

# Virtual Mentor

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## JOURNAL DISCUSSION

### **The Evolving Definition of Posttraumatic Stress Disorder: Legal Ramifications**

Daniel Yohanna, MD, and Maxwell R. Rovner, MD, JD

**Berger O, McNeil DE, Binder RL. PTSD as a criminal defense: a review of case law. *J Am Acad Psychiatry Law*. 2012;40(4):509-521.**

*I was flying back to San Francisco to get a flight to the East Coast and I had a nightmare. The motion of the plane brought me back, and I woke up shouting. Everyone on the plane moved away and there was a big empty spot around me on the plane. After that, it was very bizarre and jarring.*  
John Kerry [1]

In this article, Drs. Berger, McNeil, and Binder have reviewed case law from appellate courts around the country and in the District of Columbia regarding the use of posttraumatic stress disorder (PTSD) as a criminal defense [2]. This review is especially important to forensic psychiatrists because as it establishes and outlines how PTSD can be used at the trial level and how it is viewed at the appellate level when the trial court decision has been appealed.

### **Defining PTSD**

When John Kerry returned from Vietnam in April of 1969, he suffered a flashback and dissociation due to his combat experience [1]. The reaction of his fellow passengers—regarded by Vietnam veterans as characteristic of the era—was misunderstanding and revulsion. However, largely as a result of media coverage of the plight of returning Iraq and Afghanistan War veterans, PTSD has become part of the common lexicon. Twelve to 13 percent of returning veterans of the Iraq war [3] and a lesser number from the Afghanistan war [4] have been diagnosed with PTSD. Other sources of public exposure to the diagnosis of PTSD include reporting on children and adults who have been abused or who have been repeatedly exposed to acts of violence in our inner cities and who go on to develop the condition.

Even the new *Diagnostic and Statistical Manual of Mental Disorders*, fifth edition (*DSM-5*), has recognized the changes in our understanding and perhaps acceptance of PTSD by placing it and reactive attachment disorder, disinhibited social engagement disorder, acute stress disorder, and adjustment disorder in a separate chapter on trauma- and stressor-related disorders. The *DSM-5* also expanded the definition of the criterion of the traumatic event, known as criterion A, to include *learning* that a traumatic event befell a close family member or friend. The list of symptoms has been expanded to include intrusive symptoms, avoidance of stimuli

associated with the traumatic event, and alterations in arousal and reactivity, which means negative thoughts and emotions associated with the traumatic event [5].

This redefinition may prove legally significant, inasmuch as exaggerated negative beliefs about oneself and the world, a phenomena also known as hostile attribution or intent, may increase the likelihood of a person's committing an aggressive act [6]. For example, possessing, after a traumatic event, the distorted idea that the whole world is a dangerous place or that certain groups of people cannot be trusted may increase the risk that a person will react aggressively to what would otherwise have been viewed as a benign situation. So, for instance, if a person has been assaulted by someone in a baseball cap and bomber jacket, he or she might use mace more readily on the next similarly attired individual who brushes past her. The new criteria are likely to expand the number of people diagnosed with PTSD and increase the likelihood that it will be used as a defense in criminal cases.

### **PTSD in Criminal Defenses**

The review paper examines recent cases brought on appeal in which PTSD was offered as a basis for a criminal defense. It includes claims that the defendant is not guilty by reason of insanity (NGRI), cases in which unconsciousness was used as a defense, self-defense justifications, and cases involving diminished capacity and mitigating circumstances in sentencing.

Using the legal database LexisNexis, Berger et al. reviewed 194 federal and state appellate court cases in which PTSD was used as a defense through 2010. Of those cases, 47 involved a criminal defense based on a diagnosis of PTSD. In 39 of the cases, there was a PTSD defense that was addressed by the appellate court and they became the subject of authors' review; in 8, the issue appealed was not related to PTSD, so the appellate court decided the case on other grounds. Also included in the review were three unpublished trial cases in which PTSD had been raised successfully as a defense. It is likely that there are numerous similar cases, but such trials are generally not published and are therefore unavailable for review.

Several important conclusions can be drawn from this review for forensic psychiatrists. First and foremost, expert testimony regarding PTSD meets criteria for admissibility in court. It meets what is known as the *Daubert* test of admissibility decided in the 1993 U.S. Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals* [7]. Following the court's decision in that case, diagnosis is admissible if it is provided by an expert, i.e., one who uses reliable criteria to make the diagnosis, and if there is support for the diagnosis in the literature and general acceptance of the diagnosis in the field.

PTSD has been the basis for successful insanity defenses since 1979. Berger and his colleagues concluded from the small number of jury trials reviewed that PTSD has been a successful insanity defense at trial, particularly and perhaps only, when the phenomenon of dissociation has been involved.

PTSD has received mixed treatment as an insanity defense at the appeal level. This is especially true since the widespread reform of insanity statutes around the country following the NGRI trial of John Hinckley Jr., who shot President Reagan in 1981. In many state and federal laws, statutes were amended to require that a defendant have a *severe* mental illness or defect [8], and insanity became an affirmative defense, i.e., one that required proof that the defendant was insane and met the strict M’Naghten requirement that he or she lacked the capacity to understand the nature and quality or wrongfulness of his or her conduct—sometimes summarized as “knowing right from wrong” [8]. The affirmative defense was a response to the less restrictive criteria of the American Legal Institute (ALI), which some states still retain and which allow an insanity claim to be made if the defendant was incapable of conforming his or her conduct to the requirement of the law at the time of the crime [9].

*Dissociation.* Berger concludes that dissociation would likely be the only PTSD-related phenomenon that would meet the M’Naghten standard in jurisdictions where a “clear and convincing” standard of proof is applied. Dissociation is defined by the American Psychiatric Association as “a disruption of consciousness, memory, identity or perception” and is associated with several psychiatric diagnoses other than PTSD [5]. Dissociation following a traumatic event is strongly correlated to the development of PTSD [10] but is generally responsive to treatment [11]. Proving that dissociation has occurred and continues to be a symptom in defendants with PTSD is a challenge for forensic experts, especially when the defendant in question has undergone treatment.

*Unconsciousness.* The dissociation symptom of PTSD has also been used successfully to argue in favor of the defendant’s unconsciousness during a criminal act. If it can be demonstrated that a defendant was not conscious of his surroundings when he committed a criminal act, that is, in itself, grounds for acquittal. Although it is not known what weight juries have given this defense in acquittals, courts have determined that juries can be instructed by the judge during a trial about the nature of this defense and may consider it in their deliberations and that expert testimony about it can be given.

*Self-defense.* The authors have also cited cases in which battered-spouse syndrome has been classified as a form of PTSD and used as a defense. Courts have deemed PTSD relevant in cases in which abuse victims have harmed their abusers [2]. Given the expanded *DSM -5* criteria that include negative alterations of cognition, it is likely that PTSD may be used more often as a component of self-defense arguments.

Appellate courts have also ruled that it is an error for trial courts to exclude expert testimony in cases where PTSD has been introduced to refute the requisite state of mind (or *mens rea*) in jurisdictions where expert testimony typically is allowed to refute *mens rea*. The *mens rea* standard requires that the person had a specific intent to commit a crime and committed it purposely and knowingly [12]. These rulings

confirm that PTSD is relevant in trials where diminished capacity or a related *mens rea* defense is offered.

The authors conclude that PTSD can also play a role in establishing a mitigating circumstance during the sentencing phase of trial. They cite hyperarousal symptoms, impaired impulse control, overestimation of danger and dissociative phenomena as likely elements to be used as a mitigating circumstance in federal and in some state cases, but a connection between the PTSD and the offense must be established.

### **Conclusion**

In conclusion, forensic psychiatrists will need to be familiar with the use of PTSD as a legitimate and proper defense in criminal cases, especially given the changes in the *DSM-5* and greater public awareness of PTSD. Careful screening for PTSD, review of ongoing symptoms, changes in symptoms over time, with or without treatment, and relevance to the offense will be crucial elements of expert testimony.

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Daniel Yohanna, MD, is the vice chair and an associate professor in the Department of Psychiatry and Behavioral Neuroscience at the University of Chicago Pritzker School of Medicine. His interests are in community psychiatry and forensic psychiatry, as well as the development of systems of care for people with mental illness.

Maxwell R. Rovner, MD, JD, is a fourth-year psychiatry resident at the University of Chicago Medical Center. He is a graduate of Harvard Law School and the University of Chicago Pritzker School of Medicine. Before going to medical school, he was a law clerk for U.S. District Judge Harry D. Leinenweber, a policy assistant to Chicago Mayor Richard M. Daley, and the chief speechwriter to Mayor Daley and U.S. Senator Carol Moseley-Braun. He is interested in outpatient and forensic psychiatry.

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