Mental Disorder: Case Law Update

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Introduction

Section 16 of the Criminal Code\(^1\) acts as an entry point for a certain class of severely mentally ill individuals into our criminal justice system. The Criminal Code recognizes that for some individuals, mental disorder will affect their cognition to the point that it would be unprincipled to find them criminally liable. Not all individuals who commit criminal acts under the affect of a mental disorder and who could benefit from psychiatric care are diverted into the forensic system through the NCRMD defense. Though the verdict is an avenue to treatment, it is primarily about ensuring that individuals have the capacity to form criminal intent, before assigning criminal responsibility. The NCRMD verdict has been brought into the public attention through publicized controversial cases such as Allan Schoenborn and Guy Turcotte.\(^2\) Harper’s policy of “tough on crime” and the changes to the NCRMD disposition through Bill C-14 have reinvigorated a concern over who is eligible for the defense and how the case law has developed. I will address these questions through an analysis of Canadian English-language case law. I am limited to reviewing reported cases and, for the purpose of scoping, have focused on cases out of Quebec, Ontario, and British Columbia that from 2014 to 2016.

History of the NCRMD Defense

The section 16 defense originated in the Canadian Criminal Code in 1892 as a derivative of the M’Naghten test developed in England.\(^3\) Changes to the NCRMD test can be traced to the deinstitutionalization of mental health services in the 1950s and 1960s. Patients moved from mental health institutions to the criminal justice system, partially because there were insufficient

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\(^1\) Criminal Code, RS C 1985, c C-46 s 16 [Criminal Code].
\(^2\) Lisa Grantham, “Bill C-14: A step backwards for the rights of mentally disordered offenders in the Canadian Criminal Justice System” (2014) 19 Appeal 63 at 73 [Grantham].
\(^3\) Don Stuart, Canadian Criminal Law 7th ed (Toronto: Carswell, 2014), at 426 [Stuart].
increases in community or out-patient services upon the closing of mental health institutionalizations. The shift has been called the ‘criminalization’ of mentally ill individuals. In 1991, section 16 was amended to its current form, notably with the language of ‘insanity’ being replaced by ‘mental disorder’. An important change to the practical use of section 16 came when the SCC in *R v Swain* struck down the old disposition regime, the Lieutenant Governor’s Warrant system, in 1991. A new regime was legislated by Parliament in the following year, allowing for greater procedural protection and requiring that the new scheme was not arbitrary. Prior to these changes, pursuing an NCRMD defense was only really attractive if the accused was facing imprisonment for life on the charge. The result was that pursuing an NCRMD defense became a more ‘reasonable’ option for individuals who were facing slightly less time in prison.

Recent changes by Steven Harper’s government to the disposition of NCR accused persons and its “tough on crime” politics, have potentially caused the opposite effect due to the unattractive disposition. The verdict of NCRMD may not be able to serve its primary function, to prevent the incorrect findings of guilt of individuals without criminal culpability, if no defense counsel can sensibly advise a client to pursue the verdict due to the risks presented by the disposition. But alongside this political tide there is some movement within the jurisprudence to widen the NCRMD verdict. For instance, *R v Bouchard-Lebrun* opens the possibility for the NCRMD verdict to match scientific knowledge of co-occurrence of substance use and mental disorders, and thus to bring more individuals within the sphere of mental disorder.

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5 Stuart, *supra* note 3 at 425.
Who are the NCRMD?

The NCRMD verdict applies to individuals who have severe mental disorders. The National Trajectory Project of Individuals Found NCRMD (NTP) gives insight into who was actually brought under this provision through studying people found NCRMD in Quebec, Ontario, and British Columbia between 2000 and 2005.\(^7\) An important finding of the study is that approximately half of the NCRMD population does not have a high school education.\(^8\) Further, 71.5% of people found NCRMD were under some form of government income support.\(^9\) It is highly unlikely that these individuals will have the personal capacity to conduct or fund a complicated legal defense. This is troubling, given the evidentiary requirements of the defense and the legal issues involved.

NCRMD findings occur at a higher rate in Quebec, where there are 6.4 times more cases diverted into the review board system than in Ontario, and 5 times more than in British Columbia. The NTP has found that the difference in rate of NCRMD verdicts between Quebec and other Canadian jurisdictions is increasing.\(^10\) Legal practitioners pursuing an NCRMD verdict should be aware of the regional variations in the court's approach to NCRMD verdicts. The NTP study provides information on provincial variation pertaining to both review board treatment and issues at trial, including for instance success rates based on type of mental disorder alleged.

The NTP argues that, following deinstitutionalization and the corresponding failure to create community services to replace these services, pathways into medical treatment have been

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\(^7\) Anne C Crocker et al., “The National Trajectory Project of Individual Found Not Criminally Responsible on Account of Mental Disorder in Canada.” (2015) 60:3 Canadian Journal of Psychiatry 96 at 97 [Crocker, “NTP”].

\(^8\) Crocker, NTP2, supra note 4 at 109.

\(^9\) Ibid at 108.

\(^10\) Crocker, “NTP”, supra note 7 at 103.
limited.\(^\text{11}\) As a result the forensic system, and the NCRMD verdict, have become a gateway into medical treatment.\(^\text{12}\) That 72% of people found NCRMD have had at least one prior psychiatric hospitalization\(^\text{13}\) may suggest a level of incapacity or unwillingness on the part of the current system to provide long term care for mentally disordered individuals, putting them on the path to committing criminal offences. The fact that many successful NCRMD verdicts involve individuals who have been hospitalized may have to do with the evidentiary record created by interaction with the medical system.

A common perception of NCRMD verdict in the media is that intelligent individuals use it to get off easy from serious crimes. This perception is perpetuated by the fact that media attention is focused on dramatic and emotionally charged cases. Both Allan Schoenberg and Guy Turcotte have been cases through which the public discusses the NCRMD defense, in both these cases the men involved killed their children. Those who are found NCRMD come from a much broader range of index offences than murdering their children. Two out of three NCRMD index offences involve offences against the person, but they vary widely in severity.\(^\text{14}\) The NCRMD test requires stringent proof, acceptance of the possibility of indefinite incarceration in a forensic hospital and, often, an admission to the \textit{actus reus} of the offence.\(^\text{15}\) Despite public perception, a criminal defense lawyer does not lightly counsel a client to pursue the NCRMD defense as the accused is submitting to both indefinite incarceration and often admitting to the \textit{actus reus} of the

\(^\text{11}\) \textit{Ibid} at 103  
\(^\text{12}\) Crocker, NTP2, \textit{supra} note 4 at 107.  
\(^\text{13}\) \textit{Ibid} at 108.  
\(^\text{14}\) \textit{Ibid} at 104  
\(^\text{15}\) See, \textit{R v Flanagan}, 2015 ONSC 6840 [\textit{Flanagan}]; \textit{R v Richmond}, 2016 ONCA 134 [\textit{Richmond}] (A case where NCRMD was plead after a trial was run to prove guilt – NCRMD not found).
criminal act. Misconceptions that the review board system is too tough, or unfamiliar may also encourage defense counsel to avoid the NCRMD defence.\textsuperscript{16}

\textit{The Section 16 Test}

An accused individual is presumed to not suffer from a mental disorder,\textsuperscript{17} therefore the first step in proving a section 16 verdict is showing, on a balance of probabilities that the accused did suffer from a mental disorder at the time of the offence. By operation of section 16(3), this burden is placed on the party who is raising the defense. The substance of the test for a NCRMD defense is contained in section 16(1) of the \textit{Criminal Code}:

\begin{quote}
“No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.”\textsuperscript{18}
\end{quote}

The test is interpreted as having two main inquiries. The first is the threshold question; does the accused have a mental disorder? The second inquiry is whether the mental disorder affected the accused’s behaviour in the appropriate way. The mental disorder must have caused the individual at the material time to be either incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong. These two steps and recent case law are discussed below, with a discussion of select evidentiary issues following.

\textsuperscript{16} M. Lawrence & S. Verdun-Jones, "Delusions of Justices: Results of Qualitative Research on the Management in British Columbia of Cases involving Allegations of Substance-Induced Psychosis" (2015) 62 Crim L.Q. 475 [Lawrence and Verdun-Jones].

\textsuperscript{17} \textit{Criminal Code}, supra note 1 s 16(2).

\textsuperscript{18} \textit{Ibid} s 16(1).
**Step One: Threshold**

**Introduction: The Holistic Approach**

The initial step for a section 16 defense is to show that the accused had a mental disorder. Though the changes in 1991 to the *Criminal Code* replaced the phrase ‘Insanity’ with ‘Mental disorder’, this did not change or clarify the actual content of the definition. Mental disorder is defined in the *Criminal Code* as a ‘disease of the mind’,\(^{19}\) which is a term defined through case law. The determination of whether an accused suffered from a mental disorder is a question of fact.\(^{20}\) The Supreme Court of Canada has clearly stated that whether a condition is a mental disorder is not a medical question, but a legal inquiry with a medical component.\(^{21}\)

In *Cooper v R*, the SCC described disease of the mind as potentially, “any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding, however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion”.\(^{22}\) In *Bouchard-Lebrun*, the SCC indicates that the point is not to carve out a set of diagnoses that always count as a medical disorder. A judge does not refer to a list of ‘accepted medical conditions’ but takes a contextual approach, called the holistic approach, to each case to determine if the individual has a mental disorder.\(^{23}\) The holistic approach consists of two factors and a policy consideration. *Bouchard-Lebrun* indicates that despite the exclusion in *Cooper* of self-induced states caused by alcohol – some states of intoxication *may* be found to be

\(^{19}\) *Criminal Code*, supra note 1 s 2.


\(^{21}\) Ibid, at 331

\(^{22}\) *Cooper v R*, 1977 CarswellOnt 60 (SCC), at para 51 [*Cooper*].

a mental disorder by the holistic test.\textsuperscript{24} It should also be noted that the exclusion in \textit{Cooper} has not historically been read to bar accused who are intoxicated at the time of the offence from pursuing an NCRMD defense, so long as the intoxication is not the cause of the behaviour.\textsuperscript{25} The definition of mental disorder is thus potentially very broad.

It is not necessary or even appropriate for a judge to use all of the factors of the holistic approach in each case. \textit{Stone} states that the internal cause factors, the prior dominant approach in section 16 jurisprudence, was not appropriate to use in cases where the line between internal and external causes is unclear.\textsuperscript{26} \textit{R c Turcotte} states that where the both internal factor and policy considerations clearly point towards finding of a mental disorder, the fact that there is no continuing danger will not preclude the finding of a mental disorder.\textsuperscript{27} The holistic approach gives judges a range of tools such that a combination of them will be sufficient for the judge to make a determination. The fact that mental disorder is “not capable of precise definition”\textsuperscript{28} limits certainty about the determination of whether or not a condition is a mental disorder. Despite \textit{Bouchard-Lebrun} indicating that it is preferable for courts to rely on individualized analysis not past case law in the determination of mental disorder,\textsuperscript{29} judges seem to have used the holistic approach stably in their definition of mental disorder, with some growth in the area of intoxication. For instance in \textit{Bouchard-Lebrun} and \textit{R c Tremblay},\textsuperscript{30} the court is able to give a more nuanced approach to co-occurring substance use disorder and mental illness through the holistic approach.

\begin{itemize}
  \item \textsuperscript{24} \textit{Ibid}, at para 88.
  \item \textsuperscript{25} \textit{R c Turcotte}, 2013 QCCA 1916 at para 80 [\textit{Turcotte}].
  \item \textsuperscript{26} \textit{Stone}, supra note 20 at 203.
  \item \textsuperscript{27} \textit{Turcotte}, supra note 25 at para 94.
  \item \textsuperscript{28} \textit{Bouchard-Lebrun}, supra note 23 at para 60.
  \item \textsuperscript{29} \textit{Ibid} at para 77.
  \item \textsuperscript{30} \textit{R c Tremblay}, 2013 CarswellQue 10164 [\textit{Tremblay}].
\end{itemize}
**Internal Cause Factor**

The internal cause factor states that an accused is more likely to have a mental disorder if their condition is caused by an internal cause that is personal to the accused. The Judge considers if a ‘normal person’ placed in the accused’s situation would likely “fall into a similar mental condition”.\(^{31}\) As the regular person is assumed to have no mental disorder, if a regular person would not have the same reaction as the accused, the ‘cause’ is not something external but something internal to the accused. The test is an objective comparison and can be made based on psychiatric evidence.\(^{32}\) The comparison keeps in mind all the circumstances of the accused. For instance, if a person has taken drugs, it is not just which drug is taken but also factors including fatigue or the pace of consumption.\(^{33}\) On its face this factor indicates that any internal cause may be indicative of a mental disorder. But this must be qualified by the exclusion in *Cooper*. *Bouchard-Lebrun* has not resulted in all cases of co-occurrence resulting in NCRMD findings; an example of court’s caution with this new jurisprudence is the appeal and eventual reversal of the finding of NCRMD in the case of Guy Turcotte.

**Continuing Danger Factor**

The second factor, the continuing danger factor, is primarily about public safety. If a mental condition is likely to present a recurring danger, then it is more likely to be seen as a disease of the mind.\(^{34}\) *Stone* indicates that whilst a finding that someone poses a recurring risk of violence will militate towards a finding of a mental disorder, the fact that they are “not a

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31 *Turcotte*, *supra* note 25 at para 75.
33 *Ibid* at para 72.
34 *Ibid* at para 73.
continuing danger does not preclude a finding of a disease of the mind”. That continuing
danger is not a requirement for the finding that someone has a mental disorder is important, as
risk of recurring danger has little to do with the underlying concern for ensuring that an
appropriate criminal liability was present at the time of the offence.

Further, Stone indicates that the court may consider any evidence in front of them when
determining the risk of violence, but that particular attention should be paid to the “psychiatric
history of the accused and the likelihood that the trigger alleged” will reoccur. Bouchard-
Lebrun qualifies this, stating that the danger the court should be attentive too is the danger that
can arise “independently of the exercise of the will of the accused”. R v H(S) indicated a
specific focus should exist on the risk of “recurrence of the commonplace events that triggered”
the state.

If it is found that consumption of a drug led to the alleged mental condition, this
individual may be found to not have a mental disorder if the only risk of another dangerous
episode would be caused by the accused voluntarily taking drugs. There is room for counsel,
supported by scientific evidence, to argue that for an addicted individual, consumption of drugs
is beyond the exercise of their will, and thus the continuing danger factor for addicted individuals
militates towards a finding of the presence of a mental disorder. Further, counsel may take up the
statement in Stone that the continuing danger factor is not a prerequisite to a mental disorder.
Evidence for this section of the test comes from both expert opinions, self-reporting of the
accused, and medical history.

35 Stone, supra note 20 at 212.
37 Bouchard-Lebrun, supra note 23 at 74.
38 R v H(S), 2014 CarswellOnt 5065, at para 84 (ONCA) [H(S)].
39 R v Cramer, 214 BCSC 1166 at para 121 [Cramer].
Policy

Stone states that trial judges should be able to consider the policy concerns that underlie the inquiry when determining if someone fits within the appropriate category. Thus, in a section 16 application, the judge may consider whether the accused is likely to benefit from the regime in Part XX.1 of the Criminal Code. If they are not likely to benefit, then they are less likely have a disease of the mind.40

Medical Component

Expert psychiatric evidence often forms the starting point of a judge’s analysis of whether or not an individual suffered from a mental disorder. Judges often seem to start from the testimony of experts and then apply the holistic factors, as well as use expert evidence to inform their findings under the factors. A trial judge is considered to have erred if they assign “near-dispositive effect to the medical opinion”.41 The purpose of the testimony is to provide the trial judge with a description of the “accused’s mental condition and how it is considered from a medical point of view”,42 but as the experts do not take into account the policy aspects of the section 16 view, judges can not be bound by their testimony.43

In the selection of cases I have reviewed, judges do not often disagree with the psychiatrists and medical professions as to the existence of a medical mental disorder. Though a firm commitment to the court’s jurisdiction in determining mental disorders exists, the ONSC stated that “Canadian courts have at least implicitly recognized that the major mental illnesses,

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40 Bouchard-Lebrun, supra note 23 at 75.
41 R v H(S), supra note 38 at para 83.
43 Bouchard-Lebrun, supra note 23 at 62.
the psychoses, are diseases of the mind, and, thus mental disorders… so, too, the personality disorders.”. By ‘implicitly recognized’ I believe the court is referring to the fact that judges do not often go into an analysis of the holistic factors where the medical evidence indicates a condition that is normally accepted by the courts as being a medical disorder.

In *R v H(S)* the court indicated that both a “disease of the brain” and a “disease of the mind” could qualify as a mental disorder under section 16. Again, the court seems to be maintaining a broad understanding of the definition of ‘mental disorder’. This inclusion of problems with the brain qualifying as a mental disorder may be helpful in broadening the defense. In *R v H(S)* the court accepted that longer term substance abuse that changes the brain can be a mental disorder.

In *R v Z(GC)* the judge specifically addresses practical issues of diagnosis. The Judge addresses the difficulties experts have in assessing psychiatric conditions of individuals with co-occurring drug-use and mental disorders. The Judge recognizes that some assumptions, for instance, that ‘sobering up’ happens in custody, are not always realistic given the reality of access to illicit substances in custody.

In contested NCRMD cases, it is common to have a psychiatrist appear for both the Crown and the defense. The judge may prefer one psychiatrist’s characterization of the specific disorder to the other psychiatrist’s, but where both Crown and defense agree to the presence of a medical disorder, judges do not often unilaterally reject the medical testimony. Rejection of psychiatric testimony is most likely to occur in unsettled areas of the defense, for instance if the

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44 *R v Dobson*, 2015 ONSC 2865 at para 75 [*Dobson*].
45 *Tremblay*, *supra* note 30.
46 *R v Z(GC)*, 2015 BCSC 1596 at para 58 [*Z(GC)*].
defense is raising NCRMD in the context of substance abuse. Trial judges often acknowledge the presence of the mental disorder at the first stage of the analysis, but then at the second stage reject that it affected the individual in the appropriate way or at the material time.

A benefit of not treating psychiatric evidence as determinative of the presence of a ‘mental disorder’ is that it allows for the definition to be flexible. If there was a pre-determined list of mental diagnosis that counted as mental disorders then they would have to be changed whenever science changed. Simpson argues that by retaining jurisdiction with the court, the judicial definition is able to ‘keep’ up with the scientific definition. This assumes that evolutions in science are able to easily penetrate into the judicial mind. As many potential NCRMD individuals have previous contact with the medical system and already have diagnosis, the extensive scrutiny of the actual mental state at the second branch of the test, and the fact that the existence of a mental disorder is not often in itself contested – a statement that the medical opinions are not dispositive may mask what is actually happening. If the accused falls with a category of medical diagnosis that often are accepted as a mental disorder judges seem content to rely on habit rather than an application of the holistic factors. It is where counsel is arguing something new that the holistic factors are important.

A benefit of the current system is it does not require a firm diagnosis. In R v Z(GC), despite extensive contact with the medical system over a period of time, treating physicians were not able to come to a firm diagnosis. The lack of firm diagnosis was not a bar to Ms. Z(GC) meeting the first stage of the NCRMD test. This is important, given the shifting nature of diagnostic categories and the uncertainty of individual diagnosis means that it is not unusual for

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47 See, Bouchard-Lebrun supra note 23; Turcotte supra note 25.
48 See, R v Campione, 2015 ONCA 67 [Campione]; R v G(CZ), supra note 45.
49 R v G(CZ), supra note 45 at para 45.
an individual to be differently diagnosed by multiple psychiatrists or to have their diagnosis shift over time.\textsuperscript{50} This is also a reason to not accept a ‘list’ of mental disorders.

**Analysis of the Test**

It is important to note the apparent stability in this part of the threshold requirement for the section 16 test. Generally, if a client is diagnosed by psychiatrists with a mental disorder, they will be found to have a mental disorder at law. The threshold can be relatively low, in that there is no requirement for proof that the disorder affected the actual conduct at this point of the test. Where change seems to be happening at this point is with the treatment of co-occurring substance abuse and mental disorder. The existence of substance use at the time of offence or accusations of malingering are common issues.

In the recent case *R v H(S)*, the Ontario Court of Appeal stated that “what is critical is not so much the medical characterization of the condition or its origin in medical terms, but rather its effect on the capacity of the accused”.\textsuperscript{51} The statement in *R v H(S)* indicates that it does not matter if a disease of the mind is physical in origin or a purely functional disorder with no physical cause, what was important was whether the condition impaired the accused in the requisite way. This can be read as a slight contrast to the statement in *Bouchard-Lebrun* that the court’s role is to determine the source of the accused’s mental condition. In the case at hand it was specifically whether or not it was caused by self-induced intoxication or a disease of the mind.\textsuperscript{52} *R v H(S)*’s characterization of the role of the court may be more in line with a move away from an intoxication-mental disorder dichotomy as presented in *Cooper*.

\textsuperscript{50} Lawrence and Verdun-Jones, supra note 16.
\textsuperscript{51} *R v H(S)*, supra note 38 at para 78
\textsuperscript{52} *Bouchard-Lebrun*, supra note 23 at para 37.
Application to Co-occurrence of Mental Disorder and Substance-Abuse

Intoxication itself does not necessarily rule out the possibility of an accused having a mental disorder. Often when an accused has engaged in substance abuse around the time of the offence, if a court finds that the accused had a mental disorder, the court will indicate that substance abuse was irrelevant to the offence. For instance in *R v W(T)*, the accused had a few alcoholic drinks prior to entering the wrong hotel room and sexually touching the victim. The Court found that W(T)’s actions were caused by a mental disorder, medically diagnosed as Non-Rapid Eye Movement Sleep Arousal Disorder, and accepted that:

> Alcohol consumption likely played some part in the incident in that it contributed to the onset of the sleep walking episode, along with sleep deprivation for several days, significant travel and a change in time zone. But self-induced intoxication was clearly not the governing, the primary or even a major factor.

The court accepted minimal substance abuse at the time of the offence is not preventative of a NCRMD finding, where the mental disorder could have been triggered without the substance abuse.

The NTS found that 30% of studied NCR-accused are diagnosed with a substance use disorder. Further, approximately 20% of NCRMD verdicts in the NTS study reported substance use and or being under the influence at the time of the offence. This data does not indicate the extent to which the substance abuse caused or affected the mental disorder, but shows that this is

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53 *Turcotte*, *supra* note 24 at para 80.
56 Crocker, NTP2, *supra* note 4 at 111.
a population that is involved with substance abuse and is reflected in case law. Given this data, 
Cooper’s exclusion of self-induced states caused by alcohol or drugs, read as a total exclusion of 
substance use, is not a reflection of how the NCRMD defense has been functioning. For, at least 
the 30% with diagnosed substance use disorder, the impairment of their mind by substances did 
not bar judges from finding they were NCRMD, this has often been made possible by judges 
sweeping substance abuse under the rug as non-causal. Though judges may sometimes be 
factually correct in finding that substance abuse did not have anything to do with the offence, 
research indicates that there is often a more common and a more nuanced link between mental 
disorder and substance use. In cases of co-occurrence, it is difficult and perhaps impossible to 
determine whether a psychosis is caused by a substance use or an underlying mental disorder.

In Bouchard-Lebrun the SCC opened up the door to the use of section 16 when self-
induced intoxication was more strongly at play. Bouchard-Lebrun should not be read as too far 
off as a distinction from Cooper. Bouchard-Lebrun still insists that the mental disorder is the 
cause of criminal behaviour, but indicates that where both drug consumption and a mental 
disorder could have triggered a psychosis, it is possible for a mental disorder to be found: 

One example would be a case in which the mental condition of the accused indicates 
an underlying mental disorder but the evidence also shows that the toxic psychosis

57 See Tremblay (poly-substance abuse triggered underlying psychosis); Z(GC), supra note 45 at para 58-
60 (“On balance I accept the opinion of Dr. Tomita that drug abuse is not the cause of her underlying 
psychotic mental disorder. (That is a separate question from whether alcohol or drug use as opposed to 
her underlying psychotic condition were the cause of psychotic delusions which as the defence contends 
caused the accused to kill her mother.”); R v Flanagan, supra note 15 at para 30 (diagnosed with 
psychosis NOS (possibly induced by substance abuse and severe personality disorder)).
58 Lawrence and Verdun-Jones, supra note 16.
was triggered by the consumption of drugs of a nature and in a quantity that could have produced the same condition in a normal person.\textsuperscript{59}

This is not an explicit recognition that \textit{both} substance use and underlying mental disorders can together cause the criminal activity and NCRMD may apply.

Bouchard-Lebrun’s psychosis was found to have resulted from a single incident of self-induced intoxication. The SCC declined to find that Bouchard-Lebrun’s state of mind qualified as a mental disorder. I have not come across any case where an accused individual has been found NCRMD on the basis of a single incident of intoxication, but \textit{R v Cramer} and \textit{R v Tremblay} indicate that where substance abuse causes or triggers an underlying mental disorder an accused may be found mentally disordered. This had been found by the courts prior to \textit{Bouchard-Lebrun}. For example, in \textit{R v Snelgrove}, the court accepted that cocaine-induced psychosis constituted a mental disorder. The court held that the psychosis was separate from the cocaine intoxication at the time of the offence.\textsuperscript{60}

In \textit{R v Tremblay}, an individual with poly-substance abuse that resulted in a prolonged psychosis was found to be NCRMD through an application of the holistic test. Mr. Tremblay was hospitalized after beginning to demonstrate psychotic symptoms; he was diagnosed as having “psychosis associated with abuse of illicit drugs”. While hospitalized, Mr. Tremblay grabbed a pen and stabbed another patient in the neck. At the time, he was off street drugs and on anti-psychotic medication, but the psychotic incident in which he stabbed the patient was causally connected to drug abuse as the psychosis was caused by the drug use. The court distinguished Tremblay’s psychosis from the psychosis rejected in \textit{Bouchard-Lebrun} as Mr. Tremblay had

\textsuperscript{59} \textit{Bouchard-Lebrun, supra} note 23 at para 88.
\textsuperscript{60} \textit{R v Snelgrove}, 2004 BCSC 102 at 178, (The Court did not find that the mental state of the accused was sufficient for the NCRMD defense).
engaged in, “constant poly-drug use since adolescence”\(^6\) whilst Mr. Bouchard-Lebrun’s psychosis was caused by a “single episode of intoxication”.

The Court then states that a normal person, who, as the accused, had stopped using drugs a month earlier and been on a prolonged antipsychotic treatment, would not be engulfed in a full state of psychosis as the accused had been.\(^6\) The psychosis was thus ‘internally’ not ‘externally’ caused - weighing towards a finding of a mental disorder.\(^6\) The Court points out studies cited by the expert psychiatrist indicating that psychotic phenomena in chronic substance abusers “could reflect underlying neurobiological changes that are different from psychoses associated with acute intoxication and could therefore explain the presence of persistent episodes of psychotic symptoms”.\(^6\) The Court found Mr Tremblay to be a continuing danger, “the accused wanted to kill a person one month after he stopped taking drugs and two weeks after he began taking medication, showing that he presented a danger to others, which continued to demonstrate the presence of a mental illness affecting the accused”.\(^6\)

This Court did not explicitly discuss the policy factor or the second part of the mental disorder test, but presumably accepts that a psychosis of this strength rendered Mr. Tremblay both unable to appreciate the nature and quality of the act or without the capacity to know it was wrong. The Court points to three key factors: the change in neuronal architecture of the brain through long term poly-substance abuse, triggering latent mental illness, and the accused’s predisposition to psychosis seen from his family history.\(^6\) By demonstrating that something internal had changed in Mr Tremblay due to the prolonged drug use, the Court was able to assert

\(^6\) *Tremblay*, supra note 30 at para 17.
\(^6\) *Ibid* at para 20.
\(^6\) *Ibid* at para 22.
\(^6\) *Ibid* at para 27.
\(^6\) *Tremblay*, supra note 30 at 28.
that it was not just intoxication at play, and thus a bona fide mental disorder. In *R v Lesann*, a psychosis that was found to be caused by chronic alcoholism and liver cirrhosis was also found to be a mental disorder.\(^{67}\) In *R v Cramer*, use of crystal meth was found to have played a releasing role to an underlying schizophrenic disorder, the accused was found NCRMD.\(^{68}\)

In *R c Turcotte* the court made a finding of NCRMD for an instance of substance related psychosis, but this was appealed and subsequently a finding of second-degree murder was made. Mr. Turcotte killed his two children whilst affected by an adjustment disorder, and heavily intoxicated. In the appeal, the Quebec Court of Appeal stated that “the source of this mental condition must then be identified: was it the mental disorder or the intoxication, or a combination of the two? The answer will determine whether the respondent may be held criminally responsible for his actions, since section 16 *Cr. C.* requires that the cause of the incapacity be a mental disorder”.\(^{69}\) The court also indicates that if the intoxication was not the trigger for the mental state, but a contributing factor, Mr. Turcotte could be found NCRMD.\(^{70}\)

Despite some movement in the courts to broaden the ways in which substance abuse can interact with mental disorder while still keeping an individual eligible for the NCRMD verdict, fact patterns where the substance-use connected to the psychosis is closer to a single or isolated use, as opposed to a long term addiction, are contentious. A reason for this may be the interaction between *Criminal Code* section 33.1 and the NCRMD defense. In *Bouchard-Lebrun*, the SCC confirmed that the section 33.1 applies to “any mental condition that is a direct extension of a state of intoxication”.\(^{71}\) This does not prevent the court from finding that an single episode of

\(^{67}\) *R v Lesann*, 2014 SKQB 332.

\(^{68}\) *Cramer*, supra note 39 at para 120.

\(^{69}\) *Turcotte*, supra note 25 at para 82.

\(^{70}\) *Ibid*, 85

\(^{71}\) *Bouchard-Lebrun*, supra note at para 37, 91.
intoxication is a mental disorder, but may negate a finding of NCRMD. The courts seem more comfortable finding a mental disorder exists in cases of substance abuse if they are shown that the mental disorder was in some way ‘latent’, for example through prevalence of the mental disorder in the accused’s family,\textsuperscript{72} perhaps because here the mental disorder can be more easily conceptualized as an indirect, not direct, extension of the intoxication.

**Step Two: Specific Factors**

Section 16 does not apply in every case where the criminal actions of the accused are the result of a mental disorder. It is not enough that the accused *has* a mental disorder, the accused must be afflicted by the mental disorder at the material time and affected in a specific way.\textsuperscript{73} It must be the case that the mental disorder impaired the capacity of the accused such that the accused was either “incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong”. By articulating two branches of the test, Parliament has indicated that there are two distinct standards, though both can be proven, one is sufficient for a finding of NCMRD.

The second step of the test emphasizes the theoretical underpinnings of the defense provided by section 16. The primary purpose is not to create a diversion for all of those persons involved with the criminal justice system who have severe mental health problems into a mental health system, but to ensure that the ability to distinguish right from wrong is present for all individuals who are convicted of criminal offences.\textsuperscript{74} *R v Oommen* states that the test is about ensuring that accused persons do have the “rational choice about whether to do it or not”.

\textsuperscript{72} See especially *R v Temblay*, see also *R v Cramer*.
\textsuperscript{73} *Z(CG)*, *supra* note 47 at para 74.
\textsuperscript{74} *Bouchard-Lebrun*, *supra* note 23 at para 49.
The evidence for both these branches is primarily from expert evidence about the quality of the accused’s mental state, but also draws heavily from evidence of those who interacted with the accused close to the incident and accounts of the accused's mental states from family and friends. Though both of these branches are determinations made by the judge, the opinions of expert witnesses are sometimes given weight that appears determinative, especially where defense and crown agree on an NCRMD finding.75

The second stage of the NCRMD test may seem unnecessary if an accused has already proven they have a mental disorder, but it is crucial to acknowledge the agency of those with mental disorders. Just because a person has a mental disorder does not mean they are inherently ‘out of control’ at all times. By acknowledging that individuals with mental disorders can have control of themselves, the court acknowledges that individuals with mental disorders can function safely within society. I will begin with a brief overview of each section and then address specific evidentiary issues for ‘serious offences’ and assumptions about the rationality of mentally disordered individuals.

**First Branch: Appreciating the nature and quality of the act or omission**

The first branch is that the accused was incapable of appreciating the nature and quality of the act or omission. The word ‘incapacity’ indicates that the mental disorder must be sufficiently severe.76 To be found NCRMD it is sufficient that the accused is incapacitated in either nature or quality, or both.77 ‘Appreciating’ is interpreted to mean something more than

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75 See for instance, *R v Flanagan*, (Dr. Helen Ward, the psychiatrist for the Crown, recommended in her report that the accused was not capable of appreciating that his behaviour was wrong, and the court accepted this)

76 *Dobson*, supra note 44 at para 98.

77 *Ibid* at para 100.
'knowledge', as required by the second branch. Appreciating is a second order function, whilst ‘knowledge’ is understood as base. Thus to appreciate the act the individual needs to be able to analyze. This analysis consists of first being aware of what he or she is doing, and then to be able to “estimate and understand the physical consequences that would flow from the conduct”.

A first point of tension in the jurisprudence is what exactly is meant by ‘physical consequences’. In *R v Dobson*, the ONSC interprets physical consequences narrowly. Mr Dobson, who suffered from a schizotypal personality disorder, planned and carried out a suicide pact with two other individuals. They believed that upon ‘death’ they would leave their earthly vessels and travel to paradise. Mr Dobson killed the individuals but survived himself. The Court found that the accused knew that his actions against the victims would result in death. He understood the nature and quality of his actions because he understood the direct physical consequences. The Court focuses on understanding of narrow physical consequences, that an action will lead to death, without accounting for the role paranoid delusions played in the accused’s understanding of the incident – that death would lead to another form of life.

In other cases the courts have taken a more expansive view of physical consequences that includes how the accused’s mental disorder has changed their perception of reality. In *R. v. Kirby*, the Ontario Court of Appeal stated that, “I wish, however, to guard myself from being thought to hold that, in every case where an accused knows, for example, that he is shooting a human being and that the shooting will cause death, the accused is capable of appreciating the

80 *R v A(M) 2010 QCCS 1455*, at para 28; see also *Dobson, supra* note 44 at para 103.
nature and quality of the act. Some delusions may cause the act of killing to assume in the accused's mind an entirely different character."⁸¹

This logic is taken up in a more recent case out of the Ontario Supreme Court called *R v Onachie*. Mr Onachie stabbed his father multiple times resulting in his fathers death, but at the time he perceived that his father was possessed and understood his actions to be stabbing and killing the devil. In direct contrast to *Dobson*, the court found that Mr. Onachie had a “complete misapprehension of the nature and quality of what he was actually doing”,⁸² Mr. Onachie thought his actions would bring his father back to his normal state, not end his life. Though this case cites *Dobson* for other issues, it does not address the apparent divergence, but does distinguish the facts at hand from those in *R v Landry* where the SCC found that an individual, who perceived they were God and killed an individual they believed to be Satan as part of a divine mission, was able to appreciate the nature and quality of his acts.⁸³ The court explains that these cases are different because Mr. Onachie thought the final result would be life, whilst in *Landry* the intended end result was death.⁸⁴ This explanation does not seem to make *Dobson* consistent with *Onachie*, as Mr. Dobson’s end goal was some sort of continuation after death.

**Second Branch: Knowing the criminal act was wrong**

The main authority for the second branch of the test is found in *R v Oommen*, where the court states, “The issue is whether the accused possessed the capacity present in the ordinary person to know that the act in question was wrong having regard to the everyday standards of the

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⁸¹ *R v Kirkby*, 1985 CarswellOnt 108 at para 66 (ONCA) [*Kirkby*].  
⁸² *R v Onachie*, 2015 ONSC 7928, at para 19 [*Onachie*].  
⁸⁴ *Ibid* at para 19.
ordinary person”\textsuperscript{85}. ‘Wrong’ is interpreted to mean moral wrongness, not legal wrongness. In \textit{Oommen}, the SCC makes it clear that the capacity to know something is wrong requires both knowing right from wrong in the abstract sense, and the capacity to apply this knowledge to the circumstances of the criminal act in question. Though both capacities are necessary, the focus should be on the latter inquiry. The question is not whether the accused knew something was wrong or right, but whether the accused had the capacity to know in the particular incident at hand.\textsuperscript{86}

\textbf{Material Time}

If an accused, at the time of the criminal act, did not have the capacity to know the act was wrong, but after the act realized that it was wrong, the accused would still qualify for the NCRMD defense. The question is whether the accused lacked the capacity at the material time - not before or after.\textsuperscript{87} In \textit{R v Z(GC)} the Court uses testimony of Z(GC)’s actions towards the dead body, such as covering it so her child would not see it, to indicate that she was rational after the offence and both that she knew her actions were wrong and understood the consequences.\textsuperscript{88} Thus though conduct \textit{after the offence} is not in question, the courts may use it to infer the accused’s ability to know wrongness at the time of the offence. A lack of remorse can be taken to indicate that an accused thought they were morally justified or that they did not know their act was wrong,\textsuperscript{89} and remorse is often used to show that the accused knew they were doing something

\textsuperscript{86} Campione, supra note at para 48.
\textsuperscript{87} Oommen, supra note 84.
\textsuperscript{88} Z(GC), supra note 46 at para 134.
\textsuperscript{89} Ibid at para 141.
wrong. But remorse is something that develops after an act has occurred, thus it may not necessarily indicate the accused’s mental state at the time of the offence.

It makes sense that the court gives weight to temporally closer actions, like hiding a body immediately after the offence, to determine the capacity of the accused to know moral wrongness. Given that the court is trying to understand the inner mental state of a person, inferences will have to be drawn. But there is room here for social science to inform how courts treat temporality and the shifting mental states of individuals with mental disorders. The current state of evidence seems to be that judges can draw whatever reasonable inferences they want from the behaviour of the accused at any time prior, during, and after the offence - to decide how the accused’s mental state and capacity was at the material time. Information on how fast an individual can ‘snap out of’ a psychotic state, how ‘functional’ some one can act in the midst of a psychosis, or how mentally disordered individuals are able to understand and communicate about their own mental states would help ensure that the law is applied properly in this area.

Deviant Code or Community Code

An important factor in this test is understanding by what standard ‘morally wrong’ is to be determined. In Oommen, the court explains a requirement that the accused be following ‘society’s views’ not their own deviant moral code:

We are not here concerned with the psychopath or the person who follows a personal and deviant code of right and wrong. The accused in the case at bar accepted society's views on right and wrong. The suggestion is that, accepting those views, he was unable because of his delusion to perceive that his act of killing was wrong in the particular
circumstances of the case. On the contrary, as the psychiatrists testified, he viewed it as
right. This is different from the psychopath or person following a deviant moral code.\textsuperscript{90}

Thus if an accused chooses to follow their own, or a deviant moral code, they are not found to
fall under this branch of the test.

In \textit{R v Campione}, the ONCA considered the instructions of the trial judge that:

A subjective belief by the accused that his conduct was justifiable will not spare him
from criminal responsibility even if his personal views or beliefs were driven by
mental disorder, as long as he retained the capacity to know that it was regarded as
wrong on a societal standard,\textsuperscript{91}

This was held to be an accurate summary of the considerations for moral wrongfulness. Thus, an
accused who has a subjective but honest belief that by the moral standards of society their
actions are justifiable will not be covered by this branch of the test if the accused has retained the
capacity to know that it was wrong by the societal standard.\textsuperscript{92} The Court states that being
motivated by a delusion or mental disorder is not the same as having the capacity to know
something is wrong by societal standards.\textsuperscript{93} In \textit{Campione} the court found that Ms Campione was
\textit{motivated} in part by her mental disorder to kill her children, but that she still knew her actions
were wrong.

In \textit{R v Kisun}, Mr. Kisun was charged with criminal harassment and found NCRMD, due
to a series of escalating threatening communications sent to an ex-girlfriend. Mr. Kisun had
previously been on a peace-bond preventing from contacting the victim.\textsuperscript{94} The Court found that

\textsuperscript{90} \textit{Oommen, supra} note 84 at para 32.
\textsuperscript{91} \textit{Campione, supra} note 48 at para 48.
\textsuperscript{92} \textit{Ibid} at para, 41.
\textsuperscript{93} \textit{Ibid}, at para 30.
\textsuperscript{94} \textit{R v Kisun}, 2016 BCPC 24 at para 47 [\textit{Kisun}].
Mr. Kisun believed his contact with the victim was legally sanctioned and that she had contacted him. These beliefs were false, but due to the mental disorder they were fixed in Mr. Kisun’s mind. The Court found that Mr. Kisun knew that harassment was morally wrong, but due to the false beliefs from his mental disorder he did not have the capacity to apply this understanding. Mr. Kisun could not know his actions were morally wrong because he believed he was helping the victim and engaging in a noble cause.

In *R v Flanagan*, the ONSC equates the capacity to know something is wrong, with being able to weigh the pros and cons of an action, presumably against the starting point of the moral code of society. The Courts states that, “It is not a stretch to accept that the mind of a person who is in the midst of psychotic auditory hallucination is so very disordered that he is unable to rationally weigh the pros and cons of more effective measures”. *Campione* can be read as presenting a ‘tougher’ standard than *Oommen, Flanagan*, and *Kisun*. In *Oommen* and *Kisun* the courts seem to accept that knowing something is morally right involves a capacity to justify the action, or as in *Flanagan* to weigh it. *Campione* may be presenting a concept of ‘moral wrongness’ that is closer to a binary rule – either the accused knows it is right or wrong. The former capacities seem closer to the way people understand morals as a balancing in a given situation. As the test is about the capacity to apply moral knowledge to a given situation, the reading imbued with the concept of balancing seems to map better onto the capacity in question.

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95 *Ibid* at para 54.
96 *Ibid* at para 52.
97 *Flanagan, supra* note 15 at para 72.
Legally or Morally Wrong

Altruistic killing and other acts that lead to death are a contentious area for NCRMD findings, both in public perception and the application of the defense by the courts. In *R v Dobson* the ONSC states that “Especially in serious cases, like killing a fellow human being, there is little difference between what is legally wrong and what is contrary to the ordinary moral standards of reasonable men and women”.98 The Court cites *R v Chaulk* as the authority for this proposition – but though the cited passage in *Chaulk* indicates that “What is illegal and what breaches society’s moral standards does not often differ”99, the Supreme Court of Canada does not indicate a differential standard for ‘serious cases’. *Chaulk’s* asserted connection between societal and legal values may also be questionable, especially in the context of Canadian multiculturalism and shifting societal standards around prostitution and drug use.

If the application of the test as presented in *Dobson* is correct, then reaching an NCRMD verdict for ‘serious cases’ will be exceedingly difficult, especially when combined with *Campione’s* narrow reading of the first branch of the test. Two individuals with ‘equal’ mental disorders who commit different offences may not both have the NCRMD defense open to them despite both having the same mental incapacities. The narrowing of the test in *Campione* does not seem to be line with the purpose of section 16 as it distinguishes on the bases of offence not mental capacity.

Other Evidentiary Issues

Evidence of the elements of a section 16 test come from a wide variety of sources. Often the most important source is the testimony of experts from the medical or psychiatric fields.

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98 *Dobson*, supra note 44 at para 160.
Information about the accused from observations of others who interacted with the accused both at the time of, before, and after the incident, is valuable.\textsuperscript{100} This can range from the contents of a police interview shortly after the fact to a family member’s evidence about the deteriorating mental state of their relative. Medical records can also be very important. This may problematic if an individual has not had extensive interaction with the medical system or if they have been misplaced.\textsuperscript{101}

Having sufficiently strong evidence to prove the elements of the NCRMD defense can be challenging. The first barrier is that often the thing that must be proven, the mental capacity of the accused at a point in the past, is neither physical, visual, or measurable. The second difficulty stems from the fact that the accused presumably suffers from a mental disorder and thus may not be easy for lawyers or medical professionals to work with. Further, their mental disorder or the alleged criminal act may have caused distance between the accused and family members or close friends who otherwise would be ideal candidates to testify to the accused’s behaviour. \textit{Tremblay} shows that, even after three months of antipsychotic medication, the accused was still psychotic. There is no guarantee that the accused will be in a stable mental state through the litigation process or able to present consistently in medical interviews from the time of the incident to the trial date. If the accused was in a serious psychotic state at the time of the offence and it was homicide, this may mean there were truly no witnesses to actual criminal incident.

The courts do acknowledge that the quality of the evidence, for instance inconsistencies in testimony, are not necessarily a deficiency in the evidence indicative of malingering, but a result of the mental disorder itself. In \textit{R v Cramer} the court noted that there was inconsistency between “these scattershot explanations immediately after the offence and his later, more

\textsuperscript{100} \textit{Richomnd}, supra note 16 at para 31
\textsuperscript{101} \textit{Ibid} at para 32.
focussed ones to the psychiatrists”, and that the connection between his delusions and resulting actions was unclear. Instead of concluding that Cramer was malingering, the Court acknowledges that Mr. Cramer probably would have concocted a ‘clearer’ explanation if he was truly malingering, and that the evidence of expert witnesses had shown that the accused “struggles for explanations at the best of times”.103 Inconsistencies in his testimony were to be expected. The Court did not blindly accept that mental disordered people act strangely or irrationally, but was attentive to how the psychiatrists said a schizophrenic person is likely to act.

The courts do seem to hold some problematic assumptions about the level and type of rationality available to the accused. In *R v Z(GC)*, the Court found that the accused was malingering. One of the reasons the court doubted her claims of mental disorder was because they could not see the rational connection between her criminal action – murdering her mother - and her delusions. Her mother was not the central character of the delusions, but rather was in a relationship with the imagined ‘pimp’. The Court stated that “It is not clear why in her delusional thinking killing her mother was necessary or even how that would end the abuse that she says she and her son are enduring”.104 Though the Court uses this information to inform whether the individual was malingering, not whether self-defence was applicable, the following passage from *Oommen* explaining why the accused did not need to prove self-defence points out a flaw in the logic of *Z(GC)*:

Indeed, to posit such a requirement is to require the defence to prove two logically inconsistent propositions: first, that the accused was by reason of mental disorder unable to make the choice which a reasonable person would make; and second, that

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102 *Cramer, supra* note 39 at para 131.
103 *Ibid* at para 132.
104 *Z(GC), supra* note 46 at para 71.
the accused acted reasonably in repelling an imminent attack. The difficulty is avoided, however, when it is recognized that s. 16 is not merely a vehicle for bringing particular defences before the court; it is an independent condition of criminal responsibility. 105

The reason for the NCMRD defense is to exclude persons from criminal responsibility who are unable to form criminal intent due to a mental disorder, being suspicious of irrational actions disadvantages an accused for the very reason they have been drawn under the section 16 defense in the first place.

When the NCRMD verdict is contested the party against the defense often relies on malingering. 106 In R v Z(GC), the Crown successfully argued malingering. In this case the crown alleged that the Ms Z(GC) was feigning memory loss as to the incident and that she was using symptoms of a mental disorder to justify her actions when they either did not happen or could not have caused the reaction that they did. 107 Both conclusions are drawn after rejecting the testimony, in part, of the defense expert psychiatrist on the basis that the testimony was deficient due to a lack of evidence pertaining to the subjective mental state of the accused at the material time. The court draws a negative inference in favour of malingering from the accused denying the Crown psychiatrist access to assess the accused. From this denial the Judge is able to draw an adverse inference that the defence would not withstand scrutiny, 108 as “There are many aspects of the defence case that require expert scrutiny but the accused has chosen to deprive the Crown of

105 Oommen, supra note 84 at para 30.
106 See, Z(GC), supra note 46.
107 Ibid at para 113.
108 Ibid at para 119.
the ability to fully do so". The Supreme Court of Canada confirmed that this exception to the accused’s right of silence is justified. 

Though this inference is supported by jurisprudence, it may be challenging to navigate for defense counsel managing a mentally disordered client. Mental disorder can come along with paranoid traits and distrust. *R v Richmond* is an appeal to the Ontario Court of Appeal for a charge of second-degree murder. Mr. Richmond raised the defense of NCMRD directly after he was found to guilty in 2006. The psychiatrist for the defense recommended that NCRMD be found. Amongst other issues the Court of Appeal judgement addresses the reasonableness of the jury’s rejection on the NCRMD verdict. The Court found that a jury is not required to accept strong circumstantial evidence for NCRMD findings from a defense witness, in this case a psychiatrist, even where the Crown does not present contrary evidence – they are just required to assess the probative value of the evidence. Here, the probative value of the evidence was found to be too small. Some of the factors that caused the psychiatrists testimony to have limited weight was that Mr. Richmond had not allowed the psychiatrist to access his family members or friends, that he had provided no account of the murder, and that there was no post-conviction interview with the appellant. As these material gaps were caused by Mr. Richmond refusing to do certain things, it can be said that Mr. Richmond’s actions hindered the finding of NCRMD, despite the fact that he wanted the verdict. It is important to note that unlike many successful NCRMD cases, Mr. Richmond did contest at trial that the Crown could prove he had committed the criminal act.

109 Ibid at para 120.
110 *R c Charlebois*, 200 SCC 53, at 37.
111 *Richmond*, supra note 15 at para 57.
112 Ibid at para 60.
113 Ibid at para 66.
The Court in *Richmond* recognized that raising the defense immediately after the guilty verdict put Mr. Richmond in unfavourable circumstances – his psychiatrist had been traveling and thus unable to participate in interviews and it was before the jury that had heard the trial. The Court also found that it was Mr. Richmond’s choice to raise the defense in these circumstances, and thus it was not a ground of appeal.114

In *R v Z(GC)* the timeliness of expert reports and the existence of another reasonable explanation for the accused’s actions were key issues. Relevant evidence of mental state at the time of the offence was sparse in this case, and the even transcripts of police interviews four days after the incident were considered unreliable as there was “a real possibility that G.C.Z. invented or substantially distorted the content of her delusions and the relevant events in order to justify her actions against her mother”.115 As counsel, where possible, gathering evidence about the accused’s state of mind should begin as early as possible.

**Conclusion**

The test for the NCRMD defense is complicated and challenging to prove. It relies on judges, lawyers, and medical professionals being able to marshal evidence about what was going on in the mind of the accused at a time in the past. Criminal offences have *mens rea* elements, inquiring about the mind of the accused is not unusual in our legal system, but in NCRMD cases the accused is potentially suffering from a mental disorder that can make their thoughts and actions seem inexplicable or irrational. Despite difficulties the test is clearly not impossible as individuals are found NCRMD. This does not mean that no individuals are being improperly excluded from the NCRMD defense. I have pointed to the court’s difficulty with substance

115 *Z(GC)*, *supra* note 47 at para 105.
abuse, the interpretation of physical consequences, and the heightened standard of ‘wrongness’ for serious offences, as areas where the NCRMD test is currently under tension. In these areas narrow interpretations risk excluding individuals with mental disorders who “did not at the material time have the level of autonomy or rationality required to attract criminal liability”116 from the NCRMD defense.

116 Bouchard-Lebrun, supra note 23 at para 49.