

Up Front

COMPETENCY AND BRAIN INJURY

An Interview with Robert Denney, Psy.D.

By Beth M. Hearne

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Robert L. Denney, Psy.D.

What are the specific competencies in the criminal justice process?

From the time a person is first stopped by a law enforcement officer until the time they, in the worst case scenario, are executed, competency is an important factor. There are different legal standards for what specifically constitutes competency at each point in the process; however, they are all based on the same core principle.

What are the constitutional foundations for ‘competency to confess’ in regard to the mental or cognitive functioning of a criminal defendant?

The 5th Amendment of the U.S. Constitution is huge in this regard because it says, “No person shall be deprived of life, liberty, or property, **without due process of law.**” Due process of law means going through a series of steps that will, in and of itself, protect that citizen’s rights. This is a core tenant of American society. It is very, very clear in the criminal justice system that a judge has to be involved, formal charges have to be reviewed, and in many instances, a full trial occurs to decide whether somebody is guilty or not guilty. There are due process safe guards throughout criminal proceedings, at every step along the way.

What does competency mean?

Competency has to be defined in terms of its context. A common use of the term competency is when someone says, ‘I need to go see a physician or some other professional and I want them to be competent.’ That definition implies an advanced level of skill, somebody that we can really trust to be able to do the task that we want done. But in legal terms, in civil, as well as criminal settings, competency is a much different concept; the threshold is not as high. Competency is, in essence, the basic ability to understand the nature and consequences of a particular legal proceeding and make appropriate decisions as the proceeding unfolds.



Another foundation is found within the 6th Amendment. In all criminal prosecutions, the accused “shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,” and they must “be informed of the nature and cause of the accusation; to be confronted with the witnesses against him,” and very importantly this: “to have the Assistance of Counsel.” Individuals have a right to counsel but implied in this clause is they have the right to *effective* counsel. On the other side of the coin, inherent in this right is the freedom to waive the right to due process. An example would be somebody who chooses to plead guilty rather than go through a full trial. Yes, they have the right to a full trial, even in front of a jury, but they may choose to plead guilty and waive that right to due process in that regard. It’s not throwing out all of due process, but they are waiving one particular aspect of it. In some instances, individuals will choose to forego representation by a lawyer and actually represent themselves in their legal case. Whether or not it is a wise choice for the person is another matter, but the competency to make that decision is very basic. As with other competency related decisions, it is important for the person to understand the significance of what he or she is doing and the potential consequences. It may not be the best choice for them, maybe it’s frank bad judgment, but they still have the right to do it, if they are otherwise considered competent by the judge.

Another foundation lies in the 8th Amendment. It is relevant for us in the mental health arena because of the cruel and unusual punishment clause. It basically says, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Criminal defendants have a right to be free from what is considered cruel and unusual punishment. What defines cruel and unusual punishment has varied over the years and it is, of course, established by legal precedent, typically laid down by the U.S. Supreme court. For example, given revisions in the state laws recently,

as well as a general change in viewpoint in the country, we’ve seen changes in regard to the issue of executing those who have mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court said it is not considered constitutionally appropriate to execute a mentally retarded individual regardless of how serious, terrible, or heinous the crime. This is a good example of how the law changes - in many respects it is like a living, breathing process evolving from statutory rules laid down by elected officials and case law set by judges and appellate courts.

As you mentioned, the Supreme Court has altered their opinion on executing someone with mental retardation. How might that decision apply to someone with a brain injury?

It does not specifically apply, but it certainly does not mean that it does not apply. I think the specific issue will probably be litigated in the future. I believe there has been some movement in that regard, and there have been two U.S. Supreme Court cases recently that get close to the issue. One dealt with the presence of an ‘organically based learning disability’ and low IQ as information the jury can use to potentially mitigate against applying the death penalty. The other case raised the issue of a ‘uniquely severe permanent handicap.’ The handicap was related to low IQ, but more importantly, the wording broadens the potential considerations for not imposing the death penalty if that condition appeared to contribute to the crime. Neither of these cases have the impact of an across-the-board prohibition against executing mentally retarded individuals that the *Atkins v. Virginia* decision set in place.

I believe the argument against executing an individual with significant brain injury would be a very good one for defense lawyers to make in some capital cases. The inclusion of traumatic brain injury as an eligible disability under the [Individuals with Disabilities Education Act] (IDEA) adds weight to the argument. Of course, every jurisdiction is going to be a bit different, and eventually the issue would need to be decided by the U.S. Supreme Court, but state jurisdictions could decide the issue without the Supreme Court being involved. It is important to remember that states can, and oftentimes do, provide more individual rights than the minimum required by the U.S. Constitution.

What are the landmark judicial cases involving competency?

The most significant competency case is *Dusky v. United States* 362 U.S. 402 (1960). It has jurisdictional authority throughout the U.S. and has had so much impact that aspects of it have been carried over into Canadian law. In this particular instance, Milton Dusky had chronic, undifferentiated schizophrenia and was charged with kidnapping after assisting two teenagers in the kidnapping and rape of a 16-year-old girl. The trial judge found him competent to stand trial after a mental health professional opined Dusky to be oriented to place and time and to have some recollection of events constituting the offense. Dusky was convicted and appealed, contending he had not been competent to stand trial. The U.S. Supreme Court reversed the conviction and sent the case back to the trial judge for further proceedings.

The U.S. Supreme Court indicated it is not sufficient that a person have a factual understanding of their legal situation - they must have a factual *and* rational understanding. The test for competency to stand trial "must be whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational, as well as factual, understanding of the proceedings against him." All of the states and the federal jurisdiction have adopted this basic competency standard, although the wording can change a little bit. For example, in the federal standard, a

person needs to understand the nature and consequences of the proceedings against him and be able to assist properly in his/her defense. It incorporates the spirit of *Dusky* in that it includes a factual, as well as rational, understanding. The basic competency issue as outlined in *Dusky* not only deals with competency to stand trial, but it impacts all the other competencies as well - the competency to waive *Miranda* rights and confess, competency to waive the right to an attorney, competency to waive the right to trial and plead guilty, competency to be sentenced, and even competency to be executed.

How do functional abilities or impairment after brain injury relate to competency to confess?

A person has to have an adequate level of intellectual ability such as to understand the situation they are in, appreciate the seriousness of it, and sufficient memory so that they can retain that knowledge and apply it to decision making. One thing that I believe would be particularly relevant in regard to brain injury

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would be loss of abstract reasoning, judgment, and memory. Depending upon the nature of the injury, an individual with neurocognitive impairment may be more suggestible than someone who does not have those neurocognitive difficulties - they may not recognize that they are being led down a path that is not in their best interest. In regard to confession, I think that a person with cognitive impairments may not fully appreciate the seriousness and the impact of confessing to what a law enforcement official is suggesting he or she might have done. They may confess in order to please the interrogator, or if the confession is legitimate, they may not appreciate the legal trap they are putting themselves in (as opposed to saying, "I'm going to stick with my *Miranda* rights and I request to see an attorney before I say anything.")

What are the 'Miranda Right's and 'Warning?'

The *Miranda* Rights are constitutional rights that all citizens have. The Warning itself is what is actually read to the suspect when they are first brought into custody. According to *Miranda*, we all have a right to an attorney if we want one, and we need to be made aware of the fact that we can speak if we want to, but that anything we say can and will be used against us in criminal proceedings. Basically, once a person understands that they are in custody or reasonably suspects that they are in custody, they have the right to remain silent and request an attorney. The case law is pretty consistent that if a person is not read those rights and confesses, it becomes difficult for that confession to be entered into evidence because it is uncertain whether the person really

waived their right to silence in a "knowing, intelligent, and voluntary" manner.

Is the *Miranda* Warning ever delivered in written form?

The *Miranda* Warning is not required to be given in written form, but I understand it is done that way in some jurisdictions. Some states have the officer read while the suspect is reading along too and require a signature indicating understanding. Most of the time, however, it is only given orally.

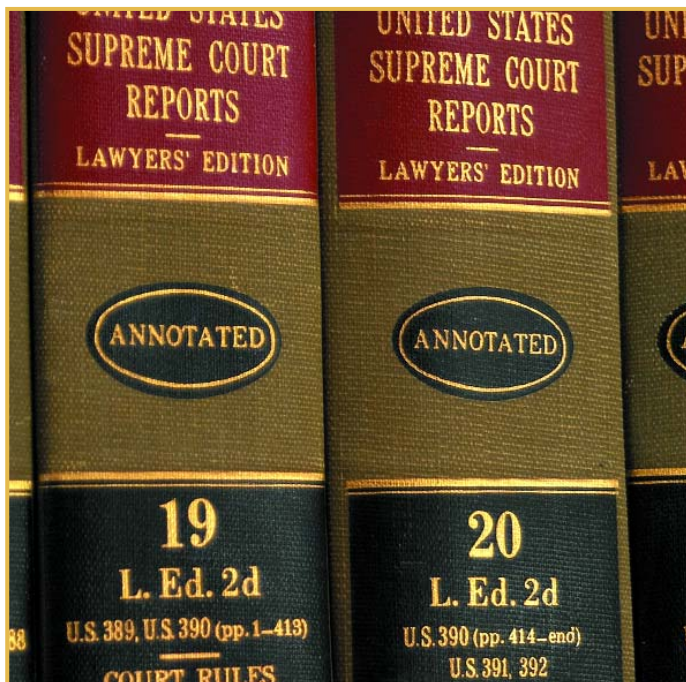
As you know, many individuals with brain injury don't look like they have a problem. Police officers are going to state the *Miranda* Warning just like they would for any common person on the street without realizing that this particular person may have some special cognitive deficits that would make a difference. How would they know?

How do functional abilities, or lack thereof, after brain injury relate to 'competency to waive?'

The individual with a brain injury may not appreciate the significance of the waiving and the potential ramifications. Or possibly the suspect does not remember those ramifications. Depending upon the nature of the impairment, an individual with a brain injury may be more susceptible to being manipulated than a person without such an injury - not intentionally manipulated by police, but just by the nature of the setting (the intimidation that is inherent is being held ostensibly against your will in an office somewhere and being asked many pointed questions over an extended period of time). Such a situation would be scary for anyone. It wouldn't surprise me that a person with a brain injury could have some difficulty in really appreciating their rights and their ability to refrain from talking too much: to say, "I'm going to wait to talk to you until I get an attorney." I suspect the more severe the injury, the less likely it is for the person to intelligently, knowingly, and voluntarily waive their right to silence.

How important are confessions in the guilty verdict?

Research shows that a confession presented to the jury in court is very powerful evidence, regardless of the circumstances surrounding that confession. If somebody confesses, the odds are that they are going to be found guilty even though



there is literature out there suggesting that confessions are not really that reliable. Believe it or not, people do confess to things that they really didn't do. Most people, including jurors, don't realize this fact and jurors don't get a primer on the nature of confession before they become a juror in a trial. They might think, "Well gosh, he confessed so he must be guilty...so why are we even sitting here debating this?" The debate about whether the confession is admissible or not is not something that is going to happen in front of the jury. The jurors are just going to hear that the defendant confessed and what he or she said. It is also likely that the defense attorney would not be allowed to explain the circumstances of the confession.

After brain injury, a person may lack accurate recall of events or may confabulate, both of which might affect the validity of confession. Are there ways to challenge or recant false confessions?

Individuals with significant brain injuries and those with progressive neurological diseases (progressive dementia and such) can confabulate, but often these cases tend to get resolved before there are any on-going serious criminal charges. There are always exceptions. There is a term called pre-trial diversion, where the case is resolved somewhat informally early in the process. For example, you have some fellow in a small town, and everybody knows this particular fellow. He has a mental illness. He walks around town and does odd things but everybody knows him and for the most part he's benign. Every once in a while, he gets into a scuffle, and the police come down and say, 'Come on, Joe, let's just take you back to your house,' or they take him to the hospital, and nobody worries about it - no criminal charges are filed. That would be, in essence, a pre-trial diversion. That happens a lot. Of course, if the offense is very serious or somebody gets hurt, then the situation is more difficult. I believe that as the seriousness of the neuropathology increases, the likelihood of pre-trial diversion increases, and the likelihood of really carrying out serious, harmful crimes decreases, in general.

The issue of recanting false confessions becomes a concern when the case is more serious and progresses further in the criminal judicial process. The issue of false confessions is understood well enough that the law requires some form of corroborating evidence against the defendant beyond just a confession. The process of recanting an allegedly false confession is done long before a jury is in place. In many ways, the issue is addressed in its own trial by a judge, where the defense and prosecution present the evidence regarding the confession (including any potential expert mental health testimony) and the judge makes a ruling. Relevant information is presented regarding the nature and severity of the defendant's neurological condition (including specific deficit areas), history of confabulating, and the likelihood this confession was, or was not, confabulation. I imagine that in a scenario where someone has a severe enough neurological condition to confabulate, the lack of other corroborating evidence would make it clear the confession was false. In circumstances where there is enough evidence to prosecute an individual even without the confession, the argument for ruling a confession as inadmissible is based on the individual's competency (or lack thereof) to waive the right to silence - that is, intelligent, knowing, and voluntary.

What is the impact of amnesia on competency?

That's a really interesting issue. Surprisingly, a large percentage of individuals that are charged with murder have amnesia for the offense. Whether the amnesia is a psychological reaction or simply a ruse is debatable. Literature suggests that most researchers in this area are suspicious regarding the veracity of this 'memory loss.' However, there are instances where



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somebody could have legitimate amnesia for the crime. There was actually a case in 1968, *Wilson v. U.S.*, where the defendant, Wilson, was in a car accident right after the crime, had a substantial brain injury and indicated that he could not recall the offense. In this particular case, his functioning in other neurocognitive areas was considered fine. Now, this was in the mid-60's so the assessment of his cognition was probably not as good as it would be now, but he was not considered to be substantially impaired by on-going memory problems. He just had a specific retrograde amnesia of the offense: the period of time just before his injury. His competency to stand trial was questioned. If he could not recall the offense, how could he help his attorney put on a decent defense?

It was argued up to the D.C. Circuit Court of Appeals. Their decision was rather insightful, in my view. The decision was that memory for the offense is not definitely necessary to put on an adequate defense and to be competent, but not in every case. For example, a person robs the bank, the police were pulling up to the bank right when he left so the defendant was in constant eye contact, and the police followed him. He crashes his car, the police walk up to the car, and he is unconscious with the money in the front seat. In this instance, it does not take a great deal of investigative power or strategizing to prosecute that person because it's such a clear cut case. The court decided that in situations where somebody could possibly have an alibi, that is, some evidence or room for a possibility that he was not there at the time of the offense, then one must assume an alibi exists, even if the defendant cannot remember it. In that instance, the person with no memory for the event could potentially be considered not competent to proceed. So it has to do with how many facts of the case are known, how much the defense must rely on the defendant's own memory, how much of the case is understood by the prosecution, how much the prosecution can actually help the defense in putting together the facts of the case, and whether or not there is room for alibi. Depending on the circumstances, the judge could find the defendant not competent to stand trial. The decision is designed to err on the side of protecting the rights of the defendant. Overall, remember, the criminal justice system in the United States is based on the notion that it's better to let ten guilty people go free than to wrongly convict one innocent person.

The scenario would get more complicated if it were a violent offense. A person may be incompetent to proceed in his case, but if he is considered dangerous due to the mental disease or defect, he may end up in custody even if he has never been convicted of a crime. If a defendant is found not competent to stand trial and then eventually considered by the court to

be unrestorable, and with brain injury that could very well be the case, the legal system would seek some kind of placement for the person that would maintain security for society but also provide for the needs and as much autonomy for the criminal defendant as possible. If the defendant is clearly dangerous as a result of the mental health difficulties, it gets very difficult to find a secure placement for him. It becomes even more difficult if someone is found not guilty by reason of insanity. Individuals who actually go through a trial and are found to have committed a violent act, but because of their mental health difficulties were judged to not have the prerequisite understanding of the wrongfulness of it or were not able to control themselves (depending on what jurisdiction), have significant difficulty getting released back to the community. An example of this situation is John Hinckley.

Is there research on cognitive ability and suggestibility?

There is not a huge amount of research as it relates to forensic proceedings, but there is research out there to suggest that with cognitive deficits a person tends to be more suggestible. This then raises the issue of the *Miranda* again. Somebody might confess to a crime under the pressure of the interrogation even when they may not have done it, but they see it as a potential avenue of escape, so to speak. They are being held, it's been several hours, it's hot, and they're hungry and miserable, and they want to go home. They believe, and sometimes successfully, if they just cooperate and answer the questions then they'll get to go home. There is research to show that even people without cognitive deficits will wrongly concede to a crime. People of younger ages tend to do that as well, as they are more suggestible.

How are the Gudjonsson Suggestibility Scales used?

The scales consist of two tests. Professor Gisili Gudjonsson at the University of London developed these tests that measure interrogatory suggestibility. The test is designed around a memory task where the individual is read a paragraph and then has to answer questions. There are several questions: some of the questions are straightforward and some are more leading in nature. The individual is given a score, and regardless of how well he/she does, the person giving the test gives feedback saying, in essence, you didn't do very well and you need to do it again. After the negative feedback, there is a way to measure the interrogative pressure as to how much the person may change his/her answers given the social pressure of the interrogation. This is considered "shift," that is, the amount of

change in the overall responses. The score is a combination of the original performance but also how much change was made given the negative pressure.

These are used quite a bit in forensic mental health cases where there is a question of whether somebody can really appreciate the *Miranda Warning* or whether they were unduly swayed into confessing, even though they may have understood they had a right to remain silent. Because of the nature of the interrogatory situation, they tended to yield and confess when they otherwise would not have. There are cases where brain injury is the concern and individuals are then evaluated by mental health professionals in regard to their competency to waive their *Miranda Rights*. It's not unusual for the evaluator to use these scales to try and "get at" how susceptible the person is to such pressure. It's a relatively new area of research - the scales have been around since the 80's but applying it in this setting with this particular type of difficulty is relatively recent.

Is it possible to have a valid waiver, but a false confession?

Yes, the issue of understanding your right to remain silent and waiving that right would be the waiver. The issue of the confession being true or not is another issue. A person can understand that she has the right to remain silent and has the right to a lawyer but waive that right and say, 'I want to tell you everything I know.' It's a valid waiver if she did it intelligently, knowingly, and voluntarily, but then, she could give a completely bogus confession. There are individuals (and it probably relates to some kind of psychological abnormality) that will confess to things simply because they like to be in the limelight and get all the attention, particularly if it's a large or high profile crime. It would not be unusual for a number of people to come forward and confess to those crimes even though they had absolutely nothing to do with them. It gives them meaning in life. So someone can give a valid, competent waiver who is confessing to something they had absolutely nothing to do with.

What are the main issues in competency to stand trial?

It boils down to the core issue of whether the person understands the nature and consequences of the proceedings against them and their ability to assist properly in their defense. This is a very basic level of understanding. Does the person understand that he is in a court of law, that he is facing criminal



charges that allege certain things, that he will have a lawyer of his own choice or one assigned to him that will attempt to help him in the case, that there is a prosecutor that is attempting to gain a conviction against him, that there is a judge that is impartial and is going to be making decisions about rules of law and making sure that his constitutional rights are being protected, does he understand the basic trial process - that he can either have a trial by judge or by jurors, and that the jurors are supposedly impartial and will come up with an objective opinion regarding guilt based on the evidence presented. That all sounds pretty complicated, but the level it takes to be competent to stand trial is not that high, frankly. It can all be summarized in whether or not the defendant has a factual and rational understanding of the current situation he is facing, can he help his attorney, and does he understand he could potentially be convicted and receive a sentence. The defendant has to be able to at least work with his attorney and give details of the offense and how he may or may not have been involved. There are criminal defendants who simply do not want to assist in any manner. They may not want to work with their attorney because they believe their attorney is not a good one or is biased against them, or they believe the judge is biased against them but that belief is not based on a mental illness or defect, per se. The individual may be very unruly and disruptive in court, but that does not make him legally incompetent because he has the *capacity* to assist - he simply chooses not to do so.

What happens to someone who truly is incompetent to stand trial?

Number one, if it's blatantly clear from the beginning, it's very possible that they would receive some sort of pre-trial diversion and they would be taken to the hospital. But if the crime is too serious to resolve in an informal way and it has to go through the formal judicial process, based on case law the judge must address the issue of competency. That generally includes mental health professionals evaluating the person and providing expert opinion to the court to demonstrate that the person's intellectual or cognitive functioning is, or is not, such that they are competent. If it is not, then the judge rules that the defendant is not competent and orders him or her in to treatment with the goal of restoring competency. If there is no particular treatment that is going to make them competent, as would commonly occur in neurological disease, the judge then has to make a decision as to whether this defendant is unrestorable.

Every jurisdiction is a little bit different about this, but in general, once a judge has determined a person is unrestorable, then the question of public safety comes to the forefront. The question is, 'Can the person be safely released?', and if so, the charges can be dropped and the person can go back to whatever setting they need. Often, when you've got somebody with significant difficulties like this and they get caught up in the criminal justice system, it's because possibly they were living independently and shouldn't have been (they might have been homeless or living in the community without the needed supervision). You could say the system had failed them to some degree because they were basically on their own and they really shouldn't have been. So if the person is not competent and not restorable, the court is going to try and do what's right. That might be facilitating placement of this person in a setting where they do have appropriate supervision and can get their needs met.

What does burden and standard of proof mean?

The terms are commonly confused. Take a basic criminal offense. The defendant is charged with bank robbery. In our society, the defendant is innocent until proven guilty, which means the government or prosecutor has to prove the case. They carry the burden to show that this person is guilty. The burden can be on one side or the other depending on the nature of the situation. In a criminal offense, the burden is on the government to prove this person actually did the crime.

The standard of proof is different and there are all different levels that are used in different circumstances. Earlier I said that our criminal justice system is based on the notion that it's better to have ten guilty people go free than to convict one innocent person. That is clearly reflected in the standard of proof for a criminal conviction, which is beyond reasonable doubt. So in this instance, the jurors or the judge must find the person guilty beyond reasonable doubt. That doesn't mean beyond all doubt, but beyond all reasonable doubt. Okay, there may be some possibility that the person may not have done it, but everything is so clear, that for me to conclude that he didn't do it, I would really have to be unreasonable and ignore some of the information.

At face value, beyond a reasonable doubt seems pretty clear but that's a difficult standard to meet. You have to have a pretty good showing of the evidence to prove it. If one juror has a significant doubt, then the defendant should not be considered guilty. There may be a 'hung jury,' but there should not be a decision of guilt.

Another standard of proof, which is not quite so strong, is in the civil legal realm. A good example of this is the O. J. Simpson trial. Mr. Simpson was charged with the murder of his wife: that's a criminal offense and the standard of proof in that regard was beyond reasonable doubt. The jurors did not find him guilty because they continued to have reasonable doubt at the end of the trial. Then it went to civil court where he was being sued for issues around wrongful death. In essence, same facts - it all evolved around the notion that he would have been the perpetrator in the death of his wife. In the civil case, the jury found him guilty. In a civil case, the standard of proof is not beyond reasonable doubt; it is 'preponderance of the evidence,' which is really closer to a 50/50 chance. In this instance, there needs to be only enough evidence to tip the scale, for example 51%.

There is a standard in between that is called 'clear and convincing' evidence but that is typically used when you're dealing with civil commitment. It's more stringent than preponderance of the evidence because more is at stake. Generally, preponderance of the evidence is really an issue of money. One side wins; one side loses. Liberty interests are not necessarily at stake. With a criminal conviction, liberty interests are at the forefront - you are taking somebody off the streets and incarcerating them or even worse, executing them. It's very, very serious so you don't want to make a harmful error. In between those two is the clear and convincing standard. Here you have somebody being civilly committed to treatment even though they don't want to go to the hospital. It has a higher level of standard because the person is losing some rights to freedom, but it's not as severe as it would have been had they been

incarcerated in prison. It's also basically society acting in the best interest of that person. This is what the law considers *parens patriae*, a term meaning that we are going to act in a paternal manner towards this person and do what they need done, even though they don't like it or don't understand that they need it done. A good example is hospitalizing someone that needs hospitalization but does not appreciate it.

What are the neuropsychological aspects of competency to stand trial?

There is very little research on this. There was one study some years back from Bridgewater State Hospital in Massachusetts where they measured the neurocognitive functioning of individuals found competent and not competent to stand trial. There were some difficulties in the study because they were predominantly psychiatric diagnoses rather than neurocognitive ones, and race and cultural issues may have played a part in the results as well. The 1999 study was done by Nestor, Daggett, Haycock, and Price who retrospectively studied the neuropsychological functioning of 181 competency evaluatees. Results suggested competent defendants score higher in areas of psychometric intelligence, attention, memory (particularly verbal), and verbal and non-verbal social intelligence. Surprisingly, there were no differences in general abstract reasoning, but the measures they used in this regard were not necessarily that sensitive and the results were confounded by the presence of other mental illness beyond neurocognitive concerns. This is the first and only research that addresses this area specifically, of which I am aware. There needs to be more research done, and specifically with individuals with brain injury who are facing criminal charges. In dealing with the legal setting a person would need to remember what their lawyer tells them, remember what happens in court, and have the speed of mental processing and tracking ability to follow what's happening in court. It doesn't require a huge amount of intellectual savvy, of course, because the level of competency is not real high. As it relates to brain injury, I think the issue we need to be most concerned about is verbal memory. I think that's what would cause the most problems for a person with brain injury facing criminal legal proceedings.

How is competency evaluated?

First of all, competency should be evaluated by someone who is competent, meaning professional competency. The professional needs to have a good understanding of the criminal legal standards. A lot of mental health professionals do very fine mental health evaluations, but applying the

results of the evaluation to a particular criminal forensic situation requires specialized knowledge beyond that of the general mental health practitioner. In psychiatric, neuropsychological, or clinical psychology, most practitioners have no advanced understanding of such criminal standards. So, my first caveat would be that the evaluator would have to be competent to do that work.

Then how is somebody evaluated? In many instances it might simply be an extended interview with the person, record review, and corroborative interview. But when it comes to a question of neurocognitive functioning, I think an interview is inadequate and we need a more objective assessment of cognitive abilities. I recommend a pretty thorough neuropsychological evaluation to address various strengths and weaknesses and, taking that into consideration, completing a thorough interview of the defendant, which really gets at the point of their real understanding of basic legal issues. Do they understand that they are facing criminal charges? Do they understand the role of the main players in the courtroom, what a trial is, what juries do, and that sort of thing. And then, throughout the whole process, the evaluator is judging how cooperative the person is - his capacity to relate with a lawyer with at least as much ability as he is relating to me, the evaluator. It's very helpful to get corroborative information about the person from others. Believe it or not, criminal defendants don't always tell the truth. They might actually describe problems that don't exist, they may exaggerate the problems, or they may act like they don't understand, when in fact they do. They may simply be uncooperative and are so angry and hostile that they have been arrested in the first place that they don't want to cooperate with anybody, least of all a mental health professional.

So it's very helpful to interview other people that know this individual. In dealing with people with brain injury, it's extremely helpful to: contact people who are aware of the nature of the injury; to get medical records; to talk to family members that can tell you how this person was when they were a child, how they performed in school, and whether they had any pre-injury disabilities that might affect the test results. And lastly, it's very important for the evaluator to incorporate measures that are sensitive to test-taking effort, symptom exaggeration, and malingering. A forensic neuropsychological evaluation that does not incorporate objective measures of test taking effort is an incompetent evaluation.

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