and professional recognition. In Australia, the peak society for psychologists is the Australian Psychological Society and for psychiatrists it is the Royal Australian and New Zealand College of Psychiatrists.

In this Chapter the term “mental health expert” refers to “psychologist” and “psychiatrist” unless otherwise specified.

[61.40] The mental health expert

It is important for lawyers to understand the difference between an evaluation conducted for clinical (treatment or rehabilitation) purposes and a medico-legal evaluation. Clinical evaluations are often conducted within a specific context of establishing treatment or management goals and identifying factors that are likely to enhance or complicate treatment outcome. The evaluation is often different from a medico-legal examination and may not examine issues relevant to legal questions, such as the relative contribution of pre-injury factors and the injury itself to the current symptoms.

Within clinical psychology and psychiatry, some practitioners have developed a subspecialty in medico-legal (forensic) work. Such practitioners have taken time to become well acquainted with the legal system, which often requires that they undertake further specialised and advanced training. This training usually includes, at a minimum, coverage of the following issues:

- study of the role of the expert witness and familiarity with the guidelines for expert witnesses provided by the various courts;
- awareness of the underlying principles of law;
- skill at applying legal questions to the discipline of psychology or psychiatry;
- familiarity with the role of solicitor and barrister;
- practice in communicating clearly to legal professionals; and
- an understanding of the common ethical dilemmas that emerge in this work.

[61.50] Choosing the mental health expert

The first choice the solicitor must make is whether to select a clinical psychologist or a psychiatrist or both as a prospective expert.

Both professionals are accepted by the courts as mental health experts entitled to provide testimony in the area of psychological and psychiatric diagnoses. In R v Whitbread (1995) 78 A Crim R 452 at 460 Hampel J said:

There is nothing in the definitions or the literature about the functions of psychologists and psychiatrists which differentiates between them on the basis that one has more or less understanding and knowledge of the nature and functioning of the mind in its normal or abnormal state.
However, each specialty has specific skills that can be more or less relevant to the case. Psychiatrists, for example, have more knowledge of the relevance of medical conditions and medications to the client’s psychological symptoms, while psychologists have specific expertise in the administration and interpretation of psychological tests. A competent psychiatrist knows when to consult a clinical psychologist, and the reverse is equally true. The seasoned expert is cautious to remain within her or his own area of expertise, and shows no reluctance to consult colleagues who could bring a different point of view to examining the problem.

In choosing a mental health expert, lawyers should be aware of the relevant qualifications required by an expert in this field, including specialist qualifications and membership of relevant professional bodies. They should request a copy of the prospective professional’s curriculum vitae with specific reference to relevant training or experience or research in cases similar to the one at hand. The professional’s reputation amongst peers is often accessible by discussion with other respected professionals in the field and other lawyers who have utilised her or his services. The lawyer should inquire about the mental health expert’s experience in providing expert testimony in both written and oral form and perusal of other medico-legal reports provided by this specialist is recommended.

The role of the mental health expert in psychological injury claims

Both plaintiff and defence lawyers typically retain psychologists, psychiatrists and other mental health experts in cases of psychological injury. The information provided by such experts can help to determine the validity of the psychological injury as well as the extent of impairment, the impact of impairment on an individual’s personal and social functioning, the individual’s prognosis, and the need for, and costs, of treatment. It can also address the extent to which there are pre-existing conditions and/or vulnerabilities that will alter the material contribution of the work-related event or events, relative to other factors (Young, 2007).

The opinions provided by mental health experts must have a strong foundation, being derived via a thorough review of any relevant documentation, comprehensive examination of the injured person, the application of valid and reliable assessment instruments where appropriate, and thorough knowledge of the scientific literature related to the individual’s purported psychological condition. It is the role of the expert witness to advocate for his or her data and conclusions, rather than for a particular party, and irrespective of who has retained him or her (Kane, 2006).

Defining mental disorder

Mental disorder is a syndrome characterised by clinically significant disturbance of an individual’s cognitive, emotion regulation, or behaviour that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are typically associated with significant distress or disability in social, occupational or other important activities: American Psychiatric Association (2013). The diagnosis of a mental disorder must be clinically useful in assisting clinicians to determine prognosis, treatment plans and potential outcomes for their clients.

Distinction between mental disorder and general medical condition

One of the difficulties inherent in using the term “mental” is that is suggests that there are clear boundaries between physical and psychological “mental” functioning. Contrary to this however, empirical evidence indicates a close interactive relationship between mental disorders and physical or biological factors or processes, as well as associations between general medical conditions and the behavioural or psychosocial factors or processes: American Psychiatric Association (2004, 2013).
[61.190] Classifying mental disorders

The two major classification systems currently in worldwide usage are the Diagnostic and Statistical Manual of Mental Disorders (DSM) (American Psychiatric Association (2013)) and the International Statistical Classification of Diseases and Related Health Problems: Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines (ICD-10) (World Health Organisation (1992-1994[SP5])). Both are commonly used in Australia and the choice of system will depend on the preference of the treating clinician and the setting where he or she works.

Authors preparing the most recent editions of both the DSM and ICD have worked closely for harmonization; harmonisation between the classification systems in terms of their use of classification codes and the compatibility of the wording and terms between the two systems (Sadock, Sadock & Ruiz, 2015). The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines (ICD-10) (World Health Organisation (1992-1994)) forms part of the ICD-10 International Statistical Classification of Diseases and Related Health Problems (World Health Organisation (1992-1994); (1992)) which describes a wide range of health concerns, physical illness and disease. The Diagnostic and Statistical Manual of Mental Disorders, commonly referred to as the DSM, is the standard diagnostic reference source for mental health professionals of all disciplines and is routinely used in clinical practice and is widely cited for disability, insurance and forensic matters. The current version of the DSM (DSM-5) provides an alternative list of both the ICD-9-CM and ICD-10-CM equivalent codes for each disorder.