

forensic evaluations that are accurate, fair, and avoid deception (APA, 2013; Guideline 11.01). For example, because of the factors often unique to forensic contexts, practitioners should make sure to consider matters such as low effort, response style, and malingering (APA, 2013; Guideline 10.02). As noted by both the district court and the appeals court, some of the reports offered in this case failed to meet the standards described in the guidelines above and therefore did not equally weigh in the decision of whether to reconsider the burden of proof.

The law and clinical forensic practice have long had a complex relationship, attempting cohesion despite different aims and boundaries. Also important in this case was the ability of the psychologists to convey their assessment techniques and forensic opinions in a way that was interpretable and useable by the trier of fact. When reports that fall short of expectations enter the court room, they can contribute to a poor reputation for the field, serve as an injustice to decision makers, and improperly affect individual rights. A high-quality report, therefore, is not simply answering the question, but doing so in a way that provides the best supported, clearly inferred, and most comprehensive opinion. This opinion must also consider specific legal nuances without sacrificing quality and maintaining neutrality. Ultimately, the work undertaken by forensic practitioners affects not only the individual evaluator, but also the credibility of the entire field of forensic evaluation as well as the liberty of those they evaluate. Toward this end, specific training and competence in the specialty area of clinical forensic practice is important to the ethical execution of justice and protection of individual rights.

Jury Instruction on Criminal Responsibility Defenses Involving Voluntary Intoxication

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Substantial Likelihood for Miscarriage of Justice Existed with Model Jury Instructions for Insanity Defenses in Cases Involving Mental Illness Caused by Voluntary, Chronic Substance Use

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Key words: insanity defense; voluntary intoxication; settled insanity

In *Commonwealth v. Dunphe*, 153 N.E.3d 1254 (Mass. 2020), the Supreme Judicial Court of Massachusetts held that there was a significant risk that the jury misunderstood a model jury instruction on criminal responsibility. With this, justice demanded that the defendant's conviction be vacated and the case remanded for a new trial.

Facts of the Case

Aldo Dunphe had a six- to seven-year history of smoking large quantities of cannabis most days. In February 2013, Mr. Dunphe's wife (then fiancée) noticed behavioral and personality changes, including increased paranoia around her fidelity. In the following months, his mental health deteriorated, and on November 1, 2013, Mr. Dunphe was psychiatrically hospitalized on a voluntary basis. Clinicians diagnosed him with psychosis not-otherwise-specified because they were unable to disentangle his cannabis use from a potential preexisting mental disorder. He did not use any cannabis following his admission. During a family visit on November 2, 2013, Mr. Dunphe claimed his biological father (Mr. Dunphe is adopted), who abused him as a child, was another patient on the psychiatric ward (his biological father resides in Guatemala). He repeated this delusion to a nurse two days later.

On November 5, Mr. Dunphe killed the patient he claimed was his father. He thereafter washed his hands and returned to his room, where he was found by police laying on his bed with the victim's blood on his clothing. He told police that the victim threatened to kill him and that he waited for the nurse to leave the victim's room before he entered the room and grabbed the victim by the neck, took him to the ground, punched him, and stuffed towels in his mouth and nostrils. He stated he intended to beat the victim but not to kill him. Later that day, when interviewed by two additional police officers, Mr. Dunphe admitted to killing the victim. He told the

officers that the victim was his biological father, was responsible for keeping him hospitalized against his wishes, and had threatened to kill him.

During the jury trial, Mr. Dunphe presented an insanity defense. The defense expert testified that Mr. Dunphe had schizophrenia and, per Massachusetts's insanity standard articulated in *Commonwealth v. McHoul*, 226 N.E.2d 556 (Mass. 1967), as a result of mental disease or defect, he lacked both the capacity to appreciate the wrongfulness of his conduct and the ability to conform his behavior to the requirements of the law. This expert opined Mr. Dunphe could have been experiencing some symptoms of cannabis withdrawal, but this withdrawal could not explain his delusions and hallucinations and thus did not explain his psychiatric symptoms at the time of the attack. In contrast, the Commonwealth's expert diagnosed "substance-induced psychotic disorder and a cannabis withdrawal condition" (*Dunphe*, p 1261) that caused hallucinations and opined Mr. Dunphe did not have a mental disease or defect at the time of the offense. Further, he opined Mr. Dunphe understood murder was against the law and that he had the capacity to conform his conduct to the law. Following the provision of model jury instructions regarding the insanity defense, Mr. Dunphe was convicted of first-degree murder with extreme atrocity or cruelty and assault and battery causing serious bodily injury.

Mr. Dunphe filed a motion for a new trial and to reduce the verdict. This motion was based, in part, on arguments that there was insufficient evidence to find him criminally responsible beyond a reasonable doubt and that the jury instructions on insanity created a substantial likelihood of a miscarriage of justice. Mr. Dunphe argued a conviction of second-degree murder was more appropriate as he had established mental illness, not substance use, was the primary cause of his behavior at the time of the offense. His motion was denied. Mr. Dunphe appealed his conviction and the denial of his motion to the Massachusetts Supreme Judicial Court, primarily arguing the jury instructions "created a substantial likelihood of a miscarriage of justice" (*Dunphe*, p 1262).

Ruling and Reasoning

Regarding the first argument, the court concluded that a reasonable juror could have accepted the opinion and rationale of the Commonwealth's expert regarding Mr. Dunphe's mental disorder and

criminal responsibility; thus, he was not entitled to an acquittal.

In considering the second argument, in Massachusetts, when a mental state defense is raised, the Commonwealth must prove beyond a reasonable doubt that the defendant was criminally responsible at the time the alleged offense occurred. The lack of substantial capacity to appreciate the wrongfulness or to conform one's conduct must be a result of mental illness and not primarily a result of voluntary intoxication. The court noted that case law indicates the origin of the mental disease or defect is irrelevant, and, therefore, a mental disease or defect resulting from long-term use of substances or induced disorders lasting beyond the point of intoxication are recognized as bases for insanity defenses; thus, defenses on the basis of fixed and settled insanity are acceptable in the Commonwealth.

These distinctions were not clearly indicated in the model jury instructions. The model jury instructions provide three scenarios to clarify the interaction between voluntary substance use and mental illness and under which circumstances a lack of criminal responsibility should be decided. One scenario is that a defendant's mental disease or defect itself caused the lack of substantial capacity even though the defendant was under the influence of drugs or alcohol at the time of the alleged offense. A second scenario is that a defendant has a mental disease or defect and use of drugs or alcohol triggered or intensified the preexisting condition, which then caused the defendant to lose substantial capacity; when this occurs and the defendant did not know the use of drugs or alcohol would cause this to occur, the defendant is not criminally responsible. Third is when a defendant has a mental disease or defect and "knew or had reason to know" (*Dunphe*, p 1263) use of drugs or alcohol could trigger or intensify the mental illness; this is viewed as voluntary consumption of drugs and the defendant is found criminally responsible. As written, however, the instructions did not clearly indicate that a mental disease or defect eventually arising from chronic voluntary substance use can qualify for an insanity defense in the Commonwealth.

The court agreed with Mr. Dunphe that, as written, the model jury instructions regarding criminal responsibility could have created confusion and a substantial likelihood of a miscarriage of justice. The court identified two potential problems regarding the language related to the cause or origin of the mental

disease or defect and its interaction with voluntary intoxication. The court noted that there was no dispute that Mr. Dunphe was not under the influence of cannabis at the time of the offense. The Commonwealth expert opined, however, that the symptoms were a result of a drug-induced psychosis and the prosecutor's statements emphasized the impact of voluntary, long-term cannabis use on the defendant's brain. These inferences, combined with the instruction that a defendant is not entitled to a criminal responsibility defense if voluntary intoxication is the cause of a lack of substantial capacity, may have led a reasonable jury to conclude erroneously that a mental disease or defect caused by chronic cannabis use (i.e., settled psychosis) is not recognized as a mental disease or defect under the law. Further, the court decided that, because Mr. Dunphe was not intoxicated at the time of the offense, the third scenario ("knew or had reason to know" that voluntary intoxication could worsen psychiatric symptoms) did not apply in this case. Ultimately, the court ruled the jury instructions for mental state trials should be amended to reflect the intention of the court and the case law of the Commonwealth. Mr. Dunphe's convictions were vacated, and his case was remanded back to the superior court for a new trial.

Discussion

In *Dunphe*, the court provided a review of the relevant case law in the Commonwealth that serves as a basis for insanity defenses. It also dissected the jury instructions related to the defense. The court concluded that the instruction pertaining to the origin of mental disease or defect, as written, could have been misinterpreted by a reasonable jury. To that end, the court amended jury instructions to reflect more accurately the intent that the origin of a defendant's mental disease or defect need not be considered when deciding criminal responsibility.

Case law in Massachusetts establishes numerous avenues whereby a defendant can be considered not criminally responsible. A defendant can be found not guilty by reason of insanity as a result of cognitive or volitional impairments. In addition, in the stated spirit of not criminalizing mental illness or addiction, the court used *Dunphe* to clarify the meaning of the Commonwealth's case law around this matter. It made clear that cases of fixed or settled insanity secondary to substance use qualify for an insanity defense. The ruling further codified the intent of the

court by amending provisionally the model jury instructions to ensure jurors understand substance use that induces settled insanity is indeed a reasonable affirmative defense. This ruling did not expand the standard, but rather clarified case law in the Commonwealth under which a defendant can be considered not guilty by reason of insanity.

Mental Health Pretrial Diversion

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A Retroactive Application of a Mental Health Pretrial Diversion Program Is Allowed

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In *People v. Frahs*, 466 P.3d 844 (Cal. 2020), the Supreme Court of California considered whether a statute creating a mental health pretrial diversion program could be applied retroactively. The court ruled the statute can be applied retroactively because it could have an ameliorative effect, there was no "savings clause" (exemption from the statute's operation), the California legislature did not signify an intent for the statute to be prospective only, and the judgment in the case was not final at the time the statute was enacted. The court ruled a conditional remand was appropriate to determine eligibility for the diversion program.

Facts of the Case

In March 2016, Eric Frahs was throwing rocks at vehicles in front of a store he later entered, where he attempted to steal beverages and then punched the store owner. He was subsequently charged with two counts of second-degree robbery and one count of throwing a substance at a motor vehicle with intent to cause injury.