

Post-Traumatic Stress Disorder and the Law: Critical Review of the New Frontier

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Since its debut in the psychiatric nomenclature in 1980, post-traumatic stress disorder (PTSD) has had a dramatic impact on criminal and civil jurisprudence. PTSD has created a cottage industry among both criminal and negligence attorneys and mental health practitioners. The diagnosis first achieved public notoriety when it was introduced as a new basis for the insanity defense. More recently "syndrome evidence" of the subtypes and variations of PTSD have encroached on the substantive criminal law of self-defense. In addition, the diagnosis may have an impact on such traditionally legal and factual determinations as the credibility of witnesses and may undermine conservative tort doctrine that attempts to cabin psychic injury. The emerging legal area of victims' rights has been strengthened and paradoxically divided by PTSD. Yet the newly defined disorder of PTSD has not borne such a heavy forensic burden easily. Indeed the diagnosis poses for psychiatry some of the very problems it supposedly solves for legal purposes, including the illusory objectivity of the causative traumatic event and the expert's dependence upon the victim's subjective and unverifiable reports of symptomatology for the diagnosis.

No diagnosis in the history of American psychiatry has had a more dramatic and pervasive impact on law and social justice than post-traumatic stress disorder (PTSD), which first appeared in the American Psychiatric Association's *Diagnostic and Statistical Manual*, Third Edition (DSM-III)¹ in 1980, and subsequently in the Manual's 1987 revision (DSM-III-R).² Vietnam veterans, previously stigmatized by that demoralizing war, were transformed from social out-

casts into victims as their plight was viewed from the PTSD perspective.³ Men and women who had been scorned became eligible for disability benefits and improved mental health services. Indeed, the national shame of the war came to be understood as a factor contributing to the victimization of the affected veterans.

The diagnosis of PTSD has also given a new credibility to a variety of victims who come before the courts either as defendants or plaintiffs. Whether the legal issue is criminal or civil, involves culpability or compensation, PTSD has become relevant to law in general and litigation in particular. PTSD is now as

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firmly entrenched in the legal landscape as it is in contemporary psychiatric textbooks. "Accurate assessment of PTSD-specific symptoms forms the basis for defining psychic injury in law, and for exculpating an individual from criminal responsibility."⁴ Lawyers have invoked PTSD in ingenious, if sometimes far-fetched, attempts to obtain insanity and self-defense acquittals. PTSD has also proved an effective tool in attacking traditional legal restrictions on liability for intentional and negligent infliction of psychic harm. More broadly, the PTSD diagnostic conception offers the law a scientific rationale to support the sociopolitical ideology of victimization and to justify the growing recognition of victims' rights.⁵ Yet, as previous writers have emphasized, "serious problems with the diagnosis of PTSD render it vulnerable to legal challenge and subject to abuse."⁴ (at 115)

Criminal Law

Defendants In criminal trials, defendants may include PTSD as an element of their defense in an attempt to negate their culpability or mitigate their sentences. "Attorneys have argued that, since PTSD is acknowledged as a disorder in DSM-III, it is a 'mental disease,' and their clients who experience it are legally insane, thus not responsible for their behavior."⁶ Such use of the PTSD diagnosis has achieved some notoriety. In 1981, Newsweek characterized PTSD as "a malady that Vietnam vets brought home with them that has now landed in the courts as the latest wrinkle in the insanity defense."⁷ In addition to its use

to establish insanity, diminished capacity, and self-defense, the PTSD defense has been used in plea bargaining and in presentence reports, often with the defendant avoiding prison and receiving treatment as a condition of probation.

A standard casebook in law and psychiatry illustrates the impact of PTSD on criminal law by presenting the exemplary case of *State v. Heads*.⁸ Heads, a Vietnam veteran, sought out his wife in the home of her sister and brother-in-law after she had left him, taking their children with her. The defendant armed himself, forced his way into the house, and began firing, killing his brother-in-law. Despite his plea of insanity, he was convicted of first-degree murder because he could not establish that he had a recognized mental disorder.

Heads' verdict was overturned on unrelated grounds. While he was awaiting retrial, the APA issued DSM-III, containing the PTSD diagnosis. At his second trial, defendant's expert witness argued that Heads suffered from PTSD, a recognized mental disorder, and had experienced a flashback at the time of the shooting. According to the defense, "[Defendant] was not himself on the night of the killing. He thought he was in Vietnam. He did not know that what he was doing was wrong; he thought he was fighting for his country."⁸ (at 510) Heads was acquitted by reason of insanity.

A critical factor in Heads' PTSD insanity defense was the "flashback" or dissociative feature considered by many PTSD experts to be the equivalent of a psychotic state. Because of this dissocia-

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tive feature, PTSD is a diagnostic concept that cannot readily be contained by the ordinary forensic distinction between psychosis and personality disorder. PTSD is manifested by symptoms that can change over time without the diagnosis changing. If psychosis is the psychiatrist's *sine qua non* for an insanity defense, then PTSD with dissociation seemingly qualifies.

PTSD has also appeared in veterans' defenses for nonviolent crimes. For example, the diagnosis constituted a "creative" defense in the case of a Vietnam helicopter pilot charged with smuggling several tons of marijuana into Massachusetts. The defendant's expert witness testified that the pilot suffered from "action-addict" syndrome, in which the person "craves dangerous, thrilling situations that psychologically create a parallel state to the original trauma—living on the edge, having the adrenalin flowing." The expert explained that the pilot and his accomplice "literally re-created their military unit and had another mission. Except instead of shooting Vietnamese, they smuggled 7,000 pounds of inert hashish from Morocco to Gloucester, Massachusetts. [He] was not a drug dealer. All he wanted was a thrill."⁹ This "action-addict" defense, though perhaps less convincing than dissociative reaction, demonstrates the flexibility of the PTSD diagnosis when used for exculpatory purposes in the courtroom. In another case, a jury in Birmingham, Alabama, actually acquitted a veteran on an armed robbery charge, after a psychiatric expert witness testified on a variation of the "action-addict" theory that

the defendant's crimes "were designed to put him in a situation in which he could get hurt or shot." The witness indicated that the veteran's motivation was "severe guilt because he survived while his buddies died."⁷ As this case well illustrates, the diagnosis of PTSD is almost unique in its capacity to convey to jurors both a "scientific" explanation of the defendant's nonresponsibility and a sympathetic account of his victim status mitigating his blameworthiness. Although these examples involve veterans, the same defenses have been used by individuals suffering from PTSD as a result of nonmilitary traumatic events, as will be discussed below.

Women Victims as Defendants The application of the PTSD concept has presented some interesting legal twists when retaliation by women victims leads them to be charged with crime themselves. The most notable instance of this occurs when the battered woman strikes back at her batterer and then invokes PTSD as an element of her criminal defense. Depending on whether the defense chosen is insanity or self-defense, quite different, even seemingly opposite, arguments involving PTSD may arise.

When "battered-woman syndrome" was introduced in some earlier cases, it was, like "Vietnam War Syndrome," offered as a mental disorder negating criminal responsibility in the context of an insanity defense. A much publicized example made into a docudrama was "The Burning Bed," in which a battered woman killed her sleeping husband by pouring gasoline on his bed and setting it on fire. She was found not guilty by

reason of insanity and was immediately released as no longer mentally ill or dangerous.

Despite the success of such cases, legal advocates for battered women have preferred to use "syndrome evidence" to assert self-defense, claiming that perceptions, feelings, and behavior induced by the syndrome are not a "mental disorder" but rather the characteristic responses of the "reasonable" woman who has been brutalized by men in a patriarchal society. For example, in *Ibn-Tamas v. United States*,¹⁰ the defendant claimed that she shot her husband in self-defense during an argument. Refuting the prosecution's characterization of the shooting as an "ambush," her attorney described the husband's pattern of abuse and recounted how on the morning of his death the husband had beaten his wife, threatened her with a gun, and told her to leave the house.¹¹

The defense attempted to introduce expert testimony to support its claim that defendant suffered from battered spouse syndrome, a clinically recognized subtype of PTSD. Such testimony would have supported the conclusion that the syndrome is a predictable response to long-term abuse and that a woman suffering from such syndrome may reasonably perceive retaliation against the abuser as an act of self-defense. However, the court refused to permit Dr. Lenore Walker, a leading expert in the "battered spouse" field, to testify, and the defendant was convicted.

The preceding examples—"Burning Bed" and *Ibn-Tamas*—represent the two faces of PTSD evidence: syndrome

as "sickness" and syndrome as a "normal" response under the circumstances. Such a dichotomy has great significance. Feminist legal critics have persuasively argued that the criminal law's conception of self-defense is based on masculine assumptions about human psychology. Battered woman syndrome evidence challenges such assumptions in its assertion that retaliation can be in self-defense even in situations where the violent conflict or threatening confrontation has ended by "objective" male standards.

Courts have varied in their willingness to accept this challenge to old assumptions. For example, in *New Jersey v. Kelly*,¹² the defendant claimed that she killed in self-defense, and therefore had to prove both that she truly felt herself to be in danger (subjective test) and that such a feeling was reasonable (objective test). The court in *Kelly* allowed evidence of battered women's syndrome to be introduced regarding both prongs of the defense, and the defendant prevailed. In allowing this syndrome evidence to be admitted regarding the objective test, the court can be seen as endorsing the category of the "reasonable battered woman," and as indicating that if the defendant could in this fashion prove that she reacted the way other women in her situation would react, she would satisfy the objective legal test for self-defense. Battered women syndrome, therefore, was not in these circumstances regarded as an "illness" or aberrant condition, but rather as evidence of when the objective or reasonable bat-

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tered woman would feel her life was in danger.

In contrast, the court in *State v. McClain*¹³ excluded battered-woman syndrome evidence insofar as it related to the reasonableness of a battered woman's claim of self-defense in the killing of her abuser. That court "treated battered woman's syndrome as an abnormality—some sort of mental illness or pathology."¹⁴ As such it could not be introduced to show how the reasonable or objective person would behave. Legal critics of *McClain* argue that the decision threatens to "fly in the face of accepted scientific doctrine," in declaring battered women's syndrome to be an illness.¹⁴

These arguments reflect the ideological and political conflicts that have arisen around the PTSD diagnosis and its particular subtypes. Feminists increasingly repudiate the notion that either the batterers or the women they batter are "sick." The move from identifying the psychological syndrome as a mental disorder gives way to the narrative of gender politics and reasonable responses to male oppression. There are obvious parallels here to the ideological and political struggle over the psychiatric diagnosis of homosexuality. At first it seemed that the diagnosis mitigated the social stigma of homosexuality but eventually the diagnosis was itself indicted as stigmatizing by gay activists.

Victims as Witnesses The PTSD diagnosis has also had an impact on legal arguments involving the victims of crime who appear as witnesses against the defendant. Defense attorneys, in an

attempt to discredit such witnesses, may emphasize discordant or contradictory behavior such as delays in reporting the crime or mistakes in identification of the criminal. The prosecution, to establish the victim's credibility and corroborate his or her testimony, may call upon an expert witness to testify that a discordant or contradictory behavior that might undermine the victim's testimony was the result of PTSD. Such introduction of the PTSD diagnosis as "syndrome evidence"¹⁵ has most often occurred in rape trials, in which the expert may testify that the victim suffered from "rape trauma syndrome,"¹⁶ the acute phase of a clinically recognized PTSD subtype. Courts are not entirely comfortable with the prospect of having such expert testimony usurp the fact-finder's basic function as to whether a rape has occurred, e.g., in the absence of any other probative evidence the victim claims she was raped, the defendant claims nothing happened, and expert testimony of PTSD potentially decides the central questions of fact. Nonetheless, "testimony regarding the presence of absence of rape trauma syndrome in the complainant could affect rape trials significantly."¹⁷ For example, in *Allewalt v. State*, both parties admitted there was a sexual encounter, and the use of PTSD syndrome evidence was held admissible to support the victim's testimony that she had not consented to sexual intercourse.¹⁸

It has been suggested that "courts allowing evidence of rape trauma syndrome have done so because of its widespread recognition in the psychiatric

community and because the subject matter of the testimony was outside the scope of the jury's knowledge, thus making the testimony helpful in rendering a decision."¹⁷ Some courts, however, continue to reject such testimony on the grounds that rape trauma syndrome evidence has insufficient scientific foundation to indicate reliably that the alleged crime of rape has actually occurred.¹⁹

Testimony concerning PTSD has also appeared in a trial concerning kidnaping and forced prostitution. In *United States v. Winters*,²⁰ the defendant suggested that the alleged victims had not been kidnaped but instead had voluntarily accompanied the defendant and committed acts of prostitution over a long period of time, without attempting to escape. In rebuttal, the prosecution presented an expert who explained that the trauma inflicted on the women by the defendant could have caused them to develop PTSD, which in turn would have produced learned helplessness and hindered escape attempts. The court held that this expert's testimony was admissible.

Although the subject is complicated, one can reasonably generalize that courts resist efforts to accept syndrome evidence as proof that a crime such as kidnaping or rape has occurred, but will allow its use to explain a victim's otherwise inexplicable or contradictory behavior. This is quite reasonable even on clinical grounds since often there is no independent evidence to substantiate the patient's account of the traumatic event. Nonetheless, in a variety of situations where the court is faced with con-

flicting testimony of victim/plaintiff and defendant, PTSD may be used directly or indirectly to swing the balance of credibility to the victim. PTSD has proved even more central in cases of physical and sexual abuse involving child victims. The probative value of the victim's testimony is problematic because of age and therefore the presence or absence of PTSD can be critical. As PTSD in the defendant can exculpate or mitigate, so PTSD in the victim can lead the government to prosecute, the jury to sentence, and the judge to punish.

Victim's Rights The past two decades have witnessed the emergence of victims' rights. Many factors are at work in this heightened awareness of the "forgotten persons" of the criminal justice system, but the recognition of the victims' psychological injury is an important part of the new sensibility. Legislation addressing victims' rights touches on three main areas: victim compensation funds, victim satisfaction with the criminal process, and victim impact statements (VIS). Each of these measures, though not without controversy, seems to be informed by clinical thinking about PTSD and its treatment. Victim compensation funds have often been allocated for PTSD mental health services as well as other medical and financial losses. But, just as there has been a conflict over battered woman syndrome as sickness or normal reaction, there has been a struggle between mental health professionals and other community based groups over the proper utilization of victim compensation funds. Least controversial are the victim satisfaction

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measures, which have injected a note of sensitivity into the criminal process and seek to avoid traumatizing the victim, e.g., by providing a separate waiting room for the victim of rape and the rapist. The victim impact statement has caused the most legal controversy. The victim of a crime such as rape is empowered by being given a voice in the criminal process by presenting a VIS at the time of sentencing. The VIS usually takes the form of a written report accompanying the presentence report. But in some jurisdictions the victim is allowed to speak in court. Evidence that the victim developed PTSD as the result of the defendant's actions may be included in the VIS and thus the objective evidence of the diagnosis may influence the judge to sentence more heavily. PTSD can also serve as proof of damages for a civil action arising out of the crime, as well as being the basis for payments from victim compensation funds set up by the State.

Victim impact statements have assumed even greater importance since the Supreme Court in *Payne v. Tennessee*²¹ ruled them admissible at the sentencing stage of capital punishment cases. In that case, the Court overruled two of its recent precedents, which had excluded such emotionally charged evidence from capital punishment hearings, and permitted testimony by the grandmother of a boy whose mother and sister had been brutally murdered by defendant regarding the effect of the murders on her grandson.²² Now that a murder victim's family is permitted to describe the crime's impact at the time of capital

sentencing, PTSD is a typical element in "scientifically" corroborating the claimed impact. Where a member of the murder victim's family develops severe PTSD, there may be an added likelihood that the death sentence will be imposed. Research indicates that more than one of five family members met the DSM-III-R diagnostic criteria for homicide-related PTSD at some time following the relative's death.²³ The authors calculated on this basis that over 1.1 million family survivors have developed PTSD. Thus, PTSD and violent crime have an important relationship and, as victim impact statement cases illustrate, PTSD can have enormous consequences in law.

"Psychology is a knife that cuts two ways." PTSD in the victims can serve to penalize the victimizers, but as we have already seen it can mitigate when the defendant is a victim. The most notable example is battered woman syndrome, which either as a mental disorder or as a normal reaction has been accepted by several state governors as the basis for executive clemency even when the courts have rejected it as the basis for a plea of insanity or self-defense.

Civil Law

By giving diagnostic credence and specificity to the concept of psychic harm, PTSD has become the lightning rod for a wide variety of claims of stress-related psychopathology in the civil arena. Unlike the diagnostic concept of neurosis, which emphasizes a complex etiology, PTSD posits a straightforward causal relationship that plaintiffs' lawyers welcome. Beyond its significance as

an apparent solution to the legal problem of causation, PTSD's greatest importance is that it seems to make matters scientific and objective that the court once considered too subjective for legal resolution. Standard legal reference works now provide explicit templates for civil litigation based on the DSM-III-R definition of PTSD.²⁴ Practicing attorneys assume that, "since PTSD has been recognized as a mental disorder that can be isolated and diagnosed, it has become a legitimate legal and factual issue with regard both to establishing liability and to defining damages in personal injury cases."²⁵ Lawyers are told that such claims even include the effects of invisible trauma. PTSD is demonstrating its ability to influence the current tort system both economically and doctrinally. The diagnosis is being used to erode traditional legal restrictions and break down barriers to recovery.

The following kind of case illustrates the potential economic impact of PTSD. During the Vietnam War, a group of Quaker women protesters, arrested while picketing outside the White House, were subjected to the indignity of strip searches, which included vaginal and rectal probing for drugs. Arguing that they were illegally arrested, these women brought a successful legal action but were awarded only nominal damages.²⁶ As in many such cases at the time, psychiatrists simply had no generally accepted conception of how to describe the psychic harm of such a brutalizing experience. Furthermore, courts were suspicious of what seemed to be totally subjective evidence in the form of plain-

tiffs' complaints about how they were "all upset," "could not sleep," felt "uncomfortable" every time they saw a policeman, and had "disturbing memories" of the incident. This essentially subjective evidence is transformed into "objective" and probative evidence by the expert who puts such symptoms together in a neat scientific package as PTSD. So "objectified" by PTSD in today's court rooms the group of Quaker women might well be awarded substantial damages.

PTSD has contributed to the remarkable increase in damage awards arising out of malpractice litigation against mental health practitioners who sexually abuse their clients/patients. The injury done to these plaintiffs is disabling psychic harm and the typical diagnosis is some combination of depression and PTSD. Six and even seven figure awards for damages are not unusual in these cases. As in the criminal law where the PTSD diagnosis can be the defendant's cry for sympathy as well as the scientific explanation of exculpation, so in the civil law PTSD is a plaintiff's cry of moral outrage against the victimizer as well as a measure of damages against the tortfeasor.

Purely Psychic Injury Historically, courts have been reluctant to award damages for psychic injury, without accompanying tangible physical injury (or at least some physical contact), because of difficulties in proof and valuation, and out of fear of opening the courts to a potentially unmanageable number of dubious claims.²⁷ PTSD, however, is causing noticeable changes in legal doc-

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trines that have traditionally limited recovery for psychic injury in the absence of physical contact. Psychiatric, psychological, and other mental health experts armed with the PTSD diagnosis purporting to offer both proof and valuation of harm are influencing courts to find liability in this area. Traditionally, courts have divided such instances into categories of "intentional," "grossly negligent," and "negligent" infliction of emotional distress, and applied different rules to each.

Intentional Infliction of Emotional Distress To obtain recovery for damages for intentional infliction of emotional distress, a plaintiff must generally prove four elements: (1) defendant's conduct must be intentional, or in reckless disregard of plaintiff's repose; (2) the conduct must be outrageous; (3) a causal connection must exist between defendant's conduct and plaintiff's distress; and (4) plaintiff's distress must be severe.²⁸ The PTSD expert can presumably provide probative testimony as to the third and fourth of these criteria. Courts, however, generally apply an *ad hoc* determination of the second criterion of outrageousness, e.g., the court must regard the defendant's behavior toward the plaintiff as "so extreme in degree [as] to go beyond all bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community."²⁹ In recent cases, plaintiffs have attempted to bolster claims of defendant's outrageous conduct with expert testimony that they suffer from PTSD. By a kind of reverse reasoning they argue that the defendant's conduct must have been

outrageous if it produced PTSD in the plaintiff. Evidence about PTSD may at least get the plaintiff's lawyer into court.

For example, in *Aloqaili v. National Housing Corp.*,³⁰ plaintiffs sued their landlords for housing discrimination, alleging intentional infliction of emotional distress. The district court rejected both defendants' contention that plaintiffs had not suffered serious emotional harm and their motion for summary judgment. According to the court, the plaintiff's introduction of expert testimony that she was suffering from PTSD as a result of defendants' behavior presented facts creating a genuine issue for trial.

However, the courts have not been swept away; in *Jones v. Tennessee Valley Authority*,²⁹ the 6th Circuit rejected a "whistle-blowing" plaintiff's claim for intentional infliction of emotional distress despite evidence that he suffered from PTSD. That court did *not* find defendants' actions, which included harassment, verbal abuse, and obstruction of plaintiff's work activities in retaliation for his reporting safety violations to the government "sufficiently outrageous" to support his claim, notwithstanding his PTSD diagnosis.

Thus, although judges are of course free to apply their own "objective" determination of outrageousness, those who accept the PTSD diagnosis as scientific may be prepared to view the presence of PTSD itself as proof that defendant's traumatizing behavior must have been outrageous and award damages for intentional infliction of emotional distress on that basis. The increasingly recognized problems of sexual harassment

suggest that PTSD will prove relevant to claims of intentional infliction of emotional distress in that area.

PTSD may also substantially up the damages ante for gross negligence or recklessly inflicted emotional distress. In the well-known Buffalo Creek disaster,³¹ more than a hundred people died as a result of defendants' faulty construction of a dam. In this important forerunner of PTSD tort litigation, which occurred before the PTSD diagnosis was officially introduced, the court awarded survivors \$6,000,000 for what was then termed "traumatic neurosis." The notation in the DSM-III-R that PTSD "is apparently more severe and longer lasting when the stressor is of human design,"^{2 (at 248)} is particularly appropriate for the faulty dam construction and would facilitate "man-made" disaster litigation like Buffalo Creek.

Negligent Infliction of Emotional Distress With regard to negligently inflicted emotional distress without accompanying physical injury, courts have generally allowed damages for plaintiffs who are in the zone of physical danger of the negligent act. However, debate continues over recovery for plaintiffs who are in a "psychic zone of danger," commonly referred to as "bystander" cases. Courts traditionally fear creating a situation that could lead to unlimited liability for a negligent defendant.²⁸ Once again, however, the existence of a recognized psychiatric disorder has the effect of undermining the justification for the traditional limits of the "zone of danger" doctrine, which was already much criticized by activist courts. In

both physical and psychic danger zone cases, such activist courts, led by California, apply a "foreseeability" test, asking whether the defendant could have foreseen that his or her actions would cause emotional distress to the plaintiff. "If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor (a) should have realized that his conduct involved an unreasonable risk of causing the distress . . . and (b) from facts known to him, should have realized that the distress, if it were caused, might result in illness or bodily harm."³² Applying the foreseeability standard, a California court more than 20 years ago awarded damages to a mother who witnessed the negligently caused death of her daughter by an automobile, even though the mother observed the accident from a safe distance.³³ The court reasoned that a negligent motorist could reasonably foresee that if a mother witnessed such an accident, she would sustain emotional damage.

From a legal perspective there is an important conceptual leap in these bystander cases that should be highlighted. There is a sequence in the requirements for a cause of action for negligent infliction of emotional harm: from physical injury, to physical contact, to being in a zone of danger where the plaintiff could have been seriously injured. But the bystander cases begin a new conceptual sequence, it is the effect on the plaintiff of injury to a third party when the plaintiff was not in danger of injury. As the quoted California case indicates,

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courts had overcome this conceptual hurdle without PTSD. Indeed, the Buffalo Creek litigation crossed this hurdle. Still, PTSD is an important addition to the plaintiff lawyer's armamentarium.

Because the DSM-III-R defines PTSD to result only from events "that would be markedly distressing to almost anyone,"^{2 (at 250)} lawyers have argued that a DSM-III-R diagnosis of PTSD in the plaintiff can preempt or at least supplement the court's reasoning regarding foreseeability: "When the evaluator finds that the plaintiff's injuries satisfy the criteria of post-traumatic stress disorder, foreseeability will not be in question, because the circumstances of the defendant's negligence will be so extreme as to make injury nearly inevitable."³⁴ Thus the PTSD diagnosis can encroach on the traditionally legal and factual determination of foreseeability. PTSD could similarly undermine the legal "presence" in the zone of danger requirement for recovery in jurisdictions that require it in cases of negligent infliction of emotional distress. Direct observation of the traumatic event is not required for a DSM-III-R PTSD diagnosis; "learning about a serious threat of harm to a close friend or relative"^{2 (at 248)} may sometimes suffice. From the psychiatric perspective, the plaintiff need not be present in either the physical or psychic danger zone in order to develop PTSD. Expert psychiatric testimony asserting PTSD in such instances can undermine legal doctrines that rein in awards for psychic harm on the rationale that evidence would be too subjective.

Many state supreme courts have re-

sisted the boldness of the foreseeability test in cases involving negligent infliction of emotional distress on the grounds that it creates a slippery slope on which no objective limits can be set on who may recover. The "scientific" diagnosis of PTSD would presumably supply those needed limits for the more conservative courts.

Combined Psychic and Physical Injury Where a plaintiff has suffered both physical and mental injuries, a PTSD diagnosis may be invoked to obtain a larger award for the mental component. For example, in *Ruiz v. Gonzales Caraballo*,³⁵ a case reminiscent of the Quaker women, the court took into account emotional trauma in awarding compensatory damages of \$150,000 to a plaintiff who was diagnosed as having PTSD subsequent to the use by police of excessive physical force during an arrest.

Automobile Accidents Since at least a portion of automobile accidents meet the criterion for a stressful event in the DSM-III-R, the use of PTSD to multiply an injured plaintiffs' damages translates psychic harm into substantial dollars within the tort system. In fact, lawyers are now instructed that PTSD is "particularly applicable to personal injury claims based on psychological reactions to automobile, public carrier, home, and industrial accidents."³⁶ The PTSD diagnosis is being used with increased frequency in routine motor vehicle accident cases, to the extent that "it almost would seem as though the appearance of the diagnostic entity of PTSD has spawned a subtype of PTSD patients—

the litigious victim of an automobile accident.”³⁶ (at 40)

The place of PTSD within transportation accidents has an interesting history in forensic medicine. During the latter part of the 19th century, as the frequency of railway travel and related accidents increased, a medical condition emerged that was referred to as “railway spine.” Trimble,³⁷ who summarized this literature, reports that the concept of spinal concussion was used to explain how a relatively minor injury could result in disproportionately severe symptoms. The recognition of this disorder by the medical community changed the nature of personal injury litigation, by allowing claims to be based on an inferred pathological process, rather than objective evidence, e.g., loss of a limb. “The disorder and its accompanying pathology were seized upon by litigants and their friends.”³⁷ (at 18) The notion that actual damage to the spine was responsible for the suffering observed in such cases was discounted by Page,³⁸ who suggested that symptoms unattributable to physical injury might more accurately be explained as resulting from the severe fright that accompanies a railway collision, rather than from a concussion for which there is no substantiating evidence. Thus, Page invoked a psychological explanation for the sequelae of a traumatic experience. Charcot³⁷ (at 44) suggested that the nervous states observed after railway accidents were manifestations of hysteria. Kamman³⁹ viewed post-traumatic neurosis as a response to the traumatic experience, unrelated to any physical

injuries received. Furthermore, he distinguished between “post-traumatic neurosis” and “compensation neurosis.” Although the latter was unconscious, it was thought to be precipitated by the “prospect of compensation, acting in association with personality defects.” “Whiplash,” “PTSD,” “secondary gain,” and “malingerer” are today’s scientific terms that echo this history.

The foregoing considerations serve to illustrate the expanding plaintiff’s pathway through which all torts lead to psychic trauma, psychic trauma leads to PTSD, and PTSD leads to financial reward.

PTSD and Legal Reform Recent legislative reforms (e.g., in California) and pending proposals in state and federal legislatures seek to control the damages awarded in malpractice and other tort litigation. One dimension of this reform is to limit, or even exclude damages for noneconomic losses such as pain, suffering, and emotional distress. By virtue of its status as a medical diagnostic entity, PTSD scientifically avoids these damage-limiting reforms provisions and potentially becomes another medically disabling condition to be compensated. PTSD also has major implications for reforms intended to control the rising costs of workman’s compensation. By defining PTSD to include physical manifestations, the DSM-III-R has provided a means for exempting PTSD-diagnosed plaintiffs from the traditional limitations placed on so-called “mental-mental” claims,⁴⁰ i.e., claims for purely psychic damages resulting

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from purely psychic distress in the workplace.

The combination of the PTSD diagnosis and the progressive expansion of the scope of third party legal responsibility for negligent injury⁴¹ threatens an explosion of emotional injury adjudication. Tort litigation is, however, not the only source of compensation.

The benefits and services to which a mental disability can qualify one throughout the United States include not only tort damages for emotional distress, but also Workers' Compensation, Social Security disability insurance benefits, supplemental security income (SSI), Medicaid, Medicare, private disability insurance benefits, Veterans Administration benefits, special education benefits for persons under age 22, vocational rehabilitation services, and enhanced employment and educational opportunities under the Federal Rehabilitation Act. . . . Altogether, there are in the United States more than 40 different systems of compensation for disability.³⁴

Concluding Comments

As this brief overview of a vast and growing subject illustrates, it would be difficult to overestimate the impact of PTSD on legal doctrine, legal thinking, and legal reality. In the criminal law PTSD has become a tool of the prosecutor as well as the defendant. And PTSD has helped to nourish "victims' rights," which now may threaten the constitutional rights of criminal defendants. PTSD as a theory of causation and a measure of damages has raised the stakes in civil litigation. But the apparent frequency of the diagnosis and its ubiquitous appearance in the courtroom should warn us that the DSM-III-R diagnosis may not provide the kind of bright lines that courts or even scientists

require. The ideological struggle over the condition of battered women, which parallels the struggles over the diagnosis of homosexuality, may indicate what is to come both in law and in psychiatry.

The concept of PTSD has demonstrated an almost awesome capacity to rework the psychological narratives of life experience. From the Holocaust survivor to the incest survivor, PTSD offers a new frontier of explanation. It seems at first to provide a world of Manichaean moral certainty where evil people traumatize innocent victims, but of course it is not that simple, indeed the victimizers claim to have been victims—the abuser was abused. Indeed the Vietnam veteran who committed atrocities on civilians is for that very reason a likely candidate for PTSD.

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