Reseting the Bar

Sentencing the Mentally Disordered Accused

Janessa Mason
janessam@uvic.ca

March 18, 2016
Submitted as Major Paper in CLT

This is a Draft Paper. It is made available to Community CLE registrants. This paper should not be distributed to others without the author’s express opinion.
Contents

Introduction ........................................................................................................................................... 2

Part I: An Overview of Sentencing Principles ......................................................................................... 2
  1. Sentencing Principles in the Criminal Code .................................................................................. 2
  2. The Principles of Sentencing in the Context of Mentally Disordered Offenders ................. 4

Part II: Parity ............................................................................................................................................ 6
  1. The Mitigating Effect of a Mental Disorder ..................................................................................... 7
     (a) Reduced Culpability .................................................................................................................. 7
     (b) Amenability to Treatment ......................................................................................................... 9
  2. Public Safety Concerns ................................................................................................................... 10
     (a) Likelihood of Reoffending ........................................................................................................ 11
     (b) Amenable to Treatment .......................................................................................................... 14
     (c) Dangerousness / Gravity of Harm ......................................................................................... 15
  3. Conflict in the Jurisprudence ........................................................................................................... 18

Part III: What Can Be Done? .................................................................................................................... 21
  1. The Judiciary .................................................................................................................................... 22
  2. Expert Guidance ............................................................................................................................... 25
  3. Suggestions for Counsel ................................................................................................................... 26

Conclusion ............................................................................................................................................... 28
Introduction

In all cases, the ultimate disposition imposed on an offender must reflect both the gravity of the offence and the circumstances of the offender.¹ In the context of the mentally disordered accused, the manifestation of mental illness requires attentive care to crafting an individualized and proportionate sentence. In some cases, evidence of mental disorder may have mitigating effects at sentencing, where moral culpability is compromise by reason of mental illness, such that a rehabilitative disposition is both possible and fit. Alternatively, having regard to the violent nature of the offence and the accused’s lack of amenability to treatment, a substantial custodial sentence may be required in order to ensure the safety of the public.

This paper explores the complex and nuanced principles of sentencing where there is evidence of mental disorder in an accused. I begin with an overview of the basic principles of sentencing and their application in the context of the mentally disordered accused. Part II outlines the case law relevant to issues of parity among sentencing the mentally ill. Finally, I end with a look at the role that the judiciary, psychiatric experts and counsel can play in reforming the law, policy and procedures of sentencing the mentally ill accused.

Part I: An Overview of Sentencing Principles

1. Sentencing Principles in the Criminal Code

The ultimate sentence imposed on an offender must be in accordance with the foundational principles of sentencing as laid out in s. 718 to s. 718.2 of the Criminal Code.² This section provides a brief overview of these principles and their application where there is evidence of mental illness in an accused. The fundamental purpose of sentencing is to contribute to crime prevention and maintenance of a safe society by “imposing just sanctions” that have one

¹ Criminal Code RSC 1985, c. C-46 at s. 718.1 [Code].
² Ibid at s. 718-718.2.
or more of the following objectives: denunciation, deterrence, separation, rehabilitation, reparation and reconciliation.  

The primary consideration for judges in imposing a “just sentence” is the principle of proportionality. This principle mandates that all sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality in punishment is also fundamentally connected to the principle of criminal liability generally. That is, penal sanctions may only be imposed where the offender is morally blameworthy and possesses a morally culpably state of mind. Proportionality has been further recognized by the Supreme Court of Canada which held that those who intentionally cause harm will be punished more severely than those who cause harm unintentionally.  

A proportionate sentence is partially determined by an assessment of the circumstances of the offender. Where an accused has both the intention and volition to act unlawfully and cause harm, the law will hold such a person morally blameworthy. Where this culpable state of mind is lacking or compromised, the degree of responsibility is, or should be, accordingly reduced and the final disposition should reflect this.  

The Supreme Court of Canada has frequently noted that sentencing is an individualized exercise, requiring the sentence imposed to be uniquely suited to the individual, having regard to the circumstances of the offence and of the offender. A fit disposition is tempered by any aggravating or mitigating factors as mandated in s. 718.2(a) of the Criminal Code. The court must assess these factors and tailor a sentence to fit the offender in the specific circumstances. For example in British Columbia (BC), the Court of Appeal acknowledged that the

---

3 S. 718 of the Code.
6 Ibid at para 40.
7 R v Martineau, [1990] 2 SCR 633, 58 CCC (3d) 353, 1990 CarswellAlta 143 (WL Can) [Martineau cited to WL Can].
8 This is discussed in greater detail in Reduced Culpability in Part II of this paper.
11 R v G(D), 2014 BCCA 84 (BCCA) cited to para 38, 599 WAC 146 at para 38.
12 Strangely, s. 718.2(a) of the Code only lists some of the aggravating factors and no mitigating factors. This is left to the courts to specify and decide what constitutes aggravating and mitigating factors.
administration of justice requires an individualized sentence in order to fashion a fit sentence to suit the circumstances of the offender.\textsuperscript{13}

The principle of least restraint in s. 718.2(e) must also be considered. This requires that all other sanctions that are reasonable or appropriate, given the circumstances of the offence, should be considered for all offenders.\textsuperscript{14} Where alternative sanctions with less of an infringement on the liberty of the offender are appropriate and available, they are to be imposed rather than a custodial sentence.

As discussed in \textit{Stone}, the judiciary is required to promote the public interest and bring the law into harmony with community values.\textsuperscript{15} The principles of sentencing communicate these values through the objectives of sentencing, which were listed above.\textsuperscript{16} The BC Court of Appeal recognizes that each of these codified objectives may contribute to the protection of the public in a broader sense, as judges are to look at the conduct and moral blameworthiness of an offender and determine if the public interest is best served by either rehabilitating the offender or removing the offender from the community.\textsuperscript{17}

The principle of parity is set out in s. 718.2(b) and mandates that sentences should be similar for similar offenders and offences committed in similar circumstances. Sentencing judges are required to look at the relevant factors in the commission of an offence and among offenders to ensure consistency and fairness in sentencing. This is a delicate and complicated balance between consistency and individualized sentencing. At present, judges engage in a cursory explanation of the relevant factors considered, including their relative weight or influence on a disposition. I suggest that further explanation is needed with respect to the relative weight of these often conflicting factors. This is discussed in Part III of this paper.

2. \textbf{The Principles of Sentencing in the Context of Mentally Disordered Offenders}

The principles of sentencing must be applied with particular sensitivity when there is evidence that the offender suffers from mental illness. An individualized sentence requires that the court be attentive to the mental state and circumstances of the mentally disordered accused.

\textsuperscript{13} \textit{McConnell}, supra note 9; \textit{R v Bacon}, 2013 BCCA 396, 301 CCC (3d) 97.
\textsuperscript{14} See s. 718.2(e) of the \textit{Code}.
\textsuperscript{16} See s. 718 of the \textit{Code}.
\textsuperscript{17} \textit{R v Smith}, 2013 BCCA 173, 296 CCC (3d) 386; \textit{R v Berner}, 2013 BCCA 188, 297 CCC (3d) 69.
Where moral blameworthiness is reduced by reason of mental illness, the principle of proportionality requires a more lenient sentence and the range of sentencing objectives and outcomes should be modified accordingly. Specifically, the goals of deterrence and denunciation should not be emphasized. Instead, the courts should emphasize the protection of the public either through rehabilitative or custodial sentences having regard to proportionality as determined by the circumstances of the offender and the offence.

The protection of the public is a primary sentencing consideration whether there is evidence of mental disorder in an accused or not. The question to be asked is whether the public safety can be ensured through a sentence served in the community or whether a term of imprisonment is necessary. As will be outlined in *The Mitigating Effect of Mental Disorder* in Part II, where the accused does not threaten public safety, the court should impose a sentence aimed at rehabilitation in the community. In most cases, an offender will eventually be released into the community – either immediately after trial or following a period of incarceration – and society has an interest in treating or halting the offender’s mental illness before it worsens or escalates to the level of severe psychosis. In some cases, a conditional or probationary term may be imposed in an attempt to ensure treatment that may contribute to lessening the effects of the mental disorder. This approach was specifically adopted in *Dixon*, in which a five year sentence was reduced on appeal to two years less a day and three years’ probation with treatment conditions. Treatment of and controlling the mental disorder at an earlier stage of development is designed to help prevent an escalation to a more serious offence. Without regard to the offender’s possible rehabilitation, the community at large will most likely be exposed to more, rather than less, harm from mentally disordered behaviour upon release.

Deterrence will normally not be appropriate or effective when sentencing a mentally disordered accused. The BC Court of Appeal has held that mental illness is a special

---

19 See also *R v Peters*, 2000 NFCA 55, 584 APR 184, 2000 CarswellNfld 296 (WL Can) at para 23 [*Peters* cited to WL Can]. The Newfoundland Court of Appeal endorsed the sentencing judge’s decision to give considerable weight to a psychiatrist who stressed the importance of treating the offender’s disorder before he was “left behind.”
20 *R v Ayorech*, 2012 ABCA 82, 544 WAC 306, 2012 CarswellAlta 384 (WL Can) at para 14 [*Ayorech*].
22 See also *R v MacKenzie*, 2004 BCPC 100, 2004 CarswellBC 858 (WL Can) [*MacKenzie* cited to WL Can]. The public interest is also served by having an offender rehabilitated and return to the community as a productive and contributing individual. In *MacKenzie*, the court determined that given the minor offence committed, the offender diagnosed with bi-polar disorder was not a threat to the public and should be allowed to continue teaching.
circumstance requiring that deterrence not be a primary factor in sentencing.\textsuperscript{23} It is not necessary “to incarcerate someone...whose mental illness was a cause of her committing the offence...and who undertakes an appropriate course of medical treatment.”\textsuperscript{24} Deterrence may not be effective. Specific deterrence is meaningless to those who are out of touch with reality due to mental illness\textsuperscript{25} and individuals who do not experience mental illness are unlikely to be deterred by the punishment of the mentally disordered.\textsuperscript{26} Further, normal levels of punishment are not appropriate where an offender’s moral culpability is reduced resulting from mental illness contributing to the commission of a crime.\textsuperscript{27} Alternatively, a custodial sentence will normally be imposed where the offender is deemed too dangerous or the prospects for rehabilitation are low. This proposition is explored in \textit{Concerns for Safety} in Part II of this paper.

\textbf{Part II: Parity}

Parity requires similar sentences for similar offenders and offences in similar circumstances.\textsuperscript{28} Coupled with the contrasting principle that requires individualized sentencing, this requires judges to make a detailed and complicated assessment of the relevant factors in sentencing. Similarity in mental illness is virtually impossible to define, and the associated manifestations will differ vastly among the mentally disordered accused. This is a live issue for sentencing judges, and the case law demonstrates that the principles of sentencing may apply differently in many cases. At times, evidence of a mental illness in an offender operates with a mitigating effect at sentencing. In other instances, the presence of a mental disorder may be outweighed by other considerations for the purposes of ensuring public safety. Given that there cannot be blanket uniformity in sentencing with respect to specific mental conditions, there remains conflict and tension within the law, leaving uncertainty and unwarranted disparity in sentences imposed on mentally disordered offenders.

\textsuperscript{23} \textit{R v L(JHQ)}, 100 WAC 150, [1995] BCJ No 1447, 1995 CarswellBC 529 (WL Can) (BCCA) \textit{[L(JHQ)]} cited to WL Can].
\textsuperscript{24} \textit{R v Dickson}, 2007 BCCA 561 at para 70, 228 CCC (3d) \textit{[Dickson]}.
\textsuperscript{25} \textit{R v Robinson}, 19 CCC (2d) 193, [1974] OJ No 545, 1974 CarswellOnt 1073 (WL Can) (ABCA) \textit{[Robinson cited to WL Can]}.
\textsuperscript{26} \textit{Peters}, supra note 19.
\textsuperscript{27} \textit{Robinson}, supra note 25.
\textsuperscript{28} Section 718.2(b) of the \textit{Code}.
1. The Mitigating Effect of a Mental Disorder

A proportionate and individualized sentence requires the courts to respond to the circumstances of the offender. Evidence of a mental condition that impacts an offender’s moral blameworthiness “...is a mitigating factor which may be taken into consideration and in appropriate circumstances is to be given considerable weight when sentencing such an individual.”29 Such considerations align with the moral standards of criminal liability in Canada, where more lenient sentences are appropriate for offenders with reduced blameworthiness.30 As will be demonstrated in this section, a mental illness may often operate with a mitigating effect on sentencing as a result of the offender’s reduced moral culpability. Additionally, when an offender demonstrates amenability to treatment, the imposed sentence may also be reduced in order to promote and effect rehabilitation.

(a) Reduced Culpability

Evidence of a mental disorder will act with mitigating effect on sentencing where the moral blameworthiness of the offender is reduced by way of mental illness. The presence of a mental disorder at the time of the offence is not by itself sufficient to trigger the mitigating effect on sentencing, but if the offender can show a causal link between his illness and his criminal conduct then mitigation is warranted. Affirming the decisions from the Ontario Court of Appeal on this point,31 Justice Romilly characterizes the issue as a question of whether the mental illness contributed to the conduct in question to the extent that the moral culpability of the offender is reduced.32 The judge must determine whether there is a causal connection between the mental illness and the unlawful conduct sufficient to diminish the moral culpability of the offender. In McConnell, the accused was convicted of assault causing bodily harm and assault with a weapon. The court found that the accused’s bipolar disorder was sufficiently influential at the time of the offence to compromise his moral blameworthiness and act as a mitigating factor.33 As a result, his sentence was suspended and he was placed on probation for three years, during which he was

29 LJHQ, supra note 23 at para 10.
30 M(JJ), supra note 5.
31 Robinson, supra note 25; and R v Ellis, 2013 ONCA 739, 303 CCC (3d) 228 [Ellis].
32 McConnell, supra note 9 at para 21.
33 Ibid at para 26.
required to participate in and successfully complete any counseling or treatment program as directed by the probation officer.

Diminished moral culpability of an offender may be found where the mental condition is such that it impairs the offender’s ability to reason and make calculated judgments. Mitigation is warranted due to diminished intentionality and judgment in regard to acceptable standards of behaviour.\(^{34}\) In *Fayemi*, the accused pleaded guilty to fraudulently collecting over $15,000 in welfare payments from the Ministry of Housing and Social Development.\(^{35}\) The accused suffered from bipolar disorder during the commission of the offence. Judge Howard found that this significantly impaired her usual reasoning-processes and judgment, thereby reducing her moral culpability.\(^{36}\) In accordance with the psychiatric evidence compiled by the accused’s medical support team, he determined that the accused’s unlawful behaviour was out-of-character and, absent the mental illness, the accused would not have committed the fraud.\(^ {37}\) Although the mental illness does not negate the accused’s responsibility for the offence, it does sufficiently reduce her blameworthiness. As a result, rehabilitation was the primary sentencing focus and a suspended sentence with a term of two years’ probation was fit. The rehabilitative conditions of probation included attendance at a mental health office and participation in counselling programs.\(^ {38}\)

The Ontario Court of Appeal has come to a similar conclusion.\(^ {39}\) The court upheld a decision which found that the mental illness of the accused did not reduce his culpability to warrant a primarily rehabilitative sentence. The accused was charged with breach of trust by a public officer for abusing his position with the Immigration and Refugee Board. Having regard to the expert psychiatric evidence, the judge found actions of the accused were well-planned and organized, and that his mental illness would not impair his ability to function normally. Without substantially reduced culpability, the denunciatory and deterrent sentence imposed was not demonstrably unfit.

\(^{34}\) *R v Johnson*, 112 CCC (3d) 225, 137 WAC 261, 1996 CarswellBC 2634 (WL Can) at para 33 [*Johnson* cited to WL Can].
\(^{35}\) *Fayemi*, supra note 18.
\(^{36}\) *Ibid* at para 37.
\(^{37}\) *Ibid* at para 41.
\(^{38}\) See also *Dickson*, supra note 24. The accused, with undiagnosed and untreated bipolar disorder, forged cheques for her personal benefit. Her psychiatrist believed that there was a direct causal connection between her mental illness and the commission of the offences. A sentence of twelve months’ imprisonment was substituted on appeal with a conditional sentence.
\(^{39}\) *Ellis*, supra note 31.
(b) Amenability to Treatment

Evidence that an accused is often amenable to treatment is correlated with a more lenient and rehabilitative sentence. The circumstances of the offender must be such that there is a reasonable prospect of rehabilitation. A rehabilitative sentence will not be fit where the accused is not receptive to treatment. Amenability to treatment may be demonstrated by the independent steps taken by the accused to seek and maintain control over their mental illness. In MacKenzie, Judge de Walle favourably considered that the accused had relocated to his home community in order to be closer to his treating doctor.\(^{40}\) The accused took a temporary leave from teaching and stayed in continuous contact with his supports in the medical community. In Fayemi, Judge Howard also positively considered the accused’s success in maintaining control over her mental illness by actively participating in treatment programs and therapy.\(^{41}\) She was regularly monitored by her community mental health care team with Vancouver Coastal Health, began treatment with a psychiatrist and followed the prescribed medication plan for her illness. This was mirrored in McConnell, where the accused was well connected to local supports in the community, and was involved with the Community Outreach and Support Team, a support network of medical professionals, psychiatrists and social workers.\(^{42}\) In each of these cases, a rehabilitative approach to sentencing was available as the accused was demonstrably receptive to treatment.

The rehabilitative sentences are designed to reduce the reoccurrence of criminal behaviour. Thus the conditions of probation may require the accused to take reasonable steps to control his mental illness such that it will not likely cause him to behave dangerously or commit additional offences.\(^{43}\) In Fayemi, Judge Howard notes the accused’s “great success” in bringing her mental illness under control.\(^{44}\) As a result of her treatment initiatives, the accused was able to work for more than a year without health-related incidents or interruptions, which signaled to the judge that she was unlikely to participate in future unlawful conduct.

Amenability to treatment is also relevant to sentencing the mentally disordered accused in respect to the objective of public safety. In Anthony-Cook, the psychiatric evidence did not

\(^{40}\) MacKenzie, supra note 22.

\(^{41}\) Fayemi, supra note 18.

\(^{42}\) McConnell, supra note 9.

\(^{43}\) MacKenzie, supra note 22 at para 23.

\(^{44}\) Fayemi, supra note 18 at para 43.
support a finding that the accused’s psychosis was sufficiently treatable.\textsuperscript{45} His mental health team had a limited ability to ensure compliance with his treatment plan. This was further complicated because he presented with psychotic symptoms even when his medication and drug-use were controlled. In this case, the accused’s mental illness did not appear to have a significantly mitigating effect on his sentence.\textsuperscript{46} Sentencing outcomes for mentally disordered offenders who do not show amenability to treatment are discussed further in the following section.

2. \textbf{Public Safety Concerns}

Although evidence of a mental illness may be relevant at sentencing, a fulsome calculation of a fit sentence requires an assessment of all relevant factors. Though the accused may have a diminished degree of moral culpability, the gravity of the offence is not alleviated by the mental illness of the offender. Having regard to the nature of the offence, the court must still treat the unlawful conduct as a criminal offence, notwithstanding the causal link to a mental illness.\textsuperscript{47} The protection of the public may be emphasized through a sentence which adequately addresses the rehabilitation of the mentally ill offender but when the prospects of rehabilitation are low and when the offender is a threat to public safety, the public may be better protected through a sentence which removes or separates the offender from the community.

In this section I will discuss the concept of the offender’s dangerousness as it is relevant to the sentencing goal of “public safety.” Dangerousness will primarily be determined by reference to the risk of harm posed by the individual and the gravity of the damaged caused by that potential harm.\textsuperscript{48} In cases involving grave harm and extreme violence or where the risk of reoffending is significant,\textsuperscript{49} the mental health condition of the offender will operate with little or no mitigating effects and the purposes of deterrence and denunciation will be emphasized.\textsuperscript{50}


\textsuperscript{46} See Peters, supra note 19. In Newfoundland, the Court of Appeal has indicated that accused’s insight into their illness may also be relevant to an assessment of amenability to treatment. Quoting from the psychiatrist, the court notes the accused’s recognition of his need for treatment. “His eyes have been opened up,” and his movement towards progress was viewed favourably.

\textsuperscript{47} Robinson, supra note 25.

\textsuperscript{48} Proulx, supra note 10.

\textsuperscript{49} \textit{R v Taylor}, 2014 BCCA 304, 615 WAC 49, 2014 CarswellBC 2379 (WL Can) [\textit{Taylor} cited to WL Can].

\textsuperscript{50} See also \textit{R v Kaufman} 2009 BCCA 165, 83 WCB (2d) 87, 2009 CarswellBC 1019 (WL Can) at para 10 [\textit{Kaufman} cited to WL Can]. Speaking for the Court, Groberman J.A. finds that the nature of the offence is such that without
(a) Likelihood of Reoffending

The first issue before the court is a question of estimating the likelihood that a specific mentally disordered accused will reoffend if released into the community. Where there is a realistic probability of recidivism, the courts are more likely to determine that public safety is best ensured by separating the offender from the community through a sentence of incarceration. A custodial sentence is “the only definite way to ensure that [the accused] does not reoffend.”\(^5\)

The probability of reoffending is evaluated with regard to the offender’s past behaviour and criminal record, whether the unlawful behaviour or mental illness is associated with addictive substance use and whether the accused is amenable to treatment. Where mentally disordered offenders are seen as likely to reoffend, a custodial sentence may be imposed in order to protect public safety.

(i) Reference to Past Behaviour

The offender’s past behaviour and criminal record will be assessed by the courts when determining the accused’s risk of reoffending. In *Hawkins*, the court notes that the accused’s “prior behaviour is important in determining the appropriate sentence” and gives a detailed synopsis of the unlawful background of the accused as it may establish a pattern of conduct.\(^5\)

Romilly J. also notes the relevance of previously imposed sentences because “any propensity toward this type of conduct…is cause for great concern and for a very careful and judicious approach to sentencing”\(^5\) so as to prevent repeated, future harm.

Courts have also expressed that mental health, especially untreated mental illness, may increase a person’s likelihood to commit an offence where that person maintains the belief that their unlawful behaviour is justified or appropriate. In *Taylor*, the court also views the nature of the accused’s past crimes as relevant to the analysis of risk.\(^5\) In this case, the accused was convicted of violating a no-contact order and criminal harassment. In crafting a fit sentence, Bennett J.A., speaking for the court, reviewed the accused’s substantial criminal record,

---

including 25 prior convictions of domestic violence and criminal harassment against his former wife and former girlfriend. At trial, the court relied upon the psychiatric report provided, which diagnosed the accused as having a delusional disorder. This explained the accused’s unwillingness to participate in treatment or take medication, as he maintained a strong conviction that his stalking and harassing behaviour was justified and reasonable. His limited understanding of his actions and their consequences were significant, and as a result, the court determined that the accused was at a high risk of future stalking, harassing and violent behaviour towards his ex-girlfriend and her new partner. Ultimately, the accused was sentenced to four and a half years imprisonment. Because the court believed that it was highly unlikely that the accused’s risk of reoffending could be successfully and safely managed in the community, “containment and intense supervision are likely the only means to ensure public safety.”

(ii) The Involvement of Drugs or Alcohol

The courts have recognized a high risk of reoffending when the accused has ongoing challenges with drug and substance use. In *Walsh*, the accused pleaded guilty to two counts of arson resulting in approximately $150,000 in damages to a Canadian Pacific heritage building. His mental health concerns – “attention deficit hyperactivity disorder, and perhaps some foetal alcohol effect” – were largely untreated, and were coupled with chronic cannabis abuse. Though the accused had a minor criminal record, the psychiatrist viewed him as a high risk to reoffend because of his ongoing drug use. In addition to earning a ten month credit for pre-trial custody, the accused was sentenced to an additional year imprisonment. Though this sentence may not exceed proportionality or parity, it highlights the courts’ consideration of substance use when determining likelihood of reoffending. The court determined that, “at least in the short term” his risk for reoffending would be decreased in light of the “forced abstention from cannabis use” while serving his sentencing in jail.

The Court of Appeal expressed a similar concern in *Anthony-Cook*, where the accused remained likely to commit future offences if he did not abstain from illegal drug use. In this case, the accused had a long-standing schizoaffective disorder, complex paranoia delusions and ongoing drug use problems. He pleaded guilty to manslaughter mid-trial and counsel made a

---

59 *Cook*, supra note 45.
joint sentencing submission for 18 months of incarceration and without probation order. At the sentencing hearing, the court relied upon the assertive community treatment team reports, including the expert psychiatric evidence, which suggested that the use of substances may increase the accused’s psychosis. The psychiatrist did not believe the accused was receiving adequate treatment in jail, and because the accused was not motivated to go to residential treatment facility for substance abuse, recommended a longer custodial stay in a forensic or psychiatric hospital. The trial judge stated that “while [rehabilitation] is a very important factor in sentencing, I must also…offer protection to the public… I am concerned that the danger of [the accused] committing future offences will be increased if he does not abstain from the consumption of illegal drugs.” The accused was ultimately sentenced to three years’ imprisonment, less time served, and three years’ probation. This was upheld on appeal where the court noted that the trial judge appropriately associated the accused’s illegal drug use with his offending. The court supported the trial judge’s concern about the risk of reoffending, given his criminal past, his use of illegal drugs and the problematic effect this had on his medication and treatment regime. The sentence was not deemed to be either unfit or contrary to the public interest, having regard to the risk to society if the accused relapsed into illegal drug use and did not comply with treatment.

It should be noted that concerns for public safety has its limits in sentencing. The pursuit of public safety does not warrant the maximum sentence if the degree of harm caused by the offence is not at the very top end of the seriousness scale. That is, concerns about future harm as a sentencing factor must be “limited” by what is proportionate. A sentence cannot be longer than what is proportionate or fit in order to achieve some other goal, whether that goal is deterrence, treatment or public safety.

60 Ibid at para 16.
61 See also R v Knight, 2009 ABCA 86, 447 WAC 282. A psychiatric report suggested that the accused’s conduct was modified by drug use. The Alberta Court of Appeal determined that it was impossible to conclude that the accused did not pose a danger when in the community as there was no evidence of his willingness to participate in related therapy or whether he had done so in the past.
62 If the public needs additional protection beyond a proportionate sentence, then the criminal justice system must have other resources available. This may include, for example, “dangerous offender” legislation.
(b) Amenable to Treatment

The courts have found increased dangerousness where the mentally ill offender is not amenable to treatment. A refusal to seek and participate in treatment, particularly when coupled with a criminal record or history of unlawful behaviour, may signal a likelihood of reoffending. When this is established, the appropriateness of a rehabilitative sentence is lessened and the court will emphasize the protection of the public through a custodial sentence.63

In McCotter, the trial judge found that without treatment, the accused would remain very dangerous.64 In this case, the accused had violently beaten and murdered his former girlfriend and her new partner. The trial court found him to be uncooperative during the psychiatric evaluation and disinterested in addressing his mental illness.65 McKinnon J. held that until the accused is successfully treated, he would remain unstable, easily moved to violence and a very dangerous person. Further, the court held that the accused showed no insight into the damage caused by his behaviour. A life sentence with a twenty-year period of parole ineligibility was imposed. This decision was upheld on appeal, where the court found the accused’s prognosis for rehabilitation dismal, given his history of not cooperating with medical staff or treatment.

Lack of insight into one’s mental illness may also indicate resistance to treatment.66 In Chang, the accused pleaded guilty to two counts of second degree murder, one count of aggravated assault and one count of assault causing bodily harm. Though the psychiatrist found a definitive diagnosis challenging, she stated that the accused presented symptoms of a psychotic disorder, and depression. She further stated that although he was capable of appreciating the nature and quality of his actions and of knowing that what he was doing was wrong, he was unlikely to seek treatment given his longstanding and largely untreated mental health problems.67 A second psychiatrist agreed that the accused did not see himself as someone requiring treatment. Having regard to the circumstances of the offender, the judge ordered the mandatory life sentence and imposed a period of seventeen years for parole ineligibility.

Demonstrable non-compliance with a mental health treatment plan may lead the court to conclude that risk to the community is only manageable with a custodial sentence.68 In Hall, the

63 Taylor, supra note 49 at para 27.
64 R v McCotter, 2014 BCCA 27, 596 WAC 72, 2014 CarswellBC 164 (WL Can) [McCotter cited to WL Can].
65 Ibid at para 18.
67 Chang, at para 36.
accused was charged with multiple offences, including arson and uttering threats to a witness. In addition, the accused had a lengthy history of psychotic, delusional and hallucinatory problems and had regularly resisted taking his prescribed medications. These concerns were complicated by significant alcohol and prescription medication abuse. Judge Dohm concluded that despite the community-based resources to assist his treatment, the only way to ensure that society will be safe from the accused’s conduct is to impose a sentence of incarceration.\(^69\)

It should be noted that with a life sentence, the objective of protecting public safety is automatically met. Thus judges should not increase the period of parole ineligibility based on a consideration of future public safety. The period of parole ineligibility should balance the mitigation due to mental illness and the aggravation due to the severity or gravity of the offence.

(c) Dangerousness / Gravity of Harm

In some cases, evidence of a mental disorder may be an element of dangerousness, as well as diminished moral culpability. The second stage of determining dangerousness is an analysis of the gravity of potential harm resulting from a re-offence.\(^70\) Where the public may be exposed to grave danger, it would be “an error to attach much weight to [efforts towards rehabilitation].”\(^71\) More specifically, if the risk of future grave harm exists, it may not be appropriate to assume the accused can be rehabilitated. When assessing the dangerousness of future harms, the court has made reference to past behaviour, an accused’s unpredictable conduct and extreme or gratuitous violence requiring denunciation as paramount principle.

(i) Predictions Based on Past Criminal Behaviour

Predictions of future dangerousness have been made with reference to patterns of criminal behaviour. In McConnell, the court found that it was reasonable to conclude that future violence on the part of the accused could mirror the accused’s current violent behaviour. Judge Romilly reflects on the use of a bladed weapon in the commission of the offence and determines that future violence could also involve the use of a weapon.\(^72\) This parallels the first prong of the test, in which the court analyses the accused’s propensity to commit dangerous offences. Where

---

69 Ibid at para 32.
72 McConnell, supra note 9 at para 6.
there is consistency in behaviour, the court will be cautious of the nature of the offence to
determine if future harms would replicate past actions.

(ii) Unpredictability of Accused’s Behaviour

Evidence of mental illness may indicate future dangerousness where the accused’s
behaviour is found to be unpredictable. In Bennight, the accused was convicted of second degree
murder for viciously and repeatedly beating a woman. Evidence was adduced at trial to suggest
that the accused’s impulsive and violent behaviour was exacerbated by his brain injury and other
mental health problems. The trial judge found that rather than have a mitigating effect on his
moral culpability and sentencing outcome, in these circumstances, his mental state could only be
interpreted as a demonstration of how bleak his prospects were for rehabilitation. Coupled with
the lack of evidence demonstrating premeditation of this offence, the particular circumstances of
this offender indicated unpredictable violent behaviour and dangerousness. This determination
was upheld on appeal, where the court found that the trial judge was entitled to deem the accused
at the highest order of dangerousness, given that, among other factors, the extreme and violent
killing occurred absent an explanation.

(iii) Extreme Violence

The courts have emphasized the protection of the public in cases involving extreme
brutality and gratuitous violence. In these cases, the aggravating factors have outweighed the
mitigating effects of mental illness, and the purposes of deterrence and denunciation have been
emphasized at sentencing.

In B(D), the accused suffered from severe mental illness, including mixed personality
disorder, “Cluster B” borderline personality organization and narcissistic personality disorder.
After being denied access to his children by the courts, the accused became angered to the extent
that he stabbed his former parents-in-law to death in front of his stepson. He then went to his
former wife’s home, stabbing her in front of their two children. Though the accused was
significantly mentally disordered at the time of the offences, rather than treat his mental illness as
a mitigating factor, the court focused on the ways in which his illness operated to impair his

ability to premeditate the murders. Ultimately the accused pleaded guilty to three counts of second degree murder and was sentenced to life imprisonment. A twenty year parole ineligibility period was imposed in order to denounce killing in the presence of young children. The Court of Appeal did not interfere with the trial decision and found the sentence to be fit.

In another case involving a mandatory life sentence, the period of parole ineligibility was extended to properly reflect the seriousness of the offence committed. In *Truong*, the accused was convicted of second degree murder after stabbing the four-month old baby of his former wife and her new partner. The accused was severely mentally disordered at the time of the offence, and the evidence indicated that he believed his marital relationship with the victim could be reconciled with the new child “out of the way.” On appeal, the court found the conduct to be vindictive, willful and cruel. The court explicitly references specific deterrence of the conduct, denunciation and the protection of the public. Having regard to the principles of sentencing as well as the circumstances and nature of the offence against a defenceless infant, an extended period of parole ineligibility was appropriate.

Where the offence is extremely brutal and gratuitously violent, the court has found that the mitigating factor of mental illness will be significantly outweighed by the aggravating factors. In *Rothgordt*, the accused was convicted of second degree murder following the vicious stabbing and beating death of the victim who he had met on social media for the purposes of sexual encounters. Immediately following the murder, the accused attempted to dispose of the body by arson. The court found the initial attack to have been unprovoked, extraordinarily brutal, bizarre and extremely violent. Referencing the accused’s institutional history and prior 20 criminal convictions, the court found that the accused was well-trained in articulating the positive talk of rehabilitation. The accused referred to having completed a treatment program, to having bettered himself spiritually and to appreciating the need to avoid risky situations which could lead to reoffending. However, while commending the accused for his rehabilitative efforts while in custody, the court was hesitant to attach substantial weight, given that he may continue to pose a risk to the public. The unexplained and exceedingly violent attack on a defenceless, older victim, followed by seemingly rational and calculated behaviour, led the court to conclude

---

76 Ibid at para 5.
77 Ibid at para 30.
78 *Rothgordt*, supra note 71.
79 Ibid at para 103.
that the accused’s behaviour was unpredictable, dangerous and extraordinarily violent. Consequently, the judge finds that the principle of deterrence is a predominant consideration.  

In *Kirkpatrick*, the trial judge expressly acknowledged the need to consider the nature of the circumstances surrounding the commission of the offence. In this case, the accused was convicted of second degree murder after he shot his former employer the day after he was given a dismissal notice. The senseless execution-style murder by a shotgun also traumatized witnesses to the crime. On appeal, the court found that the circumstances under which the victim was killed were particularly aggravating. To that end, a period of parole ineligibility higher than the minimum was fit.

Where the court determines that the accused poses a threat to public safety, by reference to the dangerousness analysis, a custodial sentence may be necessary despite evidence of mental illness.

### 3. Conflict in the Jurisprudence

The case law demonstrates significant variance in how mental illness is treated in Canadian criminal law and sentencing. Judicial discretion is required to navigate the complex intersection between mental health and the criminal justice system. Though there is some consistency with the underlying principles relied upon by judges, there is minimal consistency with regard to the types of offences or specific mental illnesses. That is, though judges will look to the mental illness and its causal link to the commission of an offence, a diminished culpability does not always result in an emphasis of rehabilitation. As demonstrated in the sections above, the mitigating effects of mental illness can be outweighed by aggravating factors. What may be aggravating in some cases may seem inconsequential in others. The problem is that this individualized sentencing results in inconsistency in outcomes. As it stands, there is minimal judicial explanation of what is considered relevant and virtually no precise description of the

---

80 *Ibid* at para 105.
82 But see *R v Khosa*, 2014 BCSC 194, [2014] BCJ No 215. Despite an extremely violent crime, the accused was sentenced to the minimum period of parole ineligibility. The accused was convicted of first degree murder after stabbing his sister 13 times. Both the accused and the victim suffered from paranoid schizophrenia, but the accused was able to appreciate the nature and quality of his actions. The court considered the difficult background of the accused and the hardship that this conviction would have on the accused’s family.
83 For example, analyses referencing reduced moral culpability, amenability to treatment, risk of future harm as discussed above.
associated weight of factors considered by the judiciary in making sentencing calculations for the mentally disordered accused. I would argue that parity is compromised in these instances. With the variety of sentencing options, the weight of mental illness, the outcomes of offence and the need to protect the public safety in a range of means, I would argue that it cannot be said that there is definitive parity among mentally ill offenders, absent an explanation for relevant factors.

What makes a similar offender and a similar circumstance?

As noted by Madam Justice Southin, these cases raise problems in “balancing rehabilitation on the one hand and punishment…on the other hand.”84 Returning to the fundamental duty of sentencing, judges must impose a sentence that is fit for the offence and the offender.85 The following cases demonstrate the obvious conflict for judges, where competing interests and objectives have played into the calculation of individualized sentencing; I would argue an alternative and defensible outcome could have been imposed.

In Batisse, a persuasive case from the Ontario Court of Appeal, the court faced the difficult task of sentencing an Aboriginal woman guilty of kidnapping.86 At the time of the offence, the accused had recently suffered a miscarriage following an unprovoked beating. She did not tell her partner of the miscarriage, but instead kidnapped a newborn baby from the nearby hospital. After a seven-hour search, the baby was found and returned unharmed to the mother. While considering the circumstances of the offender, Justice Gillese made reference to the accused’ background and upbringing – one which included constant physical, sexual and emotional abuse at the hands of her mother, uncle and various common-law partners. The background of the accused was found to contribute to the serious mental health issues she faced at the time of the offence. In addition to these personal challenges, she was young, Aboriginal and a first-time offender. Having regard to the mitigating circumstances of the offender, juxtaposed with the serious crime of kidnapping a newborn, several of the sentencing goals – specifically, rehabilitating the offender, denouncing kidnapping, and both general and specific deterrence – would be defensible and primary considerations. On appeal, the court concluded that the trial judge was entitled to emphasize denunciation and deterrence, despite the diminished moral culpability of the offender. The accused was sentenced to two and a half years’

84 R v Deen, 120 CCC (3d) 482, 162 WAC 46, 1997 CarswellBC 2531 (WL Can) at para 4 (BCCA) [Deen cited to WL Can].
86 R v Batisse, 2009 ONCA 114, 241 CCC (3d) 491 [Batisse].
incarceration to adequately reflect society’s denunciation of the offence and operate as a
deterrent. I would challenge this finding, however, given that her mental illness was found to be
an “active [ingredient]” in her decision to commit the offence.\footnote{Ibid at para 56.} Is society better off by putting
the accused in a federal penitentiary? Upon her release, having not likely adequately, if at all,
addressed her troubling background and mental illness, it is wrong-minded to assume that the
protection of society is best achieved through a custodial sentence. I would argue that her
potential future dangerousness is likely to be reduced more meaningfully after receiving
treatment specific to her circumstances.

In a seemingly contradictory judgment in 1995 from the BC Court of Appeal, the court
found the mental illness of the accused was to be given substantial weight, even in cases
involving very serious crimes. In \textit{L(JHQ)},\footnote{\textit{L(JHQ)}, supra note 23.} the accused pleaded guilty to sexually assaulting his
three daughters. The assaults each began when the victims were between the ages of 5 and 8 and
continued for up to ten years. As a result of the trauma suffered, each complainant suffered
serious psychiatric problems, including attempted suicide. The trial judge referred to the need to
emphasize general deterrence. The judge reviewed the mitigating factors, including the
psychological issues of the accused, but determined that given the atrocious acts, a minimum jail
sentence of two years was required in order to send a message that “if you hurt the children, you
will pay the price.”\footnote{Ibid at para 9.} On appeal, however, this sentence was overturned for being demonstrably
unfit. The Court of Appeal found that the trial judge had not given sufficient weight to the mental
illness of the accused which, in appropriate circumstances, “is to be given considerable weight
when sentencing an individual.”\footnote{Ibid at para 10.} The sentence was reduced to two months and three years’
probation.

I question this decision as well for several reasons. Specifically, I take issue with what
appears to be a cursory review of the damage caused to the victims. Though not always a
consideration for the court, the harm caused by the offence is an important aggravating factors at
sentencing.\footnote{718.2(a)(iii.1) A court that imposes a sentence shall also take into consideration the following principles...a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing...evidence that the} In this case, as discussed in trial, the victims were left with serious and irreparable
psychological harm. Their father frequently and gravely violated a position of trust as their natural father. Though he was found to be at a low risk for reoffending in the future,\(^9\) the second prong of the dangerousness test calls for an assessment of the gravity of the damage.\(^9\) In my opinion, a sentence which promotes deterrence and particularly denunciation would not be demonstrably unfit in these circumstances. There is great public interest in denouncing a father who is sexually abusing this three daughters for over a decade. Further, in my opinion, a low likelihood of reoffending supports a submission that a rehabilitative purpose is unnecessary and should not be a primary concern.

In some cases, it may be possible to achieve multiple sentencing goals. In MacKendrick, the mentally disordered accused was convicted of arson following the burning of a community barn.\(^9\) The barn was quickly consumed and destroyed by the fire. The accused had a minor criminal record, but was considered high-risk to reoffend because of his ongoing drug use. Ultimately, it was determined that the risk was manageable in the community despite conflicting mitigating and aggravating factors. Rather than focus on the protection of the public through rehabilitative or custodial sentences, a sentencing circle was held due to the unusually widespread impact on the community which was adversely affected by the property damage. The accused was reportedly profoundly influenced by the sentencing circle and the concern expressed by the community that the focus should be on a rehabilitated future for him.

Seemingly conflicting purposes may also be resolved through the imposition of a suspended sentence. This meets the rehabilitative needs of the accused by allowing access to treatment during probation, and the suspended custodial sentence still sends a denunciatory message to the public.

**Part III: What Can Be Done?**

Sentencing the mentally disordered accused can send lasting and meaningful messages to the community as a whole thus it is important to look after the vulnerable populations of both the

---

\(^9\) In **L(JHQ)**, supra note 23, was a case of historic sexual assault, occurring some 25 years prior. The Court of Appeal found the accused was unlikely to reoffend given the lengthy gap in reported assaults.

\(^9\) Further, this additionally accords with the first component of the proportionality principle, the gravity of the offence, pursuant to s. 718.1 of the **Code**.

mentally ill offender and the victims of these offences, both of whom receive such little support in the criminal justice system. In this section, I outline some areas to improve the process of sentencing where there is evidence of a mental disorder.

1. The Judiciary

Our current state of law demonstrates a lack of transparency in reasoning when sentencing the mentally disordered accused. As we have seen, at times evidence of a mental disorder may have mitigating effects on sentencing outcomes, or may be outweighed by other factors, or may in fact work against the accused to justify more harsh custodial sentences. Though there are patterns at play in sentencing the mentally disordered accused, with respect, I suggest sentencing judges need to give a more fulsome explanation of their decisions. That is, reasons for sentencing explain not only what is considered relevant, but the extent to which certain factors were relied upon. In this way, judges could take a leading role in the reformation of sentencing the mentally disordered accused. Rather than just list the factors that have been considered, judges could give a more candid explanation of the impact of these factors – especially with regard to evidence of mental illness. Though sentencing judges may be concerned that greater discussion of the actual impact of aggravating and mitigating factors may open the judgments to greater appellate review, I believe it is only with a detailed understanding of the relative weight of mental illness in sentencing that counsel can develop a better understanding of how to support judges by submitting relevant information. Counsel would be more effective in their supportive role to the judiciary if judges offered clearer articulation of the relevant factors used in sentencing.

I would also argue that Appellate review provides assurance in the law and strengthens the criminal justice system. Reviewing sentencing decisions of trial judges allows for greater parity in sentencing and for the development of a more just and robust law. If an error is made at trial, the administration of justice requires its correction. Where the trial judge has not expressly factored in the mental health of the accused, the case law demonstrates that the judge will normally be presumed to have done so. I would question the efficacy of this process: why should we assume that mental health of the offender has not only been considered, but has also

---

95 I note here that judicial efficacy may be negatively impacted when the settlement of issues is delayed and brought on appeal.
96 See Peters, supra note 19.
been given the “considerable weight” it is supposed to be given?97 If it is an important and guiding mitigating factor, why not highlight how and why it is important? This legitimizes mental illness as a meaningful, powerful and active force in the criminal justice system. It also assists trail judges in future cases as well as counsel who are contemplating on appeal on the grounds that mental disorder was not adequately considered by the trial judge.

A clear articulation of sentencing judgements can also lead experts by elucidating what is and is not within the scope of judicial notice. Though judges, as triers of law, are in the only position to decide what can be entered into court, they can rely on expert evidence on matters falling outside the scope of common knowledge.98 For example, while judges are in a position to determine the proportionality of a sentence based on the circumstances of an offender, an expert may assist the court by articulating the exact and nuanced manifestation of a mental illness in an accused. The more subtle aspects of an offender’s mental health could reasonably be beyond the scope of what the judiciary is expected to bring to court and expert psychiatric explanation would be advantageous and justified.99 In order to do this, we need judges to clearly articulate the relevant principles as to how and why mental disorder is relevant at sentencing, so that expert psychiatrists can fill in the gaps.100

Judges can also be leaders that stir change within the legal system. Though Parliament is responsible for developing the codified laws, judges can be leaders of procedural change by setting the bar for the practice of sentencing the mentally disordered accused. Given the substantial discretion conferred upon the judiciary, sentencing judges could direct inquiries and practices that will lead to a finding of a fit and proper sentence. Where there is evidence of a mental disorder, subject to the consent of the accused, judges could direct a psychiatric evaluation to be attached to a pre-sentencing report (“PSR”) at the expense of Crown.101 I would

97 I suggest an argument could be made that the advantageous position held by the trial judge allows for substantial deference to the sentencing judge. However, where his appellate review involves an analysis of the law or a written summary of cases and circumstances of the offenders, as with a pre-sentencing report with a psychiatric evaluation, the advantageous position held by trial judges is arguably minimized and may not be necessary for a just and successfully summary.
99 This is discussed further in the subsequent section.
100 See R v Dawson, 2009 BCPC 294, [2009] BCWLD 8529, 2009 CarswellBC 2692. The provision of helpful and complicated medical details was used to establish a fit and proper sentence.
101 But see R v Gray, 2002 BCSC 1192, 169 CCC (3d) 194, in which the Court of Appeal found that the trial judge did not have the jurisdiction to order the expenditure of public funds for a fetal alcohol spectrum disorder assessment at a private facility. At trial, the judge directed a stay of judicial proceedings in the event that Crown
argue that it is in the public interest, and society would benefit from this authority in judges, to
direct a psychiatric assessment and rehabilitation. As triers of law, judges could outline the
contents of a PRS to minimally require the inclusion of information relevant to the offence and
the principles of sentencing. Further, judges can appoint their own experts to assist in
understanding the subtle but influential mental health aspects active in a specific individual. Or,
where there are multiple or conflicting psychiatric evaluations adduced at sentencing, a neutral
expert for the court could offer insight as to how to weigh and interpret the PSR. By making this
an established pattern, judges of the inherent jurisdiction to direct procedural change, wherever
there is evidence of a mental disorder and the accused has consented, the judiciary could be
provided with a more fulsome understanding of the context of the accused, ensuring the closest
alignment to a proportionate, fit and individualized sentence for a specific individual.

By focusing on the judiciary, we have the opportunity to converge the otherwise parallel
lines of the criminal justice system and the public health authorities. If our goal in sentencing the
mentally disordered accused really is rehabilitation, then we need to do more than pass the buck
to other disciplines in the criminal justice system after sentencing. The judiciary cannot
overextend the reach of the law for fear of being paternalistic, and issues of civil liberties arise
where an individual is forced into treatment contrary to or without meaningful or informed
consent. But if we are going to sentence the mentally disordered for the purposes of
rehabilitation, I would argue that the judiciary should be encouraged to do all that it can to ensure
that the purported goals are actually met.

Rather than ignore the issue at sentencing, passing the responsibility to Corrections or
Probations, I suggest a sentencing regime that requires the accused to return to a specialized
sentencing court may be a helpful alternative. Neither Corrections nor Probation singularly have
the resources to ensure meaningful and consistent rehabilitation efforts. A modified suspended
sentence with conditions mandating follow-up with the courts at designated milestones could
ensure that the accused is complying with the direction of a probation officer. Further, deviation
from these probationary directives could be addressed early, before an escalation to a serious
denied to fund the assessment. This was overturned on appeal. In the alternative, it might be possible to remedy
Crown’s denial with a suspended sentence and a probation order with conditions, directed at rehabilitation.

102 See for example Bennight, supra note 73, where evidence precluding premeditation was adduced; and, evidence
supporting a rehabilitative outcome, such as an accused’s amenability to treatment.
103 See the Canada Evidence Act RSC 1985, c. C-5.
104 See Truong, supra note 75.
breach and additional charges. Supported guidance may be a meaningful way to regulate rehabilitative behaviour and the creation of specialized sentencing courts may address these concerns. There are defensible criticisms and limitations of specialized courts, but we must find a meaningful and effective way to bring together the needs of the mentally ill who find themselves involved in the criminal justice system as a result of their mental health concerns.

2. Expert Guidance

Expert psychiatric evidence can play a significant role in sentencing where there is evidence of mental illness in an accused. In particular, expert psychiatric reports can provide an explanation of mental illness that falls outside the scope of judicial knowledge and provide meaningful recommendations with regard to sentencing. Despite their limitations, these reports can be used to improve the individualization process to ensure sentences fit for the circumstances of a mentally disordered offender.

Expert psychiatric evidence can explain the subtle but meaningful differences in manifestations of various mental illnesses. Expert psychiatrists must guide judges beyond the presence of mental illness to explain how it operates with respect to the specific individual in front of the court. This is necessary for a fulsome consideration of the specific circumstances of a specific offender. It is then up to the judges to apply these facts to principles of sentencing. Further, detailed psychiatric understanding of mental illness can provide context for determining whether mental illness has causal relationship to the commission of the offence or to support or undermine a finding of certain elements of an offence in order to raise reasonable doubt. This would be particularly relevant for cases where specific intent is a key element of an offence, as with first and second degree murder.

Experts may also contribute by making recommendations respecting sentencing outcomes. For example, expert psychiatric evidence may be needed for the purposes of predicting the dangerousness or likelihood of reoffending and propensity to criminal conduct

---

105 For example, rather than banish specialized issues to one court, all courtrooms, counsel and judges should be equipped to adequately process evidence of mental illness. Further, it could be argued that the existence of specialized courts could encourage such specialized knowledge on the part of counsel and the judiciary to the exclusion of a comprehensive legal foundation. Lastly, issues of intersectionality may occur where the issue before the court properly falls within multiple specialized matters.

106 Dickson, supra note 24; McConnell supra note 9.

107 See B(D), supra note 74; See also R v Lincoln, 2009 BCSC 1181, [2009] BCJ No 1181, 2009 CarswellBC 3180 (WL Can) [Lincoln cited to WL Can].
given the specific manifestations of mental illness in a specific accused. That is, an expert may explain how the specific manifestation of a mental illness in a specific accused would likely respond to a particular sentencing outcome\textsuperscript{108} or demonstrate how it would present undue hardship on a particular accused.\textsuperscript{109} This relates to proportionality as it provides context for assessing the fitness of a sentence for a particular mentally ill accused.\textsuperscript{110}

3. Suggestions for Counsel

Counsel also have an important role to play in sentencing a mentally disordered accused. As a quasi-minister of justice, Crown counsel have an obligation to seek a fair and fit sentence for the offender, and not necessarily “the toughest” sentence possible. This role will include providing the judge with evidence to establish parity in sentencing. That is, Crown should make available legal authority to establish a sentencing range used by courts where there is evidence of mentally disorder, and where there are competing and defensible principles for both a rehabilitative and custodial sentence. Where there is evidence of risk to public safety, Crown must demonstrate why a conditional or suspended sentence is not appropriate.

For defence counsel, the task will be to show the court that due to a diminished culpability by way of mental illness, a rehabilitative sentence is appropriate and that the safety of the public will not be threatened by the accused’s release into the community. The court will need to see that the accused had diminished moral culpability at the time of the offence as a direct result of their mental disorder. Defence counsel will need to show the causal link and provide expert evidence that will assist in the calculation of the degree of responsibility of the accused. Additionally, because evidence of a mental illness may not have a mitigating effect in some circumstances, defence counsel must prepare the client for such a finding where the

\textsuperscript{108} \textit{Ibid} at para 22. In this case, the psychiatrist spoke to the fact that the degree of disorder affecting a person will be different among people.
\textsuperscript{109} See \textit{R v Boudreau}, 39 CCC (2d) 75, 36 APR 63, 1978 CarswellNS 146 (NSCA). A mental illness may affect sentencing because the sentence would constitute a greater hardship for a mentally disordered offender than it would be for an offender who is mentally stable.
\textsuperscript{110} Notwithstanding the pre-conditions as articulated in \textit{Mohan}, supra note 98, experts wishing to adduce psychiatric evidence must be focused in their content.\textsuperscript{110} To be meaningful aids to judges, experts cannot present skewed or misleading information to the court. Experts are needed because judges do not have psychiatric expertise and substantial concerns could arise where a judge is reliant on unrepresentative psychiatric evidence. There is danger of and motivation for experts to seek and present self-fulfilling evidence and procedural safeguards may work to combat these dangers, but counsel and judges must remain vigilant to ensure the proper administration of justice.
circumstances of the offence are particularly grave, excessively brutal or gratuitously violent. Counsel should be prepared to explain to the court why the mitigating effects should nonetheless be considered and that the likelihood of reoffending is lower than may be assessed by experts or others.

Defence counsel should attempt to demonstrate the accused’s amenability to treatment since one of the purposes of sentencing is rehabilitation. Defence counsel should consider seeking therapeutic bail or an adjournment of sentencing, to allow the accused the opportunity to demonstrate successful steps towards rehabilitation and treatment. This may include the provision and availability of supportive and therapeutic home environment\(^{111}\); attendance in therapy and counselling\(^{112}\); taking prescribed medications\(^{113}\); maintenance of employment without mental health related incident\(^{114}\); and participation into a substance abuse treatment facility.\(^{115}\) Defence counsel can in this way show the court that an custodial sentence is no longer necessary and a sentence with a focus on rehabilitation is not only viable, but that it protects the safety of the community and is in the best interest of the community.

Defence counsel should also provide alternatives to sentencing options that may achieve the prescribed outcomes, as in the case of *MacKendrick*, \(^{116}\) where participation in a sentencing circle had a profound effect on the accused.

Defence counsel should also make use of reference letters from people who have regular contact with the accused and can speak to the efficacy of treatment steps. This may include psychiatrists, medical staff or community support workers who can speak to the accused’s efforts at treating their mental illness. From an enforcement perspective, the accused may show compliance with sentence conditions through the evidence of a probation or corrections officer who can speak to the reduced dangerousness and risks to public safety. In the community, family, friends, employers, or others in the community who have maintained long-standing relationships with the accused, may provide evidence to show the general good character of the accused, and that their unlawful behaviour was out-of-character, supporting a causal link between the mental illness and the commission of the offence.

---

\(^{111}\) *Batisse*, supra note 86.

\(^{112}\) *Fayemi*, supra note 18 at para XX.

\(^{113}\) *Ibid* at para 18.

\(^{114}\) *Ibid*.

\(^{115}\) *Cook*, supra note 45.

\(^{116}\) *MacKendrick*, supra note 94.
Conclusion

The principles of sentencing mandate a proportionate and individualized sentence to ensure parity among similar offenders and offences. That said, there can be great disparity in sentencing outcomes where there is evidence of mental illness. The ways in which mental illness contribute to the gravity of the offence and the circumstances of the offender are complex, diverse, subtle and substantive. In some instances, where an offender’s moral culpability is low, evidence of mental illness may operate with mitigating effects, such that a rehabilitative sentence to be served in the community is an available and fit sentence. Contrarily, evidence of mental illness have only a marginal a mitigating effect on sentencing outcomes, and the other relevant circumstances of an offence may play a more dominant role to the extent that a custodial sentence is required to ensure public safety.

It is time for the judiciary and the legal profession to take an active role in clearly articulating and applying the foundational concepts and principles active in sentencing the mentally disordered accused. With these mechanism of accountability, judicial activism in this area can be the catalyst for psychiatric experts, experienced mental health advocates and dedicated counsel to submit to the court relevant, meaningful and persuasive assistance. To do so, there must be a willingness to do more than pay lip service to rehabilitating the mentally disordered accused. If we can take a different approach to justice, one in which our actions and our conduct reflect our purported rehabilitative and protective objectives, we can begin to converge the parallel lines of the criminal justice system and the public health system to effectively respond to the practicalities and realities of the mentally ill offender.