



Intellectual Disability and the Law

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In NSW 2013: This article illustrates the judge's view of intellectual disability in relation to a sexual assault on a 15-16 year old girl. At what point does intellectual disability diminish moral culpability and how does the judge work it out? So if you're a psychologist, and you've been asked to write a court report, are you sure that you understand intellectual disability as the judge will understand it? Will you find that the report creates a paradoxical twist at the end?

In the NSW Court of Criminal Appeal (*Dawson v R* [2013] NSWCCA 61, Ref 5), a 55 year old man appeals against a 9 year sentence with a non-parole period of 6 ½ years for the five counts of sexual assault on the 15-16 year old daughter of his *de facto* partner. As a result there were five sentences, some of which were concurrent and some were accumulative. There were three grounds for appeal...

1. His Honour erred in not giving effect to his finding of special circumstances.
2. His Honour failed to apply the totality principle in relation to the sentences imposed.
3. His Honour gave no weight to the Applicant's significant intellectual disabilities other than on the issue of contrition and remorse.

The first two grounds were to do with the application of special circumstances and the issues of totality across the five separate sentences. The Crown conceded that the sentencing judge had made an adding up error when it came to applying special circumstances to the overall sentence of nine years.

The special circumstances were applied to shorten the portion of non-parole period on each of the separate five sentences to range between 60 and 66%. As it turned out, on the total sentence the non-parole period added up to 72% of the overall sentence. The appeal was successful and the non-parole period was reduced to six years, a reduction of six months on the time spent in jail.

Special circumstances were due to the offender's intellectual disabilities and the circumstances of the offending. The neuropsychological testing provided the court with evidence of significant organic brain impairment. The brain damage was consistent with 38 years of daily cannabis use, alcohol abuse and a serious head injury. The

offender's overall intellectual functioning fell within the 5th percentile. His IQ therefore is around 74-76, which places him in the borderline intelligence category. The offender also scored well below average on the measure for Executive Functioning. He was also assessed to have very poor verbal skills and surprising poor verbal memory.

The third ground for appeal is to do with the length of the sentence in relation to a person with an intellectual disability. The defence team claimed that because of his "borderline intellectual functioning and well below executive functioning" then neither *general* nor *specific deterrence* should be reflected in the sentence. In other words, more culpability should be less of an issue and there is no point in making an example of an intellectually disabled person in order to deter others from doing the same thing. The defence counsel pointed to *Muldrock* (*Muldrock v The Queen* [2011] HCA 39) as an example.

In *Muldrock* a 30 year old man with a mild intellectual disability was originally sentenced by the District Court of NSW to 9 years for the opportunistic sexual assault on a boy of nine. The case went on to the NSW Court of Criminal Appeal and then on to the High Court of Australia (HCA) where there was an imbroglio of legal argument about non-parole periods and procedures. But importantly, the HCA clarified the matter of moral culpability in relation to this type of crime as committed by a mentally retarded individual.

The HCA demonstrated that certain assumptions must be made on behalf of a mentally retarded person in a court of law that just would not apply to an adequately functioning person. For example, when the offender in *Muldrock* was originally questioned by police, he told lies and tried to direct and deflect, and he tried to distract the police from their inquiries. The HCA said that the lies were not a sign of guilt in this case, but were more a feature of or consequence of the intellectual disability. The overarching concern in this case becomes more a matter of rehabilitation rather than punishment, deterrence and denunciation. In other words, there still remains the legal matter of public safety no matter what. All the same, the HCA effectively reduced the sentence from 9 years to less than three years.

In Muldrock the offender was assessed as having a *mild intellectual disability** with an IQ of around 62 and his disability was congenital. In Dawson the offender's intellectual disability was partly due to motor bike accidents, but also to daily cannabis and alcohol abuse over 38 years. Also, in Dawson the offender had a past relationship and two grown up children. He had participated as a volunteer in community activities; he had been self-employed as a milk venter and a car detailer. Although in Muldrock the offender had a driver's license, he had struggled with a short time of employment and he was assessed as requiring employment in a sheltered workshop. In Dawson the judge did not believe that there was sufficient evidence of significant intellectual disability to the point of reducing moral culpability as in Muldrock and the appeal judges agreed.

All the same, the offender in Dawson was given some consideration because of his intellectual disability when it came to the question of contrition and remorse. The degree of contrition and remorse is one of the subjective factors that feed into establishing special circumstances. Depending upon how you view the evidence, on one hand it looks like the offender was blaming the victim for coming-on to him and that it was all a bit of a joke. At the very least, the offender says that the girl didn't say "stop".

This is where the sentencing judge let the "intellectual disability" have some influence in establishing special circumstances. Because of his poor Executive Functioning the offender is not able to join the dots. So the judge was able to

conclude that if you take into account his intellectual disability then there is contrition and remorse; and what is more the offender was not able to read the non-verbal communication of the girl who would have at least said "stop" non-verbally.

In Dawson, the psychologist's report provided evidence of an intellectual disability and this finding did contribute to establishing special circumstances. The special circumstance in turn potentially reduced the offender's time in jail. But on the other hand, the intellectual disability *per se* then became a concern for the judge in relation to the offender's prospects for rehabilitation. Because of the offender's poor capacity for learning, will he be able to complete the sex offender's program and retain the information sufficiently to satisfy the conditions for a release on parole. The judge noted that the offender at least had enough time in jail to complete the sex offender's program twice. I wonder if the defence counsel sees this result as a paradoxical twist.

Potentially the offender in Dawson might end up spending the entire nine years of his sentence in full time custody if he's unable to retain the information in the sex offender's program. The overall responsibility of the law, so say the judges, is public safety when it comes to sex offenders. The offender is required to prove that the community is safe if he is to be released on parole.

Dawson v R [2013] NSWCCA 61, Ref 5

Muldrock v The Queen [2011] HCA 39

*IQ classification tables

A normal IQ score ranges between 90 and 109. As shown in the following table, scores over 120 are considered high and scores below 90 are considered low.

The following can be used as a general guideline:

IQ Range	WAIS-III/WISC-III	Percent of population
130+	Very superior	2.2
120-129	Superior	6.7
110-119	High average	16.1
90-109	Average	50.0
80-89	Low average	16.1
70-79	Borderline	6.7
50-69	Mild Intellectual Disability	2.2
35-49	Moderate Intellectual Disability	-
34 and below	Severe or Profound Intellectual Disability	-

Adapted from

<http://www.cddh.monash.org/assets/documents/intellectual-disability.pdf>