DON'T SAY DEPRESSION: SPECIFIC DIAGNOSABLE INJURIES UNDER THE WASHINGTON LAW AGAINST DISCRIMINATION'S PRIVILEGE STATUTE

Jack Miller*

Abstract: In 2018, the Washington State Legislature amended the Washington Law Against Discrimination (WLAD) to prevent automatic waivers of physician- and psychologist-patient privileges when plaintiffs claim non-economic, emotional distress damages. This legislation appears to be in response to the Washington Court of Appeals' decision *Lodis v. Corbis Holding, Inc.*,[1] which held that a plaintiff waives their[2] patient- and psychologist-privilege merely by alleging emotional distress damages. The new law, RCW 49.60.510, prevents waiver unless the plaintiff alleges a specific diagnosable injury, relies on the testimony of a healthcare or psychiatric expert, or claims a "failure to accommodate a disability or discrimination on the basis of a disability." RCW 49.60.510 does not specify what constitutes a specific diagnosable injury, but the legislative history suggests the Legislature was attempting to shift WLAD's privilege law towards a standard similar to one used in federal courts. This Comment explores the federal court's psychotherapist-patient privilege[3] waiver and argues that federal courts' privilege jurisprudence can provide some clarity to the ambiguity of "specific diagnosable" injuries. It further argues that courts' failure to consider this legislative goal risks a return to the *Lodis*-era waiver standard.

INTRODUCTION

Debate surrounds what role physician- and psychotherapist-patient privilege should play in litigation where a plaintiff seeks emotional distress damages.[4] Defendants argue the privileged communications are

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1. 172 Wash. App. 835, 292 P.3d 779 (2013).

2. *Washington Law Review* uses "they" and "their" instead of "he" or "she" to avoid gender-specific language.

3. Unlike state courts, federal courts do not recognize a physician-patient privilege. EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES 643 (3d ed. 2016) ("[T]he federal courts have largely refused to recognize the [physician-patient] privilege.").

4. *See, e.g.*, Beth S. Frank, *Protecting the Privacy of Sexual Harassment Plaintiffs: The Psychotherapist-Patient Privilege and Recovery of Emotional Distress Damages Under the Civil Rights Act of 1991*, 79 WASH. U. L.Q. 639, 663 (2001) (arguing that plaintiffs suing under Title VII and claiming emotional distress damages should not automatically waive psychotherapist-patient privilege); 25 TOBY PIERING, NEW LAW LIMITS DISCLOSURE OF MEDICAL RECORDS IN DISCRIMINATION CASES, WASH. EMP. L. LETTER 1 (M. Lee Smith Publishers LLC, Brentwood,

relevant to causation because the alleged emotional distress might be caused or exacerbated by pre-existing medical or emotional conditions.[5] Plaintiffs claim, on the other hand, that they should be allowed to seek emotional distress damages without disclosing their communications with counselors and doctors because such discovery is unnecessarily invasive.[6] In federal court, much of the debate arises from civil rights litigation.[7] Some argue plaintiffs will be unwilling to pursue civil rights cases if privilege is waived.[8]

In 2018, Washington State took a side in the privilege debate. The Washington State Legislature enacted an amendment to its Law Against Discrimination ("WLAD").[9] This amendment, RCW 49.60.510, altered the common-law waiver standard concerning the physician- and psychologist-patient privilege waiver adopted in *Lodis v. Corbis Holdings, Inc.*[10] Under *Lodis*, a plaintiff waived their physician- or psychologist-patient privilege merely by seeking noneconomic damages for emotional distress.[11] The new statute prevents waiver under such circumstances.[12] Instead, in order for there to be a waiver of privilege, the plaintiff must (1) allege a "specific diagnosable physical or psychiatric injury" proximately caused by the defendant, (2) rely "on the records or testimony of a health care provider or expert witness to seek general damages," or (3) allege "failure to accommodate a disability" or allege "discrimination on the basis of a disability."[13]

This Comment focuses on the first exception: when the plaintiff alleges a "specific diagnosable physical or psychiatric injury."[14] What constitutes a specific diagnosable injury is far from clear and the new

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T.N. 2018) (citing WASH. REV. CODE § 49.60.510 (2019) and arguing that RCW 49.60.510 undermines employers' ability to defend themselves from discrimination and harassment suits).

5. PIERING, *supra* note 4, at 1.

6. *See* Frank, *supra* note 4, at 663 (arguing courts should not permit the invasion of a Title VII plaintiff's privacy through discovery of mental health records).

7. Helen A. Anderson, *The Psychotherapist Privilege: Privacy and "Garden Variety" Emotional Distress*, 21 GEO. MASON L. REV. 117, 117 (2013).

8. Frank, *supra* note 4, at 663 ("If courts determine that a victim waives the psychotherapist-patient privilege . . . when she [brings] a civil rights action, then fewer victims will act as 'private attorneys general' for fear of invasion of privacy.").

9. WASH. REV. CODE § 49.60.510 (2019).

10. 172 Wash. App. 835, 855, 292 P.3d 779, 791 (2013).

11. *Id.*

12. WASH. REV. CODE § 49.60.510(1).

13. *Id.* § 49.60.510(1)(a)–(c).

14. *Id.* § 49.60.510(1)(a).

statute provides no guidance.[15] For example, it is unclear if a plaintiff waives privilege when the alleged emotional experience is symptomatic of a psychiatric condition.[16] A reasonable interpretation of the statute would require a plaintiff to allege in their complaint a specific condition—like Post-Traumatic Distress Disorder—to waive privilege. Still, an equally reasonable interpretation of the statute would find waiver if a plaintiff said they felt anxious because General Anxiety Disorder is a diagnosable condition.[17] Fundamentally, this Comment seeks to address the ambiguity of the new statute and provide a framework for parties and courts interpreting RCW 49.60.510.

RCW 49.60.510 is best understood in the context of the privilege debate outlined above. It mirrors the compromise adopted by some federal courts known as the "garden variety" standard.[18] These federal courts allow a plaintiff to maintain privilege while seeking emotional distress damages if the alleged emotional distress is "garden variety."[19] Garden variety distress has many definitions,[20] but is generally defined as the emotional experience an ordinary person would experience as a result of the defendant's conduct.[21] The garden variety standard seeks to allow plaintiffs to recover for "incidental" or "intrinsic" emotional distress while maintaining their psychotherapist-patient privilege.[22]

Still, the garden variety standard, although attempting to appease both sides, is not without criticism. For example, the garden variety standard does not readily clarify which emotional experiences are considered garden variety, and which are not.[23] Therefore, it does not provide useful guidance to litigants as to whether privilege will be waived.[24]

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15. *See id.* § 49.60.510.

16. *See id.*

17. AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 432 (4th ed. 1994).

18. *See* Anderson, *supra* note 7, at 137 (arguing the garden variety standard is a compromise "between the concerns for fairness to defendants and concerns about plaintiffs' privacy").

19. *See, e.g.*, Fitzgerald v. Cassil, 216 F.R.D. 632, 637 (N.D. Cal. 2003) (discussing garden variety standard used by some federal courts).

20. *See* Anderson, *supra* note 7, at 138–39 (listing the various definitions of garden variety emotional distress).

21. *Id.* at 137.

22. *Id.* at 138 ("Concerns about routine findings of waiver even for 'incidental' or 'intrinsic' emotional distress damages seem to underlie the garden variety approach.").

23. *See id.* at 142 (discussing the uncertainty the garden variety standard imposes on availability of privilege).

24. *Id.* ("Measured by the judge or magistrate's personal yardstick of normal emotional distress, the garden variety standard is unknowable in advance.").

This Comment argues that the "specific diagnosable" injury requirement of RCW 49.60.510 similarly attempts to allow plaintiffs to recover for incidental emotional distress damages without waiving privilege. In that way, the new statute adopts the garden variety standard and federal case law may provide some guidance to determine the scope of specific diagnosable injuries under WLAD. However, the statute uses "diagnosable injury" and not "garden variety."[25] It remains to be determined how much diagnosable injuries and garden variety emotional responses diverge from one another. Still, garden variety and "diagnosable injury" point to the same dichotomy: emotional responses that are merely incidental to discrimination and those that are something more substantial. With that in mind, this Comment seeks to provide a historical framework for parties and courts, in order to properly interpret RCW 49.60.510 going forward. Because no appellate court has interpreted the new statute yet, this Comment cannot say with certainty what experiences constitute a specific diagnosable injury; however, by establishing a framework of federal garden variety case law and Washington privilege law, this Comment can provide guidance for courts and practitioners concerned with the scope of RCW 49.60.510.

Part I briefly explains the WLAD. Part II discusses Washington's privilege law and the standard prior to RCW 49.60.510. It also touches briefly on the standards used in federal court, including the garden variety standard and the policy considerations concerning privilege waiver. Part III explores the history of RCW 49.60.510's enactment. Part IV argues that RCW 49.60.510 was intended to adopt something akin to the federal garden variety standard and that courts need to consider the legislative history of RCW 49.60.510. Courts failing to consider this historical backdrop risk misconstruing the legislative intent of RCW 49.60.510 and defeating its purpose: to allow plaintiffs to testify regarding incidental emotional harm without waiving privilege.

I. THE WASHINGTON LAW AGAINST DISCRIMINATION

Washington State enacted the WLAD with the purpose of preventing discrimination.[26] The statute provides a private cause of action for persons injured by unlawful discrimination.[27] This cause of action allows

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25. *See* WASH. REV. CODE § 49.60.510 (2019).

26. *Id.* § 49.60.010.

27. *Id.* § 49.60.030(2).

an individual to be awarded "actual damages" sustained as a result of discriminatory conduct.[28]

The statute does not define "actual damages."[29] However, courts have interpreted "actual damages" to include "back pay, front pay, mental anguish, and emotional distress."[30] A plaintiff may be awarded damages if the plaintiff can prove the damages were proximately caused by the discriminatory actions.[31] Therefore, a plaintiff is entitled to emotional distress damages so long as the plaintiff can establish that they suffered emotional distress proximately caused by the defendant's discrimination. In fact, a plaintiff does not need expert testimony to prove emotional distress damages.[32]

WLAD commands courts to construe its provisions liberally.[33] Consequently, courts avoid any statutory construction that "narrow[s] the coverage of the law."[34] This preserves the legislative intent to eradicate discrimination in Washington.[35] Furthermore, when Washington courts have not directly dealt with a legal issue under the statute, courts look to federal discrimination law for persuasive authority.[36]

II. TESTIMONIAL PRIVILEGE, GENERALLY

Privilege prevents compulsory disclosure of certain communications and related information during the course of litigation.[37] Often, privilege impacts discovery during litigation by preventing some information from being known to opposing parties.[38] Privileging information is a policy

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28. *Id.*

29. Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, 114 Wash. App. 80, 97, 55 P.3d 1208, 1216 (2002).

30. *Id.*

31. Martini v. Boeing Co., 137 Wash. 2d 357, 371, 971 P.2d 45, 52 (1999) ("[D]amages must be proximately caused by the wrongful action, resulting directly from the violation of RCW 49.60.").

32. Negron v. Snoqualmie Valley Hosp., 86 Wash. App. 579, 588, 936 P.2d 55, 60 (1997).

33. WASH. REV. CODE § 49.60.020 (2019).

34. Marquis v. City of Spokane, 130 Wash. 2d 97, 108, 922 P.2d 43, 49 (1996).

35. WASH. REV. CODE § 49.60.020 ("The provisions of [RCW 49.60] shall be construed liberally for the accomplishment of the purposes thereof.").

36. Xieng v. Peoples Nat'l Bank of Wash., 120 Wash. 2d 512, 531, 844 P.2d 389, 399 (1993) ("[I]n the absence of adequate state authority, federal authority is persuasive in interpreting RCW 49.60.").

37. *See, e.g.*, WASH. REV. CODE § 5.60.060 (2019) (listing circumstances under which individuals will not be compelled to testify).

38. *See, e.g.*, FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ."); WASH. R. CIV. P. 26(b)(1) ("Parties

decision,[39] and there are different forms of privilege, including attorney-client privilege, spousal privilege, physician-patient privilege, psychotherapist or psychologist-patient privilege, and many others.[40] Not every state or court recognizes every privilege, and they vary both in terms of what information is privileged and under what circumstances privilege applies.[41] Privilege no longer applies when the party who holds the privilege waives it.[42]

This Comment concerns Washington's physician-patient,[43] counselor-patient,[44] and psychologist-patient privileges[45] as they pertain to suits arising under WLAD.[46] In particular, it addresses how RCW 49.60.510 impacts the waiver standards of these privileges. This Part addresses how privilege operates, at a general level. It begins with a discussion of the interaction between Washington discovery rules and privilege law. It then discusses federal psychotherapist-patient privilege waiver standards.[47] Finally, it addresses the policy concerns of privilege law and how privilege affects litigation.

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may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . .").

39. 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE 466–67 (Kenneth S. Broun ed., 7th ed. 2013) ("[R]ules of privilege are not without a rationale. Their warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice."); EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES 4 (3d ed. 2016) ("[P]rivilege law concerns 'extrinsic social policy.'").

40. IMWINKELRIED, *supra* note 3, at 332 ("All states recognize some form of the traditional spousal, attorney-client, and clergy privileges . . . . Further, as the Supreme Court noted in *Jaffee*, the states are in accord that there should be a psychotherapy privilege. The vast majority also enforce a general medical privilege.").

41. DIX, *supra* note 39, at 490 ("State patterns in the recognition of privileges vary greatly."); IMWINKELRIED, *supra* note 3, at 326 ("[T]he state bodies of privilege law differ with respect to both the degree of statutorification and some of the specific privileges recognized.").

42. IMWINKELRIED, *supra* note 3, at 1150 ("It is not a foregone conclusion that every privilege is waivable.").

43. WASH. REV. CODE § 5.60.060(4) (2019).

44. *Id.* § 5.60.060(9).

45. WASH. REV. CODE § 18.83.110 (2019).

46. For brevity and consistency with federal terminology, I will refer to counselor-patient privilege and psychologist-patient privilege collectively as psychotherapist-patient privilege.

47. Federal courts do not recognize a physician-patient privilege. IMWINKELRIED, *supra* note 3. However, they do recognize a psychotherapist-patient privilege, which includes privileged communications between psychiatrists, psychologists, and other licensed counselors (like licensed social workers) and their patients. Jaffee v. Redmond, 518 U.S. 1, 15 (1996) (establishing a psychotherapist-patient privilege for confidential communications between patients and licensed psychotherapists).

A. *Washington's Discovery Rules and Privilege Law*

Privilege limits the broad discovery rules operating in Washington State.[48] Parties may discover "any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . . ."[49] Though privilege statutes directly conflict with the broad discovery rules operating in Washington State, Washington courts respect the Legislature's right to establish privilege.[50] However, because privilege is an affront to fair adjudication, Washington courts construe privilege statutes narrowly by finding waivers.[51] Commonly, courts throughout the United States hold that placing health at issue in a lawsuit—by alleging an injury, for example—waives privilege.[52]

Washington statutes privilege certain communications from compulsory testimony.[53] RCW 5.60.060 codifies many of these privileges.[54] This list includes the prohibition on testimony by both treating physicians and mental health counselors.[55] Certain situations establish a waiver of these privileges. For example, a patient waives their physician-patient privilege by placing their health at issue in the lawsuit.[56] In addition, a waiver of physician-patient privilege for one physician constitutes a waiver of all physicians.[57]

Washington separately establishes psychologist-patient privilege.[58] This statute states that communications between a client and psychologist share the same protections as attorney-client communications.[59] Vocal communications with psychologists and

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48. *See* Lowy v. PeaceHealth, 174 Wash. 2d 769, 776, 280 P.3d 1078, 1082 (2012).

49. WASH. R. CIV. P. 26(b)(1) (emphasis added).

50. State v. Harris, 51 Wash. App. 807, 812, 755 P.2d 825, 828 (1988).

51. *Id.*

52. *See* Ellen E. McDonnell, *Certainty Thwarted: Broad Waiver Versus Narrow Waiver of the Psychotherapist-Patient Privilege After Jaffee v. Redmond*, 52 HASTINGS L.J. 1369, 1375 (2001).

53. *See* WASH. REV. CODE § 5.60.060 (2019); *id.* § 18.83.110 (2019).

54. *See id.* § 5.60.060 (entitled "Who is disqualified—Privileged communications"). This statute contains the lion's share of Washington's statute-enacted privileges. It includes spousal privilege (§ 5.60.060(1)), attorney-client privilege (§ 5.60.060(2)(a)), parent-child privilege (§ 5.60.060(2)(b)), clergy-penitent privilege (§ 5.60.060(3)), physician-patient privilege (§ 5.60.060(4)), psychotherapist-patient privilege (§5.60.060(9)), and many more.

55. *See id.* § 5.60.060(4); § 5.60.060(9).

56. *See id.* § 5.60.060(4)(b) ("Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waiver the physician-patient privilege."); Carson v. Fine, 123 Wash. 2d 206, 213–14, 867 P.2d, 610, 615 (1994).

57. *Carson,* 123 Wash. 2d at 214, 867 P.2d at 615.

58. WASH. REV. CODE § 18.83.110 (2019).

59. *Id.*

written counseling records pertaining to those communications are privileged from discovery and admission in a court proceeding.[60]

The Washington State Supreme Court has found the psychologist-patient privilege and physician-patient privilege to be largely identical, despite physician-patient privilege and psychologist-patient privilege residing in different statutory schemes and the psychologist-patient privilege having no statutory waiver carve-out.[61] Extending this holding, the Washington Court of Appeals, in *Lodis v. Corbis Holdings, Inc.*,[62] held that claiming emotional distress damages places a plaintiff's mental health at issue in a proceeding.[63] Thus, under *Lodis*, by claiming emotional distress damages, the plaintiff waived their psychologist-privilege.[64]

Lodis involved an individual who filed suit against his employer alleging age discrimination and retaliation under WLAD.[65] The plaintiff, Steven Lodis, sought emotional harm damages.[66] During discovery, Lodis refused to provide records relating to his past psychological treatment, although he acknowledged he had received such treatment.[67] Instead, he asserted that physician- and psychotherapist-patient privilege prevented disclosure of the records.[68] Due to Lodis' refusal, the trial court granted the defendant's motion in limine to "preclude Lodis from introducing evidence of his alleged emotional distress at trial through testimony or documents."[69]

On appeal, Lodis argued that a plaintiff should not waive psychologist-patient privilege if they do "not allege a specific psychiatric disorder, make[] no claim of an exacerbated preexisting condition, and do[] not intend to rely on medical records or

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60. *See* Redding v. Va. Mason Med. Ctr., 75 Wash. App. 424, 427, 878 P.2d 483, 485 (1994) ("The attorney-client privilege extends to documents that contain a privileged communication. By analogy, the psychologist-patient privilege claimed . . . applies to records of counseling to the extent that they document statements . . . made during the counseling session.").

61. Petersen v. State, 100 Wash. 2d 421, 429, 671 P.2d 230, 237–38 (1983) ("[RCW 18.83.110] essentially provides the same protection to psychologist-patient communications as is provided by RCW 5.60.060 for communications between physician and patient.").

62. 172 Wash. App. 835, 292 P.3d 779 (2013).

63. *Id.*, at 855, 292 P.3d at 791 ("Thus, when a plaintiff puts his mental health at issue by alleging emotional distress, he waives his psychologist-patient privilege for relevant health records.").

64. *Id. Lodis* was subsequently limited to this holding by RCW 49.60.510.

65. *Id.* at 841, 292 P.3d at 784.

66. *Id.* at 844, 292 P.3d at 785.

67. *Id.*

68. *Id.*

69. *Id.*

testimony . . . ."[70] Lodis relied on federal courts' standards for privilege waivers and argued Washington should adopt one of the narrower federal privilege waiver standards.[71] Under these standards, a plaintiff must rely on the communications between a psychotherapist and the plaintiff or must allege something more than a garden variety[72] emotional response to waive privilege.[73]

The Court of Appeals disagreed.[74] The court held that, because the psychologist-patient and physician-patient privileges are essentially the same, a plaintiff placing their mental health at issue also waives psychologist-patient privilege.[75] The court held it is irrelevant that the plaintiff never intended to rely on past treatment with counselors in establishing his emotional distress claim.[76] Rather, by seeking non-economic emotional distress damages, a plaintiff places their mental health at issue and waives psychologist privilege.[77] Thus, under *Lodis*, even when a plaintiff does not claim a specific emotional injury, that plaintiff waives their psychotherapist-patient privilege and must disclose their communications with counselors.[78]

RCW 49.60.510 essentially abrogated the holding of *Lodis*—at least to the extent it applies to cases arising under WLAD.[79] Under the statute, a plaintiff does not waive any privilege by alleging emotional distress damages, unless an exception applies.[80] An examination of federal privilege waiver standards helps clarify the specific diagnosable injury exception in the statute.[81]

B. Federal Courts Psychotherapist-Privilege

The United States Supreme Court recognized psychotherapist-patient privilege in *Jaffee v. Redmond*.[82] When establishing a federal

70. *Id.* at 854, 292 P.3d at 790.

71. *Id.*

72. The garden variety distinction and how it applies to waiver is discussed in greater detail in section II.B, *infra*.

73. *Lodis*, 172 Wash. App. at 855, 292 P.3d at 790.

74. *Id.*

75. *Id.* at 854, 292 P.3d at 790.

76. *Id.* at 855, 292 P.3d at 791.

77. *Id.* at 856, 292 P.3d at 791.

78. *See id.* at 855, 292 P.3d at 791.

79. *See* WASH. REV. CODE § 49.60.510(1) (2019).

80. *Id.* § 49.60.510(1)(a)–(c).

81. *Id.* § 49.60.510(1)(a).

82. 518 U.S. 1, 9–10 (1996).

psychotherapist-patient privilege, the Court described a number of policy reasons to establish privilege. The Court stated that "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears."[83] Furthermore, establishing psychotherapist-patient privilege "serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem."[84] Additionally, the Court mentioned that "if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected.'"[85]

Though the Court did not establish waiver in *Jaffee*, it hinted that there may be circumstances under which waiver could occur.[86] In the absence of clear guidance from the Court concerning privilege waiver, federal courts developed varying standards to determine when a plaintiff has waived their psychotherapist-patient privilege.[87] Three standards have emerged[88]: a broad waiver, narrow waiver, and middle-ground approach.[89] Broad waiver stands for the principle that a plaintiff waives their privilege "by merely asserting a claim for emotional damages."[90] This is akin to the stance the Washington State Court of Appeals took in *Lodis*.[91] The narrow waiver approach limits waiver to only situations where a plaintiff relies on the privileged communications or information in the course of litigation.[92]

The middle ground approach is predicated on the idea of garen variety emotional harm and finds waiver only if the plaintiff alleges an emotional harm greater than a garen variety response to the defendant's conduct.[93] Essentially, the garden variety standard seeks to differentiate emotional experiences that are incidental to the harm caused by the

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83. *Id.* at 10.

84. *Id.* at 12.

85. *Id.* at 18.

86. *Id.* at 17 n.14 ("Like other testimonial privileges, the patient may of course waive the protection.").

87. McDonnell, *supra* note 52, at 1369.

88. Anderson, *supra* note 7, at 118; *see also* McDonnell, *supra* note 52, at 1370.

89. McDonnell, *supra* note 52, at 1370.

90. *Id.*

91. *See* Lodis v. Corbis Holdings, Inc., 172 Wash. App. 835, 855, 292 P.3d 779, 791 (2013).

92. McDonnell, *supra* note 52, at 1369.

93. *See* Fitzgerald v. Cassil, 216 F.R.D. 632, 638 (N.D. Cal. 2003).

defendant's conduct and those that are more severe.[94] Garden variety emotional distress is often described as "ordinary or commonplace emotional distress."[95] Conversely, a non-garden variety emotional response "may be complex, such as that resulting in a specific psychiatric disorder."[96] Under the garden variety standard, a plaintiff who alleges mere garden variety emotional distress does not waive their psychotherapist-patient privilege.[97] On the other hand, one who alleges something more, such as a specific injury, does waive their privilege.[98]

C. Policy Debate Surrounding Waiver

Commentators disagree as to whether privilege should be waived when a plaintiff claims an emotional distress injury. Some commentators claim that privilege is needed to encourage plaintiffs to bring suit without "fear that their mental health with be placed on trial."[99] They argue that, often, much of a plaintiff's mental health records are irrelevant to an emotional distress cause of action.[100] Still, others argue that, in the absence of waiver, defendants can be exposed to large damage awards without the ability to explore causation.[101] Further, because the plaintiff alleges an emotional harm, the defendant cannot explore other factors that might contribute to or cause the plaintiff's emotional state.[102]

In support of stronger privilege standards, one scholar, Beth S. Frank, likens psychotherapist-patient privilege to Federal Rule of Evidence 412. Rule 412 prohibits the admission of evidence of a sexual assault victim's sexual history by a defendant during a criminal case.[103] In civil cases, Rule 412 requires the probative value of a victim's sexual history or predisposition to substantially outweigh the "danger of harm to any

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94. Anderson, *supra* note 7, at 138.

95. *Id.* at 637 (quoting Ruhlmann v. Ulster Cty. Dep't of Soc. Servs., 194 F.R.D. 445, 449 n.6 (N.D.N.Y. 2000)).

96. *Id.* (quoting *Ruhlmann*, 194 F.R.D. at 449 n.6).

97. *Id.*

98. *See id.* (citing Ford v. Contra Costa Cty., 179 F.R.D. 579, 579 (N.D. Cal. 1998)).

99. Frank, *supra* note 4, at 663.

100. *Id.* at 664 ("[M]ental health records often contain personal and private information wholly irrelevant to the civil rights claim.").

101. Anderson, *supra* note 7, at 119 (noting how many laws or precedents limiting waiver of privilege leave the "defendant . . . vulnerable to a large award but unable to fully explore issues such as causation").

102. PIERING, *supra* note 4.

103. FED. R. EVID. 412(a).

victim and of unfair prejudice to any party" before the victim's sexual history is admissible.[104] Beth S. Frank argues that often a plaintiff's mental history is wholly irrelevant to their claim.[105] Yet, when waiver occurs, the plaintiff is often exposed to a "piece-by-piece analysis of her life," despite its irrelevance to the claim.[106] Thus, there is a concern that exposure of a plaintiff's past mental health treatment can prejudice an emotional distress claim.[107]

Conversely, favoring broader waiver standards, commentators argue that restricted waiver allows a plaintiff to cherry-pick testimony concerning their emotional distress claim, while withholding other factors that may contribute to the plaintiff's perceived harm.[108] According to them, medical issues may cause a plaintiff's emotional distress, rather than the defendant's conduct.[109] Thus, if a plaintiff does not waive privilege when alleging emotional distress, the defendant will not be able to inquire into these other factors to challenge causation of the emotional distress.[110]

The garden variety standard attempts to balance these competing concerns by limiting waiver to circumstances when a plaintiff claims emotional stress beyond what a normal person would experience. Still, the garden variety standard is criticized for failing to realistically capture emotional responses to defendants' conduct. For example, Professor Helen A. Anderson suggests that the distinction between garden variety emotional distress and a diagnosis or reliance on expert testimony to support a claim is not a useful one.[111] First, the distinction benefits plaintiffs who have never been treated by a psychotherapist or whose emotional distress appears normal to the court.[112] Second, "garden

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104. *Id.* at 412(b)(2).

105. Frank, *supra* note 4, at 664 ("[M]ental health records often contain personal and private information wholly irrelevant to the civil rights claim.").

106. *Id.*

107. *Id.*

108. PIERING, *supra* note 4.

109. *Id.*

110. *Id.*

111. Anderson, *supra* note 7, at 139–40. Professor Anderson recognizes the need for a compromise in implied waiver situations arising in civil rights litigation. *Id.* at 144. However, concerns about variability in waiver findings and defendants' exposure to potentially high damage awards without the ability to defend themselves led her to propose a legislative solution. *Id.* at 152. Under her proposed solution, plaintiffs could elect to forego seeking actual damages for a statutorily capped amount of damages and maintain privilege. *Id.* at 153. If, however, the plaintiff elected to seek actual damages, then they would face potential waiver. *Id.*

112. *Id.*

variety" emotional distress is a legal fiction and the use of terms such as "'ordinary,' 'intrinsic,' or 'normal' emotional harm has no firm basis in reality."[113] Finally, the garden variety standard stigmatizes those who experience so-called "abnormal" amounts of emotional distress because the standard draws the line at normal/abnormal emotional distress.[114] This results in "allow[ing] those who were less harmed, and those who do not have serious psychological issues, to claim the privilege, while forcing those who most value the privilege—those with significant mental distress—to choose between claiming their actual damages and waiving the privilege or simply claiming an 'ordinary' amount."[115]

The garden variety standard is also criticized because of the "imprecision and elasticity of the phrase 'garden variety.'"[116] Courts vary in how they define the garden variety distinction.[117] These varying definitions lead to varying results in application.[118] Regardless, the garden variety standard has gained traction,[119] and the Washington State Legislature appears to have adopted it in some form by enacting RCW 49.60.510.

III. ENACTMENT OF RCW 49.60.510

RCW 49.60.510 was enacted[120] to address perceived invasive discovery practices into plaintiffs' mental and medical treatment history.[121] RCW 49.60.510 essentially abrogated *Lodis v. Corbis Holdings* as it pertained to the WLAD.[122] The statute established that, by

113. *Id.*

114. *Id.* at 141.

115. *Id.* at 143.

116. *Id.* at 138 (citing Flowers v. Owens, 274 F.R.D. 218, 225–26 (N.D. Ill. 2011)).

117. *See id.* (listing various definitions of the garden variety standard).

118. *Id.* at 139 (noting the lack of uniformity in judicial application of the garden variety standard and that therefore "courts remain free to weed the garden as they will").

119. *Id.* at 134 ("[T]he majority of the lower courts seem to be converging on the middle-ground, or garden variety, approach.").

120. S.B. 6027, 65th Leg., 2018 Reg. Sess. (Wash. 2018) (codified at WASH. REV. CODE § 49.60.510 (2019)).

121. *See S. Law & Just. Comm. Hearing*, TVW.COM (JAN. 18, 2018), https://www.tvw.org/watch/?eventID=2018011225 [https://perma.cc/SK8N-GT59] (statement of Sen. Kuderer).

122. Though no mention of *Lodis* appears in the bill reports, some observers recognized S.B. 6027 as a response to *Lodis*. *See* Christine Willmsen, *New Washington State Law Bans Medical Records from Open Court During Sexual Harassment Lawsuits*, SEATTLE TIMES (June 2, 2018), https://www.seattletimes.com/seattle-news/washington-state-bans-medical-records-from-open-court-during-harassment-lawsuits/ [https://perma.cc/6E8J-W3PQ] ("The law's passage stems from and essentially reverses a 2013 state Court of Appeals Division I decision in Lodis v. Corbis Holdings, Inc. . . . ."); *see also S. Law & Just. Comm. Hearing*, *supra* note 121.

claiming noneconomic damages in a suit under the WLAD, "a claimant does not place his or her health at issue or waive any health care privilege under RCW 5.60.060 or 18.83.110."[123] The statute contains three caveats that allow for privilege waiver.[124] A plaintiff waives privilege when they (1) allege "a specific diagnosable physical or psychiatric injury as a proximate result of the respondents' conduct," (2) rely "on the records or testimony of a health care provider or expert witness" when seeking general damages, or (3) allege a "failure to accommodate a disability or allege[] discrimination on the basis of a disability."[125]

While the Legislature was considering RCW 49.60.510, the Senate Committee on Law & Justice held a public comment hearing.[126] At the hearing, Senator Patty Kuderer, the bill's sponsor, testified.[127] Senator Kuderer practices as an attorney specializing in employment discrimination.[128] She testified that during her time as an employment discrimination attorney, she witnessed inconsistencies in trial court judges' rulings concerning the disclosure of medical and mental healthcare records during discovery.[129] She further testified that some judges went so far as to order the production of records going back to the birth of the plaintiff.[130] According to Senator Kuderer, these orders chilled claims of sexual harassment.[131] She also claimed that discovery of medical and mental health records was used by defense attorneys as a tactic to motivate plaintiffs to drop suits due to embarrassment.[132]

Senator Kuderer explained that one of the bill's purposes was to distinguish between what she called garden variety emotional distress and specific, diagnosable emotional injuries, such as Post-Traumatic Stress Disorder or Acute Depression.[133] According to Senator Kuderer, the statute provides that when a plaintiff alleges garden variety

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123. WASH. REV. CODE § 49.60.510(1) (2019).

124. *Id.* § 49.60.510(1)(a)-(c).

125. *Id.*

126. *An Act Relating to the Discovery of Privileged Health Care Information and Communications in Claims for Noneconomic Damages Under Certain Civil Rights Laws: Hearing on S.B. 6027 Before the S. Law & Just. Comm.*, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

127. *See S. Law & Just. Comm. Hearing*, *supra* note 121.

128. *Id.* (statement of Senator Kuderer).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

emotional distress, the plaintiff has not placed their health at issue in the proceeding and should not therefore be deemed to have automatically waived their privilege.[134] Rather, the plaintiff should be allowed to testify to how being subjected to discrimination affected them emotionally.[135] However, if a plaintiff alleges that the defendant's unlawful conduct caused a specific injury, then the plaintiff under the proposed bill would thereby waive their privilege in the action.[136]

Waiver of the privilege only extends two years prior to the first alleged unlawful act by the defendant.[137] This time limitation prevents overly-invasive discovery into the plaintiff's past treatment.[138] The bill allows the court to extend beyond the two-year restriction should the court find exceptional circumstances to do so.[139]

The passage of RCW 49.60.510 coincided with the #MeToo and Time's Up movements. RCW 49.60.510 echoes the movements' desire to protect against sexual harassment in the workplace and encourage survivors to come forward with claims. Towards the end of 2017, in the wake of allegations concerning Hollywood producer Harvey Weinstein, the #MeToo movement gained national attention, bringing sexual harassment and assault to the forefront.[140] The movement addressed pervasive sexual assault and harassment in American culture and throughout the world.[141] According to Facebook, "in less than 24 hours, 4.7 million people around the world ha[d] engaged in the 'Me too' conversation."[142]

In response to the #MeToo movement, women in Hollywood established the Time's Up movement, which "can be thought of as a

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134. *Id.*

135. *Id.*

136. *Id.*

137. WASH. REV. CODE § 49.60.510(2)(a) (2019).

138. *See S. Law & Just. Comm. Hearing*, *supra* note 121.

139. WASH. REV. CODE § 49.60.510(2)(a). As of the date of publication, the author found no cases explaining what "exceptional circumstances" means for the purposes of this statute.

140. Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements — And How They're Alike*, TIME (Mar. 22, 2018), http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/ [https://perma.cc/QP58-EFVQ].

141. Elizabeth Chuck, *#MeToo: Hashtag Becomes Anti-Sexual Harassment and Assault Rallying Cry*, NBCNEWS.COM (Oct. 16, 2017), https://www.nbcnews.com/storyline/sexual-misconduct/metoo-hashtag-becomes-anti-sexual-harassment-assault-rallying-cry-n810986 [https://perma.cc/3RFK-U6WZ].

142. Cassandra Santiago & Doug Criss, *An Activist, a Little Girl and the Heartbreaking Origin of 'Me Too'*, CNN.COM (Oct. 17, 2017), https://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html [https://perma.cc/VQD5-8PPF].

solution-based, action-oriented next step in the #Metoo movement."[143] Overall, the movement seeks to address issues in workplace equity.[144] The initiative has several different goals, including "creating legislation to combat sexual misconduct."[145]

The #MeToo and Time's Up movements did not escape attention in the Washington State Legislature. Some 200 women signed a letter to the State Legislature demanding a change to the capitol's workplace culture.[146] Several bills were introduced in the 2018 legislative session to address sexual harassment in the workplace.[147] During the Senate Committee on Law & Justice hearing on the privilege bill, Senator Kuderer mentioned Time's Up during her comments.[148] In addition, "during a public hearing about the bill, the chair of the House Judiciary Committee, Rep. Laurie Jinkins . . . said 'I guess we would call this the Weinstein bill' in reference to movie mogul Harvey Weinstein."[149] In fact, Senator Kuderer believes the #MeToo movement was a consideration for many legislators when the bill was passed.[150] The coincidence of the enactment of RCW 49.60.510 and the #MeToo and Time's Up movement may explain the ease with which the bill passed. The bill received no amendments and was approved with forty-two votes in favor and five opposed in the Senate, and ninety-seven votes in favor

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143. Langone, *supra* note 140.

144. *Id.*

145. Jennifer Calfas, *Hollywood Women Launch Time's Up to End Sexual Harassment. Here's Their Plan*, TIME (Jan. 2, 2018), http://time.com/5083809/times-up-hollywood-sexual-harassment/ [https://perma.cc/9D5B-K84V].

146. Joseph O'Sullivan, *'It's a Real Call to Action:' 170 Women Sign Letter Speaking Out Against Harassment at the Washington Legislature*, SEATTLE TIMES (Nov. 6, 2017), https://www.seattletimes.com/seattle-news/politics/its-a-real-call-to-action-170-women-sign-letter-speaking-out-against-harassment-at-the-washington-legislature/ [https://perma.cc/AN2W-JSQ3].

147. Agueda Pacheco-Flores, *Legislation in Olympia Targets Sexual Harassment in the Workplace*, SEATTLE TIMES (Jan. 24, 2018), https://www.seattletimes.com/seattle-news/politics/legislation-in-olympia-targets-sexual-harassment-in-the-workplace/ [https://perma.cc/U6Y9-RVDC].

148. *See S. Law & Just. Comm. Hearing*, *supra* note 121.

149. Christine Willmsen, *New Washington State Law Bans Medical Records from Open Court During Sexual Harassment Lawsuits*, SEATTLE TIMES (June 2, 2018), https://www.seattletimes.com/seattle-news/washington-state-bans-medical-records-from-open-court-during-harassment-lawsuits/ [https://perma.cc/D84C-A6VV].

150. *Id.*

and one opposed in the House.[151] This near unanimity is notable despite a similar bill failing the year before.[152]

Still, the statute failed to define "specific diagnosable physical or psychiatric injury" and courts risk defeating the legislative goal by misconstruing specific diagnosable injury.

IV. THE LEGISLATIVE INTENT BEHIND RCW 49.60.510

RCW 49.60.510 does not use the term "garden variety."[153] Despite no mention of garden variety, the use of specific diagnosable injury is consistent with the garden variety standard.[154] Indeed, a number of federal courts have used the term "diagnosable" as a way to differentiate garden variety emotional responses from emotional responses that are not garden variety.[155] Although RCW 49.60.510's use of "diagnosable injury" is ambiguous, it should be understood as addressing the dichotomy of incidental emotional distress. Even so, the statute leaves open questions that litigants and courts will need to address going forward. This Comment presents a framework to answer those questions. Namely, courts should look to the garden variety distinction and the policy debate it arose from in order to determine whether privilege should be waived under the circumstances.

A. Federal Courts' Use of the Term "Diagnosable"

Federal courts employing the garden variety standard have used the term "diagnosable" injury or "dysfunction" to differentiate between garden variety and non-garden variety emotional responses. In these circumstances, like RCW 49.60.510, privilege would be waived if the plaintiff alleged a diagnosable injury or dysfunction, but not if the injury was an emotional experience less than a diagnosable condition.

For example, in *Equal Employment Opportunity Commission v. Nichols Gas & Oil, Inc.*,[156] a federal court, following the garden variety

151. S. 65-6027, 2018 Reg. Sess., at 2 (Wash. 2018); H. 65-6027, 2018 Reg. Sess., at 1 (Wash. 2018).

152. *See* S.B. 5566, 65th Leg., 2017 Reg. Sess. (Wash. 2017). *But cf. S. Law & Just. Comm. Hearing*, *supra* note 121 (Senator Kuderer remarking that S.B. 5566 differed from S.B. 6027 in that it addressed the admissibility rather than the discoverability of healthcare information).

153. *See* WASH. REV. CODE § 49.60.510 (2019).

154. *Id.*

155. *See* Equal Employment Opportunity Comm'n v. Nichols Gas & Oil, Inc., 256 F.R.D. 114, 121 (W.D.N.Y. 2009); Doe v. Brunswick Sch. Dep't, No. 2:15-CV-257-DBH, 2016 WL 8732370, at *4 (D. Me. Apr. 29, 2016); Cadet v. Miller, CV 05-5042, 2007 WL 9706981, at *4 (E.D.N.Y. Oct. 30, 2007).

156. 256 F.R.D. 114 (W.D.N.Y. 2009).

waiver standard, articulated the distinction between garden variety and non-garden variety by referencing "diagnosable dysfunction":

> Garden variety claims refer to claims for "compensation for nothing more than the distress that any healthy, well-adjusted person would likely feel as a result of being so victimized"; claims for serious distress refer to claims for the "inducement or aggravation of a diagnosable dysfunction or equivalent injury."[157]

One of the plaintiffs in *Nichols Gas & Oil* had been treated by a physician for "work-related stress" and had been prescribed anti-anxiety medication.[158] However, the court noted that the complaint did not allege any "specific injuries" and only claimed damages for "pain, suffering and humiliation."[159] The plaintiff also "explicitly disavowed any emotional distress claims other than garden variety claims."[160] The court, therefore, held there was no waiver of psychotherapist-patient privilege.[161]

In *Doe v. Brunswick School Department*,[162] a federal court refused to find a privilege waiver unless the plaintiff relied on expert testimony or on a diagnosable injury to pursue damages.[163] There, the plaintiff brought a suit alleging that her son's school had failed to stop other students from harassing her son because of his perceived sexual orientation.[164] The plaintiff alleged that her son had been diagnosed with depression and post-traumatic stress disorder as a result of the defendant's conduct.[165] When the defendant sought production of plaintiff's son's counseling records, the plaintiff offered to withdraw claims "that might forfeit [the psychotherapist-patient] privilege" and therefore would not "pursue any damage claims for medically diagnosable (DSM) mental health conditions," nor would the plaintiff "rely on any medical or mental health experts" or their records to prove

157. *Nichols Gas & Oil*, 256 F.R.D. at 121 (W.D.N.Y. 2009) (citing Kunstler v. City of New York, No. 04 CIV1145, 2006 WL 2516625, at *7, *9 (S.D.N.Y. Aug. 29, 2006), *aff'd,* 242 F.R.D. 261 (S.D.N.Y. 2007)).

158. *Id.* at 117.

159. *Id.* at 121.

160. *Id.*

161. *Id.*

162. No. 2:15-CV-257-DBH, 2016 WL 8732370, at *4 (D. Me. Apr. 29, 2016).

163. *Id.*

164. *Id.* at *1.

165. *Id.* at *2.

damages.[166] The judge held that the allegations of depression and post-traumatic stress disorder "would exceed garden variety emotional damages"; however, since the plaintiff refused to rely on diagnosable conditions or experts to prove damages, the plaintiff had sufficiently limited herself to garden variety damages.[167]

In *Davis v. Global Montello Group Corp.*,[168] a federal court followed *Doe* in holding that, so long as the plaintiff was willing to abide by the conditions used in *Doe*, the court would not find a waiver of psychotherapist-patient privilege.[169] Additionally, the court held that waiver "turns not on a plaintiff's characteristics or history but, rather, on the nature of [their] claim—specifically, whether the plaintiff makes a claim for emotional distress damages greater than those that any healthy, well-adjusted person would suffer as a result of the conduct at issue."[170]

Conversely, in *Cadet v. Miller*,[171] a judge for the Eastern District of New York held the plaintiff had waived her psychotherapist-patient privilege when she alleged an intentional infliction of emotional distress claim.[172] The plaintiff's complaint alleged that the defendant's conduct had upset the plaintiff "enough to consult with a clinical psychologist, who diagnosed [them] as evidently suffering from post-traumatic stress disorder."[173] The plaintiff attempted to prevent disclosure of portions of their counseling records that they argued were not related to her claims and were privileged from communication.[174] The defendant argued that the plaintiff had placed her health at issue and had waived her privilege.[175] The court considered the different waiver standards—broad, narrow, and garden variety—and decided that it did not need to adopt any particular one because the plaintiff had alleged a "serious psychological injury, that is, the inducement or aggravation of a diagnosable dysfunction or equivalent injury."[176]

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166. *Id.* at *3.

167. *Id.* at *4.

168. No. 2:16-cv-418-JDL, 2017 WL 875782, at *2 (D. Me. Mar. 3, 2017).

169. *Id.*

170. *Id.*

171. CV 05-5042, 2007 WL 9706981, at *4 (E.D.N.Y. Oct. 30, 2007).

172. *Id.*

173. *Id.* at *1.

174. *Id.*

175. *Id.*

176. *Id.* at *4 (quoting Greenberg v. Smolka, No. 03 CIV. 8572, 2006 WL 1116521, at *6 (S.D.N.Y. Apr. 27, 2006)).

"Diagnosable" in these cases was used by the courts to differentiate garden variety emotional experiences from non-garden variety emotional experiences. A diagnosable injury or dysfunction is not a garden variety emotional response. This suggests that the Washington Legislature was attempting establish a similar privilege waiver framework by enacting RCW 49.60.510.

B. Non-Washington State Courts' Use of "diagnosable"

A number of state courts have also used the "diagnosable" injury distinction to tease out when waiver occurs.[177] The use of "diagnosable" in these instances is consistent with the federal garden variety standard, finding waiver only when a plaintiff alleges an injury beyond the general reaction of an average person.[178]

For example, in a factual situation similar to a typical claim under WLAD, the Missouri Supreme Court held that claims of generic emotional distress did not waive privilege.[179] Missouri's Human Rights Act provides a private cause of action for discrimination in "employment, public accommodation, and other interests," and a plaintiff bringing suit under the act may recover actual damages, including emotional distress damages.[180] Missouri's privilege statutes prevent disclosure of physician- and psychologist-patient communications.[181] Plaintiffs waive these privileges by placing their health at issue.[182] In the case before the Missouri Supreme Court, the plaintiff responded to discovery by representing that she had not received treatment for the emotional distress she suffered as a result of the defendant's conduct, that she had not sought a "dollar amount for any item of emotional damage," and that she was only seeking garden variety emotional distress damages.[183] The court ruled that the plaintiff had not waived her privilege because she had "precluded herself from offering any evidence that she sought treatment for emotional distress and any evidence that she ha[d] any diagnosable condition allegedly

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177. *See* State *ex rel.* Dean v. Cunningham, 182 S.W.3d 561 (Mo. 2006); Martin *ex. rel.* Martin v. Town of Upton, No. CAWO200402162, 2007 WL 809818 (Mass. Super. Ct. Feb. 2, 2007).

178. *See supra* sections II.A., II.B.

179. *State ex rel. Dean*, 182 S.W.3d at 569.

180. *Id.* at 565–66.

181. *Id.* at 566.

182. *Id.* at 567.

183. *Id.*

resulting from the acts of discrimination or harassment."[184] The court also held that the plaintiff could "seek damages for emotional distress of a generic kind—that is, the kind of distress or humiliation that an ordinary person would feel in such circumstances. These damages are generally in the common experience of jurors and do not depend on any expert evidence."[185]

In *Martin ex rel. Martin v. Town of Upton*,[186] the Superior Court of Massachusetts considered motions to compel disclosure of psychological treatment and counseling records.[187] The plaintiff alleged that she suffered nightmares and humiliation after having been injured by the defendant's negligence.[188] In determining whether these allegations amounted to a waiver of psychologist-patient privilege, the court looked to Massachusetts' jury instructions concerning damages, which stated: "[m]ental pain and suffering includes any and all nervous shock, anxiety, embarrassment or mental anguish resulting from the injury. Also, you should take into account past, present and probable future mental suffering."[189] The court held that the plaintiff would maintain her privilege unless she took certain actions like calling an expert to testify that she "suffered a mental health injury or developed a diagnosable condition as a result of the defendant's negligence."[190] It also held that:

> Even if no expert witness testifies, the plaintiff or another witness may make the plaintiff's mental or emotional condition an element of her claim by describing harm for which she seeks compensation in the form of (1) extraordinary and chronic mental pain and suffering, or (2) a specific injury or impairment such as depression, a mood or relationship disorder, a fear, phobia or aversion, or the functional equivalent of any one of these conditions.[191]

Notably, the court did not consider anxiety to be something greater than a garden variety response.[192] These decisions further indicate a use of "diagnosable" conditions or injuries as a way to determine whether a plaintiff has alleged a non-garden variety emotional response. Also

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184. *Id.* at 568.
185. *Id.* at 568.
186. No. CAWO200402162, 2007 WL 809818 (Mass. Super. Ct. 2007).
187. *Id.* at *1.
188. *Id.*
189. *Id.* at *2.
190. *Id.* at *3.
191. *Id.*
192. *Id.* at *2.

notably, *Martin ex rel. Martin* required a "specific injury," which echoes the use of "specific diagnosable injury" in RCW 49.60.510.[193] Also, while *Martin ex rel. Martin* appears to consider "extraordinary and chronic mental pain and suffering" to be a diagnosable condition, its distinction between that and other "specific" injuries could be construed to suggest "extraordinary and chronic mental pain and suffering" is not a specific injury.[194] Thus, if a court interpreted RCW 49.60.510 similarly, then waiver would only occur if the plaintiff alleged something specific like depression or a phobia.

C. Washington's Adoption of the Garden Variety Distinction

RCW 49.60.510's legislative history demonstrates an intent by the Washington State Legislature to establish a compromise akin to the garden variety standard. In large part, the garden variety standard developed as a way to appease both sides of the privilege policy debate. It occupies a middle ground approach by allowing some plaintiffs to claim non-economic emotional distress damages without waiving privilege, while still recognizing waiver under certain circumstances.[195] There is ample evidence demonstrating that the Washington State Legislature had similar desires when it enacted RCW 49.60.510.

The statute's plain language contemplates situations when a plaintiff waives privilege and when a plaintiff does not.[196] This is consistent with the general principles of the garden variety standard.[197] The Legislature's apparent abrogation of *Lodis* also shows that the Legislature intended RCW 49.60.510 to adopt a compromise similar to the garden variety standard.[198] Finally, the use of "diagnosable" in garden variety case law as a way to differentiate incidental emotional distress from more severe emotional distress further solidifies the Legislature's intent to adopt a standard similar to the widely used garden variety standard.[199]

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193. *Id.* at *3.

194. *Id.*

195. *See* Anderson, *supra* note 7, at 137.

196. *See* WASH. REV. CODE § 49.60.510 (2019).

197. *See supra* sections II.A., II.B.

198. *Compare* Lodis v. Corbis Holdings, Inc., 172 Wash. App. 835, 855, 292 P.3d 779, 791 (2013) ("Thus, when a plaintiff puts his mental health at issue by alleging emotional distress, he waives his psychologist-patient privilege for relevant mental health records."), *with* WASH. REV. CODE § 49.60.510(1) ("By requesting noneconomic damages under this chapter, a claimant does not place his or her health at issue or waive any health care privilege . . . .").

199. *See supra* sections IV.A., IV.B.

Although the Washington statute differs from other jurisdictions that use the garden variety standard in that the words "garden variety" do not appear in RCW 49.60.510, the dissimilarity is ultimately a red herring. In essence, both standards attempt to differentiate incidental emotional distress from severe emotional distress. Thus, generally speaking, both standards seek to waive privilege only in situations where plaintiffs seek damages for a relatively severe form of emotional distress. "Diagnosable injury" is one standard to accomplish that goal. "Garden variety" is another.

Given that both standards seek to protect privilege in situations where plaintiffs claim generalized emotional distress damages, Washington courts and practitioners should approach RCW 49.60.510 against the backdrop of the garden variety standard and the policy debate from which it arose. Under RCW 49.60.510, plaintiffs should be able to claim incidental emotional distress damages in most circumstances without waiving privilege. However, since the new standard is ambiguous as to what exactly constitutes a "diagnosable injury," it remains unclear how the statute will be applied in practice. Therefore, courts and practitioners should use the garden variety distinction as guidance in interpreting specific diagnosable injury.

D. Risks of Misconstruing Statute

Washington courts' primary function in construing statutes is to carry out the intent of the Legislature.[200] Courts will need to be cognizant of the Legislature's intentions behind the garden variety compromise to properly enforce the statute. Without such an understanding, courts risk backsliding towards a *Lodis*-era standard in direct contravention of the Legislature's intention to maintain privilege in some cases, even if a plaintiff claims emotional distress damages. Without keeping in mind this compromise, courts will likely fail to define specific diagnosable injury in a way that allows plaintiffs to claim any form of emotional distress damages based on relatively general emotional injuries.

For example, a recent Washington Superior Court decision, *Tao v. Seattle City Light*,[201] ruled that "mere lay assertions of a psychiatric injury" were equivalent to alleging a specific diagnosable psychiatric injury and, therefore, the plaintiff had waived her psychotherapy privilege.[202] In that case, the plaintiff alleged they suffered from anxiety

200. State, Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wash. 2d 1, 10, 43 P.3d 4, 9 (2002).

201. No. 17-2-14287-5, 2019 WL 3333891 (Wash. Super. Ct. Apr. 10, 2019).

202. *Id.* at *1.

and depression.[203] Importantly, the court did not engage in any legislative history analysis because the court found the plain language did not "distinguish between mere lay assertions of a psychiatric injury and an actual, diagnosed injury."[204]

While the *Tao* Court found the statute's meaning plain on its face,[205] its holding risks defeating the Legislature's goal in enacting RCW 49.60.510. The *Tao* Court may have reached a different result had it considered the garden variety standard. For example, a federal district court in *McKenna v. Cruz*[206] recognized in dicta that a "specific, diagnosable mental condition" is distinct from "generalized anxiety and emotional upset."[207] Although this federal court rejected adoption of the garden variety standard,[208] the court's holding indicates that the term "specific" requires more than just "mere lay assertions."[209]

Certainly, the decision in *McKenna* does not clearly demonstrate that the Washington Superior Court misconstrued the statute. Nor is it evident that finding waiver under such circumstances was the wrong result. However, the *McKenna* court's recognition that general assertions of anxiety might not amount to a specific, diagnosable injury does demonstrate that the language of the statute was not "plain." Courts should therefore pause and consider the legislative history before construing RCW 49.60.510 broadly. The announced legislative purpose was to limit waiver of privilege to confined circumstances while allowing a plaintiff to claim emotional distress damages and testify about their emotional experience.[210] In fact, the bill's sponsor, Senator Kuderer, specifically stated that a plaintiff would need to allege something like "Acute Depression" or "PTSD" in order to waive privilege.[211] If courts follow the trajectory of *Tao* and continue to find waiver without consulting the garden variety backdrop, then the courts may functionally eviscerate the demarcation the Legislature was trying to draw.

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203. *Id.*

204. *Id.*

205. Washington courts only look to legislative history if the statute is ambiguous. *See* Columbia Riverkeeper v. Port of Vancouver USA, 188 Wash. 2d 421, 435, 395 P.3d 1031, 1038 (2017).

206. No. 98 CIV. 1853, 1998 WL 809533 (S.D.N.Y. Nov. 19, 1998).

207. *Id.* at *2.

208. *Id.* at *3.

209. *Tao*, 2019 WL 3333891, at *1.

210. *See supra* section III.

211. *See S. Law & Just. Comm. Hearing*, *supra* note 121.

Ultimately, much of the uncertainty regarding the bounds of waiver under RCW 49.60.510 results from the Legislature's failure to define "specific diagnosable injury." Without a practical definition, courts risk misconstruing the statute and finding waiver when the Legislature intended there to be none. However, if courts consider the legislative history—and therefore the garden variety distinction—when interpreting RCW 49.60.510, they will go a long way towards carrying out the legislative purpose.

CONCLUSION

Until courts determine what constitutes an allegation of a specific diagnosable injury, plaintiffs and defendants alike will be unsure how privilege operates under WLAD. Federal and some foreign state case law may assist in determining the bounds of the statute. However, the case law does not provide easily applicable standards and Washington state courts will need to develop a way to differentiate diagnosable injuries from other emotional experiences. This Comment provides the background for that analysis. Until then, plaintiffs will likely do best by avoiding trigger words like "depression," even though these words have an everyday non-clinical use. Defendants, on the other hand, will likely question at what point the allegations of "feelings" turn to specific diagnosable injuries. Either way, the statute's ambiguity undermines its intended purpose: to provide plaintiffs with peace of mind that their communications with psychologists and physicians remain private. As Justice Stevens wrote in *Jaffee*, "if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected.'"[212]

212. Jaffee v. Redmond 518 U.S. 1, 18 (1996) (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).