

# Competency, Insanity, & Diminished Capacity

Bruce C. Gage, M.D.

The Washington Institute

And

The Center for Forensic Services

# Agenda

- Legal standards
- Different perspectives on mental illness
- Decision-making
- Features of memory important in forensic evaluations
- Conducting evaluations—reconciling the clinical and the legal

# Competencies Involved in Criminal Proceedings

- ***Competency to stand trial***
- ***Testimonial competence***
- ***Competency to be sentenced***
- ***Competency to be punished or executed***

# Case Law

## Dusky v US (1960)

- Adopting the suggestion of the Solicitor General:  
“...it is not enough for the district judge to find that ‘the defendant [is] oriented to time and place and [has] some recollection of events,’ but that the ‘test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.’”

# Case Law

## Drope v Missouri (1975)

- There must be *bona fide* doubt as to competency before it must be brought up
- Competency must be evaluated if there is doubt
- Competency is not static and may need to be reassessed in course of proceedings

# Case Law

## Godinez v Moran

- Competence is competence
  - No different standard for pleading guilty or waiving right to counsel
- Competence versus “knowing and voluntary”
  - Court must determine that guilty plea or waiver of right to counsel is knowing and voluntary
  - Parallels medical decision-making: competency to give consent versus giving informed consent

# WA Statute

- RCW 10.77—“‘Incompetency’ means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.”
- Whether mandating the presence of “mental disease or defect” would meet constitutional muster is doubtful—does not matter why someone is incompetent, only that they are

# Features of Competency

- Competence is a capacity, not an actuality
  - Evaluation focuses on the ability to make “rational” decisions, work with attorney
  - Whether the competent defendant will exercise this ability is a different matter
- Competency is not static
  - Must be evaluated relative to the time frame of the decisions and situation
  - May need to be reevaluated

# Features of Competency

- It is a legal construct
  - There is no actual thing that corresponds to competence
  - It is whatever the law says it is
- Mental health tends to look at knowledge, motivation, behavior, and decision-making differently than the law
  - Knowledge is dynamic and relative, not static and T/F
  - Motivation is rarely known to the person—reports regarding motivation are not to be trusted (but for different reasons than simply self-serving prevarication)
  - Behavior is primarily a matter of habit, not choice
  - Decision-making is rarely rational in the sense of syllogistic

# Criminal Responsibility

- *Actus reus* (forbidden act) + *mens rea* (guilty mind)
- NGRI plea
  - admits the forbidden act
  - claims no (culpable) actor was there; no mind there to have *mens rea*
- *Mens rea* defenses and diminished capacity are not insanity; they are not excuses
  - Seek to cast doubt on the presence of the mental element of the crime
  - May lead to “lesser included crime”

# History

- Aristotle
  - A person is morally responsible if, with knowledge of the circumstances and in the absence of external compulsion, he deliberately chooses to commit a specific act.
- Pre-Norman British law was one of strict liability
- At the beginning of 11th century, most forms of homicide and other injuries were treated as a matter of compensation under threat of feud.
- Bracton merges the strict liability of the secular law and the moral intent of church law and *mens rea* is born.

# Origins of the Insanity Defense

- “It is an ill thing to knock against a deaf-mute, an imbecile, or a minor: He that wounds them is culpable, but if they wound others, they are not culpable.” (Babylonian Talmud)
- “Forgive them, Father, for they know not what they do.” (Jesus)

# Origins of the Insanity Defense

- In Anglo-American jurisprudence, the first clear, documented instance of an insanity acquittal was in 1505
- *Davis v. U.S.* (1897) -- irresistible impulse clause sanctioned by U.S. Supreme Court
- U.S. Supreme Court has never ruled whether insanity defense is constitutionally required

# The Traditional Rationale for the Insanity Defense

- *Actus non facit reum nisi mens sit rea*
  - connected with protection of the value of autonomy and the individual's right to be punished only for things which he genuinely and deliberately has done
- The avoidance of cruelty
  - It is wrong to punish a person:
    - when he is sick
    - for being sick
    - whose illegal conduct is done as a result of being sick

# The Insanity Defense: Moral Considerations

- Punishment of those who could not control themselves (who “had no choice”) is wrong and threatens the fairness of the law
- Punishment of those incapable of appreciating personal culpability defeats the personal deterrent aspect of punishment
- Punishment of those who could not control themselves (who “had no choice”) is useless as a deterrent

# M'Naghten Rules

- Judges of the House of Lords in 1843
- Three elements in directions to the jury
  - defect of reason
  - this defect due to disease of the mind
  - the accused did not “know the nature and quality of the act he was doing, or if he did know it, that he did not know that what he was doing was wrong. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable.”
- Note that this does not comport with previous slide

# American Law Institute (ALI)

- M’Naghten plus a volitional prong
- “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.”
- Excludes habitual anti-social conduct

# Durham Rule

- The defendant's behavior was the “product of mental disease or defect.”
  - Virtually any illegal behavior of a mentally ill person can be in some sense a product
- Still the law in New Hampshire

# RCW 9A.12.010 (1975)

- “To establish the defense of insanity, it must be shown that
  - At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:
    - He was unable to perceive the nature and quality of the act with which he is charged; or
    - He was unable to tell right from wrong with reference to the particular act charged.
  - The defense of insanity must be established by a preponderance of the evidence.”
- Voluntary intoxication specifically excluded

# Mental Disease or Defect

- Legal definition—not bound to any clinical conceptualization of mental illness
- What might get included
  - Traditional mental illnesses—psychotic disorders almost always
  - Neuropsychological deficits—when they are substantial
  - Personality disorder?
  - Intoxication—”settled insanity”
  - “Mental defectiveness” (developmental disability)—usually counts though may not be relevant
  - Automatism

# Recurrent Disputes

- The dispute over the volitional prong
- Can one make sense of M'Naghten Rules as a knowledge test or must rationality enter in
- The either/or nature of insanity/responsibility does not match the shades of clinical reality
- Whether right-wrong is measured morally or legally

# Knowing Right from Wrong

## Moral Versus Legal

If it is knowing whether it is illegal

- Conflicts with the basic principal that ignorance of the law is no excuse
- Robs M’Naghten (and probably ALI) of all power
  - Capgras syndrome
  - Command of God
- WA Supreme Court has directed that jury instructions not specify either moral or legal

# Criminal Insanity Definition

- RCW 10.77.010 -- “A ‘criminally insane’ person means any person who has been acquitted of a crime charged by reason of insanity, and thereupon found to be a substantial danger to other persons or to present a substantial likelihood of committing felonious acts jeopardizing public safety or security unless kept under further control by the court or other persons or institutions.”

# Criminal Insanity

- Those not meeting this definition are released (final discharge)
  - Danger must be substantial, not just minor destruction to public property (In re Herman 1981)
  - But, in Jones v. U.S. (1983): “We do not agree with petitioner’s suggestion that the requisite dangerousness is not established by proof that a person committed a non-violent crime against property.” (DC case)

# Diminished Capacity

## Classic Version (State v Edmon)

- The defendant was unable to have the requisite *mens rea*
- Questionable doctrine
  - Prosecution must prove *mens rea*
  - Rules of evidence permit introduction of evidence that casts doubt on *mens rea*—the mental testimony need not completely disprove *mens rea*

# Rules of Evidence

- 401 (Definition Of “Relevant Evidence”)—”Relevant evidence” means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probably than it would be without the evidence.
- 403 (Exclusion Of Relevant Evidence On Grounds Of Prejudice, Confusion, Or Waste Of Time)—Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

# Rules of Evidence

- 702 (Testimony By Experts)—If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.
- 703 (Basis Of Opinion Testimony By Experts)—The facts or data in the particular case upon which an expert bases an opinion or inference maybe those perceived by or made known to him/her at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming the opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

# Rules of Evidence

- 704 (Opinion On Ultimate Issue)—Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact
- 705 (Disclosure Of Facts Or Data Underlying Opinion)—The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination

# Mental Defenses

- The act (*actus reus*) must be voluntary
  - Mental health testimony may be relevant
- Levels of culpability (*mens rea*)
  - Intent
  - Knowledge
  - Recklessness
  - Negligence
- In general, mental health testimony serves to reduce level of culpability
- Question whether mental health testimony can “disprove” negligence—anybody can be negligent

# Theories of Behavior

- Genetic (abnormality)
- Brain (damage)
- Character (pathology)
- Social (dysfunction)
- Moral (turpitude)
- Behaviorism
- Developmental or psychodynamic
- Biological
- Moral/cognitive
- Pluralism

# Behaviorism

- Responses are conditioned by the environment, therefore
- There is no such thing as decision-making as usually construed
- Strong form--mental states are not causal
- Weak form--mental states may be causal

# Developmental/Psychodynamic

- Many schools--psychoanalytic, existential, interpersonal, object relations
- Shared beliefs
  - personalities are causally important
  - nurture is central to personality development
  - there is a natural course of development
  - decision-making is subserved by a complex of habitual patterns of interaction/reaction that are primarily driven by unconscious forces
  - understanding can allow one to escape these patterns to some degree

# Biological

- Mind = Brain
- Nature more important than nurture
- Many ways for brains to fail
- Decision-making is related to genetic preservation (the selfish gene) and is driven by expeditiousness

# Moral/Cognitive

- Mind controls behavior
- Decision-making is rational, intellectual endeavor
- Treatment: persuasion, coercion
- The law is founded on this model
  - free will
  - belief in the power of future consequences
- All other models are more deterministic (though not necessarily *in toto*), and to that extent are antithetical to the law

# Decision-Making

## A Model Friendly to Most Theories

- **Decide**—from the Latin *decidere*, “to cut off”
  - Webster—to make a choice or judgment
- **Rational decision-making**
  - Syllogistic
  - Utilizes cognitive faculties
- **Emotional**
  - Non-syllogistic
  - Utilizes emotional valence on future projection
- **Reactive**
  - Non-syllogistic, non-projective
  - Utilizes the affect of the moment

# Decision-Making

- Humans primarily use emotional decision-making
  - It is faster and more efficient
  - It is habitual and each person has their own patterns
- Rational decision-making is rarely used
  - Most people believe they use this
  - “Reasons” have been shown to be primarily rationalizations made up after the fact; also habitual
  - Actual rational decisions also tend to be habitual in that an individual generally thinks and problem-solves in established patterns (a new thought is indeed a rare thing)
- Reactive decision-making is almost universally “incompetent”
  - Unlike the others, the outcome is less predictable

# Memory

- Short-term or “working” memory
- Two main types of long-term memory
  - Declarative (information retrieval) is made up of two sub-types
    - Explicit—source of information is known
    - Implicit—source of information is unknown
  - Procedural
    - Patterned series of actions are recalled
    - No “information”, no source
    - Largely unconscious—throw a ball, play an instrument

# Source Memory

- Frontal lobes—damaged in closed head injury and underdeveloped in children
- The sense that we remember the context of a memory
  - The “when, where, and who” of events or information acquisition
- Memory of source tends to increase certainty
  - There is only slightly higher accuracy of episodic memory when source is recalled
  - But source memory is just as susceptible to distortion and false implantation as other elements of memory
- The temporal relationship of elements of memory is closely related

# Reconstructive Errors

- Memories are distributed in different parts of the brain and “reassembled” for use
- “Memories” are rarely completely accurate
  - General knowledge creeps in
  - Expectations become part of the memory
    - What should have happened
    - What the person wants to have happened
- The reconstructed memory is mistaken for the actual memory
- Suggestion can play prominent role—”cueing” is sometimes suggestion
- Frontal lobe damage may lead to the person too readily accepting a memory as a match to a current stimulus

# Loss of Memories

- Happens most quickly over initial hours
- Three primary problems
  - Interference of new memories—think of what you had for breakfast at increasingly remote times (may respond to cueing or context)
  - Degradation—loss of the elements
  - Loss of source memory attached to content (may respond to cueing or context)
- But older memories are more resistant to loss following brain damage, probably due to broader distribution of engrams in the brain, making them more robust through redundancy, and because the hippocampus is sensitive to injury

# The Role of Emotion

- Emotion “imprints” memories more firmly
  - Smells and high intensity emotion are powerful
  - Memories of such events remain more accessible and are accessed more often—they are rehearsed
- The problem with emotional memory—especially “flashbulb” memory (memory of charged events)
  - Strong sense of certainty around emotionally charged memories—strongly related to sense of source
  - Frequently erroneous in content and source—same problems of reconstruction as other memories
  - On average only somewhat more accurate than everyday memory
  - Little relation between confidence and accuracy

# The Role of Emotion

- “Stress” seems to interfere with memory
  - “Stress” causes release of glucocorticoids
  - Glucocorticoids interfere with hippocampal function
    - Chronic stress yields degeneration in this structure
    - Acute stress is not so clear in normal brains
- But, people who forget traumatic episodes who do not have histories of stress often have histories of head injuries, which may injure the sensitive hippocampus making it more likely to dysfunction under the influence of acute increases in glucocorticoids

# Forensic Evaluation

- Objectivity not clinical advocacy—no responsibility to the welfare of the defendant
- The client is never the defendant
- Advocate for opinion, not for a side
- Important to stay close to the data—speculation has no place

# Evaluating Competency

- Most cases are easy from the perspective of a mental health professional
  - No mental illness, no cognitive deficit—competent
  - Floridly psychotic—incompetent
  - Profound cognitive deficits—incompetent
- Challenging evaluations
  - Mild cognitive deficits
  - Psychoses that are limited in their scope
  - Emotional dysregulation

# Elements of Competency Evaluation

- Factual knowledge of situational elements:
  - Participants in proceedings and their functions
  - Charges and peril
  - Pleas and plea bargaining
  - Essential rights
- Ability to work with attorney
- Capacity to participate in proceedings
  - Tracking proceedings (attention, memory, information processing)
  - Maintaining sufficient decorum
- Ability to make rational decisions based on knowledge and advice—cognitive deficits most relevant here

# Every Case Is Different

- While according to the law, “competency is competency is competency”, it is not practical to evaluate each and every case to determine if the person can handle an OJ trial
- The complexities of the case, the demands on the defendant, and the details of the circumstances around the case are critical
  - Plea-bargain versus trial
  - Hostile press
  - Attorney that looks like the demon next door
  - Etc.

# Ability to Work with Attorney

- Memory
  - Of relevant events
  - Ability to learn new information sufficiently to participate in preparation of case and trial
- Cognition
  - Ability to understand attorney
  - Ability to render relevant information
- Beliefs that interfere with relationship with attorney or developing strategy

# Maintaining Decorum

- Is the disruptive behavior a manifestation of mental illness?
  - Does the person have history, signs and symptoms of a recognizable disorder?
  - Is the behavior consistent with the current signs and symptoms?
- If the answer to either is “no”, then it is difficult to opine that their disruptive behavior is related to mental illness

# Memory and Competency

- Memory functions are a pre-requisite to learning and therefore for participation in proceedings
- Memory can be severely disrupted or distorted (in normals and others), creating problems with:
  - Working with attorney
  - Developing a strategy
  - Following criminal proceedings
  - Testifying

# Evaluating Memory Deficits

- Conversation, MSE, MMSE, formal testing if problems are subtle
- Tests of malingered memory deficit when patterns not consistent with known patterns of memory abnormalities
  - Use of binomial probability (e.g. 20-item recall test)
  - 15-item test (ABC test)
  - Validity Indicator Profile (VIP)

# Decision-Making and Competency

- Elements that must be present
  - Ability to communicate a decision
  - Aware of relevant situational factors
  - Understand risks and benefits of the options
  - Evaluate risks and benefits of the options
  - Decide based on risks and benefits
- Does not have to be syllogistic
  - “emotional” decision-making is generally sufficient
- Does not have to be a “good” decision

# Problems with Decision-Making

- Three main categories of decisional problems
  - “Reactive” decision-making
    - Due to “bad mood” (often a personality disorder)—solution is to wait for the person to “cool down”
    - Emotional dysregulation due to mental illness or brain damage
  - Psychosis
    - Delusion dominates relevant decisions
    - Problems with attention and concentration
    - Thought disorder—essentially a cognitive deficit
  - Cognitive deficit interferes with any number of the elements of decision-making—a long list

# Neuropsychological Testing

- Cognitive testing rarely important except to establish reality of deficits
  - Results correlate poorly with competency unless severe deficits present, but testing rarely necessary in such cases
- Attention/concentration can be important to quantify
- Executive function tests marred by poor ecological validity
- Competency instruments more useful

# Common Issues in “Close” Cases

- “I don’t trust my attorney”
- “The system is corrupt”
- “There is a computer chip controlling my mind”
- “I’m not mentally ill”
  - “I want my day in court”
  - “I won’t even consider a mental defense”
- Disruptive behavior
- Refusal to participate
- Memory problems

# Mental State Evaluations

- Cognitive ability is rarely relevant
- Chief issues are reality testing, impulse control, affective lability, and perceptual distortion
- Determining a past mental state is fraught with pitfalls
  - Memory
    - Inaccuracy is the rule
    - Normal distortion and decay
    - Effects of interrogation
    - Secondary gain is big
  - Explanations of motivation are rarely accurate
  - Lack of access to the person at or near the time

# NGRI Evaluation

- The primary goal is establishing motivation
  - Presence of disease or defect necessary, but nature and degree of deficit rarely important
  - There must be a causal nexus between the deficit and the criminal act
- Data gathering is critical
  - Records—police discovery, medical, psychiatric, criminal, work, school, military, etc.
  - Collaterals are key
  - Report of defendant—look for consistency

# NGRI Evaluation

- M’Naghten Rule and insanity
  - Invasion of the Body Snatchers
  - Abraham and Isaac
  - Shared feature—fundamental break with reality
- “Product” and “irresistible impulse” tests are not permitted in WA
  - Excludes many disorders/problems: impulsivity, agitation, mania (without psychosis), problems with emotional reactivity, limited understanding, etc.
- Uses of neuropsychological testing
  - Establishing the presence of disorder
  - Evaluating the consistency of presentation, history, etc.
  - Detecting malingering

# *Mens Rea* Evaluations

- Fundamental question: Is there sufficient evidence to suggest that some impairment made it less likely that the person had the requisite *mens rea*
- Factors that may bear on this
  - Psychosis
  - Intoxication
  - Impulsivity (and related)
  - Appreciation of relevant details of situation

# *Mens Rea* Evaluations

- Neuropsychological testing can be valuable
  - Cast doubt on whether the defendant understood relevant information (e.g. possession of stolen property and other crimes requiring presence of specific knowledge)
  - Demonstrate deficits associated with disorders of aggression (may cast doubt on intent)
- General problem—correlation versus causation
  - Head injury predisposes to impulsive aggression but this cannot prove that in a particular instance there was absence of *mens rea*
- Key is to remember that casting doubt is all that is required—attorneys will usually want more

# Reports

- Write for a lay audience
- Creating a coherent story is helpful
- Advocate for your opinion, not for a particular outcome
- Be cautious about quoting law
- Use abundant quotes
- Avoid excessive qualification—if you are finding yourself qualifying, you are probably speculating
- Data and sound inference are your friends
- Remember that this becomes a matter of record

# Testimony

- Appearance and demeanor are keys to credibility, not abundant knowledge
- Keep answers simple and on point
- Don't speculate—"I don't know" is a perfectly good answer
- Keep your cool—it's not personal
- Look out for legal terms of art (e.g. "substantial")
- Look to have role of educator
  - This is the role of the pure expert, but evaluating expert can also function this way
  - Work with attorney before case
  - Avoid jargon
  - Use visual aids
  - Think carefully about what learned treatises you use