defense UPDATE

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HIGHLIGHTS OF THE NEW IOWA RULES OF APPELLATE PROCEDURE– WHAT CIVIL PRACTITIONERS SHOULD KNOW

By: Thomas D. Waterman, Lane & Waterman LLP, Davenport, IA[1]

"A lot changed. A lot hasn't." Those words were on the free commemorative beer mugs provided at my 25th college reunion, and aptly describe the first major revision in 35 years to the Iowa Rules of Appellate Procedure. The amended rules became effective January 1, 2009 and govern appeals filed on or after that date. *See* October 31, 2008 Order entered by Chief Justice Marsha Ternus ("In the Matter of Amendments to Chapter 6 of the Iowa Court Rules"). The "former" rules continue to govern appeals filed in 2008 and earlier. The new rules and the Order adopting them are available at www.iowacourts.gov.[2] This article reviews key differences between the new and former rules.

Justice Darrell Hecht chaired the committee that revised the appellate rules, which are now far more user friendly and better organized than the former rules. The new rules are renumbered and regrouped logically. A "Table of Corresponding Numbers" is provided to cross-reference the former rules to equivalent or comparable provisions in the new rules. The new rules are accompanied by timelines and importantly, new forms (including a Notice of Appeal) and tables listing the many technical requirements for the form and content of briefs.

Many of the changes are intended to address recurring problems. The thrust of the revisions is to make life easier for the appellate courts, and some of the specific changes will make life easier for appellate practitioners as well. For example, the five day period for filing a cross-appeal is extended to 10 days after filing of a notice of appeal, or within the 30 day limit for filing the appeal, whichever is later. Iowa R. App. P. 6.10(2)(b). Other noteworthy changes are addressed topically.

Interlocutory Appeals

The new rule requires the application to "state with particularity the substantial rights affected by the ruling or order, why the ruling or order will materially affect the final decision, and why a determination of its correctness before trial on the merits will better serve the interests of justice." Rule 6.104(1)(d). To assist the appellate court with "triage," the application shall in the caption prominently display beneath the title the "date of any impending hearing, trial, or other matter needing immediate attention of the court[.]" *Id*.

The new rules confirm that the mere filing of an application for interlocutory appeal does not stay district court proceedings. Rule 6.104(1)(f). The rule specifically provides that the applicant may apply to the Supreme Court for a stay or may apply to the district court for a continuance or stay of proceedings while the application is pending (which sometimes may be months).

"Docketing" Eliminated

Countless motions for extensions were based on delays in obtaining transcripts. Accordingly, the new rules eliminate the concept of "docketing the appeal." Briefing deadlines are now computed from the date the clerk gives notice that the last transcript ordered for the appeal has been filed. Rule 6.901(1)(appellant's brief shall be filed within 50 days). If no transcript is ordered, the time for filing briefs runs from the date of the filing of the combined certificate or an approved statement of the evidence. *Id.* The time for filing a combined certificate is extended from four to seven days after the notice of appeal. Rule 6.804(1) The court reporter is to file the transcript within 40 days of the combined certificate. Rule 6.803(3(c). The Supreme Court clerk is to provide notice of the briefing deadline. Rules 6.803(6) & 6.901(1)(a). Shorter deadlines apply for child-in-need-of-assistance and termination-of-parental-rights cases which are beyond the scope of this article. Fees have increased for all filings.

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[1] The author thanks his associate Eric Long for his assistance in preparing this article.

[2] Click on "Court Rules and Forms" on the Iowa Judicial Branch home page and navigate to "Recent Amendments & New Rules" where they can be downloaded. West Publishing will issue a paper supplement including the new appellate rules this spring.

Inside This Issue

MESSAGE FROM THE PRESIDENT

Megan Antenucci

The economic crisis in our country makes these challenging times for the defense practitioner and our clients. While many industries are contracting, cutting staff and expenses, the defense bar is in greater demand to assist clients facing these cuts and business challenges. Of course, our own firms and companies are also wrestling with economic realities. One common threat we all face is budget cuts so deep in state government that the Iowa Court System may be unable to provide the basic administration of justice.

Chief Justice Ternus and her staff have reached out to the many legal organizations across the state for ideas and support in facing potential cuts, cuts through to the bone of the Iowa Judicial Branch. Meetings have been held, and the Court has solicited ideas from lawyers and judges in leadership positions to tap the vast reservoir of experience and insight from all of those groups. The Court should be commended for its openness and inclusiveness in its planning for fallout from the economic downturn and reduced revenues in Iowa. I have participated on behalf of you, the members of the Iowa Defense Counsel Association.

The Judicial Branch budget comprises approximately 3% of the overall state budget. The base budget for FY2009 was $152.4 million. Of its overall expenses, 95% of costs are for salaries and related expenses. This figure does not include training, travel, etc., only the basic costs of employees serving those in need of court services within our borders. The Governor's proposal for cost reductions by the Judicial Branch currently stands at $2.5% between now and the end of the fiscal year this summer. That equates to approximately $3.8 million in cuts in the next five months.

For FY2009-2010, the current proposal is a deep cut of $6.5% from the Judicial Branch. This proposal has been made even though some executive department agencies are exempt from the cuts. Those exempt include the Department of Corrections and the Department of Public Safety. The Judicial Branch, likewise, should receive full funding and join corrections and public safety in being spared the budget ax, due to the indispensable need for court services. Many state agencies have program funds they can cut in lieu of cutting staff. The Judicial Branch, on the other hand, cannot stop or significantly reduce the unique services that courts are constitutionally required to provide. It is essential that the fundamentals of governing our state, including the administration of justice, are strong, especially in tough times such as these.

The Judicial Branch has always been a team player when budget estimates are grim, as it should. In fact, this third branch of government is currently operating with 7% less employees that it had in fiscal year 2000. In other words, the courts have never made up for the deep cuts in the past, particularly those from FY2002-2005. So, according to Chief Justice Ternus, the looming cuts proposed by Governor Culver's office, if implemented as proposed, will mean the court system will not be able to meet the needs of Iowa's residents. To make any meaningful cost reductions, courts must be closed for unpaid furlough days or additional staff must be terminated. While already functioning at a staffing level less than that of FY2000, furloughs are currently the prominent method of cost reduction. The first day courthouses were shuttered was experienced on February 16, 2009. The court has also curtailed travel by judges and court reporters, and reduced furniture, supplies and equipment purchases.

Civil jury trials in counties without a resident judge will take the full brunt of further furlough days. Other cases, such as criminal matters where speedy trial has not been waived and juvenile matters will have priority over civil jury trials. There is a potential for some 20 furlough days in FY2009-2010 if the 6.5% cut is implemented. Cases will simply be removed from the dockets and rescheduled when resources are available.

As to the general public, the Court states that budget cuts will harm individuals and communities because, "all roads of commerce and social concern lead to, and through, the courts." Examples of effects from budget cuts are:

- exacerbation of housing problems by impeding resolution of
- landlord/tenant and foreclosure cases;
- slowing down processing child support payments;
- delays in notice of protective orders to law enforcement;
- delays in contempt actions to enforce orders;
- delays in processing child support payments;
- delays setting temporary and permanent support and custody/visitation orders;
- delays in probation revocation hearings;
- delays processing warrant updates;
- delays processing no-contact and protection orders for victims;
- increased jail costs for counties and delays for those arrested;
- delays in processing mental health and substance abuse commitments, translating into longer stays in hospitals and higher costs for counties and delays for those needing treatment;
- delays in processing garnishments;
- delays filing liens.

Justice Ternus has advised that the Judicial Council and the Iowa Supreme Court have decided to organize and extensive study of the use of modern multitrack digital recording devices as a method for making a record of court proceedings. Contrary to early rumors, this is a long-range project. Depending on the progress and conclusions of the study, it is possible that one or more pilot projects using digital recording devices could occur in FY2010. If a determination is made that digital recording for making a record of court proceedings is advantageous and a cost saving move, the court anticipates implementation of digital recording on a permanent basis would not begin until FY2011 or later, according to the Chief Justice.

The Iowa Defense Counsel Association supports full funding for the Judicial Branch for FY2009-2010. The Governor included this amount in his proposed budget to the Legislature, so it takes legislative action to implement the 6.5% reduction being discussed. That reduction should not occur. Given the relatively small size of the Judicial Branch budget, the dollars necessary are not large to allow the Courts to function properly and serve the vital role needed and mandated in Iowa.

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WHAT CIVIL PRACTITIONERS SHOULD KNOW . . . *continued from page 1*

New Requirements for Briefs

Counsel must take note of multiple changes in the rules governing the form and content of briefs. Specific requirements are set forth on margins, pagination, minimum font sizes, typeface requirements (including "serifs"), colors of the covers, and required certificates. Rule 6.901(1). The court staff reviews incoming briefs for compliance with the technical requirements, and you risk a phone call requesting a corrected filing or worse, an order striking your brief, if it is noncompliant. Read the new rules carefully, and supervise your staff appropriately.

The 50 ***page*** limit for briefs has been replaced by a 14,000 ***word*** limit for briefs using proportionally spaced typeface or 1,300 lines of text for monospaced typeface. Rule 6.903(g). A certificate of compliance with those limits is now required. *Id*. Reply briefs are half the length of the opening briefs, as before. *Id*. The new measures for length were prompted by practitioners who fudged on page limits by cramming text into single-spaced footnotes and quotations[3] or by eliminating paragraph breaks. Your computer will count the words. Note that headings, footnotes and quotations are to be counted, but not the table of contents, table of authorities, statement of issues, and certificates. Rule 6.903(1)(g). *In Hilsman v. Phillips*, 2009 WL 249885 (Iowa Ct. App. Feb. 4, 2009), Judge Doyle rebuked counsel for using too small a typeface and other gimmicks, stating:

> Upon reading the plaintiffs' brief and reply brief, this court's weary eyes suspected the typeface was a wee bit small. Upon investigation, it was determined the briefs utilized a 12 point Times New Roman typeface, not 13 point as required by Iowa Rule of Appellate Procedure 6.16(1) (2008) when using Times New Roman typeface. In addition, only one space was used at the end of each sentence, rather than the customary two spaces. With the high volume of reading faced by this court, techniques that cram more words to a page, whether employed by design, accident, or ignorance, make our job more difficult and are thus frowned upon. We wholeheartedly agree with one legal writer who stated:
>
> Large type is a must. Judges read many, many briefs. Large type is easy to read—no, let me rephrase that: Large type is a *joy* to read! When I get a brief with large margins, large type, and plenty of white-space, I savor it as one might a fine wine or a vintage port. Other judges feel the same way. So, even if your appellate court's rules do not require "14-point or *larger*"…do not try to squeeze words in, by either shrinking the type size, by decreasing the margins, or by narrowing the space between the lines. Lawyers who believe that they are helping their clients by jamming in more words are making a big mistake.
>
> Ralph Adam Fine, *The "How-To-Win" Appeal Manual* 18 (Juris Publishing 2000). Hopefully, the revised rules of appellate procedure 6.903(1)(e); (g), and 6.1401-Form 7; Certificate of Compliance with Type-volume Limitation, Typeface Requirements, and Type-Style Requirements, effective January 1, 2009, will eliminate this problem.
>
> *Id*. at *9. Don't risk such an admonition in your appeal.

References to legal authorities in briefs have been revised. Parties no longer need to underline "the most pertinent and convincing" authorities listed under each issue presented for review. *Compare* Rule 6.903(2)(c) *with* former Rule 6.14(1)(c). Parties no longer need to cite to the parallel citation in the Iowa Reporter if the case is published in the Northwestern Reporter. *Compare* Rule 6.904(2) *with* former Rule 6.14(5). The rules governing citation to unpublished authorities have also changed. Rule 6.904(2)(c) now permits citation to unpublished decisions of agencies and trial courts, as well as appellate courts, if the decision "can be readily accessed electronically." Westlaw is given as an example. It is unclear whether a decision can be cited that is not available on Westlaw or Lexis, but is available online (such as a federal court ruling accessible to nonparties through the PACER fee-based system). **Practice pointer:** if you have such decision, contact Westlaw to get it "published" on that service (email: west.attysubmissions@thomson.com). The new rules eliminate the requirement found in former Rule 6.14(5)(b) that the party attach the "unpublished" decision to the brief and certify that diligent search was conducted for any subsequent disposition.

A statement of the facts is now explicitly required for the appellant's brief. Rule 6.903(2)(f). Citations to the record in proof briefs must now include the line as well as page number of transcripts, and the same is true in final briefs if the transcript is not included in the appendix. Rule 6.904(4). If the transcript is included in the appendix, only the appendix page number need be provided. Rule 6.904(4)(b). Appellate jurists complain that some lawyers mischaracterize testimony, and that record support is sometimes difficult to find for factual assertions in the brief. The new requirement of pinpoint citations to transcript lines as well as page numbers is intended to promote accurate briefing and citations to the record. **Practice pointer:** never misstate the record, and always provide a record citation for every fact. Your opponent will call the court's attention to any misstatements or unsupported factual assertions, and you will lose credibility if your recitation of the evidence is unsupported or contradicted by the record.

The Routing Statement has been moved up to precede the Statement of the Case. Rule 6.903(2)(d). **Practice pointer**: while we all tend to think our appeals are important, few cases meet the criteria for retention by the Iowa Supreme Court. If both parties request transfer to the Court of Appeals, that probably will happen. If you want the Supreme Court to retain the appeal, the Routing Statement should explain why the criteria for retention are satisfied. The criteria remain the same, and are now found in Rule 6.1101(2). A party must request either oral or nonoral submission. Rule 6.903(2)(i). A reply to a cross-appeal is now explicitly allowed. Rule 6.903(5) & (6).

Brief of *Amicus Curiae*

The new rules add specific criteria for allowing or disallowing a brief *amic*us *curiae.* Rule 6.906(4). The new rule targets problems including efforts to evade page limitations and the filing of unhelpful "me too" briefs by inter-

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[3] Rule 6.903(1)(d) expressly permits single-spacing for footnotes, headings, and quotations more than 40 words long.

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ests groups. *See* Rule 6.906(4)(b)(1) & (2). The appellate court "will ordinarily grant a motion for leave to file an amicus curiae brief" that supports a party who is unrepresented or inadequately represented, or when the "proposed amicus curiae has a direct interest in another case that may be materially affected by the outcome[;]" or can offer the court a "unique perspective or information that will assist the court in assessing the ramifications of any decision rendered in the present case." Rule 6.906(4)(a). A brief *amicus curiae* filed with the written consent of all parties may still be stricken by the appellate court if the criteria in new Rule 6.906(4) are not satisfied. *See* 6.906(4)(c). An *amicus curiae* brief is not allowed to raise issues that a party failed to preserve for appellate review. Rule 6.906(4)(b)(3).

New Requirements for the Appendix

A longstanding complaint of appellate jurists is that too many appendices are poorly indexed, making it difficult to find key parts of the record. The new rules require more detail in the table of contents. The table of contents shall name each witness whose testimony is included and the page where his or her testimony begins. Rule 6.905(4). Exhibits must be identified, not only by letter or number, but also by a "concise description." *Id*.

"Protected information" as defined in Iowa R. Civ. P. 1.422(1) (social security numbers, etc.) shall be redacted. Rule 6.110(1). Permissive redaction of other information is allowed consistent with Iowa R. Civ. P. 1.422(2). Parties can no longer omit "immaterial formal matter" such as captions, as had been allowed under former Rule 6.15(4). Copies of matters included in the appendix must be legible. Rule 6.905(3)(c). Take care that photographs are reproduced clearly. The name of the witness must be identified at the top of each page of the transcript. Rule 6.905(7)(c). **Practice pointer:** for "extra credit," indicate whether the witness is testifying on direct or cross examination at the top of each page, as required by federal local rules. Avoid the common mistake of including unimportant material in the appendix. The entire record is available to the appellate court.

Saving Trees

Under the new rules, parties need only serve one copy of their brief and appendix. Rule 6.901(8). Service may be made electronically with the written consent of the party to be served. Rule 6.701(4). Electronic filing is a few years away.

Oral Argument

Several existing practices are now codified. For example, lawyers that display exhibits or demonstrative aids during oral argument shall serve a copy on opposing counsel at least four days earlier and shall give copies to the bailiff to distribute to each member of the panel at oral argument when the attorney checks in. Rule 6.908(6). A party may file a notice of additional authorities not cited in the briefs. Only citations are to be given, without "further argument." Rule 6.908(5). Twelve copies of the notice are filed; one copy is served. *Id*. **Practice pointer:** if the additional authority relates to a specific issue in a multi-issue appeal, identify the argument section in your brief by division or subheading.

Applications for Further Review

The new rules require applications for further review and resistances to be reproduced on both sides of a page. Rule 6.1103(1)(c); 6.1103(2). This cuts in half the volume of paper the justices receive, and saves more trees. The color of the application's cover remains yellow, but the color of the cover of the resistance has been changed to orange. Rule 6.1103(3). The grounds for further review remain the same. Rule 6.1103(1)(b). Roughly ten percent of applications for further review are granted.

Conclusion

The former rules were poorly organized. The new rules are easy to navigate and a welcome, long overdue improvement. The new rules codify practices that assist the appellate courts. During the transition period, practitioners should also follow additional requirements of the new rules when handling appeals filed before 2009 that remain governed by the former rules. If the new and former rules conflict, obey the governing rules (for example, serve *two* copies of final briefs in appeals filed in 2008, and one copy for appeals filed in 2009). The appellate courts expect and appreciate compliance with their rules. Technical mistakes undermine your reputation for diligence and distract from the substance of your arguments. You therefore owe it to your clients and the appellate courts to carefully study the new rules. ■

POST TRAUMATIC STRESS DISORDER AND THE STATUTE OF LIMITATIONS

By: Michael W. Ellwanger, Rawlings, Nieland, Killinger, Ellwanger, Jacobs, Mohrhauser, Nelson & Early, LLP, Sioux City, IA

Matthew was deaf and also suffered from cerebral palsy. He entered the Iowa School for the Deaf in Council Bluffs in 1981 at age 4 and left the facility at age 7. Upon return to his home he engaged in deviant sexual behavior. In 1988, under intensive counseling, it was discovered that he had been subjected to physical and sexual abuse by the staff and older students at the school. His mother, Julie Callahan, immediately filed a claim against the state under the Tort Claims Act. The State of Iowa raised the two year statute of limitations. Plaintiff resisted urging that under the discovery rule the claim was not barred. She did not know and could not reasonably have discovered the abuse of her child until 1988. The District Court held that the claim was barred because Matthew knew immediately that he had been abused and who had abused him. The statute of limitations therefore began to run from the date of the abuse. *Callahan v. State*, 464 N.W. 2d 268 (Iowa 1990)

The statute of limitations issue in this case was governed by the Iowa State Tort Claims Act, then Chapter 25A and now Chapter 669, the Code. The Code provided that there was a two year statute of limitations after such claim accrued. The Supreme Court discussed the common law discovery rule in Iowa, and held that it would apply to state tort claims. Id at page 273. Consequently, a claim under the State Tort Claims Act does not accrue until the Plaintiff knows or in the exercise of reasonable care should have known both the fact of the injury and its cause. Id at page 273. The court further held that it was not the knowledge of the minor, but the knowledge of his mother, which must be analyzed to determine when the statute began to run. When did the mother know of her sons injury? The court held that there was a genuine issue of material fact concerning the application of the discovery rule. Motion for Summary Judgment was inappropriate.

Although it may not have been necessary to the decision in this case, Justice Larson discussed Post Traumatic Stress Disorder at some length. He stated that this phenomena causes victims to repress information regarding abuse and therefore makes discovery difficult. At page 271 of the opinion he quoted at length from a bar review article *Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation*, 50 Ohio St. L.J. 753, 756 - 57 (1989). The key quote from the law journal was as follows:

> A practical consequence is that the child may repress or delay disclosing the sexual abuse until after the pertinent personal injury statute of limitations has run.

Judge Larson referred to this as repression syndrome and stated that it has prompted courts to apply the discovery rule liberally in child sex abuse cases.

As a consequence of this and other decisions, a diagnosis of post traumatic stress disorder generates two possible defenses to the statutes of limitations. The first is repressed memory, which invokes the discovery rule. Section 614.8A provides that an action for damages for injuries suffered as a result of sexual abuse which occurred when the injured person was a child but not discovered until after the injured person is the age of majority shall be brought within four years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the sexual abuse. This is very similar to the common law discovery rule, except that the plaintiff is given four years after discovery. The plaintiff can allege that as a result of post traumatic stress disorder he had repressed memory and as a consequence did not discover his injury and the cause thereof until after he reaches the age majority. There are cases in which allegations have been made that a victim has had repressed memory, as a result of childhood abuse, for forty or fifty years. There are thus cases in which plaintiffs have brought claims for childhood sexual abuse when the plaintiffs are in their sixties or older.

The Iowa Supreme Court, in *Callahan*, appears to endorse the concept of repressed memory. However, the Courts support for the conclusion that post traumatic stress disorder causes repressed memory is not current scientific literature, but a law review journal.

This article is not intended to be a discussion of repressed memory. Repressed memory is a theoretical concept which basically means that a significant memory usually of a traumatic nature, has become unavailable for recall. See Encyclopedia of Psychology, American Psychological Association. It is a controversial subject. There has been considerable litigation over the accuracy or validity of repressed memories. Suffice to say that post traumatic stress disorder can, in the eyes of some experts, create repressed memory and repressed memory can lead to an extension of time under the statute of limitations. It should be noted that at least one court has held that an individual cannot simply say that he does not remember and that he therefore must have repressed memory. It must be supported by expert testimony. *Duffy v. Father Flannagan'is Boys'í Home,* 2006 WL208832-Nebraska Federal District Court (The plaintiff must have scientific testimony establishing the validity of the repressed memory phenomenon and that he suffered from the condition preventing him from discovering the abuse).

A second way in which post traumatic stress disorder can lead to an extension of the statute of limitations is found in Section 614.8(1). That Section provides that the time to file a lawsuit is extended in favor of persons with mental illness, so that they shall have one year from and after the termination of the disability within which to commence an action. A plaintiff can allege that he has post traumatic stress disorder, that this is a mental illness and that as a consequence the statute of limitations should be extended.

Previous Iowa case law has consistently held that this statute does not avail a plaintiff unless the mental illness is so severe that the plaintiff does not know and understand his rights and, as a consequence, is unable to file his lawsuit. *Darrow v. Quaker Oats Co.*, 570 N.W. 2d 649, 651 (Iowa 1997); *Borchard v. Anderson,* 542 N.W. 2d 247, 249-250 (1996);

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Langer v. Simpson, 533 N.W. 2d 511, 523 (Iowa 1995); *Altena v. Altena*, 428 N.W. 2d 315, 317 (Iowa App. 1988); *Dautremont v. Broadlawns Hospital*, 827 Fed. 2d 291, 296 (8th Cir. 1987).

The test was stated most explicitly in *Langner*, 533 N.W. 2d 523:

The statute of limitations is not tolled if the person has a mental illness not rising to the level of a disability, such as to prevent the person from filing a lawsuit. In short, the disability must be such that the plaintiff is not capable of understanding the plaintiffs rights.

One case which recently dealt with this issue is *Kraft v. St. John Lutheran Church of Seward, Nebraska*, 414 Fed. 3rd 943 (8th Cir. 2005). In that case, a primary care physician and a psychologist diagnosed the student with post-traumatic stress disorder and further opined that the child did not connect his abuse with his symptoms. However, the student had earlier disclosed the abuse to his wife as an explanation for marital discord, had been told by his counselor that his problems likely stemmed from abuse, reported the abuse to the principal, and also hired an attorney to negotiate a settlement with the school. The Nebraska Discovery Rule was similar to that of Iowa. Discovery occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis for the cause of action. The Court held that the plaintiff'is various mental disorders did not render him incapable of understanding legal rights or instituting a legal action and thus were not the type of mental disorders contemplated by Nebraska law. The student was able to communicate the facts of his abuse and evaluate some of its effects on his life. He worked as a bank supervisor, handled business and financial affairs and made healthcare decisions.■

IDCA SCHEDULE of EVENTS 2009

APRIL 3, 2009
IDCA Spring CLE Seminar
Marriott Coralville Hotel & Conference Center
300 East 9th Street, Coralville, IA
8:30 a.m.–4:30 p.m.
Topic: Insurance Issues & Bad Faith

APRIL 3, 2008
IDCA Board Meeting
Marriott Coralville Hotel & Conference Center
300 East 9th Street, Coralville, IA
11:30 a.m. Full Board Meeting/Luncheon

(Please dial (800) 228-9290 or (319) 688-4000 for the Marriott Coralville Hotel & Conference Center and state "IDCA" room block for the $109 room rate.)

JUNE 4-5, 2009
IDCA Trial Academy
9:00 a.m.–5:00 p.m.
Drake University Law School
2400 University Avenue, Des Moines, IA

(Please dial (515) 255-4000 for The Holiday Inn Express, 1140 24th St., DSM, for the evening of 2/4 and 2/5 and state 'Iowa Defense Counsel' room block for $84 room rate.)

JUNE 12-13, 2009
DRI Mid-Region Meeting
Embassy Suites on the River
101 East Locust Street, Des Moines, IA
Hosted by Iowa

(Please Dial (515) 244-1700 for the Embassy Suites on the River For the evenings of 6/11 &/or 6/12 and state "DRI" room block for the $159 room rate.)

JUNE 12, 2009
IDCA Board Meeting
8:30 a.m. Executive Committee
9:30 a.m. Full Board Meeting/Luncheon
Embassy Suites on the River
101 East Locust Street, Des Moines, IA

(Please Dial (515) 244-1700 for the Embassy Suites on the River For the evenings of 6/11 &/or 6/12 and state "DRI" room block for the $159 room rate.)

SEPTEMBER 16, 2009
IDCA Board Meeting & Dinner
3:00 p.m. Executive Committee
4:00 p.m.–8:00 p.m. Full Board Meeting/Dinner
West Des Moines Marriott
1250 Jordan Creek Pkwy., West Des Moines, IA

(Please dial (515) 267-1500 for the Marriott reservations for the evenings of 9/16 & 9/17 and state "IDCA: for the room rate of $119/night.)

SEPTEMBER 17-18, 2009
44th Annual Meeting & Seminar
West Des Moines Marriott
1250 Jordan Creek Pkwy.
West Des Moines, IA
8 :00 a.m.–5:00 p.m. both days

OCTOBER 7-11, 2009
DRI Annual Meeting
Chicago, IL

DECEMBER 11, 2009
IDCA Board Meeting & Lunch
10:00 a.m. Executive Committee
11:00 a.m. Board Meeting
Location: TBD

IDCA WELCOMES NEW MEMBERS

Jason M. Craig
Ahlers & Cooney, P.C.
Des Moines, IA

Laura J. Ostrander
Gislason & Hunter, LLP
Des Moines, IA

Kami L. Holmes
Swisher & Cohrt, P.L.C.
Waterloo, IA

Vidhya K. Reddy
Nyemaster, Goode, West, Hansell & O'Brien
Des Moines, IA

POST-TRAUMATIC STRESS DISORDER AS A COMPENSABLE INJURY:

HOW IOWA COURTS SHOULD LIMIT RECOVERY OF DAMAGES IN PERSONAL INJURY AND WORKERS' COMPENSATION CASES

By: Tara Lawrence, 3rd year law student at Drake University and law clerk at Whitfield & Eddy, West Des Moines, IA

Post-Traumatic Stress Disorder (PTSD) is a highly prevalent and impairing condition.[1] The criteria for the PTSD diagnosis are arguably becoming easier to satisfy and there has been an increase in the number of people diagnosed with PTSD.[2] With the increase in the diagnoses of PTSD, claims for compensation for psychological injury due to PTSD will likely become more prevalent in civil litigation. Society has already seen how what was once a diagnosis specifically tailored to meet the needs of war veterans is now being used by plaintiffs in personal injury and worker's compensation litigation.[3]

The mental health and legal communities have long been involved in debate about the validity of the PTSD diagnosis and the use of PTSD by plaintiffs in civil litigation. Merely because the mental health community has recognized PTSD as a valid mental disorder does not necessarily confirm that PTSD should be a compensable injury in civil litigation. The symptoms of the PTSD diagnosis can be easily feigned or exaggerated and, therefore, there is a greater chance that plaintiffs will fraudulently claim they suffer from the disorder. Because there are concerns that courts could be manipulated and over-burdened with fraudulent claims, the law should instill and enforce safeguards in order to protect the integrity of the legal system. Courts should not allow the unbridled use of PTSD as a compensable injury but should place restrictions and limits on a plaintiff who is seeking to recover damages for their PTSD.

THE DEVELOPMENT OF POST-TRAUMATIC STRESS DISORDER

A History of PTSD: What It Is and Where It Came From

Trauma-induced stress disorders have been studied since the Civil War, albeit under different names.[4] During the Civil War, stress disorders suffered by combatants were called "irritable heart" or "disorderly action of the heart."[5] During World War I, it was diagnosed as "shell shock," and in World War II, it was known as "war neurosis" or "combat fatigue."[6] The modern label, PTSD, is a by-product of the Vietnam War.[7]

Psychiatrists who examined military personnel returning home from the Vietnam War diagnosed the veterans as having disorders such as an anxiety state, depression, substance misuse, personality disorder, or schizophrenia.[8] Early proponents of the diagnosis of PTSD lobbied hard for veterans to receive specialized medical care under the new diagnosis, which became the successor to the older diagnoses of battle fatigue and war neurosis.[9] The diagnosis of PTSD was developed partly as an attempt to normalize the psychological, cognitive and behavioral symptoms observed in many traumatized people.[10] It redefined the symptoms of the disorder as a normal response to an abnormal event rather than a pathological condition.[11] The new diagnosis was meant to shift the focus of attention from the details of a soldier's background and psyche to the fundamentally traumatic nature of war.[12] This was a powerful and essentially political transformation: Vietnam veterans were to be seen not as perpetrators or offenders but as people traumatized by roles thrust on them by the U.S. military.[13] As one psychiatrist explained, "PTSD legitimized their "victimhood," gave them moral exculpation, and guaranteed them a disability pension because the diagnosis could be attested to by a doctor."[14]

Understanding the foundation and development of the diagnosis of PTSD is essential in order to fully appreciate the implications this diagnosis has had on not only the world of psychiatry but on the legal community as well. What was once a diagnosis crafted for war veterans, in order to enable them to receive a disability pension and other health benefits, has now become a diagnosis sought after by plaintiffs in civil litigation in order to recover compensatory damages.[15]

PTSD Makes its Appearance in the DSM

The formal introduction of PTSD into the psychiatric nomenclature came only in 1980 with the Third Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III).[16] The DSM-III described PTSD as a constellation of

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[1] Ronald C. Kessler, Ph.D., *Posttraumatic Stress Disorder: The Burden to the Individual and to Society*, 61 J. CLIN. PSYCHIATRY 1, 4-12 (2000); C.R. Brewin, B. Andrews & J.D. Valentine, *Meta-Analysis of Risk Factors for Posttraumatic Stress Disorder in Trauma-Exposed Adults*, 68 J. Concult. Clin. Psychol. 748, 748-66 (2000)("In several community studies in the world, more than 80% of individuals have been exposed to severe trauma. Nevertheless, PTSD is seen in less than 10% of cases. The more severe the trauma is, the greater the possible development of the disorder. However, even in instances of serious trauma, not all people develop the disorder. Furthermore, not all psychological distress or psychiatric disorders after trauma should be termed post-traumatic stress disorder"); C. B. SCRIGNAR, M.D., POST-TRAUMATIC STRESS DISORDER: DIAGNOSIS, TREATMENT, AND LEGAL ISSUES (1984) at vii; N. Brunello, J. Davidson, & M. Deahl et al., *Posttraumatic Stress Disorder: Diagnosis and Eidemiology, Comorbidity and Social Consequences, Biology and Treatment*, 43 Neuropsychobiology 150, 150-62 (2001) ("PTSD is not an inevitable consequence of a severe or life-threatening trauma.")

[2] Alain Brunet et al., *Don't Throw Out the Baby with the Bathwater* (PTSD Is Not Overdiagnosed), 52 CAN. J. PSYCHIATRY 8, 501-02 (August 2007).

[3] Derek Summerfield, *The Invention of Post-Traumatic Stress Disorder and the Social Usefulness of a Psychiatric Category*, 322 BMJ 95, 95-8 (2001)(http://bmj.com).

[4] James T. Brown, *Compensation Neurosis Rides Again: A Practitioner's Guide to Defending PTSD Claims*, 63 DEF. COUNS. J. 4, 467-82 (1996); Dan J. Stein et al., Post-traumatic Stress Disorder: Medicine and Politics, 369 LANCET 139, 139-44 (2007).

[5] F.W. Furlong, *Looking for a Biological Marker When PTSD is Claimed*, 59 DEF. COUNS. J. 588 (1992).

[6] *Id*. at 588.

[7] Brown, *supra* note 4 at 469; Scrignar, *supra* note 1 at 3-5.

[8] MARTIN I. KURKE & ROBERT G. MEYER, PSYCHOLOGY IN PRODUCT LIABILITY AND PERSONAL INJURY LITIGATION (1986) at 188; *see, e.g.* HOWARD MERSKEY, THE ANALYSIS OF HYSTERIA, London, Great Britain (Gaskell Press 1995).

[9] *Id*.

[10] Ronald C. Kessler et al., *Past Year Use of Outpatient Services for Psychiatric Problems in the National Co-morbidity Survey*, 156 AM. J. PSYCHIATRY 115, 115-23 (1999).

[11] *Id*. at 118.

[12] *Id*.

[13] *Id*. at 123.

[14] *Id*.

[15] Kessler, *supra* note 1 at 7; *see also* Roger A. Reich, *PTSD and the Law*, 9 PTSD RES. Q. 2, Spring 1998 (Nat'l Center for Post-Traumatic Stress Disorder, White River Junction, Vt.) at 1-3.

[16] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd ed., American Psychiatric Press)(1980). The DSM-IV is considered the diagnostic "bible" in the psychiatric field. The DSM is published by the American Psychiatric Association and provides diagnostic criteria for mental disorders. The DSM is used by professionals as a means of communicating with others the symptoms and disorders of the mentally ill.

POST-TRAUMATIC STRESS DISORDER AS A COMPENSABLE INJURY . . . *continued from page 7*

characteristic symptoms that developed "following a psychologically traumatic event that is generally outside the range of usual human experience."[17] Many argue that even after its introduction into the DSM, the disorder was seen only as a normal response to an extraordinary event.[18] Nowadays, however, the predominant view in psychiatric publications is that PTSD is a medical disorder, characterized by particular psychological dysfunction.[19]

The required diagnostic criteria for a PTSD diagnosis were initially set forth in the DSM-III[20], however, today the Fourth Edition of the DSM (DSM-IV) specifies the diagnostic criteria for PTSD.[21] According to the DSM-IV, for a diagnosis of PTSD to be made, the victim must experience a traumatic event, i.e. "Criterion A."[22] The traumatic event needs to have involved a response of "intense fear, helplessness, or horror" to "actual or threatened death or serious injury, or a threat to the physical integrity of self or others."[23] The victim of a trauma must also evidence a cluster of symptoms for at least one month and the disturbance must cause "clinically significant distress or impairment" in important areas of function.[24] The three clusters of symptoms involve persistent re-experiencing, persistent avoidance/numbing, and a persistent increase in arousal.[25]

The three primary symptom clusters in PTSD are structured so that an individual need only present with a partial set of the full list for a cluster to meet threshold requirements for diagnosis.[26] In the case of persistent re-experiencing, only one of five ways of expressing the category must be evident on examination, although more than one may be present.[27] This allows for substantial individual variability in symptom expression.[28] In the next category, persistent avoidance, the minimum of symptoms needed is three, but the list from which they can be drawn from is longer, involving seven symptoms.[29] Finally, for persistent increased arousal, two or more of five symptoms satisfy the criterion.[30]

The most controversial of these criteria has been "Criterion A," the traumatic event or stressor.[31] The drafters of each successive edition of the DSM have struggled with its definition. The DSM-III originally defined the traumatic event as "a recognizable stressor that would evoke significant stress in almost everyone."[32] This definition was redrafted in the Third Edition-Revised of the DSM (DSM-III-R) to state: "the person had experienced an event that is outside the range of usual human experience and would be markedly distressing to almost anyone."[33] The publication of the DSM-IV in 1994 brought yet another definition of the

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[17] Scrignar, *supra* note 1 at vii.
[18] R. Yehuda & A.C. McFarlane, *Conflict Between Current Knowledge about Posttraumatic Stress Disorder and its Original Conceptual Basis*, 152 AM. J. PSYCHIATRY 1705, 1705-13 (1995); GERALD YOUNG, ANDREW W. KANE & KEITH NICHOLSON, PSYCHOLOGICAL KNOWLEDGE IN COURT: PTSD, PAIN, AND TBI (2006) at 55.
[19] Stein et al., *supra* note 4 at 139; Yehuda & McFarlane, *supra* note 18 at 1705; See also Dan J. Stein, Philosophy and the DSM-III, 32 COMPR. PSYCHIATRY 404, 404-15 (1991).
[20] AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 16; James J. McDonald, Jr., *Posttraumatic Stress Dishonesty*, 28 EMP. REL. L. J. 4, 93-111 (Spring 2003); Kurke & Meyer, *supra* note 8 at 188
[21] Young, Kane & Nicholson, supra note 18 at 55; AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., American Psychiatric Press)(1994) at 424-429.

309.81 DSM-IV Criteria for Posttraumatic Stress Disorder

A. The person has been exposed to a traumatic event in which both of the following have been present:
(1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others
(2) the person's response involved intense fear, helplessness, or horror.
B. The traumatic event is persistently re-experienced in one (or more) of the following ways:
(1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions.
(2) recurrent distressing dreams of the event.
(3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur upon awakening or when intoxicated).
(4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
(5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:
(1) efforts to avoid thoughts, feelings, or conversations associated with the trauma
(2) efforts to avoid activities, places, or people that arouse recollections of the trauma
(3) inability to recall an important aspect of the trauma
(4) markedly diminished interest or participation in significant activities
(5) feeling of detachment or estrangement from others
(6) restricted range of affect (e.g., unable to have loving feelings)
(7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)
D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:
(1) difficulty falling or staying asleep
(2) irritability or outbursts of anger
(3) difficulty concentrating
(4) hypervigilance
(5) exaggerated startle response
E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than one month.
F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

[22] *Id*.
[23] *Id*.; Young, Kane & Nicholson, *supra* note 18 at 138; Gillian Mezey, *Post-Traumatic Stress Disorder and the Law*, 5 PSYCHIATRY 7, 243-47 (2006).
[24] AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 21; Young, Kane & Nicholson, *supra* note 18 at 138.
[25] AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 21; Young, Kane & Nicholson, *supra* note 18 at 57.
[26] Young, Kane & Nicholson, *supra* note 18 at 57.
[27] *Id*.
[28] GERALD YOUNG, ANDREW W. KANE & KEITH NICHOLSON, CAUSALITY OF PSYCHOLOGICAL INJURY: PRESENTING EVIDENCE IN COURT (2007) at 55-56.
[29] Young, Kane & Nicholson, *supra* note 18 at 55-56.
[30] *Id*.
[31] *Id*.
[32] AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 21.
[33] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd ed. Rev., American Psychiatric Press)(1987).

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traumatic stressor.[34] The DSM-IV states "Criterion A" as:

> "The person has been exposed to a traumatic event in which both of the following were present: (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others, and (2) the person's response involved intense fear, helplessness, or horror."[35]

"Criterion A" is important because it essentially serves the gatekeeper function. If a person has not been subjected to an acceptable trauma then their other symptoms are irrelevant and they will not be diagnosed with PTSD. Many plaintiffs hoping to be compensated for their psychological injury seek out the PTSD diagnosis; they want to put a label on their pain. Being diagnosed with PTSD is a way of explaining to others, and especially judges and juries, what your pain is and, possibly, what caused it.

A traumatic stressor must be dramatic and severe in order to justify a PTSD diagnosis.[36] As one commentator has noted: "Most clinicians agree that the stressor event is not an inconsequential happening but represents a realistic threat to life or limb."[37] The DSM-IV-TR sets forth a list of examples of stressors that would qualify under "Criterion A."[38] It includes

> "military combat; violent personal assault; being kidnapped or taken hostage; being a victim of a terrorist attack; torture; natural or manmade disasters, or severe automobile accidents; being diagnosed with a life-threatening illness; and observing the serious injury or unnatural death of another person due to violent assault, accident, war, or disaster."[39]

The three most frequent traumatic categories involve (a) witnessing a bad injury/death, (b) fire/flood/natural disasters, and (c) life-threatening accidents.[40]

With each revision of the diagnostic criteria much debate has followed. Some critics have argued that the diagnostic criteria for PTSD have increasingly become easier to satisfy (e.g., fewer psychiatric symptoms required, more variability allowed in an individual's symptoms, more occurrences satisfying the traumatic event criteria, etc.), and that "what was once a well-defined, well-characterized condition, has currently expanded from the consequences of terrifying battles to the outcome of purported forgotten abuse in childhood."[41] Of course, there are some who argue that with the publication of the DSM-IV a major change occurred in the definition of "trauma" which made the diagnostic criteria *more difficult* to satisfy.[42] These arguments may be legitimate, however, more importantly both camps agree that the number of people diagnosed with PTSD is increasing.[43] This increase in the diagnoses of PTSD has fueled the fires of those who question the validity of the PTSD diagnosis. Many professionals in the mental health and legal communities have entered the debate as to whether PTSD is a valid diagnosis deserving of its DSM classification and whether the law should recognize PTSD as a compensable injury in civil litigation.

QUESTIONING THE VALIDITY OF THE PTSD DIAGNOSIS

PTSD: A Product of Discovery or Invention?

One of the main criticisms of the PTSD diagnosis is that it has been constructed out of sociopolitical ideas rather than psychiatric ones.[44] Psychiatrist Derek Summerfield argues that "PTSD is an example of the role society and politics play in the process of invention rather than discovery."[45] Summerfield claims that the PTSD diagnosis was created in order to remove the stigma from war veterans and guarantee Vietnam veterans a disability pension.[46] Further, he argues that "a psychiatric diagnosis is primarily a way of seeing, a style of reasoning and (in compensation suits or other claims) a means of persuasion and that it is not at all times a disease with a life of its own."[47]

However, most psychiatric conditions reflect changes in human thinking over time.[48] For example, some argue that changes in the political climate and fashion were more influential than advances in medical research in altering the categorization of homosexuality as a disease.[49] Furthermore, PTSD has had a secure place in successive editions of the DSM.[50] A perusal of any edition of the Manual shows that PTSD is not the only disorder that is shaped as much by social concepts as by psychiatric ones – for example, see antisocial personality disorder.[51] Moreover, the fact that the PTSD diagnosis has been internationally recognized is an indication of its usefulness and perceived validity.[52]

Much of the criticism surrounding the PTSD diagnosis has been focused on the sometimes indiscriminate use of the diagnosis in civil litigation and the apparent growth of a "trauma industry."[53] PTSD is an increasingly common psychiatric disorder for which compensation can be recovered and, therefore, it is routinely seen in

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[34] AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 21 at 424.
[35] *Id.* The latest edition of the DSM is the Fourth Edition, Text Revision, however, there were no changes made to the diagnostic criteria in this new edition of the DSM.
[36] McDonald, *supra* note 20 at 95.
[37] Scrignar, *supa* note 1 at 16.
[38] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. Text Revision, American Psychiatric Press)(2000) at 463-64.
[39] *Id.* at 463-64.
[40] Mezey, *supra* note 23 at 244.
[41] Harold Merskey, M.D., F.R.C.P.C. & August Piper, M.D., *Posttraumatic Stress Disorder is Overloaded,* 52 CAN. J. PSYCHIATRY 8, 499-500 (August 2007).
[42] Brunet et al., *supra* note 2 at 501.
[43] *Id.* Although, both sides differ as to the cause of this increase in PTSD diagnoses.
[44] Summerfield, *supra* note 3 at 97.
[45] *Id.*
[46] *Id.*
[47] *Id.*; N. Sartorius, *International Perspectives of Psychiatric Classification*, 152 BR. J. PSYCHIATRY 9, 9-14 (1988).
[48] Sartorius, *supra* note 47 at 11.
[49] Summerfield, *supra* note 3 at 97; Sartorius, supra note 47 at 11.
[50] Summerfield, *supra* note 3 at 97.
[51] *Id.*; Sartorius, *supra* note 47 at 13.
[52] *Id.*
[53] A. Ehlers, R. Mayou & B. Bryant, *Psychological Predictors of Chronic PTSD After Motor Vehicle Accidents*, 107 J. ABNORM. PSYCHOL. 508, 508-19 (1998); Scrignar, *supra* note 1 at 24 ("The diagnosis of PTSD has spawned a growth industry in compensation and tort action.")

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civil litigation.[54] The high level of skepticism surrounding individuals who claim to have PTSD arises, at least in part, from the high level of compensation, or secondary gain[55] associated with successful litigation.[56]

Malingering is "the intentional production of false or exaggerated symptoms."[57] In its pure form, the symptoms and disability are entirely fabricated, whereas in its partial form, some basis exists for the psychiatric or physical complaints.[58] With malingerers there is the possibility that not only the disorder, but the trauma history itself, have been fabricated.[59] It is generally assumed that the malingerer is motivated by external gain, such as financial compensation, avoidance of legal responsibility, etc., and that they are being knowingly deceptive.[60] Fictitious Disorder is another concern.[61] Fictitious Disorder is the "intentional production or feigning of symptoms in which the individual's motivation is assumed to be the sick role."[62] Unlike the malingerer, their conscious awareness of the feigned or exaggerated nature of their complaints is generally more restricted.[63]

Arguably, the potential for exaggeration of psychiatric symptoms and disability is greater because of the opportunities a PTSD diagnosis gives for secondary gain, either in terms of avoiding criminal prosecution or being awarded substantial financial sums.[64] These arguments are hard to deflect when cases such as *Johnson v. TPI Restaurant, Inc.* are returning large verdicts for small and seemingly unlikely "traumatic" events.[65] In *Johnson v. TPI Restaurant, Inc.*, a man who claimed that an allergic reaction to soup caused his PTSD was awarded $4,078 in medical expenses by a Florida jury.[66] However, all mental disorders are prone to malingering and exaggerated symptoms, if not completely fabricated, when there are secondary gains.[67] This is not unique to PTSD.[68]

PTSD as a Compensable Injury

Questions surrounding the validity of the PTSD diagnosis may be legitimate concerns. Society should not naively accept anything and everything that the mental health community has determined is a disease or a disorder. We should not assume that what is appropriately categorized as a mental disorder by the mental health community in the DSM is therefore undoubtedly a compensable injury under the law. Many people, and not just war veterans, have been exposed to severe trauma which is not of their own fault and have suffered as a result. These people may appropriately be diagnosed with Post-Traumatic Stress Disorder. Those diagnosed with PTSD may also have legitimate personal injury or workers' compensation claims for their injuries. However, the law needs to instill safeguards in order to protect the courts from being manipulated and over-burdened by those people who do not legitimately suffer from PTSD and who make fraudulent claims in order to recover financial gains.

CIVIL LITIGATION & THE SAFEGUARDS COURTS MUST ENFORCE

PTSD and its Popularity

PTSD is a popular diagnosis in civil litigation because, unlike other common psychiatric disorders such as depression, it is incident-specific and it establishes a causal relationship between a given event and the resulting psychopathology.[69] A PTSD diagnosis tends to rule out other factors potentially involved in causation.[70] Therefore, through PTSD, plaintiffs attempt to establish that their psychological problems arise from an alleged traumatic event and not from a myriad of other possible sources.[71]

PTSD is a disorder that has captivated the attention of the legal profession in the area of damage awards for psychological injury, in some part perhaps by providing plaintiffs a more tangible way of expressing "pain and suffering" inflicted by injury.[72] Historically, the law and the courts have resisted claims for psychological injuries and have been reluctant to accept pain and suffering as compensable entities, fearing a flood of litigation involving tenuous claims for mental disorders.[73] Understandably, physical defect related to trauma occupied the principle attention of judges and lawyers because physical injury was observable and could be objectively measured.[74] The less tangible emotional accompaniment of a trauma is difficult to describe and quantify, and for many years the judiciary was unwilling to accept psychological or mental injuries of an accident as a compensable entity.[75]

Perhaps more than any other psychological or medical disorder, PTSD has influenced, and been influenced by, the law.[76] PTSD is

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[54] Mezey & Robbins, *supra* note 57 at 561-63.
[55] Secondary gain can be almost any benefit a plaintiff receives from successful litigation. These benefits could be monetary as in compensatory or punitive damages in civil litigation or could be a lesser jail sentence or avoiding prosecution all together in a criminal case. Another secondary gain is often attention, care and support from others.
[56] Mezey, *supra* note 23 at 247.
[57] *Id.*
[58] *Id.* at 244.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Mezey, *supra* note 23 at 244.
[63] *Id.*
[64] *Id.*
[65] *Johnson v. TPI Restaurant Inc.*, 798 So. 2d 901, 908 (Fla. 5th DCA 2001); "*Claim That Soup Led to PTSD Lands Small Award*," THE NAT'L LAW JOURNAL 26.25 (Feb. 23, 2004).
[66] *Johnson*, 798 So. 2d at 908; THE NAT'L LAW JOURNAL, *supra* note 65. The plaintiff will only see $407.78 of that verdict, however, after factoring in his 90% fault.
[67] Brunet et al., *supra* note 2 at 501-02.
[68] *Id.*
[69] Scrignar, *supra* note 1 at 24; Although this paper is limited to a discussion of PTSD in the context of civil litigation, it is important to mention that PTSD may also be used in criminal proceedings to excuse or mitigate an individual's actions, thereby reducing their responsibility for the offense and the penalties arising from it. Mezey, supra note 23 at 243.
[70] R. Slovenko, Legal Aspects of Post-Traumatic Stress Disorder, in PSYCHIATRIC CLINICS OF NORTH AMERICA 17, 439-446 (1994).
[71] *Id.*
[72] Young, Kane & Nicholson *supra* note 21 at 55.
[73] Brown, *supra* note 4 at 467; Scrignar, *supra* note 1 at 138.
[71] Scrignar, *supra* note 1 at 138.
[75] *Id.*
[76] *A.A. Stone, Post-traumatic stress disorder and the law: Critical review of the new frontier*, in BULLETIN OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, 21, 23-

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demonstrating an ability to influence the current tort system, both economically and doctrinally.[77] The diagnosis is being used to erode traditional legal restrictions and barriers to recovery.[78] If the right of recovery for mental distress negligence cases without physical impact or injury would be firmly established, it would naturally result in a flood of litigation in cases where the alleged injury complained of may be easily feigned without detection, and the damages would rest on mere conjecture or speculation.

The Court's Role in Protecting the Integrity of the Legal System

Judges and lawyers are not sheltered from the discourse of psychiatric professionals and other individuals in the mental health community. They are aware of the criticisms and concerns regarding the use of PTSD as a compensable injury in civil litigation. It is essential that safeguards are in place to protect the legal system. Some courts have already taken action to limit or minimize the ability of plaintiffs to use PTSD as a compensable injury in civil cases, either directly or indirectly.[79] The most drastic action a court could take would be to completely eliminate the right to recover pain and suffering damages for a psychological injury. Short of eliminating the right to recover for PTSD, courts could (1) require the presence of a physical injury, (2) require expert testimony, (3) increase the burden of proving causation, and (4) reduce or cap compensatory and punitive damages. Furthermore, there are many other alternatives courts could use in order to limit or minimize compensation for psychological injuries such as PTSD.

Require the Presence of Physical Injury

There are many commentators and defense attorneys that believe the PTSD diagnosis is eagerly sought by plaintiffs looking to cash in on their misfortune.[80] Of course, as with any injury, illness or defect, the diagnosis of PTSD is susceptible to a plaintiff's false or exaggerated symptoms.[81] Because of the nature of this mental disorder and the opportunity for secondary gain, some plaintiffs may claim to suffer from PTSD and attempt to fraudulently recover damages.

Therefore, the law should require plaintiffs to present with a physical injury in order to be compensated for PTSD. In Iowa, a tort recovery for emotional distress is allowed only if accompanied by some physical injury.[82] This requirement does of course restrict some people from being compensated who may genuinely have a serious mental disorder. However, such a minimum threshold protects the legal system from being over-burdened by plaintiffs who cannot prove the causal connection between his or her injury and the accident, and from plaintiffs who may simply feign the mental disorder.[83]

Require Expert Testimony

It is essential for the law to require plaintiffs to present expert testimony regarding not only the degree of injury but the causal connection between the injury and the defendant's actions. In Iowa, plaintiffs are required to establish by expert medical testimony a causal connection between the defendant's fault and the claimed emotional distress.[84] Not only must the law require expert testimony, but judges, juries, and lawyers must closely scrutinize an expert's testimony and opinion.

For compensation-seeking claimants there will inevitably be an emphasis on persisting psychological damages and deficits, rather than resilience and recovery.[85] In some instances the legal process and more specifically the promise of financial compensation may promote and even prolong legitimate psychiatric symptoms.[86] PTSD can be easily coached or simulated and the lawyers and fact-finders alike must meaningfully examine the expert's testimony as well as the plaintiff's.

Courts should limit or exclude a plaintiff's use of expert psychiatric testimony if the evidence does not satisfy the admissibility standards. Iowa courts resist allowing the expert testimony unless they are convinced it will "aid the trial process."[87] An expert's inadequate training or experience may also be a basis for excluding (or even just narrowing) the testimony of a proffered expert.[88] Therefore, not only must courts require expert testimony, but they should also ensure that the expert testimony that is proffered is relevant and reliable.

Judges have the ability to determine which experts, if any, are competent to testify or provide other evidence. The exclusion of a plaintiff's expert testimony can be catastrophic to the plaintiff's case. Under Iowa's law, excluding the plaintiff's expert who would testify to causation would essentially foreclose the plaintiff from proving causation and meeting his or her burden of proof.[89] Although this appears to be a strict standard, it is necessary in order to protect the integrity of the court system.

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36 (1993).

77 Brown, *supra* note 4 at 467; see also A.O. Chan et al., *Posttraumatic stress disorder and its impact on the economic and health costs of motor vehicle accidents in South Australia*, 64 J. CLIN. PSYCHIATRY 175, 175-81 (2003).

78 Brown, *supra* note 4 at 477.

79 *See Roling*, 596 N.W.2d at 73; *see also Warner v. Moore*, 2006 Iowa App. LEXIS 140 (Iowa Ct. App. Feb 15, 2006); Aldridge v. D.W. Newcomer's Sons, Inc., 2003 Iowa App. LEXIS 509 (Iowa Ct. App., June 13, 2003); *France v. LAASER*; The Wholistic Health Services of Sioux City, P.C., 1989 WL 393994 (Sept. 1989).

80 McDonald, *supra* note 20 at 93.

81 *Id*.

82 *See Roling*, 596 N.W.2d at 73; *see also Warner*, 2006 Iowa App. LEXIS 140; *Aldridge*, 2003 Iowa App. LEXIS 509; *France*, 1989 WL 393994. Iowa courts have recognized exceptions to this requirement in circumstances not relevant to the discussion in this paper.

83 However, a purely mental injury may be compensable under Iowa's workers' compensation laws in the absence of an accompanying physical injury. *See Asmus v. Waterloo Comm. School Dist.*, 722 N.W.2d 653, 656-57 (Iowa 2006).

84 *See Roling*, 596 N.W.2d at 73; *see also Warner*, 2006 Iowa App. LEXIS 140; *Aldridge*, 2003 Iowa App. LEXIS 509; *France*, 1989 WL 393994.

85 Mezey, *supra* note 23 at 243; *see also Roling v. Daily*, 596 N.w.2d at 75; *Albers v. Gentry*, 2006 Iowa App. LEXIS 287, *15 (Iowa Ct. App., March 29, 2006)(expert psychiatric witness testified: "[c]ertainly this is a permanent impairment. There is therapy that is being rendered and medications, but this condition takes years to correct and oftentimes is permanent.")

86 Young, Kane & Nicholson, *supra* note 21 at 55, 79 ("An increasing number of studies have identified that PTSD symptom severity in injury populations is often higher in those who are undergoing litigation procedures."); *see also* Ehlers et al., *supra* note 53 ("A recent study provides strong evidence for the negative impact on mental health of seeking compensation on a non-veteran population. In this study of 997 road traffic accident victims, PTSD was found in a significantly higher percentage of the litigants than non-litigants at both 3 months and 1 year post-trauma, with the non-litigants also showing greater improvement in symptoms over time.")

87 Mezey, *supra* note 23.

88 McDonald, *supra* note 20 at 101.

89 *Roling*, 596 N.W.2d at 73.

POST-TRAUMATIC STRESS DISORDER AS A COMPENSABLE INJURY . . . *continued from page 11*

Require a Higher Burden of Causation

Most importantly, the law must require plaintiffs to prove that the defendant's actions directly caused their mental injury before they can recover for PTSD. In Iowa, for a mentally injured worker to prevail on his workers' compensation claim, proof of both medical causation and legal causation is required.[90] Medical causation requires a claimant to establish that the alleged mental condition was in fact caused by employment-related activities.[91] Legal causation, on the other hand, presents a question of whether the policy of the law will extend responsibility to those consequences that have in fact been produced by the employment.[92] The standard for legal causation has been formulated as "whether the claimant's stress was of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs, regardless of their employer."[93]

In *Simons v. Municipal Fire & Police Retirement System of Iowa*, an employee who applied for accidental disability pension benefits because he claimed he was incapacitated from performing his duty as a police officer as a result of PTSD was denied compensation.[94] The police officer claimed that several work-related incidents resulted in his diagnosis of PTSD.[95] The disability appeals committee denied him benefits because his PTSD "was not the result of one incident, but due to the accumulation of several events" and because he failed to show that he had been subjected to more than usual stress for a police officer.[96] Using these rules of construction in distinguishing between normal and abnormal working conditions and requiring a higher level of causation to be proven in the case of mental injuries, the courts are ensuring that absurd results do not happen.[97]

Not all states model their law after Iowa. In New Jersey, multiple and correlated factors can form the traumatic event needed to support a civil servant's eligibility for accidental disability benefits.[98] In *Foutz v. Public Employees Retirement System*, the state's appeals panel held that a former emergency medical technician who suffered from PTSD was entitled to benefits after showing that she was permanently disabled as a result of several traumatic events during the performance of her duties.[99] The court cited the holding of *Gerba v. PERS*, and stated that "as long as the traumatic event is the . . . essential, significant, or substantial contributing cause of the disability, it is sufficient to satisfy the statutory standard of an accidental disability even though it acts in combination with an underlying physical disease."[100] In this case, the plaintiff's burden of proving causation was relaxed.[101] This is a slippery slope that courts should avoid. Courts should not allow multiple traumatic events or stressors to satisfy the causation element; it opens the door for plaintiffs to exaggerate their symptoms and inflate their damages.

Require Justification of Damage Awards

The law should also limit the amount of damages available for psychological injuries such as PTSD. The caps on damages could either be statutorily enforced or the courts could set them on a case-by-case basis. The Eighth Circuit has reduced the damages award available to plaintiffs. For example, in several personal injury cases resulting from the crash of American Airlines Flight 1420, the Eighth Circuit reduced the damages awarded to the plaintiffs on the basis that the "physical injuries did not cause PTSD sufficient to sustain the principal component of an award."[102] The Court held that the plaintiffs could only recover emotional distress damages which flowed from their injuries.[103]

The Eight Circuit also limited a plaintiff's recovery to that which is causally related to the defendant's actions. Under the Court's ruling, a plaintiff cannot recover from the emotional distress arising from the accident itself.[104] Therefore, plaintiffs must not only prove that the defendants' actions caused his or her PTSD, but that his or her physical injuries were sufficient to cause his or her PTSD and also that the amount awarded does not *over* compensate him or her.[105]

CONCLUSION

Because of the loose nature of the diagnostic criteria for PTSD, the potential exists for plaintiffs to feign a mental disorder and exaggerate their symptoms. Therefore, Iowa's courts must take measures to protect the legal system from being bombarded with claims for compensation of psychological injuries. This article highlights only a few options that courts could use to minimize or eliminate the use of PTSD as a compensable injury in civil litigation.[106] Under Iowa's tort and workers' compensation law, courts have many tools at their disposal which could effectively eliminate or minimize a plaintiff's ability to recover for his or her alleged psychological injury, and if used effectively, courts could adequately protect the integrity of the legal system.■

[90] *See Asmus v. Waterloo Comm. School Dist.*, 722 N.W.2d 653, 656-57 (Iowa 2006).
[91] *Id.*
[92] *Id*
[93] *Id.*
[94] *Simons*, 2004 Iowa App. LEXIS at *2.
[95] *Id.*
[96] *Id.* at *10.
[97] *See Asmus,* 722 N.W.2d at 656-57.
[98] *Foutz v. Public Employees Retirement System*, 754 A.2d 525 (N. J. 2001); Charles Toutant, *Court Takes Broad View of Trauma Needed to Qualify for Disability*, 163 N.J.L.J. 527, 7 (Feb. 5, 2001).
[99] *Foutz*, 754 A.2d at 525; Toutant, *supra* note 99 at 7.
[100] *Gerba v. Bd. of Trustess of the Public Employees' Retirement System*, 416 A.2d 314 (N.J. 1980).
[101] *Id.*
[102] In re: Air Crash at Little Rock Arkansas, on June 1, 1999, 291 F.3d 503, 511 (8th Cir. 2002); *Manus v. American Airlines, Inc.*, 314 F.3d 968 (8th Cir. 2003); *Rustenhaven v. American Airlines, Inc.*, 320 F.3d 802 (8th Cir. 2003).
[103] *Id.*
[104] *In re: Air Crash at Little Rock Arkansas*, 291 F.3d at 510.
[105] *Id.* at 510.
[106] Certainly, the drafters of the DSM and professionals in the mental health community could also step up to change the diagnostic criteria of PTSD, however, that discussion is beyond the scope of this article and I will leave it for another day.

ARE PHYSICIAN NON-COMPETE AGREEMENTS UNDER ATTACK IN IOWA?

By: Benjamin P. Roach, Nyemaster Goode, Des Moines, IA

On November 26, 2008, the Iowa Court of Appeals issued a decision refusing to enforce a non-compete covenant in a physician employment agreement that could have far-reaching impact on Iowa medical practices, hospitals, and other entities that employ physicians. In *Board of Regents v. Warren*, ____ N.W.2d _____, 2008 WL 5003750 (Iowa Ct. App. 2008)(final publication decision pending), the Court refused to enforce a two-year, 50-mile non-compete covenant involving a physician previously employed by the University of Iowa Hospitals and Clinics ("UIHC"). The critical question for employers of physicians is whether this case is a unique result based on the specific facts of the case, or whether it signals a change in the way Iowa courts will evaluate physician non-compete covenants.

Prior to *Warren,* Iowa Courts had long recognized that restrictive covenants prohibiting physicians from competing with former employers were valid and enforceable. *See Cogley Clinic v. Martini*, 112 N.W.2d 678, 681 (Iowa 1962); *Oates v. Leonard*, 183 N.W. 462 (Iowa 1921); *Rowe v. Toon,* 169 N.W. 38 (Iowa 1918). In *Cogley Clinic*, the Supreme Court of Iowa upheld a three-year restrictive covenant prohibiting an orthopedic surgeon from practicing within a 25-mile radius of Council Bluffs. The Court found, in 1962, that good roads, available transportation, and an expanding perimeter for business and professional influence made 25 miles not too far for a patient to travel to see a medical professional. Even though Martini, the defendant doctor, would have been the only orthopedic surgeon in Council Bluffs, the Court found the availability of several orthopedic surgeons in Omaha (within the 25 mile non-compete radius) meant that patients, inconvenience having to travel for care did not rise to the level of violating public policy. In enforcing the restrictive covenant, the Court found the public policy of enforcing contracts outweighed any inconvenience to the patient public.

Based on *Cogley Clinic*, the prevailing view in Iowa has been that physician non-compete covenants were enforceable to the same extent as other professions. For the many years since *Cogley Clinic,* employers of physicians have had the comfort that a public policy argument based on patient access to care would not defeat the enforcement of physician restrictive covenants, especially as patient's ability and willingness to travel for medical care increased.

Any employer of physicians that is reliant upon non-competition covenant should no longer feel that same level of comfort. In *Warren*, the Court of Appeals held that a restrictive covenant prohibiting an oncologist from practicing in Cedar Rapids, which had been designated by the Federal Government as underserved by oncologists, was prejudicial to the public interest. Thus, there is a chance that the *Warren* decision represents a new hostility by Iowa Courts to physician non-compete agreements based on public policy grounds.

There are aspects of the *Warren* decision that could limit its applicability to the unique facts in the case. Dr. Warren spent 80% of his time employed by UIHC performing research and only 20% of his time providing patient care. Dr. Warren's allegedly competing employment involved 100% patient care. The facts also appear to establish that Dr. Warren's patient care in Cedar Rapids rarely competed with UIHC, and that Dr. Warren actually referred some patients to UIHC. The Court found these facts failed to establish that prohibiting Dr. Warren's patient care in Cedar Rapids was necessary for the protection of UIHC's business. The Court also noted that UIHC failed to present any evidence that it had promoted Dr. Warren's services within the community, or expended any money to obtain patients for Dr. Warren. There was also no evidence that UIHC provided Dr. Warren with any unique training. Interestingly, the court found that the temporal and geographic elements of the non-compete, 2 years and 50 miles, did not appear unduly restrictive. The court ultimately concluded that UIHC's failure to prove enforcement of Warren's non-compete was necessary to protect its business, and the prejudice to the public interest, outweighed the apparently reasonable geographic and temporal restrictions.

The *Warren* decision may be limited to the unique situation of a physician moving from a research-based employment to a clinical employment. In that case, the decision is unlikely to have any practical impact on the employment of physicians in Iowa. However, the *Warren* decision could just as easily be read as recognizing a new willingness of Iowa's courts to declare physician restrictive covenants unenforceable on public policy grounds, especially when the physician seeks to practice in any federally designated underserved areas. Iowa could be on its way to joining the growing list of states that either outright prohibit, or apply strict scrutiny, to physician non-compete agreements. See e.g. Colo. Rev. Stat. Ann. § 8-2-113(3)(2003); Del. C. Ann. Title 6, § 2707(1993); Mass. Gen. Laws Ann. Ch. 112, § 12X (1991); *Valley Medical Specialists v. Farber,* 982 P.2d 1277 (Ariz. 1999)(stricter scrutiny); *Iredell Digestive Disease Clinic v. Petrozza*, 373 S.E.2d 449, 455 (N.C. App. 1988)(stricter scrutiny); *Ohio Urology Inc. v. Poll*, 594 N.E.2d 1027 (Ohio App. 1991)(stricter scrutiny); *Ellis v. McDaniel*, 596 P.2d 222 (Nev. 1979)(stricter scrutiny); *Statesville Medical Group v. Dickey*, 418 S.E.2d 256 (N.C. App. 1992)(stricter scrutiny); *Odess v. Taylor*, 211 So.2d 805 (1968)(prohibited on antitrust grounds); *Bosley Medical Group v. Abramson*, 207 Cal. Rep. 477 (Cal App. 1984)(prohibited on antitrust grounds); *Bergh v. Stephens*, 175 So.2d 787 (Fl. Dist. Ct. App. 1965)(prohibited on antitrust grounds); *Gauthier v. Magee*, 141 So.2d 837 (La. App. 1962)(prohibited on antitrust grounds); *West Montana Clinic v. Jacobson*, 544 P.2d 807 (Mont. 1976)(prohibited on antitrust grounds); *Spectrum Emergency Care, Inc. v. St. Joseph Hospital and Health Center*, 479 N.W.2d 848 (N.D. 1992)(prohibited on antitrust grounds).

A more hostile view of non-competes might align more closely with the current AMA code of ethics. In 1980, after the *Cogley Clinic*

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decision, the AMA took the position that physician non-compete agreements impact negatively on healthcare and are not in the public interest. See AMA Code of Medical Ethics, § E-9.02. While stopping short of completely prohibiting covenants not to compete, the AMA strongly discourages them. *Id*. The AMA Code states that non-compete agreements "restrict competition, disrupt continuity of care, and potentially deprive the public of medical services." *Id*. The AMA has found that a person's right to choose a physician and free competition among physicians are "prerequisites of ethical practice." *Id*. at Section E-9.09. However, the last sentence of an AMA ethical cannon provides an "out" for courts still looking to enforce restrictive covenants against physicians. The last sentence states: "restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician." AMA Code § E-9.02. Courts have relied on that last sentence to uphold physician restrictive covenants even when the contract at issue contained a clause that stated no provision in violation of the AMA Code of Medical ethics could be enforced. See *Calhoun v. WHA Medical Clinic*, 632 S.E.2d 563, 574 (N.C. App. 2006).

Whatever the future impact of *Warren*, which cannot be determined with certainty until a more standard physician non-compete fact pattern is decided by Iowa's appellate courts, the decision presents an excellent opportunity for all employers of physicians to re-evaluate non-compete covenants. A tightly crafted and specific covenant is more likely to be enforceable, regardless of whether Iowa courts embark upon a new reluctance to enforce physician non-compete agreements. ■

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