CHAPTER 5

MENTAL ILLNESS AND THE LAW

Very few of the seven million Canadians with mental disorders ever come into conflict with the law. Those most likely to do so are the ones whose illness leads to homelessness, addiction and petty crime or breaches of public order.

Until fairly recently, such people were generally dealt with in the regular court system, waiting for weeks or months for medical assessment, clogging courts and jails that were ill-equipped to deal with them, receiving little or no treatment during incarceration, having no follow-up treatment arranged after release, and consequently often repeating the cycle with depressing regularity. The cost to the legal and penal systems was substantial.

Most major cities now have diversion courts, sanctioned by the Criminal Code, many of which deal exclusively with low-risk cases in which the accused appears to have a mental illness. These courts are oriented towards treatment rather than punishment. Their repeat-offender rate is impressively lower than that in the regular court and penal system, and strain on the public purse is significantly reduced.

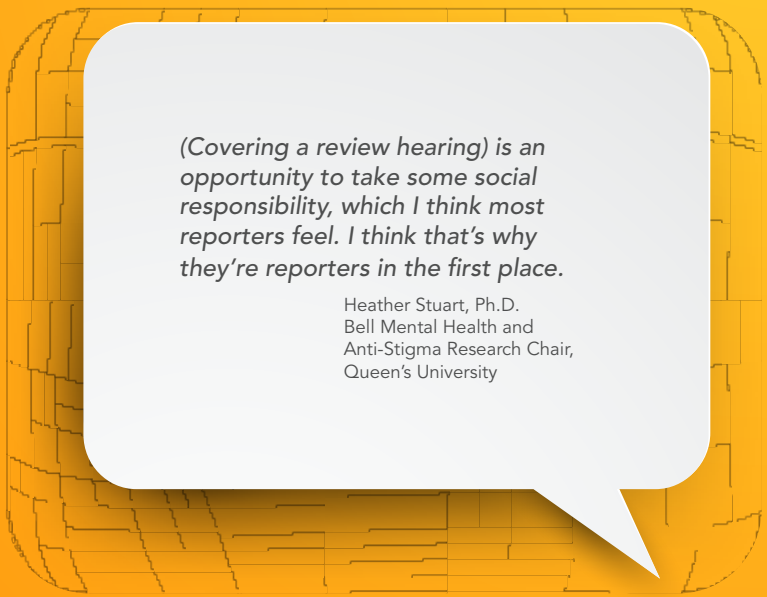
Cases are selected for diversion by the Crown. Both judge and Crown have special training and legal personnel are usually outnumbered by dedicated mental health and social workers.

Typically the accused is medically assessed – often on site the same day – acknowledges the offence, agrees to court-ordered treatment, and has his or her charges withdrawn when it is satisfactorily completed.

Treatment orders are issued by mental health courts with the patient's consent (albeit under circumstantial duress) and so do not have to conform to the restrictions of the provincial Mental Health Act for involuntary treatment. However, where the accused is 'unfit to stand trial' the court may impose involuntary treatment for up to 60 days. Court proceedings are open to the media, but few of the cases handled, by their nature, generate much news.

FITNESS TO STAND TRIAL

The Criminal Code provides that if a mental disorder makes an accused person unable to conduct his defence or instruct counsel, he is 'unfit to stand trial'. The prosecution is held in abeyance and a provincial or territorial Review Board assumes jurisdiction. It decides where the accused is to be housed, under what conditions, reviewing the matter not less than once a year.



I always have a bit of a knot in my stomach when one of these (high profile) cases comes up, because I'm wondering how we're either going to be set back or advanced by how the media cover it.

Hon. Justice Richard D. Schneider
Chairman, Ontario Review Board

NOT CRIMINALLY RESPONSIBLE

When a trial proceeds, either in mental health court or in superior court in the case of serious offences requiring a jury, there is provision in the Criminal Code for pleading that an accused person is not criminally responsible for the act they committed. It involves showing, on a balance of probabilities, that the accused was 'suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.' In other words, the person was psychotic at the time of the offence. This is known as the NCR defence.

When such a defence is initiated, the judge will usually order a number of psychiatric evaluations to be carried out by experts he or she chooses. It's a common misconception that the prosecution and defence lawyers can 'shop around' for experts to

support their case, though they may ask the judge to commission extra evaluations if they aren't satisfied with the first results.

'GETTING AWAY WITH IT'

Another popular misperception is that those found not criminally responsible for murder are effectively let off. This view is often taken by members of a victim's family, and repeated in news reports. The reality is that most people found NCR and committed for treatment will lose their freedom for longer than they might if they had simply pleaded guilty. Furthermore, with treatment comes belated, life-long appreciation of the enormity of their acts.

REVIEW PROCESS

When a jury finds someone not criminally responsible, the case is referred to the provincial or territorial review board. Typically, the board will lock the person up in a secure mental hospital and order treatment, reviewing their progress at least once a year. Members of the victim's family usually attend each review, frequently generating further newsworthy outbursts of rage, once again reported alongside – or sometimes above – the medical evidence presented.

The federal government introduced legislation in 2013 called the Not Criminally Responsible Reform Act. It came into effect in July 2014. It formally enshrines public safety as the paramount consideration for Review Boards, builds into the Criminal Code a definition of 'significant threat to public safety' – the phrase which governs a Review Board's jurisdiction over a mentally disordered person – and allows judges, upon application by the Crown, to designate some mentally ill people found NCR as 'high risk'.

Such people cannot then be granted conditional or absolute discharges, and may be eligible for reviews only once in three years. The designation can be revoked only by a court after recommendation by a Review Board. Access to treatment is not affected.

Before it became law, some judges expressed doubt whether the legislation would have had any impact on high profile cases of recent years. It was also criticized by mental health professionals, especially the three-year period between reviews, irrespective of progress in treatment. It was widely seen as punitive – and thus in conflict with the principle that the person is not guilty of a crime. As well the provision forced the occupation of a hospital bed where it might not have been clinically necessary.

Beyond provisions that give victims notification rights when a previously-violent patient is released, by 2020 the reform act did not appear to have had significant impact in generating great numbers of accused receiving a high-risk designation. Review boards already had a history of treating potentially dangerous patients conservatively, while prosecutors and judges still appeared reluctant to apply a designation that would essentially pre-judge the success of any treatment.

What remains unknown is the number of accused who have, because of the potential for such a harsh designation, avoided availing themselves of the NCR defence. The effect of this would be to put greater numbers of people who could have mounted one successfully into the correctional system where it is known they do poorly, their prognoses worsen, and they become more likely to re-offend once released into the community, typically with little or no support.

REVIEW BOARD HEARING BEST PRACTICE CHECKLIST

- ✓ Be clear that the patient is not a criminal.
- ✓ A review hearing is not a re-trial: Focus your story on rehabilitation, not vengeance.
- ✓ Check the 'facts' contained in statements made outside the hearing.
- ✓ Carefully consider the fairness of relaying characterizations of the patient made outside the hearing.
- ✓ Don't reproduce offensive language that casts stigma on people who are mentally ill unless it is critical to the story.
- ✓ Consider doing a more in-depth follow-up story which may generate more light than heat.
- ✓ Editors should review this checklist before writing headlines.