

# Proceed with Extreme Caution: The Not Criminally Responsible Defence

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G . G R E G B R O D S K Y , Q . C . \*

## I. INTRODUCTION

Defence lawyers should not be so quick to move to find their clients not criminally responsible (NCR). People do not ‘get off’ when they are found not criminally responsible. Clients are remanded into custody and their liberty can be affected far more effectually than by a prison sentence. Recent changes to the *Criminal Code* suggest defence counsel should be all the more vigilant about the potential for NCR findings.

It is difficult for counsel to predict the corollary effects of an NCR finding, and such a finding can lead to unintended consequences for any client. A client who is not facing a lengthy term of imprisonment may find themselves in a forensic hospital and subject to a Review Board for many years for a trivial offence all the while with their liberty extremely restricted. For the purposes of this article, my comments consider primarily those who are charged with violent offences who may be facing a penitentiary sentence. Furthermore, a distinction must be drawn between Mental Health Court and NCR proceedings. Counsel who contemplate seeking (or, in some cases, not opposing) an NCR finding should consult with an expert to determine the disposition that is likely to be imposed by the Review Board. A client who will be viewed as a significant risk or who is unlikely to respond to treatment may spend the rest of his or her life under mental health supervision.

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\* WITH ZACH KINAHAN, B.B.A., J.D.

While the current regime under Part XX.1 of the *Criminal Code* is modernized and Charter-compliant (see *Winko v. Forensic Psychiatric Institute*<sup>1</sup>), there is still great scope for significant deprivations of liberty for those found NCR. In some cases, these deprivations may seem disproportionate, especially when the gravity of the accused person's conduct is minor to moderate in nature. This was recognized by Joan Barrett and Riun Shandler in *Mental Disorder in Criminal Law*:

Also, in cases where the offence charged is minor in nature, the accused may prefer to be convicted and sentenced rather than be found NCR and subject to the Review Board's jurisdiction for an indeterminable length of time. Indeed, in some cases, it may be viewed as irresponsible to raise the defence where the offence charged is minor or only moderately serious.<sup>2</sup>

An apt sentiment is found in the *R. v. Kankis*<sup>3</sup> case involving an appeal from an NCR finding where the accused was charged with six counts of breaching his probation order and his recognizance. In allowing the appeal, Trotter, J. made the following observations about the implications of an NCR verdict:

At times, the criminal law proves itself a rather blunt instrument by means of which to deal with those who suffer from mental illness and are alleged to have committed non-violent crimes...A special verdict of not criminally responsible on account of mental disorder has significant consequences for a mentally disordered offender, Part XX.1 of the *Criminal Code* notwithstanding. It is especially so in the case of persons who prove intractable when offered treatment and whose "crime" is non-violent and would not attract substantial punishment upon conviction.<sup>4</sup>

There is no doubt that substantial consequences are attached to a finding of NCR. This paper will examine issues associated with the impact

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<sup>1</sup> [1999] 2 SCR 625, 135 CCC (3d) 129 (SCC).

<sup>2</sup> Joan Barrett & Riun Shandler, *Mental Disorder in Canadian Criminal Law* (Scarborough, Ont: Carswell, 2006) (loose-leaf 2016 release 4) at 4-38.22. See also Hy Bloom & Hon. Richard D. Schneider, *Mental Disorder and the Law: A Primer for Legal and Mental Health Professionals* (Toronto: Irwin Law, 2006), at 131-132. At p 132, the learned authors observe that: "There is no predictable correlation between the seriousness of the offence and the final disposition." See also the discussion of this issue by Martin J.A. in *R v Simpson* 1977 CarswellOnt 1048, 35 CCC (2d) 337 (Ont CA) at pp 359-360.

<sup>3</sup> 2012 ONSC 378, 2012 CarswellOnt 586.

<sup>4</sup> *Ibid* at para 20, citing *R v Lambie* (1996), 28 OR (3d) 360 (Ont Gen Div) at pp 379-80.

of NCR verdicts and the public perception attached to NCR decisions through a number of interesting case studies which I am familiar with. We will also consider the appropriateness of the burden placed on accused person when insanity is raised by the Crown or the Court. Finally, we will examine the new amendments to the law and their impact on individuals who may be considering the NCR defence.

## II. PART I: DEFENCE COUNSEL SHOULD NOT SO READILY PUT FORWARD NCR

### A. Consequences to Individuals Under the Law

Disposition-making under Canada's current NCR laws focuses on the present mental condition of the NCR accused rather than the seriousness of the index offence.<sup>5</sup> In providing for an examination of the accused's present mental condition, Canada's existing NCR laws specifically engage with the danger an accused might pose to others without regard to the index offence charged. This is in turn connected to the level of restrictions that must be placed on their liberty. More stringent measures are ordered where an accused, in the condition in which he comes before the Board, is believed to pose greater risk than he did at the time he committed the offence that brought him into the system. The regime is under Part XX.1 of the *Criminal Code* which conjunctively engaged with the provincial mental health legislation. Since 1992, Part XX.1 of the *Criminal Code* has governed the assessment, detention, and release of persons who have been found either unfit to stand trial or not criminally responsible on account of mental disorder. Once an individual is found not criminally responsible or unfit to stand trial due to a mental disorder, or has been found not guilty by reason of insanity, the individual is then ordered to be detained in a mental health facility under the *Criminal Code* and must receive care and treatment.<sup>6</sup>

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<sup>5</sup> Bloom & Schneider, *supra* note 2 at 132.

<sup>6</sup> *The Mental Health Act*, CCSM C M110. See s 24(1): "A person admitted to a hospital under Part XX.1 (Mental Disorder) of the *Criminal Code* (Canada) is deemed to be an involuntary patient, and while detained under that Part is subject to the provisions of this Act that concern involuntary patients, except that, notwithstanding any other provision of this Act, (a) the provisions respecting the status of a patient do not apply to the person; and (b) the person may leave or be discharged from the

Irrespective of the actual offence committed, an accused may be subject to indefinite detention. Once detention in a mental health facility is ordered, it is the Review Board's determination as to whether it is appropriate for the individual to be returned to the community. Instances of poor behaviour, adverse reactions to treatment, outbursts, and unwillingness to comply with the treatment would be compiled into a report on which the Review Board would base their decision for further treatment or release. When a negative report is made, upon review an individual may be denied release on this basis. In subsequent Review Board hearings, the decision would be made with a view to progress since the last report. Past behaviour and current compliance with treatment often create a vicious cycle for the offender. Progress in treatment is the objective, therefore an individual who maintains they are not in need of treatment are often deemed unsuitable for release. In Manitoba the provisions under ss. 24(2) of *The Mental Health Act* permit involuntary admission once the *Criminal Code* detention expires:

When detention expires under the *Criminal Code*

24(2) Shortly before a person's detention under Part XX.1 of the *Criminal Code* (Canada) expires, a psychiatrist on the staff of a facility may examine the person and assess his or her mental condition and may, if the requirements for involuntary admission under subsection 17(1) are met, admit the person to the facility as an involuntary patient in accordance with that subsection.<sup>7</sup>

The recommendation by the facility can result in involuntary detention of the basis of s. 15 of *The Mental Health Act*. Subsection 17(1) reads:

Requirements for involuntary admission

17(1) After examining a person for whom an application has been made under subsection 8(1) and assessing his or her mental condition, the psychiatrist may admit the person to the facility as an involuntary patient if he or she is of the opinion that the person

- (a) is suffering from a mental disorder;
- (b) because of the mental disorder,
  - (i) is likely to cause serious harm to himself or herself or to another person, or to suffer substantial mental or physical deterioration if not detained in a facility, and

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hospital only in accordance with Part XX.1 of the *Criminal Code* (Canada)."

<sup>7</sup> *Ibid*, s 24(2).

- (ii) needs continuing treatment that can reasonably be provided only in a facility; and
- (c) cannot be admitted as a voluntary patient because he or she refuses or is not mentally competent to consent to a voluntary admission.<sup>8</sup>

It is this process of admitting a person in a psychiatric facility that creates the possibility of a period of indefinite detention. The Review Board in Manitoba is governed by *The Mental Health Act* under s. 49. Under ss. 49(3), the panel is comprised of three members: a lawyer, a psychiatrist, and a member who is neither a lawyer nor a psychiatrist.<sup>9</sup> According to ss. 49(4) the minister, or a person designated by the minister for the purpose, shall assign members to sit on the various panels of the review board from the roster appointed by the Lieutenant Governor in Council.<sup>10</sup> In Manitoba's *Mental Health Act*, "Minister" means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act.<sup>11</sup> It is important to note that in accordance with ss. 49(8), the Review Board panel may not be comprised of a psychiatrist or physician who is treating or has treated the person, nor can a member of the panel be an officer, employee, or staff member of the facility in which the person is being treated.<sup>12</sup> Therefore, the Review Board is made up of individuals who have no history or connection to the individual being assessed. Decisions are based on information provided by the mental health facility and the courts in order to determine the risk the individual may or may not pose.

A few cases come to mind when considering the unintended consequences of the NCR defence. Two case studies are considered below.

### *1. Rights and Privileges – The O'Brien Case*

John Francis O'Brien suffered from paranoid schizophrenia and was charged with second degree murder for the death of his roommate.<sup>13</sup> In 2002, John Francis O'Brien testified as to all of the reasons why he wanted to overturn the verdict of being unfit to stand trial. Mr. O'Brien described the differences between Stony Mountain Federal Penitentiary and the

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<sup>8</sup> *Ibid*, s 17(1).

<sup>9</sup> *Ibid*, s 49(3).

<sup>10</sup> *Ibid*, s 49(4).

<sup>11</sup> *Ibid*, s 1 (definitions).

<sup>12</sup> *Ibid*, s 49(8).

<sup>13</sup> *R v O'Brien*, 2002 MBQB 184, 2002 CarswellMan 290.

Selkirk Mental Hospital in Manitoba. Mr. O'Brien was adamant that he would much rather spend his time in the penitentiary. He described the differences between *rights* in a penitentiary and *privileges* in a hospital. He explained that smoking—at that time when the offender could smoke—was a *privilege*, having your own money was a *privilege*, going for a walk was a *privilege*, all of which could be taken away from a patient.

He compared this to the *rights* given to prisoners at Stony Mountain. He described being able to work to make money at a paying job, and having the opportunity to develop skills in trades. He described having a job in the penitentiary, while at Selkirk, patients only get the \$83 a month provided by welfare.<sup>14</sup> Mr. O'Brien was adamant that a sentence in prison would allow him to have access to a good library, a canteen, a gymnasium, a yard with baseball, soccer, curling, and tennis. He also included that he would be able to interact with more people at the penitentiary and not only mentally ill patients. Mr. O'Brien described that at Stony Mountain, a prisoner can roam the grounds when their cell opens up in the morning; there is a woodworking shop, a psychiatrist, and inmates can go for a walk outside.<sup>15</sup> Mr. O'Brien told the court that at Selkirk Mental Hospital, something as simple as going for a walk outside for 15 minutes is a privilege that many patients might never receive. Mr. O'Brien described:

In Selkirk everything's a privilege and you have doctors and nurses and the treatment team, I think they call them, deciding if you can go out on the grounds for 15 minutes. That's a big, big thing. If you can get [outside] for 15 minutes. And when I say big, I mean big. There's all kinds of people waiting years to get out there for 15 minutes.<sup>16</sup>

When asked how long Mr. O'Brien had to wait to receive that privilege, he answered, "I, I still don't have it. I've been there ten years".<sup>17</sup> He then went on to explain that he did have *escorted privileges*, adding, "I need to be escorted everywhere I go".<sup>18</sup>

Mr. O'Brien explained to Oliphant, A.C.J., as he then was, that at Stony Mountain inmates could work to buy televisions for their own cells.

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<sup>14</sup> *R v O'Brien*, 2002 MBQB 184, 2002 CarswellMan 290 - June 17, 2002 (Excerpt from proceedings, evidence of John Francis O'Brien) [O'Brien Transcript] at p 59.

<sup>15</sup> *Ibid* at p 55.

<sup>16</sup> *Ibid* at p 56.

<sup>17</sup> *Ibid* at p 57.

<sup>18</sup> *Ibid*.

In Stony Mountain, he explained, inmates have televisions in their cells complete with remote controls, and they watch whatever they want to. Mr. O'Brien described a preference for baseball. However, at Selkirk, there is one television, in one room, and everyone has to watch the same channel.<sup>19</sup> His application to be transferred to the penitentiary was not allowed.

## 2. *Exhibiting Bad Behaviour – The Case of Earl Joel Wiebe*

Another interesting case to consider is that of Earl Joel Wiebe.<sup>20</sup> In circumstances such as this one, it appeared that individuals have committed offences to get out of solitary confinement. If a patient is found to be acting out, behaving stubbornly, defying or resisting authority, or deemed untreatable in a forensic institution, the patient may be subject to a form of solitary confinement. As in the Earl Joel Wiebe case, it may not be long before they find their meals being slid under the door. In this case, the NCR verdict amounted to near solitary confinement that was so apparent to this individual that he would commit various criminal acts in order to attempt to be transferred to a prison. These attempts were sometimes successful, and sometimes not.

Some offenders who are medicated in the hospital and do not like the effects of the medication consider that, in and of itself, to be a form of solitary confinement. In the penitentiary, a person is not forced to take medication. However at the hospital, if a patient does not want to take their medication, then it is physically forced upon them.<sup>21</sup> The individual must escape the effects of the medication by going to the penitentiary to (in their view) interact with the community in a meaningful way. Despite his best efforts, Earl Joel Wiebe's recurring challenge was that at the conclusion of each criminal sentence, he was returned to a forensic hospital.

This is not what the average member of the public envisions when they think of an NCR verdict.

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<sup>19</sup> *Ibid.*

<sup>20</sup> *R v Wiebe* (6 December 2001), Winnipeg, CR01-01-22439 (MBQB). Greg Brodsky, Q.C. was lead counsel. See also: James Turner, "Killer causes ruckus in mental hospital", *Winnipeg Sun* (13 June 2012), online: <<http://www.winnipegsun.com/videos/featured/featuredwin/1213592867001/killer-causes-ruckus-in-mental-hospital/1688081933001/page/1051>>.

<sup>21</sup> *O'Brien Transcript*, *supra* note 14 at p 61.

## B. Public Perception: The Stigma of Mental Illness and Criminal Behavior

### 1. *A Lifelong Stigma & Challenge for Cause*

In the eyes of the law, the stigma of mental illness lasts a lifetime. The public perception of mental illness carries with it social and legal realities, especially in the scope of criminal offenders. Louis Riel<sup>22</sup> during his trial said:

I cannot abandon my dignity. Here I have to defend myself against accusations of high treason, or I have to consent to the animal life of an asylum. I don't care much about animal life, if I am not allowed to carry with it moral existence of an intellectual being.<sup>23</sup>

An important issue in this discussion is whether or not the issue of mental illness should be raised at challenge for cause during jury selection. In jury selection, the Crown and the defence each have a limited number of peremptory challenges, for which no reason needs to be given to dismiss a juror, and an unlimited number of challenges for cause, which must be proven on specific grounds such as partiality.<sup>24</sup> Each juror comes into their role with previous life experiences, knowledge, heuristics, and biases which have the potential to interfere in decision-making and can lead jurors to form positive or negative stereotypes about a person or group, thereby influencing their verdicts.

It seems logical that if stigma towards mental illness is found to be detrimental to the impartiality of the verdict, then this problem may be abetted through a challenge for cause procedure to ensure the defendant's right to a fair trial. However, defence counsel must be aware of the risk in raising the issue during the challenge for cause, especially if it remains to be determined if this is the appropriate avenue to be taken by defence.

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<sup>22</sup> Louis David Riel (22 October 1844 - 16 November 1885) was a Canadian politician, a founder of the province of Manitoba, and a political leader of the Métis people of the Canadian prairies. He led two resistance movements against the Canadian government and its first post-Confederation prime minister, Sir John A. Macdonald. Riel sought to preserve Métis rights and culture as their homelands in the Northwest came progressively under the Canadian sphere of influence. Riel has been made a folk hero by the Francophones, the Catholic nationalists, the aboriginal rights movement.

<sup>23</sup> Desmond Morton, ed, *The Queen v. Louis Riel: Canada's Greatest State Trial* (Toronto: University of Toronto Press, 1974) at 211-212.

<sup>24</sup> See *Criminal Code*, RSC 1985, c C-46, ss 634, 638 [*Criminal Code*].



The peril lies in that by addressing these issues so early in the proceedings, the defence counsel may be in effect raising the issue before they intend to. If the defence counsel does not raise the issue, then they will not have the opportunity to address the potential for bias before the commencement of the trial.

## 2. *Vince Li – Four Thousand Psychiatrists*

The intersection between mental illness and criminal law has been used as an object of political pandering. A recent and topical Manitoban case on this point is that of Vince Li.

In 2009, Vince Li was declared by a court to be not criminally responsible for his actions in the killing of Tim McLean because he suffered from schizophrenia and dementia at the time of the killing.<sup>25</sup> In June 2010, Manitoban Justice Minister Andrew Swan suspended a decision by the *Criminal Code* Review Board to allow Li to take escorted walks on the grounds of the Selkirk Mental Health Centre. A group representing more than 4,000 Canadian psychiatrists condemned the province's decision to prevent Vince Li from taking short supervised outdoor strolls calling it, “the worst kind of political pandering and fear-mongering”.<sup>26</sup> The suggestion that Mr. Swan is pandering is demonstrative that issues related to crime and NCR are those that evoke public attention and reaction.

Essentially, the *Criminal Code* Review Board ruled Mr. Li could receive outdoor passes twice daily from the locked forensic unit at the Selkirk Mental Health Centre as long as he was accompanied by two staff members. However, the Justice Minister immediately vetoed the outings calling them, “contrary to the interests of public safety” until the centre “beefs up” security measures.<sup>27</sup> For the year prior, Mr. Li had been kept in a locked ward and was not allowed outside. The Minister of Justice demanded increased security before Manitoba would honour the Review

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<sup>25</sup> Mike McIntyre, “Vincent Li found not criminally responsible for murder”, *Winnipeg Free Press* (3 May 2009), online: <<http://www.winnipegfreepress.com/breakingnews/Vincent-Li-found-not-criminally-responsible-40781652.html>>.

<sup>26</sup> Larry Kusch, “Denying Li’s Walks ‘political pandering’”, *Winnipeg Free Press* (5 June 2010), online: <<http://www.winnipegfreepress.com/local/denying-lis-walks-political-pandering-95678234.html>>.

<sup>27</sup> *Ibid.*

Board decision regarding a crime that the Minister claimed “shocked the conscience of all Manitobans and indeed all Canadians.”<sup>28</sup>

In a letter to the *Winnipeg Free Press*, the Canadian Psychiatric Association said the Justice Minister's reaction to a Review Board's “carefully considered” decision to grant a “slight increase” in Mr. Li's liberty demonstrates “a shocking lack of knowledge and understanding of mental illness”.<sup>29</sup>

However, in this case, a significant portion of the public tended to side with the Justice Minister.

The letter to the Justice Minister was written by the association's president Dr. Stanley Yaren, who has treated Mr. Li and also serves as the director of the Winnipeg Regional Health Authority's adult forensic psychiatry program. Dr. Yaren made clear in an interview that his comments were made in his role as head of the national association.<sup>30</sup> He commented on public perception noting that, there are still “members of the public who would return to the days when the mentally ill were cast out of society to be incarcerated in prisons and asylums, never to see the light of day”.<sup>31</sup>

The *Criminal Code* Review Board, with the benefit of the advice of experts in the field, decided Mr. Li should be able to walk outside on the grounds of the hospital and the physicians responsible for Mr. Li's treatment believed that he posed no threat. Unless the public is misinformed about the circumstances of Mr. Li's escorted walks on the grounds, the message from the Minister, and his supporters amongst the public, was that this fellow should not be afforded the privilege which any other prison inmate would have on day one at the penitentiary.

### 3. *David Michael Krueger – Change of Venue*

There is no doubt that the issues of NCR create uneasiness amongst the public. A change of venue was granted to David Michael Krueger because of the community reaction to his offence and the ability to ensure

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<sup>28</sup> Dan Lett, “Swan's knee-jerk intervention shows he's not doing his job”, *Winnipeg Free Press* (5 June 2010), online: <<http://www.winnipegfreepress.com/local/swans-knee-jerk-intervention-shows-hes-not-doing-his-job-95678369.html>>.

<sup>29</sup> *Supra* note 26.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

an unbiased jury when the psychiatric background of Mr. Krueger was made public. Mr. Krueger brutally murdered three young children in 1956 and 1957 and then subsequently was found not guilty by reason of insanity and placed in Oak Ridge, an Ontario Psychiatric Facility located in Penetanguishene.<sup>32</sup> His story is worth the read.

David Krueger completed a program at Oak Ridge, he was deemed greatly improved and sent to a medium-security hospital in Brockville, Ontario in 1991. In Brockville, Krueger claims he fell in love with a psychiatric patient named Dennis Kerr who rejected his sexual advances.<sup>33</sup> During the first hour of his very first weekend pass in over thirty years, Krueger stabbed Kerr to death. Then Mr. Krueger, in his blood-drenched clothes, calmly walked to a police station and turned himself in.<sup>34</sup>

Mr. Krueger was being supervised on a day pass at the time—but his supervisor was a fellow named Bruce Hamill, a former patient who killed an elderly woman.<sup>35</sup> They were supposed to get ice cream at a nearby Dairy Queen; instead, with a selection of knives provided by Hamill, Krueger mutilated Kerr.<sup>36</sup> Hamill was an accomplice in the Brockville murder and both men were subsequently returned to Oak Ridge.<sup>37</sup>

This story had members of the public scratching their heads regarding the administration of the current hospitalization and treatment regime. When the psychiatric history was published, the story was deemed so outrageous that a motion to change the venue was granted due to the community reaction to his offence and the instability to ensure an unbiased jury.

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<sup>32</sup> Mara Bovsun, "Psycho Peter Woodcock murdered three children in late 1950s, underwent cutting-edge LSD therapy at mental hospital and killed again in 1991 when given day of freedom", *Daily News* (30 November 2013), online: <<http://www.nydailynews.com/news/justice-story/subhed-article-1.1533175>>; Mark Bourrie, "The serial killer they couldn't cure dies behind bars", *The Star* (9 March 2010), online: <[https://www.thestar.com/news/ontario/2010/03/09/the\\_serial\\_killer\\_they\\_couldn\\_t\\_cure\\_dies\\_behind\\_bars.html](https://www.thestar.com/news/ontario/2010/03/09/the_serial_killer_they_couldn_t_cure_dies_behind_bars.html)>.

<sup>33</sup> Bovsun, *ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

*4. R. v. Molodowic at the Supreme Court of Canada – Even Jurors are not Immune*

Mr. Molodowic suffers from paranoid schizophrenia. After shooting and killing his grandfather, he drove to a friend's house and told her father to call the police, as he had just shot his grandfather.<sup>38</sup> After being arrested and properly informed of his rights, he gave a statement to the police and was tried before a judge and jury on a charge of second degree murder.<sup>39</sup> Prior to trial, he had undergone two psychiatric assessments and both doctors testified that the accused's act of shooting his grandfather was consistent with his mental disorder having caused him to believe that only in so doing could he save himself from further torment.<sup>40</sup>

Further, the doctors agreed that Mr. Molodowic did not have the capacity to appreciate that his actions were morally wrong at the time of the offence. No rebuttal expert was called to contradict the testimony from the doctors but on cross-examination the Crown challenged the expert evidence and was successful in drawing a number of admissions and concessions.<sup>41</sup> Mr. Molodowic was convicted of second degree murder. The majority of the Manitoba Court of Appeal dismissed his appeal. The issue on appeal was whether the verdict was unreasonable with respect to the effects of the accused's illness on his criminal responsibility.

The dissenting opinion of Huband, J.A. became the basis of the Supreme Court's decision to set aside the verdict. The judgment was delivered by Arbour, J.:

The trial judge correctly instructed the jury that they were not required to accept that evidence, but that they had to assess it in light of the totality of the evidence tendered, and that they were entitled to reach their own conclusion even if it conflicted with that of the experts. A majority of the Court of Appeal concluded that it was not unreasonable for the jury to convict in that "it was within the right of the jury to reach the verdict it did" ((1998), 126 Man R (2d) 241, at p. 244), whether one agreed with that verdict or not. Huband J.A., dissenting, reviewed all the evidence bearing on the central question of whether the appellant knew that killing his grandfather was morally wrong. He approved of the trial judge's instructions to the jury that they were not bound to accept the unchallenged opinion of the experts but said (at p. 252):

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<sup>38</sup> *R v Molodowic*, 2000 SCC 16 at para 2, [2000] 1 SCR 420.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid* at para 17.

<sup>41</sup> *Ibid* at para 18.

The trial judge[’s] . . . instruction needs to be considered in the context of the case presented to the jury. The expert opinions of Dr. Yaren and Dr. Shane need not be accepted if there is some reason to reject them, because of some discernible flaw in their reasoning or because the opinion was formulated on too fragile a factual basis or because the opinion conflicts with inferences one might logically draw from other evidence.

One might have legitimate reservations about the opinion of Dr. Shane, standing alone. But I do not see any rational basis for rejecting the opinion of Dr. Yaren. Dr. Yaren starts with the credibility of a truly independent witness. He has substantial experience in this field. He has the benefit of a staff of skilled associates to assist him in reaching his diagnosis and formulating his opinion as to the culpability of the accused. His opinion is entirely consistent with the evidence as to the accused’s conduct in the months and weeks leading up to the shooting. It also accords with the conduct of the accused on the night of the killing, as described by others and through the accused’s own statement to the police.

To reject all of this evidence was, in my view, unreasonable and invites appellate intervention. I would set aside the verdict on the ground that it is unreasonable and cannot be supported by the evidence, and I would substitute a verdict that the accused is not criminally responsible by reason of mental disorder.

I agree with the foregoing conclusions and need expand only briefly on the reasons of Huband J.A.<sup>42</sup>

In paragraph 17 of the Supreme Court decision, the Court reiterated that Dr. Yaren was of the opinion that it was “highly probable that the appellant did not have the capacity to appreciate that his actions were wrong.”<sup>43</sup> While Dr. Shane and Dr. Yaren differed in their precise diagnoses, the mental illness shared key symptoms, including visual and auditory hallucinations, and persecutory delusions which together severely impair the sufferer’s grasp of reality. Further, as mentioned above, both doctors were of the opinion that the appellant’s act of shooting his

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<sup>42</sup> *Ibid* at para 12.

<sup>43</sup> *Ibid* at para 17: [Dr. Yaren was] Relying on his interviews with the appellant, the results of formal psychological testing conducted at the Health Sciences Centre, records from the appellant’s three-day stay at the Brandon Mental Health Centre in August 1995, interviews with the appellant’s family and the appellant’s statement to the police, he diagnosed the appellant as having developed full-blown paranoid schizophrenia, a severe mental disorder, roughly two months prior to the shooting.

grandfather was consistent with his mental disorder having caused him to believe that only in so doing could he save himself from further torment.<sup>44</sup> The Supreme Court reiterated:

I agree with Huband J.A. that the evidence, particularly the testimony of Dr. Yaren, does not reasonably support the conclusion that the appellant was lucid to the point of knowing that his acts were morally wrong at the time of the shooting. In my view, the totality of the psychiatric evidence did not give rise to the reasonable possibility that the appellant, who laboured under the effects of a severe mental disorder at the time he committed a homicide, and whose moral judgment was impaired as a result, would have had a momentary reprieve from the effects of his disorder, at the critical time, sufficient to provide him with the moral insight necessary to engage his criminal responsibility.<sup>45</sup>

This was an example of a circumstance where despite the fact that experts formulated an opinion on the culpability of the accused, public perception of crime and mental illness served to outweigh the expert testimony in the eyes of the jury. The jury was willing to overlook the professional opinion of both Dr. Yaren and Dr. Shane. Ultimately, the appeal was allowed, the judgment of the Manitoba Court of Appeal was set aside and a verdict of NCR was entered.<sup>46</sup>

### III. PART II: REASONABLE DOUBT *VERSUS* BALANCE OF PROBABILITIES

#### A. The Presumption of Innocence

In the *R. v. Godfrey* decision, Mr. Justice O'Sullivan was of the opinion that the argument against the presumption of sanity was potentially threatening to liberty given that insanity may be raised by the Crown or by the Judge.<sup>47</sup> If there was no presumption of sanity, it would be open to a jury to condemn a prisoner to incarceration as an insane person—potentially for life—if they had a reasonable doubt as to his sanity.

In *R v. Swain*, the court considered the constitutionality of the Crown being able to raise insanity over the accused's objections, and ultimately established that the Crown is generally only able to raise NCR post-guilty

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<sup>44</sup> *Ibid* at paras 16-17.

<sup>45</sup> *Ibid* at para 21.

<sup>46</sup> *Ibid* at para 24.

<sup>47</sup> (1984) 39 CR (3d) 97, 26 Man R (2d) 61 (Man CA).

verdict.<sup>48</sup> It is my opinion that one of the problems is that post-guilt insanity may be raised by the Crown or by the Court, which leaves the accused in the invidious position of being obliged to disprove it. There is the further problem that the jury may reach a compromised verdict where the jury is not convinced of guilty beyond a reasonable doubt, but is satisfied that the accused is mentally ill and perhaps injurious.

If the accused is to be subjected to a life sentence, his defences should be open to him to choose—even if, as in *R v. Chaulk*,<sup>49</sup> the accused feels they are not subject to the ‘paper laws’ and the accused is incapable of knowing that their act is condemned by people generally.<sup>50</sup>

If the accused is unfit to instruct counsel, we have another problem—that is, the accused’s ability to choose his defence must be subsumed to the compassion that the accused is incapable of understanding that the act charged is wrong in light of the ordinary moral standards of reasonable members of society.

In her opinion in *Chaulk*, Madame Justice Wilson finds that some American states in the English Law Revision Committee have come to the conclusion that the defence of insanity should be an evidential rule and not a persuasive burden:

In short, the lower burden on the accused who pleads insanity is seen as being both more consonant with fundamental principles of criminal law, and has a sufficiently high threshold to prevent insanity pleas in cases where there is only tenuous support for such a plea.<sup>51</sup>

As Madame Justice Wilson stated in *Swain*, “the unfairness of imposing on an accused who does not wish to raise the defence of insanity, the burden of proving, among other things, that he is not presently dangerous” is a problem.<sup>52</sup>

In *Swain*, Madame Justice Wilson, who was in agreement with the Chief Justice that the common law rule infringed the accused’s s. 7 Charter right to liberty, categorized some of the dangers inherent in the rule:

I accept the appellant’s submission that to permit the Crown to tender evidence of insanity against the wishes of the accused is to countenance too great an

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<sup>48</sup> [1991] 1 SCR 933, 1991 CanLII 104 (SCC) [*Swain*].

<sup>49</sup> [1990] 3 SCR 1303, [1990] SCJ No 139 [*Chaulk*].

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid* at p 70.

<sup>52</sup> *Swain*, *supra* note 48 at pp 1025-1026.

interference with the fundamental right of an accused to advance whichever defences he considers to be in his best interests and to waive those which he considers are not. I agree with the appellant that to allow the prosecution to raise the issue of insanity can completely distort the trial process because of the impact it can have on other defences raised by the accused, on the jury's assessment of his credibility, and on the traditional role played by defence counsel in an adversary system.<sup>53</sup>

Madame Justice Wilson observed, and I am compelled to agree, that allowing the prosecution to raise the issue of insanity serves to discredit the accused's credibility so that a potential defence such as alibi or accident are prejudiced. She also found that the conditions at Oak Ridge, a division at Penetanguishene, were highly corrosive and emphasized rules and regulations in lieu of personal rights. She wrote in *Swain* at p. 1027:

Under s. 16(4) of the *Criminal Code* the accused is presumed to have been sane at the time he or she committed the offence. The accused who elects not to defend on the basis of insanity relies on this statutory presumption. If I am correct in what I have said about the impact of the common law rule, allowing the prosecution to raise the issue of insanity may substantially reduce the chances of an accused's outright acquittal. It may totally defeat the strategy adopted by the defence and deprive the accused, particularly an accused who turns out to be sane, of the fair trial the adversarial process was designed to ensure. This is a high price to pay to protect the relatively small number of persons going through the criminal justice system who are truly insane and do not wish to raise it in their defence. In cases where the Crown is permitted to introduce evidence of insanity over the accused's objection and does not succeed in proving it, the defence's case may have been destroyed to no avail. His election is simply proved to have been sound but this is cold comfort to him and to his counsel.<sup>54</sup>

Directly following, Madame Justice Wilson harkened back to this paper's main argument—

I think it should be borne in mind also that another consequence of allowing the prosecution to adduce evidence of insanity is that the accused may well face consequences more harmful to him than a conviction. An insane acquittee is detained at the pleasure of the Lieutenant Governor, often for a period exceeding that which would have been possible upon conviction. He must also live with the stigma of being held to be both a criminal and insane and may face conditions worse than those obtaining in prison. The intervener, the Canadian Disability Rights Council, described the Penetanguishene Mental Health Centre in which the appellant initially spent some time and in which 130 of Canada's inmates on Lieutenant Governor's warrants are detained as:

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid* at p 1027.



... a highly coercive environment emphasizing rules and regulations rather than personal rights. At Oak Ridge, there are steel gates which are double locked. The gates are deadlocked from the end of the corridor, from 10:30 at night to 6:30 or 7:00 in the morning. The windows in the inmates' rooms have bars. One-third of the patients sleep on concrete slabs. The rooms want for cleanliness. There is no cleaning staff. There are metal detectors, a closed circuit television, and an x-ray machine. At night all inmates are locked in individual rooms. Inmates are also locked in their rooms during the day if the staff is short, which is often the case. Inmates who are in the assessment unit are subjected to intense lighting which is left on twenty-four hours a day. In some parts of the facility, there are no temperature controls. There is one psychiatrist for all the inmates at Oak Ridge and he spends one-fifth of his time away from the facility. Consequently the facility uses inmates on LGW's to act as therapists for one another. In the name of treatment, inmates of one of the units are forbidden to speak to each other during the course of an ordinary day.

It is my view that society's interest in ensuring (that persons [who are not criminally responsible] are not convicted) cannot override the right of an accused to control his own defences and to forego the defence of insanity if this is in his interests. As I stated in *R. v. Turpin*, 1989 CanLII 98 (SCC), [1989] 1 S.C.R. 1296, at pp. 1313 and 1316:

To compel an accused to accept a jury trial when he or she considers a jury trial a burden rather than a benefit would appear, in Frankfurter J.'s words, "to imprison a man in his privileges and call it the Constitution".<sup>55</sup>

With this knowledge, one has to wonder about the proposition that Chief Justice Lamer, as he then was, concludes in *Chaulk*—that the alternative of an evidentiary burden requiring the accused to merely raise a reasonable doubt would not be effective, because it would be very easy for an accused person to fake such a defence, and thereby raise a reasonable doubt.<sup>56</sup>

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<sup>55</sup> *Ibid* at pp 1027-1029.

<sup>56</sup> See *Chaulk*, *supra* note 49 at p 1342: The Attorneys General of Quebec and Ontario both argue that an evidentiary burden would be ineffective because it is very easy for an accused to "fake" insanity and to raise a reasonable doubt. Thus, lowering the burden on the accused to a mere evidentiary burden would defeat the very purpose of the presumption of sanity. The appellants answer that only an accused who is willing to be incarcerated under the "L.G.W. system" will be inclined to raise insanity. Given the severe loss of liberty which corresponds to a successful insanity plea, it is unlikely that accused people will raise s. 16 on a routine basis.

We are after all arguing about the place of detention, or whether there should be detention. If the argument is to deter and to detect flimsy cases of insanity from gullible juries, that objective is largely achieved by the compulsory and indefinite detention upon the special verdict of acquittal. As we know, if the accused is dangerous and mentally ill, he does not go to the street. He is remitted under a provincial Mental Health Act to determine place of treatment and commence what appears at the outset to be indefinite detention.

## **B. Who Can Raise NCR: Should the Crown be Obligated to Prove on Beyond Reasonable Doubt Standard?**

The defence of mental disorder is set out in s. 16 of the *Criminal Code*.<sup>57</sup> In s. 16(2) of the *Criminal Code*, the accused is required to prove on a balance of probabilities that they are NCR once they raise the defence.<sup>58</sup> In my view, akin to self-defence, the onus should rest on the Crown to prove beyond a reasonable doubt that s. 16 NCR is *not* available to the accused. In my opinion, this would be an effective safeguard to individual's liberty particularly in circumstances where the accused does not want to raise the defence and it has been raised by the Crown or the Court.

I take the position that it is for my client to instruct me on defences he wants to raise. This is, of course, subject to his not being found unable to instruct counsel. Once a client is found fit to stand trial, however, professional ethics demand that the client alone must decide whether to advance an NCR defence,<sup>59</sup> and rules of professional conduct require counsel to respect the client's ability to exercise his or her freedom of choice in this regard.

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<sup>57</sup> *Criminal Code*, *supra* note 24, s 16.

<sup>58</sup> *Ibid*, s 16(2).

<sup>59</sup> *Swain*, *supra* note 48. See also *R v Szostak*, 2012 ONCA 503, 2012 CarswellOnt 9100. Rosenberg, J. provides a noteworthy discussion on this point. The essence is captured at para 77: "I should begin by saying that I am satisfied that where, as here, the accused is fit, counsel is not entitled to advance the NCRMD defence against the wishes of the accused. I would go further and hold that counsel must have instructions before advancing the NCRMD defence. This control over the defence is a necessary consequence of the values of dignity and autonomy that underlie our adversarial system."

The major tactical decision faced by the defence is whether to raise NCR at the outset of the trial. If the accused is obviously NCR or has no defence, it is best to build an evidentiary record supporting a finding of NCR throughout the trial. On the other hand, if there is a viable defence to the underlying conduct—for example, alibi—NCR should not be pleaded until a finding of guilt is made. The reason for this is not hard to understand: a defence of “I didn't do it, but if I did I was NCR” tends to lack credibility. If the accused wants to raise the defence of accident or defence of alibi, he should be able to raise it without the connotation that goes with the NCR evidence.

### **C. The Claude Lanthier Case – Choose Your Defences Carefully**

On this point, I reflect on the Claude Lanthier case.<sup>60</sup> Claude Lanthier was out on a day pass from Selkirk Mental Hospital. Mr. Lanthier's father was seen walking down the street carrying a rifle. When the police saw Mr. Lanthier, Sr. they asked him what he was doing with the gun. Mr. Lanthier, Sr. told the police that he thought his son was coming to kill him. The police told him to put away the gun and to call 911 Emergency if anything happened. Mr. Lanthier, Sr. was concerned, and he used various items of household furniture to barricade the door. When Claude Lanthier approached his father's house he could see his father holding the gun through the window. While Mr. Lanthier, Sr. was on the phone with the police holding his rifle, the sound of Mr. Lanthier, Jr. pushing against the barricaded door could be heard through the phone. During the transfer of the 911 call, the sound of the barricade toppling over could be heard through the phone—and then you could hear footsteps. The words, “Father, I tell you I'll kill you, I tell you I'll kill you,” was heard on the 911 call, and then two gun shots ‘Bang Bang’. The door is opened and ultimately Mr. Lanthier, Sr. ends up getting shot with his own rifle. As the corded phone receiver hangs from the wall mount, you could hear the sound of it hitting the wall—slower and slower.

Initially, no one was exactly sure what transpired in those few seconds between the door being opened and the gun going off. My client, however

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<sup>60</sup> *R v Lanthier* (1973), Winnipeg 5/4904 (MBQB). This section is commentary to the case in which Greg Brodsky, Q.C. was lead counsel.

was adamant that he did not shoot his father and that the gun ‘just went off’ by accident. When I asked my client what happened he told me he was afraid his father was going to kill someone so he ran over to him and took the gun away. I asked him how he did that. He told me that his father was hunched down, and appeared to be on the phone with someone while clutching the rifle. Claude Lanthier did not know his father was on the phone with police. He tried to remove the gun from his father’s hands. His father, in turn, tightened his grip on the gun. Then the gun discharged.

As for the words, “Father, I tell you I’ll kill you, I tell you I’ll kill you,” I was able to establish this was from two different voices. The word “Father” was said by Claude, “I tell you I’ll kill you, I tell you I’ll kill you,” was said by the father. The next issue was how two shots were fired in succession. This was an unusual situation, so I took it upon myself to research and test this model of rifle. I acquired a replica of this rifle and inspected it—I learned how it works. I spent hours at the shooting range. This particular rifle has a half-moon trigger. The Crown argued that you cannot pull the trigger if your arm is extended, in the way that Mr. Lanthier, Sr.’s would have been. When Mr. Lanthier, Sr. squeezed the stock to keep hold of the gun, the half-moon trigger was engaged thereby discharging the rifle.

I was able to show that this gun, under these circumstances, could be discharged accidentally from the precise circumstances my client described—and once the bullet is in the chamber, two shots could be fired in quick succession. I stood before the jury, re-enacted the circumstances and showed how the gun could be discharged twice.

Due to the fact Claude Lanthier was on a day pass from Selkirk Mental Hospital, I had my doubts the jury would accept his explanation. This is another insidious consequence of an accused who has a history of mental illness. Claude Lanthier was in a predicament because if he were to testify to the circumstances, the Crown could cross examine him on his mental health history, thereby severely affecting his credibility. I could have moved to find Claude Lanthier found NCR, but instead we argued accident—and were successful. Mr. Lanthier was acquitted. If we went the NCR route, Mr. Lanthier would still be in custody.

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Now although that was a tangent, it is demonstrative of the notion that an accused person should be able to determine if he wants to raise

NCR or not. This is, whether he should be getting a life sentence when he could have a term definite, or whether it is possible that other defences outside the scope of NCR are available. The Claude Lanthier case is also an archetypal circumstance where defence counsel has to be vigilant when an accused faces real credibility challenges on the basis of the mental health history.

The consequences of an NCR verdict must be fully and carefully explained to the client. The client who may have the s.16 verdict available to him or her must be made to understand that, if successful, the verdict will not result in acquittal. Instead, the NCR verdict will bring the individual within the jurisdiction of the Review Board until they no longer represent a significant risk to the safety of the public (there is a caveat in the new law I intend to address in the next section).

The client must understand that while under the Review Board's jurisdiction he or she may be subject to detention in a psychiatric hospital not only initially, but also may be returned to the hospital for lengthy periods at a time even after an initial or subsequent discharge to the community. Counsel must advise the client that detention in a psychiatric facility will be for an unknown and unknowable period of time, potentially longer than any sentence they might face upon conviction in criminal court and "counsel must advise that detention in psychiatric hospital may be in very secure conditions with few or no privileges and severe restrictions on liberty."<sup>61</sup> Furthermore, the client may be transferred to various hospitals around the province based on the Board's determination of their security classification.

### ***1. Court Ordered Assessments***

Section 672.11(b) of the *Criminal Code* provides that a court may order an assessment with respect to criminal responsibility where it has *reasonable grounds to believe that such evidence is necessary* to determine whether the accused would be exempt from criminal responsibility by virtue of s. 16.<sup>62</sup> The court may make an assessment order of its own

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<sup>61</sup> Anita Szigeti & Jill Presser, "The Responsible Approach to the Issue of Criminal Responsibility" (2011) 32:5 *For the Defence* – The Criminal Lawyers' Association Newsletter 26.

<sup>62</sup> *Criminal Code*, *supra* note 24, s 672.11(b).

motion, or on the application of the accused at any time.<sup>63</sup> The Crown, however, may only seek an assessment order where: (1) The accused puts his or her mental capacity for criminal intent into issue or (2) The prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged offence, on account of mental disorder.<sup>64</sup> It is subsection (2) which provides the Crown the authority to make the motion.

The case law on s. 16 places further restrictions on the Crown. As outlined above, the Supreme Court in *Swain* held that giving the Crown an unrestricted right to raise the NCR issue against the wishes of the accused violates the accused's s. 7 *Charter* right to control his or her own defence. The Court held that the Crown is only permitted to raise the NCR defence in two situations: (1) where the accused puts his or her mental capacity into question and (2) after the trier of fact has concluded that the accused is otherwise guilty of the offence charged.<sup>65</sup>

In the recent decision of *R. v. Vassell*, Justice Dean held that s. 672.12(3), read in conjunction with the prohibition on raising the NCR defence as set out in *Swain*, means that the Crown cannot seek an assessment of criminal responsibility until the accused raises the issue or the trier has made a finding of guilt.<sup>66</sup>

It is appropriate to examine the *Her Majesty the Queen and Richard Dowdell*<sup>67</sup> decision from February 2015 as not only a breach of solicitor-client privilege, but also an unwarranted intrusion on the accused's ability to choose their defence. I have already mentioned that it is my position that an individual has the right to choose what defences he or she puts forward. If a copy of the psychiatrist report goes to the Crown, who then raises NCR or the issue of fitness, the client is deprived of his or her right to choose. It is the accused whose liberty is in jeopardy—he should decide whether he wants a term definite or an indeterminate sentence.

There are several ways that the potential for an NCR verdict may arise during a trial. First, the accused can raise the issue of NCR at the outset of the proceeding and seek to leave the issue with the jury. If evidence

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<sup>63</sup> *Ibid*, s 672.12.

<sup>64</sup> *Ibid*, s 672.12(3).

<sup>65</sup> *Swain*, *supra* note 48.

<sup>66</sup> *R v Vassell*, 2013 CarswellOnt 8344, 2013 ONCJ 333 (Ont CJ) at paras 27-28.

<sup>67</sup> [2015] OJ No 748.

capable of supporting the defence exists, the jury will be required to assess first whether it has been proved beyond reasonable doubt that the accused committed the criminal act. If the jury is so satisfied, it will then have to consider whether an NCR defence has been proved on a balance of probabilities. If the jurors are not satisfied, they must then go on to consider whether the *mens rea* for the offence is proved beyond a reasonable doubt.<sup>68</sup> The second option is to conduct the trial without raising a s. 16 defence until after the jury returns its verdict. If the accused is found guilty, meaning that the Crown has proved both the *actus reus* and *mens rea* of the offence, the defence can raise the issue of NCR and have it adjudicated before a conviction is entered.<sup>69</sup>

#### IV. PART III: NEW AMENDMENTS: REVIEW BOARD HEARINGS & HIGH-RISK ACCUSED

Sadly, many of the Federal Government initiatives on crime do not appear to be informed by reality. Under the new amendments to the *Criminal Code*, an NCR accused deemed “high-risk” would no longer be entitled to an annual review of his detention. Rather, he would only be entitled to a review every three years.<sup>70</sup> The new amendments prohibit a “high-risk” accused from entering the community for any reason other than urgent medical matters.<sup>71</sup> What a high-risk offender would be facing is the prospect of detention in a forensic hospital without any hope of release (or even an increase in privileges) for three years. This hardly seems like an environment conducive to treatment and recovery.

The clinical tools that are used to assess risk were not designed explicitly to answer the specific legal questions the NCR laws demand. For example, there is no specific clinical tool that assesses whether someone poses a “significant threat to the safety of the public”. In practice, “significant threat” has been interpreted as a real risk of serious physical or psychological harm.<sup>72</sup> A miniscule risk of grave harm will not meet this

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<sup>68</sup> *R v David*, 2002 CarswellOnt 2920, 7 CR (6th) 179 (Ont CA).

<sup>69</sup> *Swain*, *supra* note 48.

<sup>70</sup> *Criminal Code*, *supra* note 24, ss 672.81 – (1.31) – (1.32).

<sup>71</sup> *Ibid*, s 672.64(3).

<sup>72</sup> Bloom & Schneider, *supra* note 2 at 224.

threshold, nor will a high risk of trivial harm.<sup>73</sup> Given that the risk assessment tools were not explicitly designed with the legal question in mind, “it is critical that medical or psychiatric evaluations in this context be anchored in an understanding of the legal standard involved”.<sup>74</sup> In *Orlowski v. British Columbia* for example, the BC Court of Appeal found that the Review Board “had not come to grips with the legal question of significant threat” because it had been distracted by the question of how the accused “would cope in the outside world”.<sup>75</sup>

The new NCR amendments suggest fixing the problem by classifying certain offenders as ‘high-risk’ NCR persons and detaining them for lengthier periods, thereby eschewing the importance of aligning clinical and legal approaches. Although the amendments were brought to force in the name of public safety, the pressing question remains as to how to ensure the successful reintegration of NCR accused into society upon their eventual release. For instance, proposed amendments designated high-risk offenders as unsuitable for therapeutically important privileges associated with eventual community reintegration without any evidence.<sup>76</sup>

Given fears about high-risk designation,<sup>77</sup> informed mentally ill persons accused of criminal offences and their counsel will likely try to avoid the NCR route. Defence counsel will more often encourage their client to avoid NCR verdicts by accepting a plea, following which they will serve their time and exit the system. Having avoided the NCR route, mentally ill offenders will instead emerge from prison with no treatment and no supervision. A similar situation was occurring prior to Bill C-30, which was introduced in 1992.<sup>78</sup> Before Bill C-30, counsel for mentally ill accused sidestepped NCR or ‘unfit to stand trial’ options because of the

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<sup>73</sup> *Ibid.*

<sup>74</sup> Rebecca Sutton, “Canada’s Not Criminally Responsible Reform Act: Mental Disorder and the Danger of Public Safety” (2013) 60 *Criminal L Q* 41 at 58.

<sup>75</sup> 1992 CarswellBC 1103 at paras 41-42, 94 DLR (4th) 541.

<sup>76</sup> Canadian Bar Association, National Criminal Justice Section, “Bill C-54 - Not Criminally Responsible Reform Act”, (Ottawa: March 2013), online: <<https://www.cba.org/CMSPages/GetFile.aspx?guid=a205a9cc-d37f4331-8572-e0852123c591>> at 10.

<sup>77</sup> *Ibid* at 8-9.

<sup>78</sup> Bill C-30, *An Act to amend the Criminal Code and to amend the National Defence Act and the Young Offenders Act in consequence thereof* (assented to 1991, c 43, s 4, proclaimed in force February 4, 1992).



likelihood their client would spend more time in custody than if they had gone to prison, and the severe and lasting consequences to an NCR verdict on the individual.<sup>79</sup> The new amendments enacted in the *Criminal Code* will likely increase the risk that mentally ill individuals will be left untreated and unsupervised, and in turn increase the potential to harm others.

## V. PART IV: CHOOSE YOUR COMMUNITY

When advising a client on whether to seek an NCR verdict, the choice should not be presented to an accused as simply one of going to jail or going to a hospital. In light of the current regime, ethical obligations require defence counsel to consider carefully and advise the client as to the potential consequences of an NCR verdict. Those accused of relatively minor property offences, and even mid-level offences involving some violence, should be specifically informed that if found NCR, they could spend much more time detained in a psychiatric facility than they would spend incarcerated if convicted. Clients should also be advised that they are unlikely to be absolutely discharged by the Review Board until they demonstrate “insight” into their mental illness and compliance with psychiatric treatment. Clients who do not believe they are mentally ill should be told that they may progress very slowly through the Review Board system. Only once the client is fully informed can counsel obtain meaningful instructions on how to proceed.

Commentators should tread carefully when making generalizations across jurisdictions in regards to NCR findings because each provincial body handles Review Board processes differently. Furthermore, the rules governing NCR individuals can and have been changed with incoming new legislation. As well, the actual implementation of Review Board processes may vary greatly province to province, but the blemish of an NCR verdict remains with the accused for the rest of their life.

The *Criminal Code* may be altered decade to decade, as might the implementation of Review Boards, but the NCR verdict does not go away. The individual will remain shrouded in the NCR finding and will be forced to weather political ebbs and flows. Mobility rights, as considered

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<sup>79</sup> Sutton, *supra* note 74 at 59.

by the *Charter*, may be impacted by different provinces taking different approaches to Review Board implementation.

In advising mentally disordered clients as to the benefits and disadvantages of the NCR route, counsel should be aware that the public protection/treatment model enshrined in Part XX.1 of the *Criminal Code* is invasive. The model, by nature, patronizes accused persons and turns them into objects of other people's wisdom and knowledge about what is best for them. The individual then becomes a subject of institutional rules and deprivations. Mentally disordered clients who are opposed to treatment with psychiatric medications or resolved to be self-determining are poor candidates for the NCR verdict.

Clients with a history of treatment non-compliance are likely to continue to have periods of non-compliance and relapse. This will result in initial detention in hospital for lengthy periods because the non-compliant and deteriorating NCR individual will have significant difficulty convincing the Review Board they can be safely released into the community. These are clients for whom the NCR verdict should not be pursued or should be pursued with extreme caution. The client who is amenable to treatment and willing to comply is a better candidate for oversight by the Review Board.

## VI. CONCLUSION

The special verdict of not criminally responsible by reason of mental disorder raises a host of vexing legal, factual, and tactical issues for defence counsel. An accused found NCR faces the prospect of being under restrictions imposed by the Review Board for the rest of his or her life, even if the offence was relatively minor. On the other hand, an accused found NCR whose dangerousness has the prospect of being controlled may be discharged far earlier than he would have been had he been convicted of the offence.

Counsel should be wary of advising pursuit of the NCR verdict for clients who have lengthy criminal records (even if for minor offences) or a long history of diagnosis with major mental disorder and an equally long history of non-compliance with treatment. Clients who have repeatedly come into contact with the criminal justice system will often have difficulty convincing the Review Board that they do not pose a significant risk to the safety of the public.

Knowing how and when to advance an NCR defence is a crucial skill set of properly informed defence counsel. The importance of being familiar with this branch of the law will only increase as provincial governments continue to underfund mental health services.

