

THE PSYCHOLOGY OF LITIGATION

More on the Rights Waiver – Learning Disabled or Mentally Retarded?

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There seems to be a tendency to confuse mental retardation with learning disability, sometimes a tricky concept to get a judge to understand unless she or he has had direct experience with this her or himself. A common line of cross-examination when I have diagnosed someone as so severely learning disabled that it interferes with the ability to make a meaningful waiver generally seems to focus on mental retardation, with this running the danger that the concept of learning disability and its implications for knowingly, intelligently, and voluntarily waiving one's rights can become obscured.

Although characteristics of learning disabled and mentally retarded individuals often overlap in that they may both be considered handicapped and disadvantaged as well as suggestible, vulnerable, and even childlike, there are important distinctions between these two groups, with expert testimony needing to be very specific as to the nature of the learning disability and specifically how it impacts on the ability to waive one's rights.

“Does it concern you, Doctor, that Mr. So and So graduated 244th in his high school class of 500?”

No, because Mr. So and So is learning disabled, not mentally retarded and so is able to perform academically with the kind of assistance he in fact received throughout his academic career. His difficulty is with central processing of language, particularly during stressful situations (like an interrogation) such that he processes information slowly, has difficulty organizing his thoughts, and is slow to understand. In addition, his listening skills are impaired such that he sometimes fails to appreciate that some words have two meanings, i.e. “waive” and “wave.” Accordingly, he would sign a waiver someone else wrote without reading it because he has become so upset by the nature of the interrogation or not comprehend it even if he did read it because he needs things repeated several times and has to read things over and over again as well. Family, friends, and co-workers who know Mr. So and So have all confirmed his behavior in this regard as well as have the extensive educational records in his file.

Does it concern you, Doctor, that Mr. So and So scored in the Average range on an intelligence test administered to him in high school?

No, because Mr. So and So is learning disabled, not mentally retarded, and intelligent people may have learning disabilities. He also scored in the Average range on the intelligence test I likewise administered to him, and the results of both tests, 9 years apart,

are consistent with each other as well as with a diagnosis of learning disability. That is, there is a significant differential between the verbal and performance portions of the intelligence test, diagnostic of learning disability.

Learning disability is diagnosed when achievement on tests is below that expected for age, schooling, and intelligence such that learning problems significantly interfere with academic achievement. Mr. So and So first went to a psychologist for language delay at age 3, had to repeat kindergarten because of language problems, had speech and language services from kindergarten through high school as a result of a specific learning disability, was tutored throughout high school, and was admitted into the University of Tennessee under the auspices of their Disability Student Services, which allows him to have others take notes for him and to have extra time to complete exams in a separate room.

Does it concern you, Doctor, in view of your testimony being that he could not knowingly, intelligently, and voluntarily waive his rights, that Mr. So and So earned a GPA of 2.39 while at the University of Tennessee, a passing grade, and is only 14 hours from graduating?

No, because Mr. So and So is learning disabled, not mentally retarded and thus he is able to perform academic work, including attending college and graduating from college. However, in this case Mr. So and So was in college for almost 6 years and still could not complete his education, changing majors 3 times.

Although Mr. So and So may believe himself to be 14 hours from graduation, it is not clear to me that he has actually come close to earning the hours he needs in any one of these 3 majors. His student adviser was sufficiently concerned about his performance that there is a note from her in his file urging him to try to achieve at least a 2.50 GPA. In any event, he finally gave up and dropped out of school.

Does it concern you, Doctor, that Mr. So and So lived on his own, in his own apartment?

No, because Mr. So and So is learning disabled, not mentally retarded and is thus able to live independently. He is nonetheless fairly naïve and childlike, often not fully appreciating what is going on around him and historically it has been easy for others to exploit him. In fact, his parents learned later that he went deeply into debt and he is still reimbursing him after they took control of his finances. They have since learned that he bought every sob story going, often allowing others to live with him and keeping them up. At the day care center where he worked, he routinely loaned his car to any of the mothers who asked and would babysit for them on weekends at no charge.

Are you telling us, Doctor, that Mr. So and So is unable to make decisions or weigh his options?

No. He is certainly able to decide whether he wants chicken or steak for dinner and which channel to watch on tv tonight. However, when it comes to intelligently waiving his rights, that is, knowing what his options are, appreciating the consequences of his decisions, and so forth, he has much greater difficulty. If he does not know his basic rights, for example, believing that once the interrogation starts he cannot stop or that if the officer continues to be angry with him for not answering questions the “right” way that he can jail him on the spot, than he can hardly make an intelligent decision on his own behalf.