AAPL: Ask the Experts-2021

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Neil S. Kaye, MD, DFAPA and Graham Glancy, MB, ChB, FRC Psych, FRCP (C), will answer questions from members related to practical issues in the real world of Forensic Psychiatry. Please send questions to nskaye@aol.com.

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Q: I have been hired by defense (insurer) to review a case. The person crashed his car claiming that he did so on purpose to allow him to be picked up by the spacemen on a passing comet and that so doing "would save the world as is written in scripture." In the accident, he seriously injured a pedestrian as well. The man was grossly psychotic at the time and has a long history of schizophrenia and was off his meds. The questions asked are: Did he have a "conscious understanding of what he was doing," was this an "intentional act," and if he did purposely crash his car (even if it was in the service of a delusion) should he be responsible for injuring the pedestrian? Can I get your expert thoughts?

Kaye:

Wow! I have done a number of analogous cases, so let's unpack the real issues. Remember, it's always best to clarify the question you are being asked. I find it best to make certain that I understand the standard being used to decide the issue. This is not a criminal case and while it might be considered "civil," really, it's an insurance case and decisions are based on the legal interpretation of the insurance (contract) that covers this act/event. The language in this policy seems to state that coverage can be denied if the act was "intentional" and the perpetrator had a "conscious understanding" of what he was doing.

The "facts" as described include that he intentionally crashed his car, so he clearly knew what he wanted to do and followed through. One could argue that his "intent" was to be picked up by the space aliens and thus save the world, but in my experience, that argument is only likely to work if he denies that he deliberately crashed the car. Similarly, as it is foreseeable that crashing a car could easily injure the pedestrian, I would expect that he is responsible for that action as well. That might be a criminal act, and I can't guess as to whether or not his auto policy covers foreseeable injuries to a third party, although it may well have such a clause. This could lead to a situation where his insurance won't pay him for his injury/loss but would cover the pedestrian's costs, both arising from the same incident.

In some of these cases, I have suggested that the insurer may want to raise the issue of was this person's care (often intensive community treatment via public sector) within the standard of care as there may be an associated issue of liability that they haven't considered.

As for evaluating the individual, I doubt that it is likely to be of benefit in that their ability to accurately remember what they did and their reasoning while in such a psychotic state is unreliable and subject to

significant distortion. The police accident investigation report and the medical records immediately prior to the incident and in the emergency room immediately after may be the better sources. At the same time, you can be criticized for not doing an interview, so often this will be done merely to meet the ethical expectation and to satisfy outside interests.

Glancy:

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When an expert is retained by the defense in a civil action this most often entails a third-party insurance company that is litigating a case on the basis that most insurance companies have an exclusionary clause that that states that they are not liable if the act was "the product of an intentional act." It is, from a non-lawyer's point of view, understandable that insurance companies would want to prevent a person from signing one day to insure their house for $1 million, only to set it on fire the next day and claim the insurance. Former Supreme Court Justice Frank Lacobucci, also former dean of law and former president of the University of Toronto, put it this way: "The insurance system is for fortuitous, contingent risks, losses unforeseen or accidental. Therefore intentional acts are generally not covered" (Ref. 1, para. 67–71).

I have been involved in a number of these cases, mainly involving a person setting a house on fire. The legal question generally comes down to whether this act was motivated by factors inherent in a mental disorder with which the individual may have been diagnosed. This might include, for instance, a person with schizophrenia, experiencing delusions and hallucinations, setting fire to a house to rid the house of some delusional spirits or agents. Another scenario that I have come across, and is reported in the literature, is when a person sets a house on fire in order to effect their own suicide. The question comes down to whether the act of arson is an intentional act. Since there are frequently large sums of money involved, these cases may be vigorously litigated. From a forensic psychiatric point of view, they can be both challenging and intellectually stimulating.

In the case noted above, the member should ask for access to the person involved so as to be consistent with the ethics of AAPL.[2] It may well be they are not allowed access to the person, and therefore a file review is ethically acceptable and the only recourse. If you are allowed access, a full not guilty by reason of insanity assessment should be completed.[3] This would include personal interviews, collateral information from relatives and acquaintances, previous medical and psychiatric records, personal records, custodial records, police interviews, and review of the full police disclosure file. As in any insanity defense evaluation, consideration should be given to the use of psychological testing, brain imaging, and other special procedures relevant to the case.

The next task is to consult with the retaining attorney regarding a number of questions. First, it will be necessary to review the policy and the wording of the exclusionary clause. Second, it will be important for you and the attorney to review the relevant law in the particular jurisdiction. Generally speaking, as forensic psychiatrists, we are most familiar with the interpretation of the criminal laws governing the not guilty by reason of insanity defense in a particular jurisdiction. When I first began doing these cases, I was surprised to discover that civil law approaches this matter quite differently. In Ontario, although the law is administered through the province of Ontario, we are governed by a common Criminal Code of Canada, which sets out the law. We have a modified M'Naghten law, which basically substitutes appreciation for knowing (the nature and quality of the act); it also includes the concept of knowing the act was wrong. This has been interpreted as being able to apply a rational decision making process at the time of the act.[4]

In civil law, however, a much stricter application has been taken. In the case of *Darch Estate v Farmers Mutual Insurance Co.* (2011),[5] Mr. Darch set fire to the house where he had resided with his parents all his life. He was diagnosed as suffering from a form of schizophrenia, cannabis use disorder, and possibly a traumatic brain injury. He was found not criminally responsible due to mental disorder in criminal court. The judge in the civil case said that the test is whether he "appreciated the nature and

consequences of the act." Note that this is different from the wording of the Criminal Code, which says "appreciate the nature and *quality* of the act." The judge explained that this was in the sense that Mr. Darch knew the physical aspect of what he was doing and knew what would flow from these actions. He noted that the exclusionary clause denied the claim if the act was intentional. He took the interpretation of intent from a previous case (*Whaley v Cartusiano,* 1987[6]), which stated that intent should be given the ordinary and popular meaning or the common usage of the word. In the case of *Whaley*, the defendant had argued with his wife and then walked across the street and shot a neighbor whom he did not know. Even though he was found not guilty by reason of insanity, as was the law at that time, it was found that the exclusionary clause applied. In *Darch*, as we have discussed above, even though the defendant was suffering from delusions and hallucinations when he set the fire, it was concluded that he knew the physical consequences of the act. Alluding to the final clause of the insanity laws, it was noted that in civil law, the court was not concerned with whether Mr. Darch knew the act was wrong, since this goes to the morality or apportioning of blame.

I hope I have not bored readers with this review of Ontario law. The law will likely be interpreted differently in each jurisdiction, and may well be interpreted differently in civil and insurance law than it is in criminal law. It is incumbent upon the forensic psychiatrist to realize this and acquaint themselves with the law in their particular jurisdiction.

Take Home Points:

Remember to read the fine print in any case involving insurance claims and to focus on the section where terms are defined. Make sure you understand the question being asked and the standard being used by the trier of fact. A narrow and carefully tailored opinion is often best in a complex case.

References

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4. Glancy G, Regehr C. Canadian Landmark Cases in Forensic Mental Health. University of Toronto Press; 2020
5. Darch Estate v Farmers Mutual Insurance Co., OCJ 2971 (2011)
6. Whaley v Cartusiano, OJ 2688 (1987)