preme Judicial Court of Maine stated, "[I]n evaluating whether evidence of the defendant's abnormal mental state raises doubt as to the intentional quality of the defendant's actions, the fact-finder should consider the relationship between the defendant's mental state and evidence that the defendant in fact acted purposefully and appreciated the consequences of his or her actions" (*Graham*, p 1108). The trial court held that Mr. Graham had a mental abnormality at the time of the incident, but he was acting intentionally at that time, despite the presence of that abnormality. The Supreme Judicial Court of Maine agreed with the way in which the trial court analyzed whether Mr. Graham possessed the requisite intent to commit attempted kidnapping and assault, viewing the evidence most favorable to the state.

Discussion

The holding of *State v. Graham* illustrates the point that having a mental abnormality at the time of an alleged crime does not automatically preclude a person from having a culpable mental state. An individual can be mentally ill when he commits a crime and still be held fully responsible for the crime, because he knew what he intended to do when he committed the criminal act. Compare this with the affirmative defense of pleading not guilty by reason of insanity. Just because a person may have a mental illness at the time of a crime does not mean that the person does not know the wrongfulness of his acts. In the same way, just because a person may have a "mental abnormality" at the time of a crime does not mean that he lacks intentionality (i.e., lacks the requisite criminal intent) in his acts.

The burden of proof for an insanity plea differs from the burden of proof for showing requisite criminal intent. Although the burden of proving insanity varies by state, it typically rests with the defendant. In contrast, the prosecutor always has the burden of proof with regard to whether a defendant formed requisite criminal intent. *State v. Graham* is a case in which the prosecution had to prove a culpable mental state for an attempted kidnapping. Attempted crimes, such as attempted kidnapping, are more difficult for the prosecution to prove requisite intent (compared with completed crimes), because the prosecution must show what is actually in the defendant's mind at the time of the crime without the ability to show that the defendant committed the criminal act.

According to Maine's laws, a person who has a mental abnormality at the time of the offense may not be capable of forming requisite intent. Most states allow evidence of a person's mental disorder to be used in assessing a person's culpable mental state at the time of the commission of a crime. Contrast this with *Clark v. Arizona,* 548 U.S. 735 (2006), a U.S. Supreme Court decision that allowed the state of Arizona to prohibit defendants from introducing evidence of mental illness to rebut evidence of requisite criminal intent. The decision in *Clark v. Arizona*, 548 U.S. 735 (2006), does not prevent states (e.g., Maine) from using mental health testimony to assist the trier of fact in determining a defendant's ability to form requisite intent. *State v. Graham* is a clear example of a court weighing whether mental illness rebuts evidence of requisite criminal intent.

The determination of whether a mental abnormality impairs a person's ability to form requisite criminal intent requires a thorough forensic mental health assessment, including an assessment of mental state at the time of the offense. Forensic psychiatrists and psychologists have the skills needed to perform these evaluations to assist the trier-of-fact to answer the ultimate issue in this type of case.

Disclosures of financial or other potential conflicts of interest: None.

Standard for the Disclosure of Mental Health Records When Damages Are Sought for Nonspecific Mental Disability and Mental Pain and Suffering

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Defendants Bear the Burden of Proof When Seeking Patient's Waiver for Mental Health Records

In *Fagen v. Grand View University*, 861 N.W.2d 825 (Iowa 2015), the Iowa Supreme Court answered

whether a defendant in a civil case is entitled to a signed patient's waiver from the plaintiff to obtain that party's mental health records when plaintiff seeks to recover psychological damages. The trial court ordered the plaintiff to sign an unrestricted waiver for mental health treatment records. Interlocutory appeal was granted.

The Supreme Court of Iowa reversed and remanded. The justices adopted a protocol for balancing the probative value of the information with the privacy of plaintiff's privileged mental health treatment records.

Facts of the Case

Cameron Fagen, a college student at Grand View University, Des Moines, Iowa, sustained physical injuries after being beaten by fellow students on April 12, 2012. One of those fellow students was Ross Iddings. Mr. Fagen was forced to the ground, wrapped in a discarded carpet that was secured with duct tape and propped against walls while other students beat him. During the course of this abuse, Mr. Fagen fell over, hit the ground face first and shattered his jaw. His injury required transfer to a tertiary trauma center and surgical intervention.

Mr. Fagen initially filed a petition against six of the students involved in the assault, as well as Grand View University. However, before the time of this appeal, Mr. Fagen modified his claims. He asserted an assault and battery claim against Mr. Iddings and asserted negligence and premises liability against Grand View University and their security company, NPI Security.

Mr. Fagen alleged that he suffered severe and painful permanent injuries and had endured and would continue to endure great physical and mental pain, physical and mental disability, and loss of enjoyment of life. Mr. Fagen also alleged he had incurred past, and would incur future, medical expenses and a loss of earning capacity related to those injuries.

During deposition, Mr. Fagen disclosed a history of anger management treatment when he was in the fourth through sixth grades. Mr. Iddings requested the Mr. Fagen sign a release waiving privilege to his mental health records. Mr. Fagen refused. Mr. Iddings then filed a motion compelling the discovery. Mr. Fagen filed a resistance to the motion citing patient–physician privilege and a constitutional right to privacy.

Mr. Fagen argued that he was not required to release his records for several reasons: he had not sought mental health treatment as a result of the assault, which is the subject of this case; he was claiming damages related only to "garden variety" pain and suffering and mental distress (which he defined as "the emotional suffering any normal person would have experienced if they had been the victim of an assault like the one he experienced") and not for a specific psychiatric or psychological condition (*Fagen*, p 829); he had a constitutional right to privacy in those records that created an absolute patient–psychotherapist privilege and Mr. Iddings failed to provide the requisite necessity or compelling need to overcome that privilege.

The district court ordered Mr. Fagen to sign an unrestricted patient's waiver for records within five days. Mr. Fagen filed an application for interlocutory appeal, and it was granted by the Iowa Supreme Court.

Rulings and Reasoning

The majority (six to three) reversed the lower court's decision requiring Mr. Fagen to sign a patient's waiver for his mental health records. The opinion outlined a protocol to be used in determining when such waivers are appropriate. Mr. Fagen's case was remanded for reconsideration in light of the court's opinion.

The majority disagreed that Mr. Iddings was automatically entitled to all of Mr. Fagen's mental health records, once allegations of mental disability and mental pain and suffering were made. They also disagreed with Mr. Fagen's position. The majority found that a balance must be struck between the two positions.

Citing their opinion in *McMaster v. Iowa Bd. of Psychology Examiners*, 509 N.W.2d 754 (Iowa 1993), the court noted that under Iowa law, patients have a constitutional right to privacy in their medical records, but that the privilege is not absolute. They used a balancing test to determine whether the privilege attaches. A five-part protocol was adopted to determine whether a patient's privacy interest in his or her mental health record must yield to the competing interests of the board (*McMaster*, pp 758–760).

The court noted that Iowa does not recognize a common law patient–physician privilege; however, Iowa Code § 622.10 (2013) protects a person's pri-

vacy interest in confidential communications made to certain professionals, but recognizes the patient-litigant exception. Section 622.10 recognizes two competing interests: a patient's right to privacy and the need of a defendant to present a full and fair defense to the plaintiff's claims.

Reminiscent of the *McMaster* protocol, the majority found:

> . . . the party seeking the waiver must make a showing that he or she has a reasonable basis to believe the specific records are likely to contain information relevant to an element or factor of the claim or defense . . . , need only advance some good faith factual basis demonstrating how the records are reasonably calculated to lead to admissible evidence germane to an element or factor of the claim or defense . . . , and must show a nexus between the records sought and a specific claim or defense made in the case. If a party can make this showing, the patient-physician privilege is lost as to those records and the party requesting the waiver shall be entitled to the waiver to obtain those records within the scope of discovery [*Fagen*, p 835].

The majority reasoned that using this protocol would allow the court to determine when the record relates to the condition alleged by a party and therefore should be released.

Dissent

Justice Mansfield, writing for the dissent, opined that Mr. Fagen's appeal should be rejected for three reasons: the plaintiff is alleging "mental disability" which is not the same as "garden-variety" emotional distress; Iowa Code § 622.10 (2013) does not allow for a garden-variety exception; and in the personal injury context, garden-variety exceptions could be construed as either an attempt to obtain "double recovery" (from garden variety emotional distress and pain and suffering) which is not permitted, or as an attempt to obtain compensation for mental health injuries different from and more extensive than the typical "anguish, grief, distress, fear, and pain and suffering," which amounts to putting his mental health condition at issue, and therefore Iowa Code §§ 622.10(2) would apply.

Discussion

Mental health records are privileged, meaning that the patient has a right to prevent treating clinicians from disclosing the records. There are certain exceptions to this privilege including imminent violence, medical emergencies, and the patient-litigant exception, at issue in this case. When a patient places his mental health at issue by seeking psychiatric damages, he cannot block access to information material to that claim.

In re Lifschutz, 467 P. 2d 557 (Cal. 1970) illustrated that the patient, not the psychiatrist, had the testimonial privilege. Joseph Lifschutz was held in contempt for refusing to release his treatment records for a teacher, who had alleged "physical injuries, pain, suffering and severe mental emotional distress" as the result of an assault by a student. Dr. Lifshutz had declined to release the records even though his patient had not objected to the release. The court found that the patient himself had waived the privilege as it applies to information relevant to the claim.

Later in *Jaffee v. Redmond,* 518 U.S. 1 (1996), the U.S. Supreme Court recognized the psychotherapist–patient privilege. Officer Mary Lu Redmond was accused of using excessive force when she shot and killed Ricky Allen, Sr., a suspect in an attempted assault. When she sought to withhold records of the counseling she received from Karen Beyer, a social worker, after the shooting, the jury was instructed to assume that the counseling notes contained incriminating information. The Supreme Court found that the lower court had erred in their jury instructions, because there was never an assertion that Ms. Redmond had waived her patient–psychotherapist privilege. The records were confidential and protected by an absolute federal common law privilege.

The decision in *Fagen* is consistent with both *Lifschutz* and *Jaffee*; a psychotherapist–patient privilege exists until it is shown that an exception is warranted. In *Fagen*, the Iowa Supreme Court outlines a protocol for balancing the patient's privacy with the probative value of the protected information.

Disclosures of financial or other potential conflicts of interest: None.

Determining Intellectual Disability in a Post-Atkins Death Penalty Case

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