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# Canadian Guidelines for Forensic Psychiatry Assessment and Report Writing: Personal Injury

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**STATEMENT OF INTENT:** CAPL Resource Guide for Reference and Training

*This document is intended as a review of legal and psychiatric principles to offer practical guidance in the performance of forensic evaluations. This resource document was developed through the participation of forensic psychiatrists across Canada, who routinely conduct a variety of forensic assessments and who have expertise in conducting these evaluations in various practice settings. The development of the document incorporated a thorough review that integrated feedback and revisions into the final draft. This resource document was reviewed and approved by the Board of CAPL on June 28, 2022. It reflects a consensus among members and experts, regarding the principles and practices applicable to the conduct of forensic assessments. This document does not, however, necessarily represent the views of all members of CAPL. Further, this resource document should not be construed as dictating the standard for forensic evaluations. Although it is intended to inform practice, it does not present all currently acceptable ways of performing forensic psychiatry evaluations and following these guidelines does not lead to a guaranteed outcome. Differing facts, clinical factors, relevant statutes, administrative and case law, and the psychiatrist's clinical judgement determine how to proceed in any individual forensic assessment.*

*This resource document is for psychiatrists and other clinicians working in a forensic assessor role who conduct evaluations and provide opinions on legal and regulatory matters for the courts, tribunals, and other third parties. Any clinician who agrees to perform forensic assessments in any domain is expected to have the necessary qualifications according to the professional standards in the relevant jurisdiction and for the evaluation at hand.*

See the *Canadian Guidelines for Forensic Psychiatry Assessment and Report Writing: General Principles*, which applies to all of the guidelines and will not be repeated below.

## OVERVIEW OF PERSONAL INJURY

It is not uncommon for forensic psychiatrists and other experts to be involved in assessing the plaintiff in a personal injury case. Generally, the plaintiff claims psychiatric injury (which may be referred to as "psychic injury" in legal texts) or distress due to an action or inaction of the defendant. The forensic psychiatrist is asked to assess the nature and extent of the psychiatric injury, if any; degree of impairment or functional limitations; and prognosis. It is a basic tenet of

the civil law system that a private individual who believes they were wronged by another individual, group, or institution may claim compensation by way of damages.

## The Law

Private law, also known as civil law, governs relationships between individuals and includes family law, contract law, and tort law. (1) Civil law is based on English common law principles and jurisprudence and mostly judge-made, although some statutes may apply. Quebec's private law does not stem from English common law principles; instead, all private law matters are codified in the *Code Civil du Québec.* (2) Quebec is the only province with a civil code, which is based on the French *Code Napoléon* (Napoleonic Code). The rest of Canada uses the common law. (1) There are different types of tortious acts. *Intentional acts*, such as assault and battery, are where the tortfeasor (the person committing the act) can be proven to have intended to cause physical or emotional harm or distress. Intentional acts can include sexual or workplace harassment. Many suits involve *negligence*, in which a reasonable standard of safety is expected by an individual. Professional malpractice is a particular type of negligence, where a professional, such as a physician, lawyer, or accountant, is required to meet the reasonable standard of care in cases where a duty of care is owed to the patient or client. "Reasonable" care refers to the care expected of an average professional in the field (see the *Canadian Guidelines for Forensic Psychiatry Assessment and Report Writing: Professional Misconduct and Malpractice*).

*Strict liability* applies when an act or omission is likely to cause damage or distress, for instance, when an animal is taken onto someone's land and causes damage that could reasonably be expected regardless of the owner's intentions. An extension of this is *vicarious liability*, where an employer is liable for acts performed by their employee. An example of this is *Barker v. Barker,* (3) where the Crown, or the province of Ontario, was found vicariously liable for the wrongful acts of two doctors at the Penetanguishene Mental Health Centre.

If found to be liable, the tortfeasor may be asked to pay compensation to the plaintiff. Compensation can include, among other things, future health care costs, loss of past and future income, loss of competitive advantages, and pain and suffering caused to the plaintiff. It can also include "compensatory damages" (i.e., nonpecuniary losses) to compensate the plaintiff for their pain and suffering, permanent disability, and loss of normal expectations of life. The impossibility of putting a value on these losses is recognized, thus the goal is to provide some solace to the plaintiff (*Andrews v. Grand & Toy Alberta Ltd.* [4]) and allow them to gain some pleasure in their life, posthoc. Compensation will rarely include "punitive damages," where the goal is to punish the defendant who caused the plaintiff harm due to egregious conduct. Damages are restitutionary, designed to restore the plaintiff to the position they would have been in had the tort not occurred. The role of the courts is to determine whether all elements of negligence have been proven, rule on causality, and assess damages.

A landmark case in Canadian law is *Athey v. Leonati.* (5) Mr. Athey was an autobody mechanic and manager who was involved in two serious motor vehicle accidents in the same year. Then, while stretching during his warmup for a health club's rehabilitative exercise program, Mr. Athey incurred a herniated disc in his lower back. The resulting surgery outcome was said to be good but not excellent. The key issue for the court was whether the motor vehicle accidents caused the disc herniation, making the defendants 100% liable, or if the plaintiff's pre-existing back injury and actions at the health club contributed to the end state. The court concluded that the accidents caused the injury, and the presence of other causes does not reduce the liability. The court went on to say that the general test for causation is the "but for" test, in which the plaintiff must show the injury would not have occurred *but for* the negligence or tortious act of the defendant (see Glancy and Regehr for a review of this area [6]).

There are instances in which this test does not easily flow from the facts of the case; for example, when the plaintiff cannot determine direct causation (i.e., when there is more than one potential cause-in-fact). Thus, the concept of *material contribution* has developed in civil law. In a UK case, *McGhee v. National Coal Board*, (7) the plaintiff developed dermatitis from emptying a kiln in a brickyard. The court found the employer was negligent in failing to provide showers and, thus, made a material contribution to the injury. The Supreme Court of Canada adopted this reasoning in *Snell v. Farrell*. (8) In this case, the plaintiff lost vision in one eye following cataract surgery. Expert testimony could not establish the cause of the injury. The court decided that the test for causation is a practical question that need not be determined with scientific precision. Therefore, the operation materially contributed to the loss of vision.

In summary, the defendant is liable if the plaintiff can prove on the balance of probabilities that the injury would not have occurred but for the wrongful actions of the defendant, or that these wrongful actions materially contributed to the injury, pain, or distress of the plaintiff.

The "thin skull" rule is also pertinent to tort law. This rule applies to situations in which a person with a pathologically thin skull receives a blow to the head that shatters their skull. The nature of the impact would not have shattered the skull of an average person. The courts have long held that the defendant is still fully liable for the damage caused, as the person's increased vulnerability to harm does not make the harm more foreseeable. In psychiatry, this might apply to a person with a history of previously resolved depression who has now relapsed due to losing their employment after the alleged injurious event. In *Athey v. Leonati*, (5) accepting this

principle, the Supreme Court ruled that the defendants had to take the plaintiff as they found him, which is with a weak spinal column.

In other cases, the "crumbling skull" rule might apply if the plaintiff had a pre-existing condition, such as borderline personality disorder, and continued on a downhill course after the tortious event, when it could be predicted this would have happened whether or not the tortious event occurred.

The law is somewhat contradictory in this scenario. It appeared that case law was pointing to the fact that the defendant need not compensate the plaintiff for debilitating effects of a pre-existing condition. In other words, they don't need to put the plaintiff in a better position than they would have been in had they not incurred the injury. A 2017 case found the use of the phrase "crumbling skull" is rarely helpful (*Gordon v. Ahn* [9]). However, the courts seem inconsistent on this issue. Table 1 examines one method of differentiating the thin skull and the crumbling skull, which illustrates four notional scenarios and provides guidance on how an assessment tool can be used. In this table, the Global Assessment of Functioning (GAF) from the DSM-IV-TR is a convenient way of measuring function. (10) Other functional assessment tools could be used in place of this instrument, such as the World Health Organization *Disability Assessment Schedule* (WHODAS). (11,12)

Adding to the complicated nature of determining whether a plaintiff was vulnerable involves a well-known case that involved an individual who saw a dead fly in a bottle of drinking water, subsequently developing a phobia, anxiety, and depression. (13) The decision in this case ruled it was not foreseeable that an average person would develop this unusual and severe mental disorder in response to a relatively trivial harm; therefore, the case has no merit.

### Considerations Specific to Personal Injury

Because civil cases involve money, experts may be under great pressure to compromise their objectivity. (14) Consequently, these assessments can be ethically challenging. Forensic psychiatrists are careful to retain their objectivity even in the face of overt or covert pressure. Additionally, they must attempt to avoid the dual role of being both a treating psychiatrist and forensic assessor due to the associated potential bias. In our experience, however, this is especially common in civil law in some jurisdictions, and at times, the court prefers the opinion of the treating psychiatrist.

## THE PERSONAL INJURY ASSESSMENT

Personal injury assessments generally take place in an office setting. Prior to accepting an assessment, it is important that the assessor have a thorough discussion with the retaining lawyer. The lawyer will provide an overview of the case and potential issues, expected timelines, and any other matters. The psychiatrist will ensure the fee schedule is clear, including any anticipated testimony. As with all areas of forensic psychiatry, contingency fees are unethical. After discussing the basic details of the case, the retaining lawyer may delineate specific questions that are the focus of the assessment. The psychiatrist may discuss the assessment parameters with the retaining lawyer at an early stage. For instance, if the assessor intends to work with a forensic psychologist to do psychological testing, they discuss this with the lawyer. Similarly, if the assessor intends to contact friends and relatives for collateral information, this is stated as early in the process as possible to ensure both parties understand and agree on the assessment parameters at the start of the interview, or before, if possible. In personal injury cases, it is not uncommon for the evaluee to request the presence of a third party during the assessment, which should be addressed in advance (see the *Canadian Guidelines for Forensic Psychiatry Assessment and Report Writing: General Principles*). The assessor may provide the retaining lawyer with a verbal opinion before getting the directive to produce a report.

### Collateral Sources of Information (Including Collateral Interviews)

It is important to work with the retaining lawyer to obtain records that can help the assessor formulate an opinion, as delineated in Table 2.

### The Interview

A personal injury case involves an incident or series of events that, according to the plaintiff's theory, causes particular psychiatric harm. Asking the plaintiff to give a complete narrative of this event may engender a significant amount of emotion. For instance, in cases where there has been a criminal trial regarding the incident(s), which would necessarily result in a finding of fact, it may not be necessary to ask the plaintiff to repeat their memory of the events in question. It may be sufficient to ask whether they adopt the findings of fact. Nevertheless, it is often part of the forensic assessment to include a detailed description of the alleged event. This description consists of the duration and amount of exposure to any alleged trauma and the evaluee's psychological reaction, including their thoughts, feelings, and behaviour, surrounding the alleged event. This account can be compared with collateral information collected from informants and information on file. The assessor can clarify any discrepancies between these sources in the interview.

The assessor can explicitly set the frame and divide questioning into physical, psychological, and cognitive changes or consequences following the incident. This categorization makes it easier to connect the social and occupational effects and attribute them to physical versus psychiatric symptoms.

Part of the assessment involves inquiring about any prior psychological or psychiatric treatment modalities before and since the alleged incident and striving to understand the evaluee's efforts to obtain such treatments and improve

**Table 1.** Means of Differentiating the Thin Skull and Crumbling Skull

| **Scenario 1 — Average Plaintiff** | |
|---|---|
| Prior condition | • No mental health symptoms<br>• Normal social, psychological, and occupational functioning<br>• No more than slight impairment<br>• GAF score 80 (X) |
| Condition following tort | • Marked mental health symptoms<br>• Major impairment in several areas (e.g., school, family relations, judgement, thinking, mood)<br>• GAF score 31 (Y) |
| Outcome | • The defendant is liable for all harms<br>• Damages assessed at 100%<br>• Damages are X - Y = 80 - 31 = 49 |
| **Scenario 2 — Thin Skull Plaintiff** | |
| Prior condition | • Mild to moderate mental health symptoms<br>• Moderate functional difficulties<br>• Relatively stable<br>• GAF score 50 |
| Condition following tort | • Increased mental health symptoms<br>• Major impairment in functioning<br>• GAF score 31 |
| Outcome | • The defendant is liable for all harms<br>• Damages assessed at 100%<br>• Damages are 50 - 31 = 19 |
| **Scenario 3 – Crumbling Skull Plaintiff A** | |
| Prior condition | • Mild to moderate mental health symptoms<br>• Moderate functional difficulties<br>• Gradually and incrementally deteriorating<br>• GAF score 50 |
| Condition following the tort | • Increase in mental health symptoms<br>• Major impairment in functioning<br>• GAF score 31 |
| Estimation of current condition had tort not occurred | • Deterioration expected<br>• Increased mental health symptoms and reduced functioning but less severe if no tort<br>• Estimated GAF score 40 |
| Outcome | • Damages only for restoring the plaintiff to position without the tort<br>• Damages are 40 - 31 = 9 |

*continued*

**Table 1.** Continued

| Scenario 4 – Crumbling Skull Plaintiff B | |
|---|---|
| Prior condition | • Mild to moderate mental health symptoms<br>• Moderate functional difficulties<br>• Gradually and incrementally deteriorating<br>• GAF score 50 |
| Condition following the tort | • Increase in mental health symptoms<br>• Major impairment in functioning<br>• GAF score 31 |
| Estimation of current condition had tort not occurred | • Significant deterioration expected<br>• Likely same condition if tort had not occurred<br>• Estimated GAF score 31 |
| Outcome | • No harm or damages<br>• Damages are 31 - 31 = 0 |

Adapted from Glancy and Regehr (6)

their condition. This review of the evaluee's history can help the assessor determine whether reasonable and appropriate treatment modalities have been tried and if they have been successful.

A full personal and family history can permit the assessor to anlyze various factors that might have contributed to the evaluee's psychopathology or loss of function. One or more of these factors could influence the chain of contributing factors, which may significantly affect the assessor's conclusions. For instance, if the plaintiff was abused by a parent in childhood, this would contribute to the formulation.

Other aspects of the personal injury assessment include evaluating how the symptoms might have affected the plaintiff's ability to work. The principles of this section of examination are included in the *Canadian Guidelines for Forensic Psychiatry Assessment and Report Writing: Disability*. The assessor can ask specific questions about the timing of the incident and how this affected the evaluee's occupational history thereafter. This might include questions regarding claims for occupational disability, including short- or long-term disability, before the alleged trauma. The assessor conducts a similar analysis of how the alleged symptoms have affected the person's social functioning and ability to form and maintain relationships. They can include the evaluee's relationship history, as well as their exercise routines, hobbies, vacations, and participation in religious and other activities. The assessor then compares this history with an account of the evaluee's functioning before the alleged tort. Other social stressors, such as bereavement, interpersonal problems, and other traumatic events, may be canvassed and could contribute to the assesor's formulation and conclusions.

As with other types of forensic assessments, the mental state examination (MSE) is part of the assessment of personal injury cases. Of particular note may be inconsistencies between symptoms and the evaluee's emotional, behavioural, and cognitive states. The present MSE is considered in the context of the history, collateral information, and the psycholegal context, which may be pertinent to the conclusions.

## Adjunctive Testing

Psychometric testing may be helpful in personal injury cases, particularly those that include validity scales. The tests are administered and interpreted by qualified mental health professionals. Forensic psychiatrists can also work with a forensic psychologist or refer the evaluee to one when available. Neuropsychological testing or neuroimaging can be particularly useful in cases involving an alleged traumatic brain injury. It is not uncommon for lawyers working in this area to retain other professionals, such as neurologists, and these data may be available for integration into the forensic psychiatric report.

Psychometric testing can be helpful, but not necessarily definitive, in contributing to the diagnostic understanding of an evaluee, including their personality structure. Psychometric testing can provide an evaluation of function that is sometimes not easy to delineate in the clinical interview. In particular, it can measure neuropsychological deficits more accurately than a clinical interview can. This might include identifying cognitive strengths and weaknesses as well as overall intellectual ability. Various tests can aid in understanding whether an evaluee is feigning psychiatric symptoms or cognitive impairments. (15)

For instance, the determination of antisocial attitudes and values might contribute to an assessment of possible malingering. The assessment of malingering, feigning, or impression management is a crucial issue in the forensic psychiatric assessment in personal injury cases, and psychometric testing can assist in detecting all three. The

**Table 2.** Examples of Potentially Relevant Records in Civil Evaluations of Personal Injury

- Psychiatric and other mental health records
- Substance abuse treatment records
- Medical history and treatment records
- Psychometric testing results
- Expert declarations and prior forensic reports
- Educational records
- Military records
- Legal records
- Correctional records
- Records related to past lawsuits
- Personal notes and diaries
- Computer files
- Cell phone records and text messages
- Job description
- Occupational records, including workplace investigations and employment hearings
- Depositions of the plaintiff, treatment providers, and other relevant parties
- Undercover investigation reports or videos
- Collateral interviews

**Table 3.** Review of the Psychiatric Injury

- Duration and intensity of exposure to trauma, act, or omission
- Evaluee's perception/attribution of the event
- Impact of the trauma, act, or omission
- Immediate effects (psychological, social, and occupational)
- Medium-term effects (psychological, social, and occupational)
- Long-term effects (psychological, social, and occupational)
- Treatment sought and provided
- Motivation to improve
- Potential gains for continued disability (e.g., emotional, monetary, relational)
- Factors that predispose, trigger, aggravate, maintain, or relieve symptoms

DSM-5 indicates that the medicolegal context should raise the suspicions of malingering. Not surprisingly, malingering has been found to be more prevalent in civil proceedings where money is involved. McDermott summarized the literature on malingering in individuals seeking financial compensation and found that 20% to 50% were malingering or exaggerating difficulties. (16) The evaluee might also minimize previous problems. It is quite easy nowadays for plaintiffs to to look up symptoms of a disorder, which makes feigning more likely and harder to detect. Because post-traumatic stress disorder (PTSD) is commonly the focus of personal injury cases, it is notable that PTSD criteria are described in more than 22 million Internet sources. McDermott also notes that many standard instruments developed to assess PTSD use a structured interview format that inescapably uses leading questions. In addition, many evaluees have already been in treatment that draws their attention to symptoms, which is then the subject matter of a personal injury assessment.

## Special Considerations

### *Causation*

In Canada, it has become increasingly acceptable to opine on causation. (17–19) Although there is no rule prohibiting experts from addressing the ultimate issue, the judge may decide in each case whether they want the expert to provide an opinion on causation. This is because causation is a specific legal determination that concerns the trier of fact. The Supreme Court of Canada's decision in *Athey v. Leonati* (5) provides a legal explanation of the issue of causation.

### *Effects of Litigation*

There is a significant amount of commentary in mental health publications regarding the effects of litigation. Personal injury cases can take a long time and litigation can be extremely stressful for the plaintiff. This involvement alone may contribute to the plaintiff's presentation of increased impairment and possibly biased reporting. (20) Weissman proposes a model for taking into account the possibility of increased symptoms precipitated by litigation in the assessment process. (21) The assessor considers this in arriving at a conclusion in personal injury cases.

## THE PERSONAL INJURY REPORT (INCLUDING A TEMPLATE EXAMPLE)

It is prudent to discuss tentative findings with the retaining lawyer before writing a report. Any written report would likely have to be disclosed, whereas verbal discussions are usually covered under solicitor–client privilege. In

**Table 4.** Example of a Personal Injury Report Template

- Referral source
- Referral question(s)
- Qualifications of assessor
- Information sources
  - Date and place of interviews
  - Adjunctive testing
  - Collateral interviews
  - Collateral information
- Informed consent
- Identifying information
- Review of the alleged wrongful act (omitted in some cases)
  - Duration and intensity of exposure to trauma, act, or omission
  - Evaluee's perceptions of the alleged wrongful act
  - Impact of the alleged wrongful act
    - Immediate, medium-term, and long-term effects
    - Psychological, cognitive, or physical effects
    - Social effects
    - Occupational effects
- Background information (including psychiatric history and treatment)
- Review of function, symptoms, and mental status examination (and fluctuations)
- Psychiatric opinions and recommendations (as appropriate):
  - Assessment limitations
  - Diagnoses and/or symptoms
  - Functionality assessment (functional limitations, residual functions)
  - Formulation
  - Answers to specific questions asked
  - Particular effects of diagnosis and symptomatology on the plaintiff's functioning
  - Previous treatments and efficacy and suggestions for future treatment
  - Prognosis
- Signature block

striving for objectivity and honesty, the assessor's report fairly reflects their expert opinion, even if it is not entirely helpful to the retaining lawyer. We have long been aware in psychiatry that the etiology of most conditions includes biological, psychological, cultural, and social causes and is seldom unidimensional. This does not generally suit the court, since they seek a dichotomous answer. Nevertheless, the integrity of the expert's opinion must be maintained and include an honest and comprehensive analysis. The assessor attempts to establish any nexus between the injury and the presenting symptoms and uses standard psychiatric terms to describe the connection. The assessor is typically asked to comment on the evaluee's level of disability and degree of distress they've experienced compared with previous functioning.

The assessor might also consider an estimate or measure of the degree to which the state of the plaintiff has been

affected by the alleged tort. The GAF offers a convenient means of assessing and communicating this information. (10) Although the GAF is no longer included in the DSM-5TR, many forensic psychiatrists find the scale useful in communicating the degree of impairment arising from the alleged tort. Table 1 gives examples of how this can be used in practice. The DSM-5 introduced the WHODAS. This scale has two problems. First, it does not differentiate between physical and psychological symptoms causing impairment, and second, it is a self-report scale, which raises significant problems in personal injury cases. (12)

An assessor's formulation can incorporate biological, psychological, cultural, social, and contextual factors, which might include an analysis of the effects of the alleged tort. Opining on the ultimate issue of causation is discussed above. As in all forensic reports, it is important that there is a nexus between the body of the report and the conclusions, explaining how the assessor came to their findings, including an analysis of which collateral records were considered important. Although it has been controversial in civil law whether to address treatment recommendations, in Canada, it is common to include such recommendations after discussions with the retaining party.

As with all cases, perhaps more so in civil than criminal cases, there is often pressure to edit or change portions of the report; however, this is generally limited to errors of fact, typographical errors, and areas that require clarification. There has been some Ontario case law around this issue. (22)

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