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Alleged Brain Damage, Diminished Capacity, Mens Rea, and Misuse of Medical Concepts

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ABSTRACT: As focus on the insanity defense diminishes, defendants may place emphasis on a lack of knowing or purposeful behavior in order to negate a criminal charge. This use of a mens rea defense in accord with Model Penal Code principles is exemplified by the current New Jersey statute. Such a defense may result in a lesser charge or a finding of not guilty. In addition to reviewing applicable law, this report presents a sex offense case in which remote brain damage was invoked as a purported basis for incapacity to formulate the required intent; the study also raises the issue of the inappropriate or questionable use of medical principles, a practice that diminishes professional credibility in the courts and in the community.

KEYWORDS: jurisprudence, diminished capacity, mens rea, criminal sex offenses, brain damage, misuse of concepts, intent, knowingly, purposely

Traditionally a crime consists of two elements, (1) actus rea—the evil or proscribed act—and (2) mens rea, the evil mind or intent to do that act. In recent years in some states, the principles of the Model Penal Code have been incorporated into state law dealing with mens rea issues in a somewhat confusing fashion, as exemplified by the current New Jersey law which deals with "diminished capacity," a finding that in turn may result in a finding of not guilty if the requisite mental states of a crime are not met.

To illustrate this, a specimen case is presented dealing with a sexual assault in which a defendant known locally as "Jerry the Cowboy," then 35, was charged with inserting a dildo into the anus of a young boy of about 8 years old on several occasions. In addition to Jerry, two other men and the child's father faced charges from the same series of events.

The defense was that Jerry did not have the requisite mental state and therefore had committed no crime. The details of the case will be presented to illustrate further an unusual and questionable attempt to utilize this defense and to elaborate how clinical analysis can be utilized to place the matter in an appropriate clinical perspective. Second, this paper will reflect the type of testimony that is so common in the legal system in the United States.

At the request of his public defender attorney, Jerry was examined by Dr. L, a psychiatrist, on 8 June 1988 to ascertain a possible defense based on mental disorder.

New Jersey, like most other states, has a criminal responsibility statute which allows

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a finding of not guilty by reason of insanity if the person, at the time of the act that has resulted in criminal charges, as a result of mental disease or defect, did not know the nature and quality of his act or did not know right from wrong at that time. Thus the state follows the traditional "right from wrong" test, usually known as the M'Naghten Test, after the famous English case of 1843 which established the rule.

In 1979 New Jersey augmented its statute by formulating what has been called a "diminished capacity" rule, a misnomer, the semantic details of which need not be discussed here other than to point out that the rule affects responsibility to the degree that a person may not be found guilty at all of a charge, though it is possible that in certain cases—such as homicide—the person may be found guilty of a lesser charge, for example, aggravated manslaughter rather than murder.

Section 2C:2-2 of the criminal code formulates general requirements for culpability. This puts into specific legal language the essence of mens rea, the requirement that there be an intent to do the act resulting in consequences which constitute a crime as defined by law. The requirement of evil mind or intent has a long history in the law as a criterion for most criminal charges—aside from those involving strict liability. However, this statute does not deal with an intent to do evil; it deals only with an intent to do the act and to know the effect of the act—in murder, namely, the physical consequences.

This is not to be confused with acts done by mistake, which also constitutes a legitimate defense. For example, a person takes somebody else's raincoat in a restaurant; the raincoat was similar to the one that he brought in and hung on an adjacent hook. It is true that he appropriated another person's property, but there was no intent to take adverse possession. Thus, no crime has been committed.

The prime differences between a mens rea defense and an insanity or criminal responsibility defense are these. A person who does not meet the requirement for the mens rea aspect of proscribed behavior has not committed a crime and therefore cannot be found guilty of a crime. When found not guilty, and there is no applicable lesser charge, he is free to go about his business. In contrast, a person found not guilty by reason of insanity has a finding made by the judge or jury to that effect, and while technically it is a not guilty finding, removing the person from the jurisdiction of the criminal justice system, it does put the person under the aegis of a special system which has elements of both the criminal justice and mental health systems. The person remains under the jurisdiction of a court; the person is incarcerated in a specially designated institution usually for an indefinite period; and depending on the state, a complicated legal process is required before the person is released, and even then release may be subject to conditions imposed by a court or other authority. If a person continues to be mentally ill and dangerous, a lifetime incarceration may result.

Criminal statutes define crimes; if a behavior does not meet the required legal definition, then no crime has been committed. For example, "criminal homicide" occurs when a person purposely, knowingly, or recklessly causes the death of another human being (Section 2C:11-2). Murder, one form of criminal homicide, occurs when the actor "purposely" or "knowingly" causes death or serious bodily injury resulting in death.

Generally, crimes require either knowing or purposeful behavior if the person is to be successfully prosecuted. Section 2C:2-2 states that a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the defense.

"Purposely" means that the person's conscious objective was to engage in the conduct or cause such a result. It is important to note that the word "intent" is not used, but that if it is to be construed, it means intent to do the act, not to commit a specific crime. Similarly, "knowingly" means some awareness of the nature of the conduct. Thus, using a knife to stab someone requires a recognition that a knife is a weapon that can cause injury, and "purpose" means that one had the objective of using the knife for a cutting purpose that involves possible injury.

Therefore, if a charge involves the insertion of an object into the anus of a child, the issue would deal with the person's awareness of the act and the conscious objective of accomplishing the physical act. The law itself does not allow any particular qualifying aspects otherwise.

This statute has been clarified by the state supreme court only to a limited extent (*State v. Breakiron*, 1987) [*1*]. The court stated that evidence of mental disease or defect could be admitted to show whether the defendant had the requisite mental state to commit a crime. Rather carefully, the court indicated that the New Jersey law was based on the Model Penal Code, which focused on requisite mental state as the basic element of diminished capacity. Inasmuch as the mental state is an essential part of the charged offense, evidence regarding mental state puts a burden neither on the defense nor the prosecution. While it is not enough for a defendant to simply present evidence of a mental disease or deficiency, because that does not provide any basis for defense, the prosecution still has the obligation to prove beyond a reasonable doubt each element of the offense. However, an accused is by inference assumed to possess the capacity to reach the required mental state. The diminished capacity defense therefore places some burden on the defendant in this regard to demonstrate the presence of a mental disease or defect that may relate to such incapacity.

Analysis of a Case

Jerry the Cowboy, when seen, was a 39-year-old man charged with sexual penetration of a minor boy several years earlier when the boy was 8 or 9. The defendant was so charged with three other men who purportedly committed the same or similar acts. He was known in the neighborhood as Jerry the Cowboy and thus this identification by the boy ultimately contributed to his apprehension.

The charges came to light in January 1988 when the foster mother of two brothers reported to the police that she was told by one of the boys that he had been sodomized by his father between September 1985 and March 1986. He also reported physical abuse by the father and by other men, including the insertion of objects into his rectum while his mother took pictures. The man identified as "Jerry the Cowboy" was said to have put a "white tube" up the boy's rear.

The older brother reported sexual abuse by the mother, who gave a statement that she saw Jerry put a dildo into the rectum of both boys and in fact took pictures of the proceedings. However, she later was hospitalized as mentally ill and was not considered to be a suitable witness for the trial proceedings.

Jerry the Cowboy gave a statement that he knew the mother and had had sexual relations with her but did not recall inserting anything in the rectum of the boy. He also admitted to taking the two boys fishing.

The defense psychiatrist stated that Jerry had had a severe head injury at age 2, had spent two days in a coma, had developed slowly, and was temperamental, poorly adjusted, very nervous, and a slow learner. After his arrest he was hospitalized for evaluation to "determine the extent of brain injury and other pathology." Jerry had been married twice, had four children, and was living with a third woman. He also had a history of a drinking problem and was described as obviously slow, limited in comprehension, jovial in mood, and not anxious. He would stare, would have interrupted thought, was emotionally shallow, and denied being violent but admitted being impulsive and having a bad temper.

The Discussion part of the report of the defense is as follows:

> This defendant has major loss of brain tissue, most certainly related to a brain-head injury at age 2. The loss is extensive. Brain imaging methods detected that the missing brain tissue of the left frontal lobe is replaced by liquid, via enlarged lateral ventricle. This loss of the

> temporal lobe produces a typical set of clinical manifestations, known as frontal lobe syndrome: shallow affect, inappropriate elevation of mood, loss of social values, loss of "moral control" (such as indiscrete or aberrant sexual behavior), ignoring of consequences, inability to feel for another person (lack of compassion), dysinhibition, even without the ingestion of alcohol. Such loss of the frontal portion of the brain reduces a person to the same [state] as if he had a FRONTAL LOBOTOMY, which was used 50 years ago as a "cure" for the untreatable mental illness. Frankly, the "cure" was often worse than the disease itself. People so "treated" ended up with the same losses of emotional capacity as this defendant.
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> Conclusion: The above defendant, during the time of the various sexual acts [that] took place suffered from a mental defect, which rendered him incapable of formulating the requisite state of mind that is an element of the offense. His denial of the offense is, with reasonable probability, a recently developed primitive defense, constructed by the undamaged parts of his brain to rationalize and excuse the acts of the damaged (or partly missing) temporal lobe

The defense psychiatrist did add that he felt that Jerry was competent to go to trial.

> As to the defendant's competence to proceed in a criminal trial, the following findings can be made. He is neither exactly a legal scholar nor is he "street-wise" in a legal sense, yet he has the elementary capacity to understand the basic ideas which are part of the criteria for competence. Some "big words" need to be "broken down" for him

The question was therefore raised as to the merits, validity, or reasonableness of the opinions expressed by the defense psychiatrist. The logic expounded by that person is this: the defendant had had a severe brain injury at age 2 that resulted in a certain type of deficit which, in turn, was related in such a way to certain types of behavior 32 to 33 years later as to cause both the behavior as well as a lack of awareness of the behavior. Other language which is difficult to follow medically talks of the bad part of the brain performing a behavior and being covered up by the good part of the brain.

The issues include an analysis of the known brain damage and the relationship of brain damage to behavior. These then are encompassed within the concept of knowingness and purpose.

Subsequent to his arrest, Jerry was hospitalized for nine days at a local hospital for depression. Of note was his also being charged by his wife with sexually assaulting his daughter in 1986, for which he was formally arraigned in April 1988. His history of coma due to trauma at age two, prior diagnosis of neurologic impairment, low normal IQ, and pattern of alcohol abuse were described. His electroencephalogram was normal; the computerized tomography (CT) scan showed old frontal lobe damage. Jerry was diagnosed as having an impulse control disorder and placed on Tegretol (carbamazepine) and Trilafon (perphenazine). He had been depressed since his arrest in January 1988 on the charges dealing with the young boy. The attending psychiatrist offered no opinion as to his mental state referable to the pending charges, and since no submissions were made in this regard, it can be assumed that the attending psychiatrist did not offer an opinion that would support or substantiate any claim of lack of capacity.

The CT scan report noted:

> tissue loss from the left frontal lobe. Asymmetry of the lateral ventricles consistent with some diffuse tissue loss from the left hemisphere. These changes may be secondary to a remote traumatic injury.

A psychiatric evaluation in 1962 when he was 13 indicated average (low normal) mental development. He was felt to have a central nervous system disorder problem. His Lorge-Thorndyke IQ scores in 1962, 1964, and 1967 were 74, 80, and 68, respectively. In his senior year of high school, he ranked 205 in a class of 210.

Psychological testing at the local mental health center in May 1988 showed a Wechsler Adult Intelligence Scale (WAIS-R) score of 79 (verbal 78, performance 81)—a score in the borderline intelligence range. The diagnosis at the mental health center was impulse

control disorder by history, episodic alcohol abuse with reference to possible attention deficit disorder, learning disability, or mental retardation.

Examination by the psychiatrist for the prosecution reviewed the prior data. Jerry proclaimed his innocence on the charges involving the minor and denied even being known as Jerry the Cowboy, qualifying it to "not on the streets." He acknowledged having sexual relations with the mother behind closed doors.

Jerry was adopted at age 2 and had an older brother 1½ years older. He did poorly in school, stayed back in the third grade. As an adult he had had many jobs, mostly as a maintenance man, security guard, painter, and factory worker. More recently he did painting, electrical work, masonry, and landscaping at an apartment complex. He was separated from a second wife and living with a female companion and his 2½-year-old daughter. He conducted garage sales every week and was a volunteer fireman for 7 years, attending fire school for 8 weeks. These were noted to reflect his functional capacity in society. He had been referred for psychological testing by the defense, and inasmuch as the results were not utilized by the defense, it is reasonable to assume that the findings were not contributory to the defense—a not uncommon event. He denied street drugs but did drink heavily—about two 6-packs of beer a day until 8 months earlier; he denied any drinking since. He had prior motor vehicle offenses, including drunken driving. He claims to read poorly but passed a driver's test, reads the newspapers, and likes to read about stock cars.

On examination he showed a number of tattoos. He was pleasant, reasonably cooperative, talkative, showed no abnormalities in mood, and was somewhat tense. His memory was fairly good. He recalled two of three items after eight minutes. He was administered the Wechsler Adult Intelligence Scale (WAIS). Based on six verbal and three performance subtests, he had a prorated full-scale IQ of 84, with a verbal score of 84 and a performance score of 86. Thus, he is of dull normal or low average intelligence by this measure (perhaps borderline functioning clinically). He thus showed a functional level not clearly reflective of significant defect or retardation. On the Rorschach test, he had 11 mundane responses not striking in their content. His Thematic Apperception Test (TAT) responses were brief and not reflective of any consistent pattern of psychopathology. His drawings were small, simple, and childlike.

The report of the psychiatrist for the prosecution (also the author of this paper) concluded:

> [He] is an individual who shows evidence of longstanding left sided cerebral atrophy (with ventricular enlargement). The history would indicate that this is compatible with injury at age 2.
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> Such an anatomic deficit thus has been present for about 37 years. He now functions as an adult at a level reflecting a dull normal intelligence. This may also be categorized as normal to borderline intellectual functioning using another classification system. He does not have a "frontal lobotomy" nor does he demonstrate a mental illness allegedly referable to such a condition. He is able to relate and socialize quite well. He is not withdrawn. He has been able to work, drive, marry, have children, and function in society albeit not at the most sophisticated levels. Until he got in trouble with the law, he did not require medical attention. He has some degree of anxiety concering his situation; his apprehension of the possibility of incarceration reflects a reality situation. He probably had a drinking problem in the past. In any case he does not have a deficit which would render him unable to purposefully or knowingly engage in sexual misbehavior. He has no condition which would preclude his knowing the nature and quality of his act or knowing right from wrong

Jerry the Cowboy was found guilty of the acts charged, so that the system worked in the sense of the proper application of medical knowledge to a legal issue. Or to put it differently, the jury used "common sense" in deciding that the psychiatric defense was foolish or otherwise inappropriate.

The system did not work in the sense that considerable time, effort, and expenditure of public funds were utilized in a manner that demeans both the medical and legal systems.

Discussion

This paper has focused on two issues—(1) the application of psychiatric principles to evolving legal standards and (2) the misuse of psychiatric or other medical concepts to such legal standards.

It is important to illustrate the quality of testimony that is utilized in the courts. Hopefully, a reasonable level of scientific input should be characteristic of our system. Unfortunately, in my experience, so-called scientific evidence is in the United States characterized by nonsensical or distorted opinions designed to provide a base for the courtroom debate.

In this case, the defendant had a head injury at age 2. He then proceeded to function in a mediocre fashion—finishing school, marrying, fathering children, holding jobs, and so forth. At about age 35, he was charged with a sexual crime.

He had physical neurologic residuals which have been described—some atrophy and left-sided ventricular enlargement.

Not mentioned at all is the fact that (1) there is no necessary correlation between structure and psychologic function, and (2) those who have organic neurologic deficit at a very early age show plasticity in the sense that a young brain compensates for injury better than an old brain.

The defense psychiatrist, in essence, stated that Jerry did not know that he was inserting an object into the boy's anus and that he did not know the physical nature of such an act. The witness equated temporal lobe atrophy with frontal lobe damage and then equated the result with a frontal lobotomy—an inappropriate set of comparisons. The actual CT report did refer to the left frontal, not the left temporal, area.

To attribute a behavior to an injury 33 years earlier strains credulity. Throughout adulthood, there was no record of unrestrained, uncontrolled sexuality of a degree that the person could not act in a knowing or purposeful fashion. The fanciful conception of an undamaged part of a brain "trying to rationalize and excuse the acts of the damaged brain" is interesting and imaginative but questionable as reflective of reasonable scientific testimony.

As states react to the insanity defense by limiting its scope, defense attorneys are likely to revert to a mens rea defense in accord with the principles that have been reviewed in this paper. Such a tactic opens the door to even more unmodulated and inappropriate expert opinions than have been the case under the insanity defense, with a particular likelihood that claims of brain damage will be used in inappropriate ways to justify behavior.

This case is presented at length because it is not atypical of current practice, and those interested in reasonable forensic psychiatric practices should be aware of the evolution of legal standards and the potential misuse of scientific data; expert opinions therefore require careful analysis if the justice system is to maintain any credibility as a social instrument based on reason and appropriate use of knowledge as it exists.

Reference

[1] *State v. Breakiron*, 108 N.J. 591, 1987.

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