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Forensic Issues in Autism Spectrum Disorder: Learning from Court Decisions

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1. Introduction

Utilising a series of recent Australian decisions, this paper reviews contemporary approaches of the courts in relation to the relevance of Autism Spectrum Disorder (ASD) to criminal responsibility and culpability. It employs the definition of the disorder expected to be employed in DSM-V (American Psychiatric Association, 26 January 2011), recognising that the new formulation is broad-brush and does not avail itself of the nomenclature or separate diagnostic criteria for Asperger's Disorder.

It identifies a significant level of unawareness in Australian courts as to the distinctiveness, and more importantly the potential significance of the distinctiveness, of the world experience of those with symptomatology of the disorder and explores the challenge for mental health experts in effectively assisting judicial officers to understand the internal experience of those with ASD and differentiating it from personality disorders and psychopathy (see though Fitzgerald, 2010).

Drawing on the reasoning in recent decisions, it argues that, while Asperger's Disorder, and to a lesser degree ASD, have now penetrated the public and judicial consciousness to some degree, there is a significant forensic distance to travel and many challenges to be overcome before courts are enabled meaningfully to appreciate for any given defendant the impact likely to have been exercised on offending behaviour by an ASD. Identifying something of a backlash against such a disorder being viewed as significantly mitigating in Australia, it advances proposals for how mental health professionals can sensitise the courts more informedly to the potential forensic significance of ASD.

2. ASD and the law

The preponderance of scholarship in relation to ASD and the criminal law has related to persons with Asperger's Disorder (see generally Murrie et al, 2002; Silva, Ferrari and Leong, 2003; Barry-Walsh and Mullen, 2004; Haskins and Silva, 2006; Warren, 2006; Langstrom et al, 2009; Freckelton and List, 2009; Browning and Caulfield, 2011; Freckelton, 2011; Freckelton, 2013). It has identified issues that have arisen in relation to fitness to be interviewed, fitness to stand trial, capacity to form intent, fitness for extradition, defences, such as self-defence, insanity/mental impairment, diminished responsibility, and, in particular, sentencing (see Warren, 2006; Freckelton and List, 2009; Freckelton, 2013). It has also analysed particular categories of offences that have been committed by persons with ASD: offences of violence, offences against public order, sexual offences, arson offences and computer offences (see Realmuto and Ruble, 1998; Milton et al, 2002; Mouridsen et al, 2008; Freckelton, 2011; 2013;). Awareness amongst judicial officers' decisions of the potential relevance of the disorder arises principally from expert insights into the fact that those with ASD experience the world in a way that is at major variance from those without the disorder. The disorder can be marked by obsessionality, inability to apprehend verbal and non-verbal cues, lack of empathy, rigidity, literalism in response, naivete and a propensity to panic and behave impulsively and unpredictably in unfamiliar environments. (see eg *R v Mueller*, 2005 at [92]; *McC v The Queen*, 2007). Such persons may also be very suggestible (see eg *IA v The Queen*, 2005 at [8]), have an aversion to being touched by others (see eg *ZH v The Commissioner of Police for the Metropolis*, 2012) or be distressed by sensory perceptions such as noise or intense light (see Cascio et al, 2012), possibly because of sensory processing deficits (see Lane, Young, Baker and Angley, 2010). There are important indications that persons with ASD are significantly over-represented as persons in custody (Cashin and Newman, 2009; Mayes, 2003; Scragg and Shah, 1994).

There are indications arising from court decisions that mental health experts in the forensic area and judicial officers alike have not always been as aware of the counter-intuitive characteristics of ASD as they need to be so that fair decisions are made by courts about procedural issues arising in criminal trials, as well as about both the criminal responsibility and culpability of those with ASD.

As of 2013, it can be said that the incidence of cases in which ASD is invoked as relevant to criminal trials or sentencing appears to be growing. Part of this is attributable to increasing awareness of ASD within the general population and by extension within the legal community. This highlights the need for more focused and expert specialist assessment of defendants for whom their ASD may constitute an important aspect of their defence (Freckelton and Selby, 2013; Freckelton, 2013). In this paper recent Australian decisions have been selected for evaluation as illustrative of the complex forensic and mental health issues which continue to be confronted by the courts, even in a jurisdiction which has had a disproportionate number of appellate decisions which have wrestled with the forensic significance of ASD.

3. R v George (2004)

One of Australia's earliest and most significant decisions in relation to ASD in the criminal law, but which has not previously been scrutinised, save in relation to issues relating to hoarding and the law (Freckelton, 2012), was that of *R v George* (2004).

George was found guilty at first instance in the New South Wales Supreme Court of manslaughter of his 86 year old mother (for whom he was the primary carer) by criminal negligence arising from his failure to provide her with proper nutrition, hydration, medication and medical attention. He was sentenced after trial to imprisonment for seven years with a non-parole period of four years.

George appealed to the New South Wales Court of Appeal (*R v George*, 2004) on the ground that insufficient weight was given by the sentencing judge to the fact that he suffered from Asperger's Disorder and other psychological issues that resulted from a solitary life and social dysfunction. The Court of Appeal allowed his appeal and reduced his sentence to three years and six months' imprisonment with a non-parole period of two years.

The evidence before the Court was that at the time of his mother's death George was 58 years of age and had never married. He lived until the time of her death with his mother and a developmentally delayed sister. He had generally been unemployed although latterly he had undertaken some minor administrative functions at a chiropractic clinic.

About two years before her death, George's mother had instructed her children not to arrange home care for her as she was embarrassed by the state of her house and its surrounds. The garden was seriously overgrown and unkempt and the interior of the house was overrun by papers, some of which were kept in bags and piled in various rooms. The shower and the bath had not worked in some time. Newspapers were stacked in the shower recess and the toilet leaked. Thick dust and cobwebs were to be found throughout the house.

Evidence before the Supreme Court at the time of the manslaughter trial established that George's mother had been a domineering person and had vigorously resisted all efforts to take her to hospital and provide her with home care. She had an aversion to being showered. George's culpability depended on the sufficiency or otherwise of efforts he had made to provide her with care as her condition deteriorated. When ambulance officers discovered her, she was bed ridden and covered in sores. She was wearing soiled clothing and her bed and person were covered in human vomitus, faeces, urine and body fluids. She was severely malnourished and shortly afterwards died of bronchial pneumonia. Evidence established that she had not been provided with prescribed medicine for some years and that she had suffered significantly, especially in the latter stages of her life.

Psychiatric evidence shed some light on the reasons for the insufficiency of George's responses to his mother's worsening health condition. It suggested that George had a "mild variant of an autistic disorder", a diagnostic criterion for which was "a lack of social or emotional reciprocity, which could partly explain his apparent lack of concern for his mother's condition." (*R v George*, 2004: [23]) The psychiatrist noted that George had an apparently consuming

interest (typical of persons with Asperger's Disorder) in all things related to railways. He noted that: "The idiosyncratic thinking that is usually observed in the presence of Mr George's disorder could also explain his rather literal interpretation of his mother's instructions and his apparent lack of concern when interviewed about the events." (*R v George*, 2004: [23]) He explained this further as incorporating a difficulty in George having a normal level of empathy and an capacity to recognize and respond to the reactions of others by reason of his lack of empathy.

On appeal the Court found that the sentencing judge's failure to deal explicitly with these considerations "was a deficiency of some importance" in that it significantly reduced George's level of culpability:

Upon the evidence his capacity to respond to his responsibilities was clearly impaired by an unusual personality disorder arising from his history of social dysfunction, as evidenced by the utterly bizarre circumstances in which he, and the immediate family, lived.

The case is a tragic and wholly exceptional one, and we are driven to the conclusion that the Applicant's objective criminality was overstated by his Honour. As Dr Nielszen explained, Asperger's Syndrome is not normally associated with criminal offending, and the risk of the Applicant reoffending, or of being placed in a similar situation, is minimal. Personal deterrence is, accordingly, of little relevance. (*R v George*, 2004: [42]-[43])

R v George (2004) is significant as it is Australia's first appellate authority on the potential relevance of ASD symptomatology to the evaluation of criminal culpability. Its recognition of the distinctive propensity of persons with an ASD to comply with the plain words of instructions from a trusted person and not to respond emotionally even to manifest suffering, if such a response is interpreted by them as inconsistent with the instructions given to them, is consistent with clinical insights into the characteristics of persons with ASD. It highlights that the lack of empathy of a person with ASD is prone to be interpreted as malign intent (eg criminal mens rea) unless counter-intuitive expert evidence is provided to the contrary.

4. R v Hampson (2011)

Bradley Hampson, a man of 29, pleaded guilty to a range of offences relating to possession and distribution of child pornography. He was sentenced to three years' imprisonment with release after 12 months and then two years' probation. He appealed to the Queensland Court of Appeal (*R v Hampson*, 2011) on the basis that his sentence was manifestly excessive. He had

a prior conviction for using a carriage service to menace, harass or cause offence – when he had telephoned persons and made lewd inquiries of them.

Evidence before the Court of Appeal established that Hampson had been diagnosed with autism by a psychologist to whom he had been referred when he applied for a disability support pension. The criminal conduct the subject of his sentence appeal included posting sexually offensive observations on the tribute page for a murder victim and the distribution of obscene comments and sexualized depictions of children. The sentencing judge described Hampson's conduct as "depraved".

The sentencing judge acknowledged that: "It seems that the origin of your offending may lie somewhere in your history of autism and in your own social ineptitude which led you to misusing the internet in the way you did." (*R v Hampson*, 2011: [57]) The Court of Appeal, however, concluded that little weight should be given to Hampson's autism for the purposes of assessing his criminal culpability and that the trial judge's incorporation of the condition into his sentencing analysis was proper but sufficient.

The *Hampson* decision raises the difficult issue of the blameworthiness of persons with ASD for conduct that would be considered difficult to understand and repugnant in ordinary members of the community. Persons with ASD are frequently absorbed by persons, objects and details. They can be very concrete in their reactions (see eg *R v George*, 2004). They can have a propensity to engage in repetitive and obsessive behaviours, especially within the unthreatening environment of the Internet.

In the Ontario case of *R v Somogyi* (2011) a man found guilty of luring two girls under the age of 14 and inviting them to engage in sexual touching was sentenced "only" to a conditional sentence with house arrest in part because of his having ASD. In taking what he acknowledged was an unusual step Anderson J observed that Mr Somogyi had the social age of a 12 year old: "This was a fantasy world for Mr Somogyi, where he could communicate with children that were perhaps closer to his own emotional age. It appeared clear to me that part of the communication with the two undercover officers was sexual in nature, but that part of the communication was as friends, consisting of sharing music, pictures and conversation. In this communication, Mr Somogyi could be the knowledgeable outgoing leader, not the shy awkward adult." (at [36])

The environment of the Internet can enable persons with ASD to act out their sexual attractions and impulses, as well as feelings of distress and anger, without the confronting exigencies of direct person-to-person interaction. When such a pattern of fascination is coupled with a reduced level of socialization and capacity for understanding of and empathy with others' sensibilities, there is the potential for them to engage in conduct that is alienating and frightening but whose resonances and consequences are not (well) understood by them. Expert mental health evidence to explicate these limitations on the part of persons with ASD is extremely important if unfair harshness in sentencing is to be avoided.

5. DPP v HPW (2011)

In *Director of Public Prosecutions v HPW* (2011) the Victorian Court of Appeal heard an appeal brought by the prosecution contending that the sentencing judge at first instance had wrongly found a causal connection between HPW's Asperger's Disorder and his sexual offending, had erred in imposing a manifestly inadequate sentence and had inadequately cumulated the penalties he imposed for a significant number of sex offences.

HPW was found guilty at first instance of eight charges, three of which were representative of many instances of sex offending, committed against his biological daughter during a time when she was aged 11 and 12. They involved multiple instances of oral, digital and anal penetration as well as instances of masturbation and of encouraging the family dog to lick his daughter's vagina.

When interviewed by the police, HPW admitted sodomising his daughter and explained that it was "just as an experiment". He said by way of explanation that "it was just sexual gratification for myself" and commented that he was "probably a psycho".

HPW was aged 47 at the time of sentencing and without prior convictions. He had served a lengthy period of time in the army until he was discharged in 2007 for not handing back some hand grenades. He had two children from a marriage that lasted over a decade, after which he formed a relationship that involved bestiality and anal sex with another woman.

A psychologist who examined him formed the view that the offending with his daughter stopped when "he realised what he was doing". HPW's Asperger's Disorder went undiagnosed until after the criminal charges were laid. A psychologist who assessed him expressed the view (at [37]) that he had

significant deficits in social interaction; restricted behaviour, interests and activities; clinically significant impairment in social or other important areas of functioning; no apparent language impairment; and no apparent cognitive impairment. He is somewhat atypical in his awareness of his deficiencies in empathy and friendship skills.

Another psychologist, Dr Kennedy, whose report was tendered at the plea hearing, stated (at [47]):

In this case, victim empathy should be commented on for specific reasons, particularly in relation to [HPW]'s cognitive distortion associated with the offences. In this matter, he has reported that while carrying out the sexual offences he considered that [his daughter] *was experiencing the sexual abuse in a matter-of-fact way* as if the activities were normal, and nothing more than her daily activities.

Discussion of this issue occurred at some length. I should note that [HPW] did not appear to be attempting to minimise this behaviour in this [sic], but *was attempting to explain how he saw [his daughter's] response to the sexual abuse*. He thought at the time for her, it was "something to do... as if it was an activity such as playing cards or watching TV" that *had no impact on her at an emotional level*. When asked about his understanding of the effects of the sexual abuse on [his daughter], he reported in a very distinct way that the impact has been "huge... I think I've ruined her... she'll never be able to see me in the same light... it will be very difficult for her with partners in the future".

He added (at [50]):

[There is a] focus on deficient empathy, which is clearly relevant in this case, interpersonal naivety which appears to be the case in this matter, sexual frustration which is clearly relevant in this case, and immediate confession, which from my understanding, is also present. Additionally, there are sexual preoccupations, which do appear relevant in this case.

Dr Kennedy expressed the view that at the time of his offending HPW was unaware of the distress he was causing to his daughter but contended that since that time, with professional assistance, he had acquired genuine empathy and remorse. He observed that there had been no grooming process, as is often seen in sex offending cases.

The Court of Appeal found that the evidence of the expert gave no support for the foundation of the plea made on HPW's behalf, and which was (wrongly) accepted by the sentencing judge, that HPW misread his daughter's behaviour as providing encouragement to him by hints or signals, to engage in the sexual offending. Justice Tate (at [53]), writing the leading judgment, found that Dr Kennedy's opinion:

suggested that the sexual offending occurred in a context in which (1) the respondent had sexual preoccupations with his daughter, fantasising about her in a manner reflective of his previous unusual sexual relationship with an earlier partner of whom his daughter reminded him; (2) he was sexually frustrated with his current partner; (3) his level of alcohol abuse led to disinhibition; and (4) his deficient empathy meant that he believed that his sexual offending was having no emotional impact on his daughter. Dr Kennedy's opinion did not provide a proper evidentiary base supporting the finding of the sentencing judge that the respondent 'may have misinterpreted [his] daughter's cues'.

She found that the plea by counsel misrepresented the expert report. To the extent that Dr Kennedy had commented “it is highly likely that [HPW’s] behaviour is best explained by the presence of an Autism Spectrum Disorder”, Tate JA found that this could not support the proposition that there was a causal connection between his conduct and his misreading of his daughter’s behavioural cues. This led Tate JA (with Neave and Mandie JJA agreeing) to find a sentencing error to have been committed at trial. They also found that HPW’s Asperger’s Disorder should not have led to a significant moderation in the sentence imposed upon him, and that his sentence was not sufficiently cumulated to reflect the “debased and humiliating nature of the offending, the core breach of trust, or the effect of the offending upon [HPW’s] daughter” (at [82]).

While the court did not find that HPW’s Asperger’s Disorder reduced his moral blameworthiness for the purposes of sentencing, it did accept that it was appropriate to view his disorder as a mitigating factor to the extent that it was likely to make his service of a custodial sentence more burdensome for him. It ordered his sentence to be increased from seven and a half years’ imprisonment with a non-parole period of five years and six months to nine years and six months’ imprisonment with a non-parole period of six years and six months.

The *HPW* decision is a salutary reminder that judges’ evaluation of the relevance of Asperger’s Disorder will vary from case to case, depending upon factors such as the severity of the disorder, the nature of the offending and the proven relationship between the disorder and the particular offending. On some occasions it will be regarded by sentencers as powerfully relevant, while on others it may be found nearly irrelevant. This is consistent with the position with psychiatric disorders that more commonly intersect with the cases determined by the criminal courts – for instance, the fact alone that a person satisfies the DSM criteria for schizophrenia does not of itself relieve the person of criminal responsibility or culpability. However, more can be observed. A real question will arise on occasions about the extent in a meaningful sense that a person with ASD will be aware, other than at a superficial or, to them, a theoretical level, of the wrongfulness of their behaviour and of the consequences that it is likely to bring for their victim. In such a situation, real questions arise in relation to their criminal culpability and therefore the basis upon which they should be sentenced. This issue is at its most confronting when, as in the *HPW case*, the conduct is particularly unpleasant.

6. R v Sokaluk (2012)

Brendan Sokaluk was convicted by a jury in Melbourne, Australia, of ten counts of arson causing death, an offence carrying a maximum sentence of 25 years of imprisonment for each charge. The sentencing judge, Justice Coghlan of the Supreme Court of Victoria, found that Sokaluk had intentionally lit a fire in eucalypt plantations and in two other places, knowing that his actions would cause damage, and in fact causing the deaths of ten people. He accepted that Sokaluk did not intend to cause loss of life but found that, nonetheless, the fact was that he did cause multiple deaths on a day that became known in Australia as “Black Saturday”, when strong winds built up and temperatures exceeded 46 degrees Celsius.

Evidence before the jury showed that when he was being evacuated from the fire zone Sokaluk told a lie because his father earlier in the day had advised him not to go to the hills. This was but one of a number of untruths told by Sokaluk and which raised the issue of whether he understood full well that his actions were wrongful and could lead to adverse consequences. Another occurred on the next day when he returned to the scene of one of the fires and saw that his car had been destroyed by the fire. Within an hour and a half he made a claim on his insurance policy. Justice Coghlan found that his level of functioning during the call “was at the very least reasonable” (at [23]). He drew adverse inferences for Sokaluk’s level of understanding and functioning from this conduct.

In the next days Sokaluk made various comments about who had been responsible for lighting the fire and then on the Tuesday made a false and self-serving report to police that he had seen a fire fighter driving a four wheel utility lighting one of the fires. Justice Coghlan characterized this report as “a deliberate and careful attempt to attach the blame to others.” (at [25]) Later Sokaluk acknowledged to police that he had made the report so that he would not be blamed for the fire. When police spoke to him some days later, he told them that he had been smoking in his car and asserted that a piece of paper must have ignited, after which he panicked, and some time later reported the fire to authorities. However, Coghlan J noted that expert evidence repudiated the feasibility of his account. How these situations were interpreted by the sentencing judge was that since Sokaluk was able to function to some extent in an apparently reasoned and sophisticated way in the aftermath of his fire-lighting he was significantly culpable for his criminal conduct because of having the capacity to understand the nature of what he was doing. The legitimacy of such judicial reasoning is a function of whether the two scenarios were properly commensurate for a person with ASD. At the time of writing, the case is subject to appeal.

The sentencing judge reviewed in some detail the catastrophic nature of the fire and drew particular attention to the “self-sacrifice and courage” of the volunteers in the area who fought the fire. He took into account the hurtful nature of the way in which the fires had started because of Sokaluk and the life-changing nature of the fires for those who survived them.

Justice Coghlan received a substantial amount of material about Sokaluk who was 42 years of age at the time of sentencing and had no prior convictions. He received multiple expert reports which led him to conclude that Sokaluk suffered from an ASD and was intellectually disabled to a “reasonably mild degree” (at [46]). He noted that Sokaluk had grown up in the local area and had experienced difficulties during his schooling. He attended a “special school” for children with disabilities but managed to gain employment at a university where he worked as an assistant gardener for some 16 to 17 years. Justice Coghlan concluded that Sokaluk was teased and perhaps bullied in the workplace as he had been at school. Interestingly, and perhaps suggestive of his having a problematic interest in fires, he also worked for the Country Fire Authority but ceased employment in about 2006 and went onto a disability pension. He owned his own house and lived there alone but was dependent on his parents for cooking, cleaning and managing his finances. He had had two serious relationships with women and was closely emotionally connected to his dog.

Justice Coghlan accepted that Sokaluk had a “mental impairment” for the purposes of sentencing by reason of his conditions of autism and intellectual disability. He had regard to what he classified as Sokaluk’s “reduced moral culpability” and stated that he had moderated general deterrence as a factor to which he had regard in sentencing. He concluded that “personal deterrence looms somewhat larger for you than it might for others.” (at [66]) He stated that he regarded Sokaluk as “genuinely remorseful” and accepted that he did not “set out to achieve this awful result” (at [66]). He accepted that the sentence of imprisonment that he imposed would “weigh more heavily upon you than on others” (at [66]).

So far as expert evidence was concerned, Coghlan J received multiple forensic mental health expert reports but had particular regard to that of Professor James Ogloff, the Director of the Centre for Forensic Behavioural Science and Foundation Professor of Clinical Forensic Psychology at Monash University. Professor Ogloff observed that Mr Sokaluk:

“would occasionally stare blankly ahead. ... He did not appear emotionally distressed or anxious. He displayed repetitive motor behaviour which consisted of lightly touching the edge of the table that separated us and moving his hands together and apart slowly. This behaviour subsided over the course of the interview. Mr Sokaluk demonstrated very concrete literal thinking. He appeared emotionally blunted and socially immature. (Psychological Court Report, 22 December 2012, para 5)

Professor Ogloff noted Sokaluk’s assessed level of intellectual functioning, measured overall at an IQ of 74 and another psychologist’s assessment that his profile was typical of a person with autism. He took into account that Sokaluk’s relative strengths were in the areas of visual perception, non-verbal processing and attention to visual detail, while his weaknesses were in the ability to comprehend and/or respond to questions. Professor Ogloff expressed the view that the autistic symptoms experienced by Sokaluk “have been debilitating and dysfunctional, resulting in difficulties in relationships, employment and general life skills.” (Psychological Court Report, 22 December 2012, para 9). He emphasized Sokaluk’s response to the question of who the person was who was most important to him. Sokaluk responded that it was his dog and related very detailed, anthropomorphizing accounts of his dog. While Sokaluk was dependant upon his father, there was little evidence of emotional connection with him.

Professor Ogloff concluded that Sokaluk was fit to stand trial, although he thought he would experience some difficulties in following the evidence, and that the defence of mental impairment (insanity) was not available to him. Professor Ogloff expressed the view that Sokaluk was not a pyromaniac but did not feel able to identify with confidence the characteristics or motivations which had led him to engage in his fire-setting behaviours, other than to say that if he did deliberately light the relevant fire his motivation was probably expressive (namely a means of emotional expression, given his social inadequacies)

Mr Sokaluk meets the criteria for a diagnosis of Autism Spectrum Disorder. This disorder has affected his social and adaptive functioning all of his life. He does not meet the criteria for a diagnosis of a major mental illness or personality disorder at present, although he has been treated with medication in the community for depression and in prison for lowered mood and anxiety.

Whilst his overall level of intellectual functioning is in the borderline range, his verbal capacity is more limited and, in fact, falls in the intellectually disabled range. Conversely, his perceptual capabilities are much better, falling in the low average range. This suggests that while Mr Sokaluk has been able to hold a job, operate a motor vehicle, and live on his own, his level of intellectual reasoning and verbal comprehension is very impoverished. He has been dependent on his parents for maintaining his finances, cleaning his house, and providing him with meals. It takes him much longer to acquire information or to learn a task than would be the case for most others and his abstract reasoning capacity is very limited. His presentation, reasoning, receptive and expressive language are affected by the confluence of his Autism Spectrum Disorder and decreased level of intellectual functioning. For example, he is a very concrete and literal thinker.

Justice Coghlan sentenced Sokaluk to a total effective sentence of imprisonment of 17 years and 9 months, with 14 years to elapse before he would be eligible for parole. Both the Director of Public Prosecutions and Sokaluk appealed against the sentence, the one contending it was too short, the other that it was too long. At the time of writing the appeal had not been heard.

The Sokaluk appeal raises for consideration the relevance of ASD (and an intellectual disability) to the evaluation of criminal culpability when the defendant's capacity to appreciate the consequences of his behaviour is reduced by reason of his disorder. Expert evidence before the court suggested that Sokaluk's intellectual and abstract reasoning were at a low level, that his emotional connections with people were poor and that he had been ill-treated over a period of time by reason of his difficulties in communicating and interacting with others. However, Sokaluk was far from wholly disabled and to varying extents had been able to function within the community and had some capacity to appreciate that forms of behaviour are unacceptable and wrong. Thus, the question arises as to how severely he should have been punished and deterred from conduct whose terrible repercussions he was found not to have set out to achieve and whose ability to foresee and appreciate was unclear.

7. State of Western Australia v Mack (2012)

Brent Mack was charged with the murder of his mother but in an application that he made for a judge-alone trial questions arose about his fitness for trial on the basis of his suffering from autism. His counsel swore an affidavit expressing the view that there was a risk that Mack would not participate in the trial in any way, including the provision of instructions, thus making his defence extremely difficult.

A psychiatrist retained for Mack expressed the view that Mack was unfit to stand trial because of his inability to follow the course of the trial and to defend the charges against him:

He has impairment in the use of multiple nonverbal behaviours, including eye contact and body posture; a lack of social reciprocity; the failure to develop any appropriate peer relationships. He also exhibits impairments in communication in relation to the inability to sustain a conversation; stereotyped use of language; monotonous speech with an abnormal, robotic rhythm to it; and inability to understand the nonliteral aspects of communication or applied meaning.... [H]is ability to understand the abstract is virtually absent and everything is very much concrete interpretations of things. (*State of Western Australia v Mack*, 2012: [19])

When asked about the contrast between this presentation and Mack's manner in his records of interview, the psychiatrist stated that he had heard Mack speaking in a similar way to his responses in the records of interview when he spoke to members of a working party about native plants, a subject in which he had a particular interest. He expressed the view that Mack did not process emotion, particularly negative emotion, his response tending to be one of retreat from a situation physically or into himself. In such circumstances his deficits in short term memory and concrete thinking were exacerbated. He expressed the view that:

Mr Mack tends to be quite dichotomous in his thinking, so from my assessment of him, he divides things into a personal context - that's his language - personal context or some other context, such as a business context. If anything is relevant to himself personally, he tends to have a somewhat all-or-nothing approach to that. So he obliterates that from discussion completely. If it's something to do with something about which he's factually knowledgeable, then he's probably happy to talk at length about it. ... from my interviews with Mr Mack, I would expect that he would be very reluctant to talk about any matters that might arise during the course of the trial (*State of Western Australia v Mack*, 2012: [24]).

A psychiatrist called by the prosecution, although agreeing on the diagnosis, and conceding a potential for Mack's cognitive ability or performance to deteriorate during the trial because of anxiety, expressed the view that he was fit for trial. He accepted that Mack had a propensity to focus on the way in which questions were asked, rather than their substance but concluded there was no evidence to "suggest the presence of any difficulties in registration" of the content of communications to which he was privy.

Justice McKechnie accepted that the behaviour of Mack was unusual but found the evidence of the psychiatrist called by the prosecution to be more consistent with the performance of Mack during his records of interview. He concluded that "It is likely that the accused's current

presentation is more as a result of choice coupled with his autism than a result simply of his mental impairment." (*State of Western Australia v Mack*, 2012: [24]). He placed little weight on the submission that Mack's odd presentation might cause him prejudice before jurors who might be distracted by it or draw adverse inferences against him (cp *McGraddie v McGraddie*, 2009; *Parish v DPP*, 2007). However, he concluded that because of Mack's autism and its impact on the trial process generally, the interests of justice weighed in favour of a trial by judge alone (*State of Western Australia v Mack*, 2012: [44]).

The decision of McKechnie J highlights the difficulty encountered by those with ASD in being able effectively to communicate with and give instructions to their lawyers in the unwonted and intimidating atmosphere of the courtroom. While persons with ASD may be articulate and contextually appropriate when conversing about a subject of interest or fascination that is non-threatening, a wrong inference may be extrapolated that they are capable "if they simply make an effort" of speaking with their lawyers, understanding testimony and its import for their defence, and giving evidence in a courtroom. While the discontinuity between these contexts is not immediately obvious, the nature of ASD, if well explained by a mental health expert, has the potential to be compelling.

Another aspect of Mack's case that is significant is the failure of the trial judge to accept that the conduct of the defendant might be highly prejudicial and, in particular, be misinterpreted and misconstrued by a jury. This is a problematic issue for defendants with ASD because of their propensity to conduct themselves oddly and with apparent disinterest in the circumstances of their victim and the ramifications of their conduct. There is often a risk that their manner, their words and their reactions may lead jurors and judicial officers who are uninstructed in the characteristics and symptomatology of ASD to draw wrong and damaging inferences (see eg *McGraddie v McGraddie*, 2009; *Parish v DPP*, 2007).

8. Challenges for mental health expert evidence

The 2011/2012 decisions by courts in *HPW*, *Sokaluk* and *Hampson* illustrate the risk that ASD will not be found by judicial officers to have a major relevance for the determination of criminal culpability. What each case has in common is conduct that is such as to prompt high levels of censure by reference to ordinary community standards and thus a risk that such considerations will overbear subtle issues relating to the personal blameworthiness of an offender. However, there is reason to suspect that in each case the defendant's ASD constituted at least a significant context within which the criminal conduct was committed and there is reason to postulate that it may have had a sufficient influence on the conduct to have been a genuinely mitigating factor in terms of each offender's moral blameworthiness.

The decisions of *George*, *Sokaluk* and *Mack* are exemplary of cases where wrong inferences may be drawn by reason of the capacity of persons with ASD to conduct themselves in ways comparable to how others with full capacity might behave. There is a need in many criminal trial contexts that deal with persons with ASD for expert evidence that is counter-intuitive and directed toward the need for care to be taken by decision-makers, judicial or lay (ie jurors), in

drawing inferences on the basis of otherwise known conduct and capacities of persons with ASD, especially when different scenarios in defendants' lives are compared. Capacity is highly situation-related, and for all of us is variable by reference to context. Persons with ASD may be high-functioning in some contexts but when comfort zones are intruded upon or when they are outside an environment that is structured or familiar, their conduct may be erratic, their judgment poor and their capacity to appreciate the resonances and repercussions of their actions limited. This is relevant both to their capacity to function effectively within a trial context, including their fitness to stand trial, and to their criminal responsibility and moral blameworthiness for actions for which they are being tried.

Fitzgerald (2010) has postulated a subcategory of ASD that he calls "Criminal Autistic Psychopathy", characterised, he says, by persons with callous, unemotional traits who repeatedly engage in anti-social criminal conduct. He has instanced a number of serial killers who he maintains have combined features of ASD and Psychopathy. While there are theoretically fundamental differences between the two disorders, the former for instance being a developmental disorder, Fitzgerald makes a persuasive argument for the overlap of traits/symptoms in some persons. For these individuals the existence of conjoint pathology or a hybrid disorder is particularly problematic at sentencing as it is most likely to arouse concerns in relation to the need for protection of the community rather than an empathic focus on impaired levels of moral blameworthiness.

Finally, two other important issues consistently arise in criminal cases. The behaviour of a person with ASD at trial can be alienating and highly prejudicial. This bears upon whether they should be accorded the opportunity for a judge-alone trial, where that facility exists (see eg *State of Western Australia v Mack*, 2012), or whether expert evidence to disabuse jurors of misimpressions they might otherwise form should be permitted. In addition, the capacity of a person with ASD to cope without decompensating, being dangerously victimised or having the anxiety and depressive symptomatology, which is often part of an ASD (see eg *R v Sokaluk*, 2012), exacerbated within a custodial environment frequently needs to be the subject of expert opinion evidence from professionals with a sound understanding of the impact of ASD on day-to-day functioning for those with the disorder.

The challenge for mental health professionals who seek to educate courts about the relevance of ASD to decision-making about accused persons' responsibility for criminal conduct and their blameworthiness for their actions lies in identifying the causative role of ASD and its repercussions for the imposition of custodial sanctions. The reality of ASD is that it is easily misdiagnosed as it can easily fail to be identified, it can co-exist with a variety of other disorders – anxiety, depressive and personality - and it can be highly exculpatory or at least explanatory. On other occasions though it is no more than part of a context and is not particularly mitigating at all. More than simply identifying the disorder by correct diagnostics, the real issue for mental health professionals is to evaluate in a rigorous and informed way how ASD fits into the picture of criminal culpability for a particular individual in respect of particular conduct at a particular time.

9. Cases

IA v The Queen [2005] EWCA Crim 2077.

McC v The Queen [2007] NSWCCA 25.

McGraddie v McGraddie [2009] ScotCS CSOH 142.

Parish v DPP (2007) 17 VR 412; [2007] VSC 494.

R v George [2004] NSWCCA 247.

R v Hampson [2011] QCA 132.

R v Mueller (2005) 62 NSWLR 476; [2005] NSWCCA 47.

R v Sokaluk [2012] VSC 167.

R v Somogyi, 2011 ONSC 483.

State of Western Australia v Mack [2012] WASC 127.

ZH v The Commissioner of Police for the Metropolis [2012] EWHC 604.

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