Mental illness and the Credibility Crucible

Introduction

Once upon a time, a very long time ago, the world was divided into physical things and everything else. As time passed, our understanding of the world developed and we discovered that things we couldn’t perceive with our senses could still be real. Our laws followed the same trajectory and over time they accepted the reality of psychological losses. But all was not well in the legal world. Although damages for psychological losses were recognized in both tort and contract, it was hard for triers of fact to believe the plaintiffs who came to court alleging these losses. They were perceived to be, well, what can we say… not very credible or reliable.

There is little in the way of an analytical framework for assessing the evidence of plaintiffs advancing claims for psychological loss and thus their testimony in court remains confused and murky, caught in the strictures of the “reasonable person” and mired in the stigma of mental illness. The scope of the problem depends on how often individuals with mental illness find themselves testifying in the courts and the extent to which stigma and confusion around mental illness impact the court’s fact-finding process.

With respect to the incidence and cost of mental illness within society, in a September 2011 report published by the Harvard School of Public Health and the World Economic Forum entitled The Global Economic Burden of Non-communicable Diseases (NCD), the authors concluded that between 2010 and 2030, NCD were estimated to reduce global GDP by $46.7 trillion. The report concluded: “By disease, mental illness will account for the largest share of the economic burden in both 2010 and 2030, just slightly greater than cardiovascular diseases. They are followed by cancer, chronic respiratory disease and diabetes.”

In Darkness Invisible, The Hidden Global Costs of Mental Illness\(^1\), the authors quoted a 2012 World Health Organization report that concluded that “mental illnesses and behavioral disorders account for 26 percent of the time lost to disability – more than any other kind of

disease.” The authors\(^2\) write: “People underestimate the costs and significance of mental illness for many reasons. At the most basic level, policymakers and public health officials tend to view mental illness as fundamentally different from other medical problems. But just like other diseases, mental illnesses are disorders of a bodily organ: the brain.” They argue for systemic changes, starting with a “basic need for increased awareness of the scope of the problem.”

Given the high incidence of mental illness in society and the fact that assessments of the credibility and reliability of the evidence of parties and witnesses in a trial are central to the pursuit of justice, the impact of one on the other is worthy of careful consideration. This article addresses the challenges facing triers of fact when called upon to assess the credibility or reliability of plaintiffs who have sustained a brain injury, suffer from mental illness or any other condition that can impair one’s cognitive or emotional functioning\(^3\) and proposes a framework for analysing their evidence. Currently, the plaintiff’s evidence is scrutinized to see whether it “makes sense.” This is an eminently logical process given that the plaintiff is the centerpiece of the action. However, if the plaintiff suffers from mental illness, even if they tell the truth, their evidence may not fit comfortably with our notions of common sense and reasonableness. It is important to recognize this potential bias. Rather than rejecting the plaintiff’s evidence on this ground, it is suggested that a better and less discriminatory approach would be to first develop a foundational understanding of the nature of the plaintiff’s illness based on surrounding lay and expert evidence and then examine the extent to which the plaintiff’s evidence fits into the whole picture.

**Credibility and reliability- the current regime**

Every day, judges and juries are called upon to assess how much of a witness’s evidence to accept in order to fairly adjudicate legal disputes. The credibility of plaintiffs has become the

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\(^3\) References in this article to mental illness will be meant to include all conditions that impact a plaintiff’s emotional and/or cognitive functioning.
focus of most personal injury and disability claim trials. If the plaintiff is deemed credible, they succeed in the action. If the plaintiff is not deemed credible, they generally lose the action. Much hinges, then, on an assessment of the plaintiff’s credibility.

Which leads one to ask, how does a trier of fact assess a person’s credibility? One of the leading decisions in BC is *Bradshaw v. Stenner* 2010 BCSC 1398. In that decision, Madam Justice Dillon outlined the following principles:

186 Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (Raymond v. Bosanquet (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (Wallace v. Davis (1926), 31 O.W.N. 202 (Ont.H.C.); Farnya v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).

187 It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)) … (emphasis and italics added).

The highlighted excerpts in the above passage describe attributes that, while valued in mentally healthy individuals, may be undermined by mental illness. In general, one expects a good witness to be solid, strong, and their evidence to be reasonable. It is this reasonableness that gives the trier of fact confidence that the witness is credible. The corollary is that
testimony that appears weak or “unreasonable”, i.e. reflecting a notable deviation from reasonable thought or conduct, is likely to reflect a lack of credibility.

The search for credibility invites the trier of fact to embrace considerations of responsibility and solidity captured by the “reasonable person,” a hypothetical person who in any given situation will demonstrate common sense, good judgment and probity. We learn these principles in first year law school: the reasonable person is a foundational concept in tort law and reasonable expectations constitute a foundational principle in contract law. We learn that our laws expect individuals to act in a reasonable manner because that is a foundational requirement of a civilized society. Rights and remedies are fashioned with the reasonable person in mind. In fact, reasonableness, which includes the capacity to govern one’s actions through reason, may be the primordial underpinning of all good laws.

We move from the concept of “credibility” to that of “reliability”. In recent years, there has been an increasing use of the word “reliability” in trial decisions. A Quicklaw search reveals that over a ten year period from 2000 to 2010, there were 153 cases involving the word “reliability” within 3 words of “plaintiff”. In the last five years (2010 to 2015), a total of 129 decisions meet the same criteria.

The two words, credibility and reliability, appear to be used interchangeably. However, they are not synonymous. The Merriam Webster defines reliability as:

1. the quality or state of being reliable
2. the extent to which an experiment, test, or measuring procedure yields the same results on repeated trials

Synonyms given in this dictionary for “reliability” include the following words:

dependability, dependableness, reliableness, responsibility, solidity, solidness, sureness, trustability, trustworthiness

In R. v. Hart 2014 SCC 52 (Hart), the Supreme Court of Canada wrote:
¶100 Reliability can generally be established in one of two ways: by showing that the statement is trustworthy, or by establishing its reliability can be sufficiently tested at trial (R. v. Khelawon, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 61-63).

¶101… in assessing the trustworthiness of a hearsay statement, courts look to the circumstances in which the statement was made, and whether there is any confirmatory evidence. (Khelawon, at paras. 62 and 100).” (para. 100). (emphasis added)

Hence the concepts that guide in discerning “the truth” implicitly invite the trier of fact to ask: Whom do you trust? The proper question, I suggest, is: Whose evidence do you accept?

**Mental illness – dark and invisible**

There is often a disconnect between the instinctive or emotional perception of a mentally ill person’s reliability and credibility and their actual evidence. Why?

Mental illness comes in many forms and cannot be treated as a uniform entity, but in some way or other, if mental illness is disabling, it will likely startle and disrupt the paradigm of the reasonable person. It will often be unfamiliar and outside the personal experience of a practical and informed person. But what does this actually mean? In an article entitled *High Functioning*: Successful Professionals with Severe Mental Illness⁴, published in 2015 in the Duke Forum for Law & Social Change, the author who himself suffered from bipolar disorder, reviewed the extremely high incidence of mental illness and elevated rates of suicide in the medical and legal professions. He also pointed to a number of leaders in both professions with severe mental illness who had, despite their illness, led very productive lives. The message was that severe mental illness, at times even requiring hospitalization, does not equate with across-the-board “craziness”. Yet the reluctance to trust the evidence of persons with mental illness is pervasive.

A person’s demeanour often affects how trustworthy we perceive them to be. What we understand is that people with mental illness often feel shame and a sense of loss which has

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everything to do with suffering from mental illness and nothing to do with the truthfulness of their testimony or lack thereof. In *Dimensions of Loss from Mental Illness*\(^5\), the authors write that the sense of loss from mental illness often includes a loss of dignity, respect and self-esteem, and even extends to one’s sense of self and identity, as illustrated in the following passage:

> With the onset of mental illness, one is often stripped of one’s identity and left with a sense of failure and distress. One feels like a shell; a being of no substance; one who walks in the shadows of others and casts none of one’s own…

Thus a witness suffering from mental illness who has a reduced sense of self will find it difficult to speak with conviction and power. This does not go to truthfulness, yet these attributes are used often to determine whether a person is “credible” and “reliable.”

The reaction of most people who encounter mental illness is unease or instinctive rejection, even moral judgment. In an article entitled *The Stigma of Mental Illness and its Deleterious Effects on Psychiatric Treatment and Recovery*\(^6\), the authors note “Mental illness is a rare category of medical affliction in which the social repercussions for having such a condition can be just as harmful as the disease itself…. unlike asthma, mental illness is viewed more as a character flaw deserving of scorn than a biological affliction in need of treatment.”

Unfortunately, an instinctive distrust of persons with mental illness combined with any deviation in their evidence from what is perceived to be reasonable, trustworthy and solid can easily lead the trier of fact to conclude that a plaintiff is “unreliable.” Once that occurs, the case has all but been decided, not on the merits, but because the trier of fact cannot find a way to trust the evidence of a plaintiff with mental illness. Where there is credible medical evidence of mental illness, a broad brush rejection of a plaintiff’s credibility or a finding that the plaintiff is “unreliable” is highly discriminatory.

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What follows is a more in-depth examination of the particular biases and poorly-adapted trial processes at play in this area, along with suggestions as to how they can be modified so that plaintiffs with mental illness are recognized, understood and compensated in a fair and reasonable manner.

**The need to understand our own biases**

The first step to ensuring a fair hearing of a claim brought by a plaintiff with mental illness is to be aware of one’s own bias and the limitations of one’s personal understanding of the plaintiff’s medical condition.

While considering the plaintiff’s evidence on a stand-alone basis is valuable in assessing individuals who are mentally healthy, this approach can lead to systemic discrimination when applied to plaintiffs who suffer from mental illness, as some aspect of their evidence will almost inevitably lack “inherent” believability.

Here are some examples. What may be a relatively minor setback to an emotionally healthy person may be reported as overwhelming to a plaintiff whose capacity to function has been eroded by mental illness. What may be an exaggerated reaction for an emotionally healthy person may accurately reflect the reality of a plaintiff who is struggling to cope with life’s challenges. What on the witness stand may appear to be a sense of embarrassment and shame may reflect an acute awareness of the stigma of mental illness rather than implicit admission of whatever was suggested in cross-examination. Crying while on the witness stand that may seem “overemotional” to a mentally healthy person may be evidence of true suffering. What on the witness stand appears to be problems with memory and concentration may be more consistent with symptoms of depression and anxiety than with any effort to hide the truth.

In assessing damages, the law does not ask triers of fact to award what a plaintiff *should* experience, but what a plaintiff *does* experience. Triers of fact who have not experienced mental illness or who are unfamiliar with psychiatric illness may find it difficult to believe a plaintiff’s truthful description of their illness. Care must be taken not to assume the issue is one of
credibility or reliability when it may instead accurately reflect the reality of the plaintiff’s mental illness.

When plaintiffs sustain physical injuries that turn out to be more serious than expected, the full extent of the loss is generally recognized. In claims involving economic claims, losses that are greater than expected are also compensated, subject to any duty to mitigate. Yet when a plaintiff’s evidence is discounted because he/she is “too emotional” the measure of damages is also discounted and the true extent of suffering remains unacknowledged.

The problems facing plaintiffs with mental illness have not gone unnoticed. In an article by Deirdre M. Smith, “The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation” the author describes three ways in which defendants have effectively used evidence of a plaintiff’s psychiatric condition to attack their credibility. The first is by suggesting alternative causes of the plaintiff’s psychological injuries, the second is by impeaching the plaintiff’s credibility on the basis that he/she suffers from a mental illness and the third focuses on how the plaintiff likely acted in relation to the events at issue in the action.

The author notes the negative impact of mental illness on the courts’ assessment not only of a party’s credibility but also on their character. Although evidence of mental illness may be relevant for some issues and not others, it has been found to leak into and influence determinations on many fronts without proper analysis regarding its relevance to the specific issue in question. She writes:

“Where defendants offer the evidence of psychiatric disorders for the express purpose of impeachment, courts increasingly and correctly recognize the dangers of such evidence. However, we can also see from the bench trial opinions the great weight that laypeople give to mental health information in their credibility determinations, even in the absence of expert testimony explaining what specific link, if any, exists between a mental disorder and accurate perception, memory, and narrative.” (p. 798)

Moreover, assumptions about how mental illness manifests itself can be quite erroneous.

Simply put, the “practical and informed person” described in Bradshaw very likely does not have an intuitive understanding of the relationship between a plaintiff’s mental illness and the credibility or reliability of his/her testimony. The author writes:

“Professor Frank C. Keil, a professor of psychology and linguistics, observed that ‘it is not safe to assume that one’s novice intuitions about the complexity of phenomena are always accurate.’ Rather, the presence of ‘systematic biases… heavily distort one’s intuitions into thinking some classes of phenomena are much simpler than they really are.’” (pp. 813-814)

The need for a big picture perspective

A review of the Bradshaw passages cited early in this article identifies two complementary approaches to assessing credibility. One is to examine whether the plaintiff’s evidence is “inherently” credible (the highlighted excerpt) and the other is to examine whether the plaintiff’s evidence fits with other evidence adduced in the action (the excerpt in italics). Both are necessary to properly assess credibility. However, starting an analysis of credibility with the plaintiff is problematic if the plaintiff suffers from mental illness because of the real risk that they will fail the “credibility test” even though their evidence may be substantially consistent with the truth.

In many cases, plaintiffs with brain injury claims or mental health problems are put on the witness stand after being “introduced” through lay and expert evidence. This is because of the need to present the overall claim and educate the trier of fact regarding the plaintiff’s mental and emotional functioning so as to provide a framework or perspective for his/her evidence. While this practice has been criticized, it is suggested that without evidence from other witnesses, the trier of fact is at risk of rejecting a claim because of the plaintiff’s disabilities rather than because of the merits of the plaintiff’s case.

The search for context essentially reverses the process outlined in Bradshaw. The starting point in assessing the credibility of a plaintiff with mental illness is not the plaintiff but the lay and expert evidence. Only when the trier of fact is equipped with an understanding of the
issues in the action and the nature of the plaintiff’s mental illness, including any cognitive limitations or perceptual distortions, based on medical evidence and supported by lay evidence can there be a fair and informed assessment of the plaintiff’s credibility.

A frequently cited example of contextual discernment (though not involving mental illness) are the following passages in the decision of Mr. Justice N. Smith in Carvalho v. Angotti, 2007 BCSC 1760. In this personal injury action, counsel for the defendants submitted that the evidence of the plaintiff and her husband was completely lacking in credibility. The process of distilling the wheat from the chaff involved understanding the nature of record-keeping in a medical setting and recognizing its limitations when applied to a legal setting, recognizing the emotional context in which statements were made, and affirming the right of the plaintiff to pursue legitimate legal claims.

His Lordship described the issues in the following terms:

15 The attack on the plaintiff's credibility is based, in part, on various contradictions and inconsistencies within her evidence at trial and between that evidence and her discovery evidence, documents she prepared for other purposes, or statements recorded in clinical records. It is a rare case of this kind where such inconsistencies cannot be found. By the time a personal injury case gets to trial, the plaintiff typically will have provided information to a number of people - including doctors, adjusters and disability insurers - on a number of occasions over a period of years. This provides fertile ground for cross-examination precisely because very few people will have perfect and identical recollection on each of those occasions.

16 The record created on many of those earlier occasions may consist of answers a plaintiff gave to questioners who were primarily interested in only part of what the plaintiff had to say. For example, a doctor treating a plaintiff for a specific injury may seek only very general information about aspects of the plaintiff's medical history unrelated to the injury that doctor is treating. The information recorded may only be a brief summary or paraphrase of what the plaintiff said. The plaintiff will usually have no specific recollection of what he or she said on that occasion, but, when confronted with the record on cross-examination, will usually agree with the suggestion: "That is what you told Dr. X, isn't it?" The danger of giving too much weight to such inconsistencies was noted by Parrett J. in Burke-Pietramala v. Samad, 2004 BCSC 470, at paragraph 104:

I make two observations at the outset about Dr. Keyes' criticism for the variations he finds exist in the versions of symptoms given to various doctors. First of all, the reports are those of a layperson going through a traumatic and
difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. As Dr. Samad made very clear his chart and records were a long way from being a verbatim record, indeed, some of his entries from a full appointment and an examination consisted of three or four phrases. I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.

17 Although there are inconsistencies in the plaintiff's evidence, I am satisfied that she was attempting to tell the truth as she recalls it. Those inconsistencies may cause me to question the accuracy of her recollection on some points, but they come nowhere near to being a basis for a finding of outright and deliberate dishonesty.

18 Counsel for the Angottis argues that I should consider the fact that the plaintiff is what he describes as "quite claims conscious." That phrase was used in reference to the fact the plaintiff has pursued various claims with Workers Compensation, her disability insurer and Employment Insurance and to the fact that the plaintiff was continuing in a job that had been terminated so that she could be paid until the end of her notice period. If counsel is suggesting that the plaintiff is somehow less credible because she is inclined to pursue compensation she believes she is entitled to, I emphatically reject that suggestion.

Much as was done in the above passages, the truth-finding exercise of the court is enhanced by considering other explanations for apparent inconsistencies in any given situation.

The fact finding exercise during a trial always needs to include both an individual assessment of the party and an assessment of how the evidence of the plaintiff fits with the overall picture. Beginning and ending with a negative assessment of the plaintiff’s credibility will short circuit the fact-finding process. Because of the potential for negative bias, it is advisable for the trier of fact to develop a big picture perspective of what the case is about in order to place the plaintiff’s evidence in context.

The need to separate facts from stereotypes

In order not to discount or discredit a plaintiff merely because of mental illness, it is important to understand the nature of his/her illness. Confusion around how to interpret the
evidence of individuals with mental illness was addressed in an article published in the Journal of Law and Policy entitled *Ensuring a Fair Hearing for Litigants with Mental Illnesses: the Law and Psychology of Capacity, Admissibility, and Credibility Assessments in Civil Proceedings.* Misconceptions about Mental Illness. The authors note that “An individual may have diminished capacity in one area of his or her life while retaining capacity in others.” (p. 469). Despite this distinction, they note that the testimony of persons with mental illness “is often severely discounted by factfinders [who] often allow prejudices about mental illness to interfere with an accurate weighing of the credibility of witnesses who have a history of mental illness.” (p. 471). They emphasize that assessing credibility must be done with considerable care, noting that “there is … substantial clinical evidence to support the notion that it is not possible to make generalizations regarding an individual’s ability to provide accurate information simply based on whether the individual has a psychiatric diagnosis or a mental health history. Mental health research data supports the assertion that such determinations require case-by-case analyses.”

The authors recommend that triers of fact be careful to rely on legitimate, medically-based grounds before discounting the evidence of persons with mental illness:

“Evidence of a witness’s mental health history is probative only if it holds a ‘specific and scientifically legitimate relevance to the [witness’s] credibility.’ Even then, the probative value of such evidence ‘should be balanced against the potentially misleading and confusing effect that information will have on the fact-finding process.” (p. 487).

They do, however, point to one area of mental illness which requires greater scrutiny:

“What is predictive in terms of determining which individuals are more likely to be chronic liars or exhibit other acts of criminality is a cluster of behaviors and behavioral patterns characterized as “psychopathy”. (p. 478)

“The *Diagnostic and Statistical Manual of Mental Disorders, Volume IV TR (DSMIVTR)* is used by many health professionals to classify and characterize varying forms of mental illnesses according to different historical, observable, and symptomatic criteria. Antisocial personality disorder is defined by, among other characteristics, a historical and repetitive pattern of intentional deception and exploitation of others. In contrast, there is

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no reference to exploitative or intentional deceptive behavior in the list of criteria for chronic mental disorders such as schizophrenia, bipolar disorder, and other mood and anxiety disorders.” (pp. 478-479).

While findings of credibility must always remain in the domain of triers of fact, it is important not to make assumptions that individuals with mental illness are inherently unreliable or untrustworthy when they testify about their experiences.

A helpful example of the weighing of broad and potentially prejudicial stereotypes against specific evidence is found in *Kim v. Khaw* 2014 BCSC 2221. One of the issues before the court involved an assessment of the plaintiff’s mental condition and likely prognosis. The psychiatric evidence was that in Korea there was a strong stigma associated with mental illness. Both the psychiatrist for the plaintiff and the psychiatrist for the defendant considered that this could complicate the assessment and treatment of the plaintiff. Their opinions diverged on whether the plaintiff was suffering from “social anxiety” or PTSD. In considering how to approach the issue, Sharma J. wrote:

“Courts and, in my view, medical professionals must be vigilant not to descend into cultural stereotyping by assuming cultural factors are relevant without careful assessment of the individual.”

Moving to the specific facts of the case, Her Ladyship wrote:

77 “In my view, Dr. Wiseman has unduly focussed on Mr. Kim’s shame and guilt without providing a connection to a psychiatric symptom (such as anxiety). Instead, he links those characteristics to “cultural issues”. As noted above and by Dr. Lu, cultural factors do play a role in assessing Mr. Kim’s mental health status, but they are not a substitute for a psychiatric evaluation or diagnosis. Dr. Wiseman has not asked himself why Mr. Kim’s guilt and shame have manifested in such a way as to interfere with his normal functioning. I am left with the impression that he merely attributes it to Mr. Kim’s “cultural” background.

78 This approach is insensitive to anyone with cultural characteristics, however broadly that term can be used. With all due respect to Dr. Wiseman, he has over-emphasized Mr. Kim’s cultural background. Not everyone with a Korean background will be impacted by the apparent stigma of mental illness or the traditional conceptions about a man’s role in his family. Mr. Kim was impacted in a way and, to the extent that a more refined
assessment of his mental health had to be undertaken, Dr. Lu, Dr. Hancock and Dr. Sharan all noted Mr. Kim’s background as part of their overall assessment, but the appropriately focused on psychiatric symptoms…. “

The need to consider mental illness during cross-examination

Plaintiffs with mental illness are vulnerable during cross-examination and can act or react in ways that undermine, rather than reinforce, truth-finding. In Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases\(^9\), the authors write:

“The available social science literature supports the view that witnesses with mental disabilities are able to give accurate, useful, and truthful evidence that furthers the truth-seeking process, but their ability to do so is greatly hindered by current practices of cross-examination.” (p. 8).

The authors argue that cross-examination techniques can distort rather than facilitate the truth-finding exercise of the court. They write:

“[T]he idea that cross-examination as currently understood is fundamental to a fair trial is often accepted as true without adequate scrutiny. In particular, endorsements of the power of cross-examination rarely distinguish between contradictions that reveal the truth and those that obscure it. A witness may make a mistake or get confused on cross-examination, but this does not necessarily mean she is lying. As David Carson explains, this witness may simply ‘be very poor at being a witness rather than … a truth-teller.’ The court is not actually assisted in its truth-finding role when lawyers rely upon questioning techniques that demonstrate only that a particular witness is fallible under cross-examination.

Muller and Tait further argue that cross-examination can impede the truth-seeking function:

Cross-examination is often regarded as a feature of an adversarial system which enables it to claim superiority over the inquisitorial system. However, adherents of the latter system have often accused the adversarial system of giving an ‘exaggerated efficiency’ to the right of questioning. They argue that cross-examination bends and distorts evidence by means of suggestive questions and that justice cannot prevail in an atmosphere where witnesses are influenced and

\(^9\) Janine Benedet & Isabel Grant, “Taking the Stand: Access to Justice for Witnesses with Mental Disability in Sexual Assault Cases” (2012) 50 Osgoode Hall L.J. 1
badgered.” (p. 7)

The authors draw a parallel between the “problem of false confessions by accused persons that are at the heart of our wrongful convictions” and the potential for witnesses (particularly those with a disability) to “falsely contradict themselves out of confusion, fatigue or fear.” (p. 7). The psychological vulnerability of those who have succumbed to mental illness should always be a consideration in assessing a witness’s responses during cross-examination.

It is interesting to see how this consideration has played out in Canada. In R v. Hart, 2014 SCC 52, the Supreme Court of Canada addressed concerns about wrongful convictions by introducing a new common law rule of evidence in police sting operations which presumptively renders any confession inadmissible and allows the presumption to be overcome if the Crown can establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. The Court expressed concern about the degree of pressure that might be placed on a suspect by a “Mr. Big” crime boss to confess to wrongdoing and in that context noted the unique vulnerability of young people and those with mental illness. Moldaver J. wrote:

¶103 Special note should be taken of the mental health and age of the accused. In the United States, where empirical data on false confessions is more plentiful, researchers have found that those with mental illness or disabilities, and youth, present a much greater risk of falsely confessing (Garrett, at p. 1064). A confession arising from a Mr. Big operation that comes from a young person or someone suffering from a mental illness or disability will raise greater reliability concerns.

The message regarding the need for care in questioning suspects seems to be getting across. In an article published in the Financial Post on July 30th of this year, it was reported that the RCMP have adopted gentler questioning practices with suspects. The report states:

“Under the RCMP’s new approach, quietly adopted in December, investigators are encouraged to keep an open mind, resist presuming guilt, and focus more on gathering information than on getting a confession, Sgt. Darren Carr, who led the development of the new interview model, told the National Post. ‘When I’m training people, I always say, ‘Less Kojak and more Dr. Phil.’’”

It is suggested that these same considerations are applicable when plaintiffs with mental illness are cross-examined in court and triers of fact should be open to questioning the reliability
of apparent admissions obtained through aggressive and extended cross-examination during a trial.

**The need to recognize moral and reasoning prejudice**

Returning to *Hart*, in assessing the prejudicial effect of the confession, the court identified the need for trial judges to be aware that such evidence “creates a risk of moral and reasoning prejudice”. The court defined “moral prejudice” as the prejudice arising from the jury learning about the sting operation and the desire of the accused to join a criminal organization. The moral prejudice related to mental illness occurs when plaintiffs are stigmatized, seen as morally inferior or marked by a character flaw because of their illness.

The court defined “reasoning prejudice” as “the risk that the jury’s focus will be distracted away from the charges before the court” (which in that context reflected the concern that a jury would be distracted by details of the sting operation). In personal injury and disability claims, it is suggested that reasoning prejudice can occur if the overwhelming focus of a trial becomes the plaintiff’s credibility rather than the substantive issues in the action. This is particularly dangerous when the plaintiff suffers from mental illness, because problems associated with common mental illnesses such as depression and anxiety can so easily be confused with credibility issues. By way of example, it is suggested that reasoning prejudice surfaces in a disability action if the entire focus of the defence case is on the credibility of the plaintiff, rather than on the plaintiff’s ability to maintain gainful employment as defined in the disability insurance policy.

**The need to balance the interests of both parties**

Last but not least, the court faces the challenging task of balancing the right of the plaintiff to be genuinely heard notwithstanding his/her mental illness with the right of the defendant to fully defend the action. Although it applies to a different setting, the following passage in *Hart* provides a helpful description of how the balancing of conflicting interests during a trial continues to be a vital, though imprecise, exercise:
(e) How Are Probative Value and Prejudicial Effect Compared?

[108] In the end, trial judges must weigh the probative value and the prejudicial effect of the confession at issue and decide whether the Crown has met its burden…

[109] Determining when the probative value of a Mr. Big confession surpasses its potential for prejudice will never be an exact science. As Justice Binnie observed in Handy, probative value and prejudicial effect are two variables which “do not operate on the same plane” (para. 148). Probative value is concerned with “proof of an issue”, while prejudicial effect is concerned with “the fairness of the trial” (ibid.). To be sure, there will be easy cases at the margins. But more common will be the difficult cases that fall in between. In such cases, trial judges will have to lean on their judicial experience to decide whether the value of a confession exceeds its cost.

[110] Despite the inexactness of the exercise, it is one for which our trial judges are well prepared. Trial judges routinely weigh the probative value and prejudicial effect of evidence. And as mentioned, they are already asked to examine the reliability of evidence in a number of different contexts, as well as the prejudicial effect of bad character evidence. They are well positioned to do the same here. Because trial judges, after assessing the evidence before them, are in the best position to weigh the probative value and prejudicial effect of the evidence, their decision to admit or exclude a Mr. Big confession will be afforded deference on appeal.

Conclusion

We all know that it is wrong to discriminate against persons with mental illness. Yet faced with plaintiffs whose conditions are often misunderstood and whose actions are perceived to lack dependableness, adverse findings on credibility can occur almost instinctively. The exercise that needs to be undertaken any time a person with mental illness testifies requires an awareness of the potential for bias and negative stereotypes, a need to understand the big picture and the nature of the plaintiff’s claim as well as the nature of the plaintiff’s illness, and an awareness that characteristics affecting credibility and mental illness can be conflated.

Society as a whole is moving toward an increased understanding of the realities versus misconceptions of people with mental illness. Hopefully our courts will follow suit.