

# Recovering for Psychological Injuries, Third Edition

766 pp. By William A Barton,  
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## BOOK REVIEW

In his classic 1975 book *Trial Advocacy*, Professor James W. Jeans wrote, “[t]he most difficult challenge that the plaintiff’s lawyer will face in closing argument is that of presenting an evaluation of the plaintiff’s pain and suffering, past and future.”<sup>1</sup>

Jeans, who died in 2006, was one of the leading trial advocacy teachers of his time. He offered various ways to present the pain and suffering flowing from physical disability and disfigurement. But he touched on something more: the need to consider the psychological impact of those physical injuries.

“A loss of limb,” wrote Jeans, “involves the same psychic effect as that experienced with the infliction of a facial scar...the stump might be concealed behind a folded sleeve, but the victim is conscious of his loss. The integrity of the body has been violated and the frame with which he was born has been lessened and is no longer whole. Many medical articles have been written of the personality changes which frequently attend a loss of limb.”<sup>2</sup>

Jeans, as he often did, had an important message: a lawyer proving damages should not forget the psychological losses that flow from a physical injury; a presentation of the emotional impact can add to the damages.

Jump ahead nearly a half-century. An increasing number of cases add a twist to the scenario described by Jeans. In these cases, the primary injuries are not physical, they are psychological. Sexual assaults, or workplace harassment, or other tortious acts causing post-traumatic stress disorder, or similar emotional impairment, are the kinds of cases lawyers routinely face, where the primary injury suffered by the client might not be physical, but rather psychological.

And while most lawyers agree with Jeans that presenting and proving damages from a physical injury can be a challenge, almost all would say that cases where the primary injury is psychological can be even tougher.

What to do?

While presenting and proving cases where the primary injury is psychological is challenging, there is a reliable guide: Oregon lawyer William A. Barton, who has written an excellent book to help negotiate this difficult terrain. *Recovering for Psychological Injuries*, now in its third edition, lifts Barton to the status of a modern-day Jeans. He has written a book of great assistance to the legal profession, a book that should develop a stronger following in British Columbia than it has to date.

Though the book is focused on psychological injuries, it does more. Barton is an experienced senior lawyer, who has been committed to teaching trial advocacy skills to young lawyers in Oregon for years. This wise teacher offers general advice, time and time again, that new lawyers should carefully consider.

“If you are just starting to practice,” writes Barton, “and do not

have the luxury of picking from several prospective claims, consider referring your large cases to a lawyer who has the necessary experience. Apprentice yourself to the senior lawyer. The case will probably be worth much more, and you will learn more...and be better prepared to handle the next large case that comes your way.”

While the general advice is something all lawyers will find helpful, the focus of the book is on psychological injuries, and a central theme involves a contrast that Barton draws between what he calls the “quantitative” approach and the “qualitative” approach. The quantitative approach is a “deductive, right-brain way of seeing things” – a sterile, traditional, algebraic model taught in law school – while the qualitative approach “derives conclusions inductively, by focusing on the uniqueness of the loss to the specific individual.”

Barton illustrates the basic difference between the approaches, and, drawing from New Testament scripture, offers the example of two very different people: a millionaire, and a beggar who has only one dollar. “Take away half of what each possesses,” writes Barton, “and then ask, ‘Who has lost more?’” Taking a qualitative analysis, the beggar’s loss may well seem more meaningful to him.

From that starting point – and merging his ideas with earlier contributions by lawyers like Moe Levine – Barton develops a template for presenting psychological injuries. His approach is particularly effective where the plaintiff has pre-existing issues and challenges, and this makes his approach all the more valuable.

The well-organized book is easy to read and digest. Barton offers “Eleven Commandments” for psychological injury cases and follows up his rules for success with sobering advice on what to avoid: twenty-one common mistakes that lawyers make in handling psychological cases.

He sometimes offers advice that parts ways with the general approach taken by injury lawyers in British Columbia. For example, he urges lawyers to have the client contribute to the costs of the injury litigation “in an amount sufficient to temper emotion with realism.” The exact amount doesn’t matter, “so long as it’s enough to motivate the client to be reasonable.” Barton believes that this will be important when it comes time to settle the case reasonably. The immediate reaction to this is to disagree, yet on this point (and more than once, throughout the book) upon careful reflection, one concludes it would be wise to carefully consider Barton’s advice, and not dismiss what seems like an unconventional idea out of hand.

Barton provides insight into the use of treating physicians’ evidence, presenting the plaintiff’s case in chief, cross-examination, and closing argument. There is detailed commentary on the sexual abuse of patients by therapists and on child sexual abuse cases. At the end of the book, appendices 1 and 2 provide examples of expert testimony in child sexual abuse cases. A lawyer handling such a case, who has never read Barton’s book, should immediately order a copy.

Barton is more than an outstanding trial lawyer. He has, for many years, been a dedicated teacher, passing on trial skills to a generation of lawyers. His students have learned to trust him. New readers, too, will grow to trust him, as they absorb more than 700 pages of his advice in this important contribution to the practice of law. **V**

1 Jeans, James W. *Trial Advocacy*, (St. Paul: West Publishing Company, 1975).

2 Jeans, at 309.