Models of problem solving civil jurisdictions: a few reflections on two systems for civil commitment
[and cathedral architecture]

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Outline

I will not address:

- Why Canadian mental health law has developed as it has?
- How lawyers should operate? [not for me to say]

What I will try and address:

- Examine 2 jurisdictions I either know a lot about [NZ] or a little about [Ontario] in relation to one aspect of civil commitment: involuntary hospitalization [if time permits, one other approach]
- By contrasting these consider what is necessary for mechanisms in mental health law to function well.
- Importance of systems of accountability or standard setting that work on multiple levels
- Litigation as one, but only one approach
• And the best metaphor to think about all of this is…..
The Gothic Flying Buttress
Reflection

What does it take to ensure law works effectively?

– The players: standards, agreed models of practice, standard setting and policing
– The structure: a range of appeals and protections, but not too few [breeds injustice] or too many [defeats the purpose of the legislation]
– Mediation as well as litigation

Adaptations to specific types of problems solving?

– Does an adversarial or inquisitorial process always work best?
– What happens when one is litigating in:
  • a family [custody, access etc] or
  • a therapeutic relationship [need for treatment, risk to self or others]?
– What needs to occur for ‘best outcomes’?
• So, a case example of involuntary hospitalization in 2 jurisdictions…

• Simplified to illustrate the point
Involuntary hospitalization: Ontario

Statutory Accountability

Professional Accountability

Who certifies?

Any physician

Clinical pathway

Initial Assessment Form 1: 72 hours

Involuntary hospitalisation Forms 3 and 4

Rights advice?

Rights Advisor

Legal counsel?

Yes

Legal professional accountability

Law Soc Upper Canada Legal Aid Roster
Involuntary hospitalization: New Zealand

**Statutory accountability?**
Director of Area Mental Health Services

**Professional accountability?**
Professional registration
Director of Area Mental Health Services

**Who certifies?**
Any physician/‘Duly Authorized Officer’/‘Responsible clinician’

**Clinical pathway**
Initial Assessment
Section 8/9/10/11: 5 days

**Rights advice?**
District inspector

**Legal counsel?**
No

**Legal professional accountability?**
NZ Law Soc
Legal Aid Roster

**Director of Mental Health**
Director of Area Mental Health Services

**Professional Registration**
Director of Area Mental Health Services

‘Responsible clinician’
[A statutory role]

**Compulsory hospitalisation**
Sections 13, 30

**District inspector**

**Yes**

**NZ Law Soc Legal Aid Roster**

**Yes**

**NZ Law Soc Legal aid Roster**

**Yes**
Where are orders made and appealed?

- **Appeal**
  - Ontario: ‘nil’
  - NZ: Family Court
  - Ontario: CCB
  - NZ: Review Tribunal

- **Who makes the order?**
  - Ontario: Any physician
  - NZ: Responsible clinician
  - Ontario: attending physician
  - NZ: Family Court

- **Clinical pathway**
  - **Initial Assessment**
    - Ontario: nil
    - NZ: District inspector
  - **Compulsory hospitalisation**
    - Ontario: advocate
    - NZ: District inspector

- **Rights advice?**
  - Ontario: nil
  - NZ: District inspector

- **Legal counsel?**
  - Ontario: ‘no’
  - NZ: yes
  - Ontario: yes
  - NZ: yes
• More authority [and autonomy] of physician
• More authority [and autonomy] of counsel
• Later engagement of expert tribunal, and court [only on appeal]
• Model of representation becomes more adversarial, only when there is dispute
New Zealand

- Stronger statutory and regulatory definition of clinical standards
- Law Society and senior counsel oversight of models of practice
- Model of litigation both inquisitorial and with ‘best outcomes’
- Early and routine access to judicial review
- Shared [clinical and legal] functions in making coercive decisions
Which is ‘better’?

- A value judgment
- Civil commitment [inpatient and community] more commonly used in NZ
- Involuntary hospitalization is for treatment, so the 2 decisions [detention and treatment] are not separated [similar to BC]
- Court appearances routine, not always contentious or negative
The Gothic Flying Buttress
• Sometimes we analyze too narrowly, and look at one piece only:
  – The law
  – The behaviour of other players
  – Available resources
  – Only some rights [rights of refusal verses rights and need for treatment]

  – Sometimes it is best to think about the system, and how adjustments to each piece, can support the function of the whole.
Thank you

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