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Post-Traumatic Stress Disorder Claims in Auto Accident Cases: Assessing Damages, Proving Claims, Leveraging Experts

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Overview

I. Introduction (broad definition of PTSD, situations where PTSD may arise)

II. Legal Considerations (civil procedure, evidence (i.e., FRE 702), HIPAA/42 CFR Part 2, cross/direct exam, segway into experts)

III. PTSD - an expert discussion (DSM V criteria, medical record documentation, forensics, etc.)

IV. Best Practices for substantiating causation and proving damages

V. Take-Aways

What is Post-Traumatic Stress Disorder (PTSD)?

Evolution, Definition

Essential Features of PTSD

- Not congenital.
- “The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity: or witnessing or learning about a similar event in relation to a closely connected person.
- The initial injury is caused by external events.
- PTSD is a condition where physical harm to the hippocampus and the medial prefrontal cortex results when a person experiences PTSD stimuli.

Evolution of the Term

- Initially, the focus was on war and the impact on male soldiers.
- Hieroglyphs were found on walls showing a battle and the aftermath.
- In the United States, the cluster of symptoms associated with a person's response to an extreme, traumatic stressor was first documented during the Civil War and was called "Da Costa's Syndrome."
- 1920s and 1930s
 - The same cluster of symptoms were called "shell shock" during World War I.
 - The medical community recognized that shell shock occurred in children and women following a history of mental, physical and/or sexual abuse.
 - Erskine Caldwell's books "God's Little Acre" and "Tobacco Road" disclosed these abuses as the norm. Still denial by communities
- World War II coined the term "gross stress reaction."
- 1960s and 1970s – the APA published a diagnosis of PTSD because of the severity of the impairment after Vietnam. PTSD requires a traumatic event, but a traumatic event does not always cause a mental disorder. The traumatic event must be associated with mental illness that followed.
- 1980s – APA published diagnostic criteria.

Common Types of Psychological Trauma That Cause and/or Trigger PTSD

- Rape (sometimes referred to as RR-PTSD or Rape-Related Posttraumatic Stress Disorder)
- Assault (verbal and physical) (NOTE: because of the staggering prevalence of abuse, it may be the most common cause of PTSD in American women, affecting more than double the number of women as men)
- Combat (19% of Vietnam Veterans experienced PTSD at some post-war point)
- **Accidents**
- Disasters
 - Manmade
 - 911
 - BP Deepwater Horizon Oil Spill (NOTE: The Gulf Study, which is being conducted by NIEHS included PTSD and other psychological disorders)
 - Natural
 - Tsunami
 - California Fires

Scenarios that Can Cause a Triggering Event

- Diminishing the condition
- Blindsiding a person with PTSD with questions related to his/her trauma
- Saying that the event in question (e.g., the diagnosis or the current work place harassment) did not occur,
- Accusing the person of lying,
- Transference (verbal abuse, touching someone in a sensitive area)

What Does PTSD Feel Like?

- Symptoms vary from person to person.
- There is both a physical and a mental component, similar to a concussion.
- The best way to analogize it is to being “checked” during a hockey game and the player hits his head on the ice.

Translating Triggers to Different Environments

- Abusive behavior in educational, work and medical environments can cause “triggering events” and physical harm to PTSD sufferers.
- The concept of TRANSFERENCE.
- The AJC Article
 - Uncovered 450 cases of doctors who were brought before medical regulators or courts for sexual misconduct or sex crimes in 2016 and in 2017.
 - Nearly half of those cases, the doctors remained licensed to practice medicine, regardless of whether the conduct was inflicted upon employees or patients (adult and child)
 - Dr. Richard Martin Roberts is still examining patients in Texas even after the state medical board disciplinary panel in November 2017 found that he repeatedly conducted unwarranted genital exams on girls.
 - In 31 states, cases can be kept from public purview through private board actions.

How is it Diagnosed?

DSM Criteria

What is the DSM?

- The Diagnostic and Statistical Manual of Mental Disorders are criteria disseminated by the American Psychiatric Association.
- The diagnostic criteria are used by medical professionals to diagnose different psychiatric conditions including PTSD.
- Criteria changed from DSM-IV to DSM-V (2013) to DSM-V-TR (2022)

Diagnosing Changes in the Brain

- Positron Emission Tomography - PET Scan
 - PET scans of PTSD patients, compared to nondisabled patients, indicate decreased blood flow to the medial prefrontal cortex and increased blood flow to areas of the brain involved in memory and visuospatial processing.
- Functional Magnetic Resonance Imaging (fMRI)
 - Decreased blood flow to the frontal areas of the brain including the anterior cingulate gyrus and the medial frontal gyrus, as well as the medial prefrontal cortex,.
- NOTE: Like people who suffer concussions, people with PTSD will have varying imaging results. Importantly, the image could change after therapy. Absence of the items above DOES NOT MEAN that a person does not have PTSD.
- Look for hypothalamic-pituitary-adrenal axis abnormalities.
- Biological chemistry associated with PTSD differs from the biology of ordinary stress.

The Federal Rules of Civil Procedure That Govern Depositions & FRE 702

FRCP 26, 30-32

FRCP 26

- (3) *Pretrial Disclosures.*
- (A) *In General.* In addition to the disclosures required by [Rule 26\(a\)\(1\)](#) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:
 - (i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;
 - (ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and
 - (iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

FRCP 30 – Depositions by Oral Exam

- (B) *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.
- (C) *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

FRCP 30 – Part II

- (c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.
- (1) *Examination and Cross-Examination*. The examination and cross-examination of a deponent proceed as they would at trial under the [Federal Rules of Evidence](#), except Rules [103](#) and [615](#). After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.
- (2) *Objections*. An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).
- (3) *Participating Through Written Questions*. Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

FRCP 31 – Written Depositions

- (a) When a Deposition May Be Taken.
- (1) *Without Leave*. A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under [Rule 45](#).
- (2) *With Leave*. A party must obtain leave of court, and the court must grant leave to the extent consistent with [Rule 26\(b\)\(1\) and \(2\)](#):

FRCP 32 – Using Depositions in Court

- (a) Using Depositions.
- (1) *In General*. At a hearing or trial, all or part of a deposition may be used against a party on these conditions:
 - (A) the party was present or represented at the taking of the deposition or had reasonable notice of it;
 - (B) it is used to the extent it would be admissible under the [Federal Rules of Evidence](#) if the deponent were present and testifying; and
 - (C) the use is allowed by Rule 32(a)(2) through (8).

Expert Testimony and reports

- Rule 702 – 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:
 - 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;
 - The testimony is based on sufficient facts or data;
 - The testimony is the product of reliable principles and methods; and
 - The expert has reliably applied the principles and methods to the facts of the case.

Daubert

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993).
 - The 1993 United States Supreme Court landmark opinion that established standards for expert testimony.
 - Requires a “reliability of proof” and relevance.
 - **The *Daubert* Test (all four factors must be met or the expert may be disqualified)**
 - Whether a “theory or technique...can be (and has been) tested”;
 - Whether the theory or technique “has been subjected to peer review and publication”;
 - Whether, in respect to a particular technique, there is a high “known or potential rate of error” and whether there are “standards controlling the technique’s operation”; and
 - Whether the theory or technique enjoys “general acceptance” within a “relevant scientific community.”
- *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) – applied the *Daubert* Test to non-scientists.
- **RESULT for NOT meeting the Four Factors – not being qualified as an expert.**

STATE COURT PROCEDURAL CONSIDERATIONS

- Texas Civil Practice and Remedies Code
 - Sec. 74.351. EXPERT REPORT. (a) In a health care liability claim, a claimant shall, not later than the 120th day after the date each defendant's original answer is filed, serve on that party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the later of the 21st day after the date the report is served or the 21st day after the date the defendant's answer is filed, failing which all objections are waived.

PROPOSED CHANGES TO FRE 702

- Last year, the Advisory Committee on Evidence Rules [unanimously approved a proposal](#) to amend Rule 702. Specifically, FRE 702(d).
- The comment period for the amendment to the federal evidence rule on expert testimony closed in February 2022.
- These changes clearly establish the standard for admissibility of expert testimony, will likely be approved by the Supreme Court soon. Effective date - Dec. 1, 2023.
- Read FRE 702 in conjunction with FRE 104(a) – “trial judges are not limited to admissible “evidence” in making Rule 104(a) preliminary findings, and there was some concern expressed that including the term “evidence” in rule text could undermine the well-settled judicial flexibility to utilize whatever information is appropriate under Rule 104(a).”

Considerations When Interacting with Someone Who Has PTSD.

ABA Model Rules

Where to Look for Guidance

- ABA Model Rules
 - Use judgment, respect and sensitivity
 - Ethical and moral considerations are not exhausted
 - Emotional intelligence

Texas Rule 5.08

- **Rule 5.08 Prohibited Discriminatory Activities**
- (a) A lawyer shall not willfully, in connection with an [adjudicatory proceeding](#), except as provided in paragraph (b), manifest, by words or conduct, bias, or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any [person](#) involved in that proceeding in any capacity.
- (b) Paragraph (a) does not apply to a lawyer's decision whether to represent a particular [person](#) in connection with an [adjudicatory proceeding](#), nor to the process of jury selection, nor to communications protected as "confidential information" under these Rules. See [Rule 1.05\(a\)](#), [\(b\)](#). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:
 - (i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and
 - (ii) is conducted in conformity with applicable rulings and orders of a [tribunal](#) and applicable rules of practice and procedure.

Plaintiff

- Discuss whether or not the client wants to put a PTSD diagnosis “at issue” during the case.
- Adequately prepare the client for all types of questions, tones, even tough ones where defense counsel (or the government) may accuse them of lying;
- Do not “blind-side” the client during a deposition or alternative dispute resolution process by allowing defense counsel or an ombudsman to question the client about their past without having prepared them for this ahead of time;
- Advise the client to go to a therapist for counseling before, and after a deposition, ADR or judicial proceeding;
- Consider having an emotional support animal present;
- Appreciate that you, as the lawyer, may observe the client going through a range of emotions, as well as transitioning from a victim to a survivor; and
- NEVER tell a victim of trauma who has been diagnosed with PTSD, who has finally overcome viewing themselves as a victim to having a voice and becoming a survivor to act as a victim.

Defense

- Don't ask a question that you don't know the answer to;
- Make subpoena requests specific;
- Put yourself in the plaintiff's shoes or your son/daughter, sister/brother, spouse;
- Always explain the process to the witness; and
- Listen to the witness and be courteous.

Post-Traumatic Stress Disorder Claims in Auto Accident Cases

Keyhill Sheorn, MD
May 2022

DSM 5 Criteria for PTSD

Readily available information



how do i know if i have ptsd quiz?



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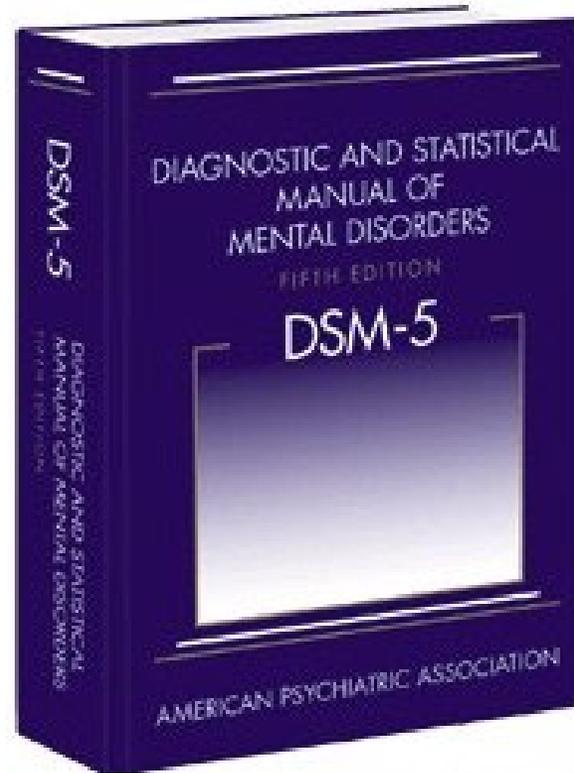
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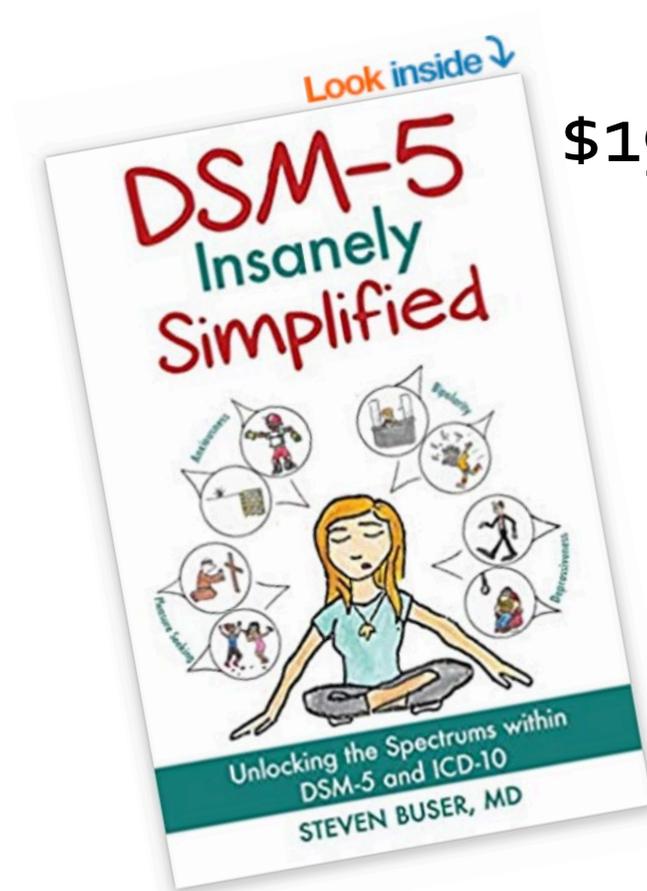
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PCL-5

PCL-5

Instructions: Below is a list of problems that people sometimes have in response to a very stressful experience. Please read each problem carefully and then circle one of the numbers to the right to indicate how much you have been bothered by that problem in the past month.

<i>In the past month, how much were you bothered by:</i>	<i>Not at all</i>	<i>A little bit</i>	<i>Moderately</i>	<i>Quite a bit</i>	<i>Extremely</i>
1. Repeated, disturbing, and unwanted memories of the stressful experience?	0	1	2	3	4
2. Repeated, disturbing dreams of the stressful experience?	0	1	2	3	4
3. Suddenly feeling or acting as if the stressful experience were actually happening again (as if you were actually back there reliving it)?	0	1	2	3	4
4. Feeling very upset when something reminded you of the stressful experience?	0	1	2	3	4
5. Having strong physical reactions when something reminded you of the stressful experience (for example, heart pounding, trouble breathing, sweating)?	0	1	2	3	4
6. Avoiding memories, thoughts, or feelings related to the stressful experience?	0	1	2	3	4
7. Avoiding external reminders of the stressful experience (for example, people, places, conversations, activities, objects, or situations)?	0	1	2	3	4
8. Trouble remembering important parts of the stressful experience?	0	1	2	3	4
9. Having strong negative beliefs about yourself, other people, or the world (for example, having thoughts such as: I am bad, there is something seriously wrong with me, no one can be trusted, the world is completely dangerous)?	0	1	2	3	4
10. Blaming yourself or someone else for the stressful experience or what happened after it?	0	1	2	3	4
11. Having strong negative feelings such as fear, horror, anger, guilt, or shame?	0	1	2	3	4
12. Loss of interest in activities that you used to enjoy?	0	1	2	3	4
13. Feeling distant or cut off from other people?	0	1	2	3	4
14. Trouble experiencing positive feelings (for example, being unable to feel happiness or have loving feelings for people close to you)?	0	1	2	3	4
15. Irritable behavior, angry outbursts, or acting aggressively?	0	1	2	3	4
16. Taking too many risks or doing things that could cause you harm?	0	1	2	3	4
17. Being "superalert" or watchful or on guard?	0	1	2	3	4
18. Feeling jumpy or easily startled?	0	1	2	3	4
19. Having difficulty concentrating?	0	1	2	3	4
20. Trouble falling or staying asleep?	0	1	2	3	4

PCL-5

	Not at all	A little bit	Moderately	Quite a bit	Extremely
<i>In the past month, how much were you bothered by:</i>					
1. Repeated, disturbing, and unwanted memories of the stressful experience?	0	1	2	3	④
2. Repeated, disturbing dreams of the stressful experience?	0	1	2	3	④
3. Suddenly feeling or acting as if the stressful experience were actually happening again (as if you were actually back there reliving it)?	0	1	2	3	④

**All of the Criteria, but not all of the
symptoms.**

Criterion A - Stressor

Criterion A - Stressor

The person was exposed to death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence.

Criterion A - Stressor

DSM IV-TR

There was a '*threat to the physical integrity of self or others*'

Criterion A - Stressor

DSM IV-TR

There was a threat *and* *'their response involved intense fear, helplessness, or horror.'*

Criterion A - Stressor

DSM 5

The person was exposed to a serious threat
and . . .

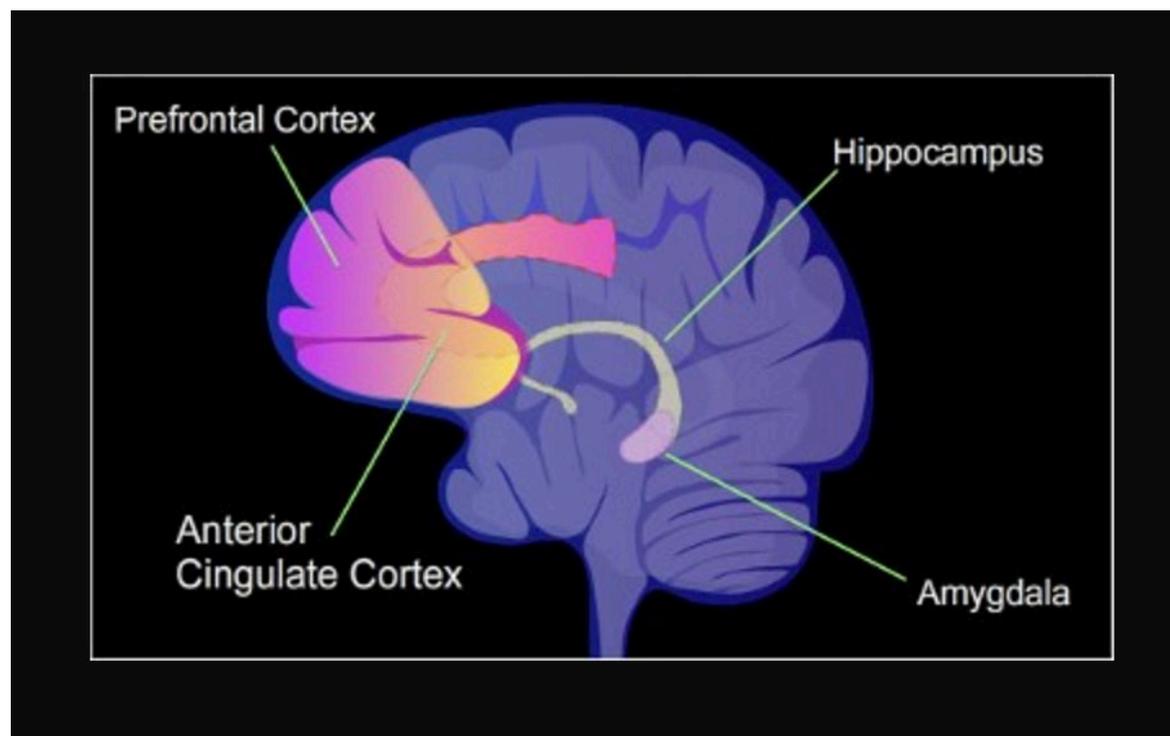
Criterion A - Stressor

DSM 5

... 'he was shocked beyond his tolerance and reacted with abject horror.'

Criterion B - Intrusion

Recurrent, involuntary, and intrusive memories, dreams, and flashbacks. Dissociative reactions (flashbacks) can be brief or a complete loss of consciousness. The episodes are accompanied by intense emotional or physiological distress.



Criterion C - Avoidance

Persistent attempts to avoid reminders of the trauma. Typical claims are about crowds or the grocery store. Think instead of small mirrors or carts.

Criterion D

Negative Alterations in Cognitions and Mood

There can be an inability to recall key features of the traumatic event. There is a pervasive despair about the world and people in general – the world is not a good place and I am not a good person for something like this to have happened.

Criterion E

Alterations in Arousal and Reactivity

Irritable, irrational behavior due to the hyper-alertness for danger.

Criterion F

Duration of the disturbance is more than one month.

Criterion G

The disturbance causes significant distress or impairment socially.

Criterion G

"I don't love my little boy anymore and it makes me want to die."

Criterion G

The disturbance causes significant distress or impairment occupationally.

Criterion G

"The car caught on fire and I remember the pain of burning. Sometimes, I have a flashback at work and I scream like a woman. It's just humiliating and I feel so bad for the young men there who look up to me to be their boss. So, I just don't go ."

Criterion G

The disturbance causes significant distress or impairment in other important areas of functioning.

Criterion G

"I'll just be feeding my dogs and and when the metal spoon hits the metal bowl – it just, it just, I can't say it what that sound is, it's too awful. I think they're hungry all the time because I don't like to feed them anymore."

Criterion H

The disturbance is not attributable to the physiological effects of a substance (eg medication, alcohol) or another medical condition.

Criterion H

The disturbance is not attributable to medication or alcohol. For example, psychotropics, street drugs, alcohol. Even if the claimant is drinking excessively because of the accident, that variable still needs to be weeded out before you can accurately assess them for PTSD.

Criterion H

The disturbance is not attributable to another medical condition.

Criterion H

'Other conditions that may be a focus of clinical attention.'

Malingering

Malingering

Pure

Malingering

Pure

Partial

Malingering

Pure

Partial

False Imputation

Alternative diagnoses

Acute stress disorder

Adjustment disorder

Anxiety disorder 2*medical condition

Bereavement

Bipolar I and II

Depression

Factitious disorder

Generalized anxiety disorder

Malingering

Personality Disorder

Panic Disorder

Phobic avoidance

Post-concussive syndrome

Psychotic Disorder

Social anxiety disorder

Substance-induced mood d/o

Motivators

Secondary gain issues.

Tertiary gain issues.

Professional's motivations.

latrogenic

Iatrogenic

(adj) adverse effect or complication caused by or resulting from medical treatment or advice.

Critogenic

Critogenic

(adj) adverse effect or complication caused by or resulting from the legal process.

Treatment



Acute Injuries Heal Acutely



Trauma-focused Modalities

Individual therapy

Group Therapy

EMDR (Eye Movement Desensitization and
Reprocessing)

CBT

Psychotropic Medications

Antidepressants - Sertraline (Zoloft); Paroxetine (Paxil); Fluoxetine (Prozac); Venlafaxine (Effexor)

Antipsychotics – Seroquel

Anticonvulsants – Gabapentin, Lamictal

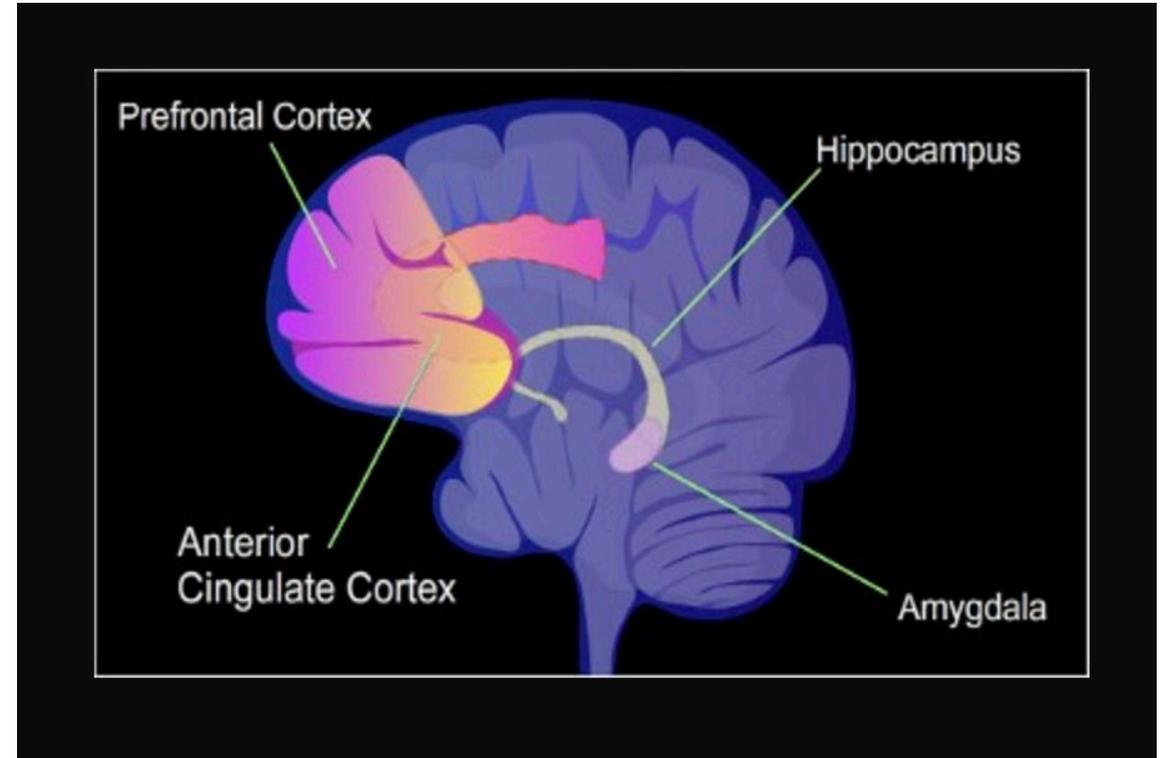
Psychotropic Medications

Antihypertensives- Propranolol, Prazosin

Antihistamines – Hydroxyzine

Psychotropic Medications

*Benzodiazepines are
contraindicated!*



Psychotropic Medications

'Bupropion, citalopram, divalproex, mirtazapine, tiagabine, topiramate, aripiprazole, divalproex, guanfacine, and olanzapine failed to differentiate from placebo when combined with an antidepressant.'

Ultimately,

we all want what is best for the claimant.

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PTSD from Motor Vehicle Accidents

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A Forensic Approach
To Assessment of Psychiatric/Psychological
Disability and Co-morbid Claims



Use of Diagnosis

- “It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability”
- Diagnostic and Statistical Manual of Mental Disorders (5th Edition)

**Peer Reviews and Independent
Examinations:
Four Critical Areas of Assessment**

Clinical / Medical Factors

Motivational Factors

Situational Factors

Occupational Factors

Challenges for Personal Injury counsel in proving PTSD claims

A diagnosis most often relied upon by treatment providers through self-report of claimant.

Opposing counsel will likely critique treatment providers' foundations for conclusions.

Treatment provider data
versus
IME data

- Similarities and Differences

Attending Physician Data

Likely:

- Claimant's reported experience of the trauma
- Mental Status Exam
- Claimant's clinical/medical history (prior knowledge or self-report) and limited test results
- Clinical Observations
- Knowledge of occupational status
- Review of other providers' records - limited
- Knowledge of current psychosocial status - limited

Attending Physician Data

Less likely:

- Knowledge of incentive to resume work
- Data from collateral contacts (family)
- Data regarding capacity or incapacity for functioning
- Optimal (detailed) treatment plan
- Return to work plan

Expected Data from IME

- Mental Status Exam
- History of Current condition
- Diagnosis
- Diagnosable condition at time last worked
- Past history: social, academic, legal, occupational
- Prior history of diagnoses
- Pre-existing limitations

Expected Data from IME

- Record review (as complete as possible)
- Psychological testing
 - Cognitive and Psychiatric Status
 - Effort/Validity Measures
- Discussion
 - Ability to work in own or any occupation
 - Specific periods of temporary impairment
 - Causation/Etiology of symptoms
 - Optimal treatment plan
 - Return to work plan

Challenges for Personal Injury counsel in proving PTSD claims

- A diagnosis often relied upon by other Experts largely through self-report of claimant with minimal validity and reliability testing.
- Opposing counsel will likely critique Experts' foundations for conclusions and focus on utility and interpretations of tests, missing data, and inconsistent data.

Expectations Regarding PTSD

- Clinical Course
- Timing of Onset of symptoms and claimant's awareness of symptoms
- Efficacy of Treatment – If not effective, why not?
- Realistic symptoms psychologically and cognitively

Expectations Regarding PTSD

- Appropriate changes or augmentation to treatment
- Functional Capacity consistent with nature and degree of symptoms?
- Alternate, more parsimonious explanations for reported symptoms?

A Few Examples of Lack of Reliable Evidence in a PTSD Claim

- The claimant's performance on measures of validity,
- inconsistencies between his report and that of his psychiatrist,
- a lack of confirming medical records,
- unusual circumstances characterizing the claimant's presentation,
- the claimant's alleged exposure to trauma is minimal, and unlikely to produce PTSD even in an individual whose presenting circumstances are otherwise credible.

Working with Experts to Establish Presence of Psychiatric Disorder, Causation, and Severity of Impairment

- While suggestions may be made for specific psychometric tests, encourage the use of that expert's standard battery (adapted to referral questions).
- Provide expert with *all* available, relevant data.
- Consider Medical Record or Peer Review first to establish strength of data and concerns over missing data.
- Consider a review of the draft IME report by an independent expert to address foundation for opinions, ambiguities, and inconsistencies.

Take-Aways

- Obtain an accurate diagnosis from a qualified expert.
- Is the diagnosis manifested in levels of impairment – whether social or occupational.
- Hire the right damages expert that takes the information tailored to the individual.
- Keep a pulse on FRE 702 and the potential changes.

Thank You

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