

Youth Mental Health Court

Pros and Cons

Fundamental Principle

- **R. v. D.B.**, [2008] 2 S.C.R. 3.
- The presumption of diminished moral culpability of young persons is a principle of fundamental justice pursuant to section 7 of the *Charter*.

YCJA Amended

s. 38(2)(f)(ii) of the *YCJA* was added on October 23, 2012, to provide that a **sentence** may have as an objective deterring the young person from committing offences.

Deterrence

- **R. v. A.A.Z. 2013 MBCA No. 33**
- I conclude that the *YCJA*'s fundamental requirement for accountability and meaningful consequences encompasses principles of proportionality and retribution, and therefore requires a **youth** justice court to take into account the seriousness of the offence, the role played by the young person in the offence, and the moral culpability of the young person. This means that, where serious offences have been committed, the concepts of proportionality, meaningful consequences and retribution may take precedence over rehabilitation and can result in significant custodial **sentences**.

Some Statistics

- Statistically there has been an increase of ten percent annually of mentally disordered accused entering the justice system while the overall arrest and prosecution rates have been declining.
- H. Bloom, R. Schneider; *Mental Disorder and the Law*, Irwin Law, 2006 p. 61.

Youth Crime

- Decline in Numbers overall since 1991.
- There has been a 26% decline in Youth cases processed between 2002 and 2006.
- Crimes against persons 18% decrease between 2002 and 2007.

Morrisette /Bloomfield (Juristat, 2008)

YCJA

Applies Criminal Code

- **141.(1)** Except to the extent that they are inconsistent with or excluded by this Act, section 16 (defence of mental disorder) and Part XX.1 (mental disorder) of the *Criminal Code* apply, with any modifications that the circumstances require, in respect of proceedings under this Act in relation to offences alleged to have been committed by young persons.

Mental Disorder

■ Criminal Code Sets Out:

- Presumption of sanity and burden of proof
- Disease of the mind
- Nature and quality of the act
- Knowledge that the act was wrong
- Crimes without specific intent
- Function of the jury
- Sentencing

Limits

- Section 16 of the *Criminal Code* provides for the defence of mental disorder.
- Many Offenders who suffer from a mental illness do not fit within the parameters of Section 16 of the Criminal Code

Psychiatric Definition

■ Mental Disorder means:

A clinically significant behavioural or psychological syndrome associated with distress, disability, or with a significantly increased risk of suffering death, pain, disability or important loss of freedom.

(DSM)

Legal Definition

- Any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding self-induced states caused by alcohol or drugs, as well as transitory states such as hysteria or concussion.
- **R. v. Cooper**, [1980] 1 S.C.R. 1149.

Classifications

- Most common system used is the DSM-IV (and following editions).
- It categorizes and provides criteria and descriptions for diagnostic purposes.
- The fact that person meets the criteria for a DSM-IV diagnosis does not mean that the individual is or was unable to control his or her behaviour at the time of the offence.

Multiple Diagnosis

- E.G. may be diagnosed as Dual Diagnosis.
- Typically diagnosis of developmental delay and have underlying ADHD or other disorder.
- May have more than one diagnosis.
- Axis I disorders are of greatest concern as most likely to impair an accused's ability to participate in court.

Youth Classification

Schizophrenia and other major mental disorders are not usually diagnosed until late teens or early twenties when symptoms first appear.

Youth with severe behavioural problems are diagnosed with **Conduct Disorder**

Conduct Disorder is characterized by persistent aggression and anti social acts

Reliability

- Diagnostic reliability (consistency of classification).
 - There are no diagnostic categories where reliability is high.
 - Only three where it is satisfactory:
 - A) Mental deficiency
 - B) Organic Brain Syndrome
 - C) Alcoholism
- (Spitzer British Journal of Psychiatry (1974))

Reliability

- More recent studies have shown that reliability has improved but continues to be a “serious problem.”
- A. Abucca, E. Rankin, C. France, The Reliability of Psychiatric Diagnosis Revisited, (2006) *Psychiatry* (Edgmont) January 3(1):41-50.

Diagnosis and Detention

- Statistical review published by the government of Canada in 2006 the authors followed all of the NCR and Unfit to stand trial cases admitted to the Review Boards in 1992 and 1993 and tracked them up until the end of 2004
- It found that in comparison to accused diagnosed with schizophrenia or 'other diagnoses', , accused diagnosed with affective disorder spent more time within the system.

Fitness

- The threshold for fitness is very low. To be determined to be unfit the accused, as a result of **mental disorder**, must be unable to:
 1. understand the nature and object of the proceedings,
 2. understand the possible consequences of the proceedings,
 3. communicate with counsel.

Fitness Test

- A court's assessment of an accused's ability to conduct a defence and to communicate and instruct counsel is limited to an inquiry into whether an accused can recount to his/her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence.

- It is not relevant to the fitness determination to consider whether:
 1. The accused and counsel have an amicable and trusting relationship,
 2. The accused has been cooperating with counsel, or
 3. The accused ultimately makes decisions that are in his/her best interests.

R. v. Taylor (1992), 17 C.R. (4th) 371.

Criticism

- The nature of the test as set out in **Taylor** has been subject of considerable debate several commentators arguing that it does not adequately protect people with specific illnesses, such as depression, paranoia or developmental delay, FAS, particularly problematic.

Canadian Studies

- Dr. Patrick Baillie et al. (2006):
- Over one-third of all inmates in *federal* penitentiaries have a mental health problem requiring treatment.
 - Providing mental health services in *provincial* jails is hampered by the short length of average sentences (~ 39 days). Providing mental health services in *federal* penitentiaries is hampered by limited resources.
 - Without access to treatment services, mentally ill offenders serve longer into their sentences, leaving little time for supervised community reintegration, which may actually increase the risk of re-offence.

Part XX.1 Disposition

- Courts can make dispositions that are the least onerous and least restrictive to the accused:
 - (a) in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
 - (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
 - (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

Delay

- Desmarais et al.
- On average 4 years elapse between the charge for the index offence and the granting of an absolute discharge. Almost one quarter of persons found Not Criminally Responsible spend 10 or more years under the jurisdiction of Review Boards.

Disposition

- Empirical evidence shows that only 2.5% of individuals received an absolute discharge at the initial hearing and in 82.2% of cases courts deferred the initial dispositions to the Review Board.^[1]
- ^[1] Livingstone JD et al., A Follow up study of persons found not criminally responsible on account of mental disorder in British Columbia, Can. Journal of Psychiatry, 2003 48: 408-415.

Review Board

- Focus Switches from a consideration of culpability to “significant threat”.
- Risk Assessment becomes an issue.
- Risk assessment is problematic for mentally ill persons. G. Harris, Rice and Cormier noted that clinical judgment alone is a poor indicator of a future risk of violence with little reliability.
- Clinicians tend to overestimate risk of violence
- Actuarial scales provide more uniformity and validity

G. Harris, M. Rice, C. Cormier; Prospective Replication of the Violence Risk Appraisal Guide, (2002) Law and Human Behaviour, Vol. 26, No. 4.

R v. Winko

- “The burden that Winko has placed on Review Boards is that of reviewing all the relevant evidence on both sides of the case. The Board must then search out and consider evidence that supports not only detaining an accused, but also evidence that supports not only detaining an accused, but also evidence that favours his or her absolute discharge, his or her release subject to the most limited of necessary restraints or the liberalization of his or her dispositionIt is worth mentioning that **there is no risk assessment tool in Canada created specifically for the purpose of quantifying whether an accused subject to the jurisdiction of a Review Board represents a significant threat.**”
- Rakesh Lamda et al; The Provincial and Territorial Review Boards, H. Mental Disorder A Comprehensive Approach, Bloom / Schneider eds, Irwin Law 2013.

Mental Health Courts

- Mental Health Courts can fill the gap.
- Courts have held that deterrence and punishment are of less importance when sentencing mentally ill offenders^[1] and rehabilitation should be a primary consideration.^[2] In fact some sentencing judges have relied on section 718.1 of the *Criminal Code*, proportionality and degree of responsibility of the offender to justify a reduced sentence.
- [\[1\]](#) **R. v. Hynes**, [1991] N.J. No. 89.
- [\[2\]](#) **R. v. Edmunds**, [2012] N.J. No. 177.

Therapeutic Courts

- Courts of Two Basic Types
- Expedited Process
- Diversionary

Design

- All Courts Have Similar 3 Stage Process
- Acquisition Phase
- Program / Intervention Stage
- Outcome

Programming

- Program phase is crucial
- Axiomatic: Court only as successful as resources applied to it
- No special resources = no results

Results

- Drug Courts Studied for 15 years in U.S. and Canada more than 100 studies available.
- Shown to be effective in reducing recidivism and reducing justice system costs.
- (Belenko, 1998, 2001; Roman, Townsend & Bhati, 2003).

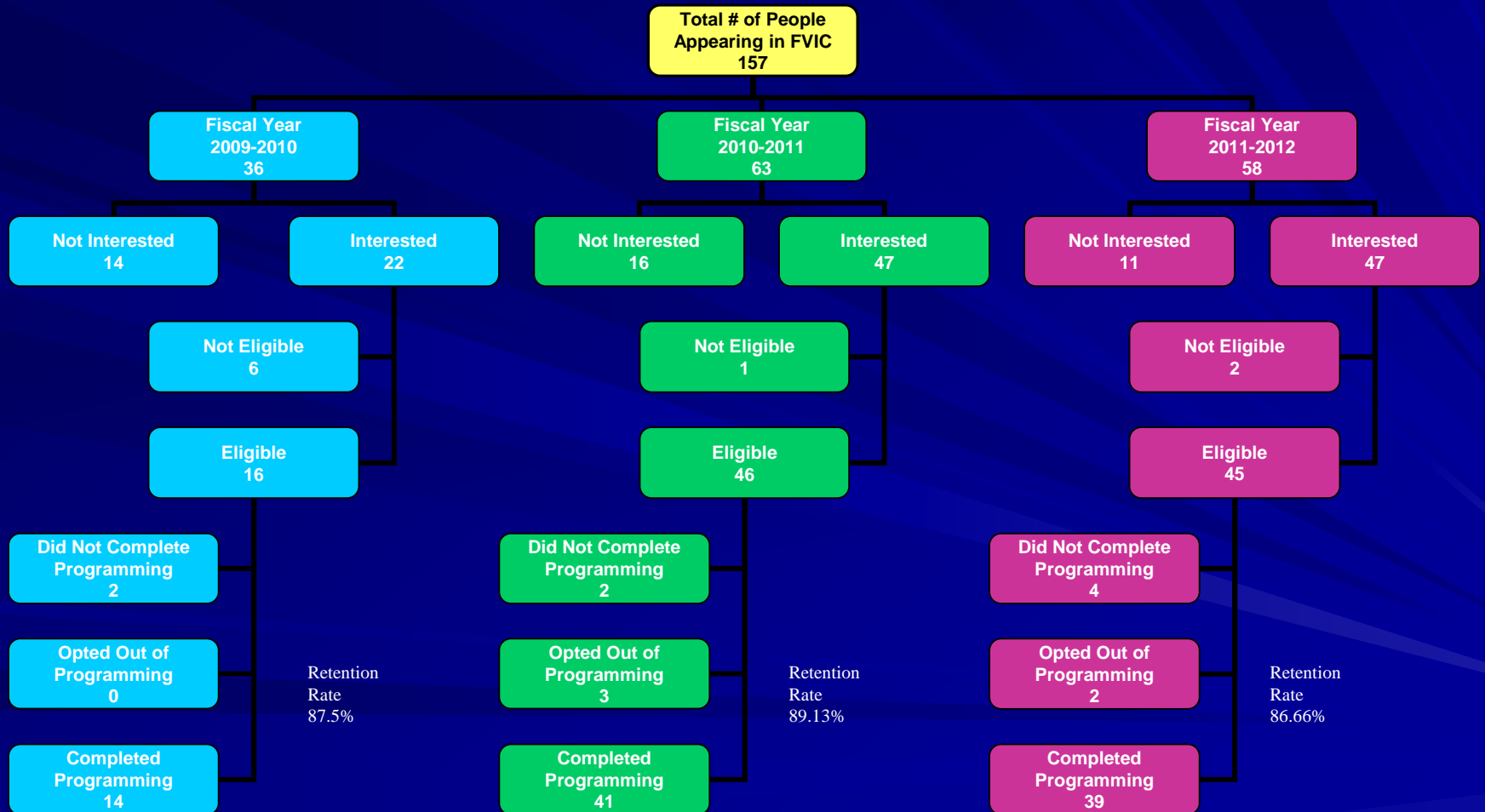
MHC Results

- E. Richardson and B. McSherry, *International Journal of Law and Psychiatry* (2010), indicate that research on MHCs is generally positive and evaluations have found:
 - high levels of satisfaction by participants with the procedure and treatment received in a MHC and low levels of perceived coercion;
 - reduced recidivism after participation in a MHC;
 - less days spent in jail compared to those processed in the traditional court system; and
 - improvements in outcomes such as reduced homelessness, psychiatric hospitalizations, frequency and levels of substance and alcohol abuse, and improvements in psychosocial functioning.

Results No Guarantee

- Results are difficult to obtain and to accurately measure.
- How to define success?

Family Violence



Family Violence Court

- “[The decision] was not based on any belief by me or government that it was not effective for the individuals who availed of the service,” King said.
- “But the reality is that when we deal with budgets we have to look at policing services and all the supports that they provide. We have to look at court services, we look at legal aid, public prosecutions and all probation services, and all of those factor into budgetary decisions.”

Conclusion

- Design is Crucial
- Success Must be Clearly Defined
- Outcomes Must be Measurable