Medico-Legal Evaluation of Psychological Injury: Current Implications for Legal Training and Continuing Education

by Dr Hugh Koch, Chartered Psychologist & Director, Hugh Koch Associates LLP
Dr Katie Newns, Chartered Psychologist, Hugh Koch Associates LLP
Dr Louise De Haro, Chartered Psychologist, Hugh Koch Associates LLP

Redress following non-fault incidents is now bedded into the Civil Litigation world both in the UK and the USA – rising number of claims are balanced by increasing scrutiny by experts and insurers. This demanding field requires lawyers, barristers and the judiciary to become as expert and as knowledgeable as possible about how injury evidence impacts on legal decisions.

This transatlantic paper reviews what issues pertain to psychological injuries and how legal decision makers perceive and use psychological evidence to contribute to and render civil judgements. Specific recommendations for continuing professional (legal) education are highlighted and reflect the situation that initially lawyers have little or no specific training in psychology (Vallano, 2013.)

Psychological injury has been defined as 'mental harm, suffering or injury caused to a person that may be a worsening of a pre-existing condition, may negatively impact functional activity, and lead to claims in the civil court for damages' (Young, 2008). Whether such injury is consistent with physical injuries, there are many assessment issues which are problematic including: severity, attribution, impact, prognosis and historical relevance (Koch and Kevan 2005.)

How are these crucial issues perceived by legal decision makers (lawyers, barristers, judges), particularly when compared to physical injuries? This article will highlight how psychology and psychological processes are understood by them and also suggest how continuing professional development (CPD) and training can advance their understanding of how psychological evidence is used in civil litigation.

The Psychology of a Personal Injury Claim

a) What is the medico-legal decision making Process:

The flow chart (figure 1) below illustrates the key events in the medico-legal decision making process from initiation of a claim to its resolution: -

b) Finding Liability

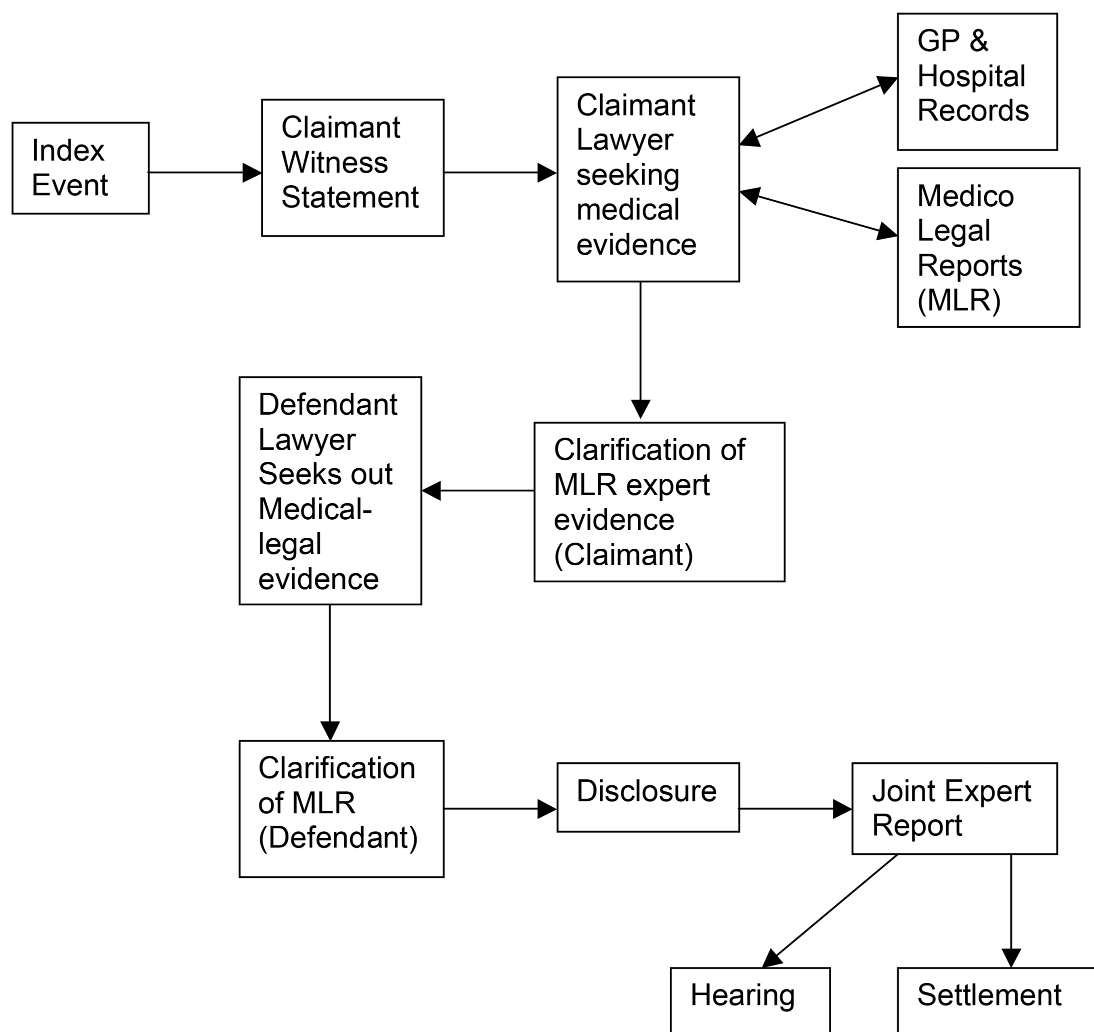
To succeed a claimant must establish a defendant's fault, which caused their injuries. This maybe established first before medical evidence is sought or alongside an 'at risk' strategy of obtaining simultaneous medical evidence.

c) Self-report and medical treatment evidence

Witness statements and contemporaneous treatment evidence provides an initial 'picture' of what may have occurred 'at the scene' and in the first few months after the index accident. Many issues of reliability pertain here (Koch 2014) including: Primacy, Recency, 'Halo' effects, suggestibility, recall and motivational factors.

Issues of consistency between self report and medical/treatment records also have psychological relevance (Koch, Lillie & Kevan, 2006).

Figure 1 The Medico-Legal trail



d) Obtaining reliable and objective medico-legal evidence
In both the UK and the USA, the independence and impartibility of the expert is paramount (CPR rules (1999) (Leckart, 2013)). This is embodied in how the expert forms his/her opinion on diagnosis/attribution/causation and prognosis and 'stands apart' from claimant self-report, medical treatment history and test data. The general issues of reliability in medico-legal assessment and the particular areas of variability, as observed by experienced psychologists and psychiatrists, have recently been researched (Koch (2015) in submission)

e) Gaining greater clarification and challenging the 'allegation'
The act of seeking recovery for psychological injury places the claimant's allegation 'in controversy' by Rule 35 questioning or its equivalent in different USA state jurisdictions. The use of defendant requested medico-legal reports, Part 35 questioning and ultimately Joint Expert report discussions all contribute to this greater clarification of what actually happened in any one index event.

Particular Perceptual Issues for Lawyers

1) Physical and Psychological Injuries: Mutually supporting or not?
It is now reasonable to progress a claim for psychological injuries irrespective of any physical injury incurred. The existence of physical injury can lend credibility to psychological injury allegations. However this can result in misperception both overly positive or, when physical injury is absent, overly negative about the effect of psychological injuries. In practice, both physical and psychological injuries have objective and subjective components, and both need careful scrutiny, as both 'can open the door to frivolous lawsuits'.

2) Adherence to classification systems alone
Lawyers differ in their awareness and understanding of how psychological disorders are classified or diagnosed. Strict adherence to ICD-10 or DSM-IV/V illustrates a lack of understanding of how clinical assessment, assessment of disruption and response to treatment are necessary adjuncts to 'whether diagnostic criteria are met'.

3) How severity is assessed
Clinicians and lawyers alike differ in terms of how they react and therefore assess an 'emotional' claimant sitting in front of them. For some, erroneously, this presentation is enough to load the claim 'high' on severity.

For most, however, assessment of severity is complex and problematic, and dictates whether claimants can pursue recovery for their psychological injuries and whether the defendant can or will challenge their claims (see Daubert and Merrell 1993.) Little is known about how lawyers determine severity and how this then determines their subsequent legal decisions. For example, if a severe disorder is alleged, which type of legal challenge is most effective: - credibility challenge; liability challenge; diagnostic challenge.

4) Presence and admissibility of pre-existing psychological injury (PEI)
Nearly 50% of the general adult population meet diagnostic criteria for a psychological disorder at some point during their lifetime. This contrasts with the 'eggshell skull' rule, taking the claimant 'as you find' them. To be admissible, PEI must be relevant, and non-prejudicial. The lawyer evaluating legal causation must consider whether PEI provides a plausible alternative explanation for the alleged psychological injuries. In addition non-disclosure of PEI may indicate concealing of evidence and contribute to the untruthfulness variable. When evaluating the relevance or 'probative' nature of PEI, many factors are considered e.g. symptom overlap between PEI and current allegation, onset date, course and duration of PEI, and comorbidity (common symptom type). It is not known how lawyers deal with PEI and its potential prejudicial nature and impact. This is crucial to the court's evidence admissibility guidelines.

5) Lawyer's knowledge of mental health issues
There are, in our opinion, many common misperceptions by lawyers about mental health issues as they pertain to civil litigation. The most notable issues are that:

- Psychological injuries are not objectively verifiable
- Psychological injuries are easily fabricated
- Psychological injuries are rarely severe or disruptive.

Competent, experienced experts utilising several means to enhance diagnostic reliability including symptom validity testing, medical record review and analysis, and behavioural observation (both

within interview and external to interview). In addition, clinical judgement plays a crucial role in using empathy to validate or invalidate a claimant's allegations.

Lawyers can benefit from training to develop their cognitive/mental/logical 'schemas' of psychological injury to then help them deal with the multi-dimensional nature of these many variables.

6) The multi-dimensional assessment of reliability and truthfulness

How can one tell a claimant was telling the truth? The common legal question. Whether this is the province of the expert, lawyer or judge, there is a general perception that the courts are wary of allowing recovery for psychological injuries not least in case this led to a profundity of civil lawsuits.

Psychologists use many methods to assess whether a claimant is lying, exaggerating or inaccurately describing their psychological symptoms (therapeutic and effective listening and communication, clinical judgement, severity assessment, consistency with contemporaneous medical records, use of standardised questionnaires, behavioural data collection) (Koch and Kevan, 2005).

Towards Continuing Professional Education for Lawyers in Psychological Injury

The importance and interest in the study of psychological injury within the legal system in both USA and UK is growing (Vallano, 2013). The variable appreciation and issues invoked in obtaining fair recovery for valid psychological injury claims depends partly on accurate perceptions by lawyers, barristers and judges about the causes, consequences and legitimacy of psychological injuries.

More training and professional development opportunity are needed to improve knowledge and understanding of psychological injury in legal professionals.

Such CPD activity should focus on:

- Clinical Issues e.g. Understanding diagnostic, attribution and prognosis issues
- Reliability Issues e.g. Consistency between data types; assessing truthfulness; reasons and motivation to exaggerate
- Expert Issues e.g. Independence and impartiality of experts; communication with experts; obtaining opinion clarification
- Quality Management Issues e.g. Effective communication between legal, medical, claimant and defendant; refining and improving medico-legal processes; improving quality and monitoring time and costs.

Several topics which fit into one of these four categories are showing in figure II below.

Figure II

Psychological Injury

Main Psychological Disorders: Differentiating factors

Priority give to Psychological issues: Is it valued?
Chronic Pain: assessment, treatment and prognosis
Impact of pre-existing history (vulnerability, treated depression, life events, egg shell skull)

Treatment or Advice?
Reliability of Information
Attribution + 'But For' test
Reliability and Truthfulness
GP medical notes: help or hindrance
Use of psychometric tests
Does anger mean 'disorder' or 'disdain'
Cognitive Impairment and seeking neuropsychological advice
Opinions after multifactorial evaluation

Psychology and Law: Practical implications for civil litigators

Psycholegal research and practice: An introduction
Psychological implications of CPR: Impartiality, multi source opinion forming and expert ethics

Getting reliable, robust opinions from experts: facts versus opinions

Effective communication with experts: Written, telephone, face-to-face

Questioning experts: getting greater clarity from Part 35 questioning

The politics of the Joint Opinion: ensuring the expert understands his/her role

Are Single Joint experts more impartial: the 'push and pull' on SJE's

'Cross examining' an experts report: how to conduct a robust critique of reports

The psychology of reliability, consistency and truthfulness: who detects deception?

Conclusion

The term 'psychological' has two separate but linked meanings and contexts within civil litigation. Firstly, it applies to a significant part of 'personal injuries' for which claimants in the UK and USA bring their case for compensation. Secondly, it applies to how lawyers understand and practice, and how they conduct their relationships with several different 'clients' or 'customers', both internal and external and how specifically they understand the way expert witnesses operate and provide impartial opinions.

The provision of training or CPD activities for lawyers is seen as crucial to the continuing development of civil litigation procedure and credibility. ■

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Seminars are being planned in the UK on these two areas in 2015.

More information about availability of training and CPD seminars can be obtained from Hugh Koch (**hugh@hughkochassociates.co.uk**) and at **www.hughkochassociates.co.uk** and also from Central Law Training (CLT) at **www.clt.co.uk**'

Independent Psychological & Orthopaedic Medico-Legal Reporting

At Hugh Koch Associates we provide a comprehensive and independent psychological and orthopaedic reporting service throughout the UK, as well as access to a psychological treatment service. Services are provided within the context of: personal injury; employment injury; stress and chronic absence management; clinical negligence; Neuro-psychology and chronic pain. We have particular expertise in assessing the psychological effects of cosmetic surgery. Adults and children are seen within four to six weeks of instruction at any of our 89 clinics across the UK, and the report provided within two weeks. The 'Find the Expert' facility on our website allows three experts to be located immediately.

GROUND FLOOR, FESTIVAL HOUSE
JESSOP AVENUE, CHELTENHAM
GLOUCESTERSHIRE GL50 3SH
Phone: 01242 263 715
Fax: 01242 528 299
email: enquiries@hughkochassociates.co.uk
web: www.hughkochassociates.co.uk