Chapter 8 : Evidence Considerations and Jury Trials

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CURRENT TO JUNE 2017

I. Introduction

This chapter deals with several evidentiary issues that arise when the accused is seeking to rely upon the exemption in section 16 for persons not criminally responsible on account of mental disorder. First, it outlines who has the burden of proving that a person was suffering from a mental disorder at the time of the offence, and the burden of proving that the mental disorder rendered the person unable to appreciate the nature or consequences of his act or of knowing that it was wrong. A related issue is the accused's right to control his own defence and therefore to not raise the issue of mental disorder.

Second, this chapter outlines the type of evidence that is required to prove a mental disorder existed at the time of the offence. Further, the chapter examines the criminal law's presumption of freedom from mental disorder. Expert evidence is discussed separately in Chapter Nine, Expert Evidence.

Third, this chapter examines the admissibility of certain types of evidence with regard to the mental disorder issue.

Finally, it outlines the special considerations that arise when the accused elects to have a jury try the mental disorder issue. It examines the issue of whether the jury should be informed of the consequences of finding the accused not criminally responsible on account of mental disorder.

II. Evidence Considerations

A. General

There are three issues that are the cornerstones of the law of evidence. They are: relevance, materiality, and admissibility.[1] The issues of relevance and materiality are beyond the scope of this paper. This chapter will address the question of the admissibility of evidence as to the mental disorder exemption. Another issue that arises often in the context of such a trial is the manner of proving mental disorder. Who has the burden of persuading the trier of fact (judge or jury) that the accused was not

[1] See R J Delisle, Evidence: Principles and Problems, 11*th* ed (Toronto: Carswell, 2015) at 157 - 212 (hereinafter Delisle).

criminally responsible? How much evidence will be sufficient to prove it?

B. Burden of Proof

1. *Criminal Code*

Whenever there is a trial, one party usually has to prove certain propositions or he/she will lose the case. This means that that party has the persuasive burden of proof. Generally, in a criminal trial, the Crown usually has the burden of proving that the accused is guilty. However, in the case of mental disorder, the person who raises the issue must prove that the accused was suffering from a mental disorder at the relevant time. Thus, if the Crown has proved beyond a reasonable doubt that the accused has committed the criminal act, and the accused wishes to rely upon the section 16 defence, he/she will have the burden of proving that he/she was suffering from a mental disorder that rendered him/her incapable of appreciating the nature and quality of his/her act or of knowing that it was wrong. If the accused is unsuccessful, and the Crown has otherwise proved his/her case, the Crown will succeed.

The *Criminal Code* provisions dealing with the burden of proof read:

> 16 (2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.
>
> (3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.[2]

These provisions basically reflect the former *Criminal Code* provisions as supplemented by common law developments. The presumption of freedom from mental disorder is discussed below.

The issue of mental disorder may be raised by the defence, by the judge, or, in some circumstances by the Crown. While the defence of (exemption for) mental

[2] RSC 1985, c C-46 (hereinafter *Criminal Code*; all further references are to this legislation unless otherwise specified).

disorder will normally be raised by the accused, it is possible, in limited circumstances, for the Crown to raise the issue. Before recent developments in the common law, the Crown had been permitted to adduce evidence of insanity at any time during the trial. Now there are limits on when the Crown can raise the issue of mental disorder. In the 1977 case, *R v Simpson,* the Ontario Court of Appeal held that if the prosecution first established beyond a reasonable doubt that the accused had committed an offence with the required *mens rea*, it could then proceed to show, on a balance of probabilities, that the accused was insane at the relevant time.[3] This rule was further narrowed in *R v Saxell,* where the Ontario Court of Appeal held that the Crown could not be permitted to raise the insanity issue unless it had leave of the court.[4] Further, when assessing whether to grant the leave, the court should have regard to the nature and seriousness of the offence and the extent to which the accused might be a danger to the public.[5] Finally, in *R v Swain,* the Supreme Court of Canada limited the Crown further.[6] According to this case, it is only when the accused raises evidence that puts into question her/his mental capacity for criminal intent, but falls short of insanity, that the Crown can put forth evidence of insanity. Where the issue is not raised by the accused during trial, the Crown may only initiate the mental disorder issue after a verdict of guilty is reached but before a conviction is entered.[7]

There are also decisions that indicate that the trial judge may consider the issue of mental disorder even where it is not raised by either the Crown or the defence. In fact, some cases indicate that the judge has a duty to direct herself/himself on the issue of mental disorder if there is evidence upon which the consideration should be given.[8]

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[3] *R v Simpson* (1977), 35 CCC (2d) 337 (Ont CA) (hereinafter *Simpson)*.
[4] (1980), 33 OR (2d) 78 (CA) (hereinafter *Saxell)*.
[5] The Crown's request to have a finding of not guilty on account of insanity substituted for a guilty plea in *R v Derbyshire* (1986), 16 WCB 462 (Ont Dist Ct) was denied where the offence was not serious and the accused was not a significant danger to himself or others.
[6] (1991), 63 CCC (3d) 481 (SCC) (hereinafter *Swain*).
[7] However, the *Criminal Code* provisions (s. 672.12) permit the Crown to apply for a psychiatric assessment if it shows the court that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged offence. This issue is discussed at length under the heading "The Right of the Accused to Control Her Own Defence".
[8] *R v Holtom* (1983), 10 WCB 180 (BC Co Ct). See also: *R v Talbot (No 2)* (1977), 38 CCC (2d) 560 (Ont HC) (hereinafter *Talbot*); *R v Kemp,* [1957] 1 QB 399 at 406 (hereinafter *Kemp*).

Courts of appeal also have the power to find mental disorder even though the issue was not raised at trial.[9] Further, the court (including the court of appeal) may order a mental assessment of the accused of its own motion under s 672.12. By ordering this assessment, the court would be raising the issue of mental condition.

At common law, whoever raised the issue (either the Crown or the defence) had the burden of proving insanity on the balance of probabilities. In *Clark v The King,* a majority of the Supreme Court of Canada held that the party raising insanity must prove it on a balance of probabilities.[10] This meant that the party did not have to convince the jury (or judge) of his/her insanity beyond a reasonable doubt, which is the standard of proof usually required in criminal trials to prove the guilt of the accused. Having to prove insanity on the balance of probabilities meant that sufficient evidence would have to be raised to weight the balance in favour of finding insanity.

When judges used other language in describing the accused's onus of proof, new trials were ordered. For example, in *Smythe v R,* the trial judge had stated that the "whole burden of proving insanity rest[ed] upon the defence".[11] The Supreme Court of Canada, in ordering a new trial, held that "where a plea of insanity is advanced on a trial for murder the law does not require the accused, in order to succeed upon that issue, to satisfy the jury that insanity has been proved beyond all reasonable doubt; it is sufficient if insanity is proved to the reasonable satisfaction of the jury."[12] The common law requirement of proof on a balance of probabilities has now been embodied in subsection 16(3).

In *R v Morin,* the accused was acquitted on a charge of first degree murder.[13] He argued that he was not the killer, or, in the alternative, that he was not guilty by reason of insanity. On appeal, the trial judge was found to have misdirected the jury in two respects. One misdirection was that the jury was to apply the criminal standard of proof

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[9] *R v Hendry* (1985), 37 Man R (2d) 66 (CA). This issue is discussed in Chapter Ten, Appeals.
[10] (1921), 35 CCC 261 (SCC).
[11] (1940), [1941] SCR 17 (hereinafter *Smythe*).
[12] *Smythe,* at 18. See also: *R v Haymour* (1974), 21 CCC (2d) 30 (BCSC); *R v Crook* (1979) 1 Sask R 273 (CA), leave to appeal to SCC refused (1980), 5 Sask R 360n (SCC) (hereinafter *Crook*); *R v Gibbons* (1946), 86 CCC 20 (Ont CA); *R v Jacobson* (1985), 61 AR 254 (Prov Ct) (hereinafter *Jacobson*).
[13] (1987), 36 CCC (3d) 50 (Ont CA), aff'd (1988), 66 CR (3d) 1 (SCC) (hereinafter *Morin*).

beyond a reasonable doubt in two stages. First, they were to apply it to the facts, and then to whether or not the accused was guilty. The Court of Appeal stated that the facts of the case are not to be examined in isolation and separately with reference to the criminal standard. The Supreme Court of Canada agreed with the Court of Appeal that there was a misdirection on the application of the standard of proof. A new trial was ordered.[14]

2. The Right of the Accused to Control Her Own Defence

For several reasons, the Crown may wish to allege mental disorder, and the defence may ask to prove absence of mental disorder. For example, the Crown may feel that it is in society's best interest that this accused be dealt with outside of the penal system and will therefore raise the issue of mental disorder. On the other hand, the accused may prefer to serve time in prison rather than to undergo treatment for the mental disorder. The accused has a right to control his/her own defence and to decline to allege mental disorder. Further, in the recent case *R v Szostak*, the Ontario Court of Appeal held that where a defendant is fit to stand trial, their lawyer may not raise the issue of criminal responsibility unless the defendant instructs them to do so.[15]

There have been exceptions where the Crown has been allowed to allege mental disorder against the accused's wishes. In *Swain*, the Crown sought to adduce evidence of the accused's insanity at the time of the offence over the objections of the defence.[16] The trial judge, however, admitted the evidence and found the accused not guilty by reason of insanity. As a result, the accused was ordered to be kept in strict custody until the Lieutenant Governor's pleasure was known.[17] The majority of the Supreme Court of Canada held that the common law rule that permitted the Crown to

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[14] The second trial was held in London, Ontario, in July, 1992, before a jury. Mr. Morin was found guilty and appealed his conviction to the Ontario Court of Appeal in 1993. Mr. Morin was found innocent on January 23, 1995 through DNA evidence that supported his claim to innocence. The Ontario Government set up a Commission to investigate the conviction of Morin. The Commission report can be found online at <http://www.attorneygeneral.jus.gov.on.ca/html/MORIN/morin.htm>.

[15] *R v Szostak* (2012), 94 CR (6th) 48, 289 CCC (3d) 247

[16] This was not an uncommon practice. In some cases, the judge introduced the issue of insanity. See: *Simpson; Talbot*; *Saxell.*

[17] The provisions of the *Criminal Code,* which permitted this, were struck down. Lieutenant Governor's Warrants are discussed in Chapter Eleven. See also: Schmitz, C, "Give Judge-made Rules Stricter Scrutiny under Charter: SCC" (1991) 11:4 *Lawyer's Weekly* 1.

lead evidence of the accused's insanity over the accused's objections violated s 7 of the *Charter of Rights and Freedoms*.[18] The rule allowed the Crown to adduce evidence of insanity where the evidence suggested the accused was insane at the time of the offence and there was a strong *prima facie* case of commission of offences of a serious nature. Application of this rule clearly resulted in the deprivation of the liberty of the accused. The deprivation of the accused's liberty by means of the Lieutenant Governor's Warrant, which could result in indefinite detention of the accused, did not accord with the principles of fundamental justice.

The violation of section 7 was held not to be a reasonable limit within section 1 of the *Charter of Rights* because the common law rule did not violate the *Charter* as little as possible. The objectives of the common law rule (to avoid conviction of an accused who may not be responsible on account of insanity and to protect the public from dangerous persons requiring hospitalization) could be met without unnecessarily limiting *Charter* rights. The Supreme Court replaced the common law rule with a rule allowing the Crown to raise the issue of insanity independently only after the judge or jury concluded that the accused was otherwise guilty of the offence charged or if the accused's defence had put the mental capacity for criminal intent in issue.

In *Swain,* the Supreme Court of Canada also discussed the accused's right to control his/her own defence. This right is not absolute.[19] The accused's right to control her/his own defence in an adversarial system includes deciding whether or not to raise the defence of mental disorder. However, if the accused chooses to conduct her defence in such a way that her/his mental capacity for criminal intent is somehow put in question, the Crown will be entitled to raise its own evidence of mental disorder and the trial judge will be able to instruct the jury on section 16 without infringing section 7.

The Supreme Court of Canada went on to discuss whether this new common law rule would infringe *Charter* subsection 15(1). The court held that although the new common law rule did distinguish between individuals on the basis of mental disability, a

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[18] Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 (hereinafter *Charter of Rights* or *Charter*).
[19] See *R v Laviolette***,** 2004 SKPC 102, [2005] 3 C.N.L.R. 202.

ground listed in section 15, this differential treatment did not result in discrimination. Lamer C.J.C., speaking for the majority stated:

> I cannot see how a rule which allows the Crown to move an individual from the category of those who will surely be convicted and sentenced to those who may be acquitted, albeit on the grounds of insanity, can be said to impose a burden or a disadvantage on that individual.[20]

The new amendments to the *Criminal Code* appear by implication to incorporate this common law rule and may extend it. Subsection 672.21(3) refers to this rule when discussing exceptions to the non-admissibility of protected statements made by the accused in the course of assessment or treatment. It reads:

> 672.21(3) Notwithstanding subsection (2), evidence of a protected statement is admissible for the purpose of
> . . .
> (e) determining whether the accused was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), if the accused puts his or her mental capacity for criminal intent into issue, or if the prosecutor raises the issue after verdict;

Further, section 672.12 provides that the Crown may apply for a psychiatric assessment of the accused to determine whether the accused was suffering from a mental disorder at the time of the offence so as to be exempt from criminal responsibility. Subsection 672.12(3) provides that the court may only order an assessment on application by the Crown if the accused puts his/her mental capacity for criminal intent into issue or if the Crown 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.[21] This latter requirement would appear to be wider than the common law rule propounded in *Swain*, because it does not limit the Crown as to

[20] *Swain*, at 523.

[21] See *R v Walker* (2002), 163 CCC (3d) 29 (BC CA); leave to appeal refused (2002), 169 CCC (3d) vi (SCC), in which the Court held that, where the opening address of the defence counsel indicates a not criminally responsible defence, the prosecution may make an assessment order application during the defendant's examination-in-chief during trial.

when it may raise the issue.

There have been a few decisions to date in which the rule in *Swain* has been considered or applied. In *R v Taylor,* the accused was charged with aggravated assault and possession of a weapon dangerous to the public peace.[22] At trial, he was found not guilty by reason of insanity after the Crown was granted leave, over the objections of the accused, to lead evidence of insanity. On appeal, the Ontario Court of Appeal held that in light of the new Supreme Court of Canada decision in *Swain*, there must be a new trial. The trial judge had taken the evidence of insanity that the Crown had led into account when making findings of credibility. This offended the principle in *Swain*. The Court of Appeal instructed that some evidence relating the accused's mental health would be admissible to establish the background leading up to the offence, but it may not be used to rebut the presumption of sanity unless the conditions set out in *Swain* are met.[23] At the re-trial, the Court affirmed that the trial judge erred in embarking on a fitness hearing without first requiring the Crown to show that it has a prima facie case against the appellant.[24]

In *R v Thomson,* the accused was charged with threatening to kill his sister-in-law and her children, pointing a firearm and other offences.[25] At trial, Crown counsel led evidence in a *voir dire* that the accused suffered from a disease of the mind and was insane within the meaning of s 16. The defence counsel did not object to the admission of the evidence and during his opening address indicated that the accused relied upon the defences of self-defence and insanity (in the alternative). The accused testified that he believed himself to be innocent due to self-defence or insanity. The accused was found not guilty by reason of insanity. The *Swain* decision was pronounced after the trial was concluded.

On appeal, the appellant argued that his rights were violated under *Charter*

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[22] (1991), 4 OR (3d) 477 (Ont CA).

[23] See also: *R v Hellman* (February 11, 1993) 500-10-000165-918 (Que CA), where the Crown raised the defence of mental disorder at trial and the accused was acquitted. The Court of Appeal set aside the acquittal and ordered a new trial because the Crown had not argued that the accused had chosen to raise the issue of mental disorder.

[24] [1992] OJ No 2394 (Ont CA).

[25] (1991), 69 CCC (3d) 314 (Ont CA) (hereinafter *Thomson*).

section 7 because the Crown introduced the evidence of insanity. In dismissing the appeal, the Ontario Court of Appeal distinguished *Swain* because an accused's rights under section 7 are not violated by the introduction of evidence of insanity by the Crown *per se*, but by the introduction of that evidence where the accused does not wish to rely on the defence of insanity.[26] In this case, the defence had specifically claimed insanity as an alternative defence and the accused's evidence was premised in part on his own skewed sense of reality. Not only did the Crown's evidence not subvert the accused's right to choose, it facilitated the defence's reliance on the two inconsistent alternative defences.[27]

In *R v Adamoski,* the accused was charged and convicted of attempted murder. At the time of trial, *Swain* had not yet been decided by the Supreme Court of Canada.[28] The Crown led evidence of insanity over the objections of the accused. A *voir dire* was conducted on the issue of insanity. The trial judge ruled that it was in the public interest and in the interest of justice that the evidence of insanity tendered by the Crown be admitted as evidence at trial. The trial judge concluded that the accused had indeed committed the offence, but he found her not guilty on account of insanity.

The procedure adopted by the trial judge with regard to the issue of insanity was later disapproved by the Supreme Court of Canada in *Swain.* On appeal, defence counsel argued that the common law rule as to the procedure to be followed where the Crown independently advances evidence of insanity had been found to be constitutionally wanting. The Crown argued that although the common law procedure had changed, the court should dismiss the appeal on the ground that no substantial wrong or miscarriage of justice had occurred.[29]

The British Columbia Court of Appeal concluded that *Swain* made it clear that the Crown was allowed to raise evidence of insanity independently only after the trier of fact concluded that the accused was otherwise guilty. In this case, the trial judge had

[26] *Thomson*, at 320.
[27] *Thomson*, at 321.
[28] (1992), 16 BCAC 214 (CA).
[29] *Criminal Code*, s 686(1)(b)(iii).

directed his mind to the issue of the accused's guilt before considering the evidence of insanity. Further, without reference to the issue of insanity, the trial judge held that he would have found the accused guilty. Consequently, since no submissions were made at trial or on appeal as to how the accused's ability to control her own defence was affected by the Crown introducing evidence of insanity, the Court of Appeal held that the Crown had satisfied the Court that the verdict would necessarily have been the same. The accused's appeal was dismissed.

In the past, defendants have tried to compare the right to consent with whether or not to use a defense of mental disorder to section 606(1.1), which states that a guilty plea may only be accepted if the accused is making the plea voluntarily and understands the consequences of the plea. In *R v Quenneville*, the accused appealed a decision where he was found not criminally responsible due to mental disorder (NCRMD) for assault and uttering threats. He claimed that he did not know the consequences of using the defence, and there had not been a proper inquiry to insure that he was voluntarily giving consent to use the defense. He argued that since section 606(1.1) requires this for a guilty plea, the same principle should be applied for a defence of NCRMD, and that his section 7 *Charter* rights had been violated. The Court held that consent by the accused to declare NCRMD does not require the same standard of inquiry as section 606(1.1), and that a lack of inquiry into the accused's consent does not violate section 7 of the *Charter*.[30]

3. Sufficiency

Not only do the parties in a case have a persuasive burden of proof, but as the trial progresses, they have the duty of going forward in the production of evidence.[31] The judge has the right to assess the evidence and determine whether there is enough evidence to leave the issue with the jury. If there is insufficient evidence to support a particular defence, for example, the judge can remove that issue from the jury's consideration.

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[30] *R v Quenneville,* 2010 ONCA 223, [2010] CarswellOnt 1773.
[31] For a discussion of the law surrounding this area, see Delisle, at 104.

One issue that arises is whether there is sufficient evidence to prove that the accused was suffering from a mental disorder at the relevant time so that he may rely on the exemption in section 16. For example, there may be a situation where expert evidence is not called. In the event of the absence of medical testimony, the conduct of the accused and the circumstances surrounding the commission of the offence may be sufficient to support a defence of NCRMD.[32]

Sometimes the psychiatric evidence presented is sufficient to address the issue of intention, but will not be sufficient fairly to raise a section 16 argument. In *R v Cairns,* the accused was charged with first-degree murder.[33] He was interviewed by a psychiatrist approximately three (3) years after the events for about three and one half (3 ½) hours. The psychiatrist testified that, in his opinion, the appellant had a long history of mental illness and that the death of the victim was not the result of conscious deliberation and planning (a requirement for a finding of first degree murder). The doctor was only able to testify that it was possible, but not probable, that at the time of the offence the accused would not have been able to appreciate fully and rationally what he was doing or know that it was wrong. The expert testified that the accused was not in a state of mind to deliberate and plan but that he was not at the point where he had no idea whatsoever of what he was doing. The trial judge ruled that there was not enough evidence fairly to raise the defence of insanity, and the Court of Appeal of British Columbia upheld this ruling.

Where the trial judge is of the view that there is not enough evidence to support the defence of NCRMD, he/she should inform counsel prior to their making their jury addresses.[34]

4. Inferences to be Drawn from Accused's Conduct

There are certain conclusions that may be drawn from the accused's conduct both before and during the trial. Subsection 4(6) of the *Canada Evidence Act* provides that the failure of the accused to testify must not be the subject of comment by the

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[32] *Simpson*, at 356.
[33] (1989), 51 CCC (3d) 90 (BCCA).
[34] *R v Charest* (1990), 76 CR (3d) 63 (Que CA) (hereinafter *Charest*). Jury addresses are discussed below.

judge or the prosecution.[35] This is not to say, however, that the jury cannot draw its own inference from the accused's refusal to testify.[36]

Although the judge may not comment upon the accused's refusal to testify, when instructing the jury, the judge is entitled to outline what inferences they might draw from certain behaviour exhibited by the accused. For example, the jury might infer that the accused was suffering from a mental disorder at the time of the offence, based on her/his subsequent conduct. The evidence of subsequent conduct would be relevant to the issue of the accused's conduct at the time of the offence, provided there was evidence of her conduct at the time of the offence. It is for the jury to determine what weight to give to this type of evidence.[37]

Often, the Crown will seek to have the jury draw an adverse inference from the fact that the accused refused to speak to the prosecution's experts. Here the law has made a fine distinction. In *R v Sweeney (No 2),* the accused wanted to rely upon the insanity defence.[38] However, he refused to submit to an examination by prosecution experts. The defence sought to exclude testimony to the effect that the accused refused to submit to examinations. The Ontario Court of Appeal held that where the accused makes his sanity an issue, evidence of his refusal to see the prosecution psychiatrist is admissible in weighing the merits of the defence and an adverse inference may be drawn from the refusal.

In *Malcolm,* the accused refused to undergo psychiatric examination by a Crown-appointed psychiatrist.[39] The trial judge held that the refusal to undergo the examination led the jury to infer that his evidence about mental condition was either contrived or so weak that it could not withstand scrutiny. The accused's counsel argued on appeal that the principle in *Sweeney* is no longer valid by reason of subsection 11(c) of the *Charter of Rights,* which provides that "any person charged with an offence has

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[35] *Canada Evidence Act*, RSC 1985, c C-5, s 4(6).
[36] *R v Vezeau* (1976), 34 CRNS 309 (SCC).
[37] *R v Brockenshire* (1931), 56 CCC 340 (Ont CA).
[38] (1977), 40 CRNS 37 (Ont CA); applied in *R v Malcolm* (1989), 50 CCC (3d) 172 (Man CA) (hereinafter *Malcolm*).
[39] (1989), 50 CCC (3d) 172; [1989] 6 WWR 23; 71 CR (3d) 238; 49 CRR 279; 58 Man R (2d) 286.

the right (c) not to be compelled to be a witness in proceedings against that person in respect of the offence...". The accused argued that if a negative inference can be drawn from his refusal to submit to examination by the Crown psychiatrist, he would be required to make statements to the psychiatrist that could be used against him at trial.

The Manitoba Court of Appeal held that there are several reasons why the Crown could not use the statement to prove facts unrelated to the accused's mental state. In other words, an accused's statement could be used to show his or her mental state, but not to prove other facts alleged by the Crown. Therefore, by submitting to a psychiatric examination, the accused was not compelled to be a witness against himself and his *Charter* rights were not offended.

The Ontario Court of Appeal in *R v Stevenson* held that no inference of guilt may be drawn from the accused's refusal to discuss the circumstances of an offence with the prosecutor's psychiatrist.[40] This refusal is an exercise of the accused's right to remain silent. However, in assessing the Crown's expert evidence in comparison with that of the accused's, the jury can take into account the accused's refusal to discuss the offence with the Crown's experts. The Crown should have the right to explain why their evidence may not be as complete as that of the defence.

C. Presumption of Freedom from Mental Disorder (s 16(2))—*Charter* Implications

The new s 16(2) reads:

> 16(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

This amendment reflects recent Supreme Canada decisions that have held that, although the presumption of sanity infringes s 11(d) of the *Charter of Rights,* it is a reasonable limitation upon the presumption of innocence.[41] At the time these cases

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[40] *R v Stevenson* (1990), 58 CCC (3d) 464 (Ont CA) (hereinafter *Stevenson*).

[41] *R v Chaulk* (1990), 62 CCC (3d) 193 (SCC) at 204 (hereinafter *Chaulk*); *R v Godfrey* (1984), 39 CR (3d) 97, leave to appeal to SCC refused (1984), 11 CCC (3d) 233n (hereinafter *Godfrey*); *R v Ratti* (1991), 24 CR (4th) 293 (SCC) (hereinafter *Ratti); R v Romeo* (1991), 2 CR (4th) 307 (SCC) (hereinafter *Romeo*). The latter two decisions adopt the analysis in *Chaulk*. See also *R v Jacquard,* [1997] 1 SCR 314; *R v Giesbrecht*

were decided, the relevant *Criminal Code* provision read:

> 16(4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

The relevant *Charter* provisions read:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 11. Any person charged with an offence has the right
> . . .
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

In *Chaulk,* the Supreme Court of Canada decided that subsection 16(4) [as it then was] of the *Criminal Code* was inconsistent with subsection 11(d) of the *Charter* but was a reasonable limit under *Charter* section 1. The phrase "until the contrary is proved" was held to place a persuasive burden of proof on the accused wishing to rebut the presumption of sanity on the balance of probabilities.

The Supreme Court dealt with the nature of the insanity defence. Lamer C.J.C., on behalf of the majority, stated (at 205) that the changing presumptions regarding criminal capacity were a continuum. At one end of the continuum were young children who were presumed not to have the capacity for criminal intent. At the other end were adults who were presumed to have criminal capacity until such presumption was rebutted on a balance of probabilities. Where there was a question of insanity, the individual did not accord with one of the basic assumptions of our criminal law model: that of being a rational autonomous being who was capable of appreciating the nature and quality of an act and of knowing right from wrong. These basic assumptions were brought into question because the accused was suffering from a disease of the mind that "[caused] him or her to have a frame of reference which [was] significantly

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(1994), 91 CCC (3d) 230 (Man CA); *R v Worth* (1995), 98 CCC (3d) 464 (Ont CA); *R v Skrzydlewski* (1995), 103 CCC (3d) 467 (Ont CA).

different than that which most people share[d]".[42] Having this mental condition meant that the accused was mostly incapable of criminal intent and should not have, therefore, been subject to criminally liability in the way that sane people were.

The appellants argued that the requirement that an accused person prove his insanity on a balance of probabilities was contrary to the presumption of innocence as guaranteed by the *Charter*. The Supreme Court agreed. The court relied upon the decision *R v Whyte,* which held that whenever the accused has the persuasive burden of proof, this is *prima facie* offensive to the presumption of innocence provided in *Charter* subsection 11(d).[43] This would apply to both offences and defences.[44] If an accused were required to prove some fact on the balance of probabilities to avoid conviction, the provision violated the presumption of innocence because it permitted a conviction in spite of a reasonable doubt as to the guilt of the accused. *Chaulk* held that Subsection 16(4) [as it then was] allowed a factor that was essential for guilt—sanity—to be presumed, therefore the Crown did not have to prove it beyond a reasonable doubt. The accused would therefore be required to prove insanity to avoid conviction. Thus, the presumption of sanity [in the then subsection 16(4)] violated the presumption of innocence.

This was not the end of the matter, however. The Supreme Court went on to consider whether subsection 16(4) was a reasonable limit under s.1 of the *Charter*. In applying the *R v Oakes* test, the Supreme Court held that the objective of subsection 16(4) was to relieve the Crown from the "impossibly onerous burden of disproving [an accused's] insanity "at the time of the offence in order to secure a conviction.[45] This objective was held to be sufficiently important to warrant limiting constitutionally protected rights and thus subsection 16(4) passed the first branch of the *Oakes* test. Second, the presumption of sanity and the reverse onus were rationally connected to this objective. Third, the presumption of sanity and reverse onus were among a range of

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[42] *Chaulk*, at 205.
[43] (1988), 42 CCC (3d) 97 (SCC) (hereinafter *Whyte*).
[44] See the discussion of this decision in D. Stuart, *Charter Justice in Canadian Criminal Law,* 6th ed (Scarborough, Ontario: Thomson Professional Publishing Canada, 2014) at 470 - 473.
[45] (1986), 24 CCC (3d) 31 (SCC). See *Chaulk,* at 218.

means that impaired subsection 11(d) as little as reasonably possible. Fourth, subsection 16(4) accommodated three important societal interests: avoiding a virtually impossible burden on the Crown, convicting the guilty, and acquitting those who truly lacked the capacity for criminal intent.[46] Thus, there was proportionality between the effects of the measure and the objective. Consequently, although subsection 16(4) contravened *Charter* subsection 11(d), it was saved by *Charter* s. 1.

It may be concluded from this decision that it is not necessary to prove the accused's lack of mental disorder at trial. Because of the presumption of freedom from mental disorder, the accused's mental health is not examined unless evidence is adduced that specifically puts mental disorder into issue. Once sufficient evidence of mental disorder has been adduced by the accused, the prosecution will have the burden of proving the absence of mental disorder.[47] Although *Chaulk* does not address the issue, the new legislation implies that the burden of proving mental disorder is not modified when mental disorder is alleged by the Crown. For example, where the Crown provides sufficient evidence to put mental disorder in issue, the defence will be required to prove absence of mental disorder on the balance of probabilities. It is interesting to note that one of the reasons for upholding the presumption of sanity was the "impossibly onerous burden of disproving insanity" that would be placed upon Crown. However, where the Crown alleges mental disorder, the accused will have the "impossibly onerous burden of disproving insanity"[48] at the time of the offence in order to be convicted or acquitted absolutely.

To summarize, there is a presumption of freedom from mental disorder, until the contrary is proved on the balance of probabilities. Whoever raises the issue of mental disorder has the burden of providing some evidence that tends to show mental disorder. The Crown (or the defence as the case may be) will then have to prove the absence of mental disorder on the balance of probabilities. Although the accused has

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[46] *Chaulk,* at 223.

[47] Healy, P. "*R v Chaulk*: Some Answers and Some Questions on Insanity" (1991), 2 CR (4th) 95, annotation.

[48] See earlier discussion in this section.

the right to control his/her own defence, the common law provides that the Crown may raise the issue of mental disorder if the accused puts into question his/her mental capacity for criminal intention or after the verdict of "guilty" is reached by the judge or jury.[49] The new *Criminal Code* provisions have somewhat extended this common law rule.

D. Admissibility of Evidence

If evidence is considered relevant, it is rationally connected to a fact that one seeks to prove.[50] Although evidence may be relevant, it may be excluded by the trial judge for a variety of reasons. The trial judge determines what evidence is admissible.[51] Usually there is a policy reason for not admitting the evidence. In the case of a criminal trial where the accused's mental condition is at issue, one recurring question is whether certain psychiatric evidence is admissible. The admissibility of expert evidence is a wide area and is discussed separately in Chapter Nine, Expert Evidence.

In the case where a witness has a mental disability, the oral testimony of the witness can be given behind a screen and such evidence is admissible under the authority of subsection 486.2(1) of the *Criminal Code*.[52] However, the meaning of mental disability for the purpose of testifying behind a screen is not the same as mental disorder. Rather, it only means that the witness is unable to fully understand the consequences of her actions (e.g., although an adult, the witness may have a child-like fear of the solemnity of the courtroom). It is not necessary for the Crown to provide an expert witness regarding the state of the witness's mental disability where the conditions are apparent to a lay person.

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[49] See *Swain*.

[50] Delisle, at 157.

[51] See, for example *R v Jennie Hawkes* (1915), 25 CCC 29 (Alta CA).

[52] *Criminal* Code, RSC 1985, c C-46, s 486.2(1) states: "Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice." See also: *R v Lanthier*, [1997] OJ No 4238 (Ont Ct Just), (QL).

E. Rebuttal and Surrebuttal

A final evidentiary issue concerns the use of expert testimony to rebut evidence provided through testimony by the other side. For example, the defence may utilize an expert who testifies that the accused was suffering from a mental disorder at the time of the offence. To rebut this claim, the prosecution may call an expert to testify that the accused did not have a disease of the mind, but had a personality disorder. Finally, the defence may wish to answer this evidence with further expert testimony in surrebuttal—a rebuttal of the rebuttal.

Generally, rebuttal evidence will be admitted if it is related to an essential issue that may be determinative of the case. If the rebuttal evidence pertains to an essential element of the case and the Crown could not have foreseen that such evidence would be necessary, it will be admissible. Consequently, if a witness makes a statement that conflicts with evidence relating to an essential issue in the case, rebuttal evidence will be admitted to resolve the conflict.[53]

In *R v Proctor,* the accused was charged with first-degree murder as a result of killing during a sexual assault.[54] He was originally found unfit to stand trial, but approximately 10 years later he was found fit and a trial was scheduled. Defence counsel made it clear that the accused did not dispute that he was the killer and that the only issue was the defence of insanity. The accused claimed that he was unable to remember certain events. The defence psychiatrists based their opinion in part on this inability to remember. In rebuttal, the Crown sought to rely on the evidence of a psychiatric nurse who had had a conversation with the accused shortly after the alleged crime was committed. This evidence had not become known until after the close of the defence case. The trial judge admitted the testimony in rebuttal. Defence counsel did not recall any of his witnesses to deal with the new evidence. The accused was convicted of first-degree murder.

The accused appealed his conviction. One ground was that the trial judge erred in admitting the nurse's testimony. However, in ordering a new trial on other grounds,

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[53] *R v Aalders,* [1993] 2 SCR 482.
[54] (1992), 69 CCC (3d) 436 (Man CA) (hereinafter *Proctor*).

the Manitoba Court of Appeal held that the trial judge was correct in admitting the nurse's evidence. Even where the Crown has notice that the accused intended to rely on the insanity defence, the Crown need not adduce evidence in chief to challenge that defence. Therefore, the Crown was properly permitted to adduce its evidence with respect to sanity in rebuttal. The accused suffered no prejudice as he was given the opportunity for surrebuttal.

In *R v Ewert,* there was a battle of the experts.[55] The accused, who relied on the defence of insanity to a charge of first degree murder, called a psychologist, who testified that the accused was suffering from a borderline personality with features of episodic dyscontrol that constituted a disease of the mind rendering him insane within the meaning of section 16. In reply the Crown called three psychiatrists who testified that the accused was not suffering from a disease of the mind as described by the defence expert, but rather had a psychopathic personality. The defence applied to recall its psychiatric expert on surrebuttal to meet the rebuttal evidence of the Crown. The trial judge denied the request and the accused was convicted. The Court of Appeal held that this denial was grounds for a new trial because the defence must be given a full opportunity to answer all Crown evidence, even that which is given on rebuttal.

In *R v Wild,* the accused was charged with second-degree murder after he was found in his car with the body of a woman who had died by strangulation.[56] The accused argued that he suffered from non-insane automatism, unknowingly caused by taking the victim's sleeping pills, which had reacted with his anti-depressant medication. The accused was convicted and appealed. On appeal, he argued that the trial judge had erred by permitting a Crown psychiatrist to testify in rebuttal that the accused had not mentioned the sleeping pills during pre-trial psychiatric assessment. The Court of Appeal dismissed the appeal, holding that the purpose for calling the psychiatrist to testify was not to impeach the accused's credibility, but to provide the psychiatrist's opinion on the accused mental condition at the relevant time. In order to provide his opinion, the psychiatrist was obliged to state the basis for his opinion. The fact that doing so involved

[55] (1989), 52 CCC (3d) 280 (BCCA) (hereinafter *Ewert*).
[56] [1993] BCJ No 634 (CA) (hereinafter *Wild*).

rejecting some of the accused's testimony did not render the psychiatrist's rebuttal evidence inadmissible.

III. Jury Trials

A. General

In many cases, an accused relying upon the section 16 exemption will elect to have her case heard by a judge and jury, if he or she has the choice. The *Criminal Code* sets out the rules concerning trial by jury. Section 471 provides that "[e]xcept where otherwise provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury."[57] The first exception is found in section 553, which states that a provincial court judge has absolute jurisdiction to try an accused who is charged with the following offences: theft, obtaining property by false pretenses, unlawful possession of property, fraud, mischief where the alleged value does not exceed five thousand dollars (including the attempt to commit any of those offences), and offences relating to gaming and betting, bawdy houses, driving while disqualified or fraud in relation to fares.[58] By virtue of section 471 and subsection 801(3), a person charged with a summary conviction offence cannot elect trial by judge and jury.

A second exception to the automatic trial by judge and jury occurs in subsection 554(1) of the *Criminal Code*. So long as an accused is not charged with an indictable offence under subsections 469 or an offence under section 553 (see previous), he or she can elect to be tried by a provincial court judge alone. The offences in subsection 469 are the most serious offences. They include treason, piracy, sedition, mutiny and first and second degree murder and the offences of attempting to commit or conspiring to commit any of these as well as being an accessory after the fact to high treason, treason or murder. However, if an accused is charged under section 469, he may, with the consent of the Attorney general, consent to be tried without a jury by a judge of a

[57] *Criminal Code*, s 471.
[58] *Criminal Code,* s 553. In such cases, the provincial court judge's discretion to try an accused is absolute and does not depend on the consent of the accused.

superior court of criminal jurisdiction.[59]

Finally, even if an accused has elected to be tried by a judge or provincial court judge, the Attorney General may require that the accused be tried by a court composed of a judge and jury unless the alleged offence is one that is punishable with a term of imprisonment of five years or less.[60] Where two or more persons are charged with the same offence, and some, but not all, of them elect to be tried by a judge alone, the judge or justice may decline to record an election and thereby must hold a preliminary inquiry.[61]

Generally, then, where an accused is initially before a justice charged with an offence (other than the most serious offences such as treason or murder), and the offence is not one over which a provincial court judge has absolute jurisdiction, the accused will have the option of electing to be tried by a judge alone and without a preliminary inquiry; or by a judge alone with a preliminary inquiry; or by a judge and jury with a preliminary inquiry.[62] In many cases, the accused seeking to rely upon the section 16 exemption for mental disorders will elect to be tried by a judge and jury. For the more serious offences, the accused must have a jury trial, although he can apply for a trial by judge alone if he obtains the consent of the Attorney General.

Where there is a choice available, whether to elect a trial by jury is a difficult question. Various theories have been suggested, but there are no hard and fast answers. Some factors to consider include: whether the accused can or will testify; the facts of the case; whether the defence is too technical for the jury to appreciate; whether the accused has a previous conviction; and whether the accused has received publicity in the media that may colour the objectiveness of the particular jury.[63] The most prudent course may be to make the decision after proceeding to the preliminary

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[59] *Criminal Code*, s 473(1).
[60] *Criminal Code*, s 568.
[61] *Criminal Code,* s 567.
[62] *Criminal Code,* s 536.
[63] This latter concern may be addressed by a change of venue, a delay of the trial or a warning by the trial judge. In *R v Keegstra* (1991), 79 Alta LR (2d) 97 (CA), where the pre-trial publicity was extreme, the Court of Appeal held that the accused was permitted to challenge jurors for cause because of pre-trial publicity.

inquiry and evaluating the Crown's case. For example, it has been suggested that trial by jury should be elected if the Crown's case is one in which human understanding is necessary for the accused to properly advance their defence.[64]

The jury must make several fairly complicated decisions in a trial where the accused has alleged a mental disorder. Although the judge decides what behaviour will amount to a disease of the mind, the jury must decide, based on the evidence, whether the accused was suffering from a disease of the mind. In order to determine whether the accused was suffering from a disease of the mind, the jury has to interpret technical psychiatric and expert evidence. However, the evidence of the psychiatrists is not determinative of the issue of mental disorder. The jury is often required to resolve the conflicting testimony of the experts. Second, the jury must also decide whether the disease rendered the accused incapable of appreciating the nature and quality of the act or of knowing that it was wrong. Finally, the jury will likely be faced with considering the consequences of their verdict.

There have been studies made of juries and their internal operation. The validity of these studies has been questioned because typically students or volunteers are used to complete these studies instead of a true sample of people who might be jurors.

While some researchers have concluded that jurors are reluctant to acquit on the grounds of insanity, others have shown that jurors are quite capable of applying the insanity laws and are willing to acquit on that basis. Chernoff and Schaffer express concern that jurors are reluctant to acquit on the grounds of insanity because the person is physically responsible for the crime, especially if it is a serious one.[65] They rely on a 1970 survey by Bronson[66] that indicates that many lay persons feel that the plea of

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[64] KA Hughes, "Role of a Jury in a Criminal Case", *Special Lectures, Law Society of Upper Canada: Jury Trials*, 1959, at 1 as cited in R. Kline, "Trial by Jury: Some Considerations" (1980) Advanced Criminal Law Paper, University of Calgary, at 18.

[65] Chernoff, P A and Schaffer, WG, "Defending the Mentally Ill: Ethical Quicksand" (1972) 10:3 Amer Crim Law Rev 505 (hereinafter Chernoff and Schaffer).

[66] *On the Conviction Proneness and Representativeness of the Death Qualified Jury: An Empirical Study of Colorado Veniremen* (1970) 42 U Colo L Rev 1. Chernoff and Schaffer state that by 1972 in the District of Columbia a jury had never acquitted on a charge of first degree murder on the grounds of insanity if the government had actively contested the issue.

insanity is a legal loophole that allows too many guilty people to go free.[67] In Bronson's study, 76% of persons who were opposed to the death penalty felt that the insanity plea was a loophole.[68] These are factors that should be considered where the accused has the choice whether to elect trial by jury.

One study undertaken in the United States examined the way juries operate when dealing with the insanity defence.[69] Although this study was undertaken twenty-five years ago, it is interesting to note its conclusions. In this study, tape recorded trials were played to people who had actually been called to serve on juries in three cities in the United States. The insanity defence was raised in the trials. In analyzing the deliberations of the (experimental) juries, the authors noted that the jurors spent most of their time reviewing the record. By the time they had finished deliberating, they had usually considered every bit of testimony, expert as well as lay, and every point offered in evidence. The jurors in the experiment were also quite willing to talk about intimate and sometimes painful experiences that they had had with spouses or parents who had become mentally ill.[70]

In the experiment, the jurors were quite aware of the division between the role of the experts in advising them, and their role in deciding whether the accused was responsible. Variations in the content of expert testimony (e.g., model testimony drafted by experts as opposed to typical testimony) did not produce differences in verdicts.[71] These jurors were twelve per cent more likely to vote for an acquittal where the *Durham* test was used as opposed to the *M'Naghten* test.[72] Jurors expressed a slight preference for the *Durham* test.[73]

If the accused has the option of having a jury trial, many factors must be

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[67] Chernoff and Schaffer, at 511.
[68] Chernoff and Schaffer, at 511, note 25.
[69] Simon, R. J., *The Jury and the Defence of Insanity,* (1968) 25:1 Wash & Lee L Review 169 (hereinafter Simon).
[70] Simon, at 219.
[71] Simon, at 217.
[72] From *Durham v United States,* 214 F. 2d 862 (DC Cir 1954) (hereinafter *Durham).*
[73] From *M'Naghten's Case* (1843), 10 Cl & Fin 200, 8 ER 718 (HL) (hereinafter *M'Naghten).* See: Simon, at 216. These tests are discussed in Chapter Six, The Exemption for Mental Disorder.

considered. Some of these include: whether the accused can or will testify; the facts of the case; whether the section 16 defence is too technical for the jury to appreciate; whether the accused has a previous conviction; the Crown's case against the accused; and whether the accused has received media attention that may colour the particular jury. Another factor to consider is the willingness of the jury to find that the person was not criminally responsible on account of mental disorder. It is undeniable that a portion of society feels that the insanity defence is a legal loophole. However, some studies indicate that a jury faced with evidence of insanity will seriously consider and weigh expert evidence and will apply the mental disorder defence.

B. Judge's Charge to the Jury

The nature of a jury trial raises unique legal issues. When a jury verdict is appealed, there are various issues raised, usually having to do with the judge's charge to the jury. Many of these appeals are based on instructions relating to expert testimony.

In *R v David*, the accused was charged with three counts of first degree murder, and at trial, raised the defence of NCRMD.[74] The trial judge instructed the jury to consider the NCRMD defence only if they were satisfied the accused had committed one of manslaughter, second degree murder, or first degree murder. The accused was convicted and appealed. The Ontario Court of Appeal stated that it would have been preferable for the trial judge to instruct a jury to consider the NCRMD defence before they decide whether the accused had the necessary mental element to commit the particular offence, but only after they are satisfied beyond a reasonable doubt that the accused committed the offence.[75] However, the Court held that it is not always wrong to instruct a jury to consider a NCRMD defence only after they have decided that the accused was guilty of manslaughter or first or second degree murder.[76] Considering the charge as a whole, the Court was "satisfied that the trial judge made it clear to the jury that they were required to consider all of the evidence relating to mental disorder when deciding whether the appellant formed the specific intent for murder and whether the

[74] (2002), 164 OAC 61, 169 CCC (3d) 165 (hereinafter *David*).
[75] *David* at para 48.
[76] *David* at para 53.

murders were planned and deliberate."[77] The appeal was dismissed.

In *Ratti,* the psychiatric evidence indicated that the accused, who was charged with the murder of his wife, was suffering from paranoid schizophrenia at the time of his offence. The trial judge instructed the jury that it was unsafe to arrive at a verdict based on expert evidence alone. The accused was convicted of first-degree murder. The Court of Appeal dismissed the appeal on various grounds and dealt with the issue of whether the trial judge misdirected the jury with this instruction. The Supreme Court of Canada ordered a new trial, but not on this issue. The Supreme Court stated that:

> [T]he trial judge made no error in instructing the jury in this regard. The statement cited above was made in the context of discussing the weight that should be attached to expert evidence in general and the role of the jury as the sole trier of fact. The trial Judge was entirely correct in advising the jury that they were not bound by the expert psychiatric testimony, and that its probative value was to be assessed in the same manner as any other testimony. In this case, factual evidence with respect to the appellant's insanity was placed before the jury. As a result the jury was in a position to assess the weight that should be given to the testimony by considering whether it was supported by the facts. The trial Judge correctly advised the jury to consider the expert testimony in relation to the facts, and that the testimony could be rejected if it was based upon factual assumptions with which they disagreed.[78]

In *R v De Tonnancourt et al,* three accused were charged with and convicted of murder in a joint trial.[79] In his charge to the jury, the trial judge stated that the jury was to consider on the question of insanity: lay testimony—evidence of non-experts; the expert testimony; and the accused's behaviour during the trial. The Manitoba Court of Appeal stated that this direction was in accord with the principles laid down by the Supreme Court of Canada.

In *Theriault v R*, the accused was charged with and convicted of first-degree

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[77] *David* at para 62.
[78] *Ratti,* at 304.
[79] (1956), 24 CR 19 (Man CA) (hereinafter *De Tonnancourt*)

murder in a jury trial.[80] He pleaded insanity at the time of the offence. On appeal, he contended that the trial judge had not sufficiently explained to the jury the defence of insanity so as to enable them to understand the legal meaning given to the word "insanity". He also argued that the summary of the evidence of the trial judge was unsatisfactory and could not allow a full appreciation of the defence raised. The Quebec Court of Appeal held that in making the summary of the evidence, the trial judge must review the substantial parts of the evidence and give the jury the theory of the defence so that they can appreciate the value and effect of that evidence and how the law is to be applied to the facts that they find. The trial judge does not have to translate for the jury into lay terms the terminology used by the experts when these terms have been adequately explained during the course of the testimony. The Supreme Court of Canada agreed with the Quebec Court of Appeal and stated:

> With respect, I agree with Jacques J.A. and Lamer J. that there is no obligation on the trial judge to interpret the testimony of experts. Kaufman J.A. speaks of the risk of "losing precision". Equally grave is the danger of error in translating technical language into common and everyday vernacular. If the testimony is highly technical, counsel who has called the expert witness should ask the witness to explain himself in language the layman can understand. The judge may, in his discretion, decide that some simplification is desirable, but failure on his part to undertake this difficult and potentially hazardous task is not, in my view, reversible error.[81]

In *Cooper,* the trial judge's charge to the jury on the issue of insanity concluded with the following:

> With that evidence before you, again it would seem to be impossible for you to bring in a finding of not guilty by reason of insanity, but the evidence is yours to consider, and it is your finding.[82]

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[80] (1981), 22 CR (3d) 138 (SCC), affirming (1978), 5 CR (3d) 72 (Que CA) (hereinafter *Theriault*).
[81] *Theriault,* at 149 - 150.
[82] *R v Cooper* (1978), 40 CCC (2d) 145 (Ont CA), reversed (1980), 51 CCC (2d) 129, 13 CR (3d) 97 at 126 (hereinafter *Cooper*).

In ordering a new trial, the Supreme Court of Canada stated that the trial judge had erred:

> ...in failing to review adequately the evidence bearing upon the insanity issue and in failing to relate the evidence of the accused's capacity to intend certain acts to the issue of insanity. The judge did not analyze the evidence of Dr. Sim or the other evidence as it may have related to the defence of insanity on the issue of whether the appellant appreciated the nature and quality of his act. Failure before the jury on the issues of intent and intoxication did not preclude success on the issue of insanity. The insanity question should have been put to the jury in such a way as to ensure their due appreciation of the value of the evidence [citations omitted]. [The Judge also erred in] concluding this portion of the charge in language which, to all intents, withdrew from the jury the essential determination of fact which it was its province to decide. If the issue was to go to the jury, then, in fairness to the accused, a much more careful charge was warranted. The issue should have been clearly left with the jury to decide.[83]

In *R v Winters,* the accused was convicted by a judge and jury of murdering her son.[84] She appealed on the ground that the trial judge erred in his instruction to the jury on the defence of insanity. In substituting a verdict of not guilty by reason of insanity, the Newfoundland Court of Appeal discussed the duties of the trial judge:

> In the present case the learned trial judge did not relate in detail the evidence in support of the defence of insanity, nor did he instruct the jury on its value and the weight which they should give to the opinion of an accepted expert. Indeed, the learned trial judge paid fleeting reference to the evidence of

[83] *Cooper*, at 127. See also: *R v Conroy,* [1993] OJ No 1860 (CA) (QL). The principle ground of appeal in *Conroy* was that the trial judge erred in properly instructing the jury as to the use of textbooks in the cross-examination of an expert witness testifying as to the insanity of the accused. The Court of Appeal allowed the appeal, stating that in the context of this case it was necessary for the trial judge to clearly state that the excerpts read in court were not to be used for the purpose of proving the truth of the opinion expressed therein but as a means of testing the value of the expert's conclusions. They could only be used to challenge the expert's credibility. And only if the witness adopted a passage in the text could the passage be admitted in evidence in support of the expert's opinion.

[84] (1985), 51 Nfld & PEIR 271 (Nfld CA) (hereinafter *Winters*).

> Dr. Paulse, and he failed to relate the other evidence in support of Dr. Paulse's opinion. In our view, it was incumbent on the learned trial judge to relate the evidence bearing on the defence of insanity to the jury and to explain the manner in which it supported that defence as defined in the law and the weight to be given that evidence.[85]

Thus, the trial judge must present a fairly detailed and accurate summary of the evidence in the case in a manner that will not decide the issue for the jury.[86]

The trial judge must also be careful not to "intrude into the province of the jury." In *Morin,* the trial judge instructed the jury to apply the criminal standard of proof beyond a reasonable doubt to individual pieces of evidence before deciding whether the accused was guilty beyond a reasonable doubt. The accused was acquitted of a charge of murder. The Court of Appeal of Ontario allowed the Crown's appeal on the judge's charge to the jury. The accused appealed to the Supreme Court of Canada.

The Supreme Court of Canada dismissed the accused's appeal and agreed that a new trial should be ordered. In commenting on the trial judge's charge to the jury, the majority of the Supreme Court (per Sopinka J.) stated:

> The reason we have juries is so that lay persons and not lawyers decide the facts. To inject into the process artificial legal rules with respect to the natural human activity of deliberation and decision would tend to detract from the value of the jury system. Accordingly, it is wrong for a trial judge to lay down additional rules for the weighing of the evidence.[87]

The trial judge has a difficult task when addressing the jury. She/He must provide helpful tips on weighing the evidence, such as observing the demeanour of the

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[85] *Winters,* at 273.

[86] See also: *R v Laycock* (1952), 104 CCC 274 (Ont CA); *R v Baltzer* (1974), 27 CCC (2d) 118 (NSCA) (hereinafter *Baltzer*); *R v Budic* (1978), 43 CCC (2d) 419 (Alta CA) (hereinafter *Budic (No 3))*; *Chartrand v R*, [1977] 1 SCR 314 (Que) (hereinafter *Chartrand*); *R.* c. *Crawford* (September 10, 1992) 500-10-000127-892 (Que CA). See also *Wild,* where just before reviewing the accused's evidence, the trial judge remarked, "The worst is yet to come." In dismissing the accused's appeal from a conviction for second degree murder, the B.C. Court of Appeal held that the words were unfortunate, but taken in the context, the jury would have understood them to mean a remark about their patience with a long and difficult review.

[87] *Morin*, at 18.

witnesses and taking into account the interests of the witnesses. However it is for the jury to decide how to proceed to determine the facts.

This issue of expert testimony was addressed in *R v Campione*.[88] The accused had been charged and convicted of first degree murder for drowning her daughters in a bath tub. The defense sought to prove that the accused was not criminally responsible on account of mental disorder, as she did not know that what she did was morally wrong. Both the Crown and defense brought in their own experts to argue this point. The accused was convicted of first degree murder and appealed the conviction on three points: 1) the trial judge erred in providing confusing instructions on determining an appreciation of moral wrongfulness; 2) the trial judge failed to caution the jury about a comment on the law made by the Crown's expert; and 3) the trial judge failed by giving a caution regarding the defence's expert's testimony that may have prejudiced the jury. In regards to the second ground of appeal, the defence argued that the Crown's expert witness made statements that demonstrated a misunderstanding of the law that was not corrected by the trial judge. The Court of Appeal held that the trial judge did not err, and dismissed the ground of appeal, stating that the witness did not claim to be an expert in the law. In regards to the third issue on appeal, the Court of Appeal held that while it would have been preferable for the trial judge to reference both experts when cautioning the jury, the statement was not prejudicial and was clearly meant to be taken as an example to apply to both experts. Regardless of the decision, this case still illustrates the importance of trial judges taking care when instructing a jury on how to handle expert testimony.

The Ontario Court of Appeal in *R v Skrzydlewski* concluded that where an accused denies criminal responsibility on account of mental disorder, it is appropriate for the trial judge to instruct the jury that:

1. hospital records relied upon by the experts do not suffer from hearsay dangers associated with statements made by the accused to hospital personnel;

[88] *R v Campione*, 2015 ONCA 72, [2015] CarswellOnt 1141.

2. statements made by the accused and others to treatment personnel are not evidence of the truth of their contents; and,

3. they ought not to consider opinions of experts who did *not* testify contained in material considered by those experts that did testify. (See also *Conroy* on this point).[89]

In *R v Worth*, the same court determined that where an accused denies criminal responsibility on account of mental disorder, but refuses to be examined by a psychiatrist retained by the Crown, the jury may be instructed that they may infer that the defense would not withstand scrutiny.[90] Such an instruction does not contravene section 7 of the *Charter*.

C. Crown and Defence Addresses to the Jury

There are other issues that arise specifically when the trial is before a jury. Often the addresses of the Crown and the defence to the jury are the subject of an appeal. The issues raised may include the procedures followed and the content of the addresses to the jury.

In *Charest,* after the defence and the Crown had finished their addresses to the jury, the trial judge in his charge withdrew the defence of insanity from the jury's consideration.[91] In ordering a new trial, the Quebec Court of Appeal held that this procedure was highly prejudicial to the accused. If the trial judge was of the view that there was no evidentiary basis for the defence of insanity, he should have made counsel aware of that decision before their addresses had started.

Sometimes the appellants argue that the jury address was inflammatory or prejudicial to the accused. For example, in *Charest,* the accused was convicted of the murder of an 11-year-old child. In his address to the jury, Crown counsel described the accused as an assassin and a murderer. He compared the accused to a terrorist or a Nazi. He also suggested that there was a sexual motive for the killing even though there was no evidence of this motive. He invited the jury to consider whether they would be

89 (1995), 103 CCC (3d) 467 (Ont CA).
90 (1995), 98 CCC (3d) 133 (Ont CA).
91 (1989), 30 QAC 227.

able to live with themselves following their verdict. The Quebec Court of Appeal held that this was a highly improper and inflammatory address and ordered a new trial.

On the other hand, in *Chartrand,* where the Supreme Court described the language chosen by the Crown as "rather colourful", the accused was not successful in arguing that the Crown used inflammatory language.[92]

In *Romeo,* the accused was charged with and convicted of the murder of a police officer.[93] He had suffered from psychiatric problems since adolescence. His defence was insanity and defence produced expert testimony to that effect. In his address to the jury, Crown counsel disparaged the evidence of the defence psychiatrist. He referred to her evidence as "beyond fairy tales." When referring to Romeo he said, "[t]he monster is cast in front of us, and it boggles my mind." The trial judge did not comment upon these remarks. However, the Supreme Court of Canada ordered a new trial. The remarks of the Crown were prejudicial to a degree sufficient to impose a legal duty on the trial judge to comment. They were calculated to inflame and did not deal with the proper question of which expert evidence to accept.

A final issue that was once the subject of great debate, but which has not received much recent attention, is whether it is appropriate for the Crown, the defence, or the trial judge to inform the jury of the consequences of a verdict of not criminally responsible on account of mental disorder. It is a general rule that juries are not to be informed of the consequences of their verdicts.[94] In the 1931 case, *R v Cracknell,* the trial judge informed the jury that if the accused were found guilty of murder, his sentence would likely be commuted.[95] The accused was seeking to rely on the insanity provisions of the *Criminal Code*. In finding this instruction inappropriate, the Ontario Court of Appeal ordered a new trial.

In *R v Smith,* the accused was raising an insanity defence.[96] Defence counsel objected to the trial judge's charge to the jury saying that "in cases where insanity is the

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[92] [1994] 2 SCR. 864.
[93] [1991] 1 SCR 86, 62 CCC (3d) 1.
[94] *R v Conkie* (1978), 39 CCC (2d) 408 (Alta CA).
[95] (1931), 56 CCC 190 (Ont CA).
[96] (1967), 5 CRNS 162 (Ont HC) (hereinafter *Smith*).

defence, and particularly in a case like this where the facts are rather horrendous, when the jury are told that their verdict is not guilty by reason of insanity they will labour under the completely mistaken apprehension that that means the accused will be leaving the courtroom with all of us this afternoon."[97] The trial judge acceded to the defence counsel's request by reading the *Criminal Code* section that dealt with the disposition of the accused. He also informed the jury that this should not influence their verdict but simply remove an extraneous consideration.

In *R v Lappin,* the accused was charged with attempted murder and pleaded not guilty.[98] The jury found him not guilty by reason of insanity after the Crown introduced evidence with respect to insanity. The Crown assured the jury that if they found the accused not guilty by reason of insanity he would not walk out onto the street. The Crown went on to make remarks to the effect that if the accused went to jail he would get out and commit another, possibly more serious, crime. The accused appealed the verdict of not guilty by reason of insanity on the ground that the Crown's address was inflammatory and deprived him of a fair trial. The appeal was dismissed.

In *R v Jollimore*, one of the grounds of appeal by the Crown was that the trial judge had erred in his instruction to the jury regarding the consequences of a verdict of not guilty by reason of insanity.[99] In dismissing the appeal, the Nova Scotia Court of Appeal noted that the instructions by the judge to the jury on the consequences of an NCRMD verdict played no major part in the verdict. Moreover, the court stated that, in general, it was preferable to inform the jury of the consequences of a verdict of not guilty on account of insanity in order to prevent speculation on the question.

Greenspan asserts that the trial judge should comment on the consequences of the insanity verdict.[100] His theory is that this practice will assuage the fears of the jury and avoid the jury's undue consideration of extraneous matters in reaching a verdict. The Alberta courts, however, are divided.

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[97] *Smith,* at 173. See also *R v Conkie* (1978), 9 AR 115, 39 CCC (2d) 408.
[98] (1976), 40 CRNS 77 (Ont CA).
[99] (1985), 67 NSR (2d) 246, 19 CCC (3d) 510.
[100] Greenspan, E L, "Informing the Jury of the Consequences of an Insanity Verdict" (1976) 40 CRNS 73.

In *Conkie,* the Alberta Court of Appeal was divided on whether the trial judge should instruct the jury as to the provisions of the *Criminal Code* that dealt with the accused's disposition [s. 614(2) as it existed before the recent amendments].[101] One justice was of the opinion that there was no requirement in law for the judge to instruct the jury as to those provisions and that the practice in Alberta was for counsel to advise the jury. The second justice agreed that there was no requirement in law that the trial judge so instruct the jury but felt that a verdict of acquittal on account of insanity should not be subject to the rule that juries are not to be informed of the consequences of their verdicts. Rather, when insanity is raised as a defence, the trial judge should inform the jury of the consequences of a verdict of not guilty by reason of insanity where the nature of the offence and the character of the accused would tend to indicate that the accused is a dangerous individual and in cases where counsel in their addresses to the jury have not done so. The third justice did not deal with the issue, as he felt that it was not critical to the outcome of the appeal.

Most recently, this issue has been discussed in a few cases in Quebec. In *R v Mailhot*, [102] the accused's counsel specifically requested that the trial judge inform the jury of the consequences of a verdict of NCRMD, in the interest of letting the jury know that they would not be responsible for "allowing a dangerous psychopath to be at large" for rendering the verdict. The trial judge refused, and the accused was convicted. On appeal, the Court held that the trial judge did not prejudice the jury by not informing them of the consequences of the verdict, because the facts of the case did not suggest that the accused was suffering from an ongoing mental disorder, and therefore, the information would not have changed the verdict. However, the Court stated that, generally, it is beneficial to inform a jury on the consequences of an NCRMD verdict, so prevent them from being conflicted between their duty to not convict someone suffering from a mental disorder at the time of the offence, and their fear of letting a

[101] (1978), 39 CCC(2d) 408, 3 CR (3d) 7.

[102] *R c Mailhot,* 2012 QCCA 964, [2012] CarswellQue 5082. This case went on to be appealed to the Supreme Court of Canada in 2013 on a different ground: 2013 SCC 17, [2013] 2 SCR 96, where a new trial was ordered.

dangerous person remain at large. The appeal was, therefore, dismissed. In *R c Proulx*,[103] the accused's counsel also asked the trial judge to inform he jury on the consequences of an NCRMD verdict. The trial judge refused, the accused was convicted of first degree murder, and the defence appealed the decision on the grounds that by not informing the jury of the consequences, the accused had not been given a fair trial. The Court of Appeal once again stated that it was generally appropriate to inform a jury on the consequences of an NCRMD verdict. However, because an expert witness had provided some insight on the consequences, the decision was upheld. These two cases nevertheless suggest the possibility of the emersion of a duty for trial judges to inform juries of the consequences of a NCRMD verdict.

It will be interesting to see if there will be further developments in the future as to whether the jury should be informed of the consequences of a verdict of not criminally responsible on account of mental disorder.

IV. Conclusion

Because a successful section 16 argument results in a hybrid verdict—the accused is not found guilty nor is he/she outright acquitted—unique evidence issues arise. The *Criminal Code* addresses several of these issues by providing for who must prove the mental disorder and the amount of proof that is necessary (on a balance of probabilities). The new provisions also address who may raise the issue of mental disorder and under what conditions. To a degree, these provisions ensure that the accused has the right to control his or her own defence.

Often, mental disorder trials take place before a jury. When a jury is present, several tactical issues arise. Some of these issues are discussed in Chapter Three, Solicitor and Client Issues. Further, the content of the addresses to the jury becomes quite significant. If the accused has the option of choosing a jury trial, some of the special implications of jury trial will be relevant.

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[103] *R c Proulx,* 2012 QCCA 1302, [2012] CarswellQue 7287.

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