

1-1-2005

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DISORDER IN THE COURT: THE USE OF PSYCHIATRIC TESTIMONY IN THE PREDICTION OF DANGEROUSNESS

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ABSTRACT

Preventive detention measures in Canada were implemented in order to protect us from the most dangerous individuals in society. The Dangerous Offender provisions permit the state to imprison an offender indefinitely. In order to justify such drastic action, psychiatric assessments are conducted in an attempt to determine who, among the “worst” offenders, would be most likely to commit a dangerous offence in the future. This paper will review the dangerous offender system in Canada, and in that context, critically reconsider the ability of mental health professionals to predict the risk of future dangerousness. Despite widespread disagreement concerning evaluation methods and the fallibility of the most common assessment tools, sentencing courts rely heavily upon expert opinions. Given this uncertainty, however, psychiatric testimony should be used cautiously, and only as a supplement to the court’s own assessment. Recommendations are presented for making the most of current techniques, and to protect those who may otherwise become victims of “disorder in the court.”

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“Dangerousness,” according to Steven Yannoulidis, “is a subjective concept, which is attributed to individuals taking account of calculable actuarial risk and the subjective fear which they invoke.”¹ For decades, however, mental health experts have attempted to objectify dangerousness, in order to make it amenable to measurement, and ideally, control.

Preventive detention provisions exist to protect society from those offenders who present an intolerably high risk to public safety. The legislation requires that those declared dangerous offenders be given indeterminate sentences. In reaching a conclusion regarding the dangerousness of an offender, the court will hear the testimony of a psychiatric expert, who conducts an assessment in an attempt to predict the individual’s risk of committing dangerous acts in the future.

This paper will survey the dangerous offender system in Canada, first by examining the *Criminal Code* provisions that create it, and then by presenting an overview of the jurisprudence surrounding the constitutionality and interpretation of this legislation. This will emphasize the significant weight given to the forensic assessment in judicial decisions.

Next, there will be a description of the most popular techniques used by psychiatrists to arrive at their conclusions. A critical examination of the research findings will reveal that even the most frequently used and empirically robust measure, the Hare Psychopathy Checklist—Revised, cannot provide confident answers to the “dangerousness” question.

Finally, there will be a review of the research, which suggests that because psychiatric assessments offer only a precarious solution to a difficult problem, the testimony of mental health experts in sentencing hearings should be limited to supplementing (and not replacing) the court’s judgement of an offender’s prospects. The result is several recommendations that may be implemented to reduce the prevalence of error and maximize the usefulness of available information.

¹ Steven T. Yannoulidis, “Negotiating ‘Dangerousness’: Charting a Course Between Psychiatry and Law” (2002) 9 *Psychiatry, Psychology and Law* 151 at 155.

I. THE DANGEROUS OFFENDER AND PREVENTIVE DETENTION

According to Andrew Forrester, preventive detention was first recommended in 1895 by the Gladstone Committee on Prisons in England, in order to segregate “for long periods of detention” a group of habitual offenders for whom regular punishment was inadequate.² The term “preventive detention” now refers to confinement or control based on the perception of a high risk of future criminality. In Canada, the use of preventive detention has been expanding, and includes the dangerous offender provisions, long-term offender provisions, and the use of annual recognizances.

Determining whether the appropriate sentence in a given case is life imprisonment or preventive detention may be problematic. Manson suggests that a life sentence is justified when the offence is particularly brutal, especially in the context of previous offences, making public safety the foremost consideration.³ On the other hand, when a psychological assessment suggests continuing dangerousness, but the current offence does not itself justify a life sentence, the result should be a dangerous offender designation. A dangerous offender application is intended for the particular group of very dangerous people from whom the public needs to be protected.⁴

1. The Dangerous Offender in Canada

The current dangerous offender regime was originally enacted in 1977,⁵ largely in response to the recommendation of the Ouimet Committee, which examined the cases of eighty habitual offenders detained on the basis of the extant system.⁶ The Committee concluded that almost 40%

² Andrew Forrester, “Preventive Detention, Public Protection and Mental Health” (2002) 13 *Journal of Forensic Psychiatry* 329. Forrester notes that it wasn’t until 1908 that such additional sentences became law. The legislation didn’t work then, and, Forrester claims “if history can be considered to predict the future, we can surely expect resounding failure” of future preventive detention regimes (at 341).

³ Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 314.

⁴ See *R. v. Neve* (1999), 137 C.C.C. (3d) 97, [1999] 11 W.W.R. 649 (Alta. C.A.) [Neve cited to C.C.C.].

⁵ Criminal Law Amendment Act, 1977, S.C. 1976-77, c. 53, s. 14.

⁶ Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Queen’s Printer, 1969).

of their subjects did not represent a serious threat to public safety. It suggested that indeterminate detention could only be justified in the case of “dangerous offenders,” and recommended a focus on specific offences, noting concerns with the ability to predict future dangerousness generally.

In 1997, Bill C-55 revised the dangerous offender provisions.⁷ The government dubbed the Bill its “high-risk offender” legislation. It added the long-term offender provisions, required that anyone being classified a dangerous offender be given an indeterminate sentence, and provided for judicial restraint by allowing controls to be placed on high-risk individuals.⁸

The relevant provisions are set out in Part XXIV of the *Criminal Code*,⁹ in sections 752-761. The first condition is conviction for a “serious personal injury offence,” which is either a sexual assault, or an indictable offence punishable by more than ten years imprisonment involving violence or danger to life, safety, or psychological well-being.¹⁰ If the prosecutor has grounds to believe that the offender might be found to be a dangerous (or long-term) offender, there may be an application to have an assessment report filed with the court as evidence:

752.1 (1) Application for remand for assessment—Where an offender is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) and, before sentence is imposed on the offender, on application by the prosecution, the court

⁷ An Act to amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act, S.C. 1997, c. 17, ss. 4-8.

⁸ See Department of Justice, News Release, “Bill C-55 Comes into Force” (21 July 1997), online: Department of Justice Canada <<http://canada.justice.gc.ca/en/news/nr/1997/c55com.html>>.

⁹ R.S.C. 1985, c. C-46.

¹⁰ Section 752 defines “serious personal injury offence” as follows:

(a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving:

(i) the use or attempted use of violence against another person, or
(ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
and for which the offender may be sentenced to imprisonment for ten years or more, or

(b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

is of the opinion that there are reasonable grounds to believe that the offender might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court may, by order in writing remand the offender, for a period not exceeding sixty days, to the custody of the person that the court directs and who can perform an assessment, or can have an assessment performed by experts. The assessment is to be used as evidence in an application under sections 753 or 753.1.

(2) Report—The person to whom the offender is remanded shall file a report of the assessment with the court not later than fifteen days after the end of the assessment period and make copies of it available to the prosecutor and counsel for the offender.

The application by the prosecutor for a remand for up to sixty days to have a report completed is the first step of the assessment process. The prerequisites of this demand are, first, that the person has been convicted, but not yet sentenced,¹¹ of a personal injury offence or an offence under s. 753.1(2)(a);¹² and second, that there are reasonable grounds to believe that the offender might receive one of the designations. This single, court-approved assessment replaced the previous requirement that each party retain their own psychiatrist to tender evidence at a hearing.¹³

In addition to the requirement of filing a section 752.1 report, there are a number of procedural requirements outlined in section 754 that

¹¹ There is an exception to this in s. 753(2), which allows an application to be made after a sentence has been imposed, if the offender was given notice of this possibility prior to sentencing, the application is commenced within six months of sentencing, and it is shown that there is relevant evidence that was not reasonably available to the prosecution at the time of the sentencing which has since become available.

¹² This section lists the potential offences leading to a long-term offender designation, and consists of several sexual offences.

¹³ See Manson, *supra* note 3 at 321-22. The author notes that this single assessment process presents several problems not considered by the Task Force on High-Risk Violent Offenders, who recommended the change. First, not every Canadian jurisdiction has at its disposal a multi-disciplinary forensic clinic capable of producing a sufficiently thorough report. Second, the recommendation was based on observations of the apparently liberal methods used by Dutch mental health professionals. Manson suggests that their Canadian counterparts are usually more guarded and conservative. He also seems to imply that since provincial mental health facilities often have problems hiring staff, those working in them may be less capable than some of their colleagues, and is therefore concerned about the enormous power vested in them by s. 752.1.

must be fulfilled before a hearing can proceed.¹⁴ Section 753(1) outlines the test to be used in determining if an offender is a dangerous offender, and consists of two branches.

The first branch is used when there has been a conviction for a violent indictable offence punishable by at least ten years imprisonment. There must be a finding that the offender: “constitutes a threat to the life, safety, or physical or mental well-being of other persons,” through failing to restrain behaviour and a likelihood of causing death or injury; persistent aggressive behaviour showing indifference to the reasonably foreseeable consequences of behaviour; or acts “of such a brutal nature as to compel the conclusion that the offender’s behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.”¹⁵

The second branch applies where there has been a conviction for sexual assault. It requires a finding that the offender’s conduct shows a “failure to control his or her sexual impulses,” and that there is a likelihood that he will cause “injury, pain or other evil to other persons through failure in the future to control...sexual impulses.”¹⁶

If either branch of the test is satisfied (beyond a reasonable doubt of the likelihood of threat), the judge *may* label the offender a “dangerous offender.”¹⁷ In *R. v. Lyons*,¹⁸ the Supreme Court noted that the judge does retain some discretion, and *Neve*¹⁹ emphasized the importance of accommodating particular factors in each individual’s case. Most recently, in *R. v. Johnson*,²⁰ the Supreme Court of Canada affirmed that a judge retains the discretion *not* to make the declaration where the goal of protecting the public could be met by imposing a less restrictive sanction.

If a dangerous offender designation is imposed, an indeterminate sentence is mandatory.²¹ An appellate court may overturn the designa-

¹⁴ Consent of the provincial attorney general (s. 754(1)(a)), and seven days notice by the prosecutor to the offender outlining the basis for the application (s. 754(1)(b)). Section 754 (2) specifies that the hearing is always conducted by a judge without a jury.

¹⁵ Criminal Code, *supra* note 9 at ss. 753(1)(a)(i)-(iii).

¹⁶ *Supra* note 9 at s. 753(1)(b).

¹⁷ *Supra* note 9 at s. 753(1).

¹⁸ [1987] 2 S.C.R. 309, 89 N.S.R. (2d) 271 [Lyons cited to S.C.R.].

¹⁹ *Supra* note 4.

²⁰ [2003] 2 S.C.R. 357, 230 D.L.R. (4th) 296 [Johnson].

²¹ Criminal Code, *supra* note 9 at s. 753(4).

tion and impose a fixed sentence. If the designation stands, a parole board will review the case “as soon as possible after the expiration of seven years” from the date of the arrest, and then every two years thereafter, to determine whether parole is appropriate.²² The protection offered by this provision is slight, however, as Professor Manson notes that between 1987 and 1992, 98.5% of applications for full parole by dangerous offenders were rejected.²³

2. The Constitutionality of the Dangerous Offender Provisions

i) *R. v. Lyons*

The Supreme Court of Canada first considered the constitutionality of the dangerous offender provisions in *Lyons*.²⁴ The offender was sixteen years old when he was charged with break-and-enter. He waived his preliminary inquiry and pleaded guilty. The Crown commenced a dangerous offender application, and the trial judge concluded that the requirements had been met, since Lyons had a “sociopathic personality.” In the Supreme Court, it was argued that the indeterminate sentence provisions of the *Criminal Code* infringed *Charter*²⁵ sections 7, 9, 11, and 12. La Forest J., writing for the majority, began by describing the dangerous offender process as one in which an indeterminate sentence is imposed in lieu of a fixed sentence for a serious personal injury offence. It was not based simply on “fears or suspicions about...criminal proclivities.”²⁶ The punishment, in fact, flows from the actual commission of a specific crime. La Forest J. wrote:

It is clear that the indeterminate detention is intended to serve both punitive and preventative purposes. Both are legitimate aims of the criminal sanction.... Part XXI [now Part XXIV] merely enables the court to accommodate its sentence to the common sense reality that the present condition of the offender is such that he or she is not

²² *Supra* note 9 at s. 761(1).

²³ Manson, *supra* note 3 at 328.

²⁴ *Supra* note 18.

²⁵ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter].

²⁶ *Supra* note 18 at para. 24.

inhibited by normal standards of behavioural restraint so that future violent acts can quite confidently be expected of that person.²⁷

He concluded that the provisions did not violate a principle of fundamental justice, nor did they violate section 7 of the *Charter*.

La Forest J. next considered whether the provisions constituted cruel and unusual punishment under section 12 of the *Charter*. He engaged in a gross-disproportionality analysis, asking whether indeterminate detention is unusually severe, and whether the severe sentence serves any additional penological purpose. He concluded that the scheme was appropriately tailored to its target group, and effectively accomplished its goals. The indeterminacy of the sentence was saved by the existence of the parole process, which he claimed “ensures that incarceration is imposed for only as long as the circumstances...require.”²⁸ As Manson noted, La Forest J. was not troubled by the fact that the parole criteria did not require a finding of dangerousness to support continued detention.²⁹

La Forest J. next dismissed arguments under section 9 of the *Charter* that the scheme constituted arbitrary detention. He stated simply that “in no sense of the word can the imprisonment resulting from the successful invocation of Part XXI be considered ‘arbitrary’.”³⁰ He stated that the legislation defines a class of particular offenders, and specifically prescribes the conditions under which they may receive the designation. Thus, there is no element of arbitrariness.

Another challenge was mounted with respect to section 11(f), which guarantees a right to trial by jury for sentences of five or more years.³¹ Dangerous offender hearings are conducted by judge alone. La Forest J. decided that because the dangerous offender application was not a new charge, but part of the sentencing process, section 11 did not apply.

²⁷ *Supra* note 18 at para. 27.

²⁸ *Supra* note 18 at para. 49. But see the discussion above, *supra* note 23 and accompanying text.

²⁹ *Supra* note 3 at 331. Manson argues that this is the weakest part of the Lyons decision, because it fails to appreciate that continuing dangerousness is the main justification for continuing detention. He also argues that as dangerous offenders spend increasing amounts of time in confinement, their ability to create a viable release plan also diminishes, compounding the problem.

³⁰ *Supra* note 18 at para. 61.

³¹ *Charter*, *supra* note 25.

In considering whether the use of psychiatric testimony was fundamentally unfair because of its uncertainty,³² La Forest J. distinguished between infallibility and relevance. He wrote: “Indeed, inherent in the notion of dangerousness is the risk, not the certainty, of harm.”³³ He acknowledged the concerns of Isabel Grant when she wrote that “surely if we add ‘beyond a reasonable doubt’ to a ‘future likelihood’ the sum total can be no greater than a balance of probabilities;”³⁴ but reminded us that the basis of law is not logic, but experience. “The most that can be established in a future context is a likelihood of certain events occurring. To doubt this conclusion is...to doubt the validity of the legislative objectives embodied in Part XXI.”³⁵ Furthermore, La Forest J. asserted that it was entirely logical to be satisfied beyond a reasonable doubt that the test of dangerousness has been met (that there exists a certain potential for harm), without assuming an ability to predict the future. “[P]sychiatric evidence,” the Court claimed, “is clearly relevant to the issue whether a person is likely to behave in a certain way and, indeed, is probably relatively superior in this regard to the evidence of other clinicians and lay persons.”³⁶ In support of this statement, La Forest J. cited an article written by a leading forensic mental health professional and a criminologist.³⁷

In considering the problem of “false positives,” that is, the erroneous over-prediction of future violence, La Forest J. wrote: “This problem does not appear to undermine the utility and fairness of the scheme so much as to fortify the conclusion that the procedural protections accorded the offender, especially on review, ought to be very rigorous.” He indicated that the scheme balances alternative risks: the risk of harm to potential victims and the risk of unnecessarily detaining offenders judged to be dangerous. Since the offender is “in the wrong by the virtue

³² See discussion of the use of psychiatric assessments of dangerousness, *infra*.

³³ *Supra* note 18 at para. 92.

³⁴ Isabel Grant, “Dangerous Offenders” (1985) 9 Dal. L.J. 347 at 360.

³⁵ *Supra* note 18 at para. 93.

³⁶ *Supra* note 18 at para. 97.

³⁷ See Robert J. Menzies, Christopher D. Webster & Diana S. Sepejak, “The Dimensions of Dangerousness: Evaluating the Accuracy of Psychometric Predictions of Violence Among Forensic Patients” (1985) 9 Law and Human Behavior 49, cited by La Forest J. in Lyons, *supra* note 18 at para. 97.

of the risk he represents” we are justified in “imposing on him the risk of unnecessary measures.”³⁸

ii) *Supreme Court Jurisprudence Since Lyons*

The Supreme Court of Canada affirmed and expanded upon *Lyons* in *R. v. Jones*,³⁹ which was a challenge based on sections 7 and 10(b) of the *Charter* to Mr. Jones’s dangerous offender designation.

In November 1986, the appellant was charged with three counts of sexual assault with a weapon and three of unlawful confinement. Prior to election, the appellant’s counsel obtained a court order under what was then section 537(1)(b) of the *Criminal Code*⁴⁰ for a remand to custody for observation to determine whether the accused was sane and fit to stand trial. Two psychiatrists and one psychologist at the forensic institution examined Jones. He was not told that during the 30-day remand, the focus shifted to the determination of an opinion on whether he was a dangerous offender. The doctors concluded he was extremely dangerous and likely to re-offend. The appellant pleaded guilty, and following his conviction, a dangerous offender hearing was held. The Crown attempted to make use of the reports that the clinicians prepared during Jones’s remand, but the defence argued that to admit the results of pre-trial psychiatric exams without the consent or warning of the accused would violate section 7. Additionally, it was claimed that the accused’s section 10(b) right to counsel was violated when he was not advised that his assessments included observations regarding his future dangerousness.

In his majority opinion, Gonthier J. referred to the case of *R. v. Wilband*,⁴¹ where the Court concluded that the rules of evidence regarding hearsay and confessions did not apply to dangerous sex offender proceedings, because as a form of sentencing, guilt had already been established. Similarly, in *R. v. Langevin*,⁴² it was held that neither section 7 nor section 11(c) guaranteed a right to be warned against the possible

³⁸ *Supra* note 18 at para. 100.

³⁹ [1994] 2 S.C.R. 229, (1994) 89 C.C.C. (3d) 353 [Jones cited to S.C.R.].

⁴⁰ *Supra* note 9.

⁴¹ [1967] S.C.R. 14, [1967] 2 C.C.C. 6.

⁴² (1984), 39 C.R. (3d) 333, 45 O.R. (2d) 705 (C.A.).

use of statements made during an initial psychiatric examination in subsequent dangerous offender hearings. Gonthier J. wrote:

I cannot agree with the characterization...that the results of the psychiatric observation are used to “incriminate” the accused at his dangerous offender proceedings... By the time the accused reaches the dangerous offender proceeding state, he has already been found culpable of the offence for which he was charged.⁴³

Gonthier J. then affirmed that dangerous offender proceedings were not characterized as a new trial, and thus were not afforded the same procedural protections. In noting that section 7 was not violated, the Court acknowledged that while these protections extended to the pre-trial period, “statements volunteered by an accused to an agent of the state will not infringe an accused’s section 7 right to silence.”⁴⁴ Jones was not “tricked” into making statements. In fact, he was warned the statements might be used against him in court. Gonthier J. also noted that “in the case of dangerous offender proceedings, it is all the more important that the court be given access to the widest possible range of information in order to determine whether there is a serious risk to public safety.”⁴⁵ To deny the court access to the psychiatrists’ findings, the Court claimed, might hinder the effective determination of the true risk posed by the offender. It was ordered that the evidence emerging from the evaluation be admitted.⁴⁶

The section 10(b) argument was also rejected. Since the Crown was not under an obligation to notify the accused of its intention to make a dangerous offender application prior to a plea being entered, there was no reason that the doctors should have been required to provide such a warning.

Interestingly, Gonthier J. stressed that “[a]n indeterminate sentence is not an unlimited sentence.... The offender faces incarceration only for the period of time that he poses a serious risk to the safety of so-

⁴³ Jones, *supra* note 39 at para. 27.

⁴⁴ *Supra* note 39 at para. 36.

⁴⁵ *Supra* note 39 at para. 45.

⁴⁶ There was a strong dissent of four judges, who concluded that the rule against self-incrimination applied even if dangerous offender hearings are characterized as a form of sentencing.

ciety.”⁴⁷ This notion was also conveyed in *Lyons*,⁴⁸ where La Forest J. referred to the parole process as a legitimizing factor. However, these decisions preceded the changes in Bill C-55,⁴⁹ which increased the initial period of parole ineligibility from three years to seven, and every two years thereafter.⁵⁰ There is no guarantee that the parole board has the capacity (or the will) to accurately reassess the continuing risk for dangerousness.

iii) *Developments in Lower Courts*

The decision of the British Columbia Supreme Court in *R. v. Brown*⁵¹ upheld the *Criminal Code* provisions authorizing the sixty-day remand for psychiatric assessments for dangerous offender applications.⁵² Smith J. held that there was no violation of *Charter* rights, because society’s interest in protecting against future risk outweighed the offender’s right against self-incrimination. However, an offender could not be punished for refusing to participate in the assessment, and this refusal should not lead to an adverse inference.

It is also significant that Smith J. held that an “assessment” under the new section 752.1 did not differ significantly from an “observation” under the previous section 756. Yet, she wrote:

Previously, assessments of this nature were often informal and unstructured, and frequently resulted in opinions that were more impressionistic than reliable. The strategic structural guidelines now used have been found to increase the level of accuracy in an assessment’s prediction of an offender’s risk of future violence.⁵³

She later noted that “‘observation’ under the old regime is negligibly different from ‘assessment’ under the new regime. In effect, no practical difference may be ascertained.”⁵⁴ It is unfortunate that Smith J. did not

⁴⁷ Jones, *supra* note 39 at para. 45.

⁴⁸ *Supra* note 18.

⁴⁹ *Supra* note 7.

⁵⁰ Criminal Code, *supra* note 9 at s. 761(1).

⁵¹ (2000), 142 B.C.A.C. 151.

⁵² *Supra* note 9 at s. 752.1(1).

⁵³ *Brown*, *supra* note 51 at para. 12.

⁵⁴ *Supra* note 51 at para. 28.

take this opportunity to forcefully foreclose the possibility of utilizing any obsolete techniques in the new assessments, even after recognizing their weaknesses.

The Nova Scotia Court of Appeal took a stronger stance in *R. v. J.T.H.*⁵⁵ Freeman J.A., writing for the court, urged judges to give greater weight to empirically-based actuarial studies than to clinical observation in deciding whether to designate someone a dangerous offender.⁵⁶ The accused pleaded guilty to charges of sexual and indecent assault. The Crown had relied on two experts with opposite opinions. Dr. Aquino, head of the Provincial Forensic Psychiatric Service, observed and interviewed the accused during a 30-day remand and concluded that there was a substantial risk he would re-offend, based on his history of deviant sexual impulses. On the other hand, Dr. Kelln, a clinical and forensic psychologist, conducted tests based on actuarial screening tools. These scores are based on interviews, the offender's history, and the nature of his crimes. The results of these tests put the accused at a "moderate" risk of recidivism. Dr. Kelln claimed these tests were "state of the art," and superior to clinical assessment. The defence psychologist agreed. Freeman J.A. wrote:

If predictions reflecting clinical judgments are little better than mere chance, little confidence can be placed in them by courts seeking to satisfy themselves as to whether there is a likelihood of reoffending. Even though the data bases forming the foundations of the actuarial instruments are still works in progress...and predictions based upon them are less than perfect, they have the virtue of taking into account all known relevant considerations and not merely the most striking ones. They appear to be the best tools available, and that may account for the special status accorded assessments performed by experts in s. 752.1.⁵⁷

⁵⁵ (2002), 170 C.C.C. (3d) 405, 2002 NSCA 138.

⁵⁶ This is sage advice considering findings such as those in Daniel A. Krauss & Dae Ho Lee, "Deliberating on Dangerousness and Death: Jurors' Ability to Differentiate Between Expert Actuarial and Clinical Predictions of Dangerousness" (2003) 26 *Int'l J.L. & Psychiatry* 113. The researchers affirm the superiority of actuarial measures over clinical opinion, but note that jurors tend to be more influenced by clinical predictions of dangerousness than actuarial ones, even after cross-examination on the testimony. The same effect might hold for judges.

⁵⁷ *Supra* note 55 at para. 30.

He equated Dr. Aquino's clinical assessment to "flipping a coin." He concluded by noting that a sufficient likelihood of threat is established when such test results show the risk of re-offending to be in the "high" range, or more than 50%. The accused's dangerous offender status was overturned.

In *Neve*,⁵⁸ the accused appealed a designation as a dangerous offender. She was a prostitute from the age of 12, and had several convictions, both as a young offender and adult, none of which involved a serious injury. In the instant case, she and a friend took a woman to a field, cut away her clothing, and drove away. The trial judge concluded that Neve was not a psychopath, but gave her an indeterminate sentence because she did not intend to change her lifestyle or accept treatment.

The Alberta Court of Appeal upheld the conviction, but overturned the dangerous offender designation. The Court held that it was unreasonable to sentence Neve as a dangerous offender, as she had a short criminal record for violence, and she did not "fall within that very small group that Parliament intended be designated as dangerous offenders."⁵⁹ To meet the test, there must be a pattern of repetitive violent or aggressive behaviour from which it is possible to conclude that the offender is a serious risk to others. The focus is on *past conduct*, not character. The Court suggested a three-part process, which considers prospects for treatment, the seriousness of the criminal conduct, and the offender's circumstances.⁶⁰

The Court also made the noteworthy observation that "[t]he problem with all this [expert testimony] is that the doctors may have little idea what any of these [legal] terms mean. And yet, obviously, their opinions will be based on whatever interpretation they give to those terms."⁶¹ Furthermore, it was suggested that "[t]o assist the psychiatrists in giving opinions on what a pattern reveals, both in terms of past conduct and

⁵⁸ *Supra* note 4.

⁵⁹ *Supra* note 4 at para. 3.

⁶⁰ See also *R. v. George* (1998), 126 C.C.C. (3d) 384 (B.C.C.A.). George pleaded guilty to manslaughter for killing a 79-year-old man by beating him in the face with a rock. He was an aboriginal person who was likely born with fetal alcohol syndrome and had a low IQ. The Court allowed his appeal from a dangerous offender designation. The killing was markedly different from the other incidents in George's history, and the trial judge erred in considering his childhood behaviour as evidence of an aggressive pattern. The social realities of the accused's background necessitated the differentiation between childhood aggression and adult criminality.

⁶¹ *Supra* note 4 at para. 206.

future dangerousness, it would be advantageous if the key elements of the pattern were put to them.”⁶²

3. The Impact of Dangerousness in Sentencing the Mentally Disordered Offender

The following cases did not involve a dangerous offender application, but instead discussed mental disorder and the Not Criminally Responsible (NCR) defence. However, they are relevant for consideration here because of their discussion of the impact of dangerousness on sentencing. Many of the factors relevant to the court in the NCR context may have increasing influence on the results of dangerous offender hearings in light of the focus on personal circumstances mandated by *Neve*. There is little reason to believe that there are significant differences in the circumstances or prospects of those who are “dangerous” because they are considered mentally ill, and those who are “dangerous” as a result of being labelled such by the court.

In *Winko v. British Columbia (Forensic Psychiatric Institute)*,⁶³ the accused had a long history of mental illness, and had been diagnosed with chronic residual schizophrenia. He was arrested in 1983 for attacking two individuals on the street. At trial, he was found NCR, and a conditional discharge was ordered under section 672.54 of the *Criminal Code*.⁶⁴ The accused challenged the constitutionality of the provisions of the *Code* dealing with the review of NCR accused.

The majority held that Part XX.1 of the *Criminal Code* created a new alternative for NCR defendants, allowing an individualized assessment to determine whether the person poses a continuing threat to society, with an emphasis on providing treatment. Section 672.54 does not create a presumption of dangerousness, and should not impose a burden of proving lack of dangerousness on the accused. A Review Board *must*

⁶² *Supra* note 4 at para. 207. See also Fenna H. Poletiek, “How Psychiatrists and Judges Assess the Dangerousness of Persons with Mental Illness: An ‘Expertise Bias’” (2002) 20 *Behav. Sci. & L.* 19, where it is argued that differences between medical and legal experts in defining dangerousness leads to confusion. Judges define dangerousness more often as harming others, whereas psychiatrists more often include harm to self in the definition.

⁶³ [1999] 2 S.C.R. 625, [1999] S.C.J. No. 31 [*Winko*]. See also *R. v. LePage*, [1999] 2 S.C.R. 744 (*Winko*’s companion case).

⁶⁴ *Supra* note 9.

direct an absolute discharge if it believes that the accused is not a significant threat. It was noted that the only constitutional basis on which the criminal law may restrict the liberty of an NCR accused is the protection of the public from significant threats to safety.

This procedure differs markedly from that used in dangerous offender proceedings, in that if the NCR accused *is* found to be a significant threat to safety, the Board may order that the accused be discharged subject to conditions, or detained. Of course, a finding of dangerousness during a dangerous offender hearing leads to mandatory confinement. Besides the difference in moral culpability for committing the offence,⁶⁵ it is not clear why this difference should exist. In both cases, the primary concern is said to be protecting the public from potential harm. Given that the NCR accused presents the same potential risk, they should presumably be subject to the same restrictions. *Winko* also directs Review Boards to make the least onerous orders possible considering both the need to protect society from danger, and the personal needs of the accused.⁶⁶ The fact is that those receiving the much more restrictive dangerous offender designation also have unique psychological and social needs that are deserving of special attention, perhaps more so, because their condition is so difficult to ameliorate.

In *R. v. Knoblauch*,⁶⁷ the Supreme Court of Canada restored the conditional sentence of a trial judge, which included an order that required Knoblauch to reside in a secure mental health institution. Knoblauch had a long history of mental illness, and had threatened to use hazardous explosives. The Court held that even very dangerous offenders could receive conditional sentences,⁶⁸ if the judge concludes that the community's safety would not be endangered because of the conditions imposed. Arbour J. concluded that since Knoblauch's dangerousness was a com-

⁶⁵ It is assumed that those who are not responsible for their actions shouldn't be "punished" for them, whereas dangerous offenders are held responsible for their crimes.

⁶⁶ This principle from *Winko* is applied in *Penetanguishene Mental Health Centre v. Ontario (A.G.)*, [2004] 1 S.C.R. 498, and its companion case *Pinet v. St. Thomas Psychiatric Hospital*, [2004] 1 S.C.R. 528.

⁶⁷ [2000] 2 S.C.R. 780, [2001] 2 W.W.R. 201.

⁶⁸ The Court stresses that the conditional sentencing provisions (s. 742.1) do not exclude "dangerous offenders" from access to conditional sentences. Presumably, this does not include individuals officially designated as dangerous offenders under 753(1), because of the mandatory effect of s. 753(4), but refers instead to offenders who have engaged in dangerous activities more generally. Knoblauch was not a designated dangerous offender.

bination of his mental illness and his access to explosives, if the latter is precluded, the risk disappears. Incarceration similarly eliminates the danger, but does little to address the mental illness. The Court asserted that this methodology might allow mentally disordered offenders to take advantage of resources available in the community.

4. Summary

Because of their perceived risk to the safety of the community, individuals labelled a “dangerous offender” by the court are subject to indefinite confinement. This process has been held to be constitutional by the Supreme Court of Canada. In deciding whether an accused is sufficiently dangerous, the court will order an assessment by a forensic mental health expert. The individual circumstances of the accused should be considered in context as a factor in determining the risk that they pose.

II. THE PSYCHIATRIC ASSESSMENT OF DANGEROUSNESS

As noted above, in determining whether a particular individual qualifies as a dangerous offender, the court will order an assessment performed by a forensic expert,⁶⁹ and this assessment often has a significant impact on the sentencing disposition. There can be a great deal of variation in how an individual assessor chooses to perform this task, in part because there are numerous psychological measures that have been designed for this specific purpose. Here, we will briefly consider the development of various forensic assessment techniques. Then, we will examine two competing systems used in evaluating whether an individual is prone to dangerous behaviour, the American Psychiatric Association’s *Diagnostic and Statistical Manual* (currently the DSM-IV)⁷⁰ diagnosis of Antisocial Personality Disorder (APD); and Robert Hare’s classification of psychopathy using his Psychopathy Checklist—Revised (PCL-R).⁷¹ In the vast majority of dangerous offender applications, one or both of

⁶⁹ *Criminal Code*, *supra* note 9 at s. 752.1(2).

⁷⁰ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Washington, DC: APA, 1994).

these methods will be utilized. They will be described and critiqued here, in an effort to determine whether they are sufficiently accurate to justify their considerable influence on the lives of those who face a lifetime of institutionalization.

1. Predicting Violence: A Brief History

Prior to the 1970s, “dangerousness” was not of much interest to forensic scientists. It was assumed that those involved in the administration of justice knew which individuals deserved particular attention because of their violent propensity. In 1974, however, Steadman and Coccozza⁷² published the results of their study that followed 98 patients who were abruptly released from detention, or into less secure conditions, despite having been classified as a “danger to the public.”⁷³ After two to three years, only about 20% were arrested, and about 2% had become involved in violent acts. This drew attention to the “false positive problem,” the notion that the prevalence of dangerousness was drastically over-perceived.⁷⁴ Steadman and Coccozza concluded that predicting violence was

⁷¹ See Robert D. Hare, *Manual for the Hare Psychopathy Checklist—Revised* (Toronto: Multi-Health Systems, 1991).

⁷² Henry J. Steadman & Joseph J. Coccozza, *Careers of the Criminally Insane: Excessive Social Control of Deviance* (Lexington, Mass.: Lexington Books, 1974).

⁷³ See *Baxstrom v. Herold*, 383 U.S. 107 (1966). Baxstrom was civilly committed at the conclusion of his criminal sentence because the authorities considered him too dangerous to be released. Baxstrom petitioned for a writ of habeas corpus, which the U.S. Supreme Court granted, and held that he had been denied the equal protection of jury review that was available to others who were civilly committed in the State of New York. Warren C.J. wrote: “The capriciousness of the classification employed by the State is thrown sharply into focus by the fact that the full benefit of a judicial hearing...is withheld only in the case of civil commitment of one awaiting expiration of a penal sentence. A person with a past criminal record is presently entitled to a hearing on the question whether he is dangerously mentally ill so long as he is not in prison at the time civil commitment proceedings are instituted. Given this distinction, all semblance of rationality of the classification...disappears” (at 115). As a result of this decision, nearly 1000 inmates in hospitals for the criminally insane were transferred to civil hospitals. Eventually about half of these were released into the community. See further discussion in Christopher D. Webster *et al.*, *The Violence Prediction Scheme: Assessing Dangerousness in High Risk Men* (Toronto: Centre of Criminology, 1994) at 2.

⁷⁴ See Christopher D. Webster & Gerard Bailes, “Assessing Violence Risk in Mentally and Personality Disordered Individuals” in Clive R. Hollin, ed., *Handbook of Offender Assessment and Treatment* (Toronto: John Wiley & Sons, 2001) 71 at 72.

virtually impossible, largely due to the fact that it is difficult in general to predict events that occur with only a low frequency.⁷⁵

In the 1980s, Monahan published his influential work, which distinguished between clinical and actuarial prediction.⁷⁶ He argued that certain demographic variables, such as past crimes and socio-economic status, are correlated to future dangerousness. However, he viewed mental illness as uncorrelated to the risk of future violence. Monahan encouraged the use of short-term studies using clearly defined predictors and outcomes.

In response to the demand from mental health and correctional professionals for a practical instrument to use in the field, a group of authors based at the Penetanguishene Mental Health Centre in Ontario developed *The Violence Prediction Scheme*.⁷⁷ Using sophisticated statistical techniques, the authors evaluated data on approximately 600 men who had committed at least one violence offence. They were followed up over a seven-year period. In creating the Violence Risk Appraisal Guide (VRAG), they determined which factors were most correlated with engaging in violence after release. These factors, including such characteristics as elementary school maladjustment, could be compared to determine an offender's relative risk.

There was some dissatisfaction with these early efforts, because studies showed that they generally had a low reliability. Clinicians desired a universal and systematic tool to utilize in completing their assessments. The DSM-IV and the PCL-R both promised to offer advances in this regard.

⁷⁵ But see Saleem Shah, "Dangerousness: Conceptual, Prediction, and Public Policy Issues" in J. Ray Hays, Thomm Kevin Roberts & Kenneth S. Solway, eds., *Violence and the Violent Individual* (New York: Spectrum Publications, 1981) 151. Shah claims that saying something is *difficult* is not the same as saying it is *impossible*, and that it is unlikely that all clinicians are generally poor at assessing risk for violence. See also Webster & Bailes, *supra* note 74 at 73.

⁷⁶ John Monahan, *Predicting Violent Behaviour: An Assessment of Clinical Techniques* (Beverly Hills, Cal.: Sage, 1981).

⁷⁷ See Webster *et al.*, *supra* note 73.

2. The DSM-IV: Antisocial Personality Disorder

The authors of the DSM emphasize that the assessment of any disorder should focus on publicly observable behaviours, because these are the only features that are amenable to reliable assessment.⁷⁸ Based on this assumption, the DSM describes a personality disorder that is typified by a “pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood.”⁷⁹ It labels this condition Antisocial Personality Disorder (APD).

Because of the poly-thetic approach to categorization in the DSM, the diagnosis can be made in a vast number of ways. Research has reported that there are a total of 32,647 variations in the DSM-IV.⁸⁰ Despite this, some supporters of the DSM diagnosis have argued that APD is the only personality disorder to consistently achieve high levels of reliability in practice.⁸¹

A task force committee of the American Psychiatric Association decided the content of DSM criteria for APD.⁸² As Hart and Hare point out, however, the criteria do not constitute a scale or a test.⁸³ Instead, the clinician determines if a given criterion is present or absent—the final decision is either no diagnosis, or a lifetime label of APD. Additionally, no consistent method is specified for assessing the disorder; researchers have used interviews, case histories, and files reviews, or a combination of these methods.

⁷⁸ See e.g. Stephen D. Hart & Robert D. Hare, “Psychopathy: Assessment and Association with Criminal Conduct” in David M. Stoff, James Breiling & Jack D. Maser, eds., *Handbook of Antisocial Behavior* (Toronto: John Wiley & Sons, 1997) 22.

⁷⁹ *Supra* note 70 at 645.

⁸⁰ Richard Rogers *et al.*, “Prototypical Analysis of Antisocial Personality Disorder: A Study of Inmate Samples” (2000) 27 *Criminal Justice and Behavior* 256.

⁸¹ For a review, see e.g. Scott O. Lilienfeld, Cynthia Purcell & Jacqueline Jones-Alexander, “Assessment of Antisocial Behaviour in Adults” in David M. Stoff, James Breiling & Jack D. Maser, eds., *Handbook of Antisocial Behavior* (Toronto: John Wiley & Sons, 1997) 60.

⁸² In fact, all criteria in the DSM is based on consensus. See E. H. Marcus, “Unbiased Medical Testimony: Reality or Myth?” (1985) 6 *Am. J. For. Psych.* 3. An example of this process in action occurred in 1973, when it was decided to remove homosexuality from the list of disorders based on a vote of the trustees and a 60% vote of the membership.

⁸³ *Supra* note 78.

The DSM-IV lists three major criteria and several subcriteria for an official diagnosis. Generally, these include: (a) a pervasive pattern of disregard for the rights of others since the age of 15, indicated by factors such as impulsivity, reckless disregard for the safety of self or others, lack of remorse, and failure to conform to social norms with respect to lawful behaviour; (b) a current age of at least 18; and (c) evidence of Conduct Disorder (another DSM diagnosis involving traits such as aggressiveness, destructiveness, and deceitfulness) before the age of 15.⁸⁴ This misconduct must not have occurred during a schizophrenic or manic episode. The DSM also notes that these individuals often lack empathy, tend to be callous and cynical, and have inflated and arrogant self-appraisals. The diagnosis is much more common in males, and tends to be related to low socio-economic status. Overall prevalence in community samples is about 3% in males, and 1% in females, however, the rates are higher in forensic settings. The disorder also tends to remit with age, particularly by the forties.

Despite, or perhaps because of, this seemingly black-and-white approach, the definition of APD has received a great deal of criticism. It is not clear that a diagnosis as complex as “antisocial personality” can be made using a categorical method. The DSM permits no degrees of disorder—the criteria for diagnosis are met, or they are not. Some researchers have suggested that psychopathy or antisocial personality is better conceived of as a dimensional construct, with traits existing in all individuals to a greater or lesser degree.⁸⁵ A dimensional model may allow for greater precision in classifying offenders who exhibit a myriad of personality traits and behaviours.

Another serious concern is the reality that the DSM diagnosis of APD suffers from both over- and under-inclusiveness. Chronic antisocial behaviour in adults may be due to a wide variety of factors, but the DSM has virtually equated APD with chronic criminality. As one researcher has pointed out, “*almost any offender in a correctional setting is hypothetically entitled to a diagnosis of antisocial personality disorder.*”⁸⁶

⁸⁴ APA, *supra* note 70.

⁸⁵ See *e.g.* Hart & Hare, *supra* note 78.

⁸⁶ Hans Toch, “Psychopathy or Antisocial Personality in Forensic Settings” in Theodore Milton *et al.*, eds., *Psychopathy: Antisocial, Criminal, and Violent Behavior* (New York: Guilford Press, 1998) 144 at 149 [emphasis in original].

APD also encompasses a variety of conditions in addition to those traditionally associated with psychopathy, including such guiltless traits as cultural deviance. White noted that APD is also complicated by substance abuse.⁸⁷ The diagnosis co-occurred with alcohol abuse 15.5 times more often than expected by chance. Some symptoms of APD, such as arrests, may be the direct result of the substance abuse, rather than the personality disorder. In fact, one study estimated the prevalence of APD in males generally by age 30 at 47%.⁸⁸

On the other hand, some researchers have argued that the DSM is under-inclusive, providing a narrow conceptualization of APD.⁸⁹ The diagnosis may fail to detect true psychopaths who have managed to avoid a great deal of contact with the legal system—in other words, the truly “successful” psychopaths.⁹⁰ Furthermore, the aggressive conduct that defines APD tends to be rare in women, which may result in them receiving an alternative diagnosis such as Borderline Personality Disorder, when in fact APD may be more appropriate.

It should be noted, as Rogers pointed out, that the final DSM-IV criteria were never tested, despite the fact that substantial modifications were made.⁹¹ Although certain personality traits used by Hare and others promoting the alternative Psychopathy model were recognized, they were relegated to “associated features.” Rogers emphasized the fact that the conception of APD as outlined in the DSM needs to be re-examined. It is interesting to note the following warning given by the American Psychiatric Association in the DSM itself:

⁸⁷ Helene Raskin White, “Alcohol, Illicit Drugs, and Violence” in David M. Stoff, James Breiling & Jack D. Maser, eds., *Handbook of Antisocial Behavior* (Toronto: John Wiley & Sons, 1997) 511.

⁸⁸ See Mark D. Cunningham & Thomas J. Reidy, “Antisocial Personality Disorder and Psychopathy: Diagnostic Dilemmas in Classifying Patterns of Antisocial Behavior in Sentencing Evaluations” (1998) 16 *Behav. Sci. & L.* 333.

⁸⁹ See *e.g.* Lilienfeld, Purcell & Jones-Alexander, *supra* note 81.

⁹⁰ See also Thomas F. Oltmanns & Robert E. Emery, *Abnormal Psychology*, 2d ed. (Upper Saddle River, N.J.: Prentice Hall, 1998) at 343. The authors note that the DSM-III was highly criticized for blurring the distinction between antisocial personality and criminality; it was difficult to diagnose APD in someone who didn’t already have a criminal record, and moved in the direction of including many more criminals within the boundaries of the disorder. The DSM-IV partially responded to this by moving back to some of the original traits suggested by Cleckley (*infra* note 93), but at the expense of greater reliability.

⁹¹ *Supra* note 80.

[W]hen the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. . . . The use of DSM-IV in forensic settings should be informed by an awareness of the risks and limitations [of misuse] discussed above.⁹²

3. The PCL-R: Psychopathy

It was Cleckley who, in 1941, first systematically described the condition we now know as psychopathy.⁹³ For decades, Hare and his colleagues developed and attempted to validate a reliable rating scale that could tap the key features of this condition.⁹⁴ The PCL-R uses expert observer ratings, based on a review of case histories and records, supplemented by interviews and behavioural observations, to make a diagnosis. The Revised version includes 20 items, designed for use with an adult male forensic population. Items are scored on a 3-point scale (from 0 = *item does not apply* to 2 = *item definitely applies*). Total scores range from 0 to 40, and a score of 30 is conventionally accepted as indicating the presence of psychopathy. The scale has an internal structure, divided into two factors. Factor 1 corresponds to interpersonal and affective features (*e.g.*, callousness), and Factor 2 reflects antisocial behaviour (*e.g.*, chronically unstable lifestyle).⁹⁵

In the Canadian correction system, risk assessment for the purposes of conditional release, treatment, and dangerous offender hearings typically include an evaluation of psychopathy using the PCL-R. These assessments are based on a structured interview as well as historical information (case files).⁹⁶ Some authors have even suggested that a failure to consider psychopathy when conducting a risk assessment may be un-

⁹² *Supra* note 70 at xxiii.

⁹³ Hervey M. Cleckley, *The Mask of Sanity* (St. Louis, Mo.: Mosby, 1941).

⁹⁴ For details of the psychometric properties of the PCL-R, see Hare, *supra* note 71. For an overview of psychometric assessment in forensic settings generally, including the PCL-R, see Gisli H. Gudjonsson, "Psychometric Assessment" in Clive R. Hollin, ed., *Handbook of Offender Assessment and Treatment* (Toronto: John Wiley & Sons, 2001) 111.

⁹⁵ Michael Woodworth & Stephen Porter, "In Cold Blood: Characteristics of Criminal Homicides as a Function of Psychopathy" (2002) 111 *Journal of Abnormal Psychology* 436.

⁹⁶ Stephen D. Hart, "The Role of Psychopathy in Assessing Risk for Violence: Conceptual and Methodological Issues" (1998) 3 *Legal and Criminological Psychology* 121.

reasonable (from a legal perspective) and unethical (from a professional perspective).⁹⁷ The use of the PCL-R in dangerous offender hearings was discussed in *William Head Institution v. Canada (A.G.)*,⁹⁸ where the judge noted that the scale can be used to predict recidivism, and even suggested that, despite Dr. Hare's recommendation, assessors possessing only a Master's degree should be permitted to perform PCL-R assessments for the purposes of the criminal justice system.⁹⁹

Hare describes psychopathy as a chronic mental condition associated with a specific set of symptoms that impairs psychosocial functioning.¹⁰⁰ Psychopathy is understood as a cluster of personality traits, including remorselessness, callousness, deceitfulness, egocentricity, failure to form close emotional bonds, low anxiety proneness, superficial charm, and externalization of blame.¹⁰¹ This is exhibited as a personality disorder characterized by an emotional deficit, accompanied by a lack of respect for the rights of others, and of social norms and rules. Clinically, a psychopath is "a dangerous person who preys on others across the life span."¹⁰²

A diagnosis of psychopathy has been associated with aggressive tendencies. A number of studies have linked higher PCL-R scores with violent behaviour. For example, one study showed a violent re-offence rate of 0% for nonpsychopaths, 7.3% for a mid-level group, and 25% for psychopaths. Failure rates (recidivism) were 40% for nonpsychopaths, and 85% for psychopaths.¹⁰³ Similarly, in one study, the violent recidivism rates of mentally disordered offenders from a maximum-security psychiatric hospital were compared over a 10-year follow-up period. A total of 40% of the inmates committed a violent offence. However, the total for those considered psychopathic was 77%.¹⁰⁴

⁹⁷ (2003), 237 F.T.R. 127, 2003 FC 780.

⁹⁸ *Ibid.* at para. 23.

⁹⁹ See *e.g.* Hart & Hare, *supra* note 78.

¹⁰⁰ Jennifer L. Skeem, John Monahan & Edward P. Mulvey, "Psychopathy, Treatment Involvement, and Subsequent Violence Among Civil Psychiatric Patients" (2002) 26 *Law and Human Behavior* 577.

¹⁰¹ Woodworth & Porter, *supra* note 96 at 436.

¹⁰² See Cunningham & Reidy, *supra* note 88.

¹⁰³ Grant T. Harris, Marnie E. Rice & Catherine A. Cormier, "Psychopathy and Violent Recidivism" (1991) 15 *Law and Human Behavior* 625.

¹⁰⁴ Hart & Hare, *supra* note 78.

Despite these findings, it is important not to confuse the concept of psychopathy with that of criminality. Criminal conduct refers to behaviour that causes significant harm to others and violates social norms.¹⁰⁵ Criminal conduct is much more pervasive in society than psychopathy, and some even consider it normal behaviour for those at certain points in development and in given social circumstances.¹⁰⁶ However, Hart and Hare claim that there is a clear link between psychopathy and crime, in that many psychopaths do engage in chronic criminal conduct, and tend to do so at a high rate and early in their life. Because of this, psychopaths are responsible for a disproportionate amount of crime in society. Crimes committed by these individuals tend to be serious and the behaviour is persistent; many psychopaths are considered “career criminals.”¹⁰⁷

Psychopaths are also considered “high-density” offenders.¹⁰⁸ They tend to commit offences at a relatively high rate (when they are not incarcerated), and they commit a wide variety of offences. Studies have shown that highly psychopathic offenders had an average offence rate that was more than double that of those who rated low on the PCL-R. Hare suggested that in general, psychopaths tend to be more criminally active than nonpsychopaths across all variables studied.

The literature provides little evidence that psychopaths respond favourably to treatment, or at least, that an effective treatment program has ever been developed. In fact, some evidence has suggested that treatment may actually make psychopathic offenders worse. It is possible that psychotherapy helps these individuals to improve their manipulation and deception skills by giving them insight into human behaviour in general without really learning anything about themselves. Psychopaths also seem adept at appearing to improve over the course of treatment, in order to become candidates for early release, only to re-offend

¹⁰⁵ See *e.g.* Terrie Moffitt, “Adolescence-Limited and Life-Course-Persistent Antisocial Behaviour: A Developmental Taxonomy” (1993) 100 *Psychological Review* 674. Moffitt suggests that there are two types of antisocial behaviour. One type, *adolescence-limited antisocial behaviour*, is a common, adaptive form that disappears by the time the person reaches adulthood. This type is unrelated to APD or psychopathy, but presumably accounts for most antisocial behaviour. *Life-course-persistent antisocial behaviour* is exhibited by relatively few individuals.

¹⁰⁶ Hart & Hare, *supra* note 78.

¹⁰⁷ Hart & Hare, *supra* note 78.

¹⁰⁸ Robert D. Hare *et al.*, “Psychopathy and the Predictive Validity of the PCL-R: An International Perspective” (2001) 18 *Behav. Sci. & L.* 623.

shortly after re-entering the community.¹⁰⁹ However, the main basis of these beliefs, a study conducted at the Penetanguishene forensic hospital, may have been seriously flawed. The Treatment Community used by the researchers included radical, unconventional components. Patients were required to spend up to two weeks in “nude encounter groups” where they were fed through tubes in the walls, and were administered LSD, alcohol, and other substances in order to disrupt their aloofness and hostility, increase their anxiety, and make them chemically dependent so they would be more “accessible” for treatment.¹¹⁰ Clearly, such treatment is completely inappropriate. Recent research has suggested that psychopaths do experience some improvement with treatment, although the results reflect only modest gains.¹¹¹

The PCL-R was developed as an alternative to the diagnostic method employed in the DSM. However, there is a strong association between a PCL-R finding of psychopathy and a DSM diagnosis of APD,¹¹² with the major difference being in prevalence rates. DSM criteria estimate the presence of APD in up to 80% of offenders. The PCL-R, however, suggests that only 15-30% of this same population are psychopathic.¹¹³ These findings suggest that psychopathy is a more precise construct. As one study noted:

Mental health experts performing forensic assessments for sentencing purposes often describe defendants as displaying Antisocial Personality Disorder...or some variation of the term. This diagnosis may have a profoundly aggravating effect on sentencing considerations, particularly in creating expectations that no rehabilitation is possible and that future criminal violence is inevitable.... In this regard, APD as a diagnostic construct becomes reified...and takes on a life of its own well beyond the underlying scientific support.¹¹⁴

¹⁰⁹ For a discussion of this, see Skeem, Monahan & Mulvey, *supra* note 101 at 579.

¹¹⁰ Skeem, Monahan & Mulvey, *supra* note 101 at 582.

¹¹¹ Hart & Hare, *supra* note 78. As the authors point out, about 90% of those diagnosed with the PCL-R criteria meet DSM criteria for APD as well, but only about 30% of APD offenders meet PCL-R criteria for psychopathy.

¹¹² See also Cunningham & Reidy, *supra* note 88.

¹¹³ Cunningham & Reidy, *supra* note 88 at 333-34.

¹¹⁴ Cunningham & Reidy, *supra* note 88 at 334.

The authors further advised that:

Psychopathy [measured by the PCL-R] is emerging as a discrete clinical entity which may be more precise and reliable than APD in identifying a subset of criminals who are at greater risk of general, as well as violent criminal recidivism. However, reification issues also apply to psychopathy. Research supports a probabilistic rather than an absolutist application of the concept.¹¹⁵

4. Summary

In completing a dangerousness assessment, mental health professionals use a variety of techniques. The most popular are the DSM diagnosis of APD, and the PCL-R analysis of psychopathy. The PCL-R is currently the most reliable risk assessment tool available; however, no forensic assessment technique can predict dangerousness with a very high level of accuracy.

IV. MAKING THE CASE AGAINST THE USE OF PSYCHIATRIC ASSESSMENTS IN COURT

1. Unreliability of Assessments

Christopher Slobogin noted the irony inherent in the law of dangerousness.¹¹⁶ In April 1983, the District of Columbia's Superior Court ruled in *In re Wilson*,¹¹⁷ that psychiatric testimony on risk of future dangerousness was too unreliable to be used in civil hospital commitments. At the same time, the Supreme Court of the United States, in *Barefoot v. Estelle*,¹¹⁸ held the same type of testimony trustworthy enough to support a death sentence. In *Barefoot*, the petitioner was convicted in a Texas state court for murdering a police officer, and he was sentenced to death. The Supreme Court denied his habeas corpus petition, on the basis that

¹¹⁵ Christopher Slobogin, "Dangerousness and Expertise" (1984) 133 U. Pa. L. Rev. 97.

¹¹⁶ 33 Crim. L. Rep. (BNA) 2115 (1983).

¹¹⁷ 463 U.S. 880 (1983) [*Barefoot*].

¹¹⁸ *Ibid.* at 897.

there was no merit to his argument that psychiatrists are incompetent to predict with acceptable reliability that a particular criminal will commit future crimes. White J. held that there was no violation of the Constitution, and, indeed, “prediction of future criminal conduct is an essential element...[of] our criminal justice system.”¹¹⁹ Amazingly, this was despite the position of the American Psychiatric Association (APA), who, in support of the petitioner, filed an amicus brief suggesting that two out of three predictions of long-term future violence made by psychiatrists are wrong. The APA further argued that “a layman with access to relevant statistics can do at least as well and possibly better” in predicting dangerousness.¹²⁰ One of the State’s psychiatrists asserted that he was “100% sure” that an individual with the characteristics described to him in a hypothetical would commit acts of violence in the future.¹²¹

Ultimately, and especially with regard to the criminal law process, it is not helpful to decide if an individual is “dangerous” in the abstract. What we really want to determine is whether a person will engage in socially unacceptable behaviour, so detrimental to the community, that it justifies engaging in pre-emptive action. The line between a “normal” criminal and a “dangerous” one is, at best, vague, and yet the power vested in the individual who draws that line is significant. As John Hinton noted, “[i]n reality, psychiatrists may be given the ultimate power of judge and jury in deciding both admission and discharge from places of indeterminate detention.”¹²²

Ronald Blackburn commented that “it has become apparent that neither clinicians nor behavioural scientists have demonstrated the ability to distinguish clearly between those who are likely to exhibit dangerous behaviour and those who are not.”¹²³ In his survey of the data, Monahan summarised the results of several attempts to identify which offenders

¹¹⁹ *Ibid.* at 922.

¹²⁰ *Ibid.* at 905.

¹²¹ John W. Hinton, “Ethics, Theory, Research and Practice: An Overview” in John W. Hinton, ed., *Dangerousness: Problems of Assessment and Prediction* (London: George Allen & Unwin, 1983) 1 at 1.

¹²² Ronald Blackburn, “Psychometrics and Personality Theory in Relation to Dangerousness” in John W. Hinton, ed., *Dangerousness: Problems of Assessment and Prediction* (London: George Allen & Unwin, 1983) 57.

¹²³ John Monahan, “The Prevention of Violence” in John Monahan, ed., *Community Mental Health and the Criminal Justice System* (New York: Pergamon, 1976).

released from institutions would commit violent crimes. He found that between 54% and 99% of those predicted to be dangerous did not subsequently commit such crimes.¹²⁴ Blackburn noted that in light of such findings, dangerousness was significantly overestimated in the American criminal justice system.¹²⁵ Research in England confirmed that both psychiatrists and the courts overestimated the risks of dangerousness, and one author noted that psychiatrists might be responsible for “restraining three or four patients in order to prevent one from committing another violent [offence].”¹²⁶ Similar concerns have also been expressed in the Canadian criminal law context.¹²⁷

In their renowned criticism of psychiatric expertise, Ennis and Litwack concluded:

[T]here is literally no evidence that psychiatrists reliably and accurately can predict dangerous behaviour. To the contrary, such predictions are wrong more often than they are right. It is inconceivable that a judgment could be considered an “expert” judgment when it is less accurate than the flip of a coin.¹²⁸

Concerned with the use of these predictions in American death penalty cases, Ewing argued that the rendering of these predictions by mental health experts is contrary to the scientific and healing traditions associ-

¹²⁴ *Supra* note 123 at 58.

¹²⁵ Cyril Greenland, “Dangerousness, Mental Disorder, and Politics” in Christopher D. Webster, Mark H. Ben-Aron & Stephen J. Hucker, eds., *Dangerousness: Probability and Prediction, Psychiatry and Public Policy* (Cambridge: Cambridge University Press, 1985) 25 at 30.

¹²⁶ See e.g. Don Stuart, *Canadian Criminal Law: A Treatise*, 4th ed. (Toronto: Carswell, 2001) at 60-61. Professor Stuart notes that both clinical analysis and an examination of past behaviour have failed to accurately predict dangerousness, but cites recent research which incorporates actuarial predictions and clinical appraisals which is more promising, at least for the purposes of creating “risk categories”. He further observes that “the mountain of available research data leads thinking lawyers to be suspicious of firm psychiatric diagnosis, treatment claims or predictions about dangerousness” (at 371).

¹²⁷ Bruce J. Ennis & Thomas R. Litwack, “Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom” (1974) 62 Cal. L. Rev. 693 at 737. The authors go so far as to recommend that courts should limit the testimony of psychiatrists to descriptive statements, excluding diagnoses, judgments and predictions, effectively removing their “expert” status (at 696).

¹²⁸ Charles P. Ewing, “‘Dr. Death’ and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings” (1982) 8 Am. J. L. & Med. 407.

ated with these professions.¹²⁹ He urged psychiatrists and psychologists to adopt an ethical ban on predictions of dangerousness where capital sentencing was possible. One review of testimony given during capital risk assessments listed numerous errors mental health professionals fell prey to, including failure to consider context, over-reliance on clinical interviews, misapplication of psychological testing, and misuse of patterns of behaviour.¹³⁰ Noting the consequences of several of these failings, Greenberg suggested that psychiatric diagnoses not be used in forensic settings, and recommended instead an emphasis on functional analyses.¹³¹

Eugenia La Fontaine asserted that due to the severity of the consequences, higher standards of reliability should be required when determining the admissibility of evidence during capital sentencing, and that expert predictions of dangerousness in such cases are unconstitutional.¹³²

2. Dissenting Opinions

There are, of course, those who hold contrary opinions. Randy Otto claims that the empirical literature in this area has been misinterpreted.¹³³ He suggests that there were limitations in the first generation of

¹²⁹ Mark D. Cunningham & Thomas J. Reidy, “Don’t Confuse Me with the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing” (1999) 26 *Criminal Justice and Behavior* 20.

¹³⁰ Stuart A. Greenberg, Daniel W. Shuman & Robert G. Meyer, “Unmasking Forensic Diagnosis” (2004) 27 *Int’l J.L. & Psychiatry* 1.

¹³¹ Eugenia T. La Fontaine, “A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases are Unconstitutional” (2002) 44 *B.C.L. Rev.* 207. See pp. 208-10 for a fascinating discussion of Texas’s “Dr. Death,” Dr. James Grigson. As of 1994, he had appeared in at least 150 capital trials on behalf of the state, and his predictions of future dangerousness had been used to help convict at least one-third of all Texas death row inmates. Dr. Grigson has repeatedly testified that he was “one hundred percent certain” that the defendant would be dangerous in the future, and habitually refers to defendants as being in the “most severe category” of sociopaths, referring to one individual as “above ten” on a scale of one to ten. Indeed, in one case, he even claimed that the defendant presented a “one thousand percent chance” of being a future danger.

¹³² Randy K. Otto, “On the Ability of Mental Health Professionals to ‘Predict Dangerousness’: A Commentary on Interpretations of the ‘Dangerousness’ Literature” (1994) 18 *Law & Psychol. Rev.* 43.

¹³³ *Ibid.* at 64.

research that placed a limit on how accurate predictions could be, such as the use of proxy measures of violence risk (administrative classifications used to infer expert's opinions). He claims that later efforts were more successful. He remains guarded, however, when he suggests that "mental health professionals have some ability to assess the risk that people present regarding legally relevant definitions of 'dangerousness,' although rates of error, remain considerable."¹³⁴

One recent study tracked the prison infraction records of Arizona death-row inmates.¹³⁵ The researchers concluded that inmates sentenced to death might, in fact, be more dangerous than others, based on their tendency to be involved in serious prison violence. Of course, living in the brutal world of high-security confinement during the final days of one's life creates confounding factors.

Others have argued that assessments should be limited to specific legal contexts. Heilbrun¹³⁶ suggested that in decisions relating to public safety and rehabilitation, forensic assessments might be useful. However, other criteria that may be relevant in the classification of a dangerous offender, including goals such as specific deterrence and more severe punishment, are "clearly outside the domain of...expertise. Simply stated, mental health professionals are not competent to address such issues."¹³⁷

3. Summary

Many researchers have argued that due to the chronic uncertainty of psychiatric predictions of dangerousness, such testimony should have limited influence in sentencing decisions, or should be excluded entirely. Empirical data has confirmed the fallibility of such predictions.

¹³⁴ Matt DeLisi & Ed A. Munoz, "Future Dangerousness Revisited" (2003) 14 Criminal Justice Policy Review 287.

¹³⁵ Kirk Heilbrun, James R. P. Ogloff & Kim Picarello, "Dangerous Offender Statutes in the United States and Canada: Implications for Risk Assessment" (1999) 22 Int'l J. L. & Psychiatry 393.

¹³⁶ *Ibid.* at 401.

¹³⁷ *Supra*, note 7.

V. RECOMMENDATIONS

Absent a major legislative reversal, psychiatric assessments in the criminal justice system are here to stay. The following recommendations are offered in order to minimize socially detrimental errors, and in order to make optimal use of the information that is available (however imperfect). These represent the most promising treatments for the current case of disorder in the courtroom.

The opportunity for the Crown and defence to retain their own psychiatric experts should be reintroduced. These experts should be required to defend their conclusions and the process by which they reached them. An impartial court-appointed assessor should be made available in the case of conflicting and equally credible Crown and defence experts.

The use of the PCL-R in all forensic risk assessments should be required. The PCL-R has proven to be a more robust predictor of future violence than other tools, such as the DSM-IV APD diagnosis. As the PCL-R accounts for the greatest number of factors in an offender's personal circumstances, it is most sensitive to the unique factual matrix in each assessment of dangerousness.

Existing dangerous offender designations should be reviewed where the finding was based on older, less reliable psychological techniques. In changing the language in the *Criminal Code* from "observation" to "assessment," it is submitted that Parliament intended that the more modern actuarial techniques be used, rather than the clinical observation method. Offenders currently serving indeterminate sentences based on less valid methods should receive a new hearing and assessment using the PCL-R.

Parole reviews should be conducted a minimum of every 2 years from the beginning of the sentence. Opportunities should be provided to demonstrate a decrease in dangerousness resulting from psychological treatment, or the decrease in aggression generally exhibited with age. Unnecessarily long prison sentences create a circular problem, as the increasing effects of institutionalization virtually eliminate the opportunity to create a viable release plan. The Bill C-55 amendments,¹³⁸ which increased the initial parole review period from three to seven years, demonstrate that the potential for overly long sentences exists from the moment of incarceration.

Parole boards should be required to specifically consider any change in dangerousness that has occurred since the last review. Consequently, new assessments should be ordered in response to potential rehabilitation of the individual inmate, instead of according to guidelines which do not account for differences between individuals.

Generally, dangerous offender dispositions should be flexible and sensitive to individual factors. Following the line of reasoning that started with *Neve* and was continued with *Winko* and *Knoblauch*, the least onerous restrictions, which still protect the public, should be imposed, having regard to the particular circumstances of the offender and the context in which his crimes were committed.

VI. CONCLUSION: MAKING THE MOST OF WHAT WE HAVE

Instead of offering the definitive answers that our adversarial system idealizes, psychiatric assessments of future dangerousness are plagued with uncertainty. This uncertainty is only compounded by taking this information out of its context and thrusting it into the courtroom, where it is presented by psychiatrists who have no legal training, and received by judges who have never seen a copy of the DSM.

It is clear, however, that even the most reliable measure, the PCL-R, is only moderately accurate, and its usefulness is still being tested in the psychological literature. Despite these shortcomings, forensic assessments are given significant weight in sentencing decisions. In fact, the *Criminal Code* mandates that an assessment be completed in determining whether an individual is one of those few offenders who are sufficiently dangerous to justify their imprisonment for an indeterminate period.

The psychiatrist must not eclipse the role of the court in such cases. As psychological risk assessments are based in large part on the offender's criminal history, the judge must make his or her own evaluation of how this reflects on future behaviour. The impact of psychometric tests should be limited to those areas in which they supplement, and not replace, the court's judgment, such as in prospects for rehabilitation.

There are two main problems with the heavy reliance upon psychiatric predictions of dangerousness; a lack of consensus regarding methods, and the fallibility of the "objective" assessment tools that are most

frequently utilized. This uncertainty begs the question of whether it is appropriate for the government to impose such restrictive measures at all—does the punishment truly fit the (potential) crime?