

Is It Murder?

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I received an email recently from a deputy public defender asking for my thoughts about a case at her office. The DA office was charging her client with manslaughter and offering two years in state prison. The prosecutor was telling her the National District Attorneys Association of criminal prosecutors was looking into charging murder in cases like this; not manslaughter, murder. Murder charges against a person with diabetes suffering hypoglycemia while driving, getting into an accident, and causing a death.

Actus Reus

In the first year of law school students are taught how crimes are defined. There are two things to look at: the act committed and the mental state of the person doing it. Actus reus is the physical act, the thing that was done. Some things need to be done with only a minimal mental state of mind and they are considered criminal. In such a case it doesn't much matter what the person who did the thing was thinking—so long as the person acted willingly. For example, if a homicide occurs without the defendant intending to kill anyone, the defendant might be guilty of manslaughter, but not murder. Murder requires a greater criminal intent known as malice aforethought; in other words, the decision and plan to kill someone. A less serious example is speeding. You do not need to have planned to speed, you only need to have done it and you are guilty of violating the law.

Mens Rea

Most crimes require a more serious mental state, a mens rea, a thought process, a specific criminal intent. In these cases, if there is no such criminal mental state there is no crime. If you are out shopping and put your bag down next to a similar bag and then leave with the wrong bag, did you steal? You committed the physical act but did not have the criminal mind required, and were, therefore, not guilty of theft. It was a mistake, not a crime. The mere fact that you did it is not enough; you had to have had a specific intent of taking something

you knew did not belong to you to be guilty of criminal theft. The case of a driver suffering from hypoglycemia causing an accident can be confusing. Virtually no one who drives while suffering low blood sugar intends to get into an accident, let alone kill someone. If someone does intend, the issue is easy—that would be murder if they did what they intended. But the case of someone who unintentionally goes low while driving and gets into a severe accident with tragic consequences is not so easy and, as the email I received shows, is controversial. It is also of great concern to all of us with diabetes.

Despite the remarkable advances that make managing diabetes easier for those of us with access to high quality health care, we all make mistakes. Blood sugars fluctuate, sometimes for reasons no one fully understands. Changes in food, exercise, stress and emotion happen to most of us all the time, and have a constant challenging impact on diabetes management. This is true for people receiving high quality health care. For people not receiving good care—many of whom have no idea they are not—managing diabetes is even harder. The vast majority of people with diabetes have never been adequately trained how to handle and avoid low blood sugar events.

At the same time, ironically, those of us sufficiently well informed to know that tight blood glucose control reduces the risk of complications, who also have access to the care necessary to achieve it, have an added dilemma: using powerful tools to achieve tight control can readily cause more frequent incidents of hypoglycemia, more dramatic low blood sugar events, and less ability to feel the symptoms of hypoglycemia as our blood sugars fall. Hypoglycemia happens more frequently in people who are trying to keep their A1Cs at goal. Hypoglycemia is especially problematic for people who do not have symptoms of low blood sugar (hypoglycemia unawareness).

So how does this get reflected in the context of criminal law when tragedy happens and an accident occurs that results in death? The issue to consider is the driver's mental state: what they knew and when they knew it; what they did to bring about the tragedy, or what they failed to do to prevent it. We start with the fact that in nearly all cases the accident

would not have happened if a mistake had not been made. Something went wrong. The critical question is one of fault. This is the mens rea we talked about earlier.

In the evening I normally take 22 units of Lantus insulin as my basal dosage. One time I recall all too well I accidentally took 22 units of fast acting insulin instead. It was a serious mistake. I put myself at risk and spent most of that night eating candy and drinking juice until I couldn't take it anymore. I was at a hotel when I did it and getting that much candy and juice and explaining why I needed it at 2AM was not easy for me at the time. I survived and could laugh the next day.

What if, instead of being in a hotel and realizing quickly what I had done, I did not know and then got in my car to drive an hour or two? If my blood sugar had been normal when I began driving it would have fallen fast and hard from such an overdose of fast-acting insulin. It would have fallen so dramatically that I might not have recognized the severity of the low before it overwhelmed me. If the consequences had been a horrid accident, would my mistake have made me guilty of murder? Of manslaughter? Or just a tragic and horrifying accident that would have gotten me sued and my driving license suspended? Or let's take a less unlikely event, one which actually happened to me about twenty years ago.

I was driving from Los Angeles to San Diego for a medical appointment at 9AM. My alarm went off at 5. I dragged myself up, read the paper and showered, tested my blood sugar and it was fine. I ate a normal breakfast and took off. Oince I drove this route frequently I had learned a critical piece of information over the years: when I drive long distances my blood sugar falls faster than it might usually drop while, for example, working at my desk. I do not know why; I cannot explain it. I only know that it does. Testing and snacking on long drives can be critical for me, and 20 years ago, I wasn't as aware of it.

On this fateful trip, my blood sugar fell dramatically and quickly as I neared San Diego. I began to realize it and started to move from the far left lane to the right on the highway. I was having trouble getting over as my blood sugar fell. I was driving slowly and cars were honking. I was causing a back-up and having trouble getting over. As my blood sugar continued to fall, my mind slowed, my reflexes were not normal. I was unable to reach over for juice, I could not remember where it was or figure out how to find it. A highway patrol officer intervened. He put on his lights and separated the other cars from me. I pulled over and mumbled and he called a paramedic.

By the time the medic arrived I had gotten some juice and my blood sugar was still low but moving up. By then I was around 60. Nothing tragic happened. The officer rescued me; the paramedics made sure I was alright before letting me drive to my appointment. End of story.

But it did not have to end that way. What if I had swiped someone while struggling to change lanes? What if in doing so someone had died?

And let's take one final episode I will invent. Let's say someone has had repeated incidents of severe hypoglycemia. The lows come on without warning and are overwhelming. He has had three prior accidents where no one was injured. He has been warned by his physician to test before driving; to carry something to treat a low at all times. He drives out on a highway an hour from home to play sports. After the workout he gets in his car without testing; he doesn't stop to eat because he just wants to get home. Then he goes low. The symptoms are harsh and dramatic: unclear thoughts, failing vision, uncontrolled movement. He tells himself he can make it two miles to the next exit where he will get something to eat. He keeps driving, becomes confused, and starts swerving. Another driver sees there is something wrong, presumes the man is drunk and calls 911 on her cell. Then she speeds up to get away from him. He suddenly jerks into her lane, she swerves to avoid him and loses control, her car goes flying into a concrete overpass. The guy is passed out from a low. The woman's car is smashed; she is dead.

Are any of these drivers guilty of a crime? All of them? What kind of crime? Next issue we'll look at what some laws say about it.

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