

Fraught with Fright: Legal Perspectives of Trauma

Attorneys need to know the various signs, symptoms and treatment modalities associated with trauma to properly represent their clients.

By **Elisa Reiter and Daniel Pollack** | December 08, 2020 at 10:00 AM



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Used in the fields of mental health, social services, health care, education and law, “trauma,” “complex trauma” and “trauma-informed practice” are terms that have different meanings across and within disciplines. Each discipline has developed

assessment and measurement tools to reveal the nature and severity of trauma and the extent to which an individual is coping with traumatic events.

Medical Aspects of Trauma

In medicine, trauma often refers to an external wound to the body. In child welfare practice, trauma-informed care stems from the findings of the seminal Adverse Childhood Experiences (ACE) [study](#) in 1998. The American Psychological Association [defines](#) trauma as:

“... an emotional response to a terrible event like an accident, rape or natural disaster. Immediately after the event, shock and denial are typical. Longer term reactions include unpredictable emotions, flashbacks, strained relationships and even physical symptoms like headaches or nausea.”

Psychological Trauma

The [Diagnostic and Statistical Manual of Mental Disorders \(5th edition\)](#) of the American Psychiatric Association reads:

“Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways: directly experiencing the traumatic event(s); witnessing, in person, the traumatic event(s) as it occurred to others; learning that the traumatic event(s) occurred to a close family member or close friend (in case of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental); or experiencing repeated or extreme exposure to aversive details of the traumatic event(s)” (p. 271).

A person can become vicariously traumatized. Particularly severe or repeated trauma can lead to post-traumatic stress disorder ([PTSD](#)).

Trauma in Criminal Law

In *Kirk v. State*, the Texas Court of Criminal Appeals dealt with an appeal of a conviction for “continuous sexual assault of a young child.” The child, who had allegedly been sexually abused over a period of years, presented at Dallas Children’s Advocacy Center, where the child created a one-page “trauma narrative” which was introduced at trial. The court held that:

“Here, the ‘trauma narrative’ was probative of K.M.’s process of treatment and the culmination of her efforts in therapy. K.M. had already testified in detail about the abuse, and the narrative had little potential to impress the jury in some irrational, yet indelible, way. The narrative was a short, one-page document set forth fully above, and the time needed to present the narrative was short. Finally, the narrative was useful to demonstrate K.M.’s participation in therapy and the consistency of her narrative. Under these circumstances, we conclude the trial court did not abuse its discretion in admitting the ‘trauma narrative’ over appellant’s objection that its probative value was outweighed by its prejudicial effect. See *Hernandez*, 390 S.W.3d at 324; *Winegarner*, 235 S.W.3d at 790. . . Further, even if we were to conclude the trial court erred in admitting K.M.’s “trauma narrative” for the other reasons urged by appellant, any such error was harmless because it did not affect appellant’s substantial rights.”

Given the definitions above, when an allegation of trauma is involved, be it physical or emotional, the trial judge must act as a gatekeeper to determine whether documentation purporting to show proof of trauma should be allowed into evidence. *Frye and Daubert* remain the seminal cases establishing the trial court judge as a gatekeeper, who must ascertain whether a given set of scientific data has gained required standing and scientific recognition among psychological and physiological authorities at the time of trial to justify introduction of what a party hopes to present as expert testimony.

In [Wolfe](#), the Texas Court of Criminal Appeals dealt with blunt force trauma, a shaken baby syndrome case. To allow testimony of an expert, the judge must find:

1. The underlying scientific theory is valid.
2. The technique underlying the theory must be valid.
3. The technique must be properly applied to the facts presented in the case before the court.

Allegations of trauma, including allegations of blunt force trauma, brain injury, shaken baby syndrome, and PTSD, must be substantiated as reliable. Judges must parse whether data is reliable through “expert” testimony. In [Kelly](#), the Texas Court of Criminal Appeals established criterion for evaluating reliability, including:

- (1) The extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained.
- (2) The qualifications of the experts testifying.
- (3) The existence of literature supporting or rejecting the underlying scientific theory and technique.
- (4) The potential rate of error of the technique.
- (5) The availability of other experts to test and evaluate the technique.
- (6) The clarity with which the underlying scientific theory and technique can be explained to the court.
- (7) The experience and skill of the person(s) who applied the technique on the occasion in question.

Traumatic Brain Injury

As professor William [Winslade](#) noted:

“People with severe brain injury may require close supervision in a controlled environment to prevent violent outbursts and other impulsive behavior. It is because such people lack the ability to control their impulses and conduct, that they may pose a threat to others and themselves. Although not all people with severe brain injury are dangerous, a history of traumatic brain injury is more common among prisoners than the general population. In two classic studies of 15 adults and 14 juveniles on death row in the mid-1980s, psychiatrist Dorothy Otnow Lewis found all 29 inmates had a history of traumatic brain injury. One might assume that their brain injuries would have been discovered and taken into consideration during their trials or at sentencing. Yet Lewis reported that evidence of brain injury was not uncovered at all, much less presented in the legal proceedings.”

Symptoms that can evidence [mild traumatic brain injury](#) (TBI) include:

- Loss of consciousness.
- A period of confusion or disorientation.
- Noise sensitivity.
- Loss of smell or taste.
- Tinnitus.
- Fatigue.
- Vertigo.
- Photophobia.
- Noise sensitivity.
- Blurry vision.
- Sleep disturbances, including insomnia and/or hypersomnia.
- Glasgow Coma Scale is usually greater than 12.

Mild TBI behavioral issues include:

- Irritability.
- Aggressive behavior.
- Inconsolability.
- Depression.
- Mood lability.
- Apathy.
- Lack of motivation.

- Social withdrawal.
- Secondary psychological decompensation.

Moderate TBI patient may present with the following issues:

- Agitation or restlessness.
- Pronounced headache that worsens or will not abate.
- Seizures or convulsions.
- Coma.
- Slurred speech.
- Loss of coordination.
- Increased confusion.

A person with **severe** TBI may present with post traumatic amnesia, as well as several of the following symptoms:

- Coma.
- Vegetative state (persistent and/or minimally responsive state).
- Increased confusion.
- Chronic illnesses.
- Personality changes, including apathy and/or aggression.

TBI can clearly impact a wide swath of cases, and Texas does provide patients, caregivers and attorneys handling cases involving TBI with resources.

Trauma in Custody Cases

No attempt is being made to mitigate the impact of traumatic events. However, Dr. Richard **Warshak** opines that:

“Some experts trivialize the terms trauma and traumatic by attaching them to circumstances that are far removed from events that we usually think of as traumatic. One of my child patients woke up to discover both his parents murdered, their bodies covered in blood. Another child was attacked by a dog and lost half her face. Another child caught his hand in an escalator. Another suffered repeated brutal attacks from a drunken parent. Horrific events such as these, in addition to physical and sexual

abuse, are the sort that mental health professionals consider childhood trauma—literally the stuff that bad dreams are made of. Stressful life events, such as a divorce, or changes triggered by divorce, do not approach trauma.”

[Warshak](#) further observes:

“No matter how fervently or dramatically children demand to dictate and control the possession schedule, and no matter how much children threaten to act out if required to spend time with a nonabusive parent, parents and courts do not traumatize children when they refuse to appease such demands. Expert witnesses who testify otherwise should be challenged to define and describe what they mean by trauma and what scientific evidence supports the prediction that enforcing expectations for contact with a parent will traumatize children.”

However, when it comes to children in foster care, [Barbara Elias-Perciful](#) notes that:

“Judges, attorneys, and systems administrators who work with traumatized children should be encouraged that there is an increasing body of support for responding to traumatized children within our child serving systems with care that is trauma informed.”

Elias-Perciful, director of [Texas Lawyers for Children](#), encourages attorneys and mental health professionals to recognize the special plight of children in foster care. She notes:

“While this can be a helpful resource, untrained practitioners may not be aware of the extensive effects trauma can have on a child or may not have access to available trauma-informed treatments and interventions. Therefore, one of the most notable harms traumatized children face is misdiagnosis from professionals untrained in brain research related to childhood trauma. Because the symptoms of trauma and the symptoms of mental disorders often overlap, children are routinely misdiagnosed with

a mental disorder for symptoms that may be healed through a trauma-informed approach.”

Trauma-Informed Approach

Dr. Bruce Perry is a psychiatrist and a senior fellow of the ChildTrauma Academy in Houston, Texas. The author of “The Boy Who Was Raised as a Dog,” he has treated over 100 patients who observed the murder of a parent. [Perry](#) concludes:

“... the most important healing experiences in the lives of traumatized children do not occur in therapy itself. Trauma and our responses to it cannot be understood outside the context of human relationships. Whether people survived an earthquake or have been repeatedly sexually abused, what matters most is how those experiences affect their relationships – to their loved ones, to themselves, and to the world. The most traumatic aspects of all disasters involve the shattering of human connections. This is especially true for children. Being harmed by the people who are supposed to love you, being abandoned by them, being robbed of the one-to-one relationships that allow you to feel safe and valued to become humane – these are profoundly destructive experiences. Because humans are inescapably social beings, the worst catastrophes that can befall us inevitably involve relational loss. As a result, recovery from trauma and neglect is also all about relationships – rebuilding trust, regaining confidence, returning to a sense of security and reconnecting to love. Of course, medications can help relieve symptoms and talking to a therapist can be incredibly useful. But healing and recovery are impossible – even with the best medications and therapy in the world – without lasting, caring connections to others.”

The Court as Gatekeeper

In the [Benchbook](#) of the Behavioral Sciences, the authors conclude in regard to psychological injuries:

“We recommend that when the steps we describe for a competent assessment of these claims are followed, gatekeepers will have cogent proof of injuries every bit as real as the loss of a job or contract.”

Mental health professionals and physicians do not typically interview third parties to substantiate the claims of their patients. Lawyers rely on expert testimony to substantiate claims of trauma. Judges must weigh allegations fraught with fright to reach reasoned conclusions in each case involving trauma.

Psychological trauma can be a consequence of stressful events that result in dysfunctional behavior such as fear, hopelessness, confusion, and memory loss. Physical and psychological trauma can impact a variety of cases. Attorneys need to know the various signs, symptoms and treatment modalities associated with trauma to properly represent their clients.

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