



A psycho-legal perspective on sexual offending in individuals with autism Spectrum disorder



A. Creaby-Attwood ^{a,*}, C.S. Allely ^{b,c}

^a Northumbria University Law School, City Campus East, Northumbria University, Newcastle-Upon-Tyne, Tyne and Wear, NE1 8ST, United Kingdom

^b School of Health Sciences, Allerton Building, University of Salford, Salford M6 6PU, United Kingdom

^c Gillberg Neuropsychiatry Centre, Gothenburg University, Sweden

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ABSTRACT

It is important to consider whether there are innate vulnerabilities that increase the risk of an individual with an autistic spectrum disorder (ASD), predominantly those defendants with a diagnosis of Asperger's Syndrome, being charged and convicted of a sexual offence. The significance of such can be readily seen in recent English case law, with judgments on appeal finding convictions unsafe where there have been a number of failings in the Judge's summing up. In this article, we will consider the gravity of Judges omitting to highlight a defendant's diagnosis of autism spectrum disorder and the necessity of detailed explanations to jury members regarding the condition and its effect upon thoughts and behaviour. Consideration will be specifically given to the necessity to prove sexual motivation in such offences and the judicial direction required in relation to whether the appellant's actions had been sexually motivated. Recognition of the social impairments inherent in ASDs are vital to this work and we shall consider whether the difficulty with the capacity to develop appropriate, consenting sexual relationships as a result of impaired social cognition may be one of the factors which increases the risk of sexual offending in individuals with ASD (Higgs & Carter, 2015).

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1. Introduction

Autism Spectrum Disorders (ASDs) have been defined as “a group of disorders characterised by qualitative abnormalities in reciprocal social interactions and in patterns of communication, typically characterised

* Corresponding author.

E-mail addresses: ann.creaby-attwood@northumbria.ac.uk (A. Creaby-Attwood), c.s.allely@salford.ac.uk (C.S. Allely).

by impairments in social reciprocal interactions and communication, (with) restricted, repetitive pattern of interests and behaviour” (American Psychiatric Association (APA), 2000, 2013). The Diagnostic Statistical Manual fifth edition’s (DSM-V, American Psychiatric Association, 2013) has resulted in significant criticisms as a result of the new criteria for ASD (i.e., McPartland, Reichow, & Volkmar, 2012; Ritvo, 2012; Waterhouse, 2013; Wing, Gould, & Gillberg, 2011). One of the main criticisms of the DSM-V was the new name of ASD used to encompass what used to be four separate disorders, namely, autistic disorder (autism), Asperger’s disorder, childhood disintegrative disorder, and pervasive developmental disorder not otherwise specified (e.g., Fernell, Eriksson, & Gillberg, 2012). These four separate disorders (previously considered to be separate in the previous edition of the DSM) are now considered to be a single condition with different levels of symptom severity in two core domains. ASD is characterised by: 1) deficits in social communication and interaction, and 2) restricted repetitive behaviours, interests, and activities (RRBs) (APA, 2013). Elsabbagh et al. (2012) conducted a systematic review of epidemiological surveys of autistic disorder and pervasive developmental disorders (PDDs) worldwide. Based on the evidence reviewed, Elsabbagh et al. (2012) found that the median of prevalence estimates of ASDs was 62/10000.

It is important to highlight here, that this article is to focus solely upon those with an ASD accused of offences of a sexual nature. Violence, with no sexual component, is not the focus of this paper. We will consider the importance of the preconception of behaviour by juries and Judges and the negative impact this has had upon defendants with an ASD, who because of the very nature of the condition, may present in a way often detrimental to the outcome of their case. This will be achieved with specific reference to current clinical research, and omissions within English case law.

1.1. Autism spectrum disorder and inappropriate sexual behaviour or sexual offending

There have been a number of papers which have investigated cases where an individual with ASD have engaged in a sexual offence or inappropriate sexual behaviour. Inappropriate behaviours have included such actions as giving a stranger a kiss (Clements & Zarowska, 2000), intruding on the personal space of an individual that they are infatuated with (Green, Gilchrist, Burton, & Cox, 2000; Howlin, 2004; Katz & Zemishlany, 2006), to inappropriate acts of masturbating (e.g., masturbating in a public place) (Haracopos & Pendersen, 1992; Ray, Marks, & Bray-Garretson, 2004). Some studies have also reported cases of individuals with ASD who have become sexually violent (Fujikawa, Umeshita, & Mutura, 2002; Kohn, Fahum, Ratzoni, & Apter, 1998; Murrie, Warren, Kristiansson, & Dietz, 2002). Another study carried out a survey of 100 caregivers (i.e., parents or guardians) regarding the sexual knowledge and behaviours of children, adolescents, and adults with ASD (Ruble & Dalrymple, 1993). Findings revealed that respondents described those in their care as engaging in a number of sexual behaviours which are considered to be inappropriate. Some of these inappropriate sexual behaviours identified included: masturbating in public (23%), inappropriate touching of the opposite sex (18%) and the use of unusual objects for masturbation (14%). However, the most frequent concern that the caregivers had was their child inappropriately touching their genitalia in public (65%) (Ruble & Dalrymple, 1993).

1.2. Risk factors for inappropriate sexual behaviour or sexual offending

There have been a number of other studies which have found that individuals with ASD are not at increased risk of offending generally (e.g., Mouridsen, 2012; Woodbury-Smith, Clare, Holland, & Kearns, 2006). However, research does seem to indicate that specific key ASD features are frequently found in individuals with ASD who commit crime (Attwood, 2007; Barry-Walsh & Mullen, 2004; Haskins & Silva,

2006; Howlin, 2004; Murrie et al., 2002). In their recently published review, Mogavero and Mogavero (2016) found a number of studies which indicated that a large proportion of the deviant or sexual offending behaviour committed by individuals with ASD is frequently due to their ASD symptoms as opposed to malice. For instance, an impaired ‘Theory of Mind’ (ToM) or an intense preoccupation with a narrow interest is often associated with engagement in criminal behaviour in individuals with ASDs (Haskins & Silva, 2006) such as that demonstrated in the case of Gary McKinnon (*The Daily Telegraph*, 2009). Mr. McKinnon hacked into the Pentagon computer because he was preoccupied with the search for signs of extra-terrestrial life. ToM refers to a person’s ability to attribute mental states (e.g., beliefs, intents, desires, pretending, knowledge) to oneself and others and also the ability to understand that others have beliefs, desires, intentions, and perspectives that are different to their own (Frith & Happé, 1994).

Some researchers have hypothesised ToM deficits as one contributory factor in acts of violent crime in individuals with high-functioning ASD (hfASD) (Baron-Cohen, 1988; Kohn et al., 1998). ToM has been found to be impaired in individuals with ASDs. However, research indicates that the pattern of deficit may be unique in individuals with hfASDs. The majority of individuals with hfASD are unimpaired on basic first-order ToM tasks (e.g., understanding that another individual can have a false belief about the location of an object) and second-order ToM tasks (e.g., understanding what one individual might think about another). This supports the theory that there may only be a developmental delay in the onset of these ToM abilities in some individuals with ASD (Kaland, Callesen, Møller-Nielsen, Mortensen, & Smith, 2008). Other studies have also suggested that individuals with ASD can engage ToM but that it may not take place spontaneously unless it is explicitly prompted (e.g., Senju, Southgate, White, & Frith, 2009). An individual with ASD may become confused or overwhelmed by a barrage of social information when they are required to respond to a social situation spontaneously, under duress (Stein, Klin, & Miller, 2004). It is important to note here that in the vast majority of individuals with hfASD such confusion does not always result in violence or offending behaviour (Goldberg et al., 2007).

An impaired ToM can be detrimental to the individual’s ability to understand social cues and can also impact negatively on impulse control and ability to empathise. Such individuals appear to be “genuinely unaware of the harm they caused their victims” (Murrie et al., 2002: 66). Another factor which has been posited to contribute to sexual offending behaviour in individuals with ASD is the ‘impaired ability to appropriately interpret their victim’s negative reactions’ to their sexual advances in some individuals with ASD (Freckelton Sc & List, 2009). This notion of deficient empathy, a common explanation in such individuals, is a view supported by others (i.e., Attwood, 2007; Wing, 1981).

Difficulties with developing appropriate, consenting adult sexual relationships due to impaired social cognition may be one of the factors which contributes to the increased risk of sexual offending in individuals with ASD (Allely & Creaby-Attwood, 2016; Higgs & Carter, 2015). Feelings of victimisation or having a grudge and desire to seek revenge may be the precursors to engagement in criminal behaviours in other individuals with ASDs (Allen et al., 2008; Attwood, 2007).

It has also been suggested that, due to the little or no experience of being in an intimate relationship, some individuals with ASD may find it difficult to express their sexuality within the ‘context of an appropriate relationship’. This may result in offending behaviour as a result of the individual’s sexual frustration (Murrie et al., 2002). Another factor which may contribute to sexual offending behaviour in individuals with ASD are impaired impulse control and empathy which can impair the individual’s ability to understand the consequences of their action and cause them to act “without thinking” (Haskins & Silva, 2006; Ray et al., 2004).

The “obsessional” interest which is frequently exhibited in individuals with ASD has also been posited as one of the factors which may contribute to sexual offending behaviour if the obsessional interest

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