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How New Medical Research May Impact Emotional Distress Claims

This morning, one of my friends who is currently working on a Ph.D in the medical field brought to my attention an article that ran yesterday on Time Magazine's Health & Family website entitled *New Test Distinguishes Physical From Emotional Pain in Brain for First Time*. The article discusses a new study the results of which were published last month in the New England Journal of Medicine.

The study found a method to utilize a brain scan to distinguish between physical pain experienced by test subjects and emotional pain. The ultimate question was whether "this physical pain pattern [detector] get[s] fooled into thinking that [social rejection] is physical pain?" Dr. Tor Wager found:

The answer we get is, no, not at all. What we find is that there are different patterns. There's a pattern of response to physical pain, but [it isn't seen] with emotional pain stimuli at all.

While this is still an early step in determining a reliable method for distinguishing between emotional and physical injury, it is nevertheless a major one. As the article noted, "Additional research on far larger samples of different types of people with different types of pain are needed before these findings could be

useful in the clinic.” Still, if the approach can be refined and validated, it stands to have major value to not just the medical field but also to the legal field as well.

For now, it appears that the primary drive of the research is to help determine whether a person is “an addict faking physical pain (but, typically in real emotional pain) and a chronic pain patient who needs medication[.]” Obviously this application could be extremely helpful in cases alleging personal injury for physical harm as it would help to either validate the alleged physical or injury or to bolster a contention of malingering. Though use for the latter is cautioned against by Dr. Wager.

“This can’t be used as a pain lie detector,” he says, “If it doesn’t show up, [it may just mean] that people’s brains are wired differently.”

Less obvious than its use for proving physical injury is the potential to expand the law on emotional distress injuries. As I have previously discussed in my article for the Rutgers Law Record addressing negligent infliction of emotional distress, the expansion of the law to allow recovery for emotional distress has long been hampered by the medical verifiability of emotional harm. The law has only begun to expand to its currently limited realm due to the increases in medical certainty of injury. Nevertheless, the difference between an expert stating that the plaintiff has shown certain signs of emotional harm is a far cry from a brain scan showing verifiable evidence of such harm. Anyone who has attempted to prove a soft tissue injury to a jury knows the extreme difficulty of proving injury based upon testimony with visual aids such as x-rays.

I believe that this study and its future progeny may be a huge stepping stone in clearing the final hurdles currently preventing injured persons from seeking to recover for their emotional injuries – a hurdle that prevents persons from being made “whole” as the law otherwise dictates that they ought to be made so.

Join us again next time for further discussion of developments in the law.

Sources

- Maia Szalavitz, *New Test Distinguishes Physical From Emotional Pain in Brain for First Time*, Time: Health & Family (May 6, 2013), available at <http://healthland.time.com/2013/05/06/a-pain-detector-for-the-brain/>

- TD Wager et al., *An fMRI-Based Neurologic Signature of Physical Pain*, 368(15) N. Engl. J. Med. 1388 (Apr. 11, 2013).
- Colin E. Flora, *Special Relationship Bystander Test: A Rational Alternative to the Closely Related Requirement of Negligent Infliction of Emotional Distress for Bystanders*, 39 Rutgers L. Rec. 28 (2012).

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