"He Said—She Said": The Role of the Forensic Evaluator in Determining Credibility of Plaintiffs Who Allege Sexual Exploitation and Boundary Violations

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The authors present civil cases that involved allegations of boundary violations or sexual assault in which there was no corroborating evidence. In these cases, the alleged perpetrators denied any wrongdoing. Both plaintiff and defense attorneys were interested in the credibility of their clients. The authors point out that it is always the trier of fact (the judge or jury) who determines what actually happened between two individuals who give different accounts of an interaction. Nevertheless, forensic experts can give information to attorneys and to the trier of fact that will help with the determination. For example, alternative explanations for the plaintiff's account of events can be ruled in or out. In addition, the authors discuss how, from a clinical perspective, perceptions of being harmed can lead to psychological signs and symptoms, but without corroborating evidence, the presence of such phenomena are not dispositive of whether a given event actually meets legal definitions of rape or boundary violations.

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Articles in the clinical and forensic literature have addressed the difficulties in determining when defendants or plaintiffs engage in malingering, pathological lying, or exaggeration of symptoms.[1,2] Some articles focus on helping the forensic evaluator ascertain the truthfulness of a patient's report or whether the psychiatric and physical symptoms are simulated (e.g., Ref. 3). The authors of these articles suggest various techniques for determining the truth but also point out the necessity for corroborating evidence.

In cases involving boundary violations or sexual exploitation, various articles have been written to examine the process involved in determining the credibility of allegations.[4,5] The process may be relatively straightforward when the perpetrator admits wrongdoing or when multiple plaintiffs make complaints against the same perpetrator. Some of the techniques proposed for use in other settings to assess credibility—for example, polygraphs, hypnosis, narcoanalysis, and functional MRIs—have problems with validity and are generally nonadmissible in forensic settings.[6,7]

It has been pointed out that no one truly knows what happened in encounters in which the only two people present give different accounts of the interaction,[4] and that forensic psychiatrists and psychologists are not human lie detectors.[5] To our knowledge, none of these articles specifically examined what can be determined when there are allegations without corroborating evidence. In addition, prior reports have not elucidated how perceptions of being mistreated can lead to symptoms and damage.

In this article, we present civil cases that involved allegations of inappropriate sexual behavior with no corroborating evidence (e.g., no physical injuries or eyewitness statements). In these cases, the plaintiff and defense attorneys wanted forensic experts to help determine who was telling the truth, and the plain-

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tiffs underwent thorough forensic psychiatric evaluations with extensive prior record review. We give examples of cases in which there was no evidence to corroborate descriptions of events. We discuss ways in which the evaluator can or cannot help the attorneys and the trier of fact determine what happened, and we discuss the role of psychological testing. Identifying data are altered to protect the anonymity of the individuals in the case descriptions. In addition, we discuss how, from a clinical perspective, perceptions of being harmed can lead to psychological sequelae, but may not be legally relevant to determinations of what actually happened.

Cases Without Corroborating Evidence

Cases without corroborating evidence fall into two categories: in the first, the plaintiff and the alleged perpetrator disagree on whether an event even occurred. In the second, they agree that something occurred, but their interpretation of the event differs significantly.

Cases in Which the Alleged Perpetrator Denies That the Event Occurred

Case 1

Dr. A. was sued by Ms. B. for inappropriate behavior during a series of medical examinations. Ms. B. alleged that Dr. A. rubbed his genitals against her while performing an ophthalmoscopic examination. She also alleged that Dr. A. asked whether he could kiss her. Dr. A. denied that these events ever happened.

Case 2

Dr. C. was sued by Ms. D. for inappropriately staring at her breasts and touching her breasts during a physical examination. Ms. D. alleged that Dr. C. looked at her in a sexual manner and that his hands lingered on her breasts during a breast examination. She said that he massaged her breasts in a sexual manner and seemed to be deriving sexual pleasure. Dr. C. denied that he did anything inappropriate.

Cases in Which the Interpretation of Events Differs Significantly

Case 3

Ms. E. and Mr. F. agreed that they had sexual contact while at a hotel during a business conference. Ms. E. alleged that she was raped. Mr. F. stated that the sexual contact was consensual. They agreed that they knew each other and that they went out to dinner with a group of business acquaintances. Ms. E. and Mr. F. subsequently walked around the downtown area where there were bars and clubs for dancing. They had had a small amount of alcohol and one dance together. Mr. F. walked Ms. E. back to her hotel room and tried to kiss her. They agreed that she resisted and said that they should not be having such contact, but that she did not actively push him away. They gradually moved to the bed and had a sexual encounter. Ms. E. said that she was trying to tell him that she was an unwilling participant. Mr. F. referred to Ms. E.'s alleged resistance as "mild protestations" and said that he interpreted her behavior as a sign that she was "excited" about this illicit contact. Ms. E. filed criminal rape charges, but the case was not pursued by the district attorney. Ms. E. sued Mr. F.'s employer for facilitating the encounter.

Case 4

Ms. G. and Mr. H. were in a hotel room working on business-related matters for their employer. They were involved in a highly stressful session, planning for an event for the next day where there were security concerns. They agreed that the meeting was followed by a sexual encounter between them. Ms. G. alleged that she was raped and that Mr. H. had engaged earlier in known, aggressive inappropriate behavior with another female employee. Mr. H. denied that the incident had been rape. He stated that consensual sex had occurred. He acknowledged that he had tried to date another female employee but stated that he stopped his pursuit when she rebuffed him. The details of the brief sexual encounter were that, from Ms. G.'s perspective, she was uninterested and then was shocked when he lifted her onto the bed and proceeded to have sexual relations with her. Mr. H. stated that she never showed him any evidence that she was unwilling. Ms. G. pressed criminal charges, but the district attorney concluded that there was insufficient corroborating evidence to prosecute the case. Ms. G. sued their employer for allowing the rape to happen.

Credibility

Role of the Forensic Evaluator

In Cases 1 through 4, attorneys asked the forensic experts whether they could provide evidence that would bear on their clients' versions of the facts. Plaintiffs' attorneys wanted to know whether their

clients were credible before they invested time, effort, and money in the cases. Defense attorneys wanted to know whether their clients were telling the truth and whether their clients' allegations that the plaintiffs were lying were credible.

The forensic evaluator should always defer to the trier of fact (i.e., the judge or jury) in determining what actually happened between two individuals who give different stories. Although the forensic evaluator must acknowledge not being in the room when the alleged incident(s) occurred, the evaluator can help the attorneys and trier of fact by making certain determinations, including looking at the history of the alleged perpetrator and ruling in or out alternative explanations for the allegations of the plaintiff based on psychological processes.

History of the Alleged Perpetrator

In all four cases, the alleged perpetrators did not admit wrongdoing, and there was no evidence of prior disciplinary actions against them or of prior offensive behavior. In each of these lawsuits, there was only one plaintiff, and there were no witnesses to the events in question. When there are prior victims or when the alleged perpetrator has had other serious charges brought against him, these facts influence the likelihood that others will perceive that the plaintiff is telling the truth. In contrast, when the alleged perpetrator has an excellent reputation with no prior allegations, others may be more likely to believe that he did not act inappropriately in the current situation. Of course, even though past behavior predicts current behavior, there are many exceptions, and the alleged perpetrator may or may not have acted inappropriately with this particular plaintiff.

History of the Plaintiff

Is There Psychosis?

A possible explanation for a plaintiff's belief that he or she has been exploited is psychosis (i.e., inability to tell what is real or not). In this scenario, a plaintiff has a history of being unable to tell what is real and has irrational thinking and distorted perceptions. It is possible that a delusional disorder, erotomanic type, causes the plaintiff to believe falsely that someone is in love with him or her. A plaintiff's attorneys are reluctant to pursue a case if psychosis will be revealed during litigation, because an alternative explanation of the plaintiff's report of the incident may be that the plaintiff experienced hallucinations and/or delusions of having been touched inappropriately or raped. This situation is exemplified in Case 5.

Case 5

The medical board investigated a female psychiatrist after a patient with a diagnosis of schizophrenia, paranoid type, made an allegation that the psychiatrist had had sex with her in the waiting room of the psychiatrist's office. The psychiatrist denied it, and it was discovered that the plaintiff had made similar allegations about other health care providers, while in a psychotic state.

In Cases 1 through 4, there was no evidence of psychosis, and, in fact, the plaintiffs were functioning fairly well. In all these cases, the plaintiffs were adamant that they were giving an accurate report of what had happened to them. The presence of psychosis can be assessed by a careful review of medical records and collateral information, an interview involving the assessment of prior psychiatric history and treatment, current symptoms and treatment, and a mental status examination. Psychological testing can also be helpful in evaluation for psychosis, as will be discussed later. Even when the forensic evaluator determines that psychosis is present, it is important to acknowledge that a plaintiff's allegation about a specific incident may still be accurate.

Is the plaintiff confused or is there evidence of dementia or mental retardation? Another possible explanation for the plaintiffs' mistakenly believing that they have been touched inappropriately is that they are confused or have dementia or mental retardation. In this scenario, they may misinterpret an event because they are unable to process information accurately. They may also engage in confabulation to cover memory gaps. This possibility can be explored by a careful review of the medical records and collateral information, an interview involving the assessment of psychiatric and medical history, a mental status examination, and neuropsychological testing. In addition, a careful review of the alleged incident can be helpful in assessing whether a plaintiff seems confused about what actually happened.

In Case 2, Ms. D. had a negative psychiatric and medical history and normal findings in a mental status examination. There was no evidence of cognitive impairment on neuropsychological testing. Ms. D. described the incident as follows: "Dr. C. pulled my gown down to my wrists. He started performing a

normal breast exam with a circular motion on one breast. Then, it changed. He started squeezing and groping. He would caress one and the other and then both. It was softer—like a caress. He would gently rub his hand against my breasts and squeeze. He squeezed both my nipples at the same time. It was like you're touched when you're making love. He started one and then the other and then both at the same time. I noted that he did not check under my arms and did not ask me to raise my arms. I looked at his face and he looked like he was enjoying himself. I couldn't believe what he was doing. I never had a doctor do something like that." Ms. D. was asked by the evaluator if it was possible that Dr. C. was simply doing a thorough examination. Ms. D. replied that she was 35 years old and had had many breast examinations. She stated that she knew the difference between a normal breast examination and what Dr. C. had done. In the case of Ms. D., there was no evidence that she was confused about what she claimed Dr. C. did to her or had manifested confusion in other areas of her functioning.

As is the case with a plaintiff who has a psychosis, it is important to recognize that even when a plaintiff has confusion, dementia, or mental retardation, the presence of cognitive dysfunction does not preclude the possibility that a specific allegation of abuse is accurate.

Is there a marked inconsistency in reporting? The forensic evaluator should consider whether the various reports that the plaintiff has made are consistent and whether the written documents and the report of the plaintiff are also consistent. An example of inconsistency is when the plaintiff continues to add details to the complaint.

Case 6

An administrative assistant in a large firm sued for sexual harassment and for having been the victim of an episode of workplace violence. There were no witnesses, but she alleged that she had been attacked at work when a manager pulled an item from her hand. In later reports, she added that he also had twisted her arm and her hand.

Is the plaintiff persistently litigious and is there evidence of lying, malingering, or exaggerating the impact of past events? Some individuals are persistently litigious and/or have a history of exaggerating the impact of events. Such tendencies may be a personality trait or may occur in the context of a specific disorder such as antisocial or borderline personality disorder. An example of prior antisocial and litigious behavior with exaggeration of symptoms is presented in Case 7.

Case 7

A woman sued her employer for sexual harassment and wrongful termination. In a review of the records, it was determined that she had been convicted of welfare fraud by failing to disclose that she was receiving income from her husband, who was stationed abroad. She had brought a prior lawsuit against a fast food chain for being burned when a coffee lid was not put on tightly. In that lawsuit, the medical records confirmed a first-degree burn, although she alleged a second-degree burn and inability to drive or use a computer for almost one year. Although the plaintiff may have been telling the truth about the current sexual harassment and wrongful termination, the fact that she had been less than truthful in the past made her seem less credible in the current lawsuit.

In Cases 1 through 4, there was no evidence of prior lawsuits or exaggeration of symptoms.

Is there evidence of a pre-existing pattern of feeling exploited or of distortion of benign actions of others? Some individuals have a tendency to misinterpret the actions of others. This inclination can be an isolated personality trait or a symptom of a disorder such as paranoid personality disorder. It can be helpful to ask whether other individuals have taken advantage of the complainant. It is certainly possible for plaintiffs to report multiple victimizations, all of which actually occurred. Nevertheless, if a plaintiff describes a pattern of experiencing similar events (e.g., his or her high school teacher and many other authority figures all looked at her inappropriately), it is possible that he or she sees malice in many situations that are benign. If the plaintiff says that such an event never happened before, it reduces the likelihood that the plaintiff is prone to inappropriate and continual misunderstanding and distortion of the actions of others.

In Cases 1 through 4, the plaintiffs denied that similar events had happened.

The Role of Psychological Testing in Determining Credibility

Psychological testing can be helpful in determining the likely credibility of allegations by evaluating for psychological problems associated with a tendency to perceive events in unconventional ways. For

example, neuropsychological testing can be used to assess for the presence of cognitive dysfunction in domains such as memory, intellectual ability, executive functioning, and language ability that may affect an individual's full comprehension of the meaning of events. The individual's performance on tests of these abilities is compared with that of normative groups, the patterns and relationships among the person's test scores are compared, and pathognomic signs of neuropsychological impairment such as aphasia are identified.

Personality testing can assess whether the individual has patterns of perception that are unconventional. For example, objective personality tests such as the MMPI-2[8] and the Personality Assessment Inventory (PAI)[9] can determine whether the individual has a pattern of answers that is similar to or different from those of persons independently described as having delusions or paranoid thinking.[10] Similarly, projective personality tests such as the Rorschach can assess for the presence of formal thought disorder and perceptual inaccuracy.[11,12]

A benefit of psychological testing in this context is that it permits evaluation of perceptual processes in a relatively neutral setting that is not dependent on a specific fact pattern. Of course, psychological test findings that demonstrate perceptual problems do not prove whether the perception of a particular event (e.g., sexual exploitation or boundary violations) reported by the examinee is accurate. However, if patterns of perceptual problems are identified on psychological testing, they may be taken into account in assessing the credibility of reports of specific incidents.

When administered and interpreted by appropriately trained individuals, psychological tests have been found to be widely admissible in legal proceedings.[13,14] The forensic evaluator who uses such procedures should be familiar with data regarding their scientific validity, relevance to the matter at hand, and general acceptance in the field.

Causation and Damage

The forensic evaluator can help the trier of fact to understand whether the alleged symptoms of the plaintiff are within the expected range for the alleged event. This knowledge is based on the clinical experiences of the evaluator as well as through knowledge of the relevant literature. The role of the forensic evaluator also includes educating the trier of fact that the same event may have differing effects on different plaintiffs. Known factors that have an impact on the psychological effects of stressful events include pre-existing psychological problems, prior stressful events, other concurrent stressors, presence or absence of support systems, drug and alcohol use, and overall resilience.[15] When there are pre-existing psychological problems, it is important to determine how the plaintiff was functioning before the alleged incidents, despite the problems. Available evidence includes not only the plaintiff's self-report, but also third-party information such as employment, school, psychiatric, and medical records. The individual may be an "eggshell" plaintiff—that is, one who is prone to having a severe reaction to even relatively minor events. The doctrine in tort law regarding the "eggshell" plaintiff requires the defendants or wrongdoers to take the injured parties as they are and holds the wrongdoers liable for all injuries caused by their actions. However, if the emotional distress would have occurred without the defendant's intervening act, the defendant is not responsible.[16]

Forensic evaluators are also asked to help determine causation. In the presence of other stressors and predisposing factors, it may be that the action of the defendant was "the straw that broke the camel's back" or it may be only one of multiple precipitants.[16] In cases of sexual exploitation and boundary violations, the plaintiffs may have pre-existing problems. In fact, these problems may have made them even more vulnerable to being exploited. An example is a woman who has been in a series of abusive relationships related to her poor judgment regarding men. This type of woman may be a target for an unethical therapist who knows that she is unlikely to resist his inappropriate behavior. Such a plaintiff may have an increased psychological reaction related to the fact that she has experienced an additional victimization superimposed on her pre-existing reactions to her prior relationships. The defense is likely to argue that this plaintiff's severe emotional distress is predominantly related to the prior multiple abusive relations. Often forensic evaluations can determine whether the new psychological symptoms are temporally related to the incident and whether the type of symptoms are typical of those experienced by others with similar trauma (e.g., by asking about the content and frequency of nightmares).

Although the presence of symptoms may be relevant to the determination of damage, efforts by experts or attorneys to argue that symptom patterns demonstrate causation are more controversial. The trier of fact may be uncertain of whether development of a "syndrome" of symptoms proves the accuracy of the accuser's interpretation of events. When the plaintiff develops genuine symptoms after an event about which the plaintiff and defendant give different accounts, and corroborating evidence is lacking, does the fact that the plaintiff developed symptoms demonstrate the accuracy of her or his interpretation of events? This assumption is implicit in questions that may be addressed to an expert during a deposition or during court testimony such as: "If the event did not occur as reported, then why else would [the plaintiff] have become symptomatic?" From a clinical perspective, the perception of having been victimized may lead to symptoms similar to those that occur when someone is actually victimized. For example, if a woman perceives that she was powerless to stop a sexual encounter, then she may develop symptoms similar to those of a woman who actually has been raped, such as feelings of betrayal, fear, embarrassment, guilt, depression, and anxiety and even symptoms of posttraumatic stress disorder. It may not matter that the alleged perpetrator considered the sexual encounter to be consensual. From a clinical perspective, the victim's symptoms are likely to be based on her perception. Stress-related symptoms are shaped by the internal psychological experience of the event.[17–19] The presence or absence of symptoms, *per se*, cannot be considered a reliable basis for determination of whether the events meet the legal definitions of rape, sexual harassment, or a boundary violation or whether the alleged perpetrator is culpable. This perspective is consistent with legal skepticism in general, that testimony about syndromes, such as rape trauma syndrome, shows that an event, such as rape, occurred.[20]

The Role of Psychological Testing in the Assessment of Damages

Psychological tests can provide objective data about an individual's mental functioning that complement information derived from his or her self-report, mental status examination findings, and record review. In assessing damage, questions that psychological test findings can address include the following.

What psychological problems does the plaintiff now have? Psychological test findings can provide evidence of the nature of current mental health problems (e.g., anxiety, depression, and psychosis). The data can then be considered in light of the available history to draw conclusions about causation.

Are the plaintiff's subjective complaints consistent with objective test findings? The examinee may report symptoms such as poor concentration, depression, and anxiety. Psychological tests can determine whether direct measurement of these domains differs from normal and is similar to individuals in whom similar problems have been independently diagnosed. For example, personality tests such as the MMPI-2 and the Personality Assessment Inventory (PAI)[9] can measure symptoms of emotional distress such as anxiety and depression. Cognitive tests such as the Wechsler Adult Intelligence Scale-III (WAIS-III)[21] and the Wechsler Memory Scale-III (WMS-III)[22] can measure current intellectual functioning, including cognitive concomitants of emotional distress such as distractibility and memory complaints. These measures can help in assessing for both the presence and severity of these problems.

Do the test findings suggest the presence of other psychological problems that the plaintiff has not reported? Psychological tests may suggest the presence of psychological problems such as personality traits (e.g., low self esteem, antisocial traits), personality disorders, cognitive dysfunction, and psychotic experiences that may not have been reported by the examinee, yet provide a context for understanding the complaints.

Is there evidence of defensiveness or malingering? The major objective personality tests (e.g., MMPI-2, PAI, MCMI-III)[23] include validity scales that are intended to assess whether the examinee is responding in a candid, cooperative manner, or is overreporting or underreporting symptoms. For example, substantial research supports the validity scales of the MMPI-2 as measures of minimization of psychological problems[24] and as measures of feigning psychological problems.[25,26]

Some plaintiffs report cognitive symptoms such as distractibility and memory dysfunction. Direct measurement of individuals' cognitive functioning with neuropsychological tests can help in assessing consistency across multiple information sources. Concern about exaggeration or malingering is raised when there are discrepancies between test data and known

patterns of performance that are characteristic of specific disorders, observed behavior during the examination, reliable collateral reports, or documented background history.[27,28]

Numerous tests have been developed specifically to evaluate motivation to perform on cognitive testing. The basic assumption is that for neuropsychological test scores to measure abilities accurately, the examinee must put forth his or her best effort. For example, symptom validity tests, or forced-choice procedures, are based on the binomial distribution theorem and include multiple items with two possible answers. An examinee should be able to get about 50 percent of the answers correct by chance alone. If the person scores worse than chance, it strongly suggests poor effort (i.e., that on multiple items, the examinee knew the correct answer and intentionally gave the wrong answer). Examples of such tests are the Victoria Symptom Validity Test[29] and the Portland Digit Recognition Test.[30] Another type of procedure relies on tests that appear difficult but can actually be performed correctly by cognitively impaired people with brain damage (e.g., the Test of Memory Malingering[31]). If an examinee with no objective evidence of brain dysfunction fails tasks that even severely impaired individuals can perform correctly, it suggests lack of effort and exaggeration of cognitive problems.

If the individual does not show evidence of exaggeration or minimization on psychological testing, the credibility of complaints of emotional or cognitive problems is enhanced. If an individual shows evidence of exaggeration of cognitive or emotional problems on psychological testing, the credibility of complaints of damage in these areas is called into question. Additional consideration of other sources of information such as behavioral observations and medical records should be given careful attention in assessing the validity of such complaints.

Summary

Forensic evaluators are often asked to give an opinion about the credibility of a plaintiff versus an alleged perpetrator, when there are no witnesses or corroborating evidence. Although the trier of fact always makes the final determination about credibility, forensic evaluators can contribute relevant information to assist in this determination. They can rule in or rule out alternative explanations for the allegations based on psychological or psychiatric processes such as psychosis, inconsistencies in reporting, cognitive problems, evidence of exaggeration of events and symptoms in other contexts, and prior patterns of being overly sensitive to the actions of others. Psychological testing can also help in these assessments.

However, there are limitations to what forensic evaluators can determine. The first four cases that were described illustrate these limitations. It is important to recognize that the examiner does not know what has happened when two people give differing accounts of what happened when they were together without witnesses. Forensic evaluators must acknowledge when there is simply a "he said—she said" scenario and that the evaluator cannot determine the truth. The forensic evaluator can rule in or rule out alternative explanations for the plaintiff's reporting abuse or assault, and these explanations may be helpful to the trier of fact. Nevertheless, even the presence of psychosis, cognitive problems, inconsistencies, or hypersensitivity do not preclude the possibility that specific events occurred as reported by the plaintiff. In addition, forensic evaluators can educate the trier of fact on the point that the presence of documented symptoms does not provide reliable information about whether an event occurred as alleged by the person who developed the symptoms. If a plaintiff believes that she was assaulted and experienced a sexual or a boundary violation (even if none occurred), she may feel frightened and betrayed and may develop symptoms similar to those of a person who was in a situation in which the validity of the events was corroborated. In conclusion, forensic evaluators can make contributions to the assessments of credibility, causation, and damage, but must recognize the limitations of this role.

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