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Housing Discrimination**

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Abstract

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The Mental Anguish and Humiliation Suffered by Victims of Housing Discrimination

By
Larry Heinrich, Ph.D.*

Introduction

[*39] With increasingly large settlements in fair housing suits such as the *Fairfield North* ease¹ and the open discussion of feelings concerning sexual harassment following the Clarence Thomas/Anita Hill hearings,² the issues of mental anguish and humiliation take on greater importance in damage consideration in housing discrimination suits.³ Recently, in a legal conference in

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¹ *Fiedler v. Dana Properties*, No. 89-1396 (E.D. Cal. amended complaint filed May 29, 1990). Better known as the *Fairfield North* case, *Fiedler* represents the largest settlement to date in the area of sexual harassment in housing. Candy J. Cooper, *Unprecedented Court Victory For Harassed Women*, S.F. EXAMINER, July 7, 1991, at A1. The 1991 out-of-court settlement yielded thirteen of the women plaintiffs and their children nearly \$600,000 plus an additional \$200,000 for attorney's fees. The plaintiffs in *Fiedler* consisted primarily of poor, single mothers and their small children residing in the *Fairfield North* housing complex. The plaintiffs alleged that the manager of the complex had repeatedly harassed them. The incidents of harassment ranged from tampering with mail and rummaging through the tenants' personal belongings to hiding in closets, threatening the women and children with guns, and sexually abusing the female tenants. If the tenant protested, she was threatened with eviction, an unbearable alternative to the already poverty-stricken single mother. For more than two years, the plaintiffs' efforts to find representation for their complaints proved unsuccessful, largely because of the difficulty in establishing damages. The owners of the complex ultimately settled the case out of court, compensating the plaintiffs for mental anguish suffered as a result of the manager's harassment and awarding plaintiffs' attorney's fees. *Id.*

² See, e.g., Jill Smolowe, *She Said, He Said; As the Nation Looks On, Two Credible, Articulate Witnesses Present Irreconcilable Views of What Happened Nearly a Decade Ago*, TIME, Oct. 21, 1991, at 36 (detailing the sexual harassment allegations by Anita Hill during the Clarence Thomas confirmation hearings).

³ Housing discrimination cases are actionable under the 42 U.S.C. §§ 1981, 1982 (1988) and 42 U.S.C. §§ 3601-3631 (1988). See *Parker v. Shonfeld*, 409 F. Supp. 876, 878 (N.D. Cal. 1976). Damages under these Acts are based on the common law of torts; damages may include compensatory damages comprised of "not only out-of-pocket loss and other monetary harm, but also such injuries as 'impairment of reputation . . . personal humiliation and mental anguish and suffering.'" *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). See also *Baumgardner v. United States Dep't of Hous. and Urban Dev.*, 960 F.2d 572, 581 (6th Cir. 1992); *Stewart v. Furton*, 744 F.2d 706, 709

which the topic was [*40] mental anguish and humiliation in civil rights and harassment suits, a speaker stated that at the time lawyers receive their law degree, they seem to lose both their right and ability to have and be sensitive to feelings.⁴ Nevertheless, attorneys experienced in harassment and discrimination suits understand the importance, and yet, the difficulty of addressing the issue of compensatory damages in relation to personal anguish and humiliation of the victims of social injustice. Considering the interrogative and investigative style which attorneys use to establish evidence for the violation itself, it is precisely that emphasis on “objectiveness” which may inhibit the disclosure of a client’s emotional vulnerability and embarrassment. Healthy and psychologically well-defended individuals are not likely to allow themselves to appear “emotionally vulnerable” when narrating events and facts to attorneys. However, it is important to remember that individuals will seek redress not simply because a law has been violated, but because they have been personally offended. There is pain, anger and hurt underlying the client’s move to take legal action against a landlord or seller. Although this pain is not necessarily related to a physical injury, courts do recognize it as a psychic injury for which compensatory damages may be awarded.⁵

It may appear difficult to present convincing evidence of mental anguish and humiliation in court.⁶ Occasionally, a client [*41] clearly expresses his or her emotional pain in court. More often than not, however, the client is unable to articulate this pain. If attorneys better understand how anguish and humiliation are expressed not only in words, but also in behavior and symptoms, they will have the opportunity to consider other means to effectively place those facts before the court.

This article briefly discusses four specific areas relating to mental anguish and humiliation suffered by victims of harassment and housing discrimination.

(6th Cir. 1985); *Phillips v. Hunter Trails Community Ass’n*, 685 F.2d 184, 190 (7th Cir. 1982); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 235 (8th Cir. 1976); *Williams v. Matthews Co.*, 499 F.2d 819,829 (8th Cir. 1974), *cert. denied*, 419 U.S. 1021 (1974); *Donovan v. Reinbold*, 433 F.2d 738, 743 (9th Cir. 1970); KENTUCKY COMMISSION ON HUMAN RIGHTS, DAMAGES FOR EMBARRASSMENT AND HUMILIATION IN DISCRIMINATION CASES, at 3 (1980) (stating “[the] theory of the availability of recovery for damages to “intangible” interests is being increasingly applied in cases of housing discrimination, both by specific statutory authorization, and by analogy of the psychic injury resulting from the act of discrimination to the so-called ‘dignity’ injury, similar to the defamation action”) [hereinafter KENTUCKY COMMISSION].

⁴ Litigating and Winning Cases Under the Civil Rights Act of 1991, (Conference sponsored by the National Employment Lawyers Association of Illinois, Apr. 16, 1992).

⁵ For further discussion, see KENTUCKY COMMISSION, *supra* note 3.

⁶ Courts have noted the inherent difficulties of evaluating emotional injuries resulting from civil rights deprivations and do not demand precise proof to support a reasonable award of damages for such injuries. *Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241, 1244 (8th Cir. 1983); *see also Phillips*, 685 F.2d 184 (7th Cir. 1982) (district court based award for mental and emotional distress on the plaintiff’s testimony and demeanor); *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974) (damages for emotional humiliation resulting from violations of §§ 1982 and 3604 inferred from surrounding circumstances).

Part I presents instances in which an attorney may utilize expert witnesses in preparing his client's case. Part II analyzes how to recognize and identify the feelings, behaviors, symptoms and manifestations of pain and humiliation in a client which may have been caused by an act of discrimination or harassment. Part III details how a forensic evaluation⁷ differs from therapy and other clinical evaluations. Finally, Part IV concludes with a brief discussion of specific legal issues and problems that are likely to occur when an individual's pain, suffering and personal anguish are before the court and become subject to direct and cross examination. The foundation for the assessment and forensic presentation of issues of personal anguish and humiliation in discrimination and harassment cases comes from the evaluation and treatment of individuals who have experienced traumatic stress as well as the evaluation and treatment of individuals who claim psychic injury and disability because of injury or work related stress.⁸

I. The Role of an Expert Witness in Discrimination Suits

There are several very different and distinct ways a mental health specialist or expert witness may prove useful in dealing with the issues of emotional and psychological distress. "Expert witnesses" refers not only to physicians, psychiatrists, psychologists, social workers and therapists, but also, to a broader range of social scientists that includes social researchers, sociologists and cultural anthropologists. An expert in the diagnosis of emotional distress or a treating therapist may assist an attorney in preparing or elaborating on the client's anguish and humiliation. Conversely, the social scientist can assist the attorney in developing relevant social information and data. Whether or not this latter individual would testify [*42] as an expert witness would be optional. A social scientist could prove helpful by identifying how the reality of discrimination is identified in on-going research. An example of this would be defining and describing the social context and framework in which discrimination occurs or is likely to occur in our society.⁹

A recent edition of the *American Psychologist*,¹⁰ the official journal of the American Psychological Association, discusses expanded roles for social scientists in the courtroom. The edition reviews the *Price-Waterhouse v.*

⁷ A forensic evaluation is a diagnostic assessment completed by a professional who has had specific training in identifying mental health issues which are, or can be, an issue in litigation. Some of these issues include competency, fitness, sanity, mitigation, exacerbation, dangerousness, custody, psychic trauma and abuse. In addition, the forensic evaluator is familiar with the demands that are placed on a professional who testifies as an expert witness.

⁸ Herbert Modlin, *Civil Law and Psychiatric Testimony*, in FORENSIC PSYCHIATRY AND PSYCHOLOGY 469 (William J. Curran et al. eds., 1986).

⁹ John Monohan & Laurens Walker, *Social Science in Law: A New Paradigm*, 43 AM. PSYCHOLOGIST 465, 470-472 (1988).

¹⁰ Elizabeth F. Loftus, *Psychology, Law and Social Change: Resolving Legal Questions With Psychological Data*, 46 AM. PSYCHOLOGIST 1046 (1991).

*Hopkins*¹¹ case in which the court recognized psychological and social research as an evidentiary basis for identifying cognitive approaches to gender and racial stereotyping. The case centered on an accounting firm's refusal to make Ann Hopkins a partner.¹² The plaintiff's counsel successfully argued that the company's refusal was based on gender stereotyping.¹³ Ann Hopkins had been described by some of her colleagues as acting in a way which "overcompensated for being a woman."¹⁴ She had also been described as having interpersonal problems.¹⁵ In the *Hopkins* case, psychological and social researchers successfully demonstrated that sex stereotyping in relation to employment expectations and evaluations could be clearly identified. Expert witness testimony "drew on both laboratory and field research to describe antecedent conditions that encourage stereotyping, indicators [*43] that reveal stereotyping, consequences of stereotyping for outgroups, and feasible remedies to prevent the intrusion of stereotyping into decision making."¹⁶ Convinced by the expert testimony, the *Hopkins*' court ultimately ruled that an "employer that treats a woman with an assertive personality in a different manner than if she had been a man is guilty of sex discrimination."¹⁷ As a result, the *Hopkins* case expanded the role of social scientists as expert witnesses. This was ". . . extraordinary to have [psychological] research, in an area so well established and thriving, be confronted by some of the most prominent legal minds in the country."¹⁸

A more familiar example of using a professional as an expert witness is when the client has sought medical attention or counseling services as a result of stress following the discriminatory incident. It may be advisable, however, to use

¹¹ Price-Waterhouse v. Hopkins, 618 F. Supp. 1109 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228 (1989). The district court held that even though a plaintiff in a Title VII case proves that her gender has played a part in an employment decision, the defendant may still avoid liability by proving by clear and convincing evidence that it would have made the same decision even without taking the plaintiff's gender into account. *Id.* at 1120. The court of appeals affirmed the clear and convincing standard. 825 F.2d at 472. In reversing both the district court and the court of appeals, the Supreme Court held that a defendant employer in a Title VII action may avoid liability by proving by a preponderance of the evidence that the same employment decision would have been reached even if it had not taken the plaintiff's gender into account. 490 U.S. at 253.

¹² *Hopkins*, 618 F. Supp. at 1111.

¹³ *Id.* at 1116-17. At the time the plaintiff was denied partnership, the accounting firm had 662 partners of whom only seven were women. *Id.* at 1112. Of the 88 candidates for partnership that year, Hopkins was the only female. *Id.* None of the other candidates had comparable records with respect to securing major contracts for the firm. *Id.* One partner advised that Hopkins could improve her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 1117. See also Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCHOLOGIST 1049, 1050 (1991).

¹⁴ *Hopkins*, 618 F. Supp. at 1116-17.

¹⁵ *Id.* at 1113-14.

¹⁶ Fiske, *supra* note 13, at 1050.

¹⁷ *Hopkins*, 618 F. Supp. at 1119.

¹⁸ Fiske, *supra* note 13, at 1057.

the therapist as a factual witness. Without qualifying the therapist as an expert in the stress response syndrome,¹⁹ the therapist could explain how the client sought relief from anxiety, depression or other symptoms.

Finally, there are cases in which a specific evaluation might be helpful for the identification and presentation of clinical evidence supporting a claim of psychological and emotional distress as a result of the discrimination. Testimony by a panel of legal experts before the Kentucky Commission on Human Rights in 1980²⁰ indicated that there is a legitimate presumption of embarrassment and humiliation in all instances of discrimination. Discrimination itself [*44] is described as an assault on personhood.²¹ Individuals will handle this stress with a variety of psychological defenses, some more successfully than others. Because of this insult towards the person,²² the Commission discussed a basic monetary standard for compensation. Such a basic (presumed) standard ranged from \$1,500.00 to \$15,000.00. In the vast majority of discrimination cases, however, an expert witness is not necessary. Nevertheless, an expert witness may be helpful if there are exacerbating circumstances of the discriminatory act or an increased vulnerability within the client.²³

While the court may rely heavily on the plaintiff's testimony and demeanor in assessing damage awards, other determinants may expand the evidentiary foundation for damage awards. In *Phillips v. Hunter Trails*

¹⁹ The essential feature of this syndrome, a cluster or complex of symptoms, is that it characteristically follows a specific distressing event. Professionals use various labels from the *Diagnostic and Statistical Manual of Mental Disorders, Third Edition Revised*, such as acute reaction to stress, adjustment reaction, anxiety reaction, or post traumatic syndrome response, to describe this. AMERICAN PSYCHIATRIC ASSOCIATION, DSM-III-R, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, (1987). The handbook of diagnostic categories and labels is commonly referred to as "DSM III-Revised" and is used by all psychiatrists and psychologists.

²⁰ Both legal and non-legal experts were invited to testify in public hearings before the Commission in the area of compensatory damage in discrimination cases. During the February, 1980 hearings in Covington, Kentucky, the participants were: R.F. Laufman, Laufman, Quinn & Gerhardstein, Cincinnati, Ohio; Dr. J. Titchener, Psychiatrist, Cincinnati General Hospital; K. F. Holbert, Special Advisor, General Counsel's Office, Dep't. of Hous. and Urban Dev., Washington, D.C.; O. H. McDonald, II, Doctoral Candidate, Univ. of Cincinnati; and R.L. Schwemm, Associate Professor of Law, Univ. of Kentucky. In hearings during March, 1980, testimony from experts included F.W. Caruso, General Counsel, Leadership Council for Metropolitan Open Communities, Chicago, Illinois; R.L. Tucker, Tucker & Watson, Chicago, Illinois; A.S. Friedman, Chief Counsel, The Housing Advocates, Inc., Cleveland, Ohio; W.H. Hickman, Polleti, Frieden, Prasker, Feldman & Gartner, New York, New York. KENTUCKY COMMISSION, *supra* note 3.

²¹ Dr. Titchener, in his testimony, described a sense of self worth that is needed for human survival. He further described the home as an extension of the self so that discrimination brings "reflexive and automatic feelings of humiliation and shame . . ." *Id.* at 45.

²² In identifying this insult to the person, the Commission stated that "feelings of inferiority, personal humiliation and the like are the rule rather than the exception in incidents of discrimination." *Id.* at 4.

²³ THE JOHN MARSHALL LAW SCHOOL FAIR HOUSING CLINIC AND LEGAL SUPPORT CENTER, A PRIMER ON FAIR HOUSING LAW 36 (1992) (published in cooperation with The Leadership Council for Metropolitan Open Communities).



Community Association,²⁴ the court reduced the initial compensatory damage amount of \$50,000.00. It appears that the court reduced the award because only the testimony and demeanor of the plaintiff were used as the basis for the award. However, in other cases, such as *Seaton v. Sky Realty*²⁵ and *Phiffer v. [*45] Proud Parrot Hotel, Inc.*,²⁶ compensatory and damage awards included humiliation

²⁴ 685 F.2d 184 (7th Cir. 1982). In *Hunter Trails*, a black couple applied to purchase a private home in a subdivision of Oak Brook, Illinois. *Id.* at 185. The couple were financially successful and qualified for a mortgage. *Id.* Four days before the closing, the Hunter Trails Community Association, in lieu of exercising their right of first refusal, informed the couple that they had assigned this right to a third party. *Id.* at 186. The assignment prevented the couple from purchasing the home. The couple then filed suit under Section 1 of the Civil Rights Act of 1866 and the Fair Housing Act, seeking an immediate injunction as well as compensatory and punitive damages. The trial court awarded the couple \$52,675 in actual damages and \$100,000 in punitive damages. *Id.* \$2,675 out of the \$52,675 was not objected to on appeal since it was for out-of-pocket expenses. *Id.* at 190. However, the Association did object to the court awarding \$25,000 to each plaintiff for “humiliation and embarrassment.” *Id.*

On appeal, the *Hunter Trails* court reduced the compensatory damages to \$10,000 for each plaintiff. The court reasoned that since the testimony and demeanor of the plaintiffs were the *only* bases for awarding damages for mental and emotional distress, \$50,000 was excessive. In reaching this conclusion, the *Hunter Trails* court compared the lower court’s award with other awards granted in the circuit. *Id.* The court then concluded that in light of other Fair Housing discrimination suit awards, \$10,000 per plaintiff was more appropriate. *Id.* at 191. The court did, however, indicate that had the lower court taken into account the recent developments and new-found knowledge about the “damaging effects of discrimination in housing,” the large award may have been justified. *Id.* at 190-191.

²⁵ 491 F.2d 634 (7th Cir. 1974). In *Sky Realty*, a black couple inquired about a home which had been advertised for sale in a predominantly white neighborhood. *Id.* at 636. The couple contended that due to their race, Sky Realty refused to negotiate on their behalf. At trial, evidence was introduced to show that Sky Realty was racially motivated. Among the evidence presented was the prospect sheet, containing the notation “col” as an abbreviation for colored. Finding that the plaintiff “suffered great embarrassment because of the actions of the defendants during his attempt with his wife to visit the property. . . .” the district court granted the plaintiff \$500 in damages for humiliation. *Id.*

On appeal, the *Sky Realty* court affirmed the district court’s award. *Id.* at 637-638. First, the court stated that under 42 U.S.C. § 1982, compensation can be awarded for humiliation of the type involved in this case. *Id.* at 636. According to the court, the plaintiff suffered humiliation for being subjected to racial indignity. The court characterized this indignity as “one of the relics of slavery which 42 U.S.C. § 1982 was enacted to eradicate.” *Id.* Second, the *Sky Realty* court concluded that this form of humiliation can be inferred from the circumstances. *Id.* at 637. In comparing discrimination under § 1982 to deprivation of the right to vote, the court noted that:

[i]n the eyes of the law this right is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right.

Id. at 638 (quoting *Wayne v. Venable*, 260 F.2d 64,66 (8th Cir. 1919)).

²⁶ 648 F.2d 548 (9th Cir. 1980). In *Proud Parrot*, a black couple attempted to rent office space in a motel. *Id.* at 550. The motel informed the couple that the advertised space would be reserved for them. When the couple returned the following day with a deposit, however, the motel refused to rent them the space. At this point the wife, suspecting the real motivation behind the refusal to rent was racial, became upset and left the premises crying. *Id.* In a subsequent action for violation of

inferred from the circumstances; the victims were embarrassed and humiliated in front of others, specifically wives and children. Although the record does not indicate that expert witnesses were utilized in these cases, the possibility remains that a forensic mental health expert's consultation may have contributed even further to the final damage awards by expanding on the impact of personal versus public humiliation.

II. Identifying Anguish and Humiliation Resulting from Discrimination

How does an attorney recognize in a specific case that the intensity of anguish, humiliation, psychological and emotional distress is a factor which needs to be highlighted and specifically [*46] addressed in the case preparation and settlement considerations? From the first meeting with a client, the attorney needs to be aware of clues which indicate that the client has experienced significant or exceptional personal distress from the discrimination. While a client may verbalize how hurt, upset or angry they were by the discriminatory act, it is important for the attorney to comprehend how the feelings are expressed or played out in symptoms and behavior. It would be useful, for example, for attorneys to be familiar with the checklist of fifty-nine symptoms mentioned in *Damages for Embarrassment and Humiliation in Discrimination Cases*.²⁷ In particular, red flags go up if the client mentions sleeping or eating problems, nightmares, restlessness, avoidance of or change in social interactions, irritability, fatigue, unusual fears, bouts of tearfulness or anxiety, an experience of increased and generalized distrust, loss of drive and enthusiasm to pursue personal responsibilities and daily activities.²⁸ When asking questions such as "how did that (action or incident) make you feel?" and "how have you been feeling about yourself since then?", the attorney must be particularly tuned in to the demeanor and responses of the client. A trained professional is not always needed to ascertain that an individual is depressed or defeated since slumped shoulders, slower speech, downcast eyes, and held back tears are all signals which are visible to any individual.²⁹ An attorney must also determine any changes in the client's adjustment since the discriminatory act. Does the client report on-going feelings

their civil rights, the district court awarded general damages to both plaintiffs for the "considerable emotional distress and humiliation" that they suffered. *Id.* at 551-52.

On appeal, the court affirmed the damage award. *Id.* at 553. The court stated that the wife's testimony as well as her overt reactions when told they could not rent the space were enough for the court to infer her humiliation. *Id.* at 552-53. Furthermore, the court held that humiliation can be inferred from surrounding circumstances and need not be based solely on the testimony and demeanor of the witness. *Id.*

²⁷ KENTUCKY COMMISSION, *supra* note 3.

²⁸ DSM-III-R lists these symptoms as indicators of anxiety, depression or response to stressful situations. American Psychiatric Association, *supra* note 19, at 250.

²⁹ For a more extended discussion of behavior during interviews see Joseph Matarazzo, *The Interview*, in HANDBOOK OF CLINICAL PSYCHOLOGY 403, 450 (Benjamin Wolman, ed., 1965).

of depression, anger, or hurt? Were there any changes in interactions with people at home or at work? Did the discriminatory act make the person feel differently about himself or herself or cause some re-evaluation of attitudes, priorities or perceptions of fairness? A specific change in mood of the individual known as “anhedonia” or “hedonic loss” is of particular clinical and forensic importance.³⁰ Anhedonia is best described as a “loss of pleasure” in one’s everyday activities and it underlies many of the symptoms already mentioned. Certainly the suggestion of loss of interest, enthusiasm or loss of pleasure in everyday activities as well as any combination of the aforementioned symptoms would warrant further clinical evaluation.

[*47]

III. Forensic Evaluations in Contrast to Other Clinical Examinations and Therapy

The forensic evaluation is a diagnostic interview and procedure which is unique and specialized in several aspects. In the first session, the forensic professional advises the client that the doctor-patient privilege needs to be voluntarily waived because the doctor will share results with counsel. It is also important that the evaluator clearly explains to the client that the diagnostic assessment is only an evaluation and the examiner may not be asked to appear in Court.³¹ My own procedure in these cases is to begin with a single clinical interview so that I can obtain a sense of whether or not the issues of personal anguish and humiliation are particularly noteworthy in this individual. In the event that the initial interview suggests intensified personal anguish and humiliation, it is likely that I might recommend additional psychological testing and clinical (forensic) evaluation.

The forensic evaluation is different from an ordinary clinical evaluation at several levels. The forensic evaluator is alert for evidence or signs that the individual may be malingering, faking, or exaggerating symptoms in order to increase a damage award.³² The forensic evaluation also differs from the ordinary clinical interview because the forensic evaluator is willing to consider outside sources of validation including individuals who come forward to support or refute

³⁰ Larry Bodine, *Tort Awards: Hedonic Damages Catch On*, NAT’L L. J., Mar. 9, 1992, at 27, 28.

³¹ An expert may not be asked or choose not to testify for a variety of reasons. In the diagnostic process, the client may become more open and in touch with the hurt and humiliation and may be more capable of presenting the best testimony. In addition, the diagnostician may uncover malingering, lying or such serious psychopathology that testimony by the forensic evaluator may not be helpful to the client’s case.

³² Certain tests, such as the MINNEAPOLIS MULTIPHASIC PERSONALITY INVENTORY II, are designed and scored with specific indicators to assist the examiner in determining the probability or likelihood of malingering (faking or exaggerating symptoms and complaints) as well as excessive use of denial or inability to acknowledge problems. *Minneapolis Multiphasic Personality Inventory II* (Univ. of Minn. Press) (distributed by National Computer Systems, Minn. MN).

the plaintiff. The forensic evaluator attempts to objectively determine differences in the plaintiff's functioning prior to and following the discrimination incident.

In general, the forensic evaluator looks for a syndrome; a group or complex of specific behaviors and complaints which are associated with reactive depression and increased anxiety. The syndrome is similar to those symptoms that are associated with the Post Traumatic Stress Syndrome. In discrimination cases, however, a "traumatic" precipitating incident generally has not occurred.³³ The [*48] discrimination or harassment certainly is subjectively traumatic to the individual, but it would generally not be classified as the result of an objective "trauma". In order for the forensic evaluator to assist the client as well as the attorney, it is critical for the evaluator to identify the manifestations of anguish and humiliation which result from the discriminatory act. As Dr. Titchener pointed out in his testimony before the Kentucky Commission on Human Rights, denial plays a significant role in masking some of the symptoms and changes which have resulted from the embarrassment and humiliation.³⁴ On occasion, it is this writer's experience that following referral of clients for a forensic evaluation, attorneys have reported that depressed clients find it easier to talk more openly about the embarrassment and humiliation connected with the discrimination or harassment. In other instances, it may be appropriate for the evaluator to recommend to the client and attorney that no further evaluation be undertaken. An evaluator may recommend this for a variety of reasons, including the fact that opening up the client's mental and emotional state to direct and cross examination would be unwise. On other occasions, it may be appropriate to recommend further counseling or therapy for the individual. The evaluator needs to make it clear to the client and attorney that he cannot provide additional therapy since it would present a potential (financial) conflict of interest if the evaluator is called upon to testify in court. In instances where this writer recommends therapy, the client is given an article³⁵ which explains how to select a suitable therapist.

IV. Special Problems and Issues

If the client has already contacted a therapist or counselor, the client and the attorney need to discuss with the therapist the advisability and feasibility of having the therapist testify at trial. A large number of professionals, especially those engaged in psychotherapy, shun court appearances and avoid court

³³ DSM-III-R describes the essential feature of post traumatic stress disorder as development of symptoms following "a psychologically distressing event that is outside the range of usual human experience [i.e. outside the range of such common experiences as simple bereavement, chronic illness, business losses, and marital conflict]." American Psychiatric Association, *supra* note 19, at 247.

³⁴ KENTUCKY COMMISSION, *supra* note 3, at 32.

³⁵ Steven J. Gross, CHOOSING A THERAPIST (1983) (copies can be obtained by writing Dr. Steven Gross, 540 Frontage Road, Suite 3215, Northfield, Illinois 60093).

testimony whenever possible.³⁶ It is also advisable to interview the therapist prior to having him or her testify. In a recent civil case in which I was asked to be a consultant for the defense, the plaintiff's counsel offered a therapist [*49] as an expert witness in relation to psychic injury. The therapist's notes contained a major misdiagnosis and the therapist could not effectively identify the therapeutic intervention geared to target symptoms. Furthermore, the therapist had taken a simplistic approach to support the client who tended to dramatize hysterical complaints. The therapist did not explore the history of the plaintiff which was replete with other psychological dynamics and stressors which accounted for numerous neurotic complaints. Following the depositions of the "experts" on both sides, it was apparent the plaintiff's case lacked adequate foundation and the matter was successfully arbitrated.

One of the problem issues or questions that I foresee in maximizing damages as a result of personal anguish and humiliation will be when the defense asks the "but for" question. Let me make an analogy from another legal area, criminal proceedings. In order to establish lack of culpability in an insanity defense, the "but for" question must be answered firmly and without clinical doubt that mental disease, illness or defect substantially impaired the defendant's understanding at the time of the offense or prevented him from conforming his behavior to the requirements of the law.³⁷ In [*50] other words, there must be a direct causal link between action and the emotional or psychological issues.

³⁶ Professionals are generally untrained and very uncomfortable with the process of cross examination. Most professionals do not expect that their statements, conclusions or the approach to the specific treatment may be called into question.

³⁷ ILL. REV. STAT. ch. 38, para. 6-2 (1991); *State v. Pike*, 49 N.H. 399 (1870). The "but for" test is part of what is commonly known as the "product test." *See, e.g., Campbell v. United States*, 307 F.2d 597 (D.C. Cir. 1962); *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1957). For a defendant to escape culpability under the product test, the defendant must show that the act complained of was the product of a mental disease or mental defect. *State v. White*, 374 P.2d 942 (Wash. 1962). In defining the term "product," the court explained that a "defendant was entitled to a judgment of not guilty by reason of insanity if he would not have committed the offense 'but for' or 'except for' the mental disorder." *Carter*, 252 F.2d at 617.

The product test received widespread notoriety after being accepted by the District of Columbia in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). However, almost two decades later this circuit overruled the *Durham* rule in favor of the now common "substantial capacity" test. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). The "substantial capacity" test, promulgated by the American Law Institute, is currently being used in most state courts and all federal circuits. *See, e.g., United States v. Holt*, 450 F.2d 868 (5th Cir. 1971); *People v. Drew*, 583 P.2d 1318 (Cal. 1978). Under the Model Penal Code, "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (1962).

One of the earliest cases recognizing a "defense on the grounds of insanity" was the *M'Naghten* case. 10 Clark & F. 200, 8 Eng. Rep. 718 (H.L. 1843). In *M'Naghten*, Daniel M'Naghten mistook Edward Drummond for Sir Robert Peel and killed him. M'Naghten subsequently was found "not guilty by reason of insanity." After the case was decided, the House of Lords put certain questions to the judges to determine the parameters of the insanity defense. *Id.* at 721. The answers given



The strict “but for” standard will generally not apply in assessing damages within employment, fair housing or civil rights actions.³⁸ Opposing counsel may suggest that the personal anguish and humiliation is caused not by the discrimination, but by the client’s vulnerability. This claim, however, does not vitiate the claim for damages.³⁹ Certainly individuals are more “vulnerable” to stress at a given moment in time, but that vulnerability does not diminish the wrongfulness of the discrimination or necessarily negate the client’s emotional response.

It is anticipated that the defense counsel could suggest to the judge or jury that a client was referred by the plaintiff’s counsel for therapy to enhance damage awards. The plaintiff’s attorney may actually be safeguarded by referring the client for forensic [*51] evaluation.⁴⁰ The issue of significant personal anguish, humiliation, emotional or psychological distress then rests, to a large degree, on the credibility of the plaintiff and the expert witness. Whether or not the plaintiff

became known as the M’Naghten rule. See generally PERKINS & BOYCE, CRIMINAL LAW & PROCEDURE 597 (6th ed. 1985). Simply stated, the M’Naghten rule is a right/wrong test. PERKINS & BOYCE, *supra* at 597. If at the time of committing an offense the defendant was “laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong,” he is entitled to the insanity defense. *Id.* The M’Naghten test replaced the prior good/evil test where an accused could escape punishment if he did “not know what he is doing, no more than . . . a wild beast.” *Rex v. Arnold*, 16 How. ST. TR. 695, 764 (1724).

In the early nineteenth century the M’Naghten rule came under attack for its inadequacy and inability to take into account psychic realities and scientific knowledge. *Durham*, 214 F.2d at 874. Specifically, the test does not recognize that insanity not only affects a person’s cognitive and/or intellectual faculties, but also, a person’s emotions. *People v. Drew*, 583 P.2d 1318 (Cal. 1978). Therefore, an insane person may know and recognize the nature of his act, namely that it is wrong and unlawful, and yet be unable to control himself due to his mental illness. *Id.* *But see* *State v. White*, 374 P.2d 942, 965 (Wash. 1962) (the M’Naghten rule is preferable because there is no more psychiatric certainty today than there was years ago). *See also* Sol Rubin, *A New Approach to M’Naghten v. Durham*, 45 J. AM. JUD. SOC’Y 133, 136 (1961). Furthermore, the M’Naghten rule was only based upon one symptom, namely defect of reason, and could not be properly and adequately applied in all circumstances. *Id.*

Consequently, some courts adopted the “irresistible impulse” test. *See, e.g.,* *Smith v. United States*, 36 F.2d 548 (D.C. Cir. 1929). However, this test also came under attack for not taking into account mental illnesses caused by “brooding and reflection.” *Durham*, 214 F.2d at 874; *accord*, *People v. Gorshen*, 336 P.2d 492 (Cal. 1959) (irresistible impulse test not recognized). Due to the inherent problems in both the M’Naghten and irresistible impulse tests, the product test and the substantial impairment tests were adopted to keep up with current legal and psychological thought. *Id.*

³⁸ David Shapiro, *Traumatic Neurosis*, in PSYCHOLOGICAL EVALUATION AND EXPERT TESTIMONY 119 (1984).

³⁹ *See generally* Nathan T. Sidley, *Proximate Cause and Traumatic Neurosis*, 11 BULL. AM. ACAD. PSYCHIATRY 197 (1983). *Cf.* *Baumgardner v. United States Dep’t. of Hous. and Urban Dev.*, 960 F.2d 572 (6th Cir. 1992). Although the court in *Baumgardner* gave the injured party the “benefit of the doubt” in affirming the emotional distress award, the court noted that the party did not seem to be “a man of vulnerable constitution easily driven to distress.” *Id.* at 581.

⁴⁰ In other words, the symptoms and manifestations of anguish and humiliation are identified and verified by a source not vested in final damage settlement.

has sought therapy or counseling may or may not become an issue. Individuals who are depressed, anxious and display a number of symptoms may not go to a therapist for a variety of reasons, the most common reasons being financial concerns or general distrust of therapy.

The defense may question whether the emotional distress was attributable not to the discrimination, but to the actions of the complaining party. If this situation is anticipated, again it is helpful if the plaintiff has been evaluated by a forensic professional. Let me give you an example. In one case, I was asked to evaluate a potential plaintiff who alleged discriminatory racial incidents at work. In the clinical interview, it became apparent that her allegations of discrimination extended beyond the immediate work environment and related to her “special” relationship with religious and political leaders as well as her special religious powers and mission from God. It would have been unwise to bring this client’s mental status into question in open court.

Finally, be wary of “experts” who are willing to testify dogmatically that significant emotional and mental distress are the result of a single stressor.⁴¹ If an expert does not give realistic consideration to other possible conditions for the client’s intense responses of anguish, then defense counsel can readily introduce other clinical experts who will bring these multiple compounding stressors to the attention of the court. As you are aware, there are psychiatrists and psychologists who are self proclaimed experts and like “fools, rush in where wise men dare to tread.” The courts are not impressed with such superficial dogmatism in an area which is not a strict and definitive science, but an art as well. It is my experience that the court will be more open to the expert witness who draws clear boundaries about what is known and what is not known and what can be stated with clinical certainty as opposed to mere hypothesis. An attorney needs to discuss the risk factor of exposing the client to brutal cross examination about past history. In addition, an attorney needs to discuss the client’s general mental and [*52] emotional functioning with the expert witness prior to placing the client on the witness stand.

Conclusion

In summary, it is important to consider that discrimination suits are filed not solely on the basis of principles of justice or violations of written law, but more likely because there is the personal experience of pain, hurt, humiliation and insult. These feelings are not only capable of being verbalized by the client, but oftentimes, manifest themselves in symptoms and behaviors that even the client does not understand. A forensic mental health specialist may be very helpful in

⁴¹ A stressor is defined as any event, condition, conflict or occurrence that produces stress. In psychodiagnostics, however, it is important for the evaluator to determine all concurrent stressors at the time of psychological distress, including possible stressors associated with interpersonal problems, occupational conditions, living circumstances, financial and legal problems, developmental difficulties as well as physical illness or injury.



the identification and explanation of reactive anxiety and reactive depression. While a forensic evaluation or expert witness may not be appropriate or useful in the majority of legal actions, certainly there are cases in which such consultation or assistance may significantly affect settlement considerations as well as final damage awards.