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PTSD in Court III: Malingering, assessment, and the law

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ABSTRACT

This journal's third article on *PTSD in Court* focuses especially on the topic's "court" component. It first considers the topic of malingering, including in terms of its definition, certainties, and uncertainties. As with other areas of the study of psychological injury and law, generally, and PTSD (posttraumatic stress disorder), specifically, malingering is a contentious area not only definitionally but also empirically, in terms of establishing its base rate in the index populations assessed in the field. Both current research and re-analysis of past research indicates that the malingering prevalence rate at issue is more like 15 ± 15% as opposed to 40 ± 10%. As for psychological tests used to assess PTSD, some of the better ones include the TSI-2 (Trauma Symptom Inventory, Second Edition; Briere, 2011), the MMPI-2-RF (Minnesota Multiphasic Personality Inventory, Second Edition, Restructured Form; Ben-Porath & Tellegen, 2008/2011), and the CAPS-5 (The Clinician-Administered PTSD Scale for DSM-5; Weathers, Blake, Schnurr, Kaloupek, Marx, & Keane, 2013b). Assessors need to know their own possible biases, the applicable laws (e.g., the *Daubert* trilogy), and how to write court-admissible reports. Overall conclusions reflect a moderate approach that navigates the territory between the extreme plaintiff or defense allegiances one frequently encounters in this area of forensic practice.

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1. Précis of the third article of the three on *PTSD in Court*

The third article of the three in the journal for court purposes on PTSD (posttraumatic stress disorder) deals with legal aspects and court, in particular (for the first two articles in the series, refer to Young, 2016a, 2017). It starts with a comprehensive review of malingering, by considering the different approaches to its definition and the different rates attributed to its prevalence. Some of the complications in determining the base rate of malingering concern differing definitions, but there are other factors at play, such as: which tests are used in the research; what are their cut-offs; which groups given that it is impossible to create groups of known malingerers; what degree of false positives and false negatives is acceptable given the imprecision in defining malingering, testing it, the cut scores used, etc.; and so on. That being said, disability claims in the area has been referred to as an epidemic, so that tests with good psychometric properties for the type of population involved need to be used. For example, PTSD has changed its entry criterion A to the point that the lowered bar to its diagnosis has been called "bracket creep." Nevertheless, it would be premature to utilize unconditionally malingering detection instruments, such as SVTs (symptom validity tests) and PVTs (performance validity tests), because they pose unresolved questions. Moreover, attributing malingering requires meeting critical testing thresholds (e.g., indicative of purposefully failing effort tests) when there is no other incontrovertible evidence to indicate it. Forensic assessors always need to use PVTs and SVTs in this context (Bush, Heilbronner, & Ruff, 2014) and need to consider the whole file involved for reliable data, such as finding in data other than from test inconsistencies that are "compelling." Otherwise, when the data indicates the presence of some form of problematic presentation and performance, terms such as poor effort and feigning should be used instead of the M word.

A section of this article reviews the literature on the estimates of malingering in the forensic disability and related evaluation context for court and similar purposes. The conclusion here is that the estimate of 40 ± 10%, as given by Larrabee, Millis, and Meyers (2009) and Larrabee (2012a) is grossly exaggerated, notwithstanding that problematic presentations and performances (not malingering, per se) legitimately fall in this range, especially for PPCS (persistent postconcussive syndrome) after mTBI (mild traumatic brain injury; Institute of Medicine (IOM), 2015; Young, 2015a). Some of the tests with validity scales that can be used in PTSD assessments include the CAPS (The Clinician-Administered PTSD Scale; Blake et al., 1995), the TSI-2 (Trauma Symptom Inventory, Second Edition; Briere, 2011), the MMPI-2-RF (Minnesota Multiphasic Personality Inventory, Second Edition, Restructured Form; Ben-Porath & Tellegen, 2008/2011), the PAI (Personality Assessment Inventory; Morey, 1991), and the SIRS-2 (Structured Interview of Reported Symptoms, Second Edition; Rogers, Sewell, & Gillard, 2010), although I have advised using the MMPI-2-RF, in particular (Young, 2014a). In the Law section of this article, which is its last part overall, the area of practice in psychological/psychiatric injury and law functions in the adversarial divide, and there are much influences and biases to consider (e.g., hindsight bias, adversarial allegiance).

The diagnosis of PTSD needs continued research. The DSM-5 (Diagnostic and Statistical Manual of Mental Disorders, 5th Edition; American Psychiatric Association, 2013) might have to reduce its set of 20 symptoms to core ones, perhaps as is found in the proposed ICD-11 (International Classification of Diseases, 11th Edition; World Health Organization, 2018). Or, it could use the newer dimensional models of how the 20 symptoms arrange, and find the core symptom in each one, like I have proposed.

At the same time, the proviso that continued research is needed on PTSD, malingering detection, and so forth, does not imply that the field has yet to reach adequate scientific standards. However tentative and in need of improvement, there would appear to be enough reliable and valid evidence both for the diagnosis of PTSD as presently constituted in the DSM-5 and the best tests that can be used to diagnose it (or its malingering). With sufficient care, current approaches to PTSD and its assessment methods should stand up to admissibility challenges in court. Admissibility to court is predicated on meeting the criteria of good science compared to poor or junk science, as per the *Daubert* trilogy. Forensic mental health assessors need to function ethically and conduct comprehensive, impartial, and scientifically-informed assessment for court to ensure meeting this bar.

2. Malingering

2.1. Introduction

The DSM-5 (APA; American Psychiatric Association, 2013; pp. 726–727) lists the "essential feature" of malingering as the "intentional production" of "grossly exaggerated" or "false" "psychological" or "physical" symptoms due to "motivation by external incentives," for example, to obtain financial compensation. Kane and Dvoskin (2011) supported the separation of mild exaggeration from malingering, but many others do not agree (e.g., Mittenberg, Patton, Canyock, & Condit, 2002).

Young (2014a) suggested that an improved definition of malingering would involve use of the term "presentation" instead of "production." Miller (2015) adopted a very similar position; e.g., PTSD symptoms could be "extensions" of recovered/improved symptoms,

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