Slipping the Surly Bonds of the Medical/Rehabilitation Model In Expert Witness Testimony

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Abstract: This essay asserts that the new academic discipline of disability studies challenges the medical/rehabilitation models of disability and that this challenge has an impact on expert witness testimony. This assertion is based on the author's experience in a civil sexual assault trial involving a male resident of a group home facility assaulted by another male resident of the group home. The author was surprised to find that her status as a visiting professor in the new academic discipline of disability studies trumped the testimony of the clinical expert witnesses, including a licensed psychologist, a behavioral specialist, and a case manager.

Keywords: expert witness, sexual assault, medical model

Introduction

Just as the Civil Rights Bill of 1964 fostered the development of black or ethnic studies and women's studies, the Americans with Disabilities Act of 1990 has fostered the evolution of disability studies in colleges and universities across the nation. Many institutions of higher education including, the University of Toledo, University of California Berkeley, University of Wisconsin Madison, University of Illinois Chicago, and the Ohio State University [Ed. note: See Taylor and Zubal-Ruggieri elsewhere in this issue for a more complete list] have developed interdisciplinary undergraduate disability studies courses, minors, majors, and graduate concentrations and programs in disability studies.

A new social constructionist model of disability has emerged out of the framework of "cultural studies" that developed in English, ethnic studies, and women's & gender studies research and theory scholarship in the last twenty years. It includes historical research, literary and art criticism, the study of representations of disability in film and drama, critiques of eugenics, holocaust studies, public policy, history, architectural and urban design research, as well as a lively critique of special education and medical models of disability.

Although the author had originally been engaged by the plaintiff's attorney for her background in vocational rehabilitation, quality of life issues in sexual assault and personal injury cases, and for her credentials as a Certified Rehabilitation Counselor and diplomate status with the American Board of Vocational Experts, by the time the case came up for deposition and trial, the author was deeply engaged in creating a disability studies program. As a result, the author subscribed to Linton's (1998, p. 118) claim that

A disability studies perspective adds a critical dimension to thinking about such issues as autonomy, competence, wholeness, independence/dependence, health, physical appearance, aesthetics, community, and notions of progress and perfection—issues that pervade every aspect of the civic and pedagogic culture.

All of these issues were present in the civil sexual assault trial where the plaintiff was suing the group home for its lack of care and supervision of its residents. The

plaintiff, a thirty-year-old man with developmental disabilities including cerebral palsy and cognitive disabilities, also used a wheelchair. On a field trip, ironically to train people with developmental disabilities in self-advocacy, the plaintiff was sexually assaulted by the perpetrator after he fell asleep in his bed. The plaintiff woke to find the perpetrator undressing him and attempting to penetrate him anally. He resisted and the perpetrator left his room.

Only one paraprofessional attendant accompanied the residents on the field trip. Ordinarily, two staff members from the group home accompany residents on such trips. The plaintiff was too embarrassed to report the assault to this lone female staff member and he did not report his experience until his male case manager came for a visit a few days later. The case manager immediately called the local police and an investigation ensued. The perpetrator, a large man with cognitive disabilities, admitted the assault and arrangements were made with the district attorney to charge him with a misdemeanor sexual assault. The perpetrator was not incarcerated, but returned to the facility. When the plaintiff realized that no steps would be taken to protect him in the group home, he left to live with his mother in a nearby large city. Unfortunately due to substance abuse, the mother was not able to provide her son a home but after the plaintiff left the facility his state and federal funding streams were cut off. Both mother and son found themselves homeless on the streets for nearly a year before funding could be reinstated. In the meantime, the plaintiff lost access to the training he had been receiving in independent living skills such as cooking, housekeeping, and working in a janitorial and file clerk capacity. His long-term goal was to live independently in his own apartment and work on a part-time basis. That is, the plaintiff was struggling with the very issues Linton notes: a*utonomy, competence, wholeness, independence/dependence.*

Although homelessness, living on the street, and caring for a parent addicted to alcohol could be framed as the ultimate bootcamp in terms of struggling with autonomy and independence, none of these experiences lead to what Linton refers to as *health, physical appearance, aesthetics, and community.* That is, the plaintiff's physical and psychological health were at further risk due to poverty, homelessness, and substance abuse by others including his mother and people confronted on the street... Even after the plaintiff designated his mother as his caretaker, thereby enabling the funding streams to flow, he ultimately fired her because of her destructive influence on his well-being. After more than 4 years the plaintiff was able to locate stable housing in a family home with only one other resident with development disabilities. He had his own room and a part-time job, but still found himself afraid of men in general, and men who were strangers to him in particular. He found it difficult to leave his new home for any purpose whatsoever. The plaintiff lost his community at his group home and lost the opportunity to make a gradual transition from a group home to independent living while maintaining his ties with friends in the group home. His physical appearance improved after he located housing (being able to bathe, get dental care, purchase clothing), but since he used a wheelchair, the plaintiff was always marked as disabled and he could never escape this identity and all of the socially constructed meanings associated with such an identity. As we shall see, this disability identity was integral to the jury trial.

When Linton refers to *aesthetics* as part and parcel of the examination of disability, in my opinion, she refers to a whole complex of ideas about disability including desirability, beauty, sexuality, and even a sense of rightness. In any sexual

assault case, these are always underlying themes which sometimes emerge as what the plaintiff was wearing, the gender, age and beauty of the plaintiff, and the plaintiff's sexuality. A male on male assault by one disabled man on another disabled man and the perpetrator able-bodied and the victim in a wheelchair and not mobile without it challenges all of our stereotypes about sexual assault, sexuality, beauty, and rightness. The idea that people with disabilities have any sexuality at all is suspect although the dangerous sexuality of men with cognitive disabilities is a common theme in film and literature (e.g., John Steinbeck's *Of Mice and Men*). Gender stereotyping is also in play here since sexual assault is generally understood to be a male on female crime. Beauty is also not ascribed to men, but in this case a sense of rightness and a sense of its opposite, wrongness emerged. The sense of rightness came from the demeanor of the plaintiff. The plaintiff was a credible witness. His bearing was dignified. His speaking was calm and clear. His confusion about whether or not he had experienced penetration was innocently believable. His vulnerability became apparent when he had to crawl from his wheelchair to the chair in the witness stand. The plaintiff did this with no shame and great cheerfulness. The plaintiff survived the questioning about his sexuality. The big question was: "Are you homosexual?" The purpose of this question was to lay the groundwork for a possible consensual sexual experience between the plaintiff and the perpetrator, but the plaintiff responded that he hoped to find a nice woman and marry some day.

The perpetrator, on the other hand, did not testify but glowered and loomed as the large able-bodied man with a previous history of sexual assault. Although this was not known by the jury, it was information possessed by all of the attorneys and expert witnesses. However, the jury did know that the perpetrator had been convicted on a felony sexual assault on the plaintiff in the criminal adjudication of this case. The misdemeanor sexual assault charges had been replaced by a felony conviction when the group home interfered with the criminal case by hiring an attorney with the perpetrator's Social Security Disability Insurance checks. Despite this conviction, the perpetrator never went to jail and no counseling was provided to him. After more than 4 years, the perpetrator still resided in the group home. The perpetrator never testified at trial. However, the act of sexual assault loomed over the entire proceedings and invaded the courtroom with a sense of wrongness.

Disability Identity

Disability identity played a key role in this civil trial for two reasons. First, the plaintiff was marked by a disability identity because of his wheelchair use. Secondly, the plaintiff claimed a disability identity because he has a cognitive disability and is involved with the self advocacy organization, People First. As pointed out above, the jury had already been presented with a powerful image of the plaintiff's disability when he had to clamber out of his wheelchair down to the floor and up the one step into the witness box and then climb up into the chair placed on the elevated platform. The jury was jolted again when a bomb scare interrupted the trial and the courthouse had to be evacuated. Although the use of elevators is not recommended in such a situation, it was clear to all the parties in the trial that the plaintiff would use the elevator even at risk of his life. No one volunteered to carry the plaintiff down nine flights of stairs to the street. When the

trial resumed an hour later, the plaintiff's disability identity was powerfully present in the minds of the jury. Neither the plaintiff's nor the perpetrator's cognitive disabilities were salient factors during the evacuation procedure, but the plaintiff was marked by his wheelchair use whereas the perpetrator had made his way down the stairs with the rest of us.

As Linton (1998, p. 12) points out:

> *"While retaining the term disability, despite its medical origins, a premise of most of the literature in disability studies is that disability is best understood as a marker of identity. As such, it has been used to build a coalition of people with significant impairments …"*

She continues:

> *"When disability is redefined as a social/political category, people with a variety of conditions are identified as people with disabilities or disabled people, a group bound by common social and political experience. These designations, as reclaimed by the community, are used to identify us as a constituency, to serve our needs for unity and identity, and to function as a basis for social activism."*

The plaintiff's attitude toward his mobility impairment was casual. If he needed to get out of his wheelchair down to the floor and climb up into the witness box, he did it with a shrug. His passion was in self-advocacy, control over his own life, and a determination to assert himself despite his cognitive impairments. In short, the plaintiff claimed his disability identity through his political activism with People First. The People First organization is part of what Shapiro (1994, p. 186) refers to as the "second wave against the professionals who have run programs for people with retardation." (The first wave was advocacy by parents for their children with cognitive disabilities.) Without the plaintiff's claiming of this aspect of his disability identity, it is unlikely that he would have had the internal strength to stand up against the professionals in the group home when he reported the sexual assault to his case manager. It is not accidental that the plaintiff selected an outside professional to report the assault and not a permanent member of the group home staff. Although the case manager could be characterized as the hero in this cast of rehabilitation professionals, when he was provided with an attorney, he ultimately failed to advocate for the plaintiff. Obviously, the case manager who had reported the assault to the police and to the group home professionals was to be restrained and silenced because he risked his company's lucrative contract with the group home. His subsequent testimony in depositions and trial was weak and non-committal.

The plaintiff's self-advocacy background also meant that the case came to trial. That is, even the plaintiff's own attorney admitted that he was reluctant to bring the case forward but the plaintiff's assertion of his right to dignity and justice kept all of the professionals in his case on track. The plaintiff, because of his activism, had transcended the old idea promulgated by psychologists "that people with retardation could have no sense of self and therefore were incapable of making decisions" (Shapiro 1993, p. 195). Although the jury's grasp of this aspect of the plaintiff's disability identity was more

subtle and perhaps even easy to erase, it was there. The plaintiff's cognitive impairment became obvious when he testified but so was his determination to be heard, for justice to be done. The plaintiff was able to assert his personhood to the point that in testimony he was listened to with an attentiveness so careful that breathing became a disruption to concentration.

The Expert Witnesses

In addition to the case manager, the defendant's attorneys brought forward a behavioral specialist and a clinical psychologist who was also a tenured professor at the local state university. It should be understood that it was the group home which was on trial here since they were the "deep pockets" in this case. Certainly, the perpetrator was the defendant as well but since his only access was to SSDI income, there was no gain be had in bringing a civil case against him alone. The problem then was to prove or disprove that the group home was liable for the actions of the perpetrator.

The behavioral specialist was so caught up in the medical/psychological model of disability that she was patently unaware of the past 30 years of development in interpersonal violence literature and had no awareness of the emerging literature on disability and violence (Krotoski, *et al.* 1996; Murphy 1993, 1996, 1998; Sobsey 1994). Instead she verged on presenting the stereotype of persons with cognitive disabilities as being incapable of providing credible testimony on their own behalf, particularly sexual assault claims. She was hired to assist clients in changing their behaviors after they had claimed a sexual assault and indicated that the sexual assault would have to be "proven" in order for her to acknowledge that such an assault had ever taken place. Interestingly, this expert had never been hired to work with perpetrators in order to change their behaviors and no such services had ever been provided to the perpetrator in this case. This expert also had a contractual relationship with the group home and therefore it was not in her interest to suggest that such sexual assaults took place at the group home or between clients from the group home on field trips.

The clinical psychologist had been hired to evaluate whether or not the plaintiff had suffered any long term psychological damage as a result of the sexual assault. The position of the defendants in this case was that the sexual contact was consensual and even if it was not consensual, there was no impact on the plaintiff. The psychologist stated he could not determine if the sexual contact was consensual or not but that the results of his testing indicated that the plaintiff was not now experiencing any post-traumatic stress disorder. The psychologist then launched into a monologue about whether or not penetration had actually occurred. This was done in a booming voice with language such as: "Did the penis touch the anus? Did the penis penetrate the anus one inch or three inches? If this happened, it would be upsetting no matter how far the penis penetrated the anus, but it had no impact on the plaintiff anyway." In this testimony, the psychologist managed to force the jury into facing what everyone knew but wanted to avoid --- the details of the sexual assault.

The testimony of these two expert witnesses placed the responsibility for the sexual assault on the shoulders of the plaintiff. Their testimony did not address any of the issues faced by residents in the group home. The social/political implications of the sexual assault were never addressed and perhaps never even noticed. Instead, the experts

focused on the case model of disability, which reduces the experience of disability to an individual medical/psychological/behavioral problem to be fixed. Ultimately, their testimony proved to be irrelevant, but that was not their fault in that the attorneys for the defendants also perceived the case to be about an individual problem and not a social issue.

This is not to say that the author was not fuddled as well. The old tried and true rehabilitation model of disability came to the forefront in discussions with the plaintiff's attorneys, reviews of the case documents, and interviews with the plaintiff, but the case just didn't fit into the usual mode. There was no way to assert lost earnings since the plaintiff's income was based on his disability and the resulting funding streams from state and federal government. His work experience had taken place in a rehabilitative or sheltered workshop environment and therefore was irregular, subject to being paid on a piece work basis, and usually below minimum wage. Records of such earnings proved impossible to obtain. Addressing vocational potential was tricky since supported employment in his community was a myth and it was unlikely that he would be able move beyond the usual muddle of sheltered workshop settings, piece work, and occasional employment.

Quality of life issues seemed to be a more promising arena for documenting damages and indeed living on the street with his substance abusing mother and the more than 4-year disruption in his attempt to learn independent living skills in order to live in his own apartment with a part-time job had been derailed, perhaps permanently. Assigning a monetary value to quality of life issues continues to be problematic in the courts and the attorneys did not hire an economist to provide testimony on this issue (Murphy and Williams 1998, pp. 15-20).

So even though the author's background in rehabilitation was certainly helpful, ultimately it was the new knowledge found in disability studies that allowed the plaintiff's attorneys to move the case away from the medical/psychological/rehabilitation model and to the social/political model of disability. That is, the focus turned away from the individual experience of the plaintiff and the perpetrator to the group home.

Disability Studies and Expert Witness Testimony

> *"As with many of the new interdisciplinary fields, creating the category "disability studies" didn't create the scholarship. Instead, the name organizes and circumscribes a knowledge base that explains that social and political nature of the ascribed category, disability. The formal establishment of the field provided a structure for research and theory across the disciplines focused on disability as a social phenomenon, a perspective largely ignored or misrepresented in the curriculum."*
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> Simi Linton (1998, p. 117)

The category of disability studies allows one to cross disciplinary boundaries in a way not permitted as a vocational rehabilitation counselor or vocational expert. It provides a context in which to place expertise in interpersonal violence and its relationship to disability. Hence, the author did not have to compete with the

psychologist over expertise in this field since she was not addressing a clinical, individual issue but a larger social issue. Her new status as a disability studies academic allowed her to provide testimony on the abuse of people with disabilities and more particularly the sexual abuse of men in institutions or group homes (Sobsey 1994, pp. 51-88).

Sobsey's (1994) path-breaking book, *Violence and Abuse in the Lives of People with Disabilities: The End of Silent Acceptance?*, summarizes five studies of sexual abuse patterns of people with disabilities, most of whom had developmental disabilities (Sobsey and Doe 1991; Sobsey-current; Sullivan, Brookhouser, Scanlan, Knutson and Schulte 1991; Turk and Brown 1992; Wescott 1993). The prevalence of abuse for adult male on adult male abuse in this population ranged somewhere between 18 to 30 percent in four of the five studies. The Sullivan, *et al.* study (1991) indicated a 57 percent of male on male sexual abuse. It was not clear why this study showed such a higher rate of abuse, but Sobsey (1994, p. 78) suggests that the study may have confounded the abuse rate when they included children with adults in their sample numbers.

Sobsey (1994, pp. 81-82) pondered the high rate of the sexual abuse of boys and men living in institutions and he suggested that the simple answer appears to be institutional structures. Because all of the studies agree that the great majority of offenders (about 9 out of 10) are males, we consider whom males have the greatest opportunity to abuse.

The traditional segregation of institutions clusters male staff together with male residents and female staff together with female residents (partly as a means of minimizing heterosexual interaction). Thus because most offenders are male, gender-clustered service systems permit greater access to male victims.

The author provided the judge and jury with this information and asked some pointed questions directed at the group home staff. Given that this research has been available since 1991, what was the institution's response? That is, did the group home staff have training in the prevention and response to sexual and physical assault within their facility? Did the staff provide sexual education training for residents? Did the staff provide sexual assault education, prevention, and awareness training for residents? Were there procedures in place for response to complaints and care of residents in the employee manual? Were there procedures in place for dealing with alleged perpetrators? Were there procedures in place for protecting victims? Were staff and residents encouraged to bring forward sexual assault complaints? In other words, the author provided testimony on liability issues and the lack of ethical behavior of the so-called rehabilitation professionals employed by this CARF certified facility.

No such procedures nor sexual assault awareness and education training sessions were in place at this facility before or after this sexual assault case came to trial and the group home most likely followed the pattern seen in other group home and institutions, which is to cover up the abuse. Sobsey (1994, pp. 90-93) points to four factors that can be identified in institutional abuse:

1) Institutional abuse is characterized by the extreme power inequities that exist between staff and residents.
2) Institutional abuse is collective in nature.
3) Institutional abuse is characterized by the cover-up, largely due to conflicts of interest.

4) Institutional abuse is characterized by clearly defined patterns of environmental influence brought about by staff who are given very few resources but a great deal of power over residents.

The plaintiff was given a six-figure award by the jury. This money was put into a special needs trust so that the plaintiff would not face losing his funding streams once again. The trust will allow the defendant extra income over his lifetime thereby improving the quality of life with such things as his own television set, a computer system, etc. The perpetrator has been returned to the group home where he remains to this day with no treatment or re-education to assist him in changing his behavior.

Olmstead vs. LC and Institutional Abuse: Implications for the Future

On June 22, 1999, the United States Supreme Court held in Olmstead vs. LC, 119 S.Ct. 2176 (1999) that the unnecessary segregation of individuals with disabilities in institutions may constitute discrimination based on disability. The court ruled that the Americans with Disabilities Act may require states to provide community based-services rather than institutional placements for individuals with disabilities.

Lois Curtis and Elaine Wilson, two women with mental illness and mental retardation, were confined in a Georgia state psychiatric hospital. They wanted to live in the community and receive community-based services. Their doctors agreed that the women were ready to do this, but the state had a long waiting list for community placement and, as a result, the women were institutionalized unnecessarily for years. The women filed suit against Tommy Olmstead, the Commissioner of Georgia's Department of Human Resources. After years of litigation, Olmstead asked the Supreme Court to decide once and for all whether unnecessary institutionalization of individuals with disabilities is a form of discrimination prohibited by the ADA. The Supreme Court ruled that the ADA has an "integration mandate."

As a result, the states are obliged to develop a comprehensive plan for community-based care. The sticking point is the movement of money from institutional care to community-based care. Although some states have demonstrated great resistance to formulating and implementing such plans, it has been true that since 1981, states have had an option under the Medicaid program to apply for funds to pay for a number of home and community-based services for people with disabilities. The number of states providing such services under this program is expanding steadily and rapidly each year (National Association of Protection and Advocacy Systems 1999).

Olmstead vs. LC creates a tremendous pressure on group homes and other facilities such as nursing homes which serve people with disabilities. The pressures are not only financial but raise complex issues in changing an institutional culture into a community-based, person-centered culture where a person with a disability can exercise the right to live where one wants to live, to live with whom one wants to live, with whom one wants to socialize, how one wants to spend one's time, and what jobs one wants (National Association of Protection and Advocacy Systems 1999). The resistance to such change should not be underestimated, but the rise of people with disabilities in our culture should not be underestimated either. As the self-advocacy movement for people with developmental disabilities matures, we will see more and more plaintiffs who will

demand justice for themselves in not only sexual assault cases, but in the right to be free of incarceration in the name of treatment, to live independently, to be acknowledged as full citizens participating in every aspect of community life.

Unfortunately, this transition from institutional care to community-based care and independent living for people with cognitive disabilities promises to be difficult and problematic. As a result, we can expect to see more and more civil lawsuits emerge as more people with disabilities demand their right to live in the least restrictive environment, and in an environment free of the threat of sexual assault. The new discipline of disability studies offers a methodology for providing expert witness testimony beyond the medical/rehabilitation model of disability in such cases.

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