

## The Ethics of Pre-Arrestment Psychiatric Examination: One Canadian Viewpoint

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Considerable criticism of pre-arrestment psychiatric examinations has been voiced from within both the psychiatric and legal professions.<sup>1</sup> This paper examines the questions being addressed in such examinations in one Canadian setting and the ethical issues raised when psychiatrists *provide* or *fail to provide* opinions on these issues.

In 1977 the Metropolitan Toronto Forensic Service (METFORS), was established by the Attorney General of Ontario as a pilot project to provide psychiatric assessments for the adult Courts of Metropolitan Toronto.<sup>2</sup> There are two units to METFORS: an In-patient Unit, where individuals accused of crimes are admitted for 30 to 60 day psychiatric assessment under the jurisdiction of the Criminal Code of Canada; and the second, the Brief Assessment Unit, where individuals are seen for one-day psychiatric assessments. The individuals examined in Brief Assessment may be at any point in their criminal justice proceeding, although the majority are seen pre-arrestment, prior to the show cause† hearing for bail.

The Brief Assessment Unit was developed because of need. In the past, individuals arrested in Toronto, who were clearly mentally ill, were frequently remanded to jail for weeks before they received psychiatric attention.<sup>3</sup> Other individuals were admitted to regional psychiatric units for 30 to 60 days when there was no psychiatric reason for such admissions. Such mentally ill individuals often did not seek legal counsel and because of their mental illness did not appreciate the role of duty counsel in the Courtroom. Individuals with a history of psychiatric hospitalization were occasionally ordered to hospital on the assumption that they were probably unfit to stand trial because of their history of mental illness.

One of the background factors to the establishment of METFORS was the Law Reform Commission of Canada's<sup>4</sup> †† recommendation concerning the diversion of individuals out of the criminal justice system to other agencies when this action is appropriate. The Commission recognized that many

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†Definition of show cause: show cause why detention of this accused is necessary.

††The Law Reform Commission of Canada was established by an Act of Parliament, June 1st, 1971, to study and keep under review on a continuing and systematic basis the statutes of Canada with a view to making recommendations for their improvement, modernization, and reform – and to develop new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society.

minor crimes are committed by mentally disordered individuals. It is not always in society's best interest or the best interest of the individual that he be prosecuted. Early identification of these individuals would alleviate their detention in facilities ill-equipped to handle them. We are aware of Penrose's Law,<sup>5</sup> that is, as psychiatric hospital population decreases, the jail population rises.

The Brief Assessment Unit examines 4 individuals daily. The assessment is completed by a multi-disciplinary team consisting of a psychiatrist, psychologist, psychiatric nurse, psychiatric social worker and correctional officer. The psychiatric interview is conducted by the psychiatrist with the participation of the rest of the team. Arrest records, jail medical records and other materials essential to our assessment are provided and reviewed. Consent is obtained from the accused to contact significant others in his life and to obtain past medical records from other psychiatric centres. Psychological testing is done, using computer scoring.<sup>6</sup> Behavioral observations of the accused are made by trained correctional officers.

In dealing with the pre-arraignment accused the following major questions are posed:

1. Is this person mentally ill now?
2. Is this person fit to stand trial?
3. Is there a psychiatric reason why an individual should or should not be granted bail?

In answering these questions the psychiatrist faces a number of ethical issues. It is our intention to deal with each ethical issue individually and to discuss the approach presently in effect in the METFORS Brief Assessment Unit.

### **Ethical Issue #1 – Informed Consent**

In the first contact with the accused, we discuss with him his legal status. We explain that the examination is voluntary, but not confidential. The individual is asked, what his understanding is of assessment, and if he has a lawyer. If he has not retained private counsel we advise him about the Ontario Legal Aid Plan, which provides legal counsel for those individuals without financial resources. He is told that we understand that he may not wish to answer certain questions, but that if he does the information *could* be contained in our report or be requested in Court.

We believe that this explanation and procedure, if tailored to the individual's mental state, ensures a voluntary and informed consent. We have been advised by the Chief Judge of the Provincial Courts of Ontario<sup>7</sup> that all brief assessment examinations take place with the consent of the accused. Occasionally some individuals arrive in our unit who have not been asked for their consent. The legal profession has failed, at times, to ensure the participation in the brief psychiatric assessment of individuals who consent, voluntarily and with full understanding. The psychiatrist clarifies the situation before any examination occurs. In the event that the individual refuses to consent and appears to be capable of an informed consent, he is returned to Court with a letter indicating that no assessment took place and the reasons for this.

On a couple of occasions, individuals have been ordered for brief

assessment without their consent by judges who believe that these individuals are mentally ill and without insight. Individuals who appear to be capable of providing an informed consent are not assessed, if they refuse the examination. We advise the judge that he can order an accused for a 30-day psychiatric assessment under the Criminal Code, based on the individual's behaviour in Court. The individual will have been arraigned for this inpatient assessment to occur, and the decision is therefore made when the accused is represented by counsel.

### **Ethical Issue #2 – Self-Incrimination**

Pre-arraignment psychiatric examinations are criticized because of their potential for self-incrimination without an understanding of the legal consequences. In our METFORS Brief Assessment Unit there are two opportunities to ensure that this is not the case, despite the examinations occurring pre-arraignment. In Court, at the time the order is made, duty counsel is available. One of their responsibilities should be to discuss the implications of their client's consent for brief psychiatric assessment at the pre-arraignment level. That is an ethical concern to be met by both lawyer and psychiatrist. The second opportunity is presented when the individual arrives in the Brief Assessment Unit. At METFORS the issue is then fully explored.

In spite of our acknowledgement that the interview is non-confidential and therefore potentially damaging to the individual from a legal viewpoint, 95%<sup>8</sup> of all individuals seen in the Brief Assessment Unit discuss their alleged anti-social behaviour fully. In many cases they provide information "against themselves" which is not otherwise available in the arrest record. An ethical concern is involved when we consider how this self-incriminating data is used.

In the Brief Assessment Unit we do not address the issue of criminal responsibility. Although we discuss the alleged anti-social act, we do so to explore the person's appreciation of his charge, the presence of any delusional system directly relevant to his fitness to stand trial, his motivation for and response to criminal behaviour, and his potential for future dangerous behaviour. The information gained from the patient alone is insufficient to offer an opinion on criminal responsibility, in our opinion.<sup>9</sup> If criminal responsibility is a psychiatric legal issue, a recommendation for further assessment after arraignment can be made. No information about the behaviour at issue is shared with the Court until the issue of criminal responsibility is addressed after a more complete assessment.

The ethics of law and psychiatry coincide on the issue of pre-arraignment psychiatric examination and self-incrimination. The potential for abuse of the psychiatric legal assessment is great. At METFORS we have been assured by the Crown Attorney that a psychiatrist will not be called to provide "fact" information based on what was told to him by the accused.<sup>10</sup> The opinion of the Ontario Court of appeal in *R. v. Vaillancourt* (1974) suggested that the Court would probably not permit the Crown, through its psychiatrist, to tender admission by the accused as to facts to prove the guilt of the accused.<sup>11-12</sup> Out of 300 brief assessment cases seen to date, no psychiatrist has been asked to provide a "psychiatric confession" for the

Crown. It should be pointed out that there is no privilege in Canadian criminal law for any patient-psychiatrist relationship. In a few cases, defense lawyers have requested psychiatric testimony on criminal responsibility after only a brief assessment examination. This testimony has concerned the lack of specific intent secondary to alcohol intoxication. In those cases, cross-examination by the Crown elicits the accused's statements to the psychiatrist. The individual has had the advice of counsel, however, and clearly appreciates the risk of presenting a psychiatric defense. We do not believe that there is an ethical concern in such cases.

We believe that the Brief Assessment Unit has addressed itself to this ethical issue concerning self-incrimination and acts appropriately. We seek a voluntary informed consent to the examination and discuss the implications at the level of each individual. We do not provide assessments where an individual capable of informed consent refuses to give it. The legal profession also has a role in ensuring that our clients are examined with their informed consent. Even if individuals "confess unknowingly" they are "protected" by the Crown Attorney's position of no psychiatric fact evidence and our own unwillingness to offer opinions of criminal responsibility based only on the Brief Assessment examination.

The defense bar would be more comfortable if this policy were law. They have requested an amendment to this Criminal Code to prevent the admission into court of statements made to psychiatrists unless the defense consents. If such an amendment were enacted, it would only codify a policy presently observed by the METFORS psychiatrists.

Another aspect of self-incrimination deals with the individual's statements about past criminal behaviour, both juvenile and adult. Psychiatrists question an individual regarding developmental issues, and past aggressive and anti-social behaviour. We use such data to answer the question about the individual's suitability for bail. This is a judicial question, and the judges have been explicit in wanting to know all of the data on which our opinion is based.<sup>13</sup> We believe it imperative that a good psychiatric legal report describe the basis for any opinions offered. The just decision is more likely reached with full information and not with limited data.

Criteria for bail concern the individual's likelihood of appearing at trial and whether his detention is in the public interest or for the protection of society.<sup>14</sup> Some individuals will question whether a psychiatrist has any role in answering this question. It is clear from our experience at METFORS that many judges wish assistance in dealing with this issue. They want not only our opinion but the data and reasoning behind the opinion. Although we are concerned ethically about providing information to the judge that he should not have at that point in the proceeding, we also believe that all information that is relevant to our opinion should be available for the examination in chief and cross-examination. The data and reasoning relevant to the opinion must be detailed and not "assumed". In our minds, Justice is ultimately served by completeness. Since both Crown and Defense may not agree with any opinion offered, they are able to understand the basis for it and challenge it. The judge is always in the position to "disregard" inadmissible data and should do so. If the psychiatrist provides the raw data for his opinion, the judge can appropriately weigh that opinion in his deliberation.

### **Ethical Issue #3 – Psychiatric Interventions at the Pre-Arrest Level in a Criminal Justice Proceeding**

It is possible for the examining psychiatrist in the Brief Assessment Unit to certify an accused as an involuntary patient, thus removing the individual from the current criminal justice proceeding. When is this an appropriate and ethical act? The individual will not have had legal advice at this time and probably will not understand the consequences of certification on his legal status. The question is whether involuntary hospitalization is ever ethical during the criminal justice proceeding.

In our opinion we have examined several accused individuals where it would have been *medically unethical* not to have sought psychiatric hospitalization. These people have been acutely mentally ill, many with drug or alcohol precipitated psychoses, who required hospitalization to stabilize them on medication. Sometimes they are not capable of informed consent and do not meet the provincial criteria<sup>15</sup> for involuntary admission. Our approach is to recommend psychiatric hospitalization to the Court by way of a Court Order for 30 or 60 days. This ensures that the Court retains jurisdiction of the individual; his lawyer is involved in the decision; and the decision is made in an open Court. For certain individuals who are too ill to be returned to Court and meet the criteria, we certify them and transfer them to a psychiatric hospital. Thereafter we notify the Court of our action. We do not believe that these individuals' rights are ignored. Rather, their right to treatment is respected and ensured by such psychiatric decisions. In our minds, it would be unethical to deprive a mentally ill individual of needed treatment in order for the Court to retain jurisdiction. This is particularly obvious when these individuals are charged with minor crimes.

We have examined many individuals who are chronically ill and who continue to become involved in minor crimes because of their illnesses. We are frequently in the position of being able to recommend that the Crown drop the charges and that the person be admitted to hospital. Again, we are faced with the question as to whether a psychiatrist should intervene, no matter how minor the charges or how chronically ill the individual. We believe that ours is an ethical approach, consistent with the Law Reform Commission of Canada's recommendations that such individuals be diverted out of the criminal justice system if this is the most appropriate action.<sup>16</sup> Otherwise, such individuals frequently spend long periods of time in detention awaiting trial in circumstances unlikely to help their mental state or to serve the interests of justice. It is an individual decision with each accused. Each individual is unique in personality and charge. The ethical approach is individual and cannot be generalized from some theoretical position divorced from the practicalities of the situation. It is not appropriate for every case that one adopts either the position that no individual within a criminal justice process be diverted from it, or the position that a psychiatrist should always divert a mentally ill individual from trial if he requires treatment.

A brief case vignette is presented to demonstrate in practical terms the application of ethics to the brief assessment work.

A 23 year old man with a history of psychiatric hospitalization on 18

occasions was examined at the METFORS Brief Assessment Unit. His diagnosis was chronic schizophrenia. He was charged with "Procuring", an offense likely to result in a fine if found guilty. During the psychiatric examination, his thinking was observed as disordered and he expressed several delusional ideas. He was able to give a reasonable history of his life, despite his obvious psychotic thought disorder, and an account of the charge that he faced. Although he expressed confusion about his own identity, claiming to be Sergeant Erskine of the F.B.I., this idea was easily shaken by simple confrontation.

Several choices were possible. It could have been argued that this individual met the criteria for involuntary admission to hospital because he was at risk to the safety of others. He could then have been moved from the criminal justice system and have been subject to civil commitment under the Mental Health Act. It would have been possible to suggest that this man's mental illness interfered with his fitness to stand trial and offer the opinion that he was unfit. The individual would then have been admitted to a maximum security psychiatric hospital, until found fit. Administratively this would likely have been at least a 6 month period. Instead, we advised the Court that this man was chronically mentally ill with a disturbance in thinking. Despite his thought disorder, he had a simple understanding of the charge against him and his legal situation. We concluded that he was marginally fit to stand trial.

We suggested that he be assisted in getting voluntary treatment in a psychiatric hospital which was willing to accept his admission. He pleaded guilty to the charge of "Procuring" and was released from detention. We do not believe our course of action was the only ethical approach, but it does demonstrate again the uniqueness of each case in deciding on the ethical forensic approach.

In summary, our experience on the Brief Assessment Unit at METFORS has exposed us to a variety of cases at a pre-arraignment level. There are no general ethical positions which deal with all cases. We pay close attention to ethical issues concerning informed consent, self-incrimination and psychiatric interventions in a criminal justice proceeding by examining each case individually. The implications of each recommendation are considered carefully to ensure an ethical approach. We believe our brief assessment examinations have demonstrated that psychiatric assessments at the pre-arraignment level can occur in the high ethical tradition expected in other medical and legal settings.

### Footnotes

1. Psychiatric News, May 5, 1978
2. Order-in-Council, May 15, 1977
3. Dr. F. Jensen, psychiatrist, provided psychiatric assessments at the Toronto Jail prior to METFORS. Individuals were frequently remanded on two or three occasions for psychiatric assessment because of the lack of psychiatric resources.
4. The Criminal Process and Mental Disorder. Working Paper 14, Law Reform Commission of Canada, 1975

"Diversion" could be described as an effort to deal with social conflict and problem resolution without resort to the criminal process. Seen in this way, diversion is more an approach than a rule, an approach which manifests itself more through attitudes than procedures. Diversion is dealt with in depth in our series of Working Papers on Sentencing and Disposition and in our Report to Parliament on Sentencing Guidelines. We consider those aspects of police and prosecutorial

- diversion which directly touch the mentally ill and the effect of mental disorder on the decision to grant bail.
5. Professor Lionel Penrose, medical geneticist.  
Bluglass R: Current developments in forensic psychiatry in the United Kingdom. *Psychiat J Univ Ottawa*, Vol 2, No 2, July 1977
  6. Ontario Correctional Institute automated MMPI, unpublished
  7. Chief Judge Hayes, in a statement at the official opening of METFORS, noted that brief psychiatric examinations, previously known as mental exams at goal, would occur with the consent of each accused.
  8. The figure 95% was based on my own experience with 150 assessments. (B. Butler)
  9. This opinion is shared by Dr. Seymour Pollack of the University of Southern California Institute of Psychiatry, Law & Behavioral Science in his extensive writings.
  10. Mr. P. Rickaby, Crown Attorney of York Judicial District, made a clear statement to METFORS psychiatrists in a meeting with them on November 19, 1977, that it was his office's "unwritten policy" that a psychiatrist would not be called to provide statements made by the accused to support the Crown's case.
  11. *R. v. Vaillancourt*, (1974), 16 C.C.C. (2d) 137, 31 C.R.N.S.
  12. Manning M and Mewett A: Psychiatric evidence. In: *Criminal Law Quarterly*, Vol. 18, 1975-76
  13. On May 15, 1978 at a joint meeting of members of the bar and judiciary with forensic psychiatrists, this issue was explored. Two judges indicated a desire to have all information relevant to the opinion of the psychiatrist, and were not concerned with the admissibility of the data at the bail hearing.
  14. Martin's Annual Criminal Code 1977, section 457 – 7a, b.
  15. (1) Any person who, (a) suffers from mental disorder of a nature or degree so as to require hospitalization in the interests of his own safety or the safety of others; and (b) is not suitable for admission as an informal patient, may be admitted as an involuntary patient to a psychiatric facility upon application therefore in the prescribed form signed by a physician.
  16. Mental Disorder in the Criminal Process. Report to Parliament, March, 1976