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THE CLINICAL PSYCHOLOGIST AS AN EXPERT WITNESS IN A PERSONAL INJURY CASE*

IRVING D. GAINES**

The clinical psychologist is a comparative newcomer to the field of negligence trials as an expert witness in court, but is worthy of our consideration in the seeking of new and improved trial techniques to help obtain the "more adequate award." The psychologist is not necessarily a physician but, instead, probably holds a Ph.D. degree. He has done four years of undergraduate work in psychology, plus probably another four years of graduate study, followed by the service of an internship. In some locales, the medical profession might consider the psychologist to be an intruder upon their field of endeavor but, in most instances, the psychologist works in close cooperation with the psychiatrist or the neurosurgeon in the case.

The injuries which lend themselves to use of a psychologist are head injuries. Through the use of various psychometric tests he is frequently able to pinpoint the exact time of occurrence of an abnormality or brain damage, or else rule out ancient causation. In many instances where neurological examinations are entirely negative the plaintiff may still suffer psychological disturbances as a complication to the original injuries. The duration will depend upon the individual's personality and history. In cases where the complaints persist for a prolonged period of time these psychological tests can often demonstrate objective evidence of the head injury. The psychologist can frequently offer an opinion, from his tests, whether or not the patient tested is a malingerer.

The psychologist is concerned with the capacity of the individual to react and, in effect, offers an opinion as to comparison of one individual with others in his age and cultural group. He is able to determine the existence of changes in personality and intelligence which may be directly attributable to an injury involved in litigation.

The basic tests given by a psychologist are projective in nature, planned to reveal only to experts the hidden anatomy of personality, just as blood counts and x-rays are diagnostic measures for medical

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men. The nub of the projective test is the way in which the subject is presented with neutral stimuli and asked to place his own interpretation upon it. Disarmed by the neutral quality of the stimulus, the object reveals important personality clues. It is the expert giving and interpreting of these clues, rather than the tests in themselves, which make these tests effective. There is no way to fake a response as there is no right or wrong answer to a question. All responses made during the tests are significant to the trained psychologist.

There are six basic types of tests given by the psychologist, and I will consider each of them briefly:

1. **RORSCHACH TEST.** This test is used for deep probing in order to reveal strengths and weaknesses, and the individual's degree of adjustment. Here, a series of ten cards is shown to the individual, one at a time; some are bright colored, others are black and white, but all are abstractions composed in ink blots. The psychologist inquires as to what the patient sees within these convolutions and what imagery they bring to mind. The subsequent description as well as the area on which attention is focused reveals clues to the individual's outlook on the realities of his environment.

2. **SENTENCE COMPLETION TEST.** Here the subject is given a group of incomplete sentences to complete with the first thought that comes to mind. They are chosen for their bearing on family, sex, personal relationships or self-concept. The incompleting sentence stimulates free association, and the result indicates whether emotional reactions are impulsive or controlled under stress; whether the subject tends to react realistically or fantastically; whether the subject responds to impulses from within or stimuli furnished by environment.

3. **FIGURE DRAWING TEST.** The subject is asked to draw a person and is advised that artistic abilities are unimportant. If a male is drawn first, then a request is made to draw a female, and vice versa. Behavior and idiosyncracies of the subject are observed closely throughout the test, and all of the details of the drawing are analyzed for personality clues. This test can spot sexual maladjustments, anxieties in personal relations, tendencies to withdraw from reality, inferiority complex, and structural brain damage.

4. **THEMATIC APPERCEPTION TEST.** Here the subject is shown, one at a time, a series of twenty pictures which concern critical and dramatic situations and invariably have ambiguous overtones. The subject is then asked to weave a story about each picture and to include events that might have occurred before and after the depicted moment. People have a tendency to interpret a situation according to past experience and needs, becoming so involved in story telling that they forget the need to disguise inner feelings. It is a method of revealing dominant drives, emotions, complexes and conflicts.

5. BENDER-GESTALT VISUAL MOTOR TEST. Here the subject is asked to copy nine geometrical figures made of dots, curves and straight lines. Speed, accuracy, position of figures are all significant. This test is used primarily to show up disturbances that are organic as well as psychological. Because a person's concept of form differs in the various stages of individual development, the manner of copying the patterns can show up disturbances. A man with a brain hemorrhage might copy in a childish scribble, and a schizophrenic might distort or lose the pattern completely.

6. I.Q. TESTS. Though such tests have been given in one form or another for nearly 400 years, their legal status is still in question and their legal use is still in its infancy. The test results are usually not admitted directly into evidence but, instead, may furnish a basis for the opinion of an expert witness such as a doctor or a psychiatrist. Such tests have a definite value in measuring the intellectual capacity of an individual, but it is seldom that a pre-injury record is available for comparison. It then becomes necessary to attempt to interpret sub-test findings as being indicative of deterioration. The test score may also be evaluated in terms of the individual's school history and former social and industrial capacity.

Though there is a voluminous amount of literature available in the psychological field as to devices and techniques useful in the appraisal of witnesses and diagnosis of testimony, there are few legal decisions and discussions as to the functioning of the psychologist as an expert witness himself. The lack of published decisions involving the psychologist as an expert witness is not necessarily a certain indication of the extent to which a psychologist presently functions in the trial court as such an expert. Along these lines, it is rather notorious that, although no appellate court has as yet approved of the judicial use of the lie detector, it is frequently used upon stipulation of the parties in trial courts. But such procedure does not produce a published opinion. On the other hand, the lack of consideration of appellate courts of the psychologist as an expert witness may be due in part to the fact that trial lawyers are not doing the creative or imaginative thinking necessary to adapt psychological developments to testimonial uses. Though no published opinion expressly authorized the clinical psychologist to perform his testing before the jury, it is certainly an item which lends itself to presentation as demonstrative evidence, but great care must be exercised to prevent the defendant's counsel from ridiculing the work of a psychologist in front of a jury, instead of disputing factually or logically the work of the psychologist. The psychologist on the witness stand must be cautious and wary of invading the province of the jury in the course of describing his testing.

In *Bratt v. Western Air Lines*¹ the court enunciated the essence of the "modern common sense" approach to expert testimony: "Will such testimony as a practical matter aid the tribunal in finding out the truth?" and said:

"It must be remembered that the court is not the judge of the quality of the evidence, nor does the witness perform the function of a juror—he can only contribute something to the jury's information, and if he can, he should be permitted to do so."

Professor David W. Louisell² of the University of Minnesota Law School, then proceeds to ask the question:

"Do not issues often arise in modern litigation as to which the psychologist has a power to draw inferences from the facts which a jury or judge without a jury, would not be competent to draw? One general category of psychology's competence would be in the field of mental abnormality—psychoses or insanity, mental incompetence, mental illness, and various gradations of mental retardation."

The majority of the reported cases relating to the psychologist as an expert witness are in the field of criminal law but are worthy of study by the tort lawyer who is seeking authority for use of the psychologist in his case. One of the earliest reported decisions on the use of such an expert witness is *People v. Hawthorne*.³ Here a psychologist, with an exceptionally fine background of education and training, was sought to be qualified in a murder case as an expert witness for the defense to testify upon the question of defendant's sanity. The trial court denied the psychologist to be competent as an expert on insanity, but permitted him to testify as to observations made while in contact with the defendant and as to any conclusions formed thereby. On appeal to the Michigan Supreme Court, Justice Butzel said in a concurring opinion:

"I do not think it can be said that his (the psychologist's) ability to detect insanity is inferior to that of a medical man whose experience along such lines is not so intensive . . . There is no magic in particular titles or degrees, and, in our age of intense scientific specialization, we might deny ourselves the use of the best knowledge available by a rule that would immutably fix the educational qualification to a particular degree."

The case of *In re: Restoration to Capacity of Masters*,⁴ was a proceeding on a petition for restoration to capacity of a woman who had been adjudged a feeble-minded person. One of the witnesses called in opposition to the petition was a psychologist. No objection

¹ 155 F.2d 850 (10th Cir. 1946).

² THE PSYCHOLOGIST IN TODAY'S LEGAL WORLD, 39 MINN. L. REV. 235.

³ 293 Mich. 15, 291 N.W. 205 (1940).

was made to the competency of his testimony, in the trial court, and the Minnesota Supreme Court said of his testimony:

"His qualifications as an expert in this field (conducting I.Q. tests upon feeble-minded persons) cannot be questioned. Even laymen are entitled to express in general terms their opinion as to the condition of another's mind, upon a suitable showing that they have had an opportunity to observe the mental characteristics and habits of such other, so as to form a reasonable conclusion or inference from the facts observed . . ."

In 1947 the Federal Court in Massachusetts permitted the use of a psychologist as a defense witness on the question of sanity in the treason trial of *U.S. v. Chandler*.⁵ Also, in the second trial of Alger Hiss, *U.S. v. Hiss*,⁶ the trial judge permitted testimony offered by the defense, in an attempt to impeach the credibility of the principal government witness, Whittaker Chambers, by both a psychiatrist and psychologist that the witness was, in their opinion, a psychopathic personality.

California has considered the testimony of the psychologist and has placed some limitations on his use. In *People v. McNichol*,⁷ a psychologist was permitted to testify for the defense in a case involving a prosecution for issuance of a bad check, and where the defense raised was intoxication which produced an alleged lack of a conscious intent to commit such an offense. However, he was not permitted to state the context of treatment notes of what the defendant had said while in a hypnotic state after injection of truth serum.

In an unrecorded case, but one discussed by Professor Louisell in his article in *Minnesota Law Review*,⁸ *State v. Pett*,⁹ a psychologist appeared as an expert witness for the state. The psychologist was permitted to testify as to all of his psychological examinations and findings, but was barred from expressing a summarizing opinion as to the question of the sanity of the defendant, as being a matter encroaching upon the province of a physician.

The Minnesota Statutes have gone far toward establishing recognition of psychologists. MINN. STAT. Sections 148.79-148.86 (1953) provides for certification of certain psychologists. MINN. STAT. Sections 256.07-256.08 (1953) requires consultation of the Commissioner of Public Welfare with a psychologist, as well as a physician, prior to the performing of certain operations upon institutionalized insane and feeble-minded persons.

⁴ 216 Minn. 553, 13 N.W.2d 487 (1944).

⁵ 72 F. Supp. 230.

⁶ 185 F.2d 822 (2nd Cir. 1950).

⁷ 100 Cal.App.2d 544, 224 P.2d 21 (1950).

⁸ *Supra*, note 2.

⁹ Dis. Ct., Carver County, 8th Jud. Dis., Chaska, Minn., 1952.

More recent decisions show the trend of the expanded use of the psychologist as an expert witness in other types of legal matters. In *Robbinsdale Amusement Co. v. Warner Bros. Picture Distributing Corp.*,¹⁰ which is a pending anti-trust suit for treble damages, the plaintiff called a psychologist as an expert witness to establish the range and degree of competition between the plaintiff and other theatres, and to show the drawing power of plaintiff's theatre. The Wisconsin Supreme Court in *Grosberg v. Grosberg*,¹¹ ruled upon a divorce proceeding which involved the question of the fitness of a wife to have permanent custody of minor children. The trial court had permitted the testimony of a psychologist in order to arrive at a decision that the husband was qualified and able to care for the children. The psychologist had actually appeared in behalf of the wife and testified that her emotional conflicts were on a neurotic level, which perhaps bordered closely on the field of medicine. No assignment of error was made as to this testimony and it was not attacked in the appellate court.

A recent decision in a suit involving a life insurance policy, *Hidden v. Mutual Life Insurance Company of New York*,¹² which considered the question of whether the insured was totally disabled within the meaning of the policies, reversed a trial court ruling which had denied a clinical psychologist the right to testify that the insured was totally disabled, and which had resulted in a jury verdict in favor of the insurance company. Here the psychologist had had considerable experience in his field in army hospitals. The appellate court said that the exclusion of psychologist's testimony could not be considered harmless since expert testimony played a great part in the trial of the case.

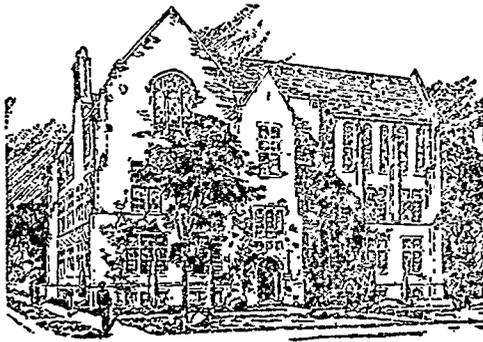
Additional decisions as to limitations, scope and usefulness of testimony by a psychologist will come in the future only through the increased usage of the psychologists by the trial lawyers as expert witnesses. However, the plaintiff's lawyer must always be ready to explore unchartered courses in the quest of the adequate verdict, and help create new law and legal authorities where none are available to them.

¹⁰ Civil #4584, 4th Dis., Minneapolis, U.S. Dis. Ct. of Minn.

¹¹ 269 Wis. 165 (1955).

¹² 217 F.2d 818 (4th Cir. 1954).

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