

roduce information regarding other potential outcomes of childhood abuse, such as difficulty controlling anger and an increased likelihood of committing violent acts.

Discussion

Defining the role of a defendant's own history of victimization in determining culpability and sentencing is a difficult task. In the present case, numerous individuals testified that Ms. Gonzales had been abused as a child and as an adult. This history of trauma and victimization has many implications for an individual's interpersonal functioning and development (Fergusson DM, Boden JM, Horwood LJ: Exposure to childhood sexual and physical abuse. . . . *Child Abuse Neglect* 32:607–619, 2008; Tyler KA: Social and emotional outcomes of childhood sexual abuse. . . . *Aggress Violent Behav* 7:567–589, 2002) and is associated with later problems with substance use (Fergusson DM, Horwood LJ, Lynskey MT: Childhood sexual abuse and psychiatric disorder in young adulthood. . . . *J Am Acad Child Adolesc Psychiatry* 35:1365–1374, 1996; Widom CS, Ireland T, Glynn PJ: Alcohol abuse in abused and neglected children. . . . *J Stud Alcohol* 56:207–217, 1995), as well as difficulties with emotion regulation (Tyler 2002); therefore, a history of trauma may very well be an important mitigating factor, although it was not found to be for Ms. Gonzales. It is interesting to reflect on when a defendant's history of victimization should be considered in legal cases and when the nature of the crime precludes the consideration of these factors.

Relatedly, even when a defendant's history of trauma is not considered as a mitigating factor, it may still have bearing on the legal proceedings. For example, in the present case, Ms. Gonzales was required to participate in several psychiatric evaluations. One of these evaluations was with a male psychiatrist who worked with her husband, and she chose not to participate. When someone has a history of victimization, it may be important to be more sensitive when assigning an evaluator. The failure to recognize that someone with a history of trauma may have difficulties communicating honestly and openly with individuals that remind them of a perpetrator may produce a situation in which it appears that the defendant is being uncooperative, when it may truly be a function of the pathology.

The matter of improper profile evidence in this case deserves discussion. This concern has come up in other cases where psychiatric profile evidence was used as an aggravating factor in penalty phases. For example, Cal. Penal Code § 190.3 (1995) does not list mental illness as a permitted aggravating factor; however, in *People v. Smith*, 107 P.3d 229 (Cal. 2005), the court ruled that it can be introduced as an aggravating factor as long as it is more probative than prejudicial in understanding the circumstances of the crime. Ultimately, the court ruled that testimony regarding psychiatric diagnosis or profile description is improper profile evidence only when the information presented has a large bearing on guilt or innocence. Ms. Gonzales' history of childhood abuse was noted during testimony as a factor that can increase the odds that an individual will behave violently. Although this information was not presented as proof of her guilt, it may have influenced how the jury viewed her potential for future violence as well as her involvement in Genny's fatal injuries. Given that a substantial number of defendants of violent crimes have trauma histories and are victims of childhood abuse, it is important to consider fully how these factors should be responsibly represented in the courts.

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Altered Mental State Tolls Statute of Limitations in Medical Malpractice Case

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Two-Year Statute of Limitations for Filing Wrongful-Death Claim Tolled Due to Patient's "Mental Disorder" Before Death

In *Maycock v. Hoody*, 799 N.W.2d 322 (Neb. 2011), the Supreme Court of Nebraska dismissed a medical malpractice and wrongful-death suit on the basis that the appellant failed to rebut the *prima facie*

case, but held that the two-year statute of limitations for the case should be tolled as previously established by the Nebraska Court of Appeals. The court held that a comatose medical patient has a *de facto* medical condition that should be extended to the person representing the patient after his death as justifying a delay in filing the paperwork for the lawsuit.

Facts of the Case

Marty A. Maycock (age 21), was a patient at Bergan Mercy Medical Center, an Alegent Health hospital, from November 17, 2005, until his death on November 22, 2005. Dr. James Frock, a board-certified nephrologist, was called in for consultation by Dr. Steve Hoody, a family medicine doctor (a defendant who was dismissed from this case, although the case bears his name). Dr. Frock's report indicated that he suspected an antifreeze overdose based on the observed severe health consequences (oliguria, acute renal failure, severe increase in anion gap metabolic acidosis, and hyperkalemia). When asked by Dr. Frock, Mr. Maycock acknowledged that he had drunk a large amount of antifreeze. Mr. Maycock was hospitalized; his condition deteriorated throughout the day of November 17, and he ceased to give coherent verbal responses and became more restless. On the morning of November 18, he was described as resting quietly in bed, eyes closed, and responding by opening his eyes to sound, but not giving responses to orientation questions and not following commands. He was intubated and placed on a ventilator that afternoon. His care was overseen by several physicians. On November 22, Mr. Maycock was diagnosed with septic shock and was comatose; he died later that day. Mr. Maycock, Sr, as special administrator of the estate of his deceased son, filed suit on Monday, November 26, 2007, but, because of the Thanksgiving holiday, it was considered to be effectively brought on November 22. The suit listed several doctors and Alegent Health. Three of the treating and consulting physicians established in their affidavits that they had met the requisite standard of care. The district court granted summary judgment for these defendants as the estate failed to rebut their *prima facie* case. The district court also dismissed the case against Alegent Health.

Four other doctors who cared for Mr. Maycock filed affidavits in support of their motions for summary judgment on the sole basis that the estate claims against them were barred by the statute of limita-

tions; that is, the treatment they provided occurred before the two-year deadline for the date of filing on November 22, 2007. The district court granted summary judgment, dismissing claims against the doctors as time barred, on the basis of the two-year statute of limitations on professional negligence applicable under the Nebraska Hospital-Medical Liability Act (NHMLA) (Neb. Rev. Stat. §§ 44-2801–44-2855 (2007)).

The estate appealed. The court of appeals ruled that Nebraska law allows for the tolling of the statute of limitations on condition of the existence of a mental disorder and reversed the district court's ruling. The doctors petitioned the Supreme Court of Nebraska for review of the appellate court's decision.

Ruling and Reasoning

The supreme court held that the appellate court had correctly reversed the district court's summary judgment in favor of the doctors on the basis of accurate application of Nebraska law, which allows for tolling the two-year statute of limitations in the presence of mental disorder (Neb. Rev. Stat. § 25-213 (2007)). The court of appeals has defined mental disorder for the purposes of this statute as "a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action" (*Maycock*, p 329).

The court disagreed with the doctors' argument that, because the case had been brought by the estate of Mr. Maycock, and the law applied only to the person with the mental disorder, tolling was not applicable. The court cited Neb. Rev. Stat. § 25-213 (2007), according to which tolling may be invoked by "a person entitled to bring any action mentioned in . . . the NHMLA" [Nebraska Hospital-Medical Liability Act]. Such a person includes a representative of a patient: the "personal representative inherits the benefits and burdens connected with running of any applicable statute of limitations applicable to decedent" (*Maycock*, p 328). The court further concluded that the state of being unconscious and unresponsive constitutes a mental disorder and remanded the case for further proceedings.

In its reasoning, the supreme court cited cases in other states in which courts had ruled similarly. The court also held that if an issue is not raised at the appropriate stage of the proceedings in a lower court, it cannot be raised *sua sponte* on appeal, thereby dismissing the doctors' argument on appeal that they

had met requirements of standard of care and should prevail in the case.

Discussion

At the time of this commentary, the case was back in the district court. Although the case raises questions of legal strategy, the relevant concern for forensic psychiatrists and psychologists is the court's view of what constitutes mental impairment. Many physical illnesses and severe traumas result in coma and altered consciousness; under those circumstances, a diagnosis of mental disorder is rarely applied. Yet under Nebraska law, the tolling could hold a medical team liable for months and potentially years in cases of prolonged coma or consequences of severe brain damage. The court applied a common sense view that Mr. Maycock was not able to make decisions for himself because of an altered mental state. Notably, however, the facts of the case suggest that, in early interviews with the doctors, he was able to respond to questions. His condition deteriorated over time, but not before doctors determined that he had ingested antifreeze, the poison that resulted in his physical deterioration, coma, and death.

This case has several other interesting dimensions. First, a presumably competent representative was given the tolling right, even though no type of incapacitation prevented him from pursuing the legal claims in a timely manner. Second, the apparently simpler defense based on the formalities of the statute of limitations proved to be far less prudent than the more complex defense invoking affidavits regarding standards of care. Finally, although the Nebraska Court of Appeals determined that Mr. Maycock was "undisputedly . . . suffering from a mental disorder, i.e., incapacitated" (*Maycock*, p 329) on November 22, 2005, when he became comatose, questions of material fact remained as to whether he was incapacitated before November 22. Since the suit was filed on November 22, 2007, this determination is critical to the two-year statute of limitations. For example, Mr. Maycock appeared to be largely unresponsive to efforts at communication on November 18, as described earlier. If he were found to be incapacitated on that date, the two-year statute of limitations would presumably have expired on November 18, 2007. The final determination of these findings is still being litigated at the time of this review.

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Civil Commitment of Native American Sex Offenders: Do States Have Jurisdiction?

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State Interests in Public Safety Weighed Against Federal Law Protecting Tribal Authority

In *In re Civil Commitment of Johnson*, 800 N.W.2d 134 (Minn. 2011), the state of Minnesota sought to commit two Native Americans on the basis of their histories of criminal sexual acts. Both individuals appealed, arguing that the district court had no jurisdiction over them as Native Americans. The Minnesota Supreme Court had to balance state interests against federal laws protecting tribal authority. The court's reasoning gave consideration to the classification of the commitment of sexually dangerous persons as a civil rather than a criminal matter. The court also considered where civil commitment falls on the dividing line between private and civil regulation.

Facts of the Case

Jeremiah Jerome Johnson was an enrolled member of the Bois Forte Band of the Minnesota Chippewa Tribe. In 2003, at age 17, he sexually assaulted a 15-year-old girl. He pleaded guilty to a false imprisonment charge for this offense. Two years later, Mr. Johnson forced another 15-year-old girl to have sexual intercourse, and he pleaded guilty to fourth-degree criminal sexual conduct. Mr. Johnson was successfully committed to the Minnesota Sex Offender Program in 2009, after the district court determined that he satisfied the statutory requirements for commitment as a sexually dangerous person (Minn. Stat. § 253B.02(18c) (2009)) for conduct committed on and off the reservation. The court made Mr. Johnson's commitment indeterminate later that year.

Lloyd Robert Desjarlais was an enrolled member of the Minnesota Chippewa Tribe. In 2002, at the