MENTALLY ILL ACCUSED IN SOUTH AFRICAN CRIMINAL PROCEDURE: EVALUATING THE MENTAL HEALTH COURT MODEL AS THERAPEUTIC RESPONSE

by

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ACADEMIC DECLARATION

I, **LETITIA PIENAAR** (student number 34863710) declare that “MENTALLY ILL ACCUSED IN SOUTH AFRICAN CRIMINAL PROCEDURE: EVALUATING THE MENTAL HEALTH COURT MODEL AS THERAPEUTIC RESPONSE“ is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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SUMMARY

Mental illness that affects an accused's fitness to stand trial is an ill-explored topic in the South African criminal justice system. The necessity to explore this topic is motivated by the increasing number of persons with mental illness moving into the criminal justice systems in South Africa, Canada, and the United States of America.

An accused's fitness to stand trial is assessed once concern about his ability to follow the proceedings, or give proper instructions to his legal representative, is in doubt. The assessment is conducted in the forensic system where the vastly different fields of law and psychiatry meet. The South African forensic system is plagued with resources and skills shortages. These inadequacies cause delays in resolving pre-trial issues for an accused in respect of whom fitness is at issue. The accused is oftentimes detained in a correctional facility awaiting fitness assessment for anything between three months to two years. Generally, detention in a correctional facility has a negative effect on the mental state of a person with a mental illness.

The logistics of fitness assessments differ between the three jurisdictions referred to above. However, the threshold for fitness in these jurisdictions is relatively low, with the result that the majority of accused persons sent for fitness assessments are found fit to stand trial. Such a finding does not imply that the accused is not mentally ill; it simply means that the illness does not affect his understanding of the court proceedings and that it does not influence his ability to communicate with his legal representative. An accused with a serious mental illness such as schizophrenia or major depression can, for example, be found fit to stand trial.

After a fitness assessment, a court may either find an accused fit to stand trial or unfit to stand trial. The fact that many persons found fit to stand trial have a mental illness suggests that there is a third category on the fitness continuum that must be acknowledged, namely, fit but mentally ill accused persons. No alternatives to traditional prosecution currently exist in South Africa for this third group of accused persons despite the fact that their situation in the criminal justice system calls for a therapeutic response.

The South African legislative framework that regulates fitness assessments and the processes associated therewith are not without challenges. The assessment practices have recently been under scrutiny by the Constitutional court, which judgment changed the position for the accused found unfit to stand trial. The position of the fit but mentally ill accused remains unregulated.

The Canadian and American criminal justice systems have implemented diversion programmes for fit but mentally ill accused persons in the form of Mental Health Courts. The underlying principle of

a Mental Health Court is therapeutic jurisprudence. Therapeutic jurisprudence evaluates the impact of the law on those in conflict with it. It promotes the inclusion of expertise from other disciplines to improve the effectiveness of the law in a particular set of circumstances.

Many South African scholars acknowledge the need for mental health expertise in the criminal justice system, and suggestions have been made for the diversion of mentally ill accused persons charged with minor offences. Those above notwithstanding, no formal diversion programmes exist in South Africa for the fit but mentally ill accused.

This research investigates the Mental Health Court as a therapeutic response to the mentally ill accused in the South African criminal justice system. The Mental Health Court models as employed in Canada and the United States of America are studied to identify elements thereof that can be employed in the South African context to provide an effective alternative to traditional prosecution for the mentally ill accused.

The Toronto Mental Health Court is studied in the Canadian context as a court that is not a diversion programme as such but has a diversion component attached to it. Diversion in Canada is reserved for those charged with less serious offences, and only these accused persons are allowed into the diversion component of the Mental Health Court. However, the Canadian Mental Health Court assists those who do not qualify for diversion but who need the specialised skills of the Mental Health Court for purposes of, for example, a bail application. The Brooklyn Mental Health Court in the United States of America is investigated as a model that constitutes a complete diversion programme and considers diversion of accused persons charged with more serious offences.

The unique structure and procedure of each of these Mental Health Courts are investigated with due consideration to the eligibility criteria of each and the sanctions employed for non-compliance of the court-monitored treatment programmes. Further, the successes and challenges of each model are highlighted.

Finally, a proposal is made for a Mental Health Court model mindful of the uniquely South African factors that have to be taken into account when building such a model. Amendments to the existing legislative framework are proposed to incorporate a Mental Health Court as a therapeutic response to mentally ill accused persons in the South African criminal justice system.

KEY TERMS

Mentally ill accused, mental illness, mentally ill, mental health court, therapeutic jurisprudence, diversion, fitness to stand trial, criminal procedure, fitness to stand trial.

LIST OF ABBREVIATIONS

Afr J Psychiatry	*African Journal of Psychiatry*
Annals Health L	*Annals of Health Law*
Aust N Z J Mental Health Nurs	*Australian and New Zeeland Journal of Mental Health Nursing*
Behav. Sci Law	*Behavioral Sciences and the Law.*
Br J Psychiatry	*British Journal of Psychiatry*
Crim L Q	*Criminal Law Quarterly*
C.S.L.R	*Cambridge Student Law Review*
Crim Justice Behav	*Criminal Justice and Behavior*
D C L Review	*University of the District of Columbia Law Review*
Int J Law Psychiat	*International Journal of Law and Psychiatry*
J. Am. Acad. Psychiatry Law	*Journal of the American Academy of Psychiatry and the Law*
Psychiatr Q	*Psychiatric Quarterly*
Psych Serv	*Psychiatric Services*
SAMJ	*South African Medical Journal*
SAJP	*South African Journal of Psychiatry*
SALJ	*South African Law Journal*
SACJ	*South African Journal of Criminal Justice*
Sask L Rev	*Saskatchewan Law Review*
South Afr Psych Rev	*South African Psychiatry Review*
SMU L Review	*Southern Methodist University Law Review*

THRHR	*Tydskrif vir Hedendaagse Romeins-Hollandse Reg*
UBCMJ	*University of British Columbia Medical Journal*
Wm and Mary Law Review	*William and Mary Law Review*

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CHAPTER 1

INTRODUCTION AND CONCEPTUALISATION

1 INTRODUCTION

Mental illness in the criminal justice system is investigated most often in relation to criminal capacity, and in particular in relation to the insanity defence.[1] A sturdy body of research has been produced in this field.

Far less has, however, been written about the impact of a mental illness on an accused's fitness to stand trial. An equally ill-explored topic, at least in South Africa, is diversion programmes for mentally ill accused persons at the pre-trial stage. This research focuses on both these relatively under-researched topics in the South African context.

The suggestion of a Mental Health Court as a therapeutic response to mentally ill accused persons in the South African criminal justice system forms the crux of this research. The Mental Health Court plays an important role in fitness assessments and offers diversion programmes to eligible mentally ill but fit, accused persons.

This chapter gives background to the research questions and explains why the practices surrounding fitness to stand trial require re-examination. The research questions are introduced, and important concepts for this research are explained. This chapter further serves to demarcate the research and gives a brief overview of the structure thereof.

2 BACKGROUND AND ORIENTATION

This research is motivated by the fact that the number of persons suffering from mental illness in society is increasing globally, so much so that it is the leading cause of disability in

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[1] See for instance Sithole SE *A Comparative Analysis of Mental Illness as a Defence in Criminal Law* (LL.M Dissertation Nelson Mandela Metropolitan University 2007) and Möller L The constitutionality of the onus of proof in cases where mental illness is averred (LL.M Dissertation University of Pretoria 2011). Also, see Kaliski S "Does the insanity defence lead to an abuse of human rights?" 2012 (15) Afr J Psychiatry 83-87. Also see Africa A "Insanity and Diminished Capacity Before the Courts" https://www.yumpu.com/en/document/view/17210882/insanitypdf# (Date of use: 10 March 2015). See further Le Roux J and Stevens GP "Pathological criminal incapacity and the conceptual interface between law and medicine" 2012 (1) *SACJ* 44-66. Lastly see Meintjies van Der Walt L "Making a muddle into a mess?: The Amendment of s78 of the Criminal Procedure Act" 2002 (15) *SACJ* 242-249.

certain countries.[2] The number of mentally ill persons in the criminal justice system is also increasing [3] to the extent that individuals, who suffer from mental illnesses, are currently overrepresented in some criminal justice systems.[4]

The overrepresentation of persons with mental illness in a criminal justice system is a result of various factors. Deinstitutionalisation is, however, the common denominator among the jurisdictions that form part of this research that most prominently contributes towards this overrepresentation. The impact of deinstitutionalisation on the criminal justice system is explained briefly below. Jurisdiction specific consequences and responses to deinstitutionalisation are discussed later in this research.

In the 1960s and 1970s, as more treatment options for the mentally ill, including psychiatric medication, became available globally, the automatic institutionalisation of the mentally ill was no longer desirable.[5] Resultantly, the deinstitutionalisation movement emerged. The

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2 For details on the statistics per jurisdiction dealt with in this research, see the individual chapters on the respective jurisdictions. See Simpson B and Chipps J "Mental health legislation: Does it protect the rights of people with mental health problems?" 2012 (48) *Social Work* 47-57 at 47 where it is stated that persons with mental illness comprise a large portion of the South African population. Mental illness is identified as the main cause of disability in Canada and the United States of America. See World Health Organisation. World Health Report: Mental Health: New Understanding, New Hope. http://www.who.int/whr/2001/en/whr01_en.pdf (Date of use: 29 May 2014).

3 Schneider RD, Bloom H and Heerema M *Mental Health Courts – Decriminalizing the Mentally Ill* (Irwin Law Canada 2007) at 2. Also see Torrey EF, Stieber J, Ezekiel J, Wolfe SM, Sharfstein J, Noble JH and Flynn LM *Criminalizing the Seriously Mentally Ill. The Abuse of Jails as Mental Hospitals* (Public Citizen's Health Research Group and the National Alliance for the Mentally ill 1992) at 40-42 where the statistics of the period from 1968 to 1992 in selected states are set out. The increase in numbers is due *inter alia* to deinstitutionalisation that is discussed later on in this research.

4 Sirotich F "The criminal justice outcomes of jail diversion programs for persons with mental illness: A review of the evidence" 2009 (37) J. Am. Acad. Psychiatry Law 461-472 at 461. Also see Parliamentary Information and Research Service *Current issues in Mental Health in Canada: Mental Health and the Criminal Justice System* (Library of Parliament Ottawa Canada 2013) at 1 where it is pointed out that mental illness in the Canadian federal system are three times as prevalent as in the general population. See further Torrey *et al Criminalizing the Seriously Mentally Ill* at 41 where it is explained that the number of mentally ill persons encountering the criminal justice system in the United States of America has been rapidly increasing since 1970 after the onset of the deinstitutionalisation movement. See chapters 4 and 5 of this research for further detail about the increase in the number of mentally ill persons in Canada and the United States of America respectively.

5 McLachlin B "Medicine and the law: The challenges of mental illness" 2010 (33) *Dalhousie Law Journal* 15-33 at 20. Also see Frailing K "The genesis of mental health courts in the United States and their possible applicability for the United Kingdom" 2008 *C.S.L.R* 63-73 at 63-64 who explains that the renewed focus on mental health law, occurred at the same time as the civil rights movement in the liberal era. Also see Slate RN, Buffington-Vollum JK and Johnson WW *The Criminalization of Mental Illness: Crisis and Opportunity for the Justice System 2nd ed* (Carolina Academic Press North Carolina 2013) at 37 who explain that President J F Kennedy was the first president to press ahead

motivation and thinking behind deinstitutionalisation were that mentally ill persons should be released from institutions and cared for in the community.[6] Deinstitutionalisation was further motivated by the belief that most mentally ill individuals do not need long term hospitalisation, and state hospitals, where mental health services used to be provided, should be replaced by outpatient clinics, residential programmes and supported employment.[7]

Deinstitutionalisation eventually resulted in the closing of state hospitals in the 1980s.[8] The intended community support services were not in place, which left many people in need of mental health care literally out on the street, and often resulted in them encountering the criminal justice system. [9]

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with plans to reduce the number of mentally ill persons in State hospitals. Pres. Kennedy had a special interest in mental health issues since he had a sister that was institutionalised for most of her life and eventually lobotomised. Also see Odegaard AM "Therapeutic jurisprudence: The impact of mental health courts on the criminal justice system" 2007 (83) *North Dakota Law Review* 225-259 at 231.

6 Torrey *et al Criminalizing the Seriously Mentally Ill* at 52. Also see Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 38. See further Draine J, Wilson AB and Pogorzelski W "Limitations and potential in current research on services for people with mental illness in the Criminal Justice system" 2007 (45) *Journal of Offender Rehabilitation* 159-177 at 159, 160 where it is stated that it was seen as the most humane treatment of mentally ill persons at the time to have them treated in the community. In hindsight, the deinstitutionalisation approach, to move mentally ill persons from hospitals to community care, can be criticised as oversimplified. Also see D'Emic MJ "The promise of mental health courts: Brooklyn criminal justice system experiments with treatment as an alternative to prison" 2007 *Criminal Justice* 25-29 at 25. See further Garner SG and Hafemeister TL "Restorative justice, therapeutic jurisprudence and mental health courts: Finding a better means to respond to offenders with a mental disorder" 2003 (22) *Developments in Mental Health Law* 1-15 at 3.

7 Torrey *et al Criminalizing the Seriously Mentally Ill* at 50, 52. In line with this vision, mentally ill persons in the United States of America became eligible for federal programmes such as Medicaid, Medicare, disability Insurance, federal housing subsidies and food stamps for which the federal government provided sufficient funding. The federal government further provided sufficient funding for community health care centres. Also, see Rossman SB, Willison JB, Mallik-Kane K, Kim K, Debus-Sherrill S and Downey PM *Criminal Justice Interventions for Offenders with Mental Illness: Evaluation of Mental Health Courts in Bronx and Brooklyn, New York* (USA National Institute of Justice 2012) at 4.

8 Frailing 2008 *C.S.L.R* 63 at 64. Also see D'Emic 2007 *Criminal Justice* 25 at 25. See further Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 3.

9 Frailing 2008 *C.S.L.R* 63 at 64, 65. Also see Rogers R and Shuman DW *Fundamentals of Forensic Practice: Mental Health and Criminal Law* (Springer USA 2005) at 85 who confirm that the number of inpatient beds has decreased dramatically and that the result is that many people with chronic mental illnesses were left with no support, often clashing with the criminal justice system. These authors refer to jails as "the poor man's mental health facility". Also see D'Emic 2007 *Criminal Justice* 25 at 25 where the movement of persons from the mental health care system to the criminal justice system during the deinstitutionalisation period, is referred to as trans-institutionalisation. See further Lurigio RJ and Snowden J "Putting therapeutic jurisprudence into practice: The growth,

Hospital treatment options were reduced because of deinstitutionalisation, and community treatment options were not as accessible as they should have been.[10] The admission requirements for involuntary mental health care at a psychiatric facility became stricter [11], leading to many mentally ill persons not qualifying for treatment. The primary focus for admission to a psychiatric hospital was based on the dangerousness of the individual.[12] The effect was that non-dangerous mentally ill persons did not qualify for involuntary mental health treatment.

Gaps in the availability of treatment in the community lead to increased arrests, especially among homeless persons with mental illness.[13] As it became more challenging to have a

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operations, and effectiveness of mental health courts" 2009 (2) *The Justice System Journal* 196-218 at 197. Also see Rossman *et al Criminal justice interventions for offenders with mental illness* at 4 where it is confirmed that community treatment was not properly funded and made available to those most in need thereof.

10 Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 3-4. See further Denckla D and Berman G "Rethinking the revolving door" 2001 Centre for Court innovation, New York. www.courtinnovation.org/sites/default/files/rethinkingtherevolvingdoor.pdf (Date of use: 7 March 2011) at 3. Also see Odegaard 2007 *North Dakota Law Review* 225 at 322.

11 Torrey *et al Criminalizing the seriously mentally ill* at 40. Also see in general Sosowsky L "Crime and violence among mental patients reconsidered in view of the legal relationship between state and mentally ill" 1978 (135) *American Journal of Psychiatry* 33-42. Also, see Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 34 where it is explained that the disability rights movement fought for the rights of the mentally ill. One of their main objectives was to limit involuntary commitment to cases where it was absolutely necessary. Also, see Rossman *et al Criminal justice interventions for offenders with mental illness* at 1 where it is stated that these stricter requirements for involuntary care contributed to the rising number of persons with mental illness in the criminal justice system.

12 See Frailing 2008 *C.S.L.R* 63 at 64 who discusses the case of Alberta Lessard from MIwaukee Wisconsin, who challenged her involuntary admission in court and succeeded. This resulted in legislative changes in the 1970's across many states in the United States of America to the effect that the main criteria for involuntary psychiatric treatment, was dangerousness, not only to oneself, but to others as well. A further requirement was that such dangerousness must be of an immediate nature.

13 Draine, Wilson and Pogorzelski 2007 *Journal of Offender Rehabilitation* 159 at 160. Also, see Bernstein and Seltzer 2003 *D C L Review* 143 at 143 where it is stated that persons with mental illness are falling through the cracks of the mental health care system and thereby increasing the number of mentally ill persons in the criminal justice system. Also, see this source at 162 where it is stated that persons who are homeless or unemployed who suffer from a mental illness are at a higher risk of arrest. Also see Hemmens C, Brody DC and Spohn CC *Criminal Courts. A Contemporary Perspective* (Sage Los Angelas 2013) at 454. Problems with service delivery have been labelled as the root of the problem and identified as a priority that has to be addressed, rather than the symptoms of the problem, being the increased number of mentally ill persons being arrested. Bernstein and Seltzer 2003 *D C L Review* 143 at 161, 162 stress that improved mental health care services to those with mental illnesses can ensure that the mentally ill do not come into contact with the criminal justice system in the first place. The authors warn against initiatives that allow the mental health care system to shun or shift their responsibilities to other departments, unfortunately, Mental Health Courts could potentially be one such initiative. They point out further that most suggestions for solutions in terms of reducing the number of mentally ill accused persons

person admitted for mental health treatment, persons with mental illness seem to have entered the criminal justice system more frequently.[14] A direct link between strict requirements for civil commitment and an increase in the number of the mentally ill accused in the criminal justice system emerged. The number of mentally ill people in hospitals and those in prisons is interrelated, i.e. if one falls, the other invariably rises.[15] This is the balloon principle.[16] Others refer to the phenomenon as trans-institutionalisation with people shifting from state mental institutions to jails.[17] Deinstitutionalisation can, at the very least, be said to have contributed to the criminalisation of persons with mental illness.[18] The discourse surrounding mental health services has, in fact, shifted from deinstitutionalisation to decriminalisation.[19]

Mentally ill persons are mostly arrested and detained on charges of petty crimes rather than

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in the system, came from the criminal justice sector, rather than the mental health sector and that more focus should be placed on what the mental health sector has to offer in terms of solutions for reducing the number of mentally ill persons in the criminal justice system.

14 Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 43. Also, see Rossman *et al Criminal justice interventions for offenders with mental illness* at 1 who mentions the difficulty of having a person admitted for involuntary care as one of the reasons for the increase of persons with mental illness in the criminal justice system. See further Odegaard 2007 *North Dakota Law Review* 225 at 231 who elaborates on the fact that admission to a psychiatric institution became more difficult in the 1970's. This was a consequence of the deinstitutionalisation movement.

15 Torrey *et al Criminalizing the seriously mentally ill* at 41. This is confirmed by the fact that public hospitals have been closing down whilst prisons are being built to accommodate the increasing number of prisoners, among whom those with mental illnesses. Also see Frailing 2008 *C.S.L.R* 63 at 64, 65 who points out that the closure of hospitals during the 1980's and the deinstitutionalisation of the mentally ill left many in need of mental health care, destitute.

16 If the one side of the balloon is pushed another part of the balloon will bulge out. Torrey *et al Criminalizing the Seriously Mentally Ill* at 41. Also see in general Penrose L "Mental disease and crime: Outline of a comparative study of European statistics" 1939 (18) *British Journal of Medical Psychology* 1-15. See further Palermo GB, Smith MB and Liska FJ "Jails versus mental hospitals: a social dilemma" 1991 *International Journal of Offender Therapy and Comparative Criminology"* 35-97 who published findings of research done on data of jails and hospitals over a 83 year period. Their findings support the thesis of "progressive trans institutionalization" where more and more mentally ill persons are found in jails and prisons than in hospitals. Also see Albanese JS *Criminal Justice* 5th ed (Pearson Boston 2013) at 243 who states that there are twice as many persons with mental illness in prison in the United States of America than in state psychiatric hospitals.

17 Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 38, 39 where it is confirmed that many of those who were released from hospital as part of the deinstitutionalisation movement, was arrested and incarcerated or ended up on the streets. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 197.

18 Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 43.

19 Draine, Wilson and Pogorzelski 2007 *Journal of Offender Rehabilitation* 159 at 159. Also see Bernstein R and Seltzer T "Criminalization of people with mental illness: The role of Mental Health Courts in system reform" 2003 (7) *D C L Review* 143-162 at 143 where it is stated that the increased criminalisation of mentally ill persons have raised concerns from policy makers from the early 2000's.

serious offences,[20] although the serious offences committed by a mentally ill person often receive wide media coverage, raising awareness of the purported dangerousness of mentally ill persons. The motivation for many of these minor offences committed by mentally ill persons is pure survival, as many of these individuals are homeless at the time of the arrest.[21]

The criminal behaviour of mentally ill persons is often a manifestation of an untreated but treatable psychiatric illness.[22] Arrests are often made for behaviour that is not criminal but unusual due to lack of treatment.[23] Incarceration of a mentally ill person results in the deterioration of the mental health of such person.[24]

The consequences of the mentally ill's deinstitutionalisation are that there is more pressure on the criminal justice system to deal with mentally ill individuals.[25] This is currently also

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20 Often referred to as "mercy bookings". See Frailing K "Issues affecting outcomes for mental health court participants" 2009 *C.S.L.R* 145-157 at 148. Also see Torrey *et al Criminalizing the Seriously Mentally Ill* at 46, 48. According to McCampbell SW "Mental Health Courts. What Sheriffs need to know" 2001 (53) *Sheriff* 40-43 less than one percent of those suffering from a mental illness are reported to have violent tendencies.

21 The fact that the homeless that are mentally ill are more at risk of being arrested and thus coming into contact with the criminal justice system, is confirmed by Torrey *et al Criminalizing the Seriously Mentally Ill* at 20 where the results of a survey is discussed that found that those that are homeless and that are suffering from a mental illness, are particularly vulnerable and hence at risk of coming into contact with the criminal justice system. Also see Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 39 where it is confirmed that many mentally ill persons ended up homeless after their deinstitutionalisation from hospital into the community where no support services were rendered to them. See further O'Keefie K *The Brooklyn Mental Health Court Evaluation: Planning, Implementation, Courtroom Dynamics, and Participant Outcomes* (Centre for Court Innovation New York 2006) at vi where it is indicated that 15% of all the Brooklyn Mental Health Court participants were homeless at some point in the year preceding arrest. Also, see Rossman *et al Criminal justice interventions for offenders with mental illness* at 5 where it is stated that persons with mental illness are generally more at risk of homelessness.

22 Torrey et al Criminalizing the Seriously Mentally Ill at 48. Also, see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 196.

23 Draine, Wilson and Pogorzelski 2007 *Journal of Offender Rehabilitation* 159 at 160.

24 Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 10. Also, see Slate RN "Mental Health Courts" in Mays LG and Gregware PR *Court and Justice* 3rd ed (Waveland Press Inc Long Grove Illinois 2004) at 425. See further Bernstein and Seltzer 2003 *D C L Review* 143 at 145 where it is pointed out that, in addition to the deterioration of the mental condition of the accused, mentally ill incarcerated persons are at a higher risk of assault and intimidation by other inmates. Also, see Odegaard 2007 *North Dakota Law Review* 225 at 234.

25 Torrey *et al Criminalizing the Seriously Mentally Ill* at 40. This was predicted as a result of deinstitutionalisation by Dr March Abrahamson who coined the term "criminalization of the mentally ill". He said that, as the mental health care system is forced to release patients prematurely, due to for example changes in Legislation (as was the case in California at the time (1968)), more pressure will be put on the criminal justice system to ensure the re-institutionalisation of these individuals. Also see Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 3.

the case in the South African criminal justice system.[26] This research explores how the South African criminal justice system currently deals with this increased load and explores the Mental Health Court as a therapeutic response to accused persons with mental illness in the criminal justice system.

3 MENTAL ILLNESS AND SOUTH AFRICAN CRIMINAL PROCEDURE

Mental illness, or intellectual disability, may become relevant during criminal proceedings in South African courts for two reasons. Firstly, it may affect the accused's ability to follow the court proceedings and conduct his [27] defence.[28] Secondly, it may affect the accused's criminal capacity in the sense that the accused could not distinguish between right and wrong at the time of the commission of the offence and /or could not direct his actions accordingly.[29] Mental illness or intellectual disability can, of course, have an impact on both fitness and criminal capacity in some instances.

Fitness to stand trial is mainly a pre-trial issue but can also be raised at any point during the trial. Fitness has to be established first before criminal capacity can be considered.[30] Criminal capacity is dealt with during the trial and impacts the accused's sentence as it is

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[26] See the discussion of the forensic system in chapter 2 of this research where the lack of resources to properly deal with accused persons with mental illness is discussed. Such lack of resources is contributing to delays in fitness assessments and finalisation of trials of accused persons with mental illness. The South African Department of Correctional Services has identified accused persons with mental illness in correctional facilities as a special group of accused persons that require a specialised approach.

[27] Reference to the male gender shall include the female gender and visa versa unless expressly indicated otherwise. The choice to make use of the male gender as a default is because the majority of persons with mental illness in criminal justice systems across the globe are male. This is also the case in South Africa. See Calitz FJW, van Rensburg PHJJ, Fourie C, Liebenberg E, van den Berg C, Joubert *G* "Psychiatric evaluation of offenders referred to the Free State Psychiatric Complex according to sections 77 and 78 of the Criminal Procedure Act" 2006 (12) *SAJP* 47-50 at 49 for a discussion of a particular study in which 94% of all patients sent for psychiatric observation were male. See further Strydom N, Pienaar C, van der Merwe L, Jansen van Rensburg B, Calitz FWJ, van der Merwe LM, Joubert G "Profile of forensic psychiatric inpatients referred to the Free State Psychiatric Complex, 2004 – 2008" 2011 *SAJP* 40-43 at 40. See chapter 2 of this research for information on the relevant statistics.

[28] Section 77 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the "Criminal Procedure Act"). Also, see Burchell J South African Criminal Law and Procedure 4th Edition (Juta Cape Town 2001) at 282 who explains that an accused may be unfit to stand trial resulting from his mental illness or mental defect.

[29] Section 78 of the Criminal Procedure Act. This incapacity is a result of the impact that the mental illness or intellectual disability had on him at the time of commission of the alleged offence.

[30] Pillay AL "Competency to stand trial and criminal responsibility examinations: are there solutions to the extensive waiting list?" 2014 (44) *South African Journal of Psychology* 48-59 at 51. Also see *S* v *Pedro* 2015 (1) *SACR* 41 (WCC) at [81].

only considered at the end of the trial.

Once the mental illness is raised as a concern during the trial, the accused is sent for psychiatric observation to assess his mental state. The enquiry into the accused's fitness is a separate and distinctly different enquiry from the one during which criminal capacity is established. Fitness concerns the accused's current state of mind, whereas criminal capacity is a retrospective inquiry into the accused's state of mind at the time of committing the offence. Fitness does not presuppose criminal capacity, and unfitness does not presuppose a lack of criminal capacity. An accused found fit to stand trial may, for instance, raise the lack of criminal capacity as a defence.[31]

This research focuses on fitness to stand trial. South African law provides for an accused who is unable, due to mental illness, to follow the proceedings against him to be declared unfit to stand trial.[32] Such a person will not be tried unless and until he regains his fitness to stand trial.[33]

On the other side of the spectrum, the court may find that an accused is indeed fit to stand trial, not implying that the accused does not have a mental illness, but rather that the mental

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31 In a study conducted by Strydom et al 2011 *SAJP* 40 the findings of a group of persons sent for psychiatric observation is discussed. It is explained that some of the accused persons were found fit to stand trial but not criminally responsible whereas others were found not fit to stand trial but criminally responsible. See, however, Kaliski SZ, Borcherds M and Williams F "Defendants are clueless – the 30-day psychiatric observation" 1997 (87) *SAMJ* 1351-1355 for a discussion of a study that found that all those in the study found unfit to stand trial, were also found to lack criminal capacity. Also, see Kruger A *Heimstra Suid-Afrikaanse Strafproses* 7th ed (LexisNexis 2010) at 222 who explains that the assessment for criminal capacity, which looks at the accused's state of mind retrospectively, in many cases also answers the question pertaining to whether the accused is fit to stand trial. Also see Van der Wolf M, van Marle H, Mevis P and Roesch R "Understanding and evaluating contrasting unfitness to stand trial practices: A comparison between Canada and the Netherlands" *International Journal of Forensic Mental Health* 2010 (9) 245-258 at 251 who explain that, in Canada 12% of persons who are eventually successful with the insanity plea was found unfit at some point in the past.

32 Section 77 of the Criminal Procedure Act.

33 A person found unfit to stand trial is detained as a state patient in terms of the Mental Health Care Act 17 of 2002 (hereinafter referred to as the "Mental Health Care Act") if it can be proved that he was involved in the commission of a serious crime involving violence. A state patient can only be released once a judge in chambers makes an order to that effect. An accused found unfit to stand trial but found to have been involved with the commission of a non-violent crime or that he did not commit the alleged crime at all, may be detained as an involuntary mental health care user in terms of the Mental Health Care Act. The Constitutional court recently ordered that the option of conditional and unconditional release must also be available to such an accused if it is clear that treatment and rehabilitation is not required. This amendment of section 77(6)(a)(ii) brought the options available to a court in respect of an accused with a mental illness who did not commit an offence, in line with the options available to a court in terms of section 78(6). The *De Vos* judgment is discussed in detail later in this research.

illness that he might have, does not affect his ability to follow the court proceedings. Persons who are found fit to stand trial include those with serious mental illnesses such as schizophrenia and major depression who do not always meet the criteria to be found unfit to stand trial.[34] Therefore, a mentally ill accused person can proceed to trial after a fitness finding.[35] This category of persons is fit to stand trial but mentally ill.[36]

The majority of accused persons sent for fitness assessments in South Africa, Canada and the United States of America are found fit to stand trial.[37] A large number of these accused may nonetheless suffer from mental illnesses varying in degrees of severity which does not necessarily affect their fitness to comprehend the proceedings against them but which nonetheless makes them a vulnerable group within the criminal justice system.

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34 Lurigio and Snowden 2009 *The Justice System Journal* 196 at 198 who specifically mention that persons with serious mental illness do not always meet the incompetence to stand trial criteria and are, consequently, found fit to stand trial and sent to prison. See Slobogin C, Rai A and Reisner R *Law and the Mental Health System Civil and Criminal Aspects* 5th ed (Thomson West United States of America 2009) at 1020 where various studies that were conducted on the number of accused persons found unfit to stand trial, revealed that in approximately 30% of matters, those sent for observation are found fit to stand trial. The authors indicate that the number may actually be lower since mental health professionals err on the side of caution with findings of fitness. Concerns have been raised about possible unnecessary referrals. The fitness tests vary between jurisdictions. See chapters 3 to 5 of this research for detail on the various tests.

35 Slobogin, Rai and Reisner *Law and the Mental Health System at* 1026 where a view is expressed that this could possibly be viewed as a positive result since a person fount fit to stand trial is not subjected to the stigmatisation associated with unfitness and is spared the delays that is brought about by the processes associated with a finding of unfitness. An opinion is also expressed that allowing marginally incompetent accused persons to stand trial ensures that the unfitness standard is applied and reserved for those with serious mental illnesses. Also, see Marks LK, Dean RS, Dwyer M, Girese A and Yates JA *New York Pretrial Criminal Procedure* 2nd ed (Thomson West 2007) at 543 who explain that an accused may for example suffer from a mental illness such as depression but may be found fit to stand trial.

36 See Marks *et al New York Pretrial Criminal Procedure* at 543 who explain that an accused with depression, or multiple personality disorder, or schizophrenia is not necessarily incompetent to stand trial as they may be able to, despite their mental illness, understand the proceedings and be able to follow it. Also, see Ontario Ministry of the Attorney General Criminal Law Division *Practice Memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* (Ontario Ministry of the Attorney General Ontario 2006) at 1 where it is acknowledged that persons with mental disorders and developmental disabilities are often found fit to stand trial necessitating consideration of alternatives to traditional prosecution practices.

37 See Schutte T "'Single' versus 'panel' appointed forensic mental observations: Is the referral process ethically justifiable?" 2013 (6) *South African Journal of Bioethics and Law* 64-68 at 67 for the position in South Africa. See O'Shaughnessy RJ "AAPL practice guideline for the forensic psychiatric evaluation of competence to stand trial: Canadian legal perspective" 2007 (35) *The Journal of the American Academy of Psychiatry and the Law* 505-508 at 507 who explains that the majority of persons sent for fitness assessments in Canada is found fit to stand trial. See the discussion thereof in chapter 4 of this research. Lastly, see Slobogin, Rai and Reisner *Law and the Mental Health System* 1020 who explain that most of the accused sent for fitness assessments in the United States of America, are found fit to stand trial. This is discussed further in chapter 5 of this research.

The latter group of accused persons, i.e. those fit for trial but mentally ill, form the focal point of this research.

4 PROBLEM STATEMENT AND RESEARCH QUESTIONS

Why should a specialised solution be explored for mentally ill accused persons in the criminal justice system? What is needed to address the unique problems that mentally ill accused persons bring to the criminal justice system? These are the two main issues that the research will focus on in exploring Mental Health Courts as a therapeutic response to persons with mental illness in the South African criminal justice system. The background to these two questions is discussed below.

The above discussion implies that there is a third category of accused persons within the fit –unfit spectrum, namely, accused persons who are fit to stand trial but mentally ill. The South African law does not provide for a mentally ill but fit accused person to be treated any differently than a mentally healthy accused. No further consideration is given to the presence of a mental illness of this category of accused in criminal proceedings unless the fitness issue is raised again or unless the accused raises a lack of criminal responsibility as a defence. The fact that the law does not provide alternative prosecution methods for fit but mentally ill accused persons may point to a disjoint between law and psychiatry in that the law does not recognise the significance of a mental illness in an accused that is fit to stand trial.

Once found fit, after the fitness assessment as provided for in the Criminal Procedure Act 51 of 1977, [38] these accused persons are sent back to prison to await trial. Research shows that the incarceration of a person with mental illness causes deterioration in the mental condition of the detained person.[39] Mental health care programmes in already overcrowded prisons are rare,[40] and it is likely that the mentally ill do not receive adequate mental health care treatment in prison, including those awaiting psychiatric observation.[41]

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[38] Hereinafter referred to as the "Criminal Procedure Act".

[39] Odegaard 2007 *North Dakota Law Review* 225 at 234. Also, see Slate *Mental Health Courts* 425. See further Bernstein and Seltzer 2003 *D C L Review* 143 at 145.

[40] Odegaard 2007 *North Dakota Law Review* 225 at 234 referring to the position in the United States of America. Also see Department of Correctional Services: "Strategic plan for 2015/2016-2019/202" http://www.gov.za/sites/www.gov.za/files/Strategic%20Plan%202015-2016%20-2019-2020_a.pdf (Date of use: 9 September 2016) at 20 where it is confirmed that overcrowding remains a problem in South African prisons.

[41] Accused persons often have to wait in prison for an available bed in a psychiatric institution where

Mentally ill individuals in correctional settings are at a higher risk of behavioural disturbances if they do not receive treatment.[42] Where proper treatment is withheld, the mentally ill person is very likely to re-offend or at the very least act inappropriately and be arrested, which perpetuates the so-called "revolving door" phenomenon.[43] Re-offending poses a risk to the safety of society and is costly to the correctional authorities that have to house these accused persons every time they clash with the criminal justice system.

Ignoring the mental illness of this accused person poses questions about the fairness and appropriateness of the criminal justice system for fit but mentally ill accused persons. Persons with mental illness pose unique challenges to the criminal justice system and, similarly, require a unique approach to address these challenges. This research focuses on possible alternatives to traditional prosecution for this third category of accused persons who are fit to stand trial but nonetheless mentally ill.

The question that arises from the brief concerns already highlighted is how the criminal justice system should respond to these individuals? Criminal justice systems across the globe continuously struggle to meet the needs of mentally ill accused persons.[44]

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the psychiatric observation in terms of section 77 or 78 of the Criminal Procedure Act has to take place. Waiting periods for available beds are impacted by the fact that psychiatric hospitals only have a specific number of beds allocated to forensic observation patients. See chapter 2 of this research for more detail. The inadequate mental health care services in prisons, are pointed out by the Constitutional court in *De Vos* v *Minister of Justice and Constitutional Development* CC case at [43]. A fact that was accepted by the Minister of Health in the court *a quo.*

42 Lamberti JS and Weisman RL"Persons with severe mental disorders in the criminal justice system: Challenges and opportunities" 2004 (75) *Psychiatr Q* 151-164 at 160.

43 See Denckla and Berman www.courtinnovation.org/sites/default/files/rethinkingtherevolvingdoor.pdf (Date of use: 7 March 2011). Also, see the information in Canadian Mental Health Association "Police and mental illness: Increased interactions" http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 4 where it is pointed out that persons with mental illnesses are more likely to be arrested and detained again after their release from a period of detention in the criminal justice setting. See further Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 4 who point out that the fact that many persons with mental illness are homeless, adds to the revolving door problem.

44 Schneider, Bloom and Heerema *Mental Health Courts* at 42. A contentious issue that is also relevant in the South African context is the incarceration of the mentally ill found unfit to stand trial but found not to have committed a crime, who is "sentenced" to a psychiatric hospital for an indefinite period due to the fact that he is mentally ill. It cannot be denied that the effect of this is that the illness and not the crime committed (or alleged crime) is punished. The illness is therefore criminalised. This issue has, however, been addressed by the Constitutional court by mending the options in terms of orders available to the court to make in respect of an accused found unfit to stand trial and found not to have committed the offence in question. Such a person can now be released conditionally or unconditionally. See in general the *De Vos* v *Minister of Justice and Constitutional Development* CC case. See the detailed discussion of this case in chapter 3 of this research.

How is fitness to stand trial determined, and what is the impact of a fitness finding on the criminal charges against the accused? How do South African courts approach cases of individuals with a mental illness or intellectual disability yet are fit to stand trial? Do these accused persons become the responsibility of the mental health care system, or do they remain the responsibility of the criminal justice system? These are just some of the questions that come to mind when first confronted with the position of the mentally ill in the criminal justice system. What is evident, though, is that mentally ill accused persons should not be treated in the same manner as mentally healthy accused persons.

This research concerns the adjectival processing of mentally ill individuals in the criminal justice system. It suggests the introduction and development of Mental Health Courts, as an alternative to the current use, in South Africa, of criminal courts, in the processing of mentally ill accused persons. Thus, it explores the idea of Mental Health Courts in South Africa to address the specific challenges that face the criminal justice system when having to process cases of mentally ill individuals.[45] Although some Mental Health Courts assist with assessments of fitness to stand trial and miscellaneous issues (such as bail applications) for any accused person in respect of whom mental illness is at issue, only those found fit to stand trial qualify to be diverted away from the criminal justice system into the Mental Health Court treatment program.[46] Mental Health Courts are a therapeutic response to mentally ill accused persons and apply therapeutic jurisprudence to achieve this goal.

To avoid the revolving door phenomenon, the adjectival approach of the criminal justice system towards mentally ill accused persons requires reflection. Part of this reflection is applying therapeutic jurisprudence in cases where mentally ill accused persons are involved.[47] A specialised approach to mentally ill accused persons in the South African criminal justice system is needed. One such specialised approach is found in Mental Health Courts, and this research suggests that Mental Health Courts should be incorporated into the South African criminal justice system.

It is submitted that Mental Health Courts can best serve the interests of society and the mentally ill individual in conflict with the law. The Mental Health Court movement aims to

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[45] As detailed later, issues pertinent to criminal law, and proof of capacity, are thus incidental to the research.

[46] Frailing 2009 *C.S.L.R 145* at 145.

[47] Schneider, Bloom and Heerema *Mental Health Courts at* 43.

build a bridge and fill the gap between the criminal justice system and the mental health care system in which mentally ill individuals often find themselves. It is further submitted that the criminal justice system can benefit from the implementation of these courts in that the number of cases processed through the South African criminal courts will be reduced, as those accused in respect of whom mental illness is an issue will be diverted away from the traditional criminal justice system. This, in turn, will reduce the number of awaiting trial prisoners in already overcrowded prisons. Society can benefit from the implementation of Mental Health Courts as they have proved [48] to reduce recidivism, resulting in a safer society.

Before addressing the research parameters and the limitations of the research, certain key concepts referred to throughout this research are clarified below.

5 CONCEPTUALISATION

The relevant concepts for this research are drawn from the legal field and the mental health field. By virtue of the different focus areas of these two fields, there are differences in the understanding and/or importance attached to certain concepts, depending on the field drawn from. Only key concepts are explored below. Concepts that form the basis of further discussion in this research are crystallised below for the reader's convenience.

5.1 Mental illness or mental disorder

Opinions differ in the legal field, on the one hand, and the mental health field on the other, on what exactly is to be understood under the term "mental illness". What may be considered a mental illness in the psychiatric setting may not necessarily be considered so in the legal setting.[49] This may indicate a disjoint between law and psychiatry that leaves a gap to be filled.

The Diagnostic and Statistical Manual [50] used for psychiatric diagnosis does not refer to

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48 Schneider, Bloom and Heerema *Mental Health Courts at* 36.

49 The person might be diagnosed with a mental illness or with mental retardation by a mental health care practitioner but if the mental illness or mental retardation does not have an impact on the accused's fitness to stand trial or criminal capacity, it will not be relevant for legal purposes as it will not have an effect on the criminal procedure as is the case when the mental illness or mental retardation is said to affect the accused's ability to follow the proceedings against him or if the illness affected his criminal capacity at the time of commission of the alleged offence.

50 As published by the American Psychiatric Association. (Hereinafter referred to as the "DSM").

"mental illness" but rather to "mental disorder", the definition of which reads as follows:

> *A mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.*[51]

Various editions of the DSM have been published and reference will be made to specific editions throughout this research where relevant.

51 American Psychiatric Association *DSM-V* (American Psychiatric Association Washington D C 2014) at 20. The definition of mental disorder in the DSM-IV reads as follows: "A clinically significant behavioural or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g. a painful symptom) or disability (i.e. impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability or an important loss of freedom". The DSM-IV makes use of a Multiaxial Evaluation system to measure different aspects of a patient's condition on 5 axes. Sadock BJ and Sadock VA *Kaplan and Sadock's Synopsis of Psychiatry: Behavioral Sciences / Clinical Psychiatry 10th ed* (Wolters Kluwer/ Lippincott Williams and Williams Philadelphia 2007) *at* 306. A report form is provided in the DSM-IV where findings per Axis can be indicated. Clinicians who do not wish to use the multiaxial format of reporting, may merely list the diagnosis, with the principle diagnosis being listed first. (Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry* at 307). A short explanation of each Axis follows as this is relevant for purposes of the selection criteria for those wishing to participate in Mental Health Court programmes as will be elaborated on later in this research. Axis 1 = Consists of clinical disorders and conditions that may be a focus of clinical attention. These include conditions usually diagnosed in infancy, childhood or adolescence. Mental retardation is however excluded and falls on Axis II. Other conditions that fall on this Axis, are delirium, dementia and other cognitive disorders, substance related disorders, Schizophrenia and other psychotic disorders, mood disorders, anxiety disorders, sexual and gender identity disorders, eating disorders, adjustment disorders and sleep disorders. See DSM-IV Table 9.1-5 and Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry* at 306 for a comprehensive list of clinical conditions that fall on Axis I of the DSM-IV. Axis II = Personality disorders and mental retardation. Ten personality disorders are listed on this Axis, namely paranoid personality disorder, schizoid personality disorder, schizotypal personality disorder, antisocial personality disorder, borderline personality disorder, histrionic personality disorder, narcissistic personality disorder, avoidant personality disorder, Dependent personality disorder, obsessive-compulsive personality disorder. Axis II also includes Personality disorders not otherwise specified and Mental Retardation. (See DSM-IV Table 9.1-6 and Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry.*at 306). Axis III = Physical disorder or general medical condition that is present over and above the mental disorder. The physical condition can be present because of the mental disorder, for example alcogestritis, which was caused by alcohol dependence. The mental disorder can similarly be the result of a physical condition, for example where kidney failure causes delirium. It is also possible that the physical condition is not related to the mental disorder at all. If a physical condition is linked to the mental disorder, that physical condition is mentioned on both Axis I and Axis III, for example, where hypothyroidism is the direct cause of major depression, Axis I will indicate that there is a mood disorder present due to hypothyroidism with depressive features. Physical conditions that will fall on Axis III are inter alia injury and poisoning, diseases of the nervous system and sense organs, diseases of the digestive-, circulatory-, and respiratory systems, infectious and parasitic diseases and diseases of the blood and blood-forming organs. (See DSM-IV Table 9.1-7 and Sadock and

Depending on the symptoms exhibited and the intensity, a mental disorder can be mild,[52] severe, [53] or moderate.[54]

It appears that the wording in the DSM has been adjusted to avoid labelling those who have a mental illness. For example, in the case of schizophrenia, the person who has schizophrenia was previously referred to as "a schizophrenic". The DSM now refers to "an individual with schizophrenia".[55] This contributes to the de-stigmatisation of the mentally ill as a clear attempt is made to separate the illness from the individual so that the illness is classified and not the individual.

The DSM cautions against using the manual as the only and final authority on mental disorders in a forensic setting.[56] More information about the particular individual's

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Sadock *Kaplan and Sadock's Synopsis of Psychiatry at* 306). Axis IV = Psychosocial and environmental factors that contribute to the development or exacerbation of the mental disorder. These stressors are events/ facts that cause the individual stress beyond that which a person would normally experience. Consideration is given to the manner in which the stressor changes the patient's life and the extent to which he is in control of the event. Positive stressors are for example a job promotion, whilst negative stressors are for example, the death of a loved one, problems with housing, problems related to interaction with crime and economic problems. The information on this Axis is particularly important in compiling a treatment plan where either the stressor can be removed if possible or the patient can be assisted in dealing with the particular stressors. (See DSM-IV Table 9.1-8 and Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry* at 306, 307 for a comprehensive list of what may qualify as psychosocial and environmental stressors. Axis V = Global assessment of functioning. The assessment considers the persons social, occupational and psychological functioning over for example the previous couple of months. A patient who had a high level of functionality before an episode has a better prognosis of recovery than a patient who had low levels of functioning. (See DSM-IV Table 9.1-9 and Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry* at 307). The scale on which the global assessment of function (GAF) is a 100-point scale, with 100 being the highest possible level of functioning. The DSM-V significantly changed the system from a multiaxial system to a more gradual approach. See American Psychiatric Association *DSM-V at 16.* Even though the DSM-V is the current diagnostic manual, most of the research material consulted for purposes of this research, still refers to and used the DSM-IV, as diagnostic manual, hence, most of the references in this research to the DSM, will be to the DSM-IV (TR) rather than the DSM-V.

52 The minimum symptoms required for the diagnosis is present with no or few additional symptoms. Symptoms only result in minor impairment in social and occupational functioning. See Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry* at 307.

53 Symptoms over and above those required for the diagnosis is present, or several very severe symptoms are present, or the symptoms result in serious impairment of social or occupational functioning. Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry* at 307.

54 Presence of symptoms or functional impairment between the "mild' and "severe" category. Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry* at 307.

55 American Psychiatric Association DSM – IV at xxii. Also see American Psychiatric Association *DSM-V* at 100, 101.

56 Whenever there is interplay between the law and the field of mental health in the criminal justice

functional impairments may, for example, be required to determine the extent and nature of his disorder.[57] The DSM also cautions that the fact that a person's behaviour matches a particular description of a mental disorder in the DSM does not imply anything with regard to the person's control or lack of control over the behaviour that is associated with the identified mental disorder at a given point in time.[58] The legal representative of the mentally ill accused can therefore not rely exclusively on a diagnosis made by a psychiatrist; it will have to be interpreted and analysed, having regard to the individual's specific circumstances, personality, behaviour and physical impairments, if any.

Clinicians often use the terms mental illness and mental defect interchangeably as synonyms of one another.[59] The terms "mental illness" and "mental defect" [60] are also used interchangeably in the South African Criminal Procedure Act.[61] No definitions of these terms are included in the Criminal Procedure Act.[62] The use of the term "mental defect" is likely to cause confusion as it is also occasionally used as a synonym for mental retardation.[63]

In the Mental Health Care Act 17 of 2002,[64] mental illness is defined as:

> *A positive diagnosis of mental health-related illness in terms of accepted diagnostic criteria*

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setting, it is generally referred to as the forensic setting. See American Psychiatric Association *DSM-V* at 25 that contains a cautionary note on the use of the DSM in the forensic setting.

57 American Psychiatric Association DSM-IV at xxiii. Also see American Psychiatric Association *DSM-V* at 25.

58 American Psychiatric Association DSM-IV at xxiii. Also see American Psychiatric Association *DSM-V* at 25.

59 Kaliski 2012 *Afr J Psychiatry 83* at 85.

60 This term is discussed later in this chapter under the discussion of the term "mental retardation".

61 See in particular s78 (1) of the Criminal Procedure Act.

62 Le Roux and Stevens 2012 *SACJ* 44 at 49.

63 Le Roux and Stevens 2012 *SACJ* 44 at 50. Also see Burchell South African Criminal Law and Procedure 284, 289 who defines mental defect as a mental state characterised by an abnormally low intellect and as a result whereof, the individual is deprived of normal cognitive or conative functions. Burchell further explains that mental defects are usually permanent, are detectable and evident as from an early age, and hinder the development of the child in that they do not learn certain social or behavioural patterns. This explanation shows striking similarities to the definition of mental retardation in the DSM as referred to later in this chapter and it is therefore safe to assume that mental defect refers to mental retardation. See Tredoux C Foster D, Allan A, Cohen A and Wassenaar D *Psychology and Law* (Juta South Africa 2005) at 420, 421. Also, see Africa A "Psychological evaluation of mental state in criminal cases" in Tredoux C, Foster D, Allan A, Cohen A and Wassenaar D *Psychology and Law* (Juta South Africa 2005) at 392. She points out further that Mental retardation is a psychological concept. Also see Pillay 2014 *South African Journal of Psychology* 48 at 49 where it is explained that mental defect is used to refer to mental retardation and other conditions such as dementia, which is characterised by cognitive deficits.

64 Hereinafter referred to as the "Mental Health Care Act".

made by a mental health care practitioner authorized to make such diagnoses.[65]

The definition of mental illness in the Mental Health Care Act is very wide and includes a range of diagnosis. It is noteworthy that the definition does not require the illness to be severe or permanent in order to be considered a mental illness. It is important to note that the fact that a person is a mental health care user in terms of the Mental Health Care Act does not automatically imply that the person is also mentally ill for purposes of section 77 and/ or section 78 of the Criminal Procedure Act.[66] It will, however, be taken into account when assessing the accused within the parameters of the Criminal Procedure Act.[67]

There are inherent dangers in attempting to define the concept of mental illness in definitive terms for legal purposes. Should the definition be couched in terms that are too wide, it could lead to a large number of persons being found unfit to stand trial and could make the so-called insanity defence available to accused persons who ought not to be able to rely on such a defence. In turn, a very strict and narrow definition could result in persons being

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65 Section 1 of the Mental Health Care Act. A mental health care practitioner for purposes of the South African Mental Health Care Act is a psychiatrist or medical practitioner (registered in terms of the Health Professions Act 56 of 1974) or a nurse, occupational therapist, psychologist or social worker with the necessary training. Landman AA and Landman WJ *A practitioner's Guide to the Mental Health Care Act* (Juta Cape Town 2014) at 12, however, submit that only a diagnosis by a psychiatrist or medical practitioner duly registered, will be acceptable in formal proceedings.

66 The definition of mental illness is particularly relevant when having to determine the accused's fitness to stand trial or criminal responsibility. Sections 77 and 78 of the Criminal Procedure Act sets out the requirements for an accused to be found unfit to stand trial or not criminally responsible. These concepts and requirements will be discussed later in this chapter and further in chapter 3 of this research. Also, see Le Roux and Stevens 2012 *SACJ* 44 at 50. See further Kruger *Heimstra Suid-Afrikaanse Strafproses* at 220. From a legal perspective, and in particular for purposes of finding that the accused lacks criminal capacity, a mental illness is considered to be an illness only if the illness is a result of a disease (pathological); and the illness is of internal origin (endogenous). Burchell *South African Criminal Law and Procedure* at 286 explains the importance and value of the mental illness having to be pathological, by comparing it to a physical illness. He explains that a physical disease happens involuntarily and affects certain organs of the body. This person cannot be blamed for contracting the disease. Similarly, a mental illness affects the brain (as an organ) in the human body so that the sufferer of the illness cannot be held responsible for contracting the illness nor for the way the illness is causing him to act. A condition brought about by external stimuli, such as the temporary psychosis caused by the excessive intake of a drug, will not qualify as a mental illness. Whether an illness is in fact pathological or not, is not always simple to determine. See Le Roux and Stevens 2012 *SACJ* 44 at 46. The authors highlight that one of the problems with the defence of pathological criminal incapacity, is that the disorders that could possibly constitute a mental illness or mental defect for purposes of this defence, are not specifically identified. Also see in general *S* v *Stellmacher* 1983 (2) SA 181 (SWA) where it is reiterated that temporary impairment caused by external stimuli such as alcohol or drugs, does not constitute a mental illness or defect. See further Swanepoel M "Legal aspects with regard to mentally ill offenders in South Africa" 2015 (18) *Potchefstroom Electronic Law Review* 3238-3258 at 3248, 3249.

67 Le Roux and Stevens 2012 *SACJ* 44 at 50. Also, see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 220.

found fit to stand trial which ought not to be. In addition, a narrow definition could exclude from the insanity defence those accused that are suffering from a mental illness according to the mental health profession but who do not meet the legal requirements set in terms of such a strict or narrow interpretation of the concept of mental illness.[68]

Since the term "mental illness" and not mental disorder appear in both the Criminal Procedure Act and the Mental Health Care Act, the term "mental illness" is used throughout the research to refer to all mental health issues other than intellectual disability. Reference will, however, occasionally be made to a mental disorder where the source consulted particularly referred to this term. It should be understood to mean mental illness. Personality disorders are further specifically excluded and only referred to specifically where relevant.[69]

5.2 Mental retardation or intellectual disability

Mental illness must be distinguished from mental retardation or intellectual disability. The DSM-IV contained a definition of mental retardation, and the term was used throughout the DSM-IV.[70] The newly released DSM-V refers to intellectual disability rather than mental retardation.[71]

The DSM-V explains the term intellectual disability as follows:

> *Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:*
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> *A. Deficits in intellectual functions, such as reasoning, problem-solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.*

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68 Le Roux and Stevens 2012 *SACJ* 44 at 54.

69 Personality disorders belong to Axis II of the DSM-IV RT and are not labelled as mental illness. Mental illnesses belong to Axis I. Axis II conditions include personality disorders and mental retardation. The drafters of the DSM-V are in the process of developing an alternative DSM-V model for personality disorders. For detail on this, see American Psychiatric Association *DSM-V* at 761.

70 See American Psychiatric Association DSM-IV-TR at 37 where mental retardation is defined as "is characterised by significantly sub-average intellectual functioning (an IQ of approximately 70 or below) with onset before age 18 years and concurrent deficits or impairments in adaptive functioning".

71 American Psychiatric Association DSM-V at 33. Legislative changes in the United States dictate the use of the word "mental retardation" rather than intellectual disability. Intellectual disability is also more in line with other classification systems, such as the ICD.

> B. *Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.*
>
> C. *Onset of intellectual and adaptive deficits during the developmental period.*[72]

Impairment in adaptive functioning is identified in at least two of certain skills areas, *inter alia,* communication, self-care, home living, self-direction, functional, academic skills, and use of community resources and safety.[73] The condition is considered chronic with an onset in the developmental years.[74] Examples of mental retardation / intellectual disability syndromes are Down Syndrome [75] Fragile X Syndrome [76] and Cat's Cry Syndrome.[77]

Mental retardation can range from mild (an IQ of between 50 and 70) to profound (an IQ below 20).[78] The DSM-V places more focus on the severity of deficits in adaptive functioning and does not focus on IQ tests alone for purposes of diagnosis.[79]

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72 American Psychiatric Association DSM-V at 33.

73 American Psychiatric Association DSM-IV at 39. Also see Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry* at 1138. Also see Calitz FJW, van Rensburg PHJJ, de Jager PP, Olander ML, Thomas L, Venter R, Wessels GA "Psychiatric evaluation of intellectually disabled offenders referred to the Free-State Psychiatric Complex, 1993-2003" 2007 (13) *SAJP* 147-1520 at 147.

74 American Psychiatric Association DSM-V at 33. Also, see Landman and Landman *The Mental Health Care Act* 13. Also see Calitz *et al* 2007 *SAJP* 147 at 148.

75 Occurs in 1 out of every 700 births. Down Syndrome is associated with a chromosomal abnormality but the exact cause of Down Syndrome is still unknown. See Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry* at 1141, 1142 for a detailed discussion of the syndrome.

76 This is the second most common cause of mental retardation and results from a mutation on the X chromosome, at what is known as the "fragile site". It is present in 1 out of every 1000 males and 1 out of every 2000 females. See Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry at* 1142 for more information on this syndrome.

77 Also known as "Cri-du-chat". Sufferers of this syndrome lack part of the 5th chromosome. These children usually have severe mental retardation. The cat-like cry of the child, caused by abnormalities of the larynx, disappears as the child ages. Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry* at 1142, 1143.

78 Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry at* 1138. Also, see American Psychiatric Association DSM-IV at 40, 41 where profound mental retardation is classified as a person with an IQ of below 25 and not 20 as per the DSM-IV-TR. See further this source at 1139-1140 where it is pointed out that 85% of all individuals with mental retardation have mild mental retardation. Those with moderate mental retardation (IQ of between 35 and 50) comprise 10% of those with mental retardation, whilst those with severe (IQ of between 20 and 35) and profound mental retardation, represent 4% and 1-2% of those with mental retardation respectively. Mental retardation is approximately 1.5 times more common among men than among women. See further Calitz *et al* 2007 *SAJP at* 147.

79 American Psychiatric Association DSM-V at 33 where it is explained that IQ scores are less reliable in the "lower end of the IQ range". An IQ score is no longer the determining factor of a person's abilities but has to be considered with the functioning levels of the relevant person. Also, see Landman and Landman *The Mental Health Care Act* at 13 who points out that this is particularly

On the legal front, the Criminal Procedure Act refers to these individuals as "intellectually disabled" and not as mentally retarded.[80] The Mental Health Care Act uses the term intellectual disability rather than mental retardation.[81]

The Mental Health Care Act distinguishes between "severe or profound intellectual disability" and "mental illness". Profound intellectual disability is defined in section 1 of the Mental Health Care Act as:

> *A range of intellectual functioning, extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self-care and requiring constant aid and supervision to severely restricted sensory and motor functioning and requiring nursing care.*[82]

As mentioned earlier, the term "mental defect" is sometimes considered synonymous with mental retardation.[83] A distinction has, however, been drawn between "mental defect" and "mental disease", where the latter has been described as a condition that can either deteriorate or improve, whereas a "mental defect" refers to a non-changing state which could be the result of mental disease or injury.[84] The term mental defect can create

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important in the forensic setting.

80 See, for example, section 271B(b)(i) of the Criminal Procedure Act that deals with the expungement of a criminal record, section 335B(1) of the Criminal Procedure Act regarding medical examination on an intellectually disabled child in respect of whom it is alleged that a sexual offence has been committed and the schedules of offences to the Criminal Procedure Act. Also see Africa Psychological evaluation of mental state in criminal cases at 392.

81 See section 1 of the Mental Health Care Act which contains the following definition: "severe or profound intellectual disability" means a range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self-care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care."

82 Section 1 of the Mental Health Care Act. It would appear as if mental retardation as defined in the DSM-IV and profound intellectual disability, are synonyms, especially if regard is had to the focus of the definitions on the adaptive (motor and sensory) functioning.

83 Le Roux and Stevens 2012 *SACJ* 44 at 50. Also see Burchell South African Criminal Law and Procedure at 284, 289 who defines mental defect as a mental state characterised by an abnormally low intellect and as a result whereof, the individual is deprived of normal cognitive or conative functions. Burchell further explains that mental defects are usually permanent and are detectable and evident as from an early age and hinder the development of the child in that they do not learn certain social or behavioural patterns. This explanation shows striking similarities to the definition of mental retardation in the DSM-IV as referred to above, and it is therefore safe to assume that mental defect refers to mental retardation. See Tredoux *et al Psychology and Law* at 420, 421. Also, see Africa *Psychological evaluation of mental state in criminal cases* at 392 who points out that mental retardation is a psychological concept. Lastly, see Pillay 2014 *South African Journal of Psychology* 48 at 49 who confirms that the term "mental defect" is used to describe conditions characterised by cognitive deficits such as dementia and mental retardation.

84 *Durham* v *United States* 214 F2d 862 (DC Cir 1954) at 875. A mental disease has been explained by Fingarette with an analogy to a physical condition, as follows: "*The ordinary physical disease symptoms is an abnormality which is produced from within the person himself, it is the result of*

confusion as it is often used to refer to mental illness rather than an intellectual disability.[85]

For the sake of consistency, reference is made to intellectual disability rather than mental retardation or mental defect in this research. The use of intellectual disability is in line with the terminology of the DSM-V, the Mental Health Care Act, and the Criminal Procedure Act, as discussed above.

Mental illness and intellectual disability are not mutually exclusive. Up to two-thirds of persons with an intellectual disability usually have a comorbid mental disorder.[86] Some mental illnesses are more common among individuals with intellectual disabilities than among other mental health care users.[87] The distinction between mental illness and intellectual disability is, however, important as the therapeutic pathways for a person with mental illnesses differ from those for persons with intellectual disabilities.[88]

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something in the person, or of something about the person's makeup which is at least for the time a part of him. Yet, although it exists within the person and may be said to be produced by him, it is produced involuntarily. Not only is the symptoms produced involuntarily, but the condition which produces it, the disease, is itself present independently of the person's will at the time". See Fingarette H "The concept of mental disease in criminal law insanity tests" 1966 (33) *University of Chicago Law Review 229-248 at 245.*

85 Clinicians often use mental illness and mental defect interchangeably as synonyms of one another. The terms "mental illness" and "mental defect" are also used interchangeably in the South African Criminal Procedure Act even though no definitions of these terms can be found in this Act. See Kaliski 2012 African Journal of Psychiatry 83 at 85. Also see Le Roux and Stevens 2012 *SACJ* 44 at 49. See the interchangeable use of mental illness and mental defect in section 78(1) of the Criminal Procedure Act.

86 Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry* at 1140. Also see Landman and Landman *The Mental Health Care Act* at 13.

87 Up to two thirds of persons with mental retardation, usually have a comorbid mental disorder. See Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry* at 1140 who explain that the severity of the mental retardation also seems to be indicative of the probability of the person having a comorbid mental disorder. Also, see Landman and Landman *The Mental Health Care Act* at 13 where it is confirmed that it is common for intellectual disability to co-occur with another mental conditions such as autism spectrum disorders and depression. Also see American Psychiatric Association DSM-IV at 42 and 43 that lists the most common associated mental disorders in a person that suffers from mental retardation. To mention but a few: attention deficit disorder (hyperactivity), mood disorders and mental disorders due to a general medical condition, such as dementia due to head trauma. Down syndrome is a common example of someone with mental retardation. Mental retardation is usually diagnosed in infancy childhood or adolescence.

88 Persons with intellectual disabilities are cared for in care and rehabilitation centres as defined in section 1 of the Mental Health Care Act. (v) "care and rehabilitation centres" means health establishments for the care, treatment and rehabilitation of people with intellectual disabilities". Also see section 6(7) of the Mental Health Care Act, which states, "(7) Care and rehabilitation centres may - (a) conduct assessments of intellectual abilities; and (b) provide care, treatment and rehabilitation services to persons with severe or profound intellectual disabilities, including assisted and involuntary mental health care users." Persons with mental illnesses are treated in psychiatric hospitals. See section 1 of the Mental Health Care Act where psychiatric hospital is defined as

5.3 Mentally ill accused

This term is used throughout the research to refer to accused persons with either or both a mental illness or intellectual disability. Even though the therapeutic pathways of persons with mental illness differ from those for persons with intellectual disabilities, a distinction between these two conditions is not necessarily made during the arrest and pre-trial phase when the exact nature of the mental condition still has to be established. Where specific attention needs to be drawn to the position of the intellectually disabled accused, rather than the mentally ill accused group as an all-inclusive term, this will be pointed out specifically.

5.4 Fitness to stand trial

Even though every jurisdiction has its own definition of what it entails to be fit to stand trial,[89] the general principle is that a person must be able to follow the proceedings and instruct his legal representative in such a manner that he can conduct a proper defence.[90] An accused may not be tried whilst he is incapable of understanding the proceedings.[91]

A fitness assessment concentrates on the current mental state of an accused to understand the proceedings and stands separate from the assessment to determine the criminal capacity of the accused at the time of the commission of the alleged offence, which

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"psychiatric hospital" means a health establishment that provides care, treatment and rehabilitation services only for users with mental illness;" Also see section 6(6) of the Act which states that: "(6) Psychiatric hospitals may admit, care for, treat and rehabilitate - (a) voluntary mental health care users in special programmes; (b) assisted mental health care users; (c) involuntary mental health care users; (d) State patients; (e) mentally ill prisoners; (f) persons referred by court for psychiatric observation in terms of the Criminal Procedure Act; and 11 (g) persons admitted for a long period as part of their care, treatment and rehabilitation."

89 See the jurisdiction specific chapters in this research for the explanation of the concept of fitness to stand trial, as it is understood in the respective jurisdictions. Although the South African Criminal Procedure Act does not contain a definition of what is to be understood under fitness to stand trial, section 77(1) of the Act compels a court to refer an accused for observation if "(1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79".

90 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 225. Also, see Kruger A *Mental Health Law in South Africa* (Butterworths 1980) at 162. See further Du Toit E, De Jager, FJ, Paizes A, Skeen A St Q and Van der Merwe SE, *Commentary on the Criminal Procedure Act* (Juta Cape Town 2012) at 13-5.

91 *S* v *Mabena and Another* 2007 (1) SACR 482 (SCA).

assessment is retrospective in nature.[92]

Fitness to stand trial is a procedural issue, whereas criminal responsibility is a substantive issue that may render the accused not guilty.[93] Since the focus of this research is procedural in nature, the concept of criminal responsibility and the consequences of the lack thereof are not canvased in detail. The concept is merely explained for the sake of contextualisation and referred to occasionally throughout the research.

5.5 Not criminally responsible

The concept refers to an incapacity that is indicative of a person suffering from a mental illness or defect that manifests in a lack of capacity to control actions and an inability to appreciate the wrongfulness of actions.[94] A person, who suffered from a mental illness or defect at the time of the commission of an act that normally constitutes an offence, will not be held criminally liable if the mental illness or defect affected his ability to distinguish between right and wrong or his ability to direct his will accordingly.[95] The term "not criminally responsible" substitutes the term "insane", which was previously used to refer to a mental illness or disorder.[96]

Where the issue of mental illness for purposes of criminal capacity is raised, the accused is referred for psychiatric observation to determine his criminal capacity at the time of the commission of the act.[97]

As alluded to earlier, the focus of this research falls on fitness issues rather than criminal

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92 Kaliski, Borchers and Williams 1997 SAMJ 1351 at 1354. Also see Africa Psychological evaluation of mental state in criminal cases at 387. See further Kruger Mental Health Law in South Africa at 164. Also, see Kruger Heimstra *Suid-Afrikaanse Strafproses* at 221. This is in contrast with the test for criminal capacity, which does not test the current state of mind of the accused, but is a retrospective test looking at the state of mind of the accused at the time of commission of the alleged offence. Kruger points out, however, at 222 that the assessment for criminal capacity, which looks at the accused's state of mind retrospectively, in many instances also answers the question pertaining to whether the accused is fit to stand trial. Also see Pillay 2014 South African Journal of Psychology 48 at 49.

93 Slovenko R Psychiatry in Law / Law in Psychiatry 2nd ed (Routledge New York 2009) at 171.

94 Burchell *South African Criminal Law and Procedure* at 280. The term "not criminally responsible" includes both pathological and non-pathological criminal incapacity.

95 Section 78(1) of the Criminal Procedure Act.

96 Burchell South African Criminal Law and Procedure at 69. Also, see Parliamentary Information and Research Service Current issues in Mental Health in Canada: Mental Health and the Criminal Justice System (Library of Parliament Ottawa Canada 2013) at 1.

97 Section 78 read with section 79 of the Criminal Procedure Act.

capacity issues. Substantive issues pertaining to criminal responsibility hence falls beyond the scope of this research.

5.6 *Fitness assessment*

The Criminal Procedure Act prescribes the procedure for an enquiry aimed at establishing an accused's fitness to stand trial or criminal capacity.[98] This research concerns the procedural aspects pertaining to such enquiry, and in particular, the assessment conducted to determine the accused's fitness to stand trial, i.e. the fitness assessment. For this reason, the term fitness assessment is used in this research to refer to the process where a mental health care practitioner assesses an accused to determine his fitness to stand trial and all processes associated therewith.

The process is often alternatively referred to in the literature as psychiatric observation. Psychiatric observation could be understood to include both the fitness assessment and the criminal capacity assessment. This term is occasionally used throughout the research when reference is made to the general psychiatric observation process where either or both fitness and/or criminal capacity is assessed.

5.7 *State patient*

This term refers to an individual classified as a state patient by a court in terms of section 77(6) of the Criminal Procedure Act (accused found unfit to stand trial), or section 78(6) of the Criminal Procedure Act (accused found not criminally liable due to mental illness).[99] Detention as a state patient is the most restrictive category of mental health care, and rehabilitation in terms of the Mental Health Care Act as a state patient can only be released from such care by order of a judge in chambers.[100] This term is relevant for purposes of

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98 The court may order an enquiry into fitness to stand trial in terms of section 77 of the Criminal Procedure Act and/or an enquiry into the criminal capacity of the accused in terms of section 78 of the Criminal Procedure Act. The enquiry is conducted and reported on in accordance with section 79 of the Criminal Procedure Act. See the detailed discussion of the section 77 procedure in chapter 3 of this research.

99 The definition of state patient in the Mental Health Care Act read with section 19 of the Judicial Matters Amendment Act 55 of 2002 (hereinafter referred to as the "Judicial Matters Amendment Act").

100 It is rather difficult to secure the release of a state patient as opposed to, for example, an involuntary mental health care user. A state patient can only be released by order of a judge in chambers whereas an involuntary mental health care user can be discharged if the head of the health establishment is satisfied that involuntary mental health care treatment and rehabilitation services

this research when discussing the consequences of a finding of unfitness to stand trial.

5.8 Involuntary mental health care user

This term refers to a person receiving involuntary mental health care treatment and rehabilitation services at a psychiatric facility in terms of the Mental Health Care Act.[101] A criminal court may order that an accused person found unfit to stand trial be treated as an involuntary mental health care user in certain circumstances.[102] The discharge process for an involuntary mental health care user is less complex than that applicable to a state patient.[103]

5.9 Criminalising mental illness

The criminalisation of the mentally ill occurs when a mentally ill person is cared for in the criminal justice system rather than the mental health care system.[104] Suffering from a

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are no longer required. See *S* v *Siko* 2010 (2) SACR 406 (ECB) in this regard. Also see section 47 of the Mental Health Care Act. The judge must *inter alia* be furnished with a report from the head of the health establishment where the state patient received treatment as well as reports from two mental health practitioners of which one must be a psychiatrist. (See section 47(3)(a)(i) and (ii) of the Mental Health Care Act). See further section 37 of the Mental Health Care Act with regard to the discharge of an involuntary mental health care user. The decision to discharge an involuntary mental health care user lies with the head of the relevant health establishment which decision has to be confirmed by the Review Board. (Section 37(5)(b)). The Registrar of the High Court need only be informed of the decision to discharge (section 37(6)) and the decision need not be confirmed by a judge in chambers.

[101] Section 32 of the Mental Health Care Act provides for this category of mental health care, treatment and rehabilitation services.

[102] Section 77(6) of the Criminal Procedure Act provides that a person found unfit to stand trial and who is charged with a non-violent crime or who, after the trial on the facts, was found not to have been involved in the violent crime that he is charged with, may be treated as an involuntary mental health care user. Such a person's mental health status is reviewed every six months and he may be discharged once it is determined that he no longer suffers from a mental illness. The Registrar of the High Court must be informed of such a discharge. See the detailed discussion of the categories of mental health care treatment and rehabilitation services as discussed in chapter 2 of this research.

[103] An involuntary mental health care user can be released upon a decision to this effect by the head of the health establishment. The Registrar of the High Court must be informed of such discharge. In the case of a state patient, release is only possible once a judge in chambers ordered such release. More detail on the discharge process is discussed in chapter 3 of this research.

[104] Dr Marc Abrahamson coined the term "criminalization of the mentally ill" after observing that there is a rapid increase in the number of mentally ill individuals being arrested in the United States of America for petty crimes. He warned that the fact that the mental health care system at the time, due *inter alia to* changes in legislation, were forced to release mentally ill individuals prematurely could in turn, result in pressure on the criminal justice system to ensure that these individuals are deinstitutionalised. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 40. Also see Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 43. Also see Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use 13 March 2015) at 7 where criminalisation of mental illness is defined as: "where a criminal, legal response overtakes a

mental illness is, of course, not a crime.[105] Historically, the mentally ill were removed from prisons and instead placed in-hospital care.[106] The opposite seems to be true today, as the criminal justice system is expected to cater for the needs of the mentally ill who encounter the law because of their mental illness.[107] The criminalisation of the mentally ill is, therefore, largely the result of a mental health care system that does not provide sufficiently for the needs of the mentally ill.[108] Labelling a person who is mentally ill as a "mentally ill offender," rather than a "patient", is degrading to the individual and affects his dignity.[109]

The criminalisation of mental illness is often blamed on deinstitutionalisation.[110] It is submitted, however, that the criminalisation of the mentally ill seems to be an unintended consequence of the deinstitutionalisation movement.[111]

It is submitted that the criminalisation of the mentally ill will continue until resources are made available to cater properly for the needs of the mentally ill who come in conflict with

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medical response to behaviour related to mental illness." and where it is explained that a person experiencing a mental health crisis, is likely to be scared, paranoid and confused and may act in an aggressive manner towards a person who is trying to help which in turn, often lead to charges of assault against such mentally ill person. This illustrates clearly how behaviour that should have been addressed by the mental health care system, is addressed by the criminal justice system since the police are often the first responders to a mental health crisis as the family or public calls the police in for help.

105 Swanepoel M "Human rights that influence the mentally ill patient in South African medical law: A discussion of section 9; 27; 30; and 31 of the Constitution" 2011 (14) *Potchefstroom Electronic Law Review* 127-261 at 138. Also, see McLachlin 2010 *Dalhousie Law Journal* 15 at 31 who states it well: "*Mental illness is a disability. It is neither a sin, nor a moral wrong".*

106 Schneider, Bloom and Heerema *Mental Health Courts* at 37.

107 This is evident from the large number of persons with mental illness that encounter the criminal justice system. See Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 4. See chapter 2 of this research for more background information on the increase in the number of mentally ill persons in the criminal justice system.

108 Seltzer T ""Mental health courts: A misguided attempt to address the criminal justice system's unfair treatment of people with mental illnesses" 2005 (11) *Psychology, Public Policy and Law* 570-586 at 580. This is particularly so where the mentally ill person already has a criminal record or where he has difficult co-occurring conditions such as substance abuse.

109 Schneider, Bloom and Heerema *Mental Health Courts*) at 37.

110 Torrey et al Criminalizing the Seriously Mentally Ill at 40.

111 Denckla and Berman www.courtinnovation.org/sites/default/files/rethinkingtherevolvingdoor.pdf (Date of use: 7 March 2011) at 3. Also see Odegaard 2007 *North Dakota Law Review* 225 at 233 where it is explained that, as part of the deinstitutionalisation movement, mentally ill persons who were not dangerous, were released from state psychiatric institutions for treatment in the community. The intention was for the community services to be in place to provide support for these persons but this was not the case, causing many mentally ill persons to relapse and clash with the criminal justice system. See further the discussion of the deinstitutionalisation movement in the United States of America as discussed in chapter 5 for reasons in support of this submission.

the law because of their mental illness.[112]

5.10 Diversion

Diversion, in this context, aims to provide an alternative to traditional prosecution and directs mentally ill person away from the criminal justice system into the mental health care system, taking into consideration the safety of the public and the mentally ill accused.[113] The objective of diversion is to address the root causes of crime through early intervention.[114] Diversion steers the mentally ill accused away from the criminal justice system towards treatment in an attempt to address the likely root of the mentally ill person's criminal behaviour.

5.11 Mental Health Courts

These are specialised courts where mentally ill accused persons are dealt with in a separate docket, a collaborative team is used to make linkages to mental health treatment, availability of appropriate clinical placement is ensured, and programmes are monitored by the court with possible criminal sanctions for non-compliance.[115]

These courts focus on rehabilitation of the mentally ill accused, reducing or avoiding time spent by the mentally ill accused in jail, as well as decriminalisation and reintegration of the mentally ill accused into the community.[116]

Mental Health Courts are problem-solving courts where therapeutic jurisprudence is

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112 Schneider, Bloom and Heerema *Mental Health Courts* at 37.

113 Schneider, Bloom and Heerema Mental Health Courts at 69.

114 See Parliamentary Information and research service *Current issues in Mental Health in Canada* at 4. Also see Rieksts M "Mental health courts in Canada" *LawNow* 2008 (33) 31-34 at 32. See further National Judicial Institute *Problem-solving in Canada's courtrooms. A guide to therapeutic justice* (National Judicial Institute Canada, 2011) at 9.

115 This is the functional definition of the Mental Health Court as crafted by Steadman, Davidson and Brown. See Steadman HJ, Davidson S and Brown C "Law and Psychiatry: Mental health courts: Their promise and unanswered questions" 2001 (52) *Psych Serv* 457-458 at 458. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 205 where the characteristics of Mental Health Courts are discussed. These are in line with the definition of Mental Health Courts offered by Steadman, Davidson and Brown.

116 Schneider, Bloom and Heerema *Mental Health Courts* at 85 advocate that these characteristics should be incorporated into the actual definition of a Mental Health Court and offers it as an alternative to the functional definition offered by Steadman, Davidson and Brown 2001 *Psych Serv* 457 at 458.

applied.[117] As part of therapeutic jurisprudence, a collaborative and co-operative,[118] rather than an adversarial approach is followed by the court.

5.12 Therapeutic jurisprudence

This term emerged as a theory of mental health law and as a direct response to the criminalisation of the mentally ill.[119]

Bernstein and Seltzer [120] explain the underlying principles of the therapeutic approach within the context of Mental Health Courts as follows:

> *From the Criminal Law perspective, two rationales underlie the therapeutic court approach: first, to protect the public by addressing the mental illness that contributed to the criminal act, thereby reducing recidivism, and second, to recognize that criminal sanctions, whether intended as punishment or deterrents, are neither effective nor morally appropriate when mental illness is a significant cause of the criminal act.*

Therapeutic jurisprudence proposes, "…the law should be restructured to better accomplish therapeutic goals."[121]

Therapeutic jurisprudence aims to address and alleviate underlying problems that may cause the particular individual to come into conflict with the law.[122] In short, it entails that therapeutic goals should be incorporated in the application of the law.[123] The aim is to rehabilitate the individual through applying therapeutic jurisprudence during the court process.

The aim of therapeutic jurisprudence, as set out above, implies that there might be elements of the existing criminal justice system that create hurdles for the mentally ill

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117 Schneider, Bloom and Heerema *Mental Health Courts* at 39. The concept of therapeutic jurisprudence will be explored later in this research. Also see Stafford KP and Wygant DB "The role of competency to stand trial in mental health courts" 2005 (23) *Behav. Sci Law* 245-258 at 246. See further Odegaard 2007 *North Dakota Law Review* 225 at 228.

118 Goldberg S *Judging for the 21st Century: A problem solving approach* (National Judicial Institute Canada 2005) at 26. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 92.

119 The term was coined by Professor David B Wexler. See Heerema M "An introduction to the mental health court movement and its status in Canada" 2005 (50) C*rim.L.Q* 255-282 at 261. Also see Schneider, Bloom and Heerema Mental Health Courts at 43.

120 Bernstein and Seltzer 2003 *D C L Review* 143 at 148.

121 Wexler DR "Therapeutic jurisprudence and the Criminal Court" 1993 (35) *Wm and Mary Law Review* 279-299 at 280. Also see Kaliski, Borchers and Williams 1997 *SAMJ* 1351 at 1354 where it is stated "Mental illness should not be used to escape justice but should certainly be important in deciding on disposal. i.e. treatment".

122 Steadman, Davidson and Brown 2001 *Psych Serv* 457 at 261.

123 Schneider, Bloom and Heerema Mental Health Courts at 3.

accused in the criminal justice system.[124] It does not aim to replace or substitute the traditional goals of the criminal justice system, but rather aims to function within the parameters of these goals to achieve a benefit for the mentally ill accused [125] and society.

5.13 Restorative justice

In the context of this research, restorative justice aims to restore relationships tainted by criminal acts and to restore both the victim and the mentally ill accused as constructive contributing members of the community.[126] It aims to identify problems, which must be addressed in order to avoid future offending.[127] Restorative justice focusses on that which is required in order for the victim to be restored to a state of well-being and establishes ways to rehabilitate the transgressor and re-integrate him into the community.[128]

Restorative justice measures involve, for example, meetings between the victim and the transgressor where the incident is discussed.[129] Since it is often family members of the mentally ill person that fall victim to his criminal behaviour, these victims would arguably want the mentally ill person to be dealt with in a compassionate and humane manner because it is a relative and not a complete stranger who committed the crime.[130]

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124 Heerema 2005 *Crim.L.Q* 255 at 261.

125 Schneider, Bloom and Heerema Mental Health Courts at 43, 44.

126 Schneider, Bloom and Heerema *Mental Health Courts* at 4. Also see Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 1 where it is explained that the aim is for the accused / offender to admit what he has done and show remorse and for the victim of the crime to respond with forgiveness. This principle is illustrated in, for example, Ontario Ministry of the Attorney General Criminal Law Division *Practice Memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 5 where provision is made for diversion of mentally ill accused persons to the Mental Health Court in Canada.

127 Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 6. Restorative justice in the South African context is defined as "…a process very similar to diversion aimed at reducing the number of awaiting-trial detainees and the number of cases on court-rolls." For more detail on restorative justice in the South African context, see National Prosecuting Authority of South Africa "Awaiting Trial Detainee Guidelines" http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf (Date of use: 17 August 2016) at 30.

128 Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 6, 7, 8 where it is stated that studies found that offenders experienced the restorative justice process involving meetings with the victim, as more fair that the traditional criminal justice system.

129 Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 7.

130 Schneider, Bloom and Heerema *Mental Health Courts* at 4. With regard to the application of restorative justice in the South African context, the principle of restorative justice has been prominently introduced into the South African criminal justice system with the enactment of the Child Justice Act 68 of 2008 which makes provision for restorative justice measures (for example a family conference where the offender is a small child) and it also provides for diversion of a child away from the criminal justice system where possible. Mental Health Courts will merely build forth on principles

The application of restorative justice in the Mental Health Court setting is promoted for those accused of minor crimes.[131] The fact that the accused may be suffering from a mental illness at the time of the intended meeting for purposes of restorative justice, could, however, make this method inappropriate and ineffective in some instances.[132]

Restorative justice and therapeutic jurisprudence both aim to address the underlying cause of the criminal behaviour. Therapeutic jurisprudence examines the therapeutic impact of the law on those in contact with the criminal justice system. Restorative justice aims to restore the damage that has been done by the criminal act.

Therapeutic jurisprudence, as applied in Mental Health Courts, can evidently be a powerful tool of restorative justice.

6 RESEARCH PARAMETERS

6.1 Research methodology

An investigative and analytical approach is followed throughout this research. Jurisdictions that make use of Mental Health Courts are included to investigate the operation of these courts. The research does not aim to be a comparative study of jurisdictions but merely serves to explore the Mental Health Court model in each of the chosen jurisdictions with the view to include the most promising aspects thereof in a proposed South African model.

Selected aspects from the fields of mental health law, criminal law, criminal procedural law, and constitutional law are incorporated to assist in evaluating Mental Health Courts as a therapeutic response to mentally ill accused persons in South Africa in line with restorative justice goals. Selected aspects of psychiatry, mostly relating to diagnostic criteria and the

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and concepts already introduced into the South African criminal justice system. It will, however, focus on a different part of the population who, due to their mental illness, deserve both compassion and intervention.

131 Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 9 who explain that the exclusion of more serious offences is to ensure that the public approves of the restorative justice process. Sexual offences are, for example, usually excluded from restorative justice programmes due to disapproval from the community.

132 Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 9 acknowledges the possibility that the presence of a mental illness at the time of the meeting with the victim could pose a problem as the accused will not be able to communicate or comprehend what the victim is conveying which will defeat the entire purpose of a restorative justice attempt. See this source at 12-14 for discussion of criticism against applying restorative justice where the accused suffers from a mental illness.

role of psychiatry in Mental Health Courts, are discussed and this research is therefore, to a certain extent, interdisciplinary.

6.2 Justification for choice of jurisdictions

The main motivation for selecting Canada and the United States of America as the jurisdictions for inclusion in the research is founded on the fact that Mental Health Courts are well established in these jurisdictions. Both are common law jurisdictions, which imply that an adversarial approach is used, as is the case in South Africa. The fact that non-common law jurisdictions, such as the Netherlands, have an inquisitorial system in place[133] arguably explains why so few European jurisdictions make use of Mental Health Courts as their current practices and procedures arguably already contain measures to deal with mentally ill accused persons appropriately.

In addition, these two jurisdictions employ two very different models of a Mental Health Court, which enables the researcher to consider a wide spectrum of aspects associated with the Mental Health Court model. In order to suggest an appropriate model for Mental Health Courts in South Africa, it is imperative to study models that differ from each other but that operate in jurisdictions where Mental Health Courts have been well established and operational for a number of years. A considerable body of literature has been published about Mental Health Courts in these two jurisdictions, which contribute to the value of including these jurisdictions in the research.

6.3 General scope of study

The mentally ill accused person in conflict with the law, and in particular the adjectival criminal process, will be the focal point of this research. The focus will fall on mentally ill accused persons, as opposed to mentally ill offenders, since the latter term implies that the person has already been convicted. This research is mainly concerned with pre-trial issues and, in particular, the assessment for fitness to stand trial, rather than issues pertaining to expert evidence and proof of criminal capacity or the lack thereof. The research considers alternatives to traditional prosecution for accused persons with mental illness, in particular Mental Health Courts, as a therapeutic response to mentally ill persons in the criminal justice system.

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133 Van der Wolf et al 2010 International Journal of Forensic Mental Health 245 at 248.

A brief history of mental illness in society and mental illness in the criminal justice system is included to illustrate the evolution of the treatment of the mentally ill by society and the mental health care system. The characteristics of mentally ill accused persons are explored in order to understand the unique challenges that these accused persons bring to the criminal justice system. The type of offences typically committed, and the mental illnesses most frequently diagnosed are identified. The role players in the forensic setting are explained, and current challenges with regard to facilities are pointed out. The need for a fresh approach to the mentally ill accused in the criminal justice system is stressed, and therapeutic jurisprudence as the basis for such a new approach is introduced. Mental Health Courts as the proposed alternative to traditional prosecution of the mentally ill accused are introduced.

Relevant legislative provisions pertaining to the mentally ill accused in the South African criminal justice system are considered to evaluate the position of the mentally ill accused in the South African criminal justice system, which does not currently make provision for a Mental Health Court. Challenges with the current system are further identified. Diversion in the South African context is considered and a need for an expansion thereof identified.

The concept of a Mental Health Court, as it currently operates in Canada and the United States, is explored. Therapeutic jurisprudence as the underlying principle of these courts is explained. The functioning of these courts, the parties involved, and the selection criteria for participation in the diversion programmes of this court in each of the mentioned jurisdictions are some of the procedural aspects that are explored. In considering Mental Health Courts for South Africa, the effectiveness, benefits, and challenges of Mental Health Courts in other jurisdictions are considered. Finally, suggestions are made for a Mental Health Court model suitable for the South African context.

Although not the primary aim of the research, consideration is given to the position of the unfit accused in the South African criminal justice system and suggestions are made to optimise the manner in which their cases are handled.

The researcher aims through this research to offer a practical solution to the unique challenges that the criminal justice system faces when encountering accused persons with mental illness. The research further aims to promote the rights of the mentally ill who come into conflict with the law because of a mental illness.

6.4 Limitations of study

The research contained herein is up to date and correct as of June 2016. The new DSM-V [134] was consulted for definitional purposes. The DSM-V was published in 2014, and very little has been published about its impact. Therefore, the majority of the literature relied upon for purposes of this research refers and relied upon the DSM-IV; hence, reference to diagnostic criteria and psychiatric admission criteria for purposes of the Mental Health Court treatment programmes mainly refer to the criteria as set out in the DSM-IV.

The research does not explore the substantive criminal law pertaining to the mentally ill in the criminal justice system, although this research draws from selected principles and concepts from the substantive criminal law. The focus falls on criminal procedural aspects.

The research does not investigate or explain the phenomenon of special or problem-solving courts *per se* as these are not strange to the South African legal system.[135] The benefits of a special court will only be elaborated upon in the context of Mental Health Courts.

The position of the mentally ill in civil proceedings is not considered. The focus is exclusively on the mentally ill accused within the criminal justice system.

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[134] This abbreviation refers to the Diagnostic and Statistical manual of Mental Disorders. This manual was developed by the American Psychiatric Association. The DSM-IV was published in 1994 and revised in 2000. The latter version is identified as DSM-IV–TR. This is the official psychiatric coding system used in the United States of America. The diagnostic criteria used by mental health care practitioners to identify a mental illness, can be found in either the Diagnostic and Statistical Manual of Mental Disorders (hereinafter referred to as "the DSM") or the International Classification of Diseases and Related Health Problems (hereinafter referred to as "ICD-10" as published by the World Health Organisation). The ICD-10 is the official classification system used in Europe. (See Sadock and Sadock *Kaplan and Sadock's Synopsis of Psychiatry* at 284). Mental health care professionals seem to use either the one or the other diagnostic manual exclusively. (See Spamers M *A Critical Analysis of the Psycholegal Assessment of Suspected Criminally Incapacitated Accused Persons as Regulated by the Criminal Procedure Act* (LL.M Dissertation University of Pretoria 2010) at 22, 23). The first DSM was published in 1952. The DSM V was recently published and brought about changes to the multi-axial system. Kaliski warns that the introduction of the new DSM-V manual published in 2014, will pose its own set of challenges as new illnesses are introduced of which psychiatrists, forensic psychiatrists, lawyers and insurance companies who provide cover for disability, will have to take note. See in general Kaliski S "Will forensic psychiatry survive DSM-5?" 2012 (15) *Afr J Psychiatry* 13-15. Also see Ogunwale A "Forensic psychiatry, DSM-V and legal insanity" 2012 (15) *Afr J Psychiatry* 91-91 at 91 who points out that, because the final decision as to if a person was "sane' at the time of committing the act in question, is a legal one, new additions of for example illnesses in the DSM-V should not have a big impact on forensic psychiatry and the way that forensic observations are approached.

[135] Special courts such as Children's courts, Equality courts, Divorce court and Domestic Violence courts are but a few specialised courts that have been in operation in South Africa for a number of years.

The research does not specifically address the human rights issues pertaining to prisoners or remand detainees. Selected human rights issues are, however, considered where it is relevant to the mentally ill accused who has to spend time in prison pending psychiatric observation in terms of sections 77, 78 and 79 of the Criminal Procedure Act.

This research specifically excludes child offenders as this group constitutes a separate research study since child justice operates in a different legal framework to adult accused persons.[136] This trend is observed globally, and indeed in some jurisdictions, Juvenile Mental Health Courts have been introduced to specifically deal with children in conflict with the law who suffer from a mental illness.

The research does not aim to include an explanation of each mental illness that may be relevant in the criminal procedure context as this research is mainly concerned with the criminal procedural law affecting the mentally ill accused in the criminal justice system. Reference to mental illnesses, statistics about the prevalence of these illnesses and related information about the mental illness is included purely to show the prevalence and impact of mental illnesses in the criminal justice context.

Assessment for criminal capacity, and the consequences of a finding of not criminally responsible, is specifically excluded because the assessment for fitness to stand trial forms the focus of the research as opposed to substantive criminal capacity concerns. The reason for this is that fitness is a requirement in order to gain access to the Mental Health Court programme. Further, most participants in the Mental Health Court programme exit the criminal justice system after completion of the programme; thus, the opportunity to raise the insanity defence never or rarely presents itself. The purpose of Mental Health Courts is to divert mentally ill accused persons away from the criminal justice system and to expedite pre-trial issues such as a fitness assessment. Fitness can be assessed and dealt with without the criminal proceedings having to continue, in order for the court to make a finding on it at the end of the proceedings, as is the case where mental illness is raised as a defence. Since this research does not consider sentencing in the traditional sense of the word, and since mental illnesses that affect an accused's criminal capacity are considered at the sentencing phase, it is not pertinently relevant to this research. Reference will, however, be made thereto as and when it is prudent to do so, and suggestions are included

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[136] This was brought about by the introduction of the Child Justice Act 68 of 2008 that establishes a separate criminal justice process for youth offenders.

on how the Mental Health Court could possibly assist these accused persons.

7 STRUCTURE OF THE RESEARCH

7.1 Chapter 1

This chapter introduces the focus area that forms the subject matter of this research. Chapter 1 further sets out the general scope and limitations of the research, the research methodology used as well as the structure of the thesis.

This chapter explains some of the key concepts that form the core of this research. This chapter introduces the concept of a Mental Health Court through its purpose and nature.

7.2 Chapter 2

Chapter 2 contextualises the research problem. The chapter contains a brief overview of the manner in which mentally ill persons were treated historically. It further considers the reasons for mentally ill persons' contact with the criminal justice system, the link between mental illness and criminal activity, and the general profile of the mentally ill accused in South Africa. The chapter explores the interplay between law and psychiatry and introduces the typical role players in the South African forensic setting. The chapter suggests that the challenges faced by the forensic system require a fresh approach to persons with mental illness in the criminal justice system and promotes Mental Health Courts as a therapeutic response to this group of persons. The chapter expands on the introduction of Mental Health Courts in chapter 1 and explains the emergence of these courts in both Canada and the United States of America.

7.3 Chapter 3

The focus of chapter 3 is exclusively on South African criminal procedure and, in particular, on procedural aspects relating to fitness to stand trial. The relevant legislation is considered, and the impact thereof on the mentally ill accused is explored. The assessment process is considered in considerable detail, and the consequences of a finding of fitness versus unfitness are explored. The reason for the in-depth analysis of largely doctrinal law is to set the tone for the researcher's later suggestion of an alternative yet procedurally sound model for dealing with mentally ill offenders. Challenges within the South African criminal justice system are identified within the context of the research topic.

Current diversion options for mentally ill accused persons are investigated, and the need for alternatives to traditional prosecution for the fit but mentally ill accused is stressed.

7.4 Chapter 4

Chapter 4 explores the Mental Health Court model as it is implemented in Canada with a specific focus on the Mental Health Court in Toronto, Ontario. It sets out the legal framework with relevant provisions from the Criminal Code and mental health legislation. It explores the court structure in Canada, including the role of the Review Board in cases of persons with mental illness.

The procedural aspects affecting the mentally ill accused in the Canadian criminal justice system are discussed with a specific focus on the assessment for fitness to stand trial and the consequences of a finding of fitness versus a finding of unfitness. Diversion in the Canadian context is discussed before exploring the procedural dynamics of Canadian Mental Health Courts, including the admission criteria and the different phases in the Mental Health Court process.

Successes and challenges of Mental Health Courts in Canada are discussed. The chapter concludes with a brief comparison of the current South African and Canadian approaches to the mentally ill accused.

7.5 Chapter 5

Chapter 5 explores the Mental Health Court model employed in the United States of America and follows the same structure as chapter 4 with the appropriate adjustments for the particular jurisdiction. This chapter focuses on the functioning of the Brooklyn Mental Health Court.

The chapter concludes with a comparison between the Mental Health Court model in the United States of America and the criminal prosecution model in South Africa. It further includes a brief comparison between the Canadian Mental Health Court model and the model used in the United States of America.

7.6 Chapter 6

The concluding chapter proposes an appropriate Mental Health Court model for South Africa with due consideration of the advantages and disadvantages of the various models

of Mental Health Courts discussed in chapters 4 and 5 and within the unique context of the South African criminal justice setting. In essence, chapter 6 presents the researcher's conclusions and recommendations.

8 CONCLUSION

Mental illness is an issue that poses unique challenges to a criminal justice system and one which is ripe for alternatives to traditional methods of criminal processing. Proposals for such alternatives, and continued research thereon, is not only necessary but also indeed urgent, considering the rapid increase in the number of mentally ill persons in criminal justice systems globally.

The South African criminal justice system is faced with unprecedented caseloads, many of which involve mental health issues. Overburdened criminal courts necessarily mean overfull prisons with awaiting trial prisoners, many of whom may suffer from a mental illness. Resource strapped correctional facilities are ill-equipped to provide mental health services to mentally ill accused persons.

Specialised skills are required to deal with cases involving mental illness effectively, skills that are not by default available in the traditional criminal justice system. These skills should be introduced into the criminal justice system, and it is proposed that an effective way to do so would be to introduce a Mental Health Court that is tasked with dealing with cases involving mental illness.

The court recently acknowledged the need for change in the criminal justice system pertaining to the manner in which persons with mental illness are dealt with. Griesel J stated:

> *…the whole situation concerning persons with mental illness or mental defects may well require a more thorough overhaul…* [137]

Mental Health Courts in the South African criminal justice system might be the first step towards such overhaul.

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[137] *De Vos N.O and Another* v *Minister of Justice and Constitutional Development and Others; InRe: Snyders and Another* v *Minister of Justice and Constitutional Development and Others* 2015 (1) SACR 18 (WCC).at [70].

Chapter 2 contextualises the unique issues that mental illness brings to the criminal justice system. The South African forensic setting is introduced, and current challenges therein highlighted. Diversion as such in a criminal justice setting is investigated. Therapeutic jurisprudence is explained, and the Mental Health Court as a therapeutic response to mentally ill accused persons is explored. Chapter 2 serves to give the general background to this research.

CHAPTER 2

BACKGROUND AND CONTEXTUALISATION

1 INTRODUCTION

This chapter provides a historical background to the manner in which mentally ill persons were treated in the past, with a specific focus on mentally ill persons in conflict with the law. This chapter further highlights the unique challenges that mentally ill accused persons bring to the criminal justice system.

The background is explained by way of a brief overview of the history of mental illness in society and the mentally ill person in conflict with the law. The possible reasons for the mentally ill person's contact with the criminal justice system are explored. The question of whether or not there is a link between mental illness and criminal behaviour is considered. The role players in the South African forensic setting are introduced, the interplay between law and psychology/psychiatry in the criminal justice system is explored, and the need for specialised mental health skills in the criminal justice system is emphasised.

Due to the unique challenges that mental illness brings to the criminal justice system, a different approach to mentally ill accused persons is needed An encounter with the criminal justice system can have a detrimental effect on the mentally ill person's mental state, regardless of the seriousness of the mental illness. Incarceration of a mentally ill accused person should ideally be avoided. To this end, diversion options for mentally ill accused persons are investigated. The South African criminal justice system does not currently make provision for the formal diversion of mentally ill accused persons way from the criminal justice system. This chapter introduces the concept of a Mental Health Court as a viable diversion option for mentally ill accused persons.

Mental Health Courts create an opportunity for the application of therapeutic jurisprudence. The application of therapeutic jurisprudence is explained with a particular focus on its role in the Mental Health Court. Jurisdictions across the globe have discovered the benefits of therapeutic jurisprudence as a tool to evaluate the impact of the criminal justice system on a mentally ill accused and to find ways to improve the situation.

Consideration is given to the concept of a specialised Mental Health Court. The emergence

of Mental Health Courts in Canada and the United States of America is explored to illustrate the circumstances that led to the establishment of these courts.

This chapter provides the non-procedural backdrop against which the proposal of a Mental Health Court for South Africa should be considered.

2 BACKGROUND TO THE TREATMENT OF THE MENTALLY ILL OVER THE AGES

2.1 Introduction

A brief look at the way in which mentally ill persons were treated in the past will assist in appreciating the advances that have been made to date and may serve to highlight the further improvements that are required. This section is not jurisdiction-specific but rather serves to give a general overview of the treatment of mentally ill persons in society over time. Specific reference will, however, be made to South Africa later in the discussion.

2.2 Background

In the earliest times, the cause of the mental illness was considered to be evil spirits.[1] Persons who showed signs of mental illness were regarded as deviants, often believed to be a witch or sorcerer, and thus subjected to exorcism.[2]

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1 Slate RN, Buffington-Vollum JK and Johnson WW *The Criminalization of Mental Illness: Crisis and Opportunity for the Justice System 2nd ed* (Carolina Academic Press North Carolina 2013) at 20, 21. Those affected by mental illness had to be cared for by their families. Some of the treatment administered by the families in an attempt to get rid of the evil spirits included removing a part of the skull so that the evil spirit could escape. Since mentally ill persons could not contribute to the wellbeing of the clan in the stone age, they were often banished, which often meant death for the mentally ill person. During the middle ages as churches and governments often became intertwined, mental illness was known as something caused by demons or the devil himself. The rituals for getting rid of the demonic spirits varied from religion to religion and ranged from pulling the hair of the mentally ill person to beating the individual. Mentally ill persons were often believed to be witches and burned at the stake as punishment. See McLachlin B "Medicine and the law: The challenges of mental illness" 2010 (33) *Dalhousie Law Journal* 15-33 at 18. See further Kruger A *Mental Health Law in South Africa* (Butterworths 1980) at 9. Also, see Gillis L "The historical development of psychiatry in South Africa since 1652" 2012 (18) *South African Journal of Psychiatry* 78-82 at 78.

2 Kruger *Mental Health Law in South Africa* at 9, 146 who elaborates further to indicate that even epileptic convulsions at the time were seen as the entry or exit of the devil from the affected person's body. Also, see McLachlin 2010 Dalhousie Law Journal 15 at 18 who points out that mental illness were mostly regarded as a religious matter that was generally ignored by the law, unless someone proved to be a danger in which case the law could be employed to "get rid" of him or her. The Greeks and the Romans, later believed that mental illness came from the body and not the brain and that the wishes of persons with mental illness should generally be respected. This approach is

Historically mentally ill persons were deemed the responsibility of the family [3] until the Renaissance (1300 – 1600), when asylums were established as places of segregation where the mentally ill were kept as outcasts. [4] There was no known treatment for mental illness at the time, and mentally ill persons were detained merely because of the belief that they might be dangerous and thus required segregation for their own safety and the safety of others.[5] In most instances, conditions in detention were inhumane and mentally ill persons were, in some cases, subjected to torture.[6] In South Africa, persons with mental illness were segregated and confined since 1652, when Jan Van Riebeeck arrived in the Cape.[7] It was not unusual during this time for a mentally ill person to be detained with convicted criminals.[8]

The concept of mental illness as a disease only emerged in the 18th century.[9] During the late eighteenth and early nineteenth century, the scientific fact about mental illness was finally acknowledged, namely that it is not caused by the devil or other such entity, but that it is a sickness.[10]

The conditions of treatment improved during the age of enlightenment as philosophies about the self and the co-existence of one's body and soul emerged.[11] Initially, no distinction was made between types of mental illnesses and all mental illnesses were

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confirmed by the fact that a curator was appointed to ensure that the mentally ill persons' property was protected which decisions were guided by the wishes of the mentally ill person. The mentally ill person's wishes as expressed during lucid moments were the guiding principle of the curator's actions. See Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness at 20 where the manner in which mentally ill persons were treated in ancient civilisations is discussed. The views of the early writers such as Plato and Hippocrates are also considered there.

3 This is the case from Roman times. See Kruger *Mental Health Law in South Africa* at 1. Also see Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness at 20, 21.

4 Kruger Mental Health Law in South Africa at 9, 10.

5 Gillis 2012 *South African Journal of Psychiatry* 78 at 78. Also, see McLachlin 2010 Dalhousie Law Journal 15 at 18. Treatments for mental conditions were few and far between at the time.

6 Kruger *Mental Health Law in South Africa* at 9. See this source at 7 where the case of Hendryntje Cract is discusses who was kept in a cage and had to endure beatings. Also see McLachlin 2010 Dalhousie Law Journal 15 at 18 who opines that mentally ill persons were generally seen as sub-standard humans.

7 Gillis 2012 South African Journal of Psychiatry 78 at 78.

8 Kruger Mental Health Law in South Africa at 8 for details of the conditions at places of detention for mentally ill persons shortly after South Africa became a Union.

9 Gillis 2012 South African Journal of Psychiatry 78 at 78 where it is also pointed out that the term "psychiatry" was coined by a French physician in 1808.

10 McLachlin 2010 Dalhousie Law Journal 15 at 18.

11 Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness at 22 where it is explained that the conditions in the very first psychiatric hospital were very poor and in fact anti-therapeutic.

considered curable.[12]

2.3 South Africa

In South Africa, all persons suffering from a mental illness were classified as *furiosi* and considered dangerous.[13] Under Roman-Dutch Law, a mentally ill person could be confined if he was "dangerously insane".[14] There were no guidelines on or control over the conditions of confinement of the mentally ill, which often led to a shocking disregard for the rights and dignity of the mentally ill in confinement.[15] The establishment of dedicated psychiatric hospitals would change this state of affairs.

Mentally ill persons were first treated in a section of Somerset Hospital that opened in 1818 until these mental health patients were moved to Robben Island in the early to mid-nineteen hundreds.[16] Valkenberg hospital opened on 20 February 1891 and could accommodate 36 mentally ill persons who were moved back from Robben Island at this time.[17] A number of

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12 Kruger Mental Health Law in South Africa at 4.

13 *Furiosi* referred more specifically to those whose disease manifested through violent behaviour. Kruger *Mental Health Law in South Africa* at 4. Also see Gillis 2012 *South African Journal of Psychiatry* 78 at 78 who explains that mentally ill persons were often referred to as "lunatics" as mental illness were at some point regarded to be linked to some effect of the moon.

14 Kruger *Mental Health Law in South Africa* at 4, 5, 6, 27. An application for an order for confinement could and was usually brought by friends or family of the mentally ill person. A curator could be appointed for a mentally ill person under Roman-Dutch Law. Such appointment was not automatic and was only done on application to the court. Where such an order was made, at least some consideration was given to the rights of the mentally ill person in that the affected person could approach the court himself for an amendment of the order placing him under curatorship if he felt aggrieved by the order. Prior to the Roman Dutch Law regulating the appointment of a curator, the mentally ill person would, for the duration of his incapacity, automatically be under the care and control of a curator. The rights of the mentally ill person received no consideration in this context.

15 Kruger *Mental Health Law in South Africa* at 7, 27 refers to the case of Hendryntje Cract who was a mentally ill woman charged with infanticide. Hendryntjie's mother applied for an order to have her confined which order was granted on 8 November 1723. She was absolved of the charges against her because of her mental condition, but was ordered to be confined for the rest of her life. Her confinement entailed being kept in a cage at the premises of Jeroen van Soelen who was paid to take care of her. It is reported that van Soelen had to beat Hendryntje until she got scared of him in order to control her. She was kept at his premises for a year and a half until her mother took her back because of the costs of the confinement at Van Soelen's premises. Also see Gillis 2012 *South African Journal of Psychiatry* 78 at 79 who explains that the mentally ill were often chained to iron rings and kept in dark cells.

16 Kruger *Mental Health Law in South Africa* at 11 who indicates that such transfer occurred in 1846. Also see Gillis 2012 *South African Journal of Psychiatry* 78 at 79 who indicates that such transfer happened a decade earlier in 1836 and discusses the detention of mentally ill persons in other facilities prior to the opening of Somerset Hospital in the Cape that had allocated beds for mentally ill persons.

17 Kruger *Mental Health Law in South Africa* at 11. Also see Gillis 2012 *South African Journal of Psychiatry* 78 at 80 who explains that even though Valkenberg hospital existed, not all mentally ill

psychiatric hospitals opened across South Africa in the late 19th and early 20th century [18], including Weskoppies Hospital in 1892 (or the *Krankzinnigengesticht* as it was known at the time).[19]

Each province had its own legislation regulating the detention of the mentally ill.[20] Control of mental institutions was centralised with the Mental Disorders Act 38 of 1916 [21] that served to consolidate all provincial legislation governing the detention and treatment of mentally disordered persons.[22] The Mental Disorders Act governed the position until the Mental Health Act 18 of 1973 came into operation.[23] Responsibility for mental health was placed back with each province in 1987.[24] The Mental Health Act dealt with seven categories of mentally ill persons using terminology such as "idiot",[25] "imbecile",[26] and "feeble-minded person".[27] A person suffering from epilepsy referred to as an "an epileptic", was also deemed to be a mentally ill or a mentally defective person.[28] A person with a mental illness who belonged to any of the classes set out above could be detained in a

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patients were transferred there. It happened over time until the psychiatric facility on Robben Island was finally closed down in 1920.

18 See Gillis 2012 *South African Journal of Psychiatry* 78 at 78, 79 who lists the psychiatric hospitals that opened across South Africa during the 19th and early 20th century. To name a few: Fort England Hospital in Grahamstown opened in 1876, Fort Beaufort in the Eastern Cape in 1897, Oranje Hospital in Bloemfontein (1883) and Townhill Hospital in Pietermaritzburg in 1882. In the 20th century Komani Hospital in Queenstown opened in 1922 followed by Stikland Hospital in Bellville (1963) and Lentegeur Hospital on the Cape Flats in 1974. Witrand Institute catered for persons with mental retardation in Potchefstroom and the Alexandra Care and Rehabilitation Centre was established in Cape Town.

19 Weskoppies Hospital got its name in 1947. Prior to this it was known as Pretoria Mental Hospital and prior to that the Pretoria Lunatic Asylum. The first patient was admitted to Weskoppies hospital on 27 January 1892. See Kruger *Mental Health Law in South Africa* at 11.

20 See Kruger *Mental Health Law in South Africa* at 12-21 for a summary of the various legislative provisions that existed in the Cape, Natal, Transvaal and the Orange Free State prior to South Africa becoming a Union.

21 Hereinafter referred to as the "Mental Disorders Act".

22 Gillis 2012 *South African Journal of Psychiatry* 78 at 78, 79. *Also see* Kruger *Mental Health Law in South Africa* at 21. The Mental Disorders Act was assented to on 10 June 1916.

23 Hereinafter referred to as the "Mental Health Act". The Act came into operation on 27 March 1975. Also see Kruger Mental Health Law in South Africa at 21.

24 Gillis 2012 South African Journal of Psychiatry 78 at 78, 79.

25 Referring to a person so deeply defective in mind from birth or from an early age as to be unable to guard himself against common physical dangers. These persons fall under class 3 of the Mental Health Act. Also, see Kruger *Mental Health Law in South Africa* at 22.

26 This referred to mental deficiency not amounting to idiocy and formed class 4 of the Mental Health Act. Also, see Kruger *Mental Health Law in South Africa* at 22.

27 A person mentally defective to such an extent that he cannot compete on equal terms with his "normal" fellows. See Kruger *Mental Health Law in South Africa* at 22.

28 Those with epilepsy formed the seventh class in the Mental Health Act. See Kruger *Mental Health Law in South Africa* at 22. Also, see this source at 9 where it is explained that epileptic convulsions were believed to be moments at which the devil was entering and exiting the affected person's body.

mental institution by order of the court.[29] The initial period of detention in accordance with a reception order could not exceed six weeks.[30] A judge in chambers had to decide on the release or further detention of a person who was initially detained by way of a reception order.[31]

In the 20th century, more understanding about the physiological processes in the brain emerged, and a large number of medications were developed in response thereto.[32] New medication made custodial treatment less essential, and mentally ill persons could be treated in the community with medication control.[33] Advances in medicine show that many mental illnesses may be successfully treated, and for this reason, the needs and potential of the mentally ill cannot be ignored by simply removing them from society by way of detention.[34]

It is evident that the field of mental health care has evolved over time and is still rapidly developing. These developments aside, individuals with a mental illness are one of the most marginalised groups in society today.[35] Mental illness goes hand in hand with stigmatisation,[36] shame, fear, and uncertainty [37] for the individual suffering from the mental

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29 Section 4 of the Mental Health Act. These orders were referred to as "reception orders". See Kruger *Mental Health Law in South Africa* at 22, 23.

30 Section 16(1) of the Mental Health Act. See Kruger *Mental Health Law in South Africa* at 23.

31 Section 18 of the Mental Health Act. Also see Kruger *Mental Health Law in South Africa* at 23.

32 Gillis 2012 South African Journal of Psychiatry 78 at 78, 79.

33 Gillis 2012 South African Journal of Psychiatry 78 at 78, 79.

34 McLachlin 2010 *Dalhousie Law Journal* 15 at 32.

35 Johnstone MJ "Stigma, social justice and the rights of the mentally ill: Challenging the status quo" 2001 (10) *Aust N Z J Mental Health Nurs* 200-209 at 200. Also see in general Swanepoel M "Human rights that influence the mentally ill patient in South African medical law: A discussion of section 9; 27; 30; and 31 of the Constitution" 2011 (14) *Potchefstroom Electronic Law Review* 127-261. See further Simpson B and Chipps J "Mental health legislation: Does it protect the rights of people with mental health problems?" 2012 (48) *Social Work* 47-57 at 47.

36 Schutte T "'Single' versus 'panel' appointed forensic mental observations: Is the referral process ethically justifiable?" 2013 (6) *South African Journal of Bioethics and Law* 64-68 at 68 since the mentally ill person in conflict with the law is often depicted as "crazed killers". Also see Swanepoel 2011 *Potchefstroom Electronic Law Review* 127-261 for a general discussion of stigmatisation amongst other issues that the mentally ill person has to face.

37 Johnstone 2001 *Australian and New Zeeland Journal of Mental Health Nursing* 200 at 201. The mentally ill often find themselves in a position where the general course of their lives, are heading for the ground because of their condition. There are many examples of brilliant men and women, who found themselves hopelessly lost in a reality, which they did not create. For example John Nash who won the Nobel prize for Economics who passed away in May 2015, suffered from Schizophrenia which greatly impacts on his ability to make further contributions to the field of Mathematics. Another example is Cantor, a great mathematician who contributed to the development of set theory, spent the last days of his life in an asylum suffering from a severe mental illness. See Schneider RD, Bloom H and Heerema M *Mental Health Courts – Decriminalizing the Mentally Ill* (Irwin Law Canada

illness and for those that encounter them. The uncertainty is not limited to those suffering from the mental illness or those involved in personal relationships with them but is also apparent in professional settings, such as the criminal justice system, where the vastly different fields of law and psychiatry meet.

3 MENTAL ILLNESS IN THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM

3.1 Historical view of the mentally ill persons accused of committing a crime

When a mentally ill person was charged with an offence, the person was generally locked away with little consideration of what he has actually done wrong.[38] He was held accountable for the consequences of the action, regardless of his mental condition at the time of committing the offence.[39]

Later, under Roman law, the mentally ill person was seen in the same light as a child who could not be held liable for murder due to his "inherent misfortune".[40] Under Roman-Dutch Law,[41] sanity was regarded as a prerequisite for punishment.[42] Reasons raised for not punishing the mentally ill person included that the mentally ill person should be regarded as dead for all intents and purposes, that such person should be compared to a child in matters involving crime and that insanity in itself is already punishment enough for the

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2007) at 36 who explain that mentally ill men and women's potential are often stolen from them by the onset of a mental illness.

38 Kruger Mental Health Law in South Africa at 146.

39 Kruger *Mental Health Law in South Africa* at 148. In the earliest times, no consideration was given to the question if the accused actually had the necessary mental capacity to form the intent to commit a crime or not.

40 Kruger *Mental Health Law in South Africa* at 148 at footnote 11 where reference is made to the Digest 48.8.12 with reference to the *infans* and the *furiosus*.

41 The provisions pertaining to the mentally ill accused person in Roman Dutch Law, was contained in various sources such as the *Constitutio Criminalis Caroli* (1532), - although according to Kruger *Mental Health Law in South Africa* at 149, footnote 12 this was not part of the Roman Dutch Law, but the Roman Dutch Law was seriously influenced by it as many Roman Dutch writers referred to it in their writings. A further source was the work on criminal law by Carpzovious (1559-1666) who was a German writer but whose work on Criminal Law was held as the authoritative work in Criminal Law in the Netherlands for longer than it was regarded as such in Germany. See Kruger *Mental Health Law in South Africa* at 149 footnote 13. Further sources were the writings of D van der Wolf (in particular his opinion dated 1649), Van Leeuwen (1626-1682), Van der Linden (1756-1835) and others the details of which can be found in Kruger *Mental Health Law in South Africa* at 149-151.

42 Section 179 of the *Constitutionem Criminalem Carolinam* (1774) as referred to in Kruger *Mental Health Law in South Africa* at 149. Also see van Leeuwen *Censura Forencis* (1741) at 5.1.18 as referred to in Kruger *Mental Health Law in South Africa* at 150 who expressed the view that mentally ill persons should not be punished for they have no judgment and no will.

mentally ill person.[43] Under Roman-Dutch Law, mentally ill persons were regarded to have no will.[44]

The portrayal of mentally ill persons under Roman-Dutch Law speaks of a disregard for the humanity and dignity of a mentally ill person, in particular the stance that the person should be regarded as dead for all intents and purposes as referred to above.

Under early colonial South African law, a person who was discovered under the circumstances indicative of "derangement of the mind" and who intended to, or had committed an indictable offence, could be detained in an institution.[45]

No express provisions were made for dealing with a person who was unfit to stand trial due to mental illness. It appears that, initially, no distinction was made between a mental illness that affects fitness and mental illness that influences the criminal capacity of an accused. It appears that an accused, who lacks criminal capacity, was automatically considered unfit to stand trial.[46]

The South African law, as it currently stands, distinguishes between a mental illness that affects a person's ability to follow proceedings and a mental illness that influenced the

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43 See Kruger Mental Health Law in South Africa at 149 where an extract from the writings of Carpzovious (1559-1666) appears. Also see Verhandelinge over de misdaden en der selver straffen; vervolgt en ten einde gebragt door Johan Jacob Hasselt (1764)2.14, 2.15 as referred to in Kruger Mental Health Law in South Africa at 151 footnote 23 who reiterates that the mental state of the accused is sufficient punishment for the accused.

44 Van Leeuwen *Censura Forencis* (1741) at 5.1.18 as referred to in Kruger *Mental Health Law in South Africa* at 150 who expressed the view that mentally ill persons should not be punished for they have no judgment and no will. Also see the opinion of Joannes van der Linden *Rechtgeleerd Practicaal en Koopmans Handboek* (1806) 2.1.5 as referred to in Kruger *Mental Health Law in South Africa* at 151 footnote 24 who opined that mentally ill persons had no will and no understanding and should therefore not be punished. Snyman CR *Strafreg 5th ed* (LexisNexis Durban 2008) at 116 points out that, due to the lack of knowledge in the field of psychiatry and psychology in the time that our Roman writers produced their scripts, their writings and opinions on this topic, cannot serve as strong guidance anymore.

45 This was in accordance with the provincial legislation of certain provinces at the time for example the Cape (Act 20 of 1879) and Natal (Act 1 of 1868). See Kruger *Mental Health Law in South Africa at* 155.

46 Kaliski SZ, Borcherds M and Williams F "Defendants are clueless – the 30-day psychiatric observation" 1997 (87) *SAMJ* 1351-1355 at 1352 where it is stated that the practice at the time was that most psychiatrists would indicate that an accused is unfit to stand trial where a mental illness or defect has been diagnosed as there were no clear guidelines on how the assessment for fitness to stand trial should be conducted. The Mental Disorders Act 38 of 1916 later contained separate provisions for accused persons found unfit to stand trial and those who lack criminal responsibility.

accused's criminal capacity at the time of committing the offence.[47]

3.2 *The link between mental illness and criminal activity*

Various schools of thought exist on this issue ranging from the notion that those with a mental illness are more prone to violence to the view that mental illness reduces the risk of violence.[48] In the latter part of the 20th century, it was finally agreed that individuals suffering from serious mental illnesses are at an increased risk of violent behaviour.[49] There is consensus that there is at the very least a link between some types of mental disorders and some types of crimes.[50] A study in Finland,[51] for example, found that men with mental illnesses are four times more likely, and women up to 27 times more likely, to commit violent crime.[52]

Mentally ill individuals in conflict with the law because of their mental illness are mostly charged with minor offences.[53] Yet, there is a general misconception that persons with mental illnesses are dangerous and cannot make decisions or grant consent regarding issues affecting them. Ignorance about mental illness can partly be blamed for such misconceptions.[54]

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47 Section 77 and 78 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the "Criminal Procedure Act"). See chapter 3 of this research for a more detailed discussion of these sections.

48 Schutte 2013 South African Journal of Bioethics and Law 64 at 64.

49 Kaliski SZ and De Clercq HG "When coercion meets hope: Can forensic psychiatry adopt the recovery model?" 2012 (15) *Afr J Psychiatry 162-166* at 162.

50 Peay J *Mental Health and Crime* (Routledge New York 2011) at 33. Also see Calitz FJW, van Rensburg PHJJ, Fourie C, Liebenberg E, van den Berg C, Joubert *G* "Psychiatric evaluation of offenders referred to the Free State Psychiatric Complex according to sections 77 and 78 of the Criminal Procedure Act" 2006 (12) *SAJP* 47-50 at 17 who accept that there is a link between mental illness and crime.

51 Calitz et al 2006 SAJP 47 at 47. Also see in general Van Rensburg PHJJ 'n Retrospektiewe Studie oor Observasie Pasiënte Gedurende 'n Twee Jaar Periode met Ondersoek na die Verband Tussen die Tipe Misdaad, die Ssiekte-diagnose en die Ras van die Pasiënt. (LL.M Dissertation, University of the Free State 1979).

52 Calitz et al 2006 SAJP 47 at 47. Also see in general Van Rensburg *Retrospektiewe studie oor observasie pasiënte*.

53 Schutte 2013 South African Journal of Bioethics and Law 64 at 68. Also, see Garner SG and Hafemeister TL "Restorative justice, therapeutic jurisprudence and mental health courts: Finding a better means to respond to offenders with a mental disorder" 2003 (22) *Developments in Mental Health Law* 1-15 at 9. See further Canadian Mental Health Association "Police and mental illness: Increased interactions" http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 3 where it is pointed out that mentally ill persons are mostly charged with for example minor theft, mischief or failure to appear in court which is either directly or indirectly linked to the mental illness.

54 Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use:

Schizophrenia is the mental illness most often diagnosed in mentally ill accused persons.[55] Some studies suggest that men with schizophrenia are seven times more likely to commit a violent crime, more in particular murder, whereas the risk factor rises to 15 times in the case of women with schizophrenia.[56] A divergent view, however, also exists that most people with schizophrenia are not violent.[57]

Apart from linking violent behaviour with crimes already committed, what remains a problem in the forensic setting is an accurate risk assessment to determine if the patient is likely to resort to violent behaviour in future.[58] Psychiatrists in the forensic setting tend to be overly cautious when it comes to future risk assessment and often opt not to discharge patients for the fear that they might exhibit violent behaviour and thereby put society at risk.[59] The hesitation to release patients out of concern for public safety causes an increase in the number of inpatients.[60] Room for entry of new patients into the system for treatment is

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13 March 2015) at 5 states that the myth that all persons with mental illnesses are dangerous are caused by factors such as the way the media portrays person with mental illnesses. This report points out that the chances of a mentally ill person being violent are increased by factors such as drug abuse, such a person is then 7 times more likely to commit a crime where as a person without a mental illness will be twice as likely to commit a crime. The report submits that the risk of a mentally ill person behaving violently can mostly be managed by medication. It is only a selected small group of persons with certain type of mental illnesses that really pose risk of violent behaviour.

55 Calitz FJW, van Rensburg PH, Oosthuizen H and Verschoor T. "Criteria for fitness to stand criminal trial" *1996 (86) SAMJ 734-737* at *734. Also see* Gagiano CA, Van Rensburg PHJ and Verschoor T "Unnecessary committals for forensic observation: Section 77 and 78 of the Criminal Procedure Act 51 of 1977" 1991 (108) *SALJ* 714-718 at 716 and further Strydom N, Pienaar C, van der Merwe L, Jansen van Rensburg B, Calitz FWJ, van der Merwe LM, Joubert G "Profile of forensic psychiatric inpatients referred to the Free State Psychiatric Complex, 2004 – 2008" 2011 *SAJP* 40-43 at 40. Also see Calitz *et al* 2006 *SAJP* 47 at 48 who report that the mental illness most often diagnosed during court ordered psychiatric observation, is schizophrenia, followed by mental retardation and epilepsy.

56 Schutte 2013 South African Journal of Bioethics and Law 64 at 64 who mentions that most studies that considered the link between schizophrenia and the risk of committing murder found that the person with schizophrenia is between 10 and 20 times more likely to commit a violent crime than expected in the general population. He explains further that the chances of the person with schizophrenia committing murder are even greater if other factors such as a longstanding duration of psychosis. It was also found that men suffering from schizophrenia are often married with children. Kaliski SZ and Zabow T "Violence, sensation seeking, and impulsivity in Schizophrenics found unfit to stand trial" 1995 (23) *Bulletin of the American Academy of Psychiatry and Law* 147-155 at 152. Also, see Calitz *et al* 2006 *SAJP* 47 at 48.

57 Kaliski and Zabow 1995 Bulletin of the American Academy of Psychiatry and Law 147 at 147. Also see Schutte 2013 *South African Journal of Bioethics and Law* 64 at 67 where it is shown that this is in line with a study conducted by Taylor and Gunn who found that serious personal and life-threatening violence was mostly committed by psychiatrically "normal" persons and that only about one third of murder accused, have a mental illness.

58 Kaliski and De Clercq 2012 *African Journal of Psychiatry* 162 at 162.

59 Kaliski and De Clercq 2012 *African Journal of Psychiatry* 162 at 164.

60 Kaliski and De Clercq 2012 *African Journal of Psychiatry* 162 at 164.

limited by this practice, as limited resources are available as it is.

3.3 Reasons for contact with the criminal justice system

Research on the reasons for the contact of mentally ill persons with the South African criminal justice system is scarce. Similarly, little has been written about the reasons for the increase in the number of mentally ill persons in the criminal justice system. Those reasons that have been identified are discussed below, in addition to reasons that contribute to the increased contact of mentally ill accused persons with the criminal justice system in other jurisdictions.

The approach of the South African police service towards people with mental illnesses is identified as a possible reason for the increased number of mentally ill individuals in the criminal justice system.[61] Persons who show signs of mental illness who have encounters with the police are more likely to be arrested and, if incarcerated, seem to spend more time detained than those not exhibiting signs of mental illness.[62] The fact that it is much faster for the police to process an arrest than to link a person with the relevant mental health care services [63] further explains the increased number of persons with mental illness in the criminal justice system. Mercy bookings [64] by the police service, particularly in the case of minor crimes, in an attempt to help the mentally ill person by ensuring that he receives treatment (even though it is in prison), contributes to the higher number of mentally ill

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61 Schutte 2013 South African Journal of Bioethics and Law 64 at 67.

62 Watson A, Hanrahan P, Luchins D and Lurigio A "Mental health courts and the complex issue of mentally ill offenders" April 2001 (52) 4 *Psych Serv* 477-481 at 478. Also see Seltzer T ""Mental health courts: A misguided attempt to address the criminal justice system's unfair treatment of people with mental illnesses" 2005 (11) *Psychology, Public Policy and Law* 570-586 at 573 where it is confirmed that individuals suffering from a mental illness is often arrested for minor offences for which those not suffering from a mental illness, is not usually arrested. Also see Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 3 where it is pointed out that a mentally ill person is more likely to be arrested for a minor offence than a person not suffering from a mental illness.

63 Seltzer 2005 *Psychology, Public Policy and Law* 570 at 573. Should the police officer elect to take the mentally ill individual to a mental health facility, this often requires the police officer to wait at the said facility until the person is admitted which is obviously very time consuming for the police officer.

64 Torrey EF, Stieber J, Ezekiel J, Wolfe SM, Sharfstein J, Noble JH and Flynn LM *Criminalizing the Seriously Mentally Ill. The Abuse of Jails as Mental Hospitals* (Public Citizen's Health Research Group and the National Alliance for the Mentally Ill 1992) at 46. This is also true in the South African context as confirmed by Schutte 2013 South African Journal of Bioethics and Law 64 at 67. Also see Seltzer 2005 *Psychology, Public Policy and Law* 570 at 573 who explains that law enforcement are often of the view that they are helping the mentally ill person by arresting him as it ensures that he receives treatment, even though that treatment is provided in a correctional facility.

persons encountering the criminal justice system.[65] Some mentally ill individuals, especially those that are homeless, initialise these mercy bookings in order to secure shelter and a meal.[66] Even when mentally ill persons are arrested with the motive to help them, the fact remains that many people with serious mental illnesses are unnecessarily arrested.[67] The negative effect of incarceration on the mentally ill is alluded to above.

The "revolving door" phenomenon [68] where those with mental illnesses are more likely to re-offend and encounter the criminal justice system repeatedly, especially where the mental illness is not treated, contributes to the high number of mentally ill persons in the criminal justice system.[69] A recent study in South Africa found that a large number of accused persons sent for observation had previous offences, confirming that the revolving door

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65 Seltzer 2005 Psychology, Public Policy and Law 570 at 573.

66 Torrey *et al Criminalizing the Seriously Mentally Ill* at 47, 49. A police official described these types of bookings as a "crisis intervention" and stated, "You get people who are hallucinating, who haven't eating for days. It is a massive clean-up effort. They get shelter, food, you get them back on their medication… It's crisis intervention". Tobar H "When jail is a mental institution" 1991 *Los Angeles Times* August 25-26 at 25-26. Also see Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 3,4 where it is explained that many homeless persons suffer from a mental illness as they might have been released from a psychiatric hospital as part of the deinstitutionalisation movement without proper community care services being in place to support them.

67 Seltzer 2005 *Psychology, Public Policy and Law* 570 at 573. 28 to 52% of persons with serious mental illnesses in the United States of America have been arrested at least once. See Sirotich F "The criminal justice outcomes of jail diversion programs for persons with mental illness: A review of the evidence" 2009 (37) J. Am. Acad. Psychiatry Law 461-472 at 462. Also see in general Fisher WH, Roy-Bujnowski KM, Grudzinskas AJ, Jonathan C, Clayfield MA, Banks SM and Wolff N "Patterns and prevalence of arrest in a statewide cohort of mental health care consumers" 2006 (57) *Psychiatric Service* 1623-1628. Also see Torrey *et al Criminalizing the Seriously Mentally Ill* at 40 where the details of a study of 500 mentally ill persons who have been arrested are discussed. The finding of this study was that these 500 individuals had on average 3 prior convictions. A further interesting finding was that 94% of this group was not receiving treatment at the time that they committed the alleged crime. For more detail on the number of mentally ill persons being arrested in the United States of America, see in general Lamb HR and Grant AW "The mentally ill in an urban county jail" 1982 (39) *Archives of General Psychiatry* 17-34 and Lamb HR and Grant AW "The mentally ill in a county jail" 1983 (40) *Archives of General Psychiatry* 363-368. Also see Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness.at 7 where it is indicated that half of all persons with mental illness have been arrested at least once.

68 Persons with mental illnesses are more likely to be arrested and detained again after their release from a period of detention in the criminal justice setting. Their movement in and out of the criminal justice system is often referred to as the "revolving door" phenomenon.

69 Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 4 where it is stated that mentally ill persons are more likely to be arrested and detained again after release. This is referred to as the revolving door phenomenon. Also, see Odegaard AM "Therapeutic jurisprudence: The impact of mental health courts on the criminal justice system" 2007 (83) *North Dakota Law Review* 225-259 at 231 who states that the revolving door phenomenon is one of the motivations for establishing the Mental Health Court as a problem solving court. Also see this source at 234 where it is stressed that the failure to treat a mental illness can cause a mentally ill person to clash with the law repeatedly.

phenomenon also presents itself in South Africa.[70]

Limited mental health care services available in the community contributes to the mentally ill coming into frequent contact with the criminal justice system.[71] Mental illnesses are often only diagnosed after a person's arrest. This could be because the person simply did not seek psychiatric assistance prior to arrest or because the needed services were not available to him.[72]

Where mental conditions go untreated, those with mental illnesses become vulnerable, and the risk of clashing with the criminal justice system increases as they may be apprehended when they appear disorientated on the street or commit petty crimes.[73] The revolving door phenomenon often starts with the commission of a petty crime such as urinating in public or shoplifting.[74] Some families press charges against their mentally ill family members in order to have them arrested as a means to ensure that they get psychiatric treatment, as psychiatric services out of prison/jail are often difficult to obtain.[75]

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70 Calitz *et al* 2006 *SAJP* 47 at 49 indicate that approximately half of the accused that formed part of the study had previous convictions, indicating that it is worrying because it seems that those with previous convictions seem more likely to commit crime again.

71 Watson *et al 2001 Psychiatric Services* 477 at 478. Also see Torrey *et al Criminalizing the Seriously Mentally Ill* at 50 who points out that in the United States of America, failure of the public mental health care system is identified as an underlying reason for the increased number of mentally ill persons in the criminal justice system. Also see Odegaard 2007 *North Dakota Law Review* 225 at 234 who states that the fact that persons with mental illness are overrepresented in the criminal justice system, is proof that the mental health care system is either not accessible to persons with mental illness outside prisons or it is accessible but inadequate.

72 Calitz *et al* 2006 *SAJP* 47 at 50 confirms that many accused are only diagnosed with mental illness after arrest. Calitz explains that this could be because many with psychotic illnesses do not seek help from the mental health care system prior to arrest. This, according to Calitz, confirms the importance of developing a comprehensive community care service.

73 Schneider, Bloom and Heerema *Mental Health Courts* at 46. Also see Frailing K "The genesis of mental health courts in the United States and their possible applicability for the United Kingdom" 2008 *C.S.L.R* 63-73 at 69 and further Frailing K "Issues affecting outcomes for mental health court participants" 2009 *C.S.L.R* 145-157 at 148. See further in general Read A "Psychiatric deinstitutionalisation in BC: Negative consequences and possible solutions" 2009 (1) *University of British Columbia Medical Journal* 25-26. It has been established that individuals from certain vulnerable groups such as the poor, the homeless and individuals suffering from HIV/AIDS, are more susceptible to develop a mental illness. This by implication also puts these groups at higher risk of coming into conflict with the law because of their higher risk of developing a mental illness.

74 Odegaard 2007 *North Dakota Law Review* 225 at 234. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 46.

75 Some families even reported having been encouraged by the Police or Mental Health services to press charges. Torrey *et al Criminalizing the Seriously Mentally Ill at* 47, 50. Also see Fine M J and Acker C "Hoping that the law will find an answer" September 1989 *Philadelphia Inquirer* 1-1 at 1 where a case is discussed that entailed a judge advising a couple to press charges against their son

3.4 Profile of a mentally ill accused person in South Africa

The exact percentage of persons with mental illness in the South African criminal justice system is unknown.[76]

Most accused persons sent for psychiatric observation by the court in criminal proceedings are charged with minor crimes, although most accused persons who are eventually found unfit to stand trial are generally charged with offences that are more serious.[77]

The majority of the accused persons referred for observation to various psychiatric facilities in South Africa are found fit to stand trial.[78]

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in order to get him mental health care. The child needed mental help but refused to be admitted and psychiatrists refused to have him admitted, as they did not believe that he is a threat to himself or others. The parents eventually forbade him access to their home and when he "trespassed" they had him arrested. The boy was offered a choice between jail and hospital and chose the latter. He eventually received much needed treatment.

76 The reason for this might be because the mentally ill remand detainees are often detained without any reference to mental health, even for those known to have a mental illness and those who should be receiving medication for their mental health challenges. See Department of Correctional Services "Discussion Document on Management of Remand Detainees in South Africa" http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016).at 84. 16.5% of the adult population in South Africa suffers from a mental illness according to Landman AA and Landman WJ *A practitioner's Guide to the Mental Health Care Act* (Juta Cape Town 2014) at 4. This figure excludes the number of children and adolescents that may be suffering from a mental illness. In some provinces as many as 17.1% of youth suffer from a mental illness.

77 Calitz *et al* 2006 *SAJP* 47 at 47 report that the offences for which the accused persons sent for observation have been arrested were: theft 27.8%, murder 18.9%, assault 18.1%, rape 16.2%. The remainder of the accused were arrested for a variety of offences such as drunken driving, vandalism and fraud at 19%. Also see Strydom et al 2011 *SAJP* 40 at 42, who reports that in their study conducted of state patients (those found not fit to stand trial or not criminally responsible and detained in terms of section 42 of the Mental Health Care Act 17 of 2002) in the Free state, the majority of crimes were crimes against the person. The offences that these individuals were accused of were mainly offences against the person, with rape being at the top of the list, followed by assault, murder, attempted rape and sexual offences other than rape. Of the offences committed against property, vandalism topped the list, followed by theft, burglary, robbery and arson. See, however, Schutte 2013 South African Journal of Bioethics and Law 64 at 68. They conclude that according to their study conducted at Sterkfontein hospital in 2010, the more serious crimes were committed by those who were eventually found fit to stand trial and criminally responsible. The non-violent and less serious charges were brought against those who were eventually found not fit to stand trial or not criminally responsible in this study.

78 In a study conducted by Kaliski, Borchers and Williams 1997 *SAMJ* 1351 at 1351 only 3 of the 80 accused that were referred for psychiatric observation, were found unfit to stand trial (at 1353). The authors however expressed concern about the fact that, many of those referred for observation to the Valkenberg Hospital, had poor knowledge about the different roles of the court officials which they submit is an indication that most of these individuals, especially if they do not have legal representation, will have difficulty following the court procedure. This highlights the importance of legal representation for accused persons. Also see in general Calitz FJW, van Rensburg PH,

Accused persons sent for observation, are often known psychiatric patients living on disability grants from the state.[79] Many of the accused persons sent for observation received mental health care at some point prior to the arrest, and a large number were non-compliant with regard to taking their medication.[80] This suggests, had these individuals been properly monitored in respect of medication, that these crimes could possibly have been prevented.[81] Many, however, are only diagnosed with a mental illness after their arrest, and they were thus not known to the mental health care system prior to the arrest.[82]

In South Africa, approximately half of accused persons sent for psychiatric observations have previous convictions.[83] This trend indicates that these accused persons sent for

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Oosthuizen H and Verschoor T. "Criteria for fitness to stand criminal trial" *1996 (86) SAMJ* 734-737 *where* a study conducted at Oranje Hospital in Bloemfontein, South Africa, showed that the majority of the accused referred for observation were found fit to stand trial. In the study *at Oranje Hospital in Bloemfontein in 1990, 52% of those referred for observation, were found to be "sane". Also see* Gagiano, Van Rensburg and Verschoor 1991 *SALJ* 714-718. See further Schutte 2013 South African Journal of Bioethics and Law 64 at 67 who found that most of the accused persons sent for observation because they allegedly had trouble communicating with their legal representatives, were found fit to stand trial. The study found that most of those with a history of psychiatric treatment were, however, found unfit to stand trial. Also see Calitz *et al* 2006 *SAJP* 47 at 49 where it is indicated that 48% of the accused persons sent for observation in the particular study was found triable, in fact, a large number was found not to have a mental illness at all. See, however, Strydom et al 2011 *SAJP 40* at 43 who reports that the majority of the group studied were found not fit to stand trial and not criminally responsible. Charges against 17.3% of the offenders were withdrawn with the understanding or upon the condition, that the hospital would further manage these individuals.

79 Strydom et al 2011 *SAJP* 40 at 42 found that the majority of persons sent for psychiatric observation receive disability grants from the state. See further Calitz *et al* 2006 *SAJP 47* at 49 who confirms this. In a study conducted at Sterkfontein hospital in 2010, it was found that the majority of those referred for fitness evaluations that had a history of psychiatric treatment, were found unfit to stand trial. See Schutte 2013 South African Journal of Bioethics and Law 64 at 67.

80 Strydom et al 2011 *SAJP* 40 at 43. 58% of the participants received mental health care prior to the offence and 63% of the participants were non-compliant with regard to taking their medication.

81 Strydom et al 2011 *SAJP* 40 at 43.

82 Schutte 2013 South African Journal of Bioethics and Law 64 at 67 points out that the South African mental health care system is "resource-scares" and lacks the capacity to provide services to all those in need thereof. Also see Calitz *et al* 2006 *SAJP* 47 at 50 who confirms that many accused are only diagnosed with mental illness after arrest. Calitz explains that this could be because many with psychotic illnesses do not seek help from the mental health care system prior to arrest. This, according to Calitz, confirms the importance of developing a comprehensive community care service.

83 Calitz *et al* 2006 *SAJP* 47 at 49. The offences for which these accused have been arrested were: theft 27.8%, murder 18.9%, assault 18.1%, and rape 16.2%. The balances of the accused were arrested for a variety of offences such as drunken driving, vandalism and fraud at 19%. Also see Kaliski, Borchers and Williams 1997 *SAMJ* 1351 at 1353 who report that in their study at the Valkenberg Hospital, found that 54.5% of those referred for psychiatric observation, and had previous convictions. 25% of the group had previous convictions for violent crimes. This is consistent with the trend in the United States of America as is evident from studies conducted that found that accused had at least 3 prior convictions. See chapter 5 of this research. Also see

observation for fitness to stand trial were either found fit to stand trial on a previous occasion, or the mental illness was not raised during the previous criminal proceedings since he was convicted.[84] This further confirms the revolving door phenomenon where those with mental illnesses come into contact with the criminal justice system on an ongoing basis.

It is not uncommon for accused persons who are eventually sent for observation to have been under the influence of alcohol or cannabis at the time of the arrest.[85] Strydom *et al* [86] suggest that substance abuse rehabilitation should go hand in hand with the forensic programme in an attempt to prevent the violent behaviour of those with mental illnesses.

Schizophrenia is the most prevalent mental illness in the forensic setting.[87] Calitz *et al* [88] found that the prevalence of schizophrenia was lower among those accused of murder than among those accused of sexual crimes and assault. A small number of accused persons are diagnosed with mental retardation.[89] The majority of accused persons sent for

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Gagiano, Van Rensburg and Verschoor 1991 *SALJ* 714 at 716 who found that most accused persons sent for observation in South Africa had previous convictions for mostly petty crimes. Lastly, see Strydom et al 2011 SAJP 40 at 41 who reports that a large number of accused persons sent for observation in various studies discussed by Calitz et al, had previous convictions.

84 Where mental illness is raised with regard to fitness and an accused is found unfit to stand trial, he cannot be convicted. Similarly, if an accused raises mental illness as a defence to a criminal charge and it is found that the accused indeed suffered from a mental illness at the time of commission of the offence, such an accused must be found not guilty. The fact that an accused thus has a previous conviction indicates that mental illness was either not raised or, if it was raised, it was found not to have an impact on the accused's fitness to stand trial or criminal capacity.

85 Calitz *et al* 2006 *SAJP* 47 at 47. Also see this source at 50 where it is stressed that substance abuse issues needs to be addressed with urgency.

86 Strydom et al 2011 *SAJP 40 at 42, 43.* He further promotes a well-developed system to monitor state patients in psychiatric hospitals as well as those receiving community care to ensure that patients who relapsed are treated immediately to avoid further possible criminal activity. A surprising finding that this study revealed was that 80% of the state patients reported that they have friends or family willing to accommodate them should they be discharged. This is surprising because state patients rarely have someone to go to after their discharge, which is often one of the factors contributing to them not being discharged when they could be.

87 Gagiano, Van Rensburg and Verschoor 1991 *SALJ* 714 at 716 where they indicate that their study at the Oranje Hospital in Bloemfontein revealed that Schizophrenia was the most diagnosed condition followed by temporary mental disorders, mental retardation, schitzo-affective disorder, psychosis, dementia, organic brain syndromes and lastly, major depression with melancholia. Also see Strydom et al 2011 *SAJP* 40 at 42 who reported that Schizophrenia was the mental illness mostly diagnosed in the group sent for observation followed by mental retardation (10%), bipolar mood disorder, psychosis due to a general medical condition, psychosis due to epilepsy, psychosis due to substance abuse and delirium. Calitz *et al* 2006 *SAJP 47* at 49 reports that schizophrenia was the most prominent diagnosis amongst persons accused of theft.

88 Calitz *et al* 2006 *SAJP 47* at 50.

89 Calitz *et al* 2006 *SAJP* 47 at 47.

observation are male [90] , with a large number of them being unemployed.[91]

The fact that the majority of accused persons sent for observation are found fit to stand trial raises questions about the 30-day observation system and reasons for referral.

Fitness assessments mostly occur at psychiatric hospitals that form part of the South African forensic setting. The setting and the most prominent role players therein are discussed below.

4 THE SOUTH AFRICAN FORENSIC SETTING

4.1 Introduction

The forensic setting is the environment in which law and psychiatry meet.[92] The case of a person with a mental illness necessarily requires the involvement of professionals from the legal field as well as the mental health field.[93] The involvement of mental health care practitioners in the legal system assists in shaping the interpretation and application of laws relating to the mentally ill in the criminal justice system.[94] Literature on forensic mental health, especially in South Africa, is, however, scarce.[95]

4.2 Interplay between law and psychiatry in the forensic setting

The different philosophies, structures, languages and objectives of the criminal justice system on the one hand and those of the mental health care system on the other create barriers for individuals with mental illnesses in conflict with the law. The criminal justice

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90 Strydom et al 2011 *SAJP* 40 at 40 reports on a study conducted to determine the profile of forensic psychiatric inpatients referred to the Free State Psychiatric Complex between 2004 and 2008. 95.8% of the group were male of ages ranging from 14 to 66, the average age being 32.5. Contrast this with the findings of Kaliski, Borchers and Williams 1997 *SAMJ* 1351 at 1354. Their study at the Valkenberg Hospital in 1996 revealed that psychiatric observation patients are between the ages of 22 and 38, male, single literate and unemployed.

91 Kaliski, Borchers and Williams 1997 *SAMJ* 1351 at 1354. Also see Strydom et al 2011 *SAJP* 40 at 42 who reports that as much as 81.5% of the group that was sent for observation was unemployed.

92 Swanepoel M "Legal aspects with regard to mentally ill offenders in South Africa" 2015 (18) *Potchefstroom Electronic Law Review* 3238-3258 at 3258 where forensic psychiatry is defined. The term "forensic mental health" is also used that seems to include a broader field than pure psychiatry.

93 Odegaard 2007 *North Dakota Law Review* 225 at 237. This is also a very necessary component of a successful Mental Health Court as will be discussed later when the multidisciplinary team of the Mental Health Court is discussed.

94 Kaliski S (Ed) *Psychological Assessment in South Africa* (Oxford University Press South Africa Cape Town 2006) at 1.

95 Kaliski *Psychological Assessment in South Africa*) at 1.

system aims to promote public safety and justice whilst the mental health care system promotes health.[96] Expertise from both these systems is required to eradicate such barriers.[97] Court models that involve both these systems in a harmonious manner can succeed in providing the mentally ill in conflict with the criminal justice system with much-needed treatment rather than incarceration.[98] These models are typically embodied in the form of diversion programmes such as Mental Health Courts.

A mentally ill accused person will, after being arrested by the police, most often be exposed to the criminal court, a correctional facility and a psychiatric institution. A brief overview of the involvement of these role players in the forensic setting follows.

4.3 *Law enforcement and the criminal court*

The mentally ill accused's first contact with the criminal justice system is with the police upon arrest.[99] The accused is usually kept in police custody until his first court appearance.[100]

Where police officers are of the view that a person has a mental illness and needs treatment, they need not necessarily make an arrest. The Mental Health Care Act 17 of 2002[101] provides that the police may use the necessary constraining measures to apprehend such a person [102] and take him to hospital for psychiatric attention.[103]

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96 Lamberti JS and Weisman RL "Persons with severe mental disorders in the criminal justice system: Challenges and opportunities" 2004 (75) *Psychiatr Q* 151-164 at 162.

97 Lamberti and Weisman 2004 *Psychiatr Q* 151 at 162.

98 Lamberti and Weisman 2004 *Psychiatr Q* 151 at 162. The authors are however mindful of the criticism that diversion programmes often face, namely fear that mentally ill accused will receive preferential access to treatment at the expense of those not in the criminal justice system. They are also mindful of concerns that such diversion programmes may add to the stigmatisation of the mentally ill.

99 See the discussion under paragraph 3.3 earlier in this chapter where the treatment of mentally ill persons by the South African police service is discussed.

100 Unless of course bail was granted at the police station pending the accused's first court appearance.

101 Hereinafter referred to as the "Mental Health Care Act".

102 Section 40 of the Mental Health Care Act. See in particular section 40(8), which provides that: "A member of the South African Police Service may use such constraining measures as may be necessary and proportionate in the circumstances when apprehending a person or performing any function in terms of this section." This raises potential concerns about the treatment of mentally ill accused persons by the police, especially if there is a lack of understanding from the side of the police regarding the symptoms of some mental illnesses.

103 A form MHCA 22 is used for this purposes as prescribed by the Mental Health Care Act. The Head of the Health Establishment where the Police decides to take the individual to, has to approve the admission on a form MHCA 07.

If arrested, the accused will appear in the criminal court within the prescribed time and in accordance with standard criminal court procedures. The criminal court may then order a fitness assessment if mental illness is raised as a concern with regard to fitness. This may be done at various junctures in the proceedings that will be explained in more detail in chapter 3 of this research. The assessment is usually conducted at a psychiatric institution. Accused persons are often detained in a correctional facility awaiting psychiatric observation at the relevant psychiatric institution.[104]

4.4 Prison and psychiatric institutions

4.4.1 Introduction

Mentally ill accused persons often move between prison and psychiatric institutions for purposes of the fitness assessment. They stay in prison awaiting availability of assessment facilities at the psychiatric institution, and once the assessment is completed are sent back to prison to await an appearance in court for the fitness finding.

The current state of South African prisons and psychiatric institutions and their resources are discussed below. Concerns about the facilities and resources are highlighted during the discussion.

4.4.2 Prisons

South Africa has the highest number of prisoners on the African continent and the ninth highest prison population in the world.[105] African prisons are overcrowded. In 2004, South African prisons were 163.7% overcrowded.[106] Gauteng's prisons were almost 200%

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104 See in this regard Department of Correctional Services: "Strategic plan for 2015/2016-2019/202" http://www.gov.za/sites/www.gov.za/files/Strategic%20Plan%202015-2016%20- 2019-2020_a.pdf (Date of use: 9 September 2016) at 17, 18 where persons in remand detention awaiting observation is included under remand detainees. State patients being declared as such in terms of the Mental Health Care Act awaiting placement in a mental institution, are also included under the number of remand detainees and thus forms part of this group of detained persons. The Department of Correctional Services must make special provision for detained persons with a mental illness as stipulated in their policy documents. See further in general Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016).

105 Department of Correctional Services "White Paper on Remand Detention Management in South Africa" http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 53.

106 In 2004 South African prisons had capacity for 114 787 prisoners, yet prisons contained a total of

overcrowded at the time.[107] In 2012 there were 152 981 prisoners in South African prisons [108], and in 2013 this number grew slightly to 155 708.[109]

Overcrowding presents a huge problem to correctional facilities and has serious cost implications for the state. At the rate of 187 903 prisoners in 2004, it cost the Government R7 818 645 830.00 per year to keep these prisoners in prison.[110] This figure has no doubt escalated if inflation over the last decade is taken into consideration, as well as the rising

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187 903 prisoners at the time, translating into prisons being 163.7% overcrowded at the time. The number remained more or less the same for 2005. See Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 53 where it is reported that occupancy levels reached 63.9% in South African prisons in 2003. See in general the African Commission on Human and Peoples' rights "Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa Mission to the Republic of South Africa 14 – 30 June 2004" http://www.achpr.org/states/south-africa/missions/prisons-2004/ (Date of use: 28 August 2011). Also, see in general Bateman C "The insanity of a criminal justice system" 2005 (95) *SAMJ* 208-212..

[107] In the Gauteng province there were 26 prisons with capacity for 26 709 prisoners. The sentenced prisoners alone, a total of 31 516 exceeded the capacity of these prisons. The total awaiting trial prisoners in the province were 19 393. With a total prison population of 50 909, Gauteng's prisons were almost 200% overcrowded. See African Commission on Human and Peoples' rights http://www.achpr.org/states/south-africa/missions/prisons-2004/ (Date of use: 28 August 2011) at 14 where it is explained that Gauteng's prisons were the most overcrowded, followed by the prisons in the Eastern Cape Province. It was reported that the Western Cape had a total of 43 prisons with a total capacity for 19 396 prisoners. The prison had 30 929 inmates. This amounted to a figure of overcrowding of 155.34%. Bateman 2005 *SAMJ* 208 at 208-2012 reported that the Pollsmoor prison facility in Cape Town was 247% overcrowded. The total number of detainees was 4050 in a facility designed for 1872 detainees. Of the 4050 detainees, 1509 were serving their sentences whilst 2509 were awaiting trial. Communal cells designed to hold 19 people, contained 30 and those built to house 30 had up to 70, more than double its capacity.

[108] The specific figures of overcrowding per province are set out in Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 53. For more detail on the figures of overcrowding in South African prisons, see Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 16 where the number of prisoners in 2009 is indicated as 163 892.

[109] For the categories of inmates included in this figure, see Department of Correctional Services http://www.gov.za/sites/www.gov.za/files/Strategic%20Plan%202015-2016%20-2019-2020_a.pdf (Date of use: 9 September 2016) at 19 (See table 1 on this page for the detail of the prison population in 2012/2013 and 2013/2014). The number of youth offenders was excluded from the number of inmates indicated in the text above. They constitute a further 27 507 detainees.

[110] In 2004, it was reported that it costs the South African Government approximately R114.00 per prisoner per day, a total of approximately R41 610 per prisoner per year. See African Commission on Human and Peoples' rights http://www.achpr.org/states/south-africa/missions/prisons-2004/ (Date of use: 28 August 2011) at 15. Also see Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 53 where it is reported that the prison population in 2004 was at its peak. The White paper gives the figure of prisoners at the time as 186 467.

costs of food, education, medical treatment and other goods that the state has to provide to detained persons as per the South African Constitution.[111]

One of the drivers of prison overcrowding across the globe is pre-trial detention.[112] The number of remand detainees in South African prisons in 2012 was 48 910.00 [113], and in 2013 this number went down slightly to 44 702.[114] Remand detainees constitute roughly a third of the prison population [115] although, some estimate that remand detainees comprise approximately half of the prison population.[116] Among these accused persons are those awaiting psychiatric observation for fitness to stand trial.

A large number, over 70%, of remand detainees are denied the option of bail, contributing

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111 Section 35 of the Constitution provides for the rights of detained persons, which includes the right to be provided with inter alia reading material and medical treatment.

112 Pre-trial detention of accused persons is specifically identified as a reason contributing to the huge problem of overcrowding in South African prisons. See Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 53. Another driver behind the increase is the increase in serious crimes in general. See Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 16.

113 Details of these numbers are contained in a white paper by Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 53. In 2000 the number reached its peak at 57 811 remand detainees in prisons. Also see the discussion document on remand detention management in South Africa by Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) *at 19* for the shift in numbers between 1999 and 2009 of remand detainees and sentenced prisoners. See, however, the strategic plan of the Department of Correctional Services for 2015/206 Department of Correctional Serviceshttp://www.gov.za/sites/www.gov.za/files/Strategic%20Plan%202015-2016%20-20192020_a.pdf (Date of use: 9 September 2016) at 19 that indicates the remand detainees during the 2012/2013 period to be slightly less at 46 090. The statistics in the Department's own documents do not add up.

114 For more detail on this, see the strategic plan for 2015/2016 of the Department of Correctional Serviceshttp://www.gov.za/sites/www.gov.za/files/Strategic%20Plan%202015-2016%20-20192020_a.pdf (Date of use: 9 September 2016) at 19.

115 As at 2009, remand detainees constituted approximately 30% of the prison population. This is confirmed in the discussion document by the Department of Correctional Services, http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 16. See Department of Correctional Services http://www.gov.za/sites/www.gov.za/files/Strategic%20Plan%202015-2016%20-20192020_a.pdf (Date of use: 9 September 2016) at 19.

116 Lawyers for Human Rights "Penal Reform programme" http://www.lhr.org.za/programme/penal-reform-programme/information (Date of use: 11 September 2016). The level of remand detention is described to have reached "critical level".

to the challenge of reducing the number of remand detainees in jail.[117] Delay in finalising court cases is also identified as a challenge in reducing the number of remand detainees in detention.[118] The number of remand detainees who spend more than two years in prison awaiting trial has gradually been increasing.[119]

Delays in fitness assessments also contribute to the high number of remand detainees in prison. Most accused persons referred for psychiatric observation remain in prison awaiting psychiatric observation.[120] Accused persons awaiting court-ordered psychiatric observation [121] should ideally be kept separate from convicted prisoners, although, due to overcrowding, this is not always the case.[122]

The mental health needs of remand detainees in South African prisons are unknown.[123]

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117 It is reported that between 2009 to 2012 the number of remand detainees denied the option of bail was between 75 and 80%. For more detail on these figures, see Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 54. For confirmation of these figures and more information on this subject, see further Department of Correctional Services, http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 18.

118 Other factors also contribute to the delays in court cases. See Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 54. Also see Pillay AL "Competency to stand trial and criminal responsibility examinations: are there solutions to the extensive waiting list?" 2014 (44) *South African Journal of Psychology* 48-59 at 48 who points out that there is a backlog of cases involving 30-day observation periods and that this adds to the pressure on the courts and the mental health care system.

119 Remand detainees often spend long periods in jail. See Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 54. In 2009 the figure was standing at 3.6% and grew to just under 6% in 2012.

120 National Prosecuting Authority of South Africa "Awaiting Trial Detainee Guidelines" *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016) at *37.*

121 Psychiatric observation can be ordered to determine a person's fitness to stand trial in terms of section 77 of the Criminal Procedure Act or to determine if the accused had the required criminal capacity at the time of commission of the offence in terms of section 78 of the Criminal Procedure Act. These sections will be analysed in chapter 3 of this research.

122 Bateman 2005 *SAMJ* 208 at 209 reports that the staff at the Pollsmoor prison in Cape Town reported that the "unstable" prisoners often mix with the other prisoners during a day at the prison. Also see Department of Correctional Services "Draft White Paper on Remand Detention Management in South Africa" http://www.dcs.gov.za/docs/landing/White%20paper%20on%20Remand%20Detention%20in%20SA%20Draft%20Final.pdf (Date of use: 26 August 2016) at 73 where the protocol on procedure to be followed in the case of mental enquiries in respect of accused persons is discussed. The protocol provides for detention in separate cells from the general prison population. The protocol further states that persons awaiting assessment should be kept in close proximity to psychiatric hospital.

123 Mkhwanazi A "Mental illness alarming in prison" https://www.health-e.org.za/2015/04/08/mental-

The reason for this might be that mentally ill remand detainees are often detained without any reference to mental health.[124] Upon admission to prison, a general health assessment is undertaken, but this is not comprehensive due to a shortage of nurses to conduct such assessments, and, as a result, mental illness often goes undetected.[125]

Even where mental health needs are detected, mental health care programmes in already overcrowded prisons are scarce [126] , and it is likely that awaiting trial prisoners do not have access to adequate mental health care treatment in prison.[127] Failure to treat the mental illness as soon as possible causes deterioration in the mental health of the mentally ill and makes eventual treatment more difficult, if not impossible.[128] It is therefore imperative that the appropriate treatment is given at the soonest possible opportunity. Recidivism amongst the mentally ill accused is a real risk if the mentally ill accused person's mental illness and other challenges are not addressed adequately during his incarceration.[129] Proper treatment programmes for the mentally ill have to be implemented, and proper community care structures have to be in place to support them upon release from detention.[130]

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illness-alarming-in-prisons/ (Date of use: 11 September 2016).

124 Remand detainees with existing mental illnesses in need of treatment or medication, consequently do not receive much needed mental health care services. See Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016).at 84.

125 Some correctional facilities admit between 200 and 400 prisoners daily. This high number of admissions combined with a shortage of nursing staff makes it almost impossible to detect mental illnesses in those suffering from them, especially since these conditions are not always "visible" at first glance and are often only detected after further investigation. Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 87.

126 Odegaard 2007 *North Dakota Law Review* 225 at 234 referring to the position in the United States of America. Also see Department of Correctional Services: "Strategic plan for 2015/2016-2019/202" http://www.gov.za/sites/www.gov.za/files/Strategic%20Plan%202015-2016%20-2019-2020_a.pdf (Date of use: 9 September 2016) at 20 where it is confirmed that overcrowding remains a problem in South African prisons.

127 Accused persons often have to wait in prison for an available bed in a psychiatric institution where the psychiatric observation in terms of section 77 or 78 of the Criminal Procedure Act has to take place. Waiting periods for available beds are impacted by the fact that psychiatric hospitals only have a specific number of beds allocated to forensic observation patients. The inadequate mental health care services in prisons, are pointed out by the Constitutional court in *De Vos* v *Minister of Justice and Constitutional Development* CC case at [43]. A fact that was accepted by the Minister of Health in the court *a quo.*

128 Schneider, Bloom and Heerema *Mental Health Courts* at 45. Also see Rich WJ "The path of mentally ill offenders" 2009 (89) *Fordham Urban Law Journal* 89-119 at 115.

129 Rich 2009 Fordham Urban Law Journal 89 at 116.

130 Rich 2009 *Fordham Urban Law Journal* 89 at 116. Also see Frailing 2009 C.S.L.R 145 at 148 where it is pointed out that individuals with chronic mental illness, often self-medicate by using alcohol or

This is not a situation unique to South Africa as is most prominently illustrated by the position in the United States of America.[131] American studies [132] reveal that those arrested who showed signs of mental illness were less likely to be successful with a bail application and spend on average more pre-trial time in jail. It was also found that mentally ill state prison inmates who were found fit to stand trial received on average sentences that are 12 months longer than those of other offenders.[133] The movement of the mentally ill accused between jail and psychiatric institutions amounts to them spending more time incarcerated than would have been the case had they pleaded guilty to the charge.[134]

The time that an accused person spends in prison awaiting psychiatric observation can vary depending on the availability of a bed at the relevant psychiatric institution.[135]

4.4.3 Psychiatric institutions

Snyman [136] states that the detention of the mentally ill in institutions should not be seen as a punishment but rather a measure in the interest of society. This view seems to suggest that all persons with mental illness necessarily pose a danger to society. This is not necessarily the case as recently pointed out by the court per Griesel J:[137]

> *It is equally well-recognised, however, that not every person with a mental illness or mental defect is a danger to society or requires to be detained in an institution. This is so because there are varying degrees of mental illness and various types of mental disability, and institutionalisation is not invariably required or indeed appropriate*

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drugs to cope with social difficulties which self-medicating means often go hand in hand with offending and re-offending.

131 See chapter 5 of this research for a discussion of the position in the United States of America.

132 Watson et al 2001 Psychiatric Services 477 at 478.

133 Ditton PM Mental Health and Treatment of Inmates and Probationers: Special Report (US Department of Justice Bureau of Justice Statistics 1999). Also, see Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 462 who confirms that those with serious mental illness spend a disproportionate amount of time in jail compared to those individuals without mental illnesses.

134 Frailing 2009 *C.S.L.R* 145 at 146.

135 Pillay 2014 *South African Journal of Psychology* 48 at 48 points out that there are waiting lists at psychiatric facilities for the 30-day observation period since limited resources for such observations is available. Also see *De Vos* v *Minister of Justice and Constitutional Development* CC case at [44] where the shortage of beds in psychiatric hospitals is accepted as a fact.

136 Snyman J "The declaration of a patient as a state president's patient" 1988 Acta Juridica 128-168 at 148, 149. Also see Du Toit E, De Jager, FJ, Paizes A, Skeen A St Q and Van der Merwe SE, *Commentary on the Criminal Procedure Act* (Juta Cape Town 2012) at 13-7. The Courts support this view as is evident from the judgment in *S* v *Mahlinza* 1967 (1) SA 408 (A) 415 at 416C-D. Also see in general *S* v *Ramokoka* 2006 (2) SACR 57 (W).

137 *De Vos N.O and Another* v *Minister of Justice and Constitutional Development and Others; InRe: Snyders and Another* v *Minister of Justice and Constitutional Development and Others* 2015 (1) SACR 18 (WCC).at [59].

The mentally ill accused himself, no doubt, sees incarceration in a high-security facility as a punishment rather than treatment.[138] This is especially so if regard is had to the poor conditions at some psychiatric hospitals.[139]

The two major challenges in the South African forensic setting, according to Bateman,[140] is the proper training of psychiatrists in the field of forensic psychiatry and the lack of beds available at psychiatric hospitals for purposes of observation. These two issues are canvassed below.

The lack of trained forensic psychiatrists is not surprising, considering that psychiatry only emerged as a science in the nineteenth century.[141] In 2013 there were 769 registered psychiatrists who had to serve a population of 50 million South Africans.[142] What contributed to the shortage is that psychiatry has been identified as the medical speciality hardest hit by the "brain drain" in South Africa, as Britain, Australia and New Zealand

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138 Kaliski and De Clercq 2012 *African Journal of Psychiatry 162* at 164.

139 Bateman 2005 *SAMJ 208 at 212* reports that on 21 June [2004], defence advocate JC Marais told Cape High Court Justice Selwyn Hockey that conditions at Valkenberg hospital were so 'horrific' that anyone admitted to Valkenberg 'will go insane'.

140 Bateman 2005 *SAMJ 208 at* 2012. At the time of writing the article, only 25 beds were available at Valkenberg for patients who have been referred for observation in terms of the Criminal Procedure Act.

141 Kruger *Mental Health Law in South Africa* at 47. Also see Gillis 2012 South African Journal of Psychiatry 78 at 78 who explains that the term psychiatry was coined in 1808. In 1970, there were approximately 100 qualified psychiatrists in South Africa, that is a ratio of 1 for each 100 000 of the population. The World Health Organization's recommended ratio at the time, was 1 for each 20 000 of the population. In 1990, there were only 309 psychiatrists registered at the Medical and Dental Council who had to serve 35 million South Africans. Gagiano, Van Rensburg and Verschoor 1991 *SALJ* 714 at 715. This situation was exacerbated by the fact that there was only one school where black South African's could study psychiatry. The same applied to coloured members of society as well as Indians. See Minde M "History of mental health services in South Africa, Part XV. The future of mental health services" April 1977 *SAMJ* 549-553 at 550. Similarly, the recommendation of the World Health Organisation at the time with regard to clinical psychologists was that there should be 6 clinical psychologists for each psychiatrist; South Africa had 70 clinical psychologists in total. Cheetham 1970 *SAMJ* 1371 at 1371. Also see Pillay AL "Could S v *Pistorius* influence reform in the traditional forensic mental health evaluation format?" 2014 (44) *South African Journal of Psychology* 377-380 at 378 where it is pointed out that there are very few psychiatrists in South-Africa as it is and the number of those specialising in forensic mental health is as a result, very small. Also see this source at 379 where it is mentioned that there are approximately four times more clinical psychologists than psychiatrists in South Africa. Even so, we do not meet the ration recommended by the World Health Organisation as referred to above.

142 Pillay 2014 *South African Journal of Psychology* 48 at 56. Only one psychiatrist had a registered sub-speciality of forensic psychiatry. Also see Gillis 2012 *South African Journal of Psychiatry* 78 at 81 reports that in 2012 there were just under 400 psychiatrists registered with the Health Professions Council that has to serve a population of 50 million.

actively recruited South African psychiatrists.[143]

When it comes to psychiatrists who are trained in forensic psychiatry, the problem is augmented. For a mental health care practitioner to be considered a forensic expert, he can only rely on his experience in an academic forensic facility as it was not initially recognised as a field of speciality.[144] The Health Professions Council recognised forensic psychiatry as a field of sub-speciality when the College of Psychiatry introduced a Diploma in Forensic Psychiatry with an assessment component.[145]

The suggestion has been made that the involvement of clinical psychologist in the forensic setting should be more prominently considered, bearing in mind that they are trained in forensic mental health, and the Criminal Procedure Act allows for these professionals to be appointed to conduct forensic assessments.[146] This could alleviate the strain on resources in the South African forensic setting, especially if regard is had to the fact that there are almost four times more clinical psychologists than psychiatrists in South Africa.[147]

Availability of beds in mental hospitals has long been a problem.[148] There are only ten

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143 Bateman 2005 SAMJ 208 at 212.

144 Kaliski S *Psychological Assessment in South Africa* at 3. Forensic psychiatry was not as at April 2005, a field of speciality recognised by the Health Professions Council of South Africa. Suggestions were made to introduce a further 18 month specialisation period after which psychiatrists will be well versed in the field of forensic psychiatry and able to do observations as requested by the courts. See Bateman 2005 *SAMJ 208.*

145 Ogunlesi AO, Ogunwale A, De Wet P, Roos L and Kaliski S "Forensic psychiatry in Africa: prospects and challenges" 2012 (15) *Afr J Psychiatry* 3-7 at 5.

146 Section 79(1)(b)(iv) of the Criminal Procedure Act. Also see Pillay 2014 *South African Journal of Psychology* 377 at 379 who points out that the training of clinical psychologists include training on forensic mental health and that they are indeed competent and skilled to conduct such assessments.

147 Pillay 2014 *South African Journal of Psychology* 377 at 379. Also see Pillay 2014 *South African Journal of Psychology* 48 at 56 where it is stated that in 2013 there were 2725 clinical psychologists registered with the Health Professions Council and only 769 psychiatrists were registered at the time.

148 Minde 1997 *SAMJ 549 at 550.* Availability of beds has been a problem since before South Africa became a Republic. To alleviate the burden of overcrowding of mental health facilities in South Africa, a partnership was formed with a private company that provided accommodation in vacant mine compounds. This initiative had a positive effect on the reduction of the number of mentally ill patients that had to be treated in mental hospitals. The possible human rights violations of being treated in a vacant mine compound cannot be ignored. The partnership was formed by Dr A M Lamont, the Commissioner for Mental Health from 1961 to 1970 and a private concern called Smith, Mitchell and Co. The accommodation was initially only made available to black South African's but eventually other races were also accommodated in these alternative facilities. Treatment in these alternative facilities, resulted in cost saving and a reduced number of persons being treated in mental health institutions. See Minde 16 April 1970 *SAMJ 549* at 551. See also Gillis 2012 South African Journal of Psychiatry 78 at 80 who explains that the accommodation was not specifically

facilities across South Africa that are able to conduct court ordered forensic assessments.[149] Patients are often added to waiting lists as entry into a mental hospital is almost only possible once another patient has been discharged.[150] Transfer of some patients to community care centres and old age homes lightened the load of overcrowding in psychiatric hospitals.[151] Patients with schizophrenia became a particular group of patients for whom more facilities were needed, and it was suggested that general hospitals could assist in this regard.[152]

Mental health care professionals have been urged to aim to increase the turnover of patients in psychiatric hospitals and to treat more patients extramurally, especially since new drugs are available that make this possible.[153] This is even more relevant today, as significant progress has been made in the field of psychiatric medication and treatment methods since the turn of the century.[154]

The shortage of facilities at psychiatric institutions arguably contributes to human rights violations of accused persons awaiting assessment as they might be detained in prison for unreasonable periods of time, sometimes two years, awaiting availability of a bed in a psychiatric hospital.[155] The shortage of facilities causes delays in the finalisation of the

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earmarked for black citizens, but that the majority of the group transferred, happened to be black. The author also adds that the conditions at the compound later received the stamp of approval from the psychiatric association. Bed shortages in psychiatric facilities is not a problem unique to South Africa and was particularly mentioned in the Canadian context. See McLachlin 2010 Dalhousie Law Journal 15 at 23.

149 Pillay 2014 *South African Journal of Psychology* 48 at 51. This number was as at 2012.

150 Minde 1997 SAMJ 549 at 550.

151 Minde 1997 *SAMJ* 549 at 551. A factor contributing to the problem is that groups of patients, such as senile patients often occupy beds in mental hospitals for years as these conditions continue to exist until death.

152 Minde 1997 *SAMJ 549* at 549, 550. The opening of Tara Hospital in Johannesburg in 1946 was a step in the right direction to treat another large group of patients found in mental hospitals, namely those with schizophrenia. Schizophrenia is one of the most common mental illnesses diagnosed among those sent for psychiatric observation in terms fo the Criminal Procedure Act. See the discussion of the profile of mentally ill accused persons earlier in this chapter.

153 Minde 1970 SAMJ 549 at 553.

154 McLachlin 2010 Dalhousie Law Journal 15 at 20. Also see Gillis 2012 *South African Journal of Psychiatry* 78 at 78, 79.

155 McLachlin 2010 Dalhousie Law Journal 15 at 23, 24. Also see Pillay 2014 *South African Journal of Psychology* 48 at 48 who points out that there are often long waiting lists at psychiatric institutions that can accommodate accused persons for 30-day observations. For more detail on the delays pertaining to assessments at psychiatric hospitals, see Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20paper%20on%20Remand%20Detention%20in%20SA%20Draft%20Final.pdf (Date of use: 26 August 2016) at 74. To illustrate the delays experienced in practice, see *S* v *Pedro* 2015 (1) SACR 41 (WCC) [2] where it is indicated that the accused had to

accused's case. These shortages also have the effect that accused persons charged with minor crimes who would normally not be incarcerated are now detained in prison awaiting psychiatric assessment.[156] This situation has led to unfortunate results – for example, there are known cases where a person awaiting psychiatric assessment in prison has died.[157] It is not unthinkable that especially where someone has been charged with a minor crime, the waiting period for assessment may exceed the period for which the individual may be sentenced in the event that he is found guilty.[158]

In the Western Cape, for example, accused persons referred for observation to Valkenberg Hospital often remain in prison for unreasonable periods of time awaiting assessment as this hospital, like many others, does not have the capacity to assess all those sent for observation.[159] Of the approximately 24 cases in which referrals are ordered every month, Valkenberg can only take in up to 15 of these referrals per month as they only have 15 beds available for patients who are referred for assessments.[160] This situation results in delays with assessments. Due to the shortage of trained staff and beds in the few psychiatric institutions authorised to conduct forensic assessments, there is usually a huge

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wait for many months before a bed for observation became available at Valkenberg hospital. In the unreported judgment of *S* v *Vika* (14519) [2014] ZAWCHC 155 (14 October 2014) at [5-6] the accused had to wait 11 months for a bed to become available at Valkenberg hospital. In another unreported judgment of *S* v *Dlali* (3/2015) [2015] ZAECBHC 2 (27 February 2015) at [3-6] the accused had to wait approximately 7 months before a bed at the Fort England psychiatric hospital became available.

156 McLachlin 2010 Dalhousie Law Journal 15 at 24, 25 where it is reported that an accused charged with a minor offence, had to wait in prison for six months before being transferred for observation.

157 McLachlin 2010 Dalhousie Law Journal 15 at 25.

158 Kruger A *Heimstra Suid-Afrikaanse Strafproses* 7th ed (LexisNexis 2010) at 226 confirms that referral for fitness to stand trial can be much harsher on an accused who has been charged with a minor offence. This accused will probably spend more time awaiting and undergoing the assessment, than the time he would have spent in prison had he been found guilty and had the issue of fitness to stand trial not been raised.

159 Bateman 2005 SAMJ 208 at 2010. This article further reports that at the time when the article was written, it was established that, in Pollsmoor prison alone, a suspected rapist had been waiting 14 months to be admitted to Valkenberg hospital for observation, a grievous assault suspect 10 months, a serious assault suspect 8 months, a murder suspect 7 months and 6 other suspects of violent crimes for between 2 and 3 months. Also see Kaliski, Borchers and Williams 1997 SAMJ 1351 at 1351, 1352 who points out that observation patients were received at Valkenberg hospital from the Western Cape, Northern Cape as well as the Eastern Cape. Also see Pillay 2014 South African Journal of Psychology 48 at 48.

160 Bateman 2005 SAMJ 208 at 2011. See further Kaliski, Borchers and Williams 1997 SAMJ 1351 at 1352 where it is reported that Valkenberg at the time (January to June 1996) received between 25 to 40 male observation patients each month. In 2005, it was reported that the high security wing of Valkenberg hospital where the observations are done, was running at 40% capacity and at twice its design capacity.

backlog of cases and lengthy waiting periods for beds to become available.[161] Accused persons can spend undue periods of time in the criminal justice system as a result of this.

Accused persons sent for observation to Valkenberg hospital are not kept separate from the state patients during their assessments.[162] The staff at Valkenberg reported that some of those admitted for observation carefully study the state patients and imitate their behaviour in an attempt to manipulate the psychiatrist into finding him either unfit to stand trial or not criminally responsible so that he can avoid prison.[163]

The problem of delays in the observation process is exacerbated, it seems, by the poor prison administration. Pollsmoor Prison authorities, for instance, could not confirm the number of detainees who had to be assessed at the Valkenberg hospital.[164] In one instance, a man has been waiting for transfer to the Valkenberg hospital for an assessment for 14 months.[165] There is no system in place to officially determine which accused persons in detention have to be sent for observation. This leads to delays in the process as psychiatrists who consult with accused persons in prisons often have to postpone these appointments as the relevant accused cannot be located for the consultation at the given time.[166]

A lack of policy provisions pertaining to those placed for observation has been identified as a service delivery obstacle in the correctional setting.[167] A fundamental logistical issue such as transport of the accused to the facility where the forensic assessment must be done creates a lack of commitment and resultantly confusion about the roles of those involved in the forensic setting.[168]

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161 This contributes to the delay in finalising court cases. See National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016).

162 Bateman 2005 *SAMJ 208* at 209.

163 Bateman 2005 SAMJ 208 at 209.

164 Bateman 2005 SAMJ 208 at 209.

165 Bateman 2005 SAMJ 208 at 2010.

166 This challenge has specifically been identified by the Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 85.

167 Service delivery to the mentally ill accused is addressed by Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 90, 131.

168 This and other challenges are highlighted in bot the White Paper ad the Draft white paper that deals with remand detention management as drafted by Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Manage

It is clear that psychiatric hospitals are facing a number of challenges and that creative solutions have to be sought to solve them. The need for psychiatric institutions such as Valkenberg, Sterkfontein and Tara is, however, paramount. In 1998, an attempt was made to close Valkenberg hospital down in its entirety in light of the move towards community rehabilitation.[169] Objections were raised against releasing all those treated at Valkenberg, raising public safety as a major concern since at least ten state patients that were released previously committed murder during the first five years of release.[170]

The use of institutions such as Valkenberg should be reserved for those in serious need of mental health care treatment and should not be overloaded by referrals from the criminal justice system. Outpatient care should be utilised where possible. It will also assist if assessments could be done on an outpatient basis.[171]

4.5 *Conclusion*

From the above discussion, it is apparent that mentally ill accused persons in the criminal justice system were treated less than desirably in the past. The current forensic system and facilities therein can be labelled as inadequate as it is plagued with a shortage of facilities and trained staff, which in turn results in delays in the assessment process and, ultimately, a delay in justice for the accused and the victims involved. The current

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ment%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 19. Logistical issues have been highlighted as a challenge by Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 83 where it is pointed out that it is assumed that the Department of Corrections will transport the accused to the forensic setting for assessment but it is not explicitly stated as the SAPS may also assist with such transport. The uncertainty and confusion is confirmed if one considers Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20paper%20on%20Remand%20Detention%20in%20SA%20Draft%20Final.pdf (Date of use: 26 August 2016) at 52 where it is stated that the SAPS are responsible for transport from prison to the psychiatric institution for purposes of the assessment since they have to produce a form J188 with the name of the facility and the type of assessment required so that the detention centre can register the release as a temporary one.

169 This is in line with the general move to "deinstitutionalise" the mentally ill. The negative effect and unintended consequences of this movement is clear from the discussion of in particular the position in the United States of America where the closure of hospitals resulted in those in need of treatment, ending up on the streets. See Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 3.

170 Bateman 2005 SAMJ 208 at 212.

171 Outpatient basis assessment has recently been ordered in respect of assessment for criminal capacity. This was done in the case of Oscar Pistorius where he attended Weskoppies hospital on an outpatient basis for his criminal capacity to be assessed. See *S* v *Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014).

challenges in the South African criminal justice system with regard to the procedure are explored in chapter 3 and add to the challenges experienced in the forensic setting.

This state of affairs creates an opportunity to explore alternatives to the current system in an attempt to alleviate at least some of the identified problems. Diversion as an alternative to traditional prosecution processes is considered below.

5 DIVERSION OF THE MENTALLY ILL ACCUSED AWAY FROM THE CRIMINAL JUSTICE SYSTEM

5.1 Introduction

Some initiatives aimed at providing a specialised solution to the mentally ill accused in the criminal justice system emerged in South Africa and in other jurisdictions. This is typically incorporated by way of a diversion programme. There are various types of diversion that can occur at various stages of the criminal proceedings. The diversion options differ from one jurisdiction to the next.

The efforts towards incorporating diversion into the South African criminal justice system are discussed in chapter 3 of this research, where the procedural dynamics of the South African criminal justice system are discussed.

Mental Health Courts have been established in Canada and the United States of America as an initiative to divert the mentally ill accused away from the criminal justice system into the mental health care system. Research suggests that Mental Health Courts are more effective than traditional courts in connecting mentally ill persons in the criminal justice system with mental health care services.[172] There is a monetary benefit in providing proper community-based programmes for the mentally ill rather than treating them in prison. Studies in this regard have shown a good return on investment in the long run, including breaking the costly cycle of crime and punishment.[173] Alternatives to traditional

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172 Almquist L and Dodd E *Mental Health Courts: A Guide to Research-informed Policy and Practice* (Council of State Governments Justice Centre New York 2009) at vi.

173 Rich 2009 *Fordham Urban Law Journal* 89 at 116, 117. Also, see Almquist and Dodd *Mental Health Courts* at vi. See further Frailing 2009 C.S.L.R 145 at 148. This has especially been the case in the Unites States of America. Treatment instead of incarceration results in cost saving for the criminal justice system. Also see Frailing 2008 *C.S.L.R* 63 at 67. Treatment also prevents future hospitalisation which contributes to a long-term cost saving. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 56.

prosecutions such as the Mental Health Court, which has a diversion component attached to it, further assist in solving the problem of overcrowding in prisons.[174]

The main types of diversion are discussed below, including Mental Health Courts, which is not necessarily a diversion programme in itself, but usually has a diversion component attached to it.

5.2 Types of diversion

Diversion programmes can generally be divided into four broad categories. These categories are derived from various jurisdictions and serve to explain the nature of diversion in its various forms.

Firstly, there are crime prevention diversion programmes aimed at diverting the mentally ill accused away from the criminal justice system prior to police intervention.[175] Diversion at the crime prevention stage is the earliest juncture at which diversion programmes can operate. At this stage, high-risk individuals, who may encounter the law because of their mental illness, are identified and assisted with medication or social assistance in order to prevent formal interaction with the criminal justice system.[176] Prior to these programmes, the arrest of a mentally ill person was seen as a positive development as this would ensure that they received mental health care treatment that they could not necessarily have accessed prior to their contact with the criminal justice system.[177] This type of diversion programme deserves serious consideration as it eliminates the mentally ill person's contact with the criminal justice system altogether. This is imperative, having regard to the negative effect that incarceration and the correctional services environment have on an individual suffering from a mental illness.[178]

Secondly, there are pre-booking diversion programmes. Here, the individual is diverted to the mental health care system before a criminal charge is filed. Pre-booking diversion

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174 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 461.
175 Schneider, Bloom and Heerema Mental Health Courts at 70.
176 Schneider, Bloom and Heerema Mental Health Courts at 70.
177 Schneider, Bloom and Heerema Mental Health Courts at 70.
178 Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 4 where it is pointed out that incarceration is especially problematic for persons with mental illness as they would often exhibit disruptive behaviour caused by the mental illness. They would then be punished for the disruption by being placed in solitary confinement for example which could be very traumatic for the mentally ill person, leading to psychosis or a complete breakdown. Also see Read 2009 UBCMJ 25 at 26.

programmes entail that a police officer as the first responder to a case involving a mentally ill person may exercise his discretion in deciding if the person will be charged or not. If the decision is taken not to file charges against the individual, the particular diversion model will determine how the officer is to deal with the individual. He may, for example, accompany him to the hospital for emergency psychiatric assessment.[179]

Thirdly, there are post-booking diversion programmes aimed at diverting the mentally ill accused person away from the criminal justice system subsequent to arrest and after charges are filed against him.[180] Post-booking diversion programmes include jail-based diversion, court-based diversion and specialised Mental Health Courts.[181] Jail based diversions entail that the accused is diverted from custody to community-based mental health care with the consent of the prosecutor, judge, and defence attorney. This is done after assessment by jail-based mental health staff and liaison with this staff and community based mental health care workers.[182] Court based diversions entail that a mental health care professional is present in court.[183] The health care professional screens the records for known mental health care users and also does an assessment of the accused, and recommends a treatment plan. He is involved in negotiations with the judge, prosecutor, and defence attorney to grant the mentally ill individual bail on the condition that he attends a mental health programme. There is, however, no separate docket for an accused that is

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179 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 462. Also see Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 7, 8 where examples of pre-booking diversion programmes are discussed. These include a Police Mental Health Team where mental health care professionals are employed by the police to respond to cases where mentally ill persons are involved. A further example is police reception centres where persons with mental illness who have been apprehended by the police can be assessed and channelled to the correct services if needed. See further Schneider, Bloom and Heerema *Mental Health Courts* at 72-74 for a discussion on the pre-charge diversion programmes available in Canada.

180 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 462. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 72 where they refer to pre-booking diversion programmes as “pre charge diversion” and to post booking diversion programmes as “post charge diversion”.

181 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 463. Also see generally Lattimore PK, Sherman R, Frisman L and Shafer MS “A comparison of prebooking and postbooking diversion programs for mentally ill substance-using individuals with justice involvement” 2003 (19) *Journal of Contemporary Criminal Justice* 30-64 Also see Seltzer 2005 *Psychology, Public Policy and Law* 570 at 575 who refers to Mental Health Court programmes as “pre-trial” diversion programmes.

182 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 463.

183 Schneider, Bloom and Heerema *Mental Health Courts* at 76 point out that mental health care workers, mostly from community agencies, often assist the court on an *ad hoc* basis as and when the Crown requires their assistance with screening and placement at an appropriate agency. The mental health workers are therefore not employed by the court in these types of diversion programmes.

so referred. The charges are often withdrawn after such diversion, alternatively the person will be convicted but receive probation with special conditions rather than a custodial sentence.[184]

What sets specialised Mental Health Courts apart from other post-booking diversion programmes is that they have a dedicated docket [185] for the mentally ill accused, and the participation in the Mental Health Court programme is voluntary.[186] It is a speciality criminal court for the mentally ill accused.[187] The personnel that work at these courts, including the judge and prosecutor, have special training in working with mentally ill accused persons.[188] The mentally ill accused person's progress in the treatment programme is monitored by the court, and incentives for completion include avoidance of incarceration and dismissal of charges.[189] This research is concerned with Mental Health Courts as a post-booking diversion programme.

Lastly, post-sentence diversion programmes. These programmes are aimed at enhancing the accused's chances of success after incarceration.[190]

Diversion in South Africa is not clearly divided into the above categories. A discussion of diversion in the South African context follows in chapter 3.

An underlying principle of diversion is therapeutic jurisprudence. Therapeutic jurisprudence as the underlying principle of a Mental Health Court as the proposed alternative to

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184 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 463.

185 Stafford KP and Wygant DB "The role of competency to stand trial in mental health courts" 2005 (23) *Behav. Sci Law* 245-258 at 246. Also see Christy A, Poythress NG, Boothroyd RA, Petrila J and Mehra S "Evaluating the efficiency and community safety goals of the Broward County mental health court" 2005 (23) *Behav. Sci Law* 227-243 at 229. See further Redlich AD, Steadman HJ, Monahan J, Robbins PC and Petrila J. "Patterns of practice in mental health courts: A national survey" 2006 (30) *Law and Human Behaviour* 347-362 at 347.

186 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 463.

187 Redlich et al 2006 Law and Human Behaviour 347 at 347.

188 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 463. Also see Seltzer 2005 *Psychology, Public Policy and Law* 570 at 576 who stress the importance of proper training for the defence attorney to ensure that he can provide meaningful support to his client which training should include ethics training so that the defence attorney can be mindful of his obligations towards his mentally ill client.

189 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 463. Also see Seltzer 2005 *Psychology, Public Policy and Law* 570 at 576 where it is highlighted that such dismissal of charges does not happen automatically in all Mental Health Courts and that the mentally ill accused is often required to request such dismissal of charges that is a complicated process in itself.

190 Schneider, Bloom and Heerema *Mental Health Courts* at 78. These programmes usually involve correctional services staff and mental health care workers creating a programme in the community for the mentally ill accused to enhance his chances of success as a community member. Participating in the programme may also be included in conditions for parole or probation.

traditional prosecution for mentally ill accused persons in South Africa is explored below.

6 THERAPEUTIC JURISPRUDENCE IN PRACTICE

6.1 Introduction

The fact that both the law and psychiatry is involved in the forensic setting could cause confusion [191] and frustration because of the different philosophies that these vastly different fields subscribe to. The challenge in finding suitable alternatives to the current system is to find an approach that will have the support of both the legal and the mental health fields.

One philosophy or theory that is supported by both the legal and psychiatric fields is therapeutic jurisprudence. Therapeutic jurisprudence introduces a fresh approach to unique groups of accused persons such as mentally ill accused persons and seeks to employ the law and legal principles to eradicate the anti-therapeutic impact that the law may sometimes have on an accused person. It focuses on the possible underlying cause of the criminal behaviour, in this case, the mental illness, rather than on the crime committed, which is often a symptom of an untreated mental illness.[192]

The background to the development of this theory and how it came to be used in the mental health care context is explored below, followed by an exposition of the nature and aim of therapeutic jurisprudence. The implementation of this philosophy in the criminal justice system is explained, followed by a discussion of selected points of criticism levied against therapeutic jurisprudence.

6.2 Background

Therapeutic jurisprudence emerged as a theory of mental health law but was first applied in drug courts in the United States of America.[193] The success of drug courts and Mental

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191 Swanepoel 2015 *Potchefstroom Electronic Law Review* 3238 at 3238 who adds that ethical dilemmas can also arise at the interface between law and psychiatry.

192 Odegaard 2007 *North Dakota Law Review* 225 at 227.

193 Lurigio RJ and Snowden J "Putting therapeutic jurisprudence into practice: The growth, operations, and effectiveness of mental health courts" 2009 (2) *The Justice System Journal* 196-218 at 199, 201. Also see Odegaard 2007 *North Dakota Law Review* 225 at 231. These courts aim to divert substance addicted accused persons away from the criminal justice system into a drug rehabilitation programme with the aim to reduce the probability of re-offending. Drug courts are very successful and are the basis upon which Mental Health Courts were started. See Frailing 2009 C.S.L.R 145 at 145. Also see Steadman HJ, Davidson S and Brown C "Law and Psychiatry: Mental health courts:

Health Courts motivated the establishment of other problem solving courts such as teen courts.[194] Problem-solving courts focus on achieving positive solutions for victims, defendants and the community.[195]

Therapeutic jurisprudence is applied in most problem-solving courts across Canada and the United States of America, such as the drug courts, prostitution courts, domestic violence courts, Juvenile Mental Health Courts, handgun courts and homeless courts.[196] Therapeutic jurisprudence has been applied in various fields of the law, including criminal procedure, criminal law, labour arbitration and personal injury law.[197]

6.3 *Nature of therapeutic jurisprudence*

Therapeutic jurisprudence is defined as "the study of the role of the law as a therapeutic agent" and demands an interdisciplinary approach as it brings insights from the mental

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Their promise and unanswered questions" 2001 (52) *Psych Serv* 457-458 at 458. The first drug court was established in Florida, United States of America in 1989 see Schneider, Bloom and Heerema *Mental Health Courts* at 41. The drug courts were a very successful product of the therapeutic jurisprudence movement. As at 2007, there were reportedly over 1000 drug courts in North America alone. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 198 who confirms that therapeutic jurisprudence was developed in the context of mental health law.

194 Schneider, Bloom and Heerema *Mental Health Courts* at 41. These courts deal with teen "bullies" and the sentence imposed upon them for committing minor offences, is to act as an advocate for a victim of youth violence in front of teen jurors. These are problem solving court aimed at handing down tailor made "sentences" and ordering participation in rehabilitation programmes to address the needs of a specific group within society. The positive result of these courts is that teens learn empathy and learn to accept responsibility for the consequences of their actions. As at 2008, there were over 2000 problem solving courts in the United States of America with every state having at least one problem solving court. Frailing 2008 *C.S.L.R* 63 at 67. Also see National Drug Court Institute *Painting the Current Picture: National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States* (Bureau of Justice Assistance and National Drug Court Institute 2011) at 40 for details of the number of problem solving court in every state as at 31 December 2009.

195 Fisher C "Building Trust and managing risk: a look at a felony mental health Court" (Centre for Court Innovation) http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011). Also see Frailing 2008 *C.S.L.R* 63 at 67 for the characteristics of problem solving courts and for the types of problem solving courts in existence across the United States of America. One such example Is "community courts" where those found guilty of lifestyle crimes, such as prostitution and vandalism, are "sentenced" to community service to "pay back" the community instead of spending time in jail. Also see Welch C and Fuller JR *American Criminal Courts. Legal Process and Social Context* (Elsevier Amsterdam 2014) at 449 where it is explained that problem solving courts aim to provide a less costly and more efficient way of dealing with offenders.

196 Schneider, Bloom and Heerema *Mental Health Courts* at 40. Also see Frailing 2008 *C.S.L.R* 63 at 67 who adds "community courts" to the list of problem solving courts.

197 Wexler, DR "Therapeutic jurisprudence in a comparative law context" 1997 (15) *Behav. Sci Law* 233-246 at 234.

health sciences into the development of the law.[198] Therapeutic jurisprudence demands a holistic approach and an optimistic one as it proclaims that there are therapeutic opportunities in all aspects of the law's functioning.[199]

Therapeutic jurisprudence is based on the principle that the law is not neutral. In other words, an accused that is exposed to the criminal justice system is affected by the law in some way or the other; thus, his experience is not neutral.[200]

Therapeutic jurisprudence views the law as a process rather than a set of rules and regulations.[201] Therapeutic jurisprudence suggests that the criminal justice system must seek understanding and gather input from other disciplines [202] such as mental health professionals to apply to the benefit of the criminal justice system and those in contact with it. Therapeutic jurisprudence demands a multi-disciplinary approach as it brings together fields that were traditionally thought not to have much to do with each other, such as law and mental health.[203]

A further underlying principle upon which therapeutic jurisprudence is based is that punishment should be reserved for those who deserve it.[204] This is not a concept unique to therapeutic jurisprudence, but it reiterates the importance of the application of this concept to the mentally ill accused.[205] Many of the offences committed by the mentally ill accused are minor offences such as shoplifting and public intoxication.[206] These crimes are often

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198 Wexler 1997 *Behavioral Sciences and the Law* 233 at 233. Also see Odegaard 2007 *North Dakota Law Review* 225 at 227.

199 Schneider, Bloom and Heerema *Mental Health Courts* at 45. Also see Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 6. It is pointed out here that restorative justice requires a similarly holistic approach.

200 Wexler 1997 Behavioral Sciences and the Law 233 at 233. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 44. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 199 who explains that the justice system can either have a therapeutic or anti-therapeutic effect on those involved in it. This confirms that the experience is not neutral.

201 Schneider, Bloom and Heerema *Mental Health Courts* at 50, 51. Also see Wexler 1997 *Behavioral Sciences and the Law* 233 at 245 where it is stated that therapeutic jurisprudence is interested in the "law in action" rather than just legal doctrine.

202 Schneider, Bloom and Heerema *Mental Health Courts* at 51. Also see Wexler 1997 *Behavioral Sciences and the Law* 233 at 234 who explains that therapeutic jurisprudence brings fields together that were traditionally thought not to have much to do with each other.

203 Wexler 1997 Behavioral Sciences and the Law 233 at 245.

204 Schneider, Bloom and Heerema Mental Health Courts at 46.

205 Schneider, Bloom and Heerema Mental Health Courts at 46.

206 Frailing 2008 *C.S.L.R* 63 at 69 and further see Schneider, Bloom and Heerema *Mental Health Courts* at 46. Also see Frailing 2009 C.S.L.R 145 at 148. Drug and alcohol abuse is often a secondary problem amongst those with mental illnesses. Sometimes however, mentally ill

not committed with criminal intent, but are the result of an underlying condition that has little to do with criminal intent.[207]

Important to note, however, is that therapeutic jurisprudence does not discard the importance of the individual taking responsibility for his actions,[208] it merely shifts the focus from what the person did to the underlying cause or reason for what he did. The focus is shifted from the "what" to the "why".

6.4 Aim of therapeutic jurisprudence.

Therapeutic jurisprudence is aimed at addressing the underlying factor that caused the individual to clash with the law.[209] In the case of a mentally ill accused person, the underlying factor to be addressed is a mental illness.[210]

Therapeutic jurisprudence promotes the treatment of mental illness at the first possible opportunity.[211] For the mentally disordered accused, an encounter with the criminal justice system is mostly anti-therapeutic as they are often subjected to abuse and generally experience a lack of meaningful treatment.[212] Arrest and incarceration *per se* can be debilitating to a mentally ill accused [213], and consequently, they do not cope well in the

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individuals are arrested by the police who believe that they are using drugs and/or alcohol because of their bizarre behaviour, when in fact they are not. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 46.

207 Odegaard 2007 *North Dakota Law Review* 225 at 251. Therapeutic jurisprudence advocates that the decision of a mentally ill accused to partake in criminal activity is no longer a matter of free choice. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 46.

208 Schneider, Bloom and Heerema *Mental Health Courts* at 46, 47. Also see Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 5 where the Mental Health Court as a product of therapeutic jurisprudence is discussed and where it is specifically stated that these initiatives do not sacrifice the idea of criminal responsibility. Many Mental Health Courts in the American model actually requires an accused to plead guilty in order to gain access to the Mental Health Court programme which confirms the focus placed on accepting responsibility for actions.

209 Schneider, Bloom and Heerema Mental Health Courts at 3. Also see Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 5.

210 This is a particular focus of the Mental Health Court. See Odegaard 2007 *North Dakota Law Review* 225 at 250.

211 Addressing the mental illness at first instance is also done with the aim to reduce recidivism and in turn, ensure a safer society. See Rich 2009 *Fordham Urban Law Journal* 89 at 115. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 45.

212 Torrey *et al Criminalizing the Seriously Mentally Ill* at 59, 60 where the abuse, assault and rape of mentally inmates in United States jails and prisons are discussed. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 45.

213 Seltzer 2005 *Psychology, Public Policy and Law* 570 at 572 who confirms that contact with the criminal justice system has a negative consequences for anyone who is arrested and/or incarcerated and even more so for those who suffer from mental illnesses. Also see Schneider, Bloom and

criminal justice system.[214]

Therapeutic jurisprudence seeks a solution that will benefit society as well as the accused and promotes creative treatment programmes such as job training that might be undertaken, together with the mental health care treatment,[215] to enable the person to be self-supporting and empowered when they complete the Mental Health Court programme.

6.5 *Implementation of therapeutic jurisprudence*

Therapeutic jurisprudence is largely based on common sense.[216] The implementation thereof should likewise be guided by common sense. A holistic approach is necessary during the implementation of therapeutic jurisprudence [217] in the criminal justice system. Its implementation requires that consideration be given to the possible therapeutic or anti-therapeutic impact of the law and how certain psychological literature can be incorporated into the legal system [218] to remedy the possible anti-therapeutic effect thereof.

Heerema *Mental Health Courts* at 116. Also see the view expressed in Ministry of Health and Long-term Care *A Program Framework for: Mental Health Diversion/ Court support services* (2006) http://www.health.gov.on.ca/en/common/ministry/publications/reports/mentalhealth/framework.pdf (Date of use: 26 August 2015) at 4 where it is pointed out that persons with mental illness that are kept in a correctional setting are at higher risk of experiencing more severe symptoms of mental illness and are at higher risk of homelessness once they are released. These accused persons are further often isolated from mental health care for as long as they are kept in the correctional facility – arguably because of resource constraints in such facilities. See further Odegaard 2007 *North Dakota Law Review* 225 at 234 who points out that the mental condition of the accused often deteriorates during incarceration. See further *Phuneuf* v *Ontario* 2010 ONCA 901 at [28].

214 Seltzer 2005 *Psychology, Public Policy and Law* 570 at 573. Also see Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 4 where it is pointed out that persons with mental illness often exhibit disruptive behaviour whilst incarcerated. Such disruptive behaviour is often caused by the mental illness. The punishment for such disruptive behaviour may in some instances include solitary confinement, which could be very traumatic for a mentally ill person and could lead to psychosis or a complete breakdown. Also see Peay *Mental Health and Crime* 36 and 37. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 45. See further Read 2009 UBCMJ 25 at 26. Also see Parliamentary Information and Research Service *Current issues in Mental Health in Canada: Mental Health and the Criminal Justice System* (Library of Parliament Ottawa Canada 2013) at 4.

215 Schneider, Bloom and Heerema Mental Health Courts at 4.

216 Schneider, Bloom and Heerema Mental Health Courts at 43.

217 Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 6. It is pointed out here that restorative justice requires a similarly holistic approach. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 60.

218 Wexler 1997 *Behavioral Sciences and the Law* 233 at 234 explains that there are two methods of applying therapeutic jurisprudence, namely: the law based approach ("LBA") and the psychology based approach ("PBA"). The LBA looks at a particular law and analyses its possible therapeutic or anti-therapeutic impact. The PBA looks at the legal system and contemplates how certain psychological literature can be incorporated into the legal system beneficially. For a detailed

The implementation of therapeutic jurisprudence can be challenging. The following three-phased approach is suggested by Schneider *et al.*[219] Firstly, the trends, characteristic and challenges of mentally ill accused persons, both before they enter the criminal justice system and thereafter, should be identified.[220] Based on the information gathered during the first phase, ways to address the specific challenges should be identified during the second phase of implementation. One of these initiatives, after investigating the needs of mentally disordered accused, is the establishment of Mental Health Courts. The third and final phase entails evaluating the therapeutic initiatives put in place during the second phase.[221]

Four main factors warrant specific consideration during the implementation of therapeutic jurisprudence.[222] The current substantive law is the first factor for consideration.[223] The reform of the substantive law can be an effective way of bringing about therapeutic results.[224]

Procedural rules, as the second factor for consideration, are a major focus of therapeutic jurisprudence.[225] The procedural rules within the criminal justice system dictate the movement of the accused within the criminal justice system and are evaluated through therapeutic jurisprudence to determine their impact on the individual, in particular, if he was treated fairly and with respect.[226]

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explanation of the application of these two approaches, see this source at 234-237 in particular.

219 Schneider, Bloom and Heerema Mental Health Courts at 57, 61.

220 Schneider, Bloom and Heerema Mental Health Courts at 57.

221 Schneider, Bloom and Heerema *Mental Health Courts* at 60, 93. Measuring the success of therapeutic initiatives such as the Mental Health Court, poses unique challenges. It is difficult to measure the success of Mental Health Courts because they are a very new phenomenon. The fact that therapeutic programmes are individualised and administered in a very informal manner makes research on the effectiveness of the court difficult, as studies are mostly only possible by way of case studies. Also see this source at 93, 94 for suggestions on how the effectiveness of rehabilitation programmes can be measured and the aspects that should be focussed on in measuring the effectiveness of these programmes.

222 Schneider, Bloom and Heerema Mental Health Courts at 52.

223 This constitutes the legislation and regulations that form the framework of the legal system. In South Africa this will include, inter alia, the Constitution, the Criminal Procedure Act and the Mental Health Care Act.

224 It is usually the Government taking the decision to change the legislation and the implementation thereof is filtered down from there. See Schneider, Bloom and Heerema *Mental Health Courts* at 52.

225 Schneider, Bloom and Heerema Mental Health Courts at 52.

226 Schneider, Bloom and Heerema *Mental Health Courts* at 52. In the context of a Mental Health Court it would be important for procedures to be put in place to ensure that a fair balance is struck between the accused right to trial and legal representation on the one hand, and public safety and public

Thirdly, the roles of those involved in the criminal justice system should be assessed to establish the therapeutic impact that the particular role has.[227] Therapeutic jurisprudence is practised by specially trained judges in Mental Health Courts by, for example, listening actively to the participant, avoiding paternalistic speech and responding to the participants with dignity and respect that translates into a more informal atmosphere.[228] Judges and lawyers working in these courts are also specially trained in the field of mental health law.[229]

Lastly, and very importantly, therapeutic jurisprudence requires a multi-disciplinary approach. Therapeutic jurisprudence acknowledges that the law and, in particular, the practice of law in the criminal justice framework can be enriched by input from other disciplines such as psychology, sociology and nursing.[230] This will, in turn, arm the criminal justice system with the knowledge on how to better address the challenges posed by mentally ill accused persons. The Mental Health Courts have a Mental Health Court team on-site consisting of specially trained lawyers, psychiatrists, psychologists, social workers, nurses and case managers.[231] Mental Health Courts function within the criminal justice system but aim to incorporate advances made in other fields of specialisation such as psychology.[232] This methodology of therapeutic jurisprudence naturally broadens the scope

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health on the other hand. Also see Seltzer 2005 *Psychology, Public Policy and Law* 570 at 574 who points out that concern was raised with regard to the varying nature of the procedures followed across Mental Health Courts since there is no single model of a Mental Health Court.

227 Training might be necessary to ensure that the officer has a deep understanding of how he can contribute to the therapeutic outcome of the process. See Schneider, Bloom and Heerema *Mental Health Courts* at 53. No specific training course might be available for Mental Health Practitioners who wish to work in the Mental Health Court. These practitioners are mostly only required to show an understanding of the relevant psycho-legal aspects involved in processing a case of a mentally ill accused through the Mental Health Court. See this source at 115, 116. The authors do however suggest a list of topics on which mental health practitioners, lawyers and judges should receive training for purposes of fulfilling their role in the Mental Health Court effectively. See 122-125 of this source.

228 Frailing K "How mental health courts function: Outcomes and observations" 2010 (33) *Int J Law Psychiat* 207-213 at 207. Processes in the Mental Health Court are conducted more informally and in a conversational tone. See Schneider, Bloom and Heerema *Mental Health Courts* at 53. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 208 where it is explained that Judges often have conversations with participants that contributes to the more informal atmosphere. Also see Odegaard 2007 *North Dakota Law Review* 225 at 240 who explains that Mental Health Courts where therapeutic jurisprudence is practiced has a less adversarial approach.

229 Schneider, Bloom and Heerema Mental Health Courts at 55.

230 Schneider, Bloom and Heerema Mental Health Courts at 54.

231 Schneider, Bloom and Heerema *Mental Health Courts* at 55. Judges and lawyers working in these courts are also specially trained in the field of mental health law. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 211 where it is further pointed out that court staff is most productive when they are "cross-trained" in each other's fields, for instance, lawyers are trained in mental health and psychiatrists are trained in law.

232 Schneider, Bloom and Heerema Mental Health Courts at 55.

of the law.

Despite the potential that the therapeutic jurisprudence movement holds, concerns have been raised about therapeutic jurisprudence. These are highlighted below.

6.6 *Criticism against Therapeutic Jurisprudence*

The first concern raised is that it is difficult to measure the effectiveness of initiatives such as Mental Health Courts, which are grounded in therapeutic jurisprudence.[233] Measuring the success of therapeutic initiatives, such as the Mental Health Court, poses unique challenges because they are a very new phenomenon.[234] The fact that therapeutic programmes are individualised and administered in a very informal manner makes research on the effectiveness even more difficult as research is mostly only possible by way of case studies.[235] The logical response to this criticism is that more studies, even though they might only be case studies, will prove the effectiveness or ineffectiveness of Mental Health Courts as instruments of therapeutic jurisprudence. The Mental Health Court movement is still new, and research about its success and outcomes for its participants are scarce, albeit steadily increasing.[236] The true effectiveness of it will only be established after the passage of some time.

Secondly, therapeutic jurisprudence has been criticised for threatening the very nature of the criminal justice system and what it stands for. Some hold the view that the purpose of the criminal justice system is to punish the rule breakers and to protect society by doing so.[237] Since one of the primary goals of criminal law is to prevent persons from taking the law into their own hands, society must have a sense of restoration after the criminal process against an accused that has committed a wrong is concluded.[238] Alternatives to traditional prosecution may seem to be in conflict with this principle if the accused is never

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233 Schneider*, Bloom and Heerema Mental Health Courts* at 60. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 208.

234 Almquist and Dodd Mental Health Courts at v. Also see Schneider, Bloom and Heerema Mental Health Courts at 60, 93.

235 Schneider, Bloom and Heerema *Mental Health Courts* at 60. Also see 93, 94 of this source for suggestions on how the effectiveness of rehabilitation programmes can be measured and the aspects that should be focussed on in measuring the effectiveness of these programmes. See further Lurigio and Snowden 2009 *The Justice System Journal* 196 at 208.

236 Almquist and Dodd *Mental health Courts at* v.

237 Schneider, Bloom and Heerema Mental Health Courts at 62.

238 Van der Wolf et al 2010 International Journal of Forensic Mental Health 245 at 250.

"punished".[239] In the traditional criminal justice setting, judges are impartial and lawyers are on opposite side of a "fight". Where therapeutic jurisprudence is applied, for example, in Mental Health Court, judges take an interest in the accused, and lawyers work together to seek the best possible solution for the accused, which is viewed as not in line with the traditional goals of the criminal justice system.[240] In response to this criticism, it is reiterated that it was never intended for therapeutic jurisprudence to "override" the criminal justice system.[241] The fact that those that support the therapeutic jurisprudence movement are not advocating for the abolishment of prisons (the epiphany of an anti-therapeutic setting) proves that the intention is rather for the theory to function alongside existing criminal justice processes.[242] It seeks to integrate therapeutic goals without detracting from the mandate of the criminal justice system to ensure accountability for past wrongs.[243]

Therapeutic jurisprudence does not discard the importance of the individual taking responsibility for his actions;[244] it merely shifts the focus from what the person did to the underlying cause or reason for what he did. The shift of focus to therapeutic outcomes is based on one of the central pillars upon which this theory stands, namely, that it is morally unacceptable to punish individuals whose behaviour can be attributed to factors beyond their control.[245] This approach is followed in the Mental Health Court.[246]

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239 Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 250 points out that this is particularly the case where the crime is serious, a greater need for restoration exists then. The author, however, points out that in the event of minor crimes this objection fades and alternatives outside of the criminal law should be sought for accused persons with mental illness.

240 Schneider, Bloom and Heerema *Mental Health Courts* at 61, 62. Also see Odegaard 2007 *North Dakota Law Review* 225 at 230, 240 who point out that this is the approach in all problem solving courts. Those involved in the court process work together to find the most suitable solution to the accused's problem.

241 Wexler 1997 Behavioral Sciences and the Law 233 at 234.

242 Schneider, Bloom and Heerema Mental Health Courts at 62.

243 Schneider, Bloom and Heerema *Mental Health Courts* at 62. The authors give a good example of how the theory envisages to do this; If a person is sentenced, followed by a period of parole for example, those in support of therapeutic jurisprudence will attempt to implement this sentence in as therapeutic a way as possible (for example by offering rehabilitative programmes or mental health care treatment) with the aim of preparing the individual for optimal functioning in the community upon his/her release. Also see Frailing 2009 C.S.L.R 145 at 146, 147 for the approaches of Hart and Morris to sentencing where mental illness is imposed which, if followed, those approaches result in "sentences" in the form of court monitored treatment programmes as utilised in the Mental Health Courts.

244 Schneider, Bloom and Heerema Mental Health Courts at 46, 47.

245 Schneider, Bloom and Heerema *Mental Health Courts* at 63. There are the supporters of the theory that suggests that the punitive aspect in the pursuit of justice should be abandoned in its entirety, especially where the criminal act was a manifestation of an inadequate community care and social services. They proclaim that justice should be measured by the therapeutic outcomes it achieved.

The third point of criticism is based on the reality that there are limited mental health resources available.[247] The fear is that the implementation of therapeutic jurisprudence will push those in the criminal justice system to the front of the line for mental health care services, whilst law-abiding citizens must patiently await their turn.[248] It is not difficult to see how this can create a feeling of unfairness. Schneider Bloom and Heerema [249] put a different perspective on this issue and state that the criticism is misguided as the critique is not so much against therapeutic jurisprudence as such, but rather a criticism of the scarcity of resources in society. The problem is thus a lack of services and not the attempt to connect mentally ill accused in the criminal justice system with the mental health care system.[250] Those who advocate for therapeutic jurisprudence by implication also advocate for increased mental health care services as the success of the therapeutic programmes which therapeutic jurisprudence sets out to achieve is dependent on sufficient mental health care resources.[251] Therapeutic jurisprudence, therefore, promotes the availability of mental health care services to both the mentally ill in the criminal justice system and those outside of it.[252] Increasing mental health resources can ensure the availability of these services to all in need thereof, in which case this ground of criticism becomes irrelevant.

7 MENTAL HEALTH COURT: A THERAPEUTIC RESPONSE

7.1 Introduction

Mental Health Courts are alternatives to traditional prosecutions that are aimed at diverting the mentally ill accused away from the criminal justice system into the mental health care system.[253] Part of the reason why diversion programmes such as Mental Health Courts

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246 Schneider, Bloom and Heerema *Mental Health Courts* at 63. The authors recommend this approach as they submit that fault, in certain circumstances, does not lie with the accused.

247 Schneider, Bloom and Heerema Mental Health Courts at 64.

248 Schneider, Bloom and Heerema *Mental Health Courts* at 64. This concern was also raised by Steadman, Davidson and Brown 2001 *Psych Serv* 457 at 458. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 212.

249 Schneider, Bloom and Heerema Mental Health Courts at 64.

250 Schneider, Bloom and Heerema *Mental Health Courts* at 64. Also see Bazelon Centre for Mental Health Law "Criminalization of people with mental illness: The role of mental health courts in system reform" http://www.bazelon.org/LinkClick.aspx?fileticket=xQf5_1grKcI%3D&tabid=104 (Date of use: 17 March 2013) at 3 where the concern is expressed that limited resources may become unavailable to those not in contact with the criminal justice system. The criminal justice system will be a "gateway" to mental health services.

251 Lurigio and Snowden 2009 *The Justice System Journal* 196 at 211.

252 Schneider, Bloom and Heerema Mental Health Courts at 64.

253 Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 5.

came into being is because it was observed that people with mental illnesses are overrepresented in the criminal justice- and correctional system.[254] This seems to be a worldwide phenomenon.[255]

The two different models of Mental Health Courts as they operate in Canada and the United States of America will be studied in this research.[256]

7.2 The Mental Health Court Model

There is no single model of a Mental Health Court as each jurisdiction creates its own model based on the needs of its community.[257] This makes finding an exact universal definition for a Mental Health Court problematic. Steadman *et al* [258] offer a functional definition of Mental Health Courts as courts where mentally ill offenders are dealt with in a separate docket, a collaborative team is used to make linkages to treatment, availability of appropriate clinical placement is ensured, and the programmes are monitored by the court with possible criminal sanctions for non-compliance. Schneider *et al,*[259] however, criticise this definition and instead suggest a definition that focusses on the characteristics of a Mental Health Court, namely rehabilitation of the mentally ill accused, reducing or avoiding time spent by the mentally ill accused in jail, a collaborative and co-operative [260] rather than an adversarial approach, decriminalisation of the mentally ill and reintegration of the mentally ill accused into the community. What is true about all Mental Health Courts is that they are "problem-solving courts" and that the underlying theory applied in all of these

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254 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 461, 462.

255 In the United States of America for example, the number of mentally ill persons being held in jails and prisons, increases by 10% per annum. See Schneider, Bloom and Heerema *Mental Health Courts* at 22. This is the same percentage as in Canada. See chapter 4 of this research for more detail on the Canadian statistics. Also see Torrey *et al Criminalizing the Seriously Mentally Ill* at 9 where it is explained that the first mental health survey that was done in 1880 during which survey it was found that persons with serious mental illnesses comprise 0.7% of the prison population. This number grew to 7.2% in a survey done in 1992. See further Parliamentary Information and Research Service *Current Issues in Mental Health in Canada* at 1.

256 See chapter 4 of this research for a discussion of Mental Health Courts in Canada and chapter 5 for a discussion of Mental Health Courts in the United States of America.

257 Watson *et al 2001 Psych Serv* 477 at 477. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 205.

258 Steadman, Davidson and Brown 2001 *Psych Serv* 457 at 458. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 205 where the characteristics of Mental Health Courts are discussed. These are in line with the definition of Mental Health Courts offered by Steadman.

259 Schneider, Bloom and Heerema Mental Health Courts at 85.

260 Schneider, Bloom and Heerema *Mental Health Courts* at 92. Also see Goldberg S *Judging for the 21st Century: A problem solving approach* (National Judicial Institute Canada 2005) at 26.

courts is therapeutic jurisprudence.[261]

What a Mental Health Court is or what it should be determined within the framework of the particular jurisdiction. The inefficiencies of the relevant mental health care system are identified, and they are addressed according to the priorities of the particular community and the available resources that can be employed to address these inefficiencies.[262] Mental Health Court models vary with regard to their eligibility criteria, processes, as well as sanctions employed for non-compliance.[263]

Two Mental Health Court model are explored in this research. Chapter 4 explores the Mental Health Court model employed in Canada, whilst chapter 5 investigates the Mental Health Court model employed in the United States of America.

7.3 *Goals and objectives of a Mental Health Court*

Each Mental Health Court has its own unique and specific goals, and these will be discussed in more detail in chapters 4 and 5 when the specific Mental Health Court models are discussed. The discussion that follows is an overview of the objectives of Mental Health Courts in general and is not jurisdiction-specific.

Mental Health Courts are aimed at diverting the mentally ill accused persons charged with minor to moderately serious criminal offence away from the criminal justice system and offering them an alternative to traditional prosecution in the criminal court.[264]

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[261] Schneider, Bloom and Heerema *Mental Health Courts* at 39. Also see Stafford and Wygant 2005 *Behavioral Sciences and the Law* 245 at 246. See further Odegaard 2007 *North Dakota Law Review* 225 at 228.

[262] Schneider, Bloom and Heerema Mental Health Courts at 85.

[263] See chapter 4 for a discussion of the Canadian model and chapter 5 for a discussion of the model employed in the Unites States of America where the differences in eligibility criteria, processes and sanctions are discussed.

[264] Some Mental Health Courts, such as the Brooklyn Mental Health Court, expanded their jurisdiction to process cases of violent crimes. See a discussion of the functionality of this court in chapter 5 of this research. Also see Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 461. See further Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 5. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 2. See further Lurigio and Snowden 2009 *The Justice System Journal* 196 at 205 where it is explained that the eligibility criteria of Mental Health Courts may differ depending on the jurisdiction that they are functioning in. Some accommodate those with Axis 1 disorders (according to the DSM-V) only and exclude those with Axis 11 diagnosis (mental retardation and personality disorders) where the latter is their only diagnosis. Some Mental Health Courts only take accused persons into their programmes if their conditions are treatable by proven methods. Some Mental Health Courts exclude accused persons charged with sexual offences, child

Mental Health Courts further aim to streamline the process involving assessment for fitness to stand trial in order to ensure the more effective use of criminal justice resources.[265] Mental Health Courts aim to alleviate overburdened criminal courts [266] so that criminal courts can deal with other serious offences not relating to mental illness.[267] These courts further aim, through diversion programmes, to reduce overcrowding of prisons as well as improve the quality of life of mentally ill persons in conflict with the law.[268]

Mental Health Courts aim to alleviate the burden that was placed on the criminal justice system because of the deinstitutionalisation movement. One of the consequences of deinstitutionalisation was that mental health care services became less available to those in need of them [269] as a result, whereof these service-deprived individuals often clash with the law. The criminal justice system is then expected to somehow address the mental health needs of these persons.[270] Of course, the criminal justice system was never designed for this [271] , and the Mental Health Courts aim to equip the criminal justice system for the new responsibility that it has been tasked with. Mental Health Courts aim to help with this new

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abuse or a crime involving the use of a firearm.

265 Mental Health Courts aim to expedite the assessment for fitness to stand trial. Schneider, Bloom and Heerema *Mental Health Courts* at 2, 86. The delays with fitness assessments in the South African context contributes to problems with overcrowding as those awaiting fitness assessments are housed in correctional facilities. See the discussion of fitness proceeding in South Africa in chapter 3 of this research.

266 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 461. Also, see Schneider, Bloom and Heerema *Mental Health Courts* at 2. See further Odegaard 2007 *North Dakota Law Review* 225 at 230 where it is acknowledged that persons with mental illness are currently contributing to the overload of the criminal justice system due to the fact that they are coming into contact with the criminal justice system more frequently.

267 Schneider, Bloom and Heerema Mental Health Courts at 86.

268 Frailing 2010 *Int J Law Psychiat* 207 at 207. Also see Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 461. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 86. See further Odegaard 2007 *North Dakota Law Review* 225 at 237 where it is stated that Mental Health Courts were established to address overcrowding, recidivism and strained resources.

269 Schneider, Bloom and Heerema *Mental Health Courts* at 2. Also see in general Prins SJ "Does transinstitutionalisation explain overrepresentation of people with serious mental illnesses in the criminal justice system? 2011 (47) *Community Mental Health Journal* 716-722 for a discussion on the debates in response to the question of whether re-institutionalisation will solve the problem of over-representation of people with serious mental illnesses in the criminal justice system or not. Also see Torrey *et al Criminalizing the Seriously Mentally Ill* at 40 where deinstitutionalisation has been identified as a phenomenon that can put pressure on the criminal justice system to re-institutionalise the mentally ill individual.

270 Schneider, Bloom and Heerema *Mental Health Courts* at 1. Also see Odegaard 2007 *North Dakota Law Review* 225 at 229 where it is highlighted that judges in traditional courts faced huge challenges in processing cases of persons with mental illness before problem solving courts were introduced. South Africa is currently experiencing huge case backlogs in respect of cases involving 30-day observation periods. See Pillay 2014 *South African Journal of Psychology* 48 at 48.

271 Schneider, Bloom and Heerema *Mental Health Courts at* 1.

responsibility of the criminal justice system by providing court-mandated treatment programmes aimed at the treatment of the accused's operative mental illness.[272]

Mental Health Courts aim to slow down the "revolving door" phenomenon by preventing or limiting re-offending.[273] Re-offending is curbed by providing mentally ill accused persons with critical mental health care services.[274] Once the mental illness is treated, the probability of re-offending decrease. Reducing recidivism, in turn, reduces crime, which contributes to public safety.[275]

Mental Health Courts aim through its processes to place the responsibility for mental health care back with the mental health care system [276] where the expertise for treating mental illnesses should naturally be expected to reside. It has been stressed that the focus should remain on reducing recidivism and successfully integrating mentally ill individuals into the community.[277] This can only be achieved if community services are enhanced.

Every court that carries the label of a Mental Health Court attempts to offer a rehabilitative response that is treatment based, as opposed to criminal sanctions.[278] The philosophy behind the Mental Health Court movement and its rehabilitative approach is that the traditional approach to deviant behaviour (punishment and incarceration), where it is predominantly the product of a mental disorder, is not only inappropriate but also ineffective in its nature.[279] There is an understanding in these courts that a rehabilitative approach will

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272 Schneider, Bloom and Heerema *Mental Health Courts* at 2. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 205 and 212 who stress the importance of availability of resources for purposes of Mental Health Court treatment programmes.

273 Frailing 2009 C.S.L.R 145 at 146. This is done by providing the mentally ill accused an entrance into community based mental health care. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 2.

274 Watson *et al 2001* Psychiatric Services 477. Also see Stafford and Wygant 2005 *Behavioral Sciences and the Law* 245 at 246. Also see Odegaard 2007 *North Dakota Law Review* 225 at 228 who points out that this is a goal of most problem solving courts.

275 Schneider, Bloom and Heerema *Mental Health Courts* at 86. Also see Odegaard 2007 *North Dakota Law Review* 225 at 228.

276 Schneider, Bloom and Heerema Mental Health Courts at 2.

277 Seltzer 2005 *Psychology, Public Policy and Law* 570 at 583, 584. The author also cautions against the use of practices that impact negatively on the mentally ill offender's chances of reintegration, for example requiring a guilty plea in order to participate in the Mental Health Court programmes. This will result in the mentally ill person having a criminal record that could complicate reintegration for him in various ways.

278 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 461. *Schneider Bloom and Heerema Mental Health Courts* at 3.

279 Schneider, Bloom and Heerema *Mental Health Courts* at 3. See further Lurigio and Snowden 2009 *The Justice System Journal* 196 at 212 where jail time as sanction for non-compliance with

best serve the interests of the public and the wellbeing of the mentally ill accused.[280]

One of the main characteristics of Mental Health Courts is that it aims to decriminalise mental illness. Rich [281] opines that inadequate community based mental health care has progressively contributed to the criminalisation of mental illness. The Mental Health Court movement aims to work closely with communities to provide mental health care treatment and will assist in decriminalising mental illness by implementing and maintaining effective community mental health programmes.

Since expertise from both the legal and mental health fields is required to deal with cases of mentally ill persons effectively, a multidisciplinary approach is followed in these courts.[282] Each Mental Health Court programme is designed with input from this multidisciplinary team to meet the needs of the particular individual in question [283] , and the therapeutic programmes at the court are not a "one size fits all" initiative. In order for a therapeutic programme to be successful, it needs support from the community from which the resources to make these programmes a reality will be drawn.[284]

Although initiatives such as special courts are created to cater for a specific group within the criminal justice system, the circumstances of the particular individual are always considered.[285] This is evident from the tailor-made treatment programme that is drafted by the multidisciplinary team referred to above. Ignoring the unique circumstances of each accused person will defeat the therapeutic aim of the Mental Health Court initiative because what is considered therapeutic for one person is not necessarily therapeutic for the next person.

As mentioned above, the goals and objectives of Mental Health Courts are determined by the jurisdiction that they aim to serve. For this reason, Mental Health Courts function differently from each other and may have been established due to different reasons. The

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treatment programmes are criticised, as it is often not helpful for the mentally ill accused to receive jail time. Also see Odegaard 2007 *North Dakota Law Review* 225 at 250 who shares the view that it is more appropriate to process cases of persons with mental illness through a specialised court rather than through the traditional criminal justice system.

280 Schneider, Bloom and Heerema Mental Health Courts at 93.

281 Rich 2009 Fordham Urban Law Journal 89 at 119.

282 Odegaard 2007 *North Dakota Law Review* 225.at 238 who also discuss the unique way in which each role player contributes to the Mental Health Court atmosphere and functioning.

283 Schneider, Bloom and Heerema Mental Health Courts at 58.

284 Schneider, Bloom and Heerema Mental Health Courts at 58.

285 Schneider, Bloom and Heerema Mental Health Courts at 58.

reasons behind the emergence of Mental Health Courts in Canada and the United States of America are discussed below.

7.4 *The emergence of Mental Health Courts in Canada*

A discussion of the emergence of Mental Health Courts is included to elucidate the circumstances that motivated the establishment of these specialised courts. Some of the reasons behind the establishment of a Mental Health Court in a particular jurisdiction, as discussed below, may also find application in the South African context and could similarly be the impetus behind the establishment of a Mental Health Court in South Africa.

The establishment of Mental Health Courts in Canada is an acknowledgement of the fact that the traditional criminal justice system is not always equipped to identify and address the mental health issues of accused persons.[286] The criminal justice system in Canada was not designed to address the needs of mentally ill accused persons in the first place.[287] Traditional criminal courts are often overburdened with caseloads making it difficult for them to adequately deal with mentally ill accused persons.[288] Besides the fact that criminal courts are often inept to deal with cases of persons with mental illness, some specific reasons or considerations can be cited as the impetus behind the establishment of the specialised Mental Health Courts in Canada. These are discussed below.

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286 Barret and Shandler *Mental Disorder in Canadian Criminal Law* at 1-29 who points out that the criminal justice system is generally ineffective in as far as it pertains to mentally ill accused persons. Also, see Heerema 2005 *Crim.L.Q* 255 at 256. Also see Rieksts 2008 *LawNow* 31 at 31. See further Hartford, Carey and Mendonca 2007 *Journal of Behavioral Health Services and Research* 198 at 199. Also see Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 259. Also see National Judicial Institute *Problem-solving in Canada's courtrooms. A guide to therapeutic justice* (National Judicial Institute Canada, 2011) at 9.

287 Schneider, Bloom and Heerema Mental Health Courts at 1. Also see *Centre for Addiction and Mental Health* v *Al-Sherevadi* 2011 ONSC 2272 (Ont S.C J) at {13} where the court stated that "As may be apparent from my endorsement, whatever problems there may be with continuing to hold persons with mental health issues in detention facilities as opposed to proper medical facilities, they pale in comparison with the problems associated with holding such persons in a police division. Not only are the police not properly equipped to deal with these people, it is not the role of the Toronto police service, or any other police service, to house these people. It is also not appropriate to foist the burden of this problem onto the police or to saddle them with the fallout from this conflict". See further Barret and Shandler *Mental Disorder in Canadian Criminal Law* at 2-31-2-33. Also see Byrick K and Walker-Renshaw B *A Practical Guide to Mental Health and the Law in Ontario* (Ontario Hospital Association Toronto 2012) at 75 where the point is made that the criminal justice system has been struggling to overcome the challenges that accused persons with mental illness bring to it. Also see Rieksts 2008 *LawNow* 31 at 31.

288 Mental Health Courts aim to alleviate the burden on criminal courts. See Toronto Mental Health Court "Overview of the Court" http://www.mentalhealthcourt.ca/pages/2/Overview.htm (Date of use: 21 July 2015) at 1.

Firstly, the deinstitutionalisation movement during the latter part of the 20th century, resulted in the release of patients from government managed psychiatric facilities into the community.[289] Resources were lacking within the community to cater for the needs of the individuals that were released from the psychiatric institutions.[290] Mentally ill persons consequently failed to reintegrate successfully into their communities due to the lack of available mental health services that resulted in the homelessness of many mentally ill persons.[291] These individuals would often encounter the criminal justice system when they either committed petty crimes or were picked up by the police for disorderly behaviour.[292] Deinstitutionalisation contributed to the criminalisation of mental illness.[293]

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289 There was limited availability of mental health care services in the community for those released from these psychiatric hospitals. See Schneider, Bloom and Heerema Mental Health Courts at 1. Also see McLachlin 2010 Dalhousie Law Journal 15 at 20. Also see Rieksts M "Mental health courts in Canada" *LawNow* 2008 (33) 31-34 at 31 where the deinstitutionalisation movement is identified as a contributing factor to the increased number of mentally ill persons in the criminal justice system. See further Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015). Also see Slinger E and Roesch R "Problem-solving courts in Canada: A review and a call for empirically-based evaluation methods" 2010 (33) *International Journal of Law and Psychiatry* 258-264 at 259.

290 Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 1. Also see Read 2009 UBCMJ 25 at 25.

291 McLachlin 2010 Dalhousie Law Journal 15 at 20 who adds that many of these individuals stopped taking their medication and deteriorated substantially as a result. Research shows that 30% to 50% of homeless people suffer from a serious mental illness. See Heerema M "An introduction to the mental health court movement and its status in Canada" 2005 (50) C*rim.L.Q* 255-282 at 257. Although these figures are drawn from the American population, it has been suggested that the figures pertaining to Canada should be in the same region. Also see Read 2009 UBCMJ 25 at 25 where it is pointed out that between 30 to 35% of the homeless population in Canada is mentally ill.

292 Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 1 where it is pointed out that at least 30% of persons with serious mental illnesses had contact with the police while trying to make contact with the mental health care system. Also see this source at 3 where criminalisation of mental illness is discussed and where it is pointed out that those released as part of the deinstitutionalisation movement experienced a different type of institutionalisation afterwards in that they would be kept in prison or jail instead of the hospital from which they were released as part of the deinstitutionalisation movement. These persons are often arrested when they have a mental health crisis. If they are arrested in this time, they then act aggressively towards the police during arrest, as they may be paranoid or suffering from hallucinations. Lack of medication can also be the cause of such behaviour. See, however, Parliamentary Information and Research Service *Current Issues in Mental Health in Canada at 1* where the view is held that most persons with mental illnesses do not come into contact with the criminal justice system during their lifetime. Also see Luther G and Mela M "The top ten issues in law and psychiatry" *Sask L Rev* 2006 (69) 401-440 at 423 where trans-institutionalisation is discussed as a factor that contributes to mentally ill persons, who would have been treated in the civil mental health system now being treated in the criminal justice system as a result of deinstitutionalisation which entailed that they were released from psychiatric institutions into the community which generally lacked support services for these persons.

293 Hartford K, Carey R and Mendonca J "Pretrial court diversion of people with mental illness" 2007 (34) *Journal of Behavioral Health Services and Research* 198-205 at 198. The release of persons

Secondly, the lack of funding for mental health care services in the community [294] contributed to the decision to establish specialised Mental Health Courts. The lack of funding added to the devastating effects of deinstitutionalisation, such as homelessness [295] and increased contact of mentally ill persons with the criminal justice system, as explained above.[296] Due to the increased contact with the criminal justice system, mentally ill persons were often housed in the criminal justice system after arrest from where they could access mental health care.[297] This state of affairs contributed to the criminalisation of the mentally ill as it leads to the inappropriate incarceration of persons with mental illness in the criminal justice system. [298]

The overrepresentation of people with mental disabilities in the criminal justice system [299]

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from mental facilities into the community increased their contact with the criminal justice system. Clinicians who subscribe to the belief that deinstitutionalisation contributed to the criminalisation of the mentally ill, often promote diversion. See Schneider, Bloom and Heerema Mental Health Courts at 36. Diversion, and more particularly Mental Health Court's form part of the Mental Health Strategy of Canada. See Mental Health Commission of Canada *Changing Directions, Changing Lives: The Mental Health Strategy for Canada* (Mental Health Commission of Canada Alberta 2012) at 36.

294 Little provision was made for funding for these health care services. See Read 2009 *UBCMJ* 25 at 25. Also see Heerema 2005 *Crim.L.Q* 255 at 258.

295 Read 2009 UBCMJ 25 at 25. This is especially the case where persons have been released from a psychiatric institution but not sufficient provision is made for support services for that person's treatment in the community.

296 O'Shaughnessy RJ "AAPL practice guideline for the forensic psychiatric evaluation of competence to stand trial: Canadian legal perspective" 2007 (35) *The Journal of the American Academy of Psychiatry and the Law* 505-508 at 506. Also see Rieksts 2008 *LawNow* 31 at 31 that states that the general decline of mental health services to persons in Canada lead to the increase of persons with mental illness in the Canadian criminal justice system.

297 Barrett J and Shandler R *Mental Disorder in Canadian Criminal Law* (Carswell Toronto 2006) at 1-30 who confirms that many mentally ill persons encounter the mental health care system for the first time when they are arrested. The families of these mentally ill persons also often believe that the only way to secure treatment for this accused is through having him arrested and for the court to order such treatment.

298 Schneider, Bloom and Heerema *Mental Health Courts* at 121. Also, see Rieksts 2008 *LawNow* 31 at 31. In the Canadian context, the inappropriate incarceration of mentally ill accused persons is specifically addressed by the health care authorities. See Ministry of Health and Long-term Care http://www.health.gov.on.ca/en/common/ministry/publications/reports/mentalhealth/framework.pdf (Date of use: 26 August 2015).

299 Between 15 to 40% of jail inmates suffer from a mental illness that is disproportionate to the prevalence of mental illness in the general population. See Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 3. Also see Read 2009 *UBCMJ* 25 at 26. See further Parliamentary Information and Research Service *Current Issues in Mental Health in Canada* at 1. Also see Mental Health Commission of Canada *The Mental Health Strategy for Canada* at 36. See further Barret and Shandler *Mental Disorder in Canadian Criminal Law* at 1-30 who confirms that a significant percentage of incarcerated persons in Canada suffer from a mental illness. Lastly, see Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 259 who confirm the overrepresentation of mentally ill accused persons in the criminal justice system as a reason for establishing Mental Health Courts. Also, see Sirotich 2009 J.

was a third motivation for establishing Mental Health Courts in Canada. Since 2000, the figure of mentally ill accused persons in the Canadian criminal justice system had been increasing by approximately 10 percent per annum.[300] The majority of mentally ill accused persons commit minor offences such as trespassing, fraud in obtaining transport, minor assault, public intoxication, and mischief.[301] These arrests are mostly initiated by reports from the public rather than intervention by the police.[302] Schneider *et al* [303] caution that this increase in figures must be investigated to determine, for example, if it is not due to an increase in arrests in general considered with population growth amongst other things. Upon investigation, it was found not to be the case and that arrests, in fact, decreased over the relevant period. [304]

Am. Acad. Psychiatry Law 461 at 462 who reports that the prevalence of persons with mental illness in prison is estimated at a bit more conservative rate, at between 5 and 10%.

300 Schneider, Bloom and Heerema Mental Health Courts at 21. Also see Schneider RD *Annotated Ontario Mental Health Statutes* 4th ed (Irwin Law Toronto 2007) at 407. See further R J O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 507. Also see Rieksts 2008 *LawNow* 31 at 31 where it is confirmed that there has been an increase in the number of mentally ill persons in the Canadian criminal justice system. See further Mental Health Commission of Canada *The Mental Health Strategy for Canada* at 36. See Heerema 2005 *Crim.L.Q* 255 at 258 who discusses the results of studies that revealed that a person in a prison population is 5 times more likely to have a mental illness than someone living in a non-incarcerated population. Also see Bakht N "Problem solving courts as agents of change" 2005 (50) *Criminal Law Quarterly* 224-254 at 245 where it is stated that the increase in the number of mentally ill persons in the criminal justice system is of particular concern if one considers the fact that the criminal justice system aims to protect the public from persons who intentionally commit crimes, those with mental illnesses are often not able to form such intention. Also see Ministry of Health and Long-term Care http://www.health.gov.on.ca/en/common/ministry/publications/reports/mentalhealth/framework.pdf (Date of use: 26 August 2015) at 4.

301 Schneider, Bloom and Heerema Mental Health Courts at 30. Also see Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015).at 3 where it is stated that the most common crimes amongst those arrested with mental illness is causing a disturbance, minor theft, mischief and failure to appear in court.

302 Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 3.

303 Schneider, Bloom and Heerema Mental Health Courts at 22. Also see Schneider *Annotated Ontario Mental Health Statutes* at 408.

304 Many reasons have been tendered for the increase of the number of mentally ill persons that come into contact with the Canadian criminal justice system. See Schneider, Bloom and Heerema Mental Health Courts at 1 who point out that deinstitutionalisation has been blamed for this phenomenon, so has the lack of available mental health care programmes out of prisons, suggesting that those in need of care commit a crime in order to be incarcerated and receive treatment. Also see Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 3, 4 where the following reasons for the increased number of mentally ill persons in the criminal justice system are listed and discussed: Lack of sufficient community support, including housing, income (lack of employment) and mental health services; High rate of substance abuse among persons with mental illness (approximately 50%) which makes treating the mental illness much harder; The "forensic" label which causes some community health care facilities to refuse

The fourth consideration that motivated the establishment of a Mental Health Court in Canada is the fact that the criminal justice system has a generally negative effect on persons with mental disabilities. It appears that the mentally ill are trapped in the criminal justice system and have difficulty escaping it for good. This has become known as the revolving door phenomenon.[305] Mentally ill persons are negatively affected by the criminal justice system in that fellow inmates often subject them to verbal and physical abuse.[306] Although this cannot be said to be unique to mentally ill accused persons, the effect of such abuse on mentally ill accused persons are severe, as their mental state is likely to deteriorate in such conditions.[307]

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treatment to persons accused of crimes due to fear of their dangerousness for example; Problems with treatment such as the side-effects of medication; Lack of cross-training for both criminal justice and mental health care professionals; Lack of timely access to mental health care services caused by the fact that access to early intervention or preventative programmes are not always easy. See Heerema 2005 *Crim.L.Q* 255 at 259 who discusses the view that this phenomenon is a product of discrimination against those with a mental illness in the criminal justice system. Prisons housing these mentally ill persons have been described as the surrogate mental health care provider of today. (See Schneider, Bloom and Heerema Mental Health Courts at 2). Also, Court JMP, Simpson AIF and Webster CD "Contesting mad versus bad: The evolution of forensic mental health services and law at Toronto" 2014 (22) *Psychiatry, Psychology and Law* 918-936 at 932, 933 who discuss the rise in numbers of persons found not criminally responsible on account of mental illness, despite crime statistics going down and arrest rates falling. This, according to these authors shows that there is a weak link in the criminal justice system.

[305] Heerema 2005 *Crim.L.Q* 255 at 259. This refers to the situation where an accused is arrested again soon after release. This pattern of arrest shortly after release continues and is especially prevalent amongst those with mental illnesses. Also see Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 4. See further Parliamentary Information and Research Service *Current Issues in Mental Health in Canada* at 5, 6.

[306] Heerema 2005 *Crim.L.Q* 255 at 260. Also see Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 4 where it is pointed out that mentally ill persons are more likely to be victimised by others. See further Read 2009 UBCMJ 25 at 26. Also see Mental Health Commission of Canada *The Mental Health Strategy for Canada at* 36 where the view is expressed that a person with a mental illness is more likely to be victim of crime than the perpetrator thereof.

[307] In *Phuneuf* v *Ontario* 2010 ONCA 901 at {28} the Ontario Court of Appeal stated that "There can be no doubt that the incarceration of mentally ill persons in a jail setting risks further deterioration of their mental state and potentially places them at real risk of physical harm.“ Mentally ill persons who are incarcerated often exhibit disruptive behaviour as a symptom of their mental illness as a result whereof they encounter sanctions such as solitary confinement that can be very traumatic for persons with mental illnesses causing psychosis or a breakdown of the mentally ill person. This is clearly deterioration in the mental state of the accused. Also see Read 2009 UBCMJ 25 at 26. Also see Bakht 2005 *Criminal Law Quarterly* 224 at 245 where it is stated that prisons are not always equipped to deal with the needs of mentally ill accused persons as they lack persons with the necessary training. See further Parliamentary Information and Research Service *Current Issues in Mental Health in Canada* at 4. Lastly, see Ministry of Health and Long-term Care http://www.health.gov.on.ca/en/common/ministry/publications/reports/mentalhealth/framework.pdf (Date of use: 26 August 2015) at 4. See in general Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015).

The fifth consideration for establishing Mental Health Courts is the view held by most advocates of the Mental Health Court movement that most mental illnesses are treatable conditions.[308] This view is supported by the expectation that the state should assume responsibility for providing treatment and facilities for such treatment.[309] If mental illness was not viewed as treatable, alternatives to incarceration for the mentally ill accused would serve no therapeutic purpose.[310]

The last and very important factor that contributed to the establishment of specialised Mental Health Courts was the tremendous delays in the criminal justice system in sorting out pre-trial issues such as fitness to stand trial and treatment orders.[311] What was concerning was the impact of the delays on the accused's rights as he was detained in a correctional facility awaiting assessment.

7.5 Emergence of Mental Health Courts in the United States of America

Various reasons for the establishment of Mental Health Courts in the United States of America have been put forward and are discussed below. Some of these overlap with those mentioned in the Canadian context but are mentioned specifically in the American

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308 Heerema 2005 *Crim.L.Q* 255 at 262.

309 Heerema 2005 *Crim.L.Q* 255 at 262.

310 Closely related to the belief that mental illnesses are treatable conditions, is the provision for hospital orders in the initial provisions of Bill C-30. Bill C-30 lead to the amendments of the parts of the Criminal Code dealing with the treatment of mentally ill accused persons. These hospital orders were applicable to persons who were fount fit to stand trial, but still suffer from a mental illness. These persons were often found guilty on the charges against them, but do not meet the criteria of the "not criminally responsible on account of mental illness" defence and would face the normal criminal trial process and sanctions. A hospital order would entail that such a person could serve the first 60 days of his sentence in a psychiatric hospital in order for him to get the necessary treatment for his mental condition after which he can be transferred to the relevant prison. A hospital order would only be possible with the consent of the accused and the relevant treatment facility. The provisions of Bill C-30 envisaged that the treatment should last for a maximum of 60 days. These provisions never made it into the promulgated version of the legislation, mainly because of concerns regarding logistics of executing the orders. Barret and Shandler *Mental Disorder in Canadian Criminal Law* at 1-13.

311 These delays were attributed to the constant shortage of resources within the forensic mental health system. See Schneider, Bloom and Heerema *Mental Health Courts* at 106. Also, see Barret and Shandler *Mental Disorder in Canadian Criminal Law* at 1-31 where it is pointed out that a lack of resources impacts all orders made under part XX.I of the Criminal Code and not only assessment orders. Also see Van de Veen SL "Some Canadian Problem Solving Court Processes" paper presented at the Canadian Association of Provincial Court Judges Pre-Institute Conference, September 2003, St John's, Newfoundland National Judicial Institute 2003. Available at http://www.aija.org.au/TherapJurisp06/Papers/VandeVeen2D.pdf at 19 where it is indicated that the delay in resolving pre-trial issues was one of the particular reasons behind the establishment of the Toronto Mental Health Court.

context as well to illustrate that similar considerations for the establishment of Mental Health Courts apply across jurisdictions.

Firstly, the increase in the number of mentally ill persons in the criminal justice system necessitated initiatives such as Mental Health Courts. Deinstitutionalisation contributed to the increase in the number of mentally ill persons in the American criminal justice system [312] because the policies for community care of mentally ill persons were not properly implemented.[313] The deinstitutionalisation movement increased pressure on the criminal justice system to process cases of the mentally ill accused, often with the aim of having these individuals re-institutionalised.[314] Studies in the United States of America found that

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312 Rogers R and Shuman DW *Fundamentals of Forensic Practice: Mental Health and Criminal Law* (Springer USA 2005) at 88. As a result, overcrowded jails and prisons experienced huge challenges to cater for the needs of mentally ill inmates. The overcrowded prisons and jails have been attributed to the conservative orientation of the criminal justice system, which focussed on punishment for all offences. It is this conservatism that was in part the impetus for the development of speciality courts. See Frailing 2008 *C.S.L.R* 63 at 67. Also see Rossman SB, Willison JB, Mallik-Kane K, Kim K, Debus-Sherrill S and Downey PM *Criminal Justice Interventions for Offenders with Mental Illness: Evaluation of Mental Health Courts in Bronx and Brooklyn, New York* (USA National Institute of Justice 2012) at 1.

313 Torrey *et al Criminalizing the Seriously Mentally Ill* at 52-55. Prior to 1960, states had the sole fiscal responsibility for its mentally ill citizens. When a mentally ill person is discharged from a state hospital, the fiscal responsibility is shifted to the federal government in that the mentally ill person qualifies for all the above mentioned federal program. This, unfortunately served as an incentive to discharge mentally ill patients as soon as possible, without much concern for their wellbeing after they have been discharged – since they do qualify for federal benefits after all. If the mentally ill person then defaulted on his medication and landed up in the criminal justice system, the fiscal responsibility could shift from the Department of Health to the Department of Corrections. The manner, in which the funding of the correctional facilities is managed, also plays a part here. Some jails (such as the New Orleans Parish Community Corrections Centre) receive their funding, based on the number of inmates it has on any given day. When the number of inmates decreases, the funding consequently diminishes and some believe that the police would then go out onto the streets and arrest the homeless, of which a large number would be mentally ill, and charge them with misdemeanours in order to get the number of inmates higher in order to get more funding. The jail received $18 per inmate per day. Fortunately, this position in New Orleans is the exception rather than the rule. For most jails there is therefore not an incentive to fill their sells with mentally ill individuals. The possibility of unnecessary arrests increases rapidly if each incarceration following upon an arrest is "rewarded" with funding. This model is for obvious reasons, not recommended. The responsibility for the care of the mentally ill thus shifted from the Federal government to the local authorities. See Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 38. The authors explain that the idea behind institutionalisation was to move the care of the mentally ill back to the community since it allowed the mentally ill to be reintegrated into the community and community mental health care was more cost effective than institutionalisation. Funding was made available for the local authorities to make community mental health services available but this was not optimally implemented.

314 Torrey et al Criminalizing the Seriously Mentally Ill at 40. The manner in which the police deal with the mentally ill accused could also be seen as a reason for increased number of mentally ill persons in the criminal justice system. Police as the first responders to incidents involving persons with mental illness, has the discretion to deal with these accused persons formally by arresting them, or

the number of people with mental illness in prison is disproportionately large compared to the general population.[315] Between 1980 and 1992, the number of inmates with mental illnesses in the United States of America grew by 154%.[316] In 2009, the prevalence of people with mental illness in jails and prisons in the United States of America varied between 6 and 18%, depending on the definition of mental illness that was used for the particular study.[317]

Secondly, Mental Health Courts were established because mental health treatment options at hospitals were less because of deinstitutionalisation, and community treatment options were not as accessible as they should have been.[318] The requirements for admission for involuntary mental health care treatment at a psychiatric facility became stricter than before.[319] The primary focus for admission to a psychiatric hospital was on the dangerousness of the individual.[320] The effect was that non-dangerous mentally ill persons

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informally by referring them to community treatment facilities. As referred to above, these treatment facilities were not as accessible as it should or could have been making it difficult to deal with these cases informally. The police thus often ended up arresting mentally ill persons and processing their cases through the criminal justice system. Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 44 where it is pointed out that persons with mental illnesses were more often arrested than persons without mental illness in the same circumstances were. Persons with mental illnesses were arrested in 47% of the cases whereas persons in the same circumstances without a mental illness, were only arrested in 28% of the cases.

315 Watson *et al 2001 Psychiatric Services* 477 at 477. Also see Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 462 who reports that prevalence of serious mental illness in jails and prisons are estimated to be 2 to 5 times higher than in the general population. 10 to 15% of jail inmates were found to be mentally ill whilst only 2% of the general population were found to be mentally ill

316 Watson *et al 2001 Psychiatric Services* 477 at 478 In 1992, for example, 3 300 of the 21 000.00 inmates in the Los Angeles County Jail required daily mental health care services.

317 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 462.

318 Garner and Hafemeister 2003 *Developments in Mental Health Law at* 1, 3, 4. See further Denckla D and Berman G "Rethinking the revolving door" 2001 Centre for Court innovation, New York. www.courtinnovation.org/sites/default/files/rethinkingtherevolvingdoor.pdf (Date of use: 7 March 2011) at 3. Also see Odegaard 2007 *North Dakota Law Review* 225 at 322.

319 Torrey *et al Criminalizing the Seriously Mentally Ill* at 40. Also see in general Sosowsky L "Crime and violence among mental patients reconsidered in view of the legal relationship between state and mentally ill" 1978 (135) *American Journal of Psychiatry* 33-42. Also see Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness at 34 where it is explained that the disability rights movement fought for the rights of the mentally ill. One of their main objectives was to limit involuntary commitment to cases where it was absolutely necessary. Also see Rossman *et al Criminal Justice Interventions for Offenders with Mental Illness* at 1 where it is stated that these stricter requirements for involuntary care contributed to the rising number of persons with mental illness in the criminal justice system.

320 See Frailing 2008 *C.S.L.R* 63 at 64 who discusses the case of Alberta Lessard from MIwaukee Wisconsin, who challenged her involuntary admission in court and succeeded. This resulted in legislative changes in the 1970's across many states in America to the effect that the main criteria for involuntary psychiatric treatment, was dangerousness, not only to oneself, but to others as well. A further requirement was that such dangerousness must be of an immediate nature.

did not qualify for involuntary mental health treatment. As it became more difficult to have a person admitted for mental health treatment, persons with mental illness seem to have entered the criminal justice system more frequently.[321] A direct link between strict requirements for civil commitment and an increase in the number of the mentally ill accused in the criminal justice system emerged.[322] What compounded the problem was that many community mental health clinics refused to accept responsibility for seriously mentally ill individuals, choosing to focus on individuals with less serious problems.[323] Since it became more difficult to have a person admitted for involuntary care, research emerged that proved that almost half of the cases of mentally ill persons who are arrested had evidence of a

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321 Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness at 43. Also see Rossman *et al Criminal Justice Interventions for Offenders with Mental Illness* at 1 who mentions the difficulty of having a person admitted for involuntary care as one of the reasons for the increase of persons with mental illness in the criminal justice system. See further Odegaard 2007 *North Dakota Law Review* 225 at 231 who elaborates and the fact that it became more difficult in the 1970's to have someone admitted to a psychiatric institution, this was a consequence of the deinstitutionalisation movement.

322 In California for example, after legislative changes in 1968 that made it more difficult to have a person committed involuntarily for psychiatric treatment, the number of mentally ill persons in the criminal justice system doubled in the first two years after the changes, and increased five-fold in a period of 8 years. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 40. Also see in general Sosowsky L "Crime and violence among mental patients reconsidered in view of the legal relationship between state and mentally ill" 1978 (135) *American Journal of Psychiatry* 33-42. Also see Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 45 where it is explained that mentally ill persons in California after being discharged from state hospitals, were three times more likely to be arrested and those with an arrest history, were 8 times more likely to get arrested. This confirms the increased contact with the criminal justice system by the mentally ill as a result of deinstitutionalisation. The same trend was present in San Francisco where an increase in the number of mentally ill prisoners was reported in the early 1970's. See Torrey *et al Criminalizing the Seriously Mentally Ill at* 40, 41. Also see Hemmens C, Brody DC and Spohn CC *Criminal Courts. A Contemporary Perspective* (Sage Los Angelas 2013) at 438 explain that prison populations doubled across the United States of America and continued to increase which phenomenon necessitated the investigation into more effective ways to deal with mentally ill offenders in the criminal justice system. Between 1974 and 1979, mental illness related incidents that came to the attention of the Police in Philadelphia, increased with 228 percent. Between 1976 and 1985 in New York City, the number of persons who were picked up by the police for being "mentally disturbed" and taken to a hospital for psychiatric evaluation, increased 16 fold in this 9 year period, from 1000 to 18500. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 41. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary Perspective* at 454 where it is confirmed that the number of mentally ill persons in prisons increased rapidly over time. See Slate RN "Mental Health Courts" in Mays LG and Gregware PR *Court and Justice* 3rd ed (Waveland Press Inc Long Grove Illinois 2004) at 426. Also see Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 38 where a dramatic drop in the number of persons in mental institutions is discussed. The drop in numbers constitutes almost 400 000.00 persons released from these hospitals during the deinstitutionalisation movement between 1955 and 1980. State hospitals have been accused of deinstitutionalising mentally ill persons by simply "dumping" mentally ill people in the community trusting that community treatment programmes will be developed to address their mental health needs.

323 Torrey et al Criminalizing the Seriously Mentally Ill at 53.

failed admission as an involuntary user at a hospital prior to their arrest.[324] Prior to the establishment of Mental Health Courts, the officials at correctional facilities complained that they are not getting cooperation from state psychiatric institutions to admit mentally ill persons and that the admission requirements were very strict in that not all mentally ill individuals "qualified" to be treated there.[325] This supports the criminalisation argument in that the failure of the mental health care system to provide sufficient support to the seriously mentally ill results in the increased involvement of the mentally ill in the criminal justice system.[326]

Thirdly, the recidivism rates combined with the trend of medication non-compliance amongst mentally ill accused persons motivated the establishment of Mental Health Courts in the United States of America. In a study conducted in 2007, it was found that 92% of inmates suffering from a serious mental illness have a history of medication non-compliance, and many of these have a lengthy history of minor offences.[327] The study found that most of these minor offences were committed during the time that the individuals were not receiving adequate treatment. Patients often stopped taking medication when the side effects became unbearable.[328]

Lastly, the consequences of untreated mental illness, due to lack of resources, motivated the establishment of Mental Health Courts. Research shows that with serious crimes committed by the mentally ill, the crime is very often a direct result of an untreated mental illness.[329] The most common offences committed by those with serious mental illnesses

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324 See generally McFarland BH, Faulkner LR, Bloom JD, Hallaux R and Bray JD. "Chronic mental illness and the criminal justice system" 1989 (40) *Hospital and Community Psychiatry* 718-723. Also see Torrey *et al Criminalizing the seriously mentally ill* 53. Also see Rossman *et al Criminal Justice Interventions for Offenders with Mental Illness* at 1 who mentions the difficulty of having someone admitted for involuntary care as one of the reasons behind the increase in persons with mental illness in the criminal justice system.

325 Torrey et al Criminalizing the Seriously Mentally Ill at 51.

326 Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 43.

327 *Lamb RH, Weinberger LE and Marsh BH* "Treatment prospects for persons with severe mental illness in an urban county jail" *2007 (58) Psych Serv 782-786 at 782.*

328 McLachlin 2010 Dalhousie Law Journal 15 at 20. Also see Torrey *et al Criminalizing the Seriously Mentally Ill* at 20, see in particular Table 2.4 that lists the circumstances under which and behaviour for which the mentally ill was arrested and kept in jail without any criminal charges having been filed against them.

329 Torrey *et al Criminalizing the Seriously Mentally Ill* at 48. Serious crimes such as homicide are especially tragic then because it is a direct result of "inadequate or non-existent treatment of the person's mental illness". See the source further at 50, 52 where some of the mentally ill individuals who landed up in prison due to inadequate mental health treatment, give their account of events. Also see Rossman *et al Criminal justice interventions for offenders with mental illness at* 57 where it

are assault and battery, followed by theft, disorderly conduct, drug and alcohol related crime and lastly, trespassing.[330] Persons with mental illness often enter the criminal justice system because of disruptive behaviour.[331] Mentally ill individuals were often arrested for not taking their medication, for being suicidal and for not being able to take care of themselves.[332] Such arrests are often made by police with the belief that they are helping

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is stated that the Brooklyn Mental Health Court operates on the assumption that criminal behaviour is a result of untreated, or ineffective treatment of the accused's mental illness. See further Odegaard 2007 *North Dakota Law Review* 225 at 251 where it is pointed out that proponents of Mental Health Courts agree that criminal behaviour is often the result of an underlying mental illness rather than criminal intent.

330 Individuals with paranoid schizophrenia are more likely to be arrested for assault, as they often believe that someone is following them or is trying to hurt them and may hurt that person to "protect" themselves. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 46. Also see Whitmer G "From hospitals to jails – The fate of California's deinstitutionalized mentally ill" 1980 (50) *American Journal of Orthopsychiatry* 65-75 at 67 who describes the case of a mentally ill man who struck a random women he was passing by in the street since he believed that she was aiming a laser beam at his testicles rendering him sterile. The most common form of theft committed by mentally ill individuals can be described as "dine and dash". This is where a person will have a meal in a restaurant and then run away because he does not have the money to pay for the meal. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 46. Also see Whitmer G 1980 *American Journal of Orthopsychiatry* 65 at 68 who confirms this and explains with reference to a case where a mentally ill women refused to pay for her restaurant bill because she believed she was "the reincarnation of Jesus Christ". The phenomenon of a mentally ill person eating at a restaurant and then not paying for it, was also observed in Madison Wisconsin. Often used as a ground to arrest a mentally ill person where no other charge is available. See Torrey *et al Criminalizing the seriously mentally ill* 46 where examples are given of mentally ill persons who have been arrested for simply trying to speak to "normal people" or for playing their music too loud. Also see Whitmer G 1980 *American Journal of Orthopsychiatry* 65 at 69 where a case is discussed where a man harassed two men who he believed was CIA agents who he believed had "kidnapped his benefactress". Drug and alcohol abuse is often a secondary problem amongst those with mental illnesses. Sometimes, however, mentally ill individuals are arrested by the police who believe that they are using drugs and/or alcohol because of their bizarre behaviour, when in fact they are not. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 46. Disorderly conduct was also one of the most common offences for which the mentally ill is arrested in Madison, Wisconsin. The extract from the survey that explains how a man with schizophrenia ended up in jail on a charge of trespassing, illustrates the lack of understanding that both the mental health care system and criminal justice system has for the practical difficulties faced by mentally ill individuals. In this instance, a man suffering from schizophrenia, had to be transferred to an adult foster care home the next day – he was living in a supervised flat at the time. He became confused by this fact and went to the clinic for assistance. He was told there that he cannot be helped and that he should leave. He told them that he had nowhere to go so he remained at the clinic. The Police was called to remove him and he was locked up in prison on charges of trespassing. The mentally ill man reported that for him, the only way he could get out was to be "flushed down the toilet". The man was fundamentally confused and his dignity so affected that this is what he believed of himself and his life. Also see Frailing 2009 C.S.L.R 145 at 148. Also see Frailing 2008 *C.S.L.R* 63 at 69.

331 Lamberti and Weisman 2004 *Psychiatr Q* 151 at 153. An estimated 7% of all Police contact with the public involves mentally ill individuals. Family members of severely mentally ill offenders often feel that contacting the police for assistance, is their last resort and hope for getting treatment for the mentally ill family member. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 47 and 50.

332 Torrey *et al Criminalizing the Seriously Mentally Ill* at 20, see in particular Table 2.4 that lists the circumstances under which and behaviour for which the mentally ill was arrested and kept in jail

the mentally ill individual, so-called “mercy bookings”.[333] Such arrests, however well-intended, are not promoting public interests and are, in fact, detrimental to the accused in need of mental health care who, instead, is now exposed to the criminal justice system.[334] Serious crimes such as homicide and assault with a deadly weapon are not crimes frequently committed by the mentally ill, but due to the bizarre nature of these crimes, they receive a lot of publicity.[335]

8 CONCLUSION

It is evident that those with mental illness were treated harshly in the past. New knowledge about mental illness and the development of new treatments and drugs will no doubt improve the treatment and quality of life of those with mental illness in society.

The impact of mental illness on the criminal justice system cannot be defined or established in concrete terms, save to say that it creates unique challenges for the criminal justice

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without any criminal charges having been filed against them. See further this source at 40 where a study found that 94% of a group that formed part of the study, was not receiving any treatment at the time that they committed the relevant crimes. See also generally Whitmer G 1980 *American Journal of Orthopsychiatry* 65 at 65.

333 Torrey *et al Criminalizing the Seriously Mentally Ill* at 46, 48, 49. Also see Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 45 where it is explained that Police would often charge mentally ill persons with “bogus” charges in order to save them from a life on the streets. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 160 who cautions against these types of arrests as it brings the mentally ill in contact with the criminal justice system that should ideally be avoided.

334 Bernstein and Seltzer 2003 *D C L Review* 143 at 160 reminds the readers that exposure to the criminal justice system can lead to deterioration of the mental state of an already mentally ill accused. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 49 where it is reported that a captain of the Los Angeles Police Department stated that mentally ill persons are often arrested and jailed for their own protection. He phrased it as follows: “You arrest somebody for a crime because you know at least they’ll be put in some kind of facility where they’ll get food and shelter. You don’t invent a crime, but it’s a discretionary decision. You might not arrest everybody or it, but you know that way they’ll be safe and fed”. Another police official described these types of bookings as a “crisis intervention” and stated that: “You get people who are hallucinating, who haven’t eating for days. It’s a massive clean-up effort. They get shelter, food, you get them back on their medication… It’s crisis intervention.”

335 Torrey *et al Criminalizing the Seriously Mentally Ill* at 48. One such example is of a man suffering from schizophrenia who killed a woman because the “voices” told him that she was the devil. Another case that received a lot of publicity, is that of Sylvia Seegrist who went on a shooting spree in a shopping centre in Philadelphia in 1985, killing three and injuring seven people. She suffered from Schizophrenia that was not adequately treated. This shooting could possibly have been prevented had Sylvia received adequate treatment. During the 10 years prior to the incident, Sylvia was hospitalised 12 times, had 6 encounters with the police and served a sentence for a misdemeanour in the year prior to the shooting incident. Another example is a case reported in Rochester of a man who robbed a bank using his pointed finger as a “gun” in his pocket. He took the money to the local zoo and threw it into the seal pit telling the animals to “return home”

system that will have to be addressed. The criminal justice system has to join forces with those in the mental health care system in order to adequately address the challenges of cases involving mental illness.

The South African forensic setting, where the fields of law and psychiatry meet, faces huge challenges in terms of resources. Lack of resources in the forensic setting translates into delays in the finalisation of cases involving mental illness. Such delays also contribute to the overcrowding of correctional facilities, where accused persons are often kept awaiting assessment. Creative ways of addressing these problems have to be sought.

Some jurisdictions, such as Canada and the United States of America, rely on Mental Health Courts to address the unique challenges that mentally ill accused persons bring to the criminal justice system. Mental Health Courts are aimed at diverting the mentally ill accused away from the criminal justice system into treatment programmes where mental health knowledge can be drawn from the mental health care system. These courts aim to, *inter alia,* reduce delays caused by forensic assessments, relieve overburdened criminal courts from cases involving mental illness and relieve overcrowding of correctional facilities by channelling mentally ill accused persons into the mental health care system. These courts also aim to reduce recidivism, which in turn leads to a safer society.

Therapeutic jurisprudence as the underlying principle of Mental Health Courts can be employed to address mental health issues in the criminal justice system as it seeks to incorporate elements from other disciplines, such as mental health, into the criminal justice system with due regard to the substantive and procedural framework of the criminal justice system. Through the implementation of therapeutic jurisprudence, mental illness as the underlying cause of criminal behaviour can be targeted. Procedure is a major focus of therapeutic jurisprudence [336] since therapeutic jurisprudence looks at how the procedures impact the particular individual and if the particular individual was treated fairly and with respect.[337]

The procedural aspects as they pertain to mentally ill accused persons in the South African criminal justice system are explored in chapter 3, and challenges in the system highlighted. The procedural challenges form the backdrop against which the suggestion of a Mental

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336 Schneider, Bloom and Heerema Mental Health Courts at 52.
337 Schneider, Bloom and Heerema Mental Health Courts at 52.

Health Court for South Africa is considered. Mental Health Courts were established in Canada and the United States of America in response to the increase in the number of mentally ill persons entering the criminal justice system and the lack of community mental health care services. South Africa is not immune to these realities, and the reasons cited for establishing Mental Health Courts in these two jurisdictions may very well apply to South Arica as well. The possibility of a Mental Health Court for South Africa is briefly explored in chapter 3 and expounded upon in chapter 6.

CHAPTER 3

SOUTH AFRICAN ADJECTIVAL LAW AND THE POSITION OF THE MENTALLY ILL ACCUSED

1 INTRODUCTION

Since the purpose of this research is to consider the possible establishment of a Mental Health Court as an alternative to traditional prosecution for the mentally ill accused in South Africa, a contextual overview of the current practices relating to the assessment of fitness to stand trial in South Africa is required.

Consideration is given to the legal framework within which the above processes operate. International treaties pertaining to the treatment of persons with mental illness, the Constitution of the Republic of South Africa, 1996, [1] as well as other relevant legislation and selected substantive law issues that affect the position of the mentally ill accused in the South African criminal justice system are discussed. The focus of the research, however, remains procedural in nature.

The Criminal Procedure Act 51 of 1977 [2] sets out the procedural framework within which these assessments take place, but the nature of the assessments is not set out in the Act. This chapter examines the order made for and the purpose of a fitness assessment, the test employed during such assessment, the actual assessment and the orders to be made after the assessment, depending on the findings made. The consequences of an order of fit to stand trial versus unfit to stand trial are examined. Challenges posed by the current system are highlighted.

The chapter considers the concept of diversion in its various forms in the South African context. It examines initiatives that have been put in place to address the unique challenges that mentally ill accused persons bring to the criminal justice system. Brief consideration is given to the possibility of a Mental Health Court for South Africa against the backdrop of the procedural challenges highlighted. Chapter 6 proposes the South African Mental Health Court model in more detail.

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1 Hereinafter referred to as the “Constitution”).
2 Hereinafter referred to as the “Criminal Procedure Act”.

2 LEGAL FRAMEWORK PERTAINING TO THE MENTALLY ILL ACCUSED IN SOUTH AFRICA

2.1 Background

The rights of persons with mental illness have not received the attention they deserved in the past.[3] In the early 1960's, however, there was a worldwide focus on the promotion of positive mental health.[4]

South Africa's attention was drawn to its mental health care legislation in the 1960's, but not necessarily in response to the worldwide move towards the promotion of positive mental health as referred to above. It was rather prompted by the assassination of Dr H F Verwoerd on 6 September 1966, by Demitrio Tsafendas, an individual with schizophrenia.[5] This prompted the establishment of a commission of inquiry into the criminal responsibility of mentally deranged persons in South Africa.[6] Later the Mental Disorders Act 38 of 1916 [7] was revised to include all aspects of mental health.[8] During the enquiry to revise the

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3 See Landman AA and Landman WJ *A Practitioner's Guide to the Mental Health Care Act* (Juta Cape Town 2014) at 4, 10 who opine that mental health is still a low priority and service delivery is hindered by lack of resources. The increase in numbers of those in South Africa suffering from HIV/AIDS have forced those in charge of the health care system in South Africa to reassess its position in terms of its mental health care services. The reason for this is because there is a parallel relationship in numbers that exists between those suffering from HIV and those suffering from a mental illness as mental illness sets inn in the latter phases of HIV/AIDS because of, for example, a viral brain infection or psychiatric side effects of anti-retroviral treatment. 43% of persons living with HIV/AIDS suffer from a mental illness. Those suffering from a mental illness are, in turn, more at risk of contracting HIV/AIDS. See in general Freeman and Kelly *Mental Health and HIV/AIDS series.* Prior to the interim Constitution of 1993 and the Constitution, the rights of the mentally ill were overshadowed by arbitrary decision-making about their fate. Due to the fact that the number of mentally ill individuals in South Africa is increasing, authorities had to develop initiatives to ensure the protection of those affected by mental illness-a once neglected population. See Freeman M and Kelly K *Mental health and HIV/AIDS series* (World Health Organisation, Johannesburg) http://whqlibdoc.who.int/publications/2005/9241593040_eng.pdf (Date of use: 15 March 2011) at 2 for more information on the link between HIV and mental illness.

4 Cheetham RWS "Commission of inquiry into the Mental Disorders Act in relation to the problems of today" December 1970 *SAMJ* 1371-1372 at 1371.

5 Kruger A *Mental Health Law in South Africa* (Butterworths 1980) at 24. Also see Strydom N, Pienaar C, van der Merwe L, Jansen van Rensburg B, Calitz FWJ, van der Merwe LM and Joubert G "Profile of forensic psychiatric inpatients referred to the Free State Psychiatric Complex, 2004-2008" 2011 *SAJP* 40-43 at 40.

6 The Commission was under the chairmanship of Mr Justice F Rumpff and was established in December 1966. See Kruger *Mental Health Law in South Africa* at 25.

7 Hereinafter referred to as the "Mental Disorders Act".

8 The inquiry by the Rumpff Commission led to the appointment by the President of the Van Wyk Commission of inquiry for revision of the Mental Disorders Act 38. The Commission of Inquiry was a one-man commission, consisting of Mr Justice J. T van Wyk. See Strydom *et al* 2011 *SAJP* 40 at 40. Also see Louw R "Principles of criminal law: Pathological and non-pathological criminal incapacity" in Kaliski S (ed) *Psycholegal Assessment in South Africa* (Oxford University Press Cape Town South Africa 2006) at 25. The report by the Van Wyk Commission of inquiry contained draft

Mental Disorders Act, the Commission commented that:

> *It is today generally recognized that persons suffering from mental illness should as far as possible be admitted to mental hospitals in the same way as any other person suffering from an illness is admitted to an ordinary hospital.*[9]

This illustrates that the focus was shifting from pure custodial measures to the concept of treatment.[10]

The manner in which the mentally ill person in the South African criminal justice system is dealt with is affected by the legislative framework within which the system functions. The Constitution, as the supreme law of the land, bestows rights on all citizens, and the most relevant for purposes of the mentally ill accused are discussed below. Once in the criminal justice system, the manner in which the accused person is dealt with is regulated by the Criminal Procedure Act. Procedural issues surrounding fitness to stand trial forms the focal point of the discussion of the Criminal Procedure Act here. Relevant provisions of the Mental Health Care Act 17 of 2002 [11] are canvassed, and specific attention is paid to the different categories of mental health care treatment and rehabilitation services provided for in the Mental Health Care Act since the criminal court may order that a mentally ill accused be provided with a certain category of mental health care treatment and rehabilitation services in terms of the Mental Health Care Act.

Before the relevant domestic legislation is discussed, obligations in terms of international instruments are briefly explored.

2.2 International instruments

The United Nations passed the resolution relating to the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care in 1991.[12]

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legislation that resulted in the Mental Health Act 18 of 1973. See also Cheetham 1970 *SAMJ* 1371 at 1372. Cheetham reports that a Commission of Inquiry was also established to investigate the problems that psychopathy presents. Similarly, a Commission was established to investigate drug and alcohol abuse, all of these findings were to be considered when drafting the Mental Health Act of 1973. it is noteworthy that the then Department of Prisons, were also represented on the Commission as it was acknowledged that many afflicted with a mental illness, were confined in prison.

9 Commission of Inquiry into the Mental Disorders Act 38 of 1916 and Related Matters under Mr Justice NJ van Wyk, RP 80/1972 at 3.8.2.

10 Kruger *Mental Health Law in South Africa* at 24, 26, 27. This is further evidenced by the move to hand the administration of mental health legislation over from the Department of the Interior to the Department of Health as early as 1944.

11 Hereinafter referred to as the “Mental Health Care Act”.

12 United Nations General Assembly resolution 46/119, *Principles for the Protection of Persons with*

These principles apply to mentally ill accused persons and to the process of establishing whether the accused, in fact, has a mental illness or not.[13]

These principles prohibit discrimination on the ground of mental illness.[14] Discrimination in the context of mentally ill detained persons refers to a distinction, preference, or exclusion that causes a hindrance to the general enjoyment of rights.[15] This international instrument makes it clear that special measures taken with the sole view to protect the rights or secure the advancement of persons with mental illness shall not be deemed discriminatory.[16] These principles further confirm the authority of a court to order mental health treatment in line with the provisions of the domestic laws of the country.[17]

These principles should be considered with the provisions contained in the United Nations Convention on the Rights of Persons with Disabilities that is specifically made applicable to persons with mental illness.[18] South Africa, as a signatory to both these international instruments, incorporated many of the principles into domestic legislation and, more particularly, the Mental Health Care Act, which is discussed later in this chapter.[19]

The relevant provisions of the Constitution as the supreme law of the Republic of South Africa are discussed below, followed by other relevant national domestic legislation.

Mental Illness and for the Improvement of Mental Health Care A/RES/46/119 (17 December 1991) http://www.un.org/documents/ga/res/46/a46r119.htm (Date of use: 13 August 2016).

13 See in particular principle 20 of the United Nations *Principles for the Protection of Persons with Mental Illness*. Principle 20.1 reads as follows: "The present Principle applies to persons serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings or investigations against them, and who are determined to have a mental illness or who it is believed may have such an illness."

14 Principle 1.4 of the United Nations Principles for the Protection of Persons with Mental Illness.

15 Principle 1.4 of the United Nations Principles for the Protection of Persons with Mental Illness.

16 Principle 1.4 of the United Nations *Principles for the Protection of Persons with Mental Illness*. Discrimination does not include any distinction, exclusion or preference undertaken in accordance with the provisions of the present Principles and necessary to protect the human rights of a person with a mental illness or of other individuals.

17 See in particular principle 20.3 of the United Nations *Principles for the Protection of Persons with Mental Illness*. Principle 20.3 reads as follows, "Domestic law may authorize a court or other competent authority, acting on the basis of competent and independent medical advice, to order that such persons be admitted to a mental health facility." In the South African context, these domestic laws would be the Criminal Procedure Act and the Mental Health Care Act. The relevant provisions of these pieces of legislation as they pertain to the mentally ill accused are discussed later in this chapter.

18 See article 1 of the United Nations General Assembly resolution number 61/106 *Convention on the Rights of Persons with Disabilities A/RES/61/106 (13 December 2006*) http://www.refworld.org/docid/45f973632.html (Date of use: 13 August 2016). The article reads as follows, "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

19 Chapter 3 of the Mental Health Care Act contains a patient charter that is based on these international Conventions.

2.3 The Constitution

The most relevant Constitutional rights as they pertain to the mentally ill accused person are highlighted in the discussion below.

The focus on equality before the law that is stressed in the international instruments discussed above is echoed in section 9 of the South African Constitution, which embodies the right to equality.[20] This right guarantees that everyone is equal before the law and that everyone has the right to equal protection and benefit of the law, including equal enjoyment of all rights and freedoms.[21] The state may not unfairly discriminate against anyone on the ground of disability.[22] Disability includes mental illness and intellectual disability.[23] Mentally ill persons are often discriminated against on the basis of their mental illness, thus violating their right to equality.[24]

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20 Section 9 of the Constitution.

21 Section 9(1) and (2) of the Constitution.

22 Section 9(3) of the Constitution. Discrimination on any of the grounds listed in section 9((3) will automatically be unfair discrimination unless it can be proven that the discrimination is fair. These grounds are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

23 In the case of *De Vos N.O and Another* v *Minister of Justice and Constitutional Development and Others; InRe: Snyders and Another* v *Minister of Justice and Constitutional Development and Others* 2015 (1) SACR 18 (WCC) (hereinafter referred to as *De Vos* v *Minister of Justice and Constitutional Development* WCC case) at [33] it was argued that section 77(6) violates the mentally ill accused's right to equality since the mentally ill person found unfit to stand trial cannot be released conditionally or unconditionally, whereas those found not criminally responsible on account of mental illness can be so released. Section 77(6) was found unconstitutional with an order to amend the relevant section to bring it in line with section 78 of the Criminal Procedure Act. The case was forwarded to the Constitutional court for confirmation of the invalidity of section 77(6). See *De Vos N.O and Others* v *Minister of Justice and Constitutional Development and Others* 2015 (2) SACR 217 (CC) (hereinafter referred to as the "*De Vos v Minister of Justice and Constitutional Development* CC case"). This judgment is discussed later in this chapter.

24 Kruger A "Mental Health and the Bill of Rights" in Lexus Nexus *Constitutional* (Lexis Nexis 2009) at 3EB1. Also see Landman and Landman The Mental Health Care Act at 11 where it is pointed out that the Mental Health Care Act supports the Constitutional prohibition of discrimination on any ground, including mental illness and other disabilities. Discrimination is often the result of ignorance about mental illness. Societies need to be educated on issues of mental illness, as this will diminish victimisation of and discrimination against persons on the ground of their mental illness. See McLachlin B "Medicine and the law: The challenges of mental illness" 2010 (33) *Dalhousie Law Journal* 15-33 at 26. Also see Read, A "Psychiatric Deinstitutionalization in BC: Negative Consequences and Possible Solutions" 2009 (1) *University of British Columbia Medical Journal* 25-26 at 26 who points out that mentally ill persons are more likely to be victimised by others than those that are not mentally ill. The author points out that society need to know more about mental illness in order to avoid the mentally ill being victimised. See further Parliamentary Information and Research Service *Current issues in Mental Health in Canada: Mental Health and the Criminal Justice System* (Library of Parliament Ottawa Canada 2013) at 1 where the view is held that mentally ill persons are more often the victim than the offender. This view is shared by the Mental Health Commission of Canada *Changing Directions, Changing Lives: The Mental Health Strategy for Canada* (Mental Health Commission of Canada Alberta 2012) at 36. Also see *De Vos* v *Minister of Justice and*

In order to achieve equality, legislative and other measures designed to protect or advance categories of persons disadvantaged by unfair discrimination may be taken.[25] Mentally ill persons in conflict with the law is such a group of persons who have been discriminated against in the past and in respect of whom measures should be taken to achieve equality.[26] Possible discrimination against the mentally ill accused can be identified at bail hearings because accused persons who are referred for fitness assessments are rarely granted bail.[27] An opinion exists that bail is refused because the person has a mental illness and not because of the seriousness of the charges against the accused.[28] This indicates that courts are reluctant to release persons with mental illness out on bail even where he is charged with a minor offence.[29]

Section 35 of the Constitution is specifically applicable to arrested, detained and accused persons.[30] Section 35 rights are also applicable to persons detained in prison awaiting

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Constitutional Development WCC case where it was argued that persons with mental illness are being discriminated against by the legislature through section 77(6) of the Criminal Procedure Act.

25 Section 9(2) of the Constitution. This is in line with Principle 1.4 of the United Nations *Principles for the Protection of Persons with Mental Illness*. This principle states that special measures taken to advance the rights of the mentally ill will not be seen as discrimination.

26 See the discussion of the past treatment of persons with mental illness in the criminal justice system in chapter 2 of this research that illustrates the injustices they suffered and the prejudice towards accused persons with mental illness. Also see *De Vos* v *Minister of Justice and Constitutional Development* CC case at [46] where the court confirms that persons with mental illnesses have been discriminated against in the past in such a manner that their dignity were affected. The court states that, "Further, accused persons with mental illnesses or intellectual disabilities have been historically disadvantaged and unfairly discriminated against. The use of prisons to "house" these vulnerable members of our society perpetuates hurtful and dangerous stereotypes. The right to dignity is not only a basic tenet of our Constitution; it is a value that is central to the interpretation of the section 12 right to freedom and security of the person. Imprisonment reinforces the stigma and marginalisation that people, like the accused in this matter, are subjected to on a routine basis. This impairs the human dignity of persons with mental illnesses or intellectual disabilities. The tenets of our Constitution dictate that accused persons, who are not considered dangerous, should not have their freedom curtailed in a manner that is tantamount to inhuman and degrading punishment in a way that impinges on their dignity and breaches their right not to be deprived of their freedom without just cause."

27 According to Schutte T "'Single' versus 'panel' appointed forensic mental observations: Is the referral process ethically justifiable?" 2013 (6) *South African Journal of Bioethics and Law* 64-68 at 67 most accused who are found unfit to stand trial, was refused bail prior to them being sent to the psychiatric institution for observation.

28 Schutte 2013 South African Journal of Bioethics and Law 64 at 67.

29 Schutte 2013 *South African Journal of Bioethics and Law* 64 at 67 discusses the findings of a study done at Sterkfontein hospital which indicates that the majority of accused persons who were eventually found unfit to stand trial, was denied bail and that the presence of a mental illness rather than the seriousness of the charges against the accused, appeared to be the deciding factor as to if bail should be granted or not.

30 Section 35 of the Constitution is headed: "Arrested, detained and accused persons". Also see Department of Correctional Services "White Paper on Remand Detention Management in South Africa" http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 11 where it is pointed out that

psychiatric observation and those undergoing such observations in psychiatric institutions.[31] In terms of section 35, detained persons are entitled to conditions of detention that are consistent with human dignity, including at least the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.[32] These persons are completely dependant on the state for the fulfilment of their basic needs whilst they are detained, and strong Constitutional protection is provided to them due to their vulnerability whilst so detained.[33]

The rights of detained persons specifically include the right to a fair trial.[34] The accused's right to a fair trial may be affected where the fitness issue is not raised in cases where there are reasonable grounds to request an assessment.[35] The right to a fair trial includes the right to have one's trial take place without undue delay.[36] Where an accused is referred for

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those persons in police custody are also entitled to the rights of detained persons.

31 This is confirmed by the South African Department of Correctional Services in Department of Correctional Services "Discussion Document on Management of Remand Detainees in South Africa" http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 84 where the group of persons awaiting observation is specifically mentioned as part of the remand detainees group. Also see National Prosecuting Authority of South Africa "Awaiting Trial Detainee Guidelines" *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016) at *37.* Section 35 (2)(e) of the Constitution states that detained persons are entitled to conditions of detention that are consistent with human dignity. The section is also applicable to persons detained in terms of the Mental Health Care Act. See Liebenberg S *Socio-Economic Rights* (Juta Claremont 2010) at 256, 257.

32 Section 35(2)(e) of the Constitution. "(2) Everyone who is detained, including every sentenced prisoner, has the right—
(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; See further section 35(2(f)(iv) that states that "(2) Everyone who is detained, including every sentenced prisoner, has the right—(f) to communicate with, and be visited by, that person's—(iv) chosen medical practitioner." Also see Landman and Landman The Mental Health Care Act at 6.

33 Liebenberg *Socio-Economic Rights* at 257, 258 where it is pointed out that the conditions in mental institutions in South Africa, are generally poor and this is even the more reason why Constitutional rights of these detained persons need strong protection. Mentally ill in detention is identified as a vulnerable group (see this source at 11, 39). Also see Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 40.

34 Section 35(3) of the Constitution. This right includes the right to have one's trial take place as soon as possible with no undue delays (section 35(3)(d)). Also see section 34 that guarantees each citizen access to court.

35 Cassim F "The accused person's competency to stand trial – a comparative perspective" 2004 (45) *Codicillus* 17-27 at 20 who opines that the court will be forsaking its duty if it did not raise the fitness issue when reasonable grounds exist and that such failure could impact on the accused right to a fair trial. Also see section 77 of the Criminal Procedure Act where an express duty is placed on the court to order an enquiry into the mental state of the accused if there are any doubts about the accused's fitness. The order for assessment and the grounds upon which it can be based, are discussed later in this chapter.

36 Section 35(3)(d) states that every accused person has the right to a fair trial, which includes the right "(d) to have their trial begin and conclude without unreasonable delay;".

a fitness assessment because he cannot communicate properly with his attorney (it is obviously the attorney that makes this claim), suspicions have been raised that such a referral is sometimes merely a tactical move by the defence to delay matters.[37] This is supported by the findings of a study at Sterkfontein hospital that found that the majority of those accused who were referred for fitness due to being unable to instruct counsel were eventually found fit to stand trial.[38] Delays in the criminal justice process due to challenges in the forensic system[39] may contribute to delays in the trial process and possibly infringe the accused right to a speedy trial.

Section 35 refers to the right to dignity in respect of conditions of detention.[40] The right to inherent dignity is specifically and separately provided for in section 10 of the Constitution and includes the right to have such dignity respected and protected.[41] Closely linked to this right is the right to freedom and security of the person provided for in section 12 of the Constitution, which pertains to bodily and psychological integrity and includes the right not to be deprived of freedom arbitrarily or without just cause.[42] This right is particularly important in the context of mentally ill accused persons who are detained in prison awaiting psychiatric observation.[43] These persons are deprived of their liberty when they are

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37 Schutte 2013 South African Journal of Bioethics and Law 64 at 67.

38 Schutte 2013 *South African Journal of Bioethics and Law* 64 at 67. The study also found that in most of these referral cases the accused had no history of psychiatric treatment, meaning that they did not encounter the mental health care system or acquire psychiatric services prior to being sent for observation. The study found that most of those with a history of psychiatric treatment were found unfit to stand trial.

39 Pillay AL "Competency to stand trial and criminal responsibility examinations: are there solutions to the extensive waiting list?" 2014 (44) *South African Journal of Psychology* 48-59 at 48 points out that there are waiting lists at most psychiatric institutions where 30-day observation periods can be conducted. He further points out that a criminal trial cannot continue until these assessments have been conducted which in itself causes delays in the trial.

40 Section 35(2)(e) of the Constitution states that: "to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment;".

41 Section 10 of the Constitution states that, "Everyone has inherent dignity and the right to have their dignity respected and protected". Also see *De Vos* v *Minister of Justice and Constitutional Development WCC case* at [33] where the provisions of section 77(6) were attacked on *inter alia* the ground of the mentally ill accused's right to dignity.

42 Section 12 (1)(a) of the Constitution. It states that, "(1) Everyone has the right to freedom and security of the person, which includes the right— (a) not to be deprived of freedom arbitrarily or without just cause." Section 12(1)(b) states that a person has the right to not be detained without trial.

43 Due to a lack of resources in the sense of available beds for psychiatric observation, mentally ill persons in respect of whom their fitness to stand trial is at issue, often spend long periods of time in jail awaiting psychiatric assessment, impacting on their right not to be deprived of freedom. See Pillay 2014 *South African Journal of Psychology* 48 at 48 who explains that the waiting period to be transferred to a psychiatric hospital often extends over several months. See further National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016) at *37.*

detained pending psychiatric observation and during such observation. Detention must be justifiable, failing which it could be seen as arbitrary decision-making about the fate of the mentally ill accused persons and can lead to an infringement of this right, and courts have to intervene to correct the injustice.[44] This right to bodily integrity also entails that a person shall not be detained without trial.[45]

The rights in the Bill of Rights must be interpreted by South African courts having due regard to international law,[46] including the United Nations Convention on the Rights of Persons with Disabilities referred to above.[47] This will ensure that the rights of mentally ill accused persons are protected to the utmost.

The above rights must be respected within the criminal justice system. The latter is mainly regulated by the Criminal Procedure Act. The most relevant aspects for the purposes of this research are discussed below.

2.4 Criminal Procedure Act 51 of 1977

2.4.1 Introduction

The focus of the discussion of the Criminal Procedure Act is on sections 77, 78 and 79, which are most relevant for purposes of mentally ill accused persons.

The Criminal Procedure Act contains specific provisions regarding psychiatric observation of accused persons who may suffer from a mental illness to determine their fitness to stand

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44 See *De Vos* v *Minister of Justice and Constitutional Development WCC case* at [33], [38], [52] where the fate of mentally ill accused persons found unfit to stand trial was said to be arbitrary as the Criminal Procedure Act did not make provision for the court to exercise discretion but only provided for two judgments to be made, namely, to order that the accused be detained as a state patient or as an involuntary mental health care user. This type of detention has serious consequences for a person's right to freedom and security of the person. Also see *De Vos* v *Minister of Justice and Constitutional Development* CC case at [20] where the Constitutional court states that "Accused persons dealt with under section 77(6)(a) require the protections guaranteed by section 12 of the Constitution because any possible institutionalisation or detention does not flow from the determination of their guilt by a court of law."

45 Section 12 (1)(b) of the Constitution.

46 Section 39(1)(b) of the Constitution states that: "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law."

47 See *De Vos* v *Minister of Justice and Constitutional Development* CC case at [29] where the court referred to its obligation to consider, *inter alia,* United Nations Conventions when interpreting the Bill of Rights. In this case, the provisions of section 12 of the Constitution was considered with due regard to the content of the United Nations Convention on the Rights of Persons with Disabilities.

trial and/or, if they had, the criminal capacity required to be found guilty of a crime.[48] Psychiatric observation of the mentally ill accused contributes to the delivery of justice for these individuals in the courts.[49]

A brief overview of the background to the development of the current Criminal Procedure Act is included below before the relevant provisions of the Criminal Procedure Act are discussed. This background serves to show the progress that has been made regarding the processing of cases involving accused persons with mental illness.

2.4.2 Background to the Criminal Procedure Act

Prior to the Criminal Procedure Act, the provisions of the Mental Disorders Act regulated the position of mentally ill persons in conflict with the law. The Mental Disorders Act referred to an accused person with a mental illness as "mentally disordered or defective".[50]

Under the Mental Disorders Act, where, prior to arraignment or sentence, a suspicion arose that a person was unfit to stand trial due to a mental illness, the magistrate could request a medical practitioner to examine the accused.[51]

If the magistrate, after receiving the medical practitioner's report, had any doubt about the mental state of the accused, he could order that the accused be detained in an institution for observation purposes.[52] The superintendent of such institution had to, as soon as practicable, submit a report to the magistrate on the mental state of the accused.[53] The Mental Disorders Act provided for the continued detention of a mentally ill accused provided that reports be rendered on the mental state of the accused until such time as the magistrate was convinced about the mental state of the accused.[54] No time limits were placed on the period of detention for purposes of ascertaining an accused person's mental

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48 Section 77 of the Criminal Procedure Act contains provisions regarding fitness to stand trial and 78 contain provisions regarding assessment for criminal capacity.

49 Kaliski *Psychological Assessment in South Africa* at 1. Justice is served in that the section 77 procedure for instance is employed to ensure that where an accused is unable to follow the proceedings he will not be tried. It would be an injustice to put a person on trial who is incapable to follow the proceedings.

50 See for example the provisions of section 27 of the Mental Disorders Act.

51 Section 27(2) of the Mental Disorders Act. This section states that two medical practitioners should examine the accused but the section specifically states that only one medical practitioner may conduct the examination if two are not available.

52 Section 27(4) of the Mental Disorders Act.

53 Section 27(5) of the Mental Disorders Act.

54 Section 27(7) of the Mental Disorders Act. The Mental Disorders Act did not limit the amount of time that the accused could spend in the institution for observation purposes and in fact provided for a further period of detention if the magistrate was not convinced about the mental state of the accused, even after receipt of the report from the superintendent.

state. The medical practitioner could certify that the accused was mentally ill and the magistrate could accept such certification if he had no further doubts about the mental state of the accused.[55] The consequence of accepting such certification was that the magistrate had to direct that such person be kept in custody in jail or an institution pending the signification of the then Governor-General's decision.[56] Where the accused was found unfit to stand trial,[57] the accused was similarly detained in a gaol or institution pending the signification of the Governor-General's decision.[58] The Mental Disorders Act contained separate provisions pertaining to the proof that the person was mentally ill at the time of committing the said offence.[59]

These provisions of the Mental Disorders Act and in particular the fact that no limit was placed on the time period for psychiatric observation, and no provision was made for the formal review of the mental state of the accused once detained, exposed the mentally ill accused to the risk of unreasonably long periods of detention for observation purposes. The Mental Health Act that governed the position of mentally ill persons after the Mental Disorders Act contained a provision in terms whereof a person being detained in a psychiatric institution could apply to the court for an enquiry as to the reasons for his detention if he believed that he ought not to be detained.[60]

The Criminal Procedure Act [61] addressed some of the concerns raised above in sections 77 to 79 thereof that contain the relevant provisions pertaining to psychiatric observation during criminal proceedings.

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55 Section 27(2) read with section 27(3) of the Mental Disorders Act.

56 Section 27(3) of the Mental Disorders Act.

57 Section 27 and 28 of the Mental Disorders Act.

58 Section 28(2) and 29(2) of the Mental Disorders Act. Similar provisions were contained in Legislation of the Cape, Section 13 Act 35 of 1891, the predecessor of the Mental Disorders Act. Also see Kruger *Mental Health Law in South Africa* at 155.

59 Section 29 of the Mental Disorders Act. The court would render a special verdict finding the accused guilty of the offence but state that he suffered from a mental illness at the time. Section 29(1) of the Mental Disorders Act. Similar provisions were contained in Legislation of the Cape, Section 12 of Act 35 of 1891, the predecessor of the Mental Disorders Act. Also see Kruger *Mental Health Law in South Africa* at 155. The consequence was that the presiding judicial officer had to order the accused to be kept in custody in jail pending the signification of the then Governor-General's decision. (Section 29(2) of the Mental Disorders Act). The Mental Disorders Act did not provide for the review of the mental state of the accused so detained at any point in time, but did provide for the withdrawal or abandonment of charges against an accused prior to an order for observation. As provided for in section 28(2) and 29(1) of the Mental Disorders Act. Section 29bis makes it possible for the prosecuting authority to withdraw the charges.

60 Section 20 of the Mental Health Act 18 of 1973. Also see Kruger *Mental Health Law in South Africa* at 76.

61 The Act came into operation on 27 July 1977.

2.4.3 Fitness to stand trial in the Criminal Procedure Act

The Criminal Procedure Act acknowledges that an accused might, due to mental illness, be unable to follow the proceedings.

Section 77(1) of the Criminal Procedure Act states that:

> *(1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.*

The court is obliged to refer an accused for an assessment of fitness to stand trial (fitness assessment) once the issue is raised.[62] Section 79 sets out the procedure to be followed when a court orders an enquiry in terms of section 77 or 78 of the Criminal Procedure Act.[63] Failure to invoke the section 79 procedure for purposes of a fitness assessment in cases where it ought to have been pursued can, if the accused is found guilty, lead to the setting aside of the conviction and sentence by an appeal court.[64]

The purpose of this provision and the rationale behind this obligation to order an enquiry into an accused's fitness once the issue is raised is to ensure that the court does not have to make a finding on a specialised area such as mental illness, without having obtained expert opinion thereon.[65]

There is no explicit presumption of "fitness" in the Criminal Procedure Act.[66] It appears, however, that an accused person's fitness to stand trial is presumed unless the contrary is

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62 Note the word "shall" in section 77(1). Also see Du Toit E, De Jager, FJ, Paizes A, Skeen A St Q and Van der Merwe SE, *Commentary on the Criminal Procedure Act* (Juta Cape Town 2012) at 13-3 where it is stated that the court "must" order an investigation into the mental state of the accused and cause a report on this issue to be lodged with the court subsequent to the said investigation. Also see this source at 13-4 where it is emphasised that the court has an obligation to refer an accused for observation once a reasonable possibility exists that the accused is not fit to stand trial. Also see *S* v *Tom and Others* 1991 (2) SACR 249 (B) 250H-251C where it is confirmed that the court is obliged to refer an accused for observation where his fitness to stand trial is uncertain. See further Kruger A *Heimstra Suid-Afrikaanse Strafproses* 7th ed (LexisNexis 2010) at 249.

63 Du Toit et al *Commentary on the Criminal Procedure Act* at 13-1. Also see Strydom *et al* 2011 *SAJP* 40 at 40. The procedures set out in sections 77 to 79 of the Criminal Procedure Act have been amended to its current state by *inter alia* the Criminal Matters Amendment Act 68 of 1998.

64 This was the case in *S* v *Kleinhans* 1991 (1) SACR 252 (Nm) where the accused was charged with murder. The issue of fitness to stand trial was not invoked in respect of the co-accused in this case and it was found on appeal that the conviction and sentence handed down on the court a quo should be set aside. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-5.

65 Du Toit et al Commentary on the Criminal Procedure Act at 13-5.

66 Compare this to the explicit presumption of "sanity" as provided for in section 78(1A) of the Criminal Procedure Act.

proven.[67] The Criminal Procedure Act further does not indicate what the burden of proof is should an accused person's fitness to stand trial be in question. It appears, however, that the state shoulders the burden of proving beyond reasonable doubt [68] that the accused does, in fact, have the capacity to follow the court proceedings.[69] This is the position regardless of who raises the issue of triability.[70]

Should an accused be found unfit to stand trial, the court may, depending on the seriousness of the crime [71] and the evidence on whether or not the accused was involved therein,[72] either order that the accused be treated as a state patient [73] or an involuntary mental health care user in terms of the Mental Health Care Act.[74] These orders and how they are arrived at will be discussed in more detail later in this research.

Where an accused is found unfit to stand trial, the trial is suspended. Such an accused is not convicted nor acquitted at this point in time.[75] The trial may, however, proceed should

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67 Some jurisdictions, such as Canada, have legislation that provides for an explicit presumption of fitness. The presumption stands until the contrary is proven. See the discussion of the Canadian Criminal Code in chapter 4 of this research.

68 Kruger Mental Health Law in South Africa at 166.

69 Kruger *Heimstra Suid-Afrikaanse Strafproses* 228. Also see *R* v *Mashimbi* 1958 (1) SA 390 (T) at 392D-H and further *S* v *Ebrahim* 1973 (1) SA 868 (A) 871F. Also see Cassim 2004 Codicillus 17 at 20. In *S* v *Ebrahim* 1973 (1) SA 868 (A) at 871 Mr Justice Van Blerk indicated that it would be unreasonable to place the burden of proving triability on the accused merely because he alleges non-triability. See further Kruger *Mental Health Law in South Africa* at 166. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-6 who confirms that the fact that an accused person is fit to stand trial must however be proved beyond reasonable doubt by the state.

70 Kruger *Mental Health Law in South Africa* at 166 footnote 90 where he points out that this differs from the position in England where the Prosecution has the burden of proving triability and the defence has the burden of proving non-triability depending on who raises the issue.

71 Only those accused persons who are found unfit to stand trial and who were charged with crimes involving serious violence such as murder, culpable homicide and rape, and who, on the evidence before the court, committed the offence may be detained as state patient. See section 77(6)(i) of the Criminal Procedure Act 51 of 1977.

72 Section 77(6) contains a provision in terms whereof the court has to consider on the facts before it if the accused was in fact involved in the crime or not before a finding on the accused's fitness to stand trial can be made.

73 Section 77(6)(a)(i) of the Criminal Procedure Act. The treatment of state patients is regulated by section 42 and 47 of the Mental Health Care Act. State patients are detained in a psychiatric institution until a judge in chambers orders his release.

74 Section 77(6)(ii) of the Criminal Procedure Act provides that, where a person is found to have been involved in a crime of a non-violent nature or where it is found that the person did not commit any crime at all (regardless of if the charges against him was of a serious nature) but such person is found not fit to stand trial, such person will be treated as an involuntary mental health care user in terms of the Mental Health Care Act. The mental state of an involuntary user is subject to period review and the person will be discharged once the person has recovered the ability to take informed decisions regarding his need for mental health care treatment and rehabilitation service.

75 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 226. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-7. See further *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [81].

the accused regain his ability to stand trial.[76] The decision to proceed with the prosecution is taken by the Director of Public Prosecutions, having regard to the particular circumstances of the case.[77]

The criminal trial continues for a person found fit to stand trial, regardless of the fact that a mental illness may be present. As long as such mental illness does not affect his fitness to stand trial, no further consideration is given thereto during the criminal proceedings unless the fitness issue is raised again later in the proceedings or unless the lack of criminal responsibility is raised as a defence.

2.4.4 Not criminally responsible in the Criminal Procedure Act

A presumption of sanity operates in South African law as confirmed by section 78(1A) of the Criminal Procedure Act.

> *(1A) Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78 (1) until the contrary is proved on a balance of probabilities.*

Where a person's criminal capacity is, however, in question section 78(2) applies. Section 78(2) of the Criminal Procedure Act states that:

> *(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.*

A person shall not be held responsible for an act committed by him if he suffered from a mental illness or mental defect at the time of the commission of the offence, provided that the mental condition rendered him incapable of appreciating the wrongfulness of his actions and/or incapable of acting in accordance with an appreciation of wrongfulness.[78] An accused who had a mental illness at the time of committing the offence can, depending on

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[76] Section 77(7) of the Criminal Procedure Act. Also see Louw in *Psycholegal Assessment in South Africa* at 43. Also see Cassim 2004 Codicillus 17 at 20. See further Du Toit et al *Commentary on the Criminal Procedure Act* at 13-3 who adds that this does however not happen often.

[77] Du Toit et al *Commentary on the Criminal Procedure Act* at 13-7. Also see this source at 13.3 where it is indicated that prosecution is rarely continued after a person was declared a state patient and when he regains his ability to understand the proceedings.

[78] Section 78(1) of the Criminal Procedure Act. To determine which disorders may constitute "insanity" and might result in criminal incapacity, disorders can be classified into certain categories as provided for in the DSM-IV. See Spamers M *A Critical Analysis of the Psycholegal Assessment of Suspected Criminally Incapacitated Accused Persons as Regulated by the Criminal Procedure Act* (LL.M Dissertation University of Pretoria 2010) at 24, 25.

the seriousness of the offence, be detained as a state patient [79] or as an involuntary mental health care user [80] and may further be released conditionally [81] or unconditionally.[82] Where the accused's condition does not meet the criteria of a mental illness as set out in section 78(1), but his capacity to act in accordance with his understanding of what is right and wrong was diminished at the relevant point in time, his diminished capacity may be taken into account during sentencing.[83]

The provisions of the Mental Health Care Act may be relevant in certain instances where a mentally ill person comes into contact with the law. An overview of the Act and the relevant provisions are set out below.

2.5 Mental Health Care Act 17 of 2002

2.5.1 Introduction

Since sections 77 and 78 of the Criminal Procedure Act contain references to the Mental Health Care Act [84] and provide for detention in terms of the Mental Health Care Act, the appropriate provisions of the Act become relevant. The discussion below includes a brief discussion of the background to and overview of the Mental Health Care Act with specific attention to the new additions to the Act, such as the 72 hour assessment period. The categories of mental health care treatment and rehabilitation services are set out before the discussion concludes with a discussion of Review Boards as they have been established in terms of the Mental Health Care Act.

2.5.2 Background to and overview of the Mental Health Care Act

The Mental Health Act [85] was repealed in its entirety by the Mental Health Care Act, which

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79 Section 78(6)(b)(i)(aa) of the Criminal Procedure Act.

80 Section 78(6)(b)(i)(bb) of the Criminal Procedure Act.

81 Section 78(6)(b)(i)(dd) of the Criminal Procedure Act.

82 Section 78(6)(b)(i)(ee) of the Criminal Procedure Act. In contrast, an accused found unfit to stand trial cannot be released unconditionally. The Criminal Procedure Act does not provide this option. Only two orders can be made where a person is found unfit to stand trial. It can be ordered that he be detained as a state patient or an involuntary mental health care user.

83 Section 78(7) of the Criminal Procedure Act. A mentally ill accused person found unfit to stand trial, does not have the benefit of his mental illness being considered further in the process as with an accused who does not quite meet the not criminally responsible standard.

84 In particular to section 32 and 37 that provides for involuntary mental health care treatment and rehabilitation services and section 42 and 47 that deals with the admission and discharge of a state patient.

85 The Mental Health Act 18 of 1973, prior to its repeal, was amended by the Mentally Ill persons' Legal Interests Amendment Act, which came into force on 13 July 1990. (GN 1610 GG 12630 of 13 July 1990). This amendment came about after a report by the Law Reform Commission on enduring

came into force in December 2004. As soon as a person receives treatment, care and rehabilitation at a mental health care institution, such services are primarily regulated by the Mental Health Care Act.

The Mental Health Care Act contains a patient charter that is aimed at empowering mental health care users with knowledge of their rights. [86] This patient charter in the South African Mental Health Care Act is partially based on a United Nations Resolution of 1991 on the Protection of Persons with Mental Illness and for the improvement of Mental Health Care.[87] There is a duty on health care workers to ensure that the mental health care user is aware of his rights in terms of this Act.[88]

The Mental Health Care Act introduced a rapid shift in focus from arbitrary decision making about the treatment of the mentally ill to patient autonomy.[89] The Mental Health Care Act

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powers of attorney. The amendment mainly concerned the managing of the estate of a mentally ill person. This amendment made it possible for the Master, or a judge in chambers to appoint a curator to a mentally ill person other than a President's patient and whose assets or income fell below a certain amount. The initial Act only provided for this if the mentally ill person was declared a State President's patient or if the person was a mentally ill prisoner. This left other mentally ill persons who were for example cared for at home, with a very expensive alternative of having to apply to the High Court for an order for the appointment of a curator. This procedure was beyond the reach of most as it is a very costly process in that the High Court first has to be approached for a *curator ad litem* to be appointed to assess the mental capacity of the individual. Only thereafter is the curator to the person appointed. The amendment to the Act introduced a simplified and more cost effective procedure accessible to those who are not mentally ill prisoners or State President's patients. Any person over the age of 18 could now approach the Master of the High Court with a request to be appointed or to appoint a curator to the mentally ill person. This could be done only if the property value of the person was less than R100 000.00 or if the income of the person was less than R24 000.00 per annum. Those not meeting the monetary requirements had to bring the application through the High Court via the previously utilised process. This amendment seem to have brought some equality between the mentally ill prisoners and State President's patients on the one hand and patients suffering from a mental illness not detained in prison or as State President's patients on the other, as the same – more cost effective process is now accessible to all these persons.

86 See chapter 3 of the Mental Health Care Act. This patient charter is partially based on the United Nations *Principles for the Protection of Persons with Mental Illness*. South Africa was only the second country to include these provisions into its mental health care legislation. See Freeman M "New mental health legislation in South Africa - principles and practicalities: A view from the Department of Health" August 2002 *South Afr Psych Rev* 4-8 at 4 footnote "a". The first country to do so was Jamaica. The new Mental Health Care Act is further based on the World Health Organisation. Guidelines for the Promotion of Human Rights of Persons with Mental Disorders http://www.who.int/mental_health/policy/legislation/guidelines_promotion.pdf (Date of use: 29 May 2014). Also see Landman and Landman *The Mental Health Care Act* at 3. See further World Health Organisation *World Health Report: Mental Health: New Understanding, New Hope*. http://www.who.int/whr/2001/en/whr01_en.pdf (Date of use: 29 May 2014).

87 United Nations Principles for the Protection of Persons with Mental Illness.

88 This obligation is contained in section 17 of the Mental Health Care Act. The only exception to the rule is where the user is admitted in an emergency in accordance with section 9(1)(c) of the Mental Health Care Act. Also see Landman and Landman *The Mental Health Care Act* at 7.

89 Simpson B and Chipps J "Mental health legislation: Does it protect the rights of people with mental health problems?" 2012 (48) *Social Work* 47-57 *at* 47 who points out that the new Mental Health

focuses very much on patient autonomy and provision of the least restrictive method of treatment, as is most evident from the provisions that regulate electroconvulsive therapy and psychosurgery.[90] The Act states further that mechanical restraint may only be used for short periods of time and only if chemical restraint seems to be inadequate.[91] The focus on the least restrictive manner of treatment is emphasised by the provision in the Act that allows for an involuntary user to be reclassified as an assisted or voluntary user if the user regains the ability to provide informed consent to mental health care treatment and rehabilitation services.[92] The protection of the mental health care user's privacy is emphasised in the Mental Health Care Act.[93] It also contains a prohibition against unfair discrimination against the mental health care user on the ground of mental health status.[94]

Care Act has shifted its focus from custodial care to human rights. This paradigm shift poses questions regarding consent to mental health care treatment and rehabilitation services and issues related thereto, such as access to the health records of mental health care users. The purpose and scope of this research does not allow for the investigation of these questions.

90 Regulations 35 and 36 of the General Regulations to the Act published in Government Gazette number 24384, (Regulation Gazette number 7578) notice number 233 of 14 February 2003. Further provisions to ensure the least restrictive treatment is that the regulations prohibit sleep therapy and provide that a mental health care user has to consent to electro convulsive therapy. See Regulation 35(3) of the General Regulations to the Mental Health Care Act re electro convulsive therapy and regulation 36 that prohibits the use of sleep therapy. Also see Landman and Landman *The Mental Health Care Act* at 12.

91 Section 1 of the Mental Health Care Act defines "mechanical restraint" as "…the use of any instrument or appliance whereby the movements of the body or any of the limbs of a user are restrained or impeded". Regulation 38 regulates restraining and states in sub regulation (3) that this type of restraint must be monitored every 30 minutes. The use of mechnical restraing must be recorded in a register (sub regulation (4) which has to be provided to the relevant Review Board on a form Mental Health Care Act 48 (sub regulation (5)).

92 Section 37(5) of the Mental Health Care Act for example provides for a user to be discharged if the Review Board finds that involuntary care is no longer needed. The user may also be treated forthwith as a voluntary or assisted user, provided the user gives consent (or in the case of an assisted user he does not refuse consent) to the treatment. Also see Landman and Landman *The Mental Health Care Act* 5 where it is pointed out that the mechanism of periodic reviews that was incorporated into the Act, supports the ideal of providing the least restrictive manner of treatment as a user may be reclassified after such a periodic review which may result in less restrictive treatment – for example if an assisted user is reclassified as a voluntary user the user may be discharged at his request.

93 Section 13(1) of the Mental Health Care Act prohibits the disclosure of information, which the mental health care user is entitled to keep confidential in terms of any law. This duty may only be breached if non-disclosure will seriously prejudice the health of the mental health care user or third parties (section 13(2)). Section 13(3) gives limited recognition to therapeutic privilege in that the mental health care provider may temporarily withhold information about the mental health care users' health status, if the mental health care provider believes that disclosure will seriously prejudice the user or will cause the user to conduct himself in a manner that will be prejudicial to the mental health care user or the health of third parties. Section 37(2)(c) of the Mental Health Care Act which provides for the periodic review of involuntary mental health care users, states as one of the factors that has to be considered during the review, whether there are other services that are less restrictive and intrusive on the mental health care user's right to privacy, dignity and movement. Also see Liebenberg *Socio-Economic Rights* at 262.

94 Section 10 of the Mental Health Care Act prohibits the unfair discrimination against a mental health care user based on his mental health status.

This could be seen as an extension of the protection of equality as provided for in section 9 of the Constitution.[95]

In further support of ensuring that the mental health care user receives the least-restrictive means of treatment, a 72-hour assessment period was introduced into this Act.[96] This is only applicable where an application for involuntary treatment is lodged.[97] After admission, a 72-hour assessment period follows to determine if the person should continue to be treated on an involuntary basis.[98] One of the advantages, amongst others, of this 72-hour assessment period is that this period of time is long enough to exclude the possibility that the person might suffer from medical conditions other than a mental illness such as meningitis or epilepsy delirium.[99] Only if it is confirmed during this 72-hour assessment that the person requires further involuntary care shall the person forthwith be treated as such by the relevant mental health care establishment.[100] The applicability of the 72-hour assessment period on accused persons ordered to receive involuntary care in terms of the Criminal Procedure Act is discussed later in this chapter.

Mental health care treatment and rehabilitation services are divided into five categories in the Mental Health Care Act. A brief description of each of these categories follows.

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95 Section 9(3) of the Constitution prohibits unfair discrimination on specific grounds that include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. With the focus on patient rights in the new legislation, health care workers might fear that they will clash with the law for merely doing their job. A former Director of Mental Health and substance abuse at the National Department of Health in South Africa, puts the minds of healthcare workers at ease by stating that: "The legislation is not intended to scare health workers and have them fearing their every move, but given past abuses of people with mental disabilities, legislated rights were seen as a necessity". Mr Freeman was the Head of Mental Health and Substance abuse at the National Department of Health during 2002. See Freeman 2002 *South Afr Psych Rev 4 at 5.* Also see Simpson and Chipps *2012 Social Work* 47 at 47 where the past discrimination against persons with mental illness is confirmed.

96 Section 34 of the Mental Health Care Act.

97 Section 34(1)(b) of the Mental Health Care Act.

98 Section 34 of the Mental Health Care Act sets out the procedure that has to be followed to determine if further care, treatment and rehabilitation on an involuntary basis are necessary. This inter alia entails assessment by two physicians, one of whom must be a mental health care worker.

99 Other advantages of the 72 hour assessment period include identifying patients who might be HIV positive who might have presented with symptoms that could possibly be confused for a mental illness. It further allows for quick recovery of the patient, especially if there is substance abuse involved. It avoids the stigma of unnecessary psychiatric hospitalisation in the event that the cause of the symptoms thought to be as a result of mental illness, was in fact caused by a condition other than a mental illness. This 72-hour assessment period adds to the aim of integrating mental health care services into other health services and thus contributes to the move towards decentralisation of mental health care services.

100 Section 34(3) and (4) of the Mental Health Care Act. The head of the health establishment may also authorise Involuntary mental health care treatment and rehabilitation services on an outpatient basis as provided for in section 34(5). This decision must be approved by the relevant Review Board (section 34(7).

2.5.3 Categories of mental health care treatment and rehabilitation services in the Mental Health Care Act

The Act distinguishes between 5 categories of mental health care treatment and rehabilitation services. The most relevant for purposes of this research is involuntary mental health care, and state patients as a court may order that an accused be detained as such.[101] All the categories will be canvassed briefly in order to explain the restrictions applicable to each category of treatment.

The least restrictive category of mental health care treatment and rehabilitation services is voluntary mental health care treatment and rehabilitation services.[102] These are the mental health care users who are capable of making an informed decision pertaining to the need for mental health care treatment and rehabilitation services, who can consent thereto and who understand the implications of the treatment.[103] These users can be discharged on request.

Assisted mental health care treatment and rehabilitation services [104] are for those users who are not able to make informed decisions about their need for mental health care treatment and rehabilitation services but require it for their own safety or the safety of others. These users are not opposed to receiving mental health care treatment. These users will be discharged once they have regained their ability to make decisions regarding the need for mental health care treatment and rehabilitation services.[105]

The third category that is very relevant for the purposes of this research is involuntary mental health care treatment and rehabilitation services.[106] These mental health care users are incapable of making an informed decision about the need for treatment and rehabilitation services but require it for their own safety or the safety of others or to prevent

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101 Section 77 and 78 of the Criminal Procedure Act provides for the court to order that an accused person be detained as a state patient where the person is found either unfit to stand trial or not criminally responsible and such person was involved in a crime with serious violence, such as murder, rape or culpable homicide. The court may also order that an accused be detained as an involuntary mental health care user where the person is found not to have committed the crime or that he committed a crime not involving serious violence.

102 Section 25 of the Mental Health Care Act.

103 These users for example suffer from depression after a traumatic event and seek mental health care treatment at a mental health care establishment for a limited period.

104 Section 26 of the Mental Health Care Act.

105 Section 31(3) of the Mental Health Care Act. If the head of the health establishment is of the view that the person is capable of taking an informed decision about treatment and the user expresses a need for further treatment, the user may forthwith be treated as a voluntary mental health care user in terms of section 25 of the Mental Health Care Act.

106 Section 32 of the Mental Health Care Act.

financial loss or further damage to the user's reputation. These users refuse to receive treatment and are thus treated against their will.[107] A 72-hour assessment is conducted to determine if involuntary care should be continued.

A criminal court may order a mentally ill accused person to be treated as an involuntary mental health care user.[108] Those who are found not criminally responsible and who committed non-violent crimes can be "sentenced" to be treated as an involuntary mental health care user.[109] Those found unfit to stand trial and who committed a non-violent crime or who did not commit the crime at all may similarly be treated as an involuntary user.[110] It is unclear whether the 72-hour assessment period applies to persons ordered by a criminal court to receive involuntary mental health care treatment and rehabilitation services.

Section 37 of the Mental Health Care Act specifically deals with the review of the involuntary mental health care user's status as such by the head of the health establishment and provides for review six months after admission and thereafter every 12 months.[111] During the said review, consideration must be given to the ability of the user to express the need for further treatment, the possibility of the user inflicting harm on himself or others, whether there are less restrictive services to be rendered that will have less of an impact on the user's privacy, dignity and movement and lastly, a plan for future treatment should be indicated.[112] The report is sent to the Review Board for consideration [113] , and the Review Board decides if further involuntary treatment is warranted or not.[114] If not, all involuntary care must be stopped, and the user must be discharged unless he consents to further treatment.[115] Where a user is discharged, the Registrar of the High Court must be informed of the discharge.[116] There is no indication in the Mental Health Care Act that

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107 Section 32 states that these users must be provided with treatment against their will – provided the criterion as set out in paragraphs (a) to (c) of section 32 is met.

108 In terms of section 77 and/or 78 of the Criminal Procedure Act. Such treatment takes place under section 32 and 37 of the Mental Health Care Act.

109 In terms of section 37 of the Mental Health Care Act. The criminal court may also make an order that these persons may also be released upon conditions, or released unconditionally as provided for in section 78(6)(b)(ii) of the Criminal Procedure Act.

110 Section 77 of the Criminal Procedure Act. These persons cannot be released unconditionally. See however the discussion of the *De Vos v Minister of Justice and Constitutional Development* WCC case later in this chapter. The court found that the lack of a provision for conditional and unconditional discharge for persons found not fit to stand trial, is unconstitutional and ordered that the situation be remedied by Government through the amendment of the Criminal Procedure Act.

111 Section 37(1) of the Mental Health Care Act.

112 Section 37(2) of the Mental Health Care Act.

113 Section 37(3) of the Mental Health Care Act.

114 Section 37(4) of the Mental Health Care Act.

115 Section 37(5) of the Mental Health Care Act.

116 Section 37(6) of the Mental Health Care Act. Also consider section 36 that prescribes that any

indicates if the position is different for a mentally ill accused person who received involuntary care by order of the court in terms of section 77(6).[117] Where an unfit accused is discharged from involuntary care, it can arguably be assumed that the accused regained his fitness to stand trial, and the trial against the accused may resume depending on the circumstances of the case.[118]

Mentally ill prisoners, as a fourth category, are persons, whether convicted or not, who are detained in custody in any prison or who are being transferred in custody or are en route from one prison to another prison.[119] This category may include persons who are awaiting psychiatric assessment to determine fitness to stand trial or criminal capacity. The Mental Health Care Act, however, only provides for convicted prisoners in this category to receive mental health care treatment and rehabilitation services on an outpatient basis.[120] Those not yet convicted seem to be excluded from outpatient care. The position of the convicted prisoner who developed a mental illness is not considered in this research as it is primarily concerned with mentally ill accused persons prior to acquittal or conviction and sentencing.

The final category of mental health care user that is very relevant in this research is the state patient. State patients are individuals who were found unfit to stand trial or not

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decision by a Review Board to continue involuntary care treatment and rehabilitation services must be sent for judicial review to the High Court. The High Court must then order the further treatment of a mental health care user as an involuntary user, or must order the immediate discharge of the user. In the case where a criminal court orders the detention of a mentally ill accused person as an involuntary user, judicial review is not employed, but the order by the criminal court in terms of section 77 or 78 of the Criminal Procedure Act may arguably serve the purpose intended for the high court to confirm further involuntary care as provided for in section 36 of the Mental Health Care Act. Questions about the 72 hour assessment period as provided for in the Mental Health Care Act are also raised.

117 The court considered this same question in *S* v *Pedro* 2015 (1) SACR 41 (WCC) [112-113] and seems to agree that court ordered involuntary users could be discharged in terms of the Mental Health Care Act. The court did not find it necessary to decide whether such a discharge should be in terms of section 37 (discharge after periodic review) or 38 (discharge upon recovery) of the Mental Health Care Act. The court found it strange that there is no mechanism in place to keep the Director of Public Prosecutions updated on the mental state of those ordered by the court to be treated as involuntary users or state patients and suggested that a relevant protocol be developed to achieve this. In this particular case, the accused was released about a month after the detention order was made, presumably in terms of section 38 of the Mental Health Care Act.

118 Section 77(7) of the Criminal Procedure Act. Also see Louw in *Psycholegal Assessment in South Africa* at 43. Also see Cassim 2004 Codicillus 17 at 20. See further Du Toit et al *Commentary on the Criminal Procedure Act* at 13-7 where the discretion of the prosecution in this regard is confirmed. Also see this source at 13-3 where it is indicated, however, that prosecution is rarely continued after a person was declared a state patient and when he regains his ability to understand the proceedings.

119 Section 1 of the Mental Health Care Act. Chapter VII of the Mental Health Care Act contains provisions relevant to mentally ill prisoners. The definition of prisoner is also contained in section 1 of the Correctional Services Act 111 of 1998.

120 Section 52 of the Mental Health Care Act.

criminally responsible due to mental illness – and who have been charged with and found to have been involved in murder, culpable homicide, rape or any other act involving serious violence.[121] These accused persons are treated as state patients in terms of the Mental Health Care Act [122] , which entails treatment in a psychiatric institution until such time as a judge in chambers orders his release.[123]

2.5.4 Review Boards

Mental Health Review Boards [124] are established in terms of the Mental Health Care Act, which serves as monitoring bodies over the human rights of the mental health care users in mental health care establishments.[125] The past treatment of people with mental disabilities [126] was a strong motivation for the establishment of Mental Health Review Boards.[127]

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121 The criminal court may order that a person be treated as a state patient in terms of section 77 and 78 of the Criminal Procedure Act. Section 78(6)(i)(aa) of the Criminal Procedure Act provides that a person may be declared a state patient where he is charged with murder, culpable homicide or rape or any other charge involving serious violence and where the court finds on the facts before it that the person committed the offence. Also see Du Toit *et al Commentary on the Criminal Procedure Act* at 13-1. Section 77(6)(i) of the Criminal Procedure Act provides for a person to be treated as a state patient if the person has been found unfit to stand trial and section 78(6)(i)(aa) contains a similar provision but pertaining to a person having been found to lack criminal capacity. Section 77(6)(a)(i) of the Criminal Procedure Act provides that a person may be declared a state patient where he is charged with murder, culpable homicide or rape or any other charge involving serious violence and where the court finds on the facts before it that the person committed the offence. Section 78(6)(i)(aa) of the Criminal Procedure Act provides that a person may be declared a state patient where he is charged with murder, culpable homicide or rape or any other charge involving serious violence and where the court finds on the facts before it that the person committed the offence. Also see Du Toit *et al Commentary on the Criminal Procedure Act* at 13-1.

122 Section 42 and 47 of the Mental Health Care Act. Sections 77 and 78 of the Criminal Procedure Act contains a reference to section 47 of the Mental Health Care Act in terms whereof patients are treated as state patients until a judge in Chambers recommends their release. Chapter VI of the Mental Health Care Act contain provisions pertaining to a state patient. (Sections 41-48).

123 Section 47 of the Mental Health Care Act and more in particular section 47(6) sets out the orders that a judge in chambers may make when an application for the discharge of state patient is brought before him. He may order that the state patient continues to be treated as such, be reclassified as an involuntary, assisted or voluntary user, or be discharged conditionally or unconditionally. Section 45 provides for leave of absence to be provided to the state patient for a limited period of time and subject to certain conditions in the time that he is detained a state patient. An application for discharge as state patient, may only be brought to a judge in chambers once in a 12 month period. (Section 47(4)(a)). Also see *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [85].

124 Section 18 of the Mental Health Care Act.

125 These Boards serve as a "watch dog" for the human rights of the mental health care users, ensures that they are not unnecessarily detained and not detained for unnecessarily long periods. The legislature introduced periodic reviews of the mental health status of the mental health care users to ensure that they are not detained in mental institutions for longer than necessary. Also see Landman and Landman *The Mental Health Care Act* at 8.

126 Freeman 2002 *South Afr Psych Rev 4* at 5. See further in general Simpson and Chipps *2012 Social Work 47* – 57.

127 Chapter 4 of the Mental Health Care Act, sections 18 to 24 establishes Mental Health Review Boards and sets out the powers and functions of the Review Boards.

Review Boards follow a multidisciplinary approach as it consists of members from the community as well as members from the medical and the legal professions.[128] The introduction of Mental Health Review Boards is labelled as one of the most important changes that the Mental Health Care Act brought about.[129]

The powers of the Board are set out in the Mental Health Care Act.[130] These Boards review the decision by the head of the health establishment to treat a person as an assisted or involuntary mental health care user.[131] Complaints of exploitation and /or abuse are to be lodged with the Review Board.[132] The Review Board is obliged to investigate such a complaint.[133] The Review Board thus provides the accountability mechanism for the South African mental health framework.

These Review Boards, however, have very little involvement in the criminal justice system. Its only official involvement, according to the Mental Health Care Act, is the periodic review of the mental state of a mentally ill prisoner.[134] Review Boards are not vested with the

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128 Section 20(1) and (2) of the Mental Health Care Act. A Review Board consists of a multi-disciplinary team comprising of a lawyer, psychologist or psychiatrist and community member.

129 Freeman August 2002 *South African Psychiatry Review* 4 at 5-7 also indicates that the introduction of involuntary outpatient care is another significant change that the Mental Health Care Act brought about. Also see Zabow T "The Mental Health Care Act (Act 17 of 2002)" in Kaliski S (ed) *Psycholegal Assessment in South Africa* (Oxford University Press Cape Town South Africa 2006) *at* 138 where the introduction of the 72-hour assessment period and the new definition of "mental health care practitioner" are also identified as important developments in the new Act. He points out further that the new title of the Act as well as the managing of the property of a mental health care user, are unique and important developments in the new Act. He adds that the inclusion of the chapter in the Act on patient rights is an important development as well as the shortening of the period of review for involuntary and assisted mental health care users, as well as state patients and prisoners with mental illness

130 Section 19 of the Mental Health Care Act states the powers to be: (1) 'The Review Board must
a) consider appeals against decisions of the head of a health establishment;
b) take decisions with regard to assisted or involuntary mental health care, treatment and rehabilitation services.
c) consider reviews and make decisions on assisted or involuntary mental health care users.
d) consider 72-hours assessment made by the head of the health establishment and make decisions to provide further involuntary care, treatment and rehabilitation
e) consider applications for transfer of mental health care users to maximum security facilities; and
f) consider periodic reports of the mental health status of mentally ill prisoners.

131 Section 19(b) and (c) of the Mental Health Care Act. They must also consider 72-hours assessment made by the head of the health establishment and make decisions to provide further involuntary care, treatment and rehabilitation (sub paragraph (d)).

132 Section 11 of the Mental Health Care Act and the forms published in the general Regulation to the Mental Health Care Act. The complaint is lodged by completing form MHCA 02. Also see the amended regulations published in Gazette number 38182 on 6 November 2014.

133 Section 11 of the Mental Health Care Act.

134 Section 19(1)(f) of the Mental Health Care Act. In the case of a mentally ill prisoner who is treated outside of prison, the mental health care status is reviewed every six months and upon recovery from the mental illness, the prisoner is transferred back to prison.

authorty to review a fitness finding by a court, nor are they involved in determining the appropriate way to deal with a person in the criminal justice system who suffers from a mental illness.[135] A suggestion is made later in this research that the involvement of the Review Boards in the criminal justice system should be expanded as part of a therapeutic response to persons with mental illness in the criminal justice system.[136]

2.6 *Correctional Services Act 111 of 1998* [137]

Reference is made to this piece of legislation since mentally ill accused persons awaiting psychiatric observation are often detained in a correctional facility awaiting transfer to a psychiatric hospital for purposes of assessment. Mentally ill remand detainees have been identified as a special group of accused persons for whom special provisions for care should be made.[138]

Section 49D of the Correctional Services Act makes provision for the treatment of mentally ill persons in remand detention.[139] Provision is further made for the detention of a person suspected to have a mental illness in a single cell for purposes of observation.[140] The correctional facility must provide health services to the mentally ill accused within its available means.[141] The regulations require a nurse to attend to mentally ill remand detainees as often as is required but at least once a day.[142] Having regards to the resource

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135 See the discussion of the Canadian Review Boards in chapter 4 of this research where their powers have been extended substantially to include these functions. Canadian Review Boards from an integral part of the Canadian criminal justice system.

136 See chapter 6 of this research where this suggestion is made.

137 Hereinafter referred to as the "Correctional Services Act".

138 See the discussion of remand detainees in chapter 2 of this research.

139 Section 49 of the Correctional Services Act. Also see Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 44.

140 Section 49D (1) of the Correctional Services Act. It is, however, not compulsory to detain an accused that is suspected to be mentally ill in a single sell as the legislation reads that such a person "may" detain such a person in a single cell. This presumably refers to observation of the accused person's general health including his mental health and does not refer to the forensic assessment, as that has to be done by a psychiatrist or psychologist for purposes of drafting the report in terms of section 79 of the Act. Due to the overcrowding problem as pointed out in chapter 2 of this research, it is doubtful whether accused persons showing signs of mental illness are detained in single cells.

141 Section 49D of the Correctional Services Act states that:
"Mentally ill remand detainees.—(1) The National Commissioner may detain a person suspected to be mentally ill, in terms of section 77 (1) of the Criminal Procedure Act or a person showing signs of mental health care problems, in a single cell or correctional health facility for purposes of observation by a medical practitioner.
(2) The Department must provide, within its available resources, adequate health care services for the prescribed care and treatment of the mentally ill remand detainee.
(3) The Department must, within its available resources, provide social and psychological services in order to support mentally ill remand detainees and promote their mental health."

142 Regulation 7 (4) states that: "(4) A registered nurse must attend to all sick sentenced offenders and

challenges in correctional settings, combined with overcrowding of these facilities as discussed in chapter 2, it is unlikely that mentally ill remand detainees receive adequate mental health care in prison.[143]

The above concludes the discussion of relevant legislation per se. The remainder of this chapter will focus on the procedural issues as they pertain to the mentally ill accused. The discussion will further be limited to pre-trial issues, and in particular, fitness to stand trial.

3 FITNESS TO STAND TRIAL

3.1 Introduction

The procedure pertaining to the fitness assessment is discussed in some detail below to illustrate the technical nature of the current process. Challenges in the current process are alluded to throughout this discussion.[144]

3.2 Purpose of assessment for fitness to stand trial

The fitness assessment ensures the delivery of justice to the accused as it embodies the fundamental principle of South African law that the accused must have the ability, firstly, to follow the court proceedings and, secondly, to communicate constructively with one's legal representative in order to conduct a proper defence.[145]

A further fundamental principle of South African law is that an accused must be present at his trial.[146] This *presence* has been accepted to mean both physical and

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remand detainees, which shall include pregnant women and the mentally ill, as often as is necessary, but at least once a day." [Sub-regulation (4) substituted by clause 6 (a) of Gazette No. 35032 of 27 February 2012].

143 See *De Vos* v *Minister of Justice and Constitutional Development* CC case at]43] where it is stated that: "It should be noted that the Correctional Services Act behoves the Department of Correctional Services to provide psychological services to detainees with mental illnesses or intellectual disabilities. However, the uncontested evidence presented by Cape Mental Health is that prisons do not have the facilities to provide appropriate treatment and care. This evidence appears to have been accepted by the Minister of Health before the High Court." (footnotes omitted).

144 The procedure regarding fitness to stand trial in chapters 4 (Canada) and 5 (United States of America) are not covered in as much detail since those jurisdictions make use of a Mental Health Court to assist with mental health issues in the criminal justice system and each Mental Health Court determine its own procedures. The detailed discussion of the South African procedure serves to illustrate the challenges and to promote the establishment of a Mental Health Court in South Africa to address these exact challenges.

145 Louw in Psycholegal Assessment in South Africa at 42. Also see Kruger Mental Health Law in South Africa at 162, 165. See further Kruger Heimstra *Suid-Afrikaanse Strafproses* 225. See further Du Toit et al Commentary on the Criminal Procedure Act at 13-5.

146 Section 35(3)(e) of the Constitution gives every arrested person the right to be present when he is tried. Section 158 of the Criminal Procedure Act. Also see Stevens P "Re-establishing triability by

psychological/mental presence.[147] The psychological/mental presence refers to the accused's ability to follow the proceedings. A mental illness may have an impact on this ability.

The mere fact that an accused is suffering from a mental illness will, however, not in itself render him unfit to stand trial.[148] An accused will only be unfit to stand trial if it is clear that the symptoms of the mental illness impair the functioning of the individual to such an extent that he is not able to understand the court proceedings or is incapable of giving proper instructions to his legal representative.[149]

Fitness to stand trial refers to the current mental capacity of an accused to understand the proceedings at the time when the trial is underway [150] and is not concerned with the mental state of the accused retrospectively.[151] Since the mere presence of a mental illness does

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means of psychotropic medication: An analysis" 2013 (76) *THRHR* 252-260 at 252. See further Kruger *Heimstra Suid-Afrikaanse Strafproses* at 227. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-1. Also see Snyman J "The declaration of a patient as a state president's patient" 1988 Acta Juridica 128-168 at 128.

147 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 225. Also see in general Snyman 1988 *Acta Juridica* 128-168. See further *Pachcourie* v *Additional Magistrate, Ladysmith* 1978 (3) SA 986 (N) 991A-H. Also see Cassim 2004 Codicillus 17 at 19, 22. See also Stevens 2013 *THRHR* 252 at 262 who confirms this. See further Burchell J *South African Criminal Law and Procedure* 4th ed (Juta Cape Town 2001) *at* 282, footnote 14.

148 Africa A "Psychological evaluation of mental state in criminal cases" in Tredoux C, Foster D, Allan A, Cohen A and Wassenaar D *Psychology and Law* (Juta South Africa 2005) at 389. Also see Kaliski SZ, Borcherds M and Williams F "Defendants are clueless – the 30-day psychiatric observation" 1997 (87) *SAMJ* 1351-1355 at 1352. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 220 who points out that the court may take the fact that a person is receiving treatment in a psychiatric institution in terms of the Mental Health Care Act into consideration when judging an accused's fitness to stand trial. The author points out that it is indeed possible for a court to find that an accused is fit to stand trial, despite the fact that he is receiving mental health care treatment and rehabilitation services in terms of the Mental Health Care Act. Also see Kruger *Mental Health Law in South Africa* at 168 for the position prior to the Mental Health Care Act and where he indicates that an abnormality does not necessarily affect triability.

149 Africa in *Psychology and Law* at 389.

150 Kaliski, Borcherds and Williams 1997 *SAMJ* 1351 at 1354. Also see Africa in *Psychology and Law* at 387. See further Kruger *Mental Health Law in South Africa* at 164 and further *S* v *Mabena* 2007 (1) SACR 482 (SCA) at [12] as well as *De Vos* v *Minister of Justice and Constitutional Development WCC case.*at {7} where it is stated that "'The accused is suffering from a mental illness the effect of which is that he or she cannot be put on trial: section 77 – the "now" question. In the adjudication of this question the condition of the accused when the conduct in question was committed is not considered." Also see Pillay AL "Could S v *Pistorius* influence reform in the traditional forensic mental health evaluation format?" 2014 (44) *South African Journal of Psychology* 377-380 at 378.

151 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 221. This is in contrast with the test for criminal capacity which does not test the current state of mind of the accused, but is a retrospective test, looking at the state of mind of the accused at the time of commission of the alleged offence. Kruger points out, however, at 222 that the assessment for criminal capacity, which looks at the accused's state of mind retrospectively, will in many instances also answer the question pertaining to whether the accused is fit to stand trial. Note, however, that lack of criminal capacity does not presuppose lack of fitness to stand trial. Also se Pillay 2014 *South African Journal of Psychology* 48 at 50 where it is confirmed that the assessment for criminal capacity is a retrospective one.

not presuppose unfitness, determining the current level of functioning of the accused is crucial. It is not impossible for an accused with a serious mental illness to have the ability and capacity to understand court proceedings and give coherent instructions to his legal representative.[152]

The determination of the accused's fitness to stand trial is a preliminary issue that has to be determined before the criminal responsibility of the accused for the act committed can be investigated.[153] The inquiry into a person's fitness to stand trial has no bearing on the inquiry into whether or not he should be held accountable for the act committed.[154] The capacities that are relevant with the assessment for triability on the one hand and for criminal responsibility on the other are vastly different.[155] It follows that non-triability does not presuppose non-responsibility and *visa versa.*[156]

The fact that fitness to stand trial is determined first before regard is had to the criminal responsibility of the accused could have the unfortunate result that the court finds the accused unfit and orders his detention in a psychiatric hospital before the prosecution

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152 Africa in *Psychology and Law* at 389. Persons found fit to stand trial include those with serious mental illnesses such as schizophrenia and major depression who do not always meet the criteria to be found unfit to stand trial. Also see Lurigio RJ and Snowden J "Putting therapeutic jurisprudence into practice: The growth, operations, and effectiveness of mental health courts" 2009 (2) *The Justice System Journal* 196-218 at 198 who specifically mention that persons with serious mental illness do not always meet the incompetence to stand trial criteria and are, consequently, found fit to stand trial, found guilty and sent to prison. See also Slobogin C, Rai A and Reisner R *Law and the Mental Health System Civil and Criminal Aspects* 5th ed (Thomson West United States of America 2009) at 1020 where various studies revealed that in approximately 30% of matters, those with serious mental illnesses sent for observation are found fit to stand trial.

153 Burchell *South African Criminal Law and Procedure* at 283. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 243. See further Pillay 2014 *South African Journal of Psychology* 48 at 51. Also see *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [81] where Rogers J explained that: "Where, by contrast, an accused is not capable of understanding proceedings as contemplated in s 77, he cannot in the nature of things enter a plea and the question of his criminal responsibility at the time of the alleged offence cannot be judicially determined in accordance with s 78. An accused who by reason of mental illness or mental defect is not capable of understanding the proceedings may or may not also have lacked criminal responsibility at the time he perpetrated the alleged offence; either way, he must be dealt with in accordance with s 77, not s 78. This means that he can be found neither guilty nor not guilty; no verdict is entered, and instead a direction must be made in accordance with either sub-para (i) or (ii) of s 77(6)(a)."

154 Fitness thus stands separately from the inquiry into guilt. See Africa A "Insanity and Diminished Capacity Before the Courts" https://www.yumpu.com/en/document/view/17210882/insanitypdf# (Date of use: 10 March 2015) at 3.

155 Snyman 1988 *Acta Juridica* 128 at 153.

156 See, however, the findings of Kaliski, Borcherds and Williams 1997 *SAMJ* 1351 at 1354 where all those in the study that were found unfit to stand trial, was also found to lack criminal capacity. Kruger *Heimstra Suid-Afrikaanse Strafproses* at 222 states that the assessment for criminal capacity, which looks at the accused's state of mind retrospectively, will in many instances, however, also answer the question pertaining to whether the accused is fit to stand trial. Note, however, that lack of criminal capacity does not presuppose lack of fitness to stand trial. Also se Pillay 2014 *South African Journal of Psychology* 48 at 50.

proved its case against the accused and more importantly, before any defence that the accused might have, has been heard.[157] This means that the accused could be detained without any evidence that he committed a crime. This position possibly violates the accused's right to a fair trial and the right not to be detained arbitrarily.[158]

In an attempt to address this concern, the South Africa legislature affected amendments to section 77 of the Criminal Procedure Act through the Criminal Matters Amendment Act 68 of 1998.[159] The current position is that the court may, after a finding of unfitness, consider evidence in a trial of the facts so as to determine whether the accused actually committed the act in question [160] before ordering his detention. The burden of proof for purposes of this inquiry is on a balance of probabilities and not beyond a reasonable doubt.[161] The trial of the facts serves as a procedural safeguard for the mentally ill accused against arbitrary

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157 If the accused is found unfit to stand trial, the court may order this accused to be detained as a state patient in a psychiatric hospital until such time as he regains his ability to stand trial. If this ability is not regained, the accused remains detained as a state patient until a Judge orders his release. Burchell *South African Criminal Law and Procedure* at 283 and see Snyman 1988 *Acta Juridica* 128 at 139-142. Also see Kruger *Mental Health Law in South Africa* at 168 who points out that this was a *lacuna* in the Criminal Procedure Act at the time. Kruger also indicates that England addressed the issue by allowing for a trial on the facts prior to the person being declared a state patient in order for a verdict of not guilty to be rendered if it is shown that the accused was not involved in the act under investigation. This recommendation was made by the Butler Commission. At the time, the Rumpff Commission in South Africa was not in favour of such a procedure as they were of the view that, if the accused cannot participate in the trial due to mental illness or defect, he also negates his elementary rights. See the *Rumpff Commission report at 10.33.*

158 This situation is a perfect example of how mental illness has been criminalised in the South African criminal justice system. Mentally ill accused persons were detained for the mere fact that they are mentally ill without due regard to their guilt or innocence. In English law, this exact problem was addressed by adjustments made to legislation. The effect of this was that the psychiatric inquiry could be postponed in selected cases till at least after the state has presented its case. This amendment enabled the defence to apply for the charges to be dropped if it appears that the state does not have enough evidence to build a prima facie case against the accused. If the charges are dropped, this means that the fitness issue will not be raised in the particular case. Snyman 1988 *Acta Juridica* 128 at 141, 142. This adjustment was possibly because of the recommendations made by the *Butler Commission* as referred to above. The practice of detaining an accused due to the mere fact that he suffers from a disability (mental illness in this case) is in direct contravention of article 14 of the United Nations Convention on the Rights of Persons with Disabilities. Also see *De Vos* v *Minister of Justice and Constitutional Development* CC case at [29] where it is stated that a disability may not be used to deprive a person of his liberty. The accused in this case suffered from mental retardation.

159 Hereinafter referred to as the "Criminal Matters Amendment Act".

160 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 219 points out that this amendment was brought about by amending section 77(6)(a) of the Criminal Procedure Act by making provision for a trial on the facts of the matter which does not constitute an official trial for purposes of finding the accused guilty or not guilty. Also see Louw in *Psycholegal Assessment in South Africa* at 43 who explains that the burden of proof in these inquiries is on a balance of probabilities and not beyond reasonable doubt as the usual burden of proof in a criminal case is. Louw warns that this could lead to an "innocent" person being found to have committed the act in question as the court will not have all the evidence before it. See the discussion on the trial on the facts later in this chapter.

161 Section 77(6) of the Criminal Procedure Act. Also see Louw in *Psycholegal Assessment in South Africa* at 43. Also see the discussion of the trial on the facts later in this chapter.

detention.[162]

There has been a rapid increase in the number of accused persons referred for fitness assessments by order of the criminal court.[163] The order for a fitness assessment is discussed below.

3.3 Order for assessment of fitness to stand trial

Section 77(1) of the Criminal Procedure Act [164] states that the matter of fitness should be "enquired into". Section 79 of the Criminal Procedure Act sets out the procedure to follow for purposes of the relevant enquiry. The stage in the process at which point a fitness assessment order may be made, grounds upon which such an order may be made, the content of the order and the jurisdiction of the court to grant such an order are canvassed below.

3.3.1 Stage in the criminal proceedings when the order may be made

The issue of fitness to stand trial can be raised at any point during the proceedings [165] prior to sentencing.[166] Where a fitness assessment is ordered, the trial is postponed pending the

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162 *De Vos* v *Minister of Justice and Constitutional Development* CC case at [39].where it is pointed out that these safeguards are put in place to protect the accused's right to freedom and prevent unfair depravation of his freedom.

163 There has been a rapid increase in referrals for fitness to stand trial since the Mental Health Care Act came into force. This is according to data from Sterkfontein hospital as reported on by Schutte 2013 *South African Journal of Bioethics and Law* 64 at 67. The reasons for the increase in referrals are not clear.

164 Section 77(1) of the Criminal Procedure Act reads as follows: "If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79."

165 Section 77(1) of the Criminal Procedure Act. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-1. Also see Louw in *Psycholegal Assessment in South Africa* at 42. Similar provisions were contained in Legislation of the Cape, Act 35 of 1891, the predecessor of the Mental Disorders Act. Also see Kruger *Mental Health Law in South Africa* at 159 who indicates that this was the case even on the earliest versions of the Criminal Procedure Act and further points out at 163 that the wording of the section leaves no doubt that the legislature foresaw that the issue of fitness may arise later in the court proceedings as is evident from the use of the words "at any stage of criminal proceedings". The issue may be raised prior to entering a plea or subsequent thereto as long as it is done before sentencing. See Africa in *Psychology and Law* at 387.

166 The possibility that an accused has a mental illness that may have affected his ability to follow the court proceedings, may even be raised after the accused has been found guilty. See Louw in *Psycholegal Assessment in South Africa* at 42. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 225. If the issue of fitness to stand trial is raised after the accused was found guilty, the conviction must be set aside and if the accused is found unfit to stand trial after the necessary observation, be declared a state patient. See further *S* v *Gouws* 2004 (2) SACR 512 (W) at 517A-D. If the accused entered a guilty plea and he is found guilty but the court finds that the accused is unfit to stand trial, the matter must be dealt with as if a plea of not guilty was entered. See, however,

fitness assessment.[167] If the accused pleads guilty and the fitness issue is raised after conviction, but before sentencing, he shall be deemed to have pleaded not guilty.[168]

The issue of fitness to stand trial can be raised by the prosecutor,[169] the defence [170] or the court itself.[171] If the issue is raised by the defence, it is usually raised before the commencement of the trial.[172] The accused's legal representative may inform the court if it

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Joubert JJ (Ed) Geldenhuys T, Swanepoel JP, Terblanche SS and van der Merwe SE *Strafprosesreg* 11th ed (Juta Cape Town, 2014) at 284 who contends that the issue of fitness to stand trial may even be raised after sentencing.

167 Stevens 2013 *THRHR* 252 at 252. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-5.

168 Section 77(6)(b) of the Criminal Procedure Act. See Kruger *Heimstra Suid-Afrikaanse Strafproses* at 231. See further Du Toit et al *Commentary on the Criminal Procedure Act* at 13-7. Also see Joubert *et al Strafprosesreg* 11th ed at 279, 284. Such an accused shall not be entitled to an acquittal or conviction in respect of the charges brought against him. See section 106(4) read with section 77(6) of the Criminal Procedure Act.

169 Also referred to as "the state" as the state prosecutes in criminal matters. See Kruger *Mental Health Law in South Africa* at 162. Also see Louw in *Psycholegal Assessment in South Africa* at 42. See further Cassim 2004 Codicillus 17 at 20. See further *S* v *Morake* 1979 (1) SA 121 (B). Only a small percentage of referrals are requested by prosecutors. According to the study conducted by Kaliski, Borcherds and Williams 1997 *SAMJ* 1351 at 1353, only 8% of all referrals to the Valkenberg Hospital, were requested by the prosecutor. Kruger *Heimstra Suid-Afrikaanse Strafproses* at 230 points out that the right of the state, through the prosecutor, to raise the issue of fitness to stand trial of the accused, may be contrary to the Constitutional values of dignity and the right to freedom of the person.

170 Louw in *Psycholegal Assessment in South Africa* at 42. Kruger *Mental Health Law in South Africa* at 162 states that the issue of fitness is usually raised by the defence or by the accused himself if the latter is unrepresented. The position seemed to have changed as according to the study conducted by Kaliski, Borcherds and Williams 1997 *SAMJ* 1351 at 1353, only about 18% of all referrals were requested by the defence. The accused himself may also request a referral although this rarely happens and it only happened in 5.7% of the cases considered by Kaliski, Borcherds and Williams. Schutte 2013 *South African Journal of Bioethics and Law* 64 at 66, 67 in their study conducted at Sterkfontein hospital, found that all of the accused persons in their study who raised the issue of fitness themselves, were in the end found fit to stand trial. Schutte submits that an accused's own account of his mental illness should not be regarded as sufficient grounds for referral for observation for fitness to stand trial (at 67).

171 Louw in *Psycholegal Assessment in South Africa* at 42. Also see Kruger *Mental Health Law in South Africa* at 162. See however Kruger *Heimstra Suid-Afrikaanse Strafproses* at 226 who cautions that the implications of referral for fitness to stand trial should be considered carefully before a court orders such referral. There could be implications for the accused in the sense that he may spend significantly more time in the criminal justice system if he is referred for a fitness assessment where he is accused of a minor offence, as opposed to the time he would have spent in the criminal justice system had the issue of fitness to stand trial not been raised. Kruger also points out that there are cost considerations as a fitness assessment in 2005 cost the community approximately R80 000.00. Also see Burchell *South African Criminal Law and Procedure* at 283. See, however, Cassim 2004 Codicillus 17 at 20 who opines that the court will be forsaking it's duty if it did not raise the fitness issue when reasonable grounds exist and that such failure could impact on the accused right to a fair trial. According to Kaliski, Borcherds and Williams 1997 *SAMJ* 1351 at 1353, 1354, 21.6% of referrals to the Valkenberg Hospital are initiated by Magistrates but that many of the accused referred to observation did not know who actually requested the assessment. In this particular study, only eight accused were referred for observation because their behaviour in court seemed disordered. Of these eight accused, only two were found to have a mental illness.

172 Kruger Mental Health Law in South Africa at 162. Also see Du Toit et al Commentary on the

is not possible to consult with the accused due to his suspected mental state.[173] In such an instance, the court can order that the accused be assessed for fitness to stand trial.[174] No provision is made for a special plea of "non-triability", but the issue of triability may also be raised by the legal representative of the accused at the stage when the accused is asked to enter his plea.[175]

Referral for a fitness assessment can further occur by agreement between the prosecutor and the legal representative of the accused, where the latter approach the prosecutor with the suggestion that a joint application is lodged for the accused to be assessed for fitness.[176]

As indicated above, fitness assessments can also be ordered by the court of its own accord. Although magistrates are capable of identifying an accused in need of a fitness assessment, they often neglect to explain the process to the accused.[177] Research shows that some accused sent for fitness assessments are unaware of why they have been sent to a psychiatric hospital.[178] Amendments to the Criminal Procedure Act addressed this concern and introduced measures to ensure legal representation for any accused who is subjected to the procedures in terms of section 77 and 78 of the Criminal Procedure Act if the lack of such representation could be detrimental to the accused.[179] The legal representative could then assist in explaining the process and the reason for referral to a

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Criminal Procedure Act at 13-3.

173 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 225. Where an accused is referred for a fitness assessment because he cannot communicate property with his attorney (it is obviously the attorney that makes this claim) suspicions have been raised that such a referral is sometimes merely a tactical move by the defence to delay matters. See Schutte 2013 *South African Journal of Bioethics and Law* 64 at 67.

174 In terms of section 77 of the Criminal Procedure Act.

175 Kruger Mental Health Law in South Africa at 163.

176 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 225 where it is explained that this approach can assist the court a great deal in that it eliminates the necessity of calling witnesses at this point and no trial preparation is required.

177 This is particularly concerning, bearing in mind that a large number of those sent for fitness assessments in the past, did not have legal representation to explain the proceedings or purpose of the assessment to him. See Kaliski, Borcherds and Williams 1997 *SAMJ* 1351 at 1354 where 60% of those sent for observation to the Valkenberg Hospital in this particular study, did not have legal representation. It was also found however, that legal representation did not result in greater awareness or knowledge of the reason for the observation on the part of the accused.

178 Kaliski, Borcherds and Williams 1997 *SAMJ* 1351 at 1354.

179 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 223 explains that section 7 of the Criminal Matters Amendment Act 68 of 1998 provides that legal representation at the expense of the state has to be provided to an accused who is subjected to the procedures under section 77(1) and 78(1) of the Criminal Procedure Act 51 of 1977 if the lack of legal representation will cause gross injustice. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-6 who points out that legal representation must be arranged for the accused where "substantial injustice" will occur if this is not done.

psychiatric hospital to the accused.

The accused has to be given an opportunity to be heard prior to referring him for a fitness assessment.[180] Resultantly, an order for a fitness assessment may not be made in the absence of the accused.[181]

3.3.2 Grounds for ordering a fitness assessment

The court must base its decision to refer an accused for a fitness assessment on a factual or medical basis, indicating that the accused may suffer from a condition that renders him incapable of understanding the proceedings.[182] There must be a mental illness or mental defect present.[183]

When the court considers whether an accused should be referred for observation in terms of section 77, the court does not apply a strict test.[184] If there is any doubt about the accused's fitness to stand trial, such an accused must be sent for a fitness assessment.[185] There is no onus of proof on the accused at this point to prove that he has a mental illness

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180 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 226. Also see *S* v *Kahita* 1983 (4) SA 618 (C) at 620E. Also see *S* v *Malcolm* 1998 (1) SASV 577 (OK) at 581G-J.

181 *S v Kahita* 1983 (4) SA 618 (K) and *S* v *Eyden* 1982 (4) SA 141 (T). Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 248.

182 *S* v *Dlali* (3/2015) [2015] ZAECBHC 2 (27 February 2015) at [18] where it is stated that: Before a court can refer an accused for observation whether in terms of section 77 (1) or 78 (2), it must be satisfied as to the existence of a factual or medical basis for the allegations of lack of fitness to stand trial and or of criminal incapacity." See Kruger *Heimstra Suid-Afrikaanse Strafproses* at 226. The author is of the opinion that the court will opt for a psychiatric observation of the accused where there is "gegronde twyfel" about the accused's ability to follow the proceedings. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-4. Also see in general *S* v *Mogorosi* 1979 (2) SA 938 (A) 941H-942A, *R* v *Mfuduka* 1960 (4) SA 770 (C); *S* v *Makoka* 1979 (2) SA 933 (A) 937G. Also see *S* v *Mabena* 2007 (1) SACR 482 (SCA) at [16]. See however Kruger *Mental Health Law in South Africa* at 163 who opines that the court need not obtain medical evidence before referring an accused for observation, but that in practice, the district surgeon or other medical practitioner would usually have examined the accused by the time the court has to make a decision as to if a person will be referred for observation or not.

183 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 226. This requirement can be distinguished from the requirements to refer an accused for psychiatric observation for purposes of determining his criminal capacity in terms of section 78(1) of the Criminal Procedure Act in that, for referral in terms of section 78(1), a mental illness or defect need not be present and referral can be done for "any other reason" which according to Kruger may include the averment of automatism at the time of commission of the alleged offence.

184 Kruger Heimstra *Suid-Afrikaanse Strafproses* at 249.

185 Joubert *et al Strafprosesreg* 11th ed 251 who stress that such a person should in particular be referred for observation where there is doubt about his mental capacities and such a person is not legally represented. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 249. Also see Kruger *Mental Health Law in South Africa* at 164.

that renders him unfit to stand trial.[186]

Some accused are simply referred for observation because of previous contact with the mental health care system.[187] Past contact with the mental health care system does not imply that the accused is suffering from a mental illness at the present time. This is particularly concerning if it is considered that the assessment for fitness to stand trial specifically focuses on the current ability of the accused to understand the proceedings and is not a retrospective inquiry.[188] On the other hand, if such previous contact with the mental health care system creates doubt with the presiding officer about the accused's fitness, it can be argued that he will be obliged to order a fitness assessment. A reasonable possibility that the accused may be suffering from a mental illness or defect is sufficient for the obligation of referral to arise.[189]

Once the issue of the accused's fitness is raised, the court is obliged to order a fitness assessment of the accused. There is no discretion in this regard, as is apparent from the wording of section 77(1) of the Criminal Procedure Act.[190] The content of the order is discussed below.

3.3.3 Content of order for a fitness assessment

The court must ensure that the order contains clear directions pertaining to if the accused has to be assessed for fitness to stand trial in terms of section 77 or for criminal capacity in terms of section 78, or for both.[191] In practice, the trend seems to be to request an

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186 Joubert *et al Strafprosesreg* 11th ed at 284.

187 Kaliski, Borcherds and Williams 1997 *SAMJ* 1351 at 1354.

188 Kaliski, Borcherds and Williams 1997 *SAMJ* 1351 at 1354. Also see Africa in *Psychology and Law* at 387. See further Kruger *Mental Health Law in South Africa* at 164 and see Pillay 2014 *South African Journal of Psychology* 377 at 378.

189 Kruger *Mental Health Law in South Africa* at 163. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-4. Also see *S* v *Tom and Others* 1991 (2) SACR 249 (B) 250H-251C.

190 The relevant part of section 77(1) reads that "…the court shall direct that the matter be enquired into and be reported on…" [my emphasis and underlining]. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-3 where it is stated that the court "must" order an investigation into the mental state of the accused and cause a report on this issue to be lodged with the court subsequent to the said investigation. See further this source at 13-5. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 249.

191 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 226. Also see Kruger *Mental Health Law in South Africa* at 164. See further section 79(4) of the Criminal Procedure Act that sets out the detail that should be in the report eventually drafted by the mental health care practitioner which includes a finding on if the accused is fit to stand trial or not. The court ordering such a referral has to complete a form J138A that constitutes a warrant, indicating the names of the psychiatrists who should conduct the assessment for fitness and/or criminal capacity. The form is attached at the end of this research as Annexure A.

assessment in terms of both these sections rather than just one or the other.[192] Even though criminal capacity, or the lack thereof, is irrelevant once an accused is found unfit to stand trial, an accused may regain his fitness, at which point the trial will commence, and criminal capacity may then become relevant. The practice to conduct both assessments simultaneously probably emerged as a cost- and time-saving initiative.[193]

The place where the assessment should take place should be named or, the nature of the place where the relevant assessment should take place should be clearly described.[194] Where psychiatric observation of an accused is ordered, a warrant is issued together therewith for the transfer of the accused to the psychiatric hospital.[195]

It should be noted that section 79(2)(a) of the Criminal Procedure Act, which creates the mechanism for referral for the fitness assessment, states:

> *a "court* ***may*** [my emphasis]. *for the purposes of the relevant enquiry into the accused's fitness commit the accused to a psychiatric hospital or to any other place designated by the court, for such periods, not exceeding thirty days at a time.* [196]

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192 Calitz FJW, van Rensburg PHJJ, Fourie C, Liebenberg E, van den Berg C and Joubert G "Psychiatric evaluation of offenders referred to the Free State Psychiatric Complex according to sections 77 and 78 of the Criminal Procedure Act" 2006 (12) *SAJP* 47-50 at 49 explain that in this study, only 5.3% of the referrals were for fitness assessments only. The majority of the referrals were in terms of both section 77 and 78 of the Criminal Procedure Act. The reason for this is probably because it is convenient for the presiding officer to have the assessment conducted in respect of both sections simultaneously. Also see Pillay 2014 *South African Journal of Psychology* 377 at 378.

193 The practice to refer the accused to be assessed in terms of both section 77 and 78 possibly emerged because it is impossible for the court as a non-expert in mental health, to establish if the suspected illness might have an impact on fitness alone or on criminal capacity as well. The assessment for criminal capacity should further probably not be postponed since this inquiry is retrospective and a passage of time may eradicate chances of determining with accuracy what the accused's state of mind was at the time of commission of the alleged offence. Pillay 2014 *South African Journal of Psychology* 48 at 50 confirms that the assessment for criminal capacity becomes more complex the longer time lapses between the alleged offence committed and the assessment.

194 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 226. The assessment should take place at a psychiatric institution unless such institution is not available. It is not clear what the cost effective alternatives to an assessment for fitness to stand trial that takes place at a psychiatric institution are. Also see *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [71] where it is stated that the name of the psychiatric institution should be indicated on the J138A form (See Annexure A at the end of this research). The superintendent of this institution shall conduct or appoint someone to conduct the observation on behalf of the court. The form also provides for two names of psychiatrists to be inserted – presumably those that should be appointed for the accused and the one appointed for the state.

195 *S* v *Pedro* 2015 (1) SACR 41 (WCC) [71]. A form J138A is used for these purposes. This form is not issued as part of regulations to the Criminal Procedure Act but was developed by the Department of Justice over time to ensure compliance with the prescripts of the Criminal Procedure Act. This form has dedicated spaces where the names of the psychiatrists that must perform the assessment has to be filled in. See Annexure A at the end of this research.

196 Section 79(2)(a) of the Criminal Procedure Act.

It is clear from the wording of the Act that there is scope for an accused's fitness assessment to be conducted at a place other than a psychiatric hospital.[197] In practice, however, it seems to be the default position to refer an accused to a psychiatric institution for a fitness assessment. This practice contributes to delays in assessments since there are only ten facilities across South Africa where court-ordered psychiatric observations are conducted.[198]

The order must further state the duration of the initial assessment period, which may not exceed 30 days.[199] The initial assessment period may be extended by another 30 days [200] in the absence of the accused unless the accused or his legal representative requests that the accused be present.[201] The accused has to be present for any further extensions of the assessment period.[202]

Since criminal proceedings are conducted in both the magistrate's court and the high court, a question that arises is if a court conducting such criminal proceedings automatically has jurisdiction to order a fitness assessment if and when the issue of fitness arises in such court? This issue is briefly considered below.

3.3.4 Jurisdiction of court to make an order for a fitness assessment

In *Siko,* it was held that if a court lacks jurisdiction to adjudicate the particular offence, the court similarly lacks jurisdiction to refer the accused for psychiatric observation.[203] It does, however, often happen in practice that an accused is referred by the magistrate's court for assessment, knowing that the case will eventually be heard by the high court.[204] In *Siko,*[205]

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197 This section may support the practices of Mental Health Courts to have the fitness of the accused assessed at the court itself by a multidisciplinary team. This could result in both time and cost savings. More details about the process followed by Mental Health Courts to assess the triability of mentally ill accused persons at court, is discussed in chapter 4 and 5 of this research.

198 Pillay 2014 *South African Journal of Psychology* 48 at 51. This is as at 2012.

199 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 227. Also see section 79(2)(a) of the Criminal Procedure Act.

200 Section 79(2)(b) of the Criminal Procedure Act. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 249.

201 Section 79(2)(b) of the Criminal Procedure Act. See Joubert *et al Strafprosesreg* 11th ed at 251. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 227, 249. Prior to the insertion of section 97(2)(b) by Act 4 of 1992, there was uncertainty as to if the accused had to be present when the period for his detention for purposes of observation, is extended. See Kruger *Mental Health Law in South Africa* at 164 footnote 82 for a discussion of the uncertainty that existed prior to the amendment of the Criminal Procedure Act which saw the insertion of section 79)2)(b). Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-27.

202 See section 158 of the Criminal Procedure Act. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 227.

203 See *S* v *Siko* 2010 (2) SACR 406 (ECS) at {1], [9].

204 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 250 where it is pointed out that in such an instance

for example, the accused was charged with murder. Since the district magistrates court lacks jurisdiction to hear a murder case, the magistrate was of the view that the magistrates court also lacks jurisdiction to refer the accused for psychiatric observation.[206] The magistrate was of the opinion that this task was reserved for a court with the necessary jurisdiction over the relevant charge. The magistrate's opinion was confirmed by the high court.[207]

Du Toit *et al* [208] disagree with this approach on the basis that section 77(1) is wide enough to allow a magistrates court to refer a murder accused for assessment even if it lacks jurisdiction to hear the actual case. Du Toit *et al* opine that it is only the finding on the triability of the accused that has to be made subsequent to the assessment in terms of section 79 that is reserved for a court with the jurisdiction to adjudicate the actual charge.[209] The magistrate's court can thus, order an assessment even if it lacks jurisdiction to conduct the trial.

Du Toit *et al's* view is bolstered by the wording of section 77(6)(a), which states that:

> *If the court, which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence….*

This confirms that the jurisdiction of the court is only relevant where a finding of unfitness is made and not when the initial referral for such an assessment is made. This view is supported by the fact that no mention is made of the jurisdiction of the court in section 77(1) in terms whereof an assessment order is made.

The decision by a magistrate to refer an accused for psychiatric observation is not reviewable by a judge in chambers in terms of section 304 of the Criminal Procedure Act.[210]

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the report containing the findings of the fitness assessment is sent to the relevant high court rather than back to the magistrates court in order to avoid delays in the trial.

205 2010 (2) SACR 406 (ECB).

206 See *S* v *Siko* 2010 (2) SACR 406 (ECB) at [9] footnote 5, where the court points out that: "A district court does not have the necessary jurisdiction to hear a charge of murder. (See section 89 of the *Magistrate's Courts Act* No. 32 of 1944) Although Section 110 of the *CPA* provides that if the accused does not plead that the court has no jurisdiction, that the court may dispose of the matter, this relates mainly to territorial jurisdiction. It can not add to the jurisdiction of the court as far as offences are concerned (See *S* v *M* (1979 (2) SA 959 T) and a person who does not have capacity to act could in any event not consent to the court's jurisdiction".

207 *S* v *Siko* 2010 (2) SACR 406 (ECB) at [9].

208 Du Toit Commentary on the Criminal Procedure Act at 13-4.

209 The jurisdiction as allocated by section 75 of the Criminal Procedure Act. Also see Du Toit *Commentary on the Criminal Procedure Act* at 13-4.

210 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 226. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-7. See in particular *S* v *Ramokoka* 2006 (2) SACR 57 (W) (Hereinafter referred to as "*S v Ramokoka*") where Willis J expresses his view on reviews of section 77 orders

This is illustrated by *S* v *Wills* [211] where the magistrate referred the accused for a fitness assessment. The finding of the psychiatrists was that the accused was unfit to stand trial.[212] The magistrate was of the view that, in terms of section 77(6)(a), a judge in chambers had to decide what should happen with the accused forthwith, including if the accused should be detained as a state patient. Hartzenberg J, however, found that the initial decision to refer an accused for observation is not reviewable.[213]

Once the order for a fitness assessment is made, the accused is usually transferred to a psychiatric institution for purposes of the fitness assessment.[214] The accused often has to wait for long periods in order for a bed in the relevant psychiatric institution to become available. The test employed to establish fitness or the lack thereof is discussed below.

3.4 Test for fitness to stand trial

3.4.1 Introduction

An accused will be unfit to stand trial if he, by reason of mental illness or mental defect, is not able to understand the proceedings in order to make a proper defence.[215] It is obvious that the first element that has to be established during the fitness assessment is whether a mental illness is present. Having said that, bear in mind that the mere fact that someone is diagnosed with a mental illness does not in itself render the person unfit to stand trial.[216] It has to be established that the symptoms of the mental illness impair the functioning of the

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taking into consideration the provisions of the Mental Health Care Act 17 of 2002 that came into force in December 2004. See further in general *S* v *April* 1985 (1) 639 (NC).

211 [1996] 4 All SA 270 (T), 1996 (2) SASV 105 (T). (Hereinafter referred to as *S* v *Wills.)*

212 *S* v *Wills* at 106E-F.

213 *S* v *Wills* at 108B-C.

214 A warrant is issued with the order for assessment – J138A. An example of such warrant is attached as Annexure A to this research.

215 Section 77(1) of the Criminal Procedure Act. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-3, 13-5. See further Burchell South African Criminal Law and Procedure 282.

216 Africa in *Psychology and Law* at 389. Also see Kaliski, Borcherds and Williams 1997 *SAMJ* 1351 at 1352 where it is stated that the practice at the time (in the 90's) was that most psychiatrists would indicate that an accused is unfit to stand trial where a mental illness or defect has been diagnosed as there were no clear guidelines on how the assessment for fitness to stand trial should be assessed. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 220 who points out that the court may take the fact that a person is receiving treatment in a psychiatric institution in terms of the Mental Health Care Act into consideration when considering if an accused is indeed fit to stand trial. The author points out that it is indeed possible for a court to find that an accused is fit to stand trial, despite the fact that he is receiving mental health care treatment and rehabilitation services in terms of the Mental Health Care Act. Also see Kruger *Mental Health Law in South Africa* at 168 for the position prior to the 2002 Mental Health Care Act where he pointed out then already that an abnormality does not necessarily affect triability. See Pillay 2014 *South African Journal of Psychology* 48 at 50 who explains that the diagnosis is not the most important aspect here but rather the symptoms and the functional implications of the symptoms.

individual to such an extent that he is not able to understand the court proceedings or be in a position to give proper instructions to his legal representative.[217]

A common-sense approach to the determination of fitness to stand trial is promoted [218] even though there are two distinct elements that must be investigated during the fitness assessment. These two assessment elements will be discussed below.[219]

3.4.2 Ability to follow the proceedings

"Ability to follow the proceedings" is understood as a general understanding of the court proceedings.[220] This first element of the test does not require exact knowledge and understanding of the technicalities of criminal procedural law.[221] Ignorance of the court procedures will not render a person unfit to stand trial, as ignorance can be supplemented with explanations and further knowledge.[222] Only when an incapacity cannot be remedied should the accused be deemed unable to follow the proceedings.[223]

The inability to follow court proceedings may be due to a mental illness as contemplated in section 77(1) of the Criminal Procedure Act. This is, however, not the only reason why an

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217 Africa in Psychology and Law at 389. Also see Pillay 2014 South African Journal of Psychology 48 at 50.

218 Du Toit et al Commentary on the Criminal Procedure Act 13-5.

219 If an accused does not fulfil the requirements in terms of either of the elements, he will be deemed unfit to stand trial.

220 See Snyman 1988 *Acta Juridica* 128 at 133. Snyman points out that this position is in line with the Australian point of view and quotes from an Australian case, which sets out the concept of fitness to stand trial very eloquently: The supreme court in *R* v *Presser* [1958] VR 45 at 48 summarised it as follows: "He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceedings, namely that it is an enquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He *needs* to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge". This approach is in line with the one followed in the United States of America, where the court emphasised in the case of *Dusky* v *United States* 363 US 402 (1960), that, when determining if an accused is fit to stand trial or not, it is insufficient to ask if the accused is orientated as to time and place and if he at least has some recollection of events. The court stated at 788 that the test is rather: "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as a factual understanding of the proceedings against him."

221 Du Toit et al *Commentary on the Criminal Procedure Act* at 13-5.

222 Snyman 1988 *Acta Juridica* 128 at 132.

223 Snyman 1988 *Acta Juridica* 128 at 132. He adds that incapacity for purposes of fitness to stand trial, refers to a "total incapacity" which cannot be supplemented by for example an explanation by the legal representative of what the court proceedings entail. Ignorance of the court proceedings can be supplemented by an explanation of the proceedings and is therefore in itself not incapacity to render a person unfit to stand trial.

accused might have difficulty following the proceedings or give instructions to his legal representative. Other reasons could be due to a physical condition of the accused, such as being deaf-mute.[224] According to older legislation [225] in South African law, a person who was unable to understand criminal proceedings *for any reason* fell under the jurisdiction of the Mental Disorders Act.[226] The implication of this was that a person who was not able to follow the proceedings, for any reason whatsoever (including being deaf-mute), regardless of whether a mental illness or defect was present, could be found unfit to stand trial and declared a state president's patient.[227] It was later accepted that a person is not mentally ill on account of being deaf-mute.[228] There is no reason why a deaf-mute person should be regarded as unfit to stand trial because the inability to communicate can be remedied by arranging for a translator in order to enable the person to understand the proceedings.[229]

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224 Snyman 1988 *Acta Juridica* 128 at 136. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 229. Deaf-mute persons were regarded as being mentally ill in English law, simply because they could not communicate on the basis of which they were detained in terms of the Criminal Lunatics Act 1800. Also see Kruger *Mental Health Law in South Africa* at 166. See further Snyman 1988 *Acta Juridica* 128 at 137 and 138. The common law test for fitness to stand trial in English law, was set out in the case of *R* v *Prichard* [1836] 7 C & P 303 at 304-5; 173 ER 135 where it was intimated that a person who cannot communicate property regarding the case should be regarded as of unsound mind, regardless of if they can communicate properly on other issues. English Courts did not readily accept that deaf-muteness equates to a mental illness or worse yet, to insanity. See, however, *S* v *Mamyila* 1913 TPD 464 at 467 where the position in the English law at the time was explained as that a person that is deaf and dumb from birth and for that reason unable to understand the proceedings, will be considered "insane". Also see the English case of *Berry* 1 QB (1875-1876) 447 where the court concluded that a deaf-mute person was insane.

225 Section 164 of the Criminal Procedure Act of 1955.

226 Section 28 of the Mental Disorders Act.

227 Kruger *Mental Health Law in South Africa* at 167. This result was due to the provisions of section 164 of the 1995 Criminal Procedure Act and section 28 of the Mental Disorders Act that had to be considered in conjunction with each other. The courts interpreted these sections to mean that a person could be declared a State President' Patients merely on the ground that he is unable to follow the proceedings rather than that the relevant person must suffer from a mental illness or defect as a prerequisite for being declared a State President's Patient. The rule that a deaf-mute person should be treated as mentally defective, was laid down in the cases of *S* v *Kansiyo* 1930 SR 127 and *S v Chinzenda* 1945 SAR 175. Also see Kruger *Mental Health Law in South Africa* at 167. In Roman-Dutch law, a deaf-mute person was not regarded as mentally ill. See *S* v *Mamyila* 1913 TPD 464. Also see Kruger *Mental Health Law in South Africa* at 166 footnote 83 where reference is made to some older case law and sources where this position in the Roman-Dutch law is confirmed.

228 It was later agreed that there is no provision that states that a person that cannot be tried should be treated as *insane*. See *In re Pupu* 1959 (3) SA 480 (SR, B) at 481H. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-5. Also see Kruger *Mental Health Law in South Africa* at 167. Subsequent to the judgment in *Pupu supra* the court still declared deaf persons State President's Patients in the absence of evidence that such a person suffered from a mental illness or mental defect. This was the case in *S* v *Maxaba* 1964(1) SA 645 (C). The accused in this case was deaf and illiterate and there was no evidence that he suffered from a mental illness or defect (at 645F and 646F).

229 Kruger *Mental Health Law in South Africa* at 166. If all efforts are not made to interpret the proceedings for the deaf-mute person, this could constitute a violation of his right to a fair trial and could constitute unfair discrimination on the ground of disability in accordance with section 9 of the Constitution. In *Pachcourie* v *Additional Magistrate, Ladysmith* 1978 (3) SA 986 (N) 991H it was stated that a deaf-mute person is not fit to stand trial if he is unassisted.

Current legislation does not allow a referral for a fitness assessment merely because someone is deaf-mute. It is only when the deaf-mute person suffers from a mental illness or mental defect that the provisions of section 77(6) find application.[230] In these cases, a deaf-mute person with a mental illness may be declared a state patient. [231]

The fact that an accused suffers from amnesia will not render him unfit to stand trial unless the amnesia is a symptom of a mental illness.[232] Similarly, the mere fact that a person has an intellectual disability will not automatically render him unfit to stand trial.[233] The triability of such an accused also depends on other factors such as speech and language proficiency, reasoning ability and level of education.[234]

The second part of the test focuses on the ability to conduct a proper defence which entails being able to instruct one's legal representative properly.

3.4.3 Ability to conduct a proper defence

This simply means that the accused must be able to answer to the charges against him [235]

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230 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 229 where a deaf-mute accused cannot communicate, it has been submitted that this person should be set free. Concerns have, however, been raised about this practice where there is *prima facie* evidence that the deaf-mute accused committed a serious offence. A deaf-mute accused or witness may make use of an interpreter who can convert sign language used by the deaf-mute person into audible language. Such testimony will be regarded as *viva voce* evidence for purposes of section 161 of the Criminal Procedure Act.

231 *S* v *Matjhesa* 1981 (3) SA 854 (O). Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-5.

232 The person will be unfit to stand trial due to mental illness and not amnesia per se. Snyman 1988 *Acta Juridica* 128 at 135. Also see this source at 128 at 135 and the sources listed there, which includes foreign case law that supports this view.

233 Calitz FJW, van Rensburg PHJJ, de Jager PP, Olander ML, Thomas L, Venter R and Wessels GA "Psychiatric evaluation of intellectually disabled offenders referred to the Free-State Psychiatric Complex, 1993-2003" 2007 (13) *SAJP* 147-1520 at 148 report that common denominators between most members of this group, was low levels of education and unemployment. The crime that was mostly committed by this group of intellectually disabled accused was rape, followed by murder and indecent assault. Theft and housebreaking was the most common crimes against property committed by this group (see 150 of this source). It is noteworthy that the type of crimes committed by this group of intellectually disabled accused, are mostly sexual crimes where as those committed by mentally ill accused are not. We can deduce that this group of intellectually disabled accused who mainly commit crimes against the person, poses a bigger risk to society than accused persons with mental illness. See Schutte 2013 *South African Journal of Bioethics and Law* 64 at 64 where it is stated that the presence of an intellectual disability is a risk factor for violence when compared to an intellectually average person.

234 Calitz *et al* 2007 *SAJP* 147 at 148 opine that once it is established that an individual's language proficiency is acceptable and that he can reason, he is competent to stand trial. They go even further and argue that the presence or absence of a mental illness or intellectual disability, then becomes irrelevant. Also see Pillay 2014 *South African Journal of Psychology* 48 at 50 who points out that the functional implications of the diagnosis of a mental illness is more important in the fitness context than the diagnosis itself.

235 Pillay 2014 South African Journal of Psychology 48 at 50.

and must be able to convey relevant information to enable his legal representative to give advice thereon.[236] The accused must be able to play a constructive role in his trial by giving instructions to his legal representative.[237] The accused must be able to convey the facts upon which he relies to prove his innocence and further be able to evaluate all the evidence given at the trial.[238] The ability to give exact instructions on how the legal representative should conduct his defence is not required.[239]

Where an accused decides to conduct his own defence, the court has to be satisfied that the accused is indeed able to do so. The mere fact that someone might be acting against his own interests by deciding to conduct his own defence does not in itself make him incapable of standing trial.[240]

Snyman [241] warns that the fact that an accused does not have a defence to a charge, or has a bizarre defence, does not automatically mean that the person is unfit to stand trial. Similarly, the fact that someone is unfit to stand trial does not mean that he does not have a defence to the charge.

Some accused persons might find it difficult to communicate due to a language barrier, they might be communicating in a second language, as a result of which their vocabulary might be limited. This is especially so if the level of education of the particular accused is low.[242] Barriers in communicating should be carefully considered before it is assumed that an accused is unfit to stand trial.[243] The mere inability to communicate properly is not necessarily an indication of or the result of a mental illness.[244]

The test for fitness to stand trial as set out above is applied during an assessment period as ordered by the court.[245] The actual assessment process is examined below.

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236 Snyman 1988 *Acta Juridica* 128 at 134.

237 Du Toit et al Commentary on the Criminal Procedure Act at 13-5.

238 Snyman 1988 *Acta Juridica* 128 at 130. Also see Stevens 2013 *THRHR* 252 at 253.

239 Snyman 1988 *Acta Juridica* 128 at 133.

240 Snyman 1988 *Acta Juridica* 128 at 134.

241 Snyman 1988 *Acta Juridica* 128 at 134.

242 Africa in *Psychology and Law* at 392.

243 Africa in *Psychology and Law* at 392.

244 Psychological knowledge about an accused's current intellectual and emotional functioning is therefore relevant in order to accurately determine the accused's fitness to stand trial. See Africa https://www.yumpu.com/en/document/view/17210882/insanitypdf# (Date of use: 10 March 2015) at 3.

245 The order is issued in terms of section 77(1) read with section 79(1) of the Criminal Procedure Act.

3.5 *Assessment of fitness to stand trial*

3.5.1 Introduction

The assessment of fitness to stand trial is conducted in terms of section 79 of the Criminal Procedure Act.[246] The aim of the inquiry during the assessment is to establish if the individual's functioning is impaired by the presence of a mental illness or defect.[247]

The prosecutor must submit a report to the institution where the observation is to take place, containing all relevant information pertaining to the accused, the charges against him and the contact details of the probation officer and the attorney for the accused.[248] The accused must be informed that a report about the observation period will be drafted by those mental health care professionals who conduct the assessment and that he is not obliged to divulge any information during this period.[249]

The duration of the assessment, what it entails, and by whom it is conducted is discussed below. Further, the content of the report that has to be drafted by those who conducted the assessment is discussed hereunder.

3.5.2 Duration of assessment period

Ideally, an accused should be moved to the psychiatric hospital for assessment immediately after the order for assessment is made. In practice, however, accused persons are sent back to prison whilst awaiting the availability of a bed in the relevant

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[246] Section 79 of the Criminal Procedure Act stipulates, i*nter alia,* by whom the accused should be assessed for fitness depending on the type of offence that he is charged with. The section also prescribes the submission of a report by those mental health professionals that conducted the assessment. See Louw in *Psycholegal Assessment in South Africa* at 42. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-1.

[247] Africa in *Psychology and Law* at 388.

[248] Kruger *Heimstra Suid-Afrikaanse Strafproses* at 228. The report has to indicate *inter alia* on who's request the assessment is conducted, the stage of the proceedings at which point the assessment was requested, information about the accused's social circumstances and detail about his family. The report also has to contain detail about the injuries sustained by the victim of the accused as well as the suspected motive for the crime committed. See this source at 228 for a detailed list of the information that should be contained in the prosecutor's report.

[249] Regulation 41(1) of the General regulations of the Mental Health Care Act published under GG R1467 in Gazette number 27117 of 15 December 2004. Also see Kruger Heimstra *Suid-Afrikaanse Strafproses* at 249. The number of mental health care professionals involved in the assessment depends on the seriousness of the crime. If it is a crime involving serious violence, the accused has to be assessed by more than one psychiatrist as provided for in section 79(1). The court may also direct that a report by a clinical psychologist be submitted. See section 79(1)(b)(iv) of the Criminal Procedure Act.

facility where the assessment is to be performed.[250] Mentally ill accused persons are often placed on long waiting lists owing to the scarce facilities at the institutions where psychiatric observations can be conducted.[251] Once a bed is available, the accused will be transferred to the psychiatric hospital.[252]

The assessment period itself shall last for a period not exceeding thirty (30) days at a time.[253] The 30-day period may be extended by a further thirty (30) days.[254]

The Act does not prescribe an assessment period of at least thirty (30) days. There does not seem to be any prohibition against releasing an accused from observation earlier than on the 30th day of the observation period. In fact, most accused are released after approximately 12 days.[255] It seems that assessment can be completed in far less than the 30-day period referred to in the Criminal Procedure Act.[256] This leaves room for shorter

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250 Bateman 2005 *SAMJ* 208 at 208. Section 49D of the Correctional Services Act 111 of 1998 (as Amended by the Correctional Matters Amendment Act 5 of 2011 states, "49D. Mentally ill remand detainees.—(1) The National Commissioner may detain a person suspected to be mentally ill, in terms of section 77 (1) of the Criminal Procedure Act or a person showing signs of mental health care problems, in a single cell or correctional health facility for purposes of observation by a medical practitioner." This presumably refers to observation of the accused person's general health including his mental health and does not refer to the forensic assessment, as that has to be done by a psychiatrist or psychologist for purposes of drafting the report in terms of section 79 of the Act.

251 Pillay 2014 *South African Journal of Psychology* 377 at 378. Also see Pillay 2014 *South African Journal of Psychology* 48 at 48 who states that the waiting period often extends over several months. Also see cases such as *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [2] where it is indicated that the accused had to wait for many months before a bed for observation became available at Valkenberg hospital. In the unreported judgment of *S* v *Vika* (14519) [2014] ZAWCHC 155 (14 October 2014) the accused had to wait 11 months for a bed to become available at Valkenberg hospital [5-6]. In another unreported judgment of *S* v *Dlali* (3/2015) [2015] ZAECBHC 2 (27 February 2015) the accused had to wait approximately 7 months before a bed at the Fort England psychiatric hospital became available.[3-6].

252 Section 79(2)(a) of the Criminal Procedure Act makes provision for the scenario where a person is committed for psychiatric observation whilst in custody. In such a case the section states, "where an accused is in custody when he is so committed, he shall, while he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal." The accused is transported to the psychiatric facility from prison by the SAPS. See Department of Correctional Services "Draft White Paper on Remand Detention Management in South Africa" http://www.dcs.gov.za/docs/landing/White%20paper%20on%20Remand%20Detention%20in%20SA%20Draft%20Final.pdf (Date of use: 26 August 2016) at 52 where it is stated that the SAPS are responsible for transport from prison to the psychiatric institution for purposes of the assessment since they have to produce a form J188 with the name of the facility and the type of assessment required so that the detention centre can register the release as a temporary one.

253 Section 79(2) of the Criminal Procedure Act. Also see Joubert *et al Strafprosesreg* 11th ed at 251.

254 The extension of the period of 30 days may be ordered in the absence of the accused. Section 79(2)(b) of the Criminal Procedure Act. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 249 and further Du Toit et al *Commentary on the Criminal Procedure Act* at 13-27.

255 Pillay 2014 South African Journal of Psychology 48 at 55.

256 Pillay 2014 *South African Journal of Psychology* 377 at 378 points out that not only is the 30-day period too long, in fact the assessment can be completed in a couple of days, but the assessment need not be done on an inpatient basis. The author argues that it is possible to conduct the

observation periods to be ordered.[257] Kruger [258] states that the duration of the observation period has to be limited as far as possible because detention for psychiatric observation can infringe the accused's right to freedom and his right to dignity.

Opinion exists that 30 days is generally excessive for purposes of a psychiatric observation and that the requisite process for assessment can be conducted within a 7-day period in the event of a single psychiatrist assessing the accused.[259] Shorter periods of assessment can lead to a reduction in the waiting period for assessment [260] as it can result in the processing of more cases in a shorter period resulting in a reduction in the number of affected awaiting-trial detainees.[261] A reduction in the number of awaiting trial detainees translates into a cost-saving for the state.[262]

The shortening of the observation period should most definitely be considered for fitness assessments but not necessarily for criminal capacity assessments as it is acknowledged

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assessment on a day-visit or outpatient basis. Also see National Prosecuting Authority of South Africa http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf (Date of use: 17 August 2016) *at* 38 who suggest that a 7-day period is sufficient in the event where the assessment need only be conducted by a single psychiatrist.

257 This is also implied in the Guidelines drafted by National Prosecuting Authority of South Africa http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf (Date of use: 17 August 2016) at 38 where it is explained that the Act does not state that the observation period must last for the entire 30-day period. These guidelines indicate, however, that in a case where an assessment needs to be conducted by a panel of psychiatrists, the 30-day observation period may be justifiable. Where the observation is conducted by a single psychiatrist, 7 days are usually sufficient for the psychiatrist to complete the requisite processes to determine fitness.

258 Also see Kruger Heimstra *Suid-Afrikaanse Strafproses* at 227.

259 The 30-day observation period is also addressed in National Prosecuting Authority of South Africa http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf (Date of use: 17 August 2016) at 38 where the opinion is expressed that the 30-day period may be justifiable where the accused has to be assessed by a panel of experts but that it is indeed excessive in the event where only one psychiatrist is required to conduct the assessment. Also see Pillay 2014 *South African Journal of Psychology* 48 at 54. Also see in general Oosthuizen H and Verschoor T "Verwysing van onverhoorbare beskuldigdes en die daarstelling van 'n verhoorbaarheidvasstellingseenheid" 1993 (6) *SAS* 155-164 who explore alternatives to admitting an accused to a psychiatric institution for purposes of a fitness assessment. These shall be considered later in this research.

260 Reduction in waiting periods for assessment will have a direct impact on the correctional authorities as cases will move faster and there will be fewer awaiting trial detainees. Awaiting trial detainees include accused persons awaiting psychiatric observation. See National Prosecuting Authority of South Africa http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf (Date of use: 17 August 2016)

261 Processing more cases simply means that accused persons will exit the criminal justice system and correctional facilities sooner than is presently the case. National Prosecuting Authority of South Africa http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf (Date of use: 17 August 2016).

262 Less awaiting trial detainees result in a cost-saving for the state in that they do not have to provide food, education, health services and other essentials as guaranteed in section 35 of the Constitution. For details on the cost-saving issue, see National Prosecuting Authority of South Africa http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf (Date of use: 17 August 2016).

that the latter assessments are clinically more complex than fitness assessments [263] and thus may possibly need to be conducted over a longer period than is required for fitness assessments.

3.5.3 Nature of the assessment

These assessments are usually done on an inpatient basis,[264] although the court recently ordered a forensic assessment (for criminal capacity) to be conducted on an outpatient basis.[265] This is a rather new development.[266]

During the 30-day assessment period, the accused is subjected to various examinations and assessments. These assessments include psychiatric interviews, psychological tests and physical examinations.[267] During the interview, a brief history of the accused is taken (purely for background information), and questions are put to the accused to establish if he understands why he has been arrested and if he understands the court proceedings.[268]

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263 Pillay 2014 South African Journal of Psychology 48 at 50.

264 Pillay 2014 South African Journal of Psychology 377 at 377. Also see Pillay 2014 South African Journal of Psychology 48 at 55.

265 The assessment is conducted during day-visits of the accused to the psychiatric facility Pillay 2014 *South African Journal of Psychology* 377 at 377 who refers specifically to the case of Oscar *Pistorius* (*S* v *Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014)) where an order in terms of section 78 was made which entailed that the accused need not be admitted to a psychiatric institution but only needed to attend there every day in order for the assessment to be done. The order is made in terms of section 79, which is also the vehicle for orders in terms of section 77, and there is thus no reason why these outpatient assessment orders should not be made in cases of persons who need to be assessed for fitness to stand trial.

266 It is new in the sense that the court does not usually specifically order that the 30-day assessment must take place on an outpatient or "day-visitor" basis. This has only been ordered in *S* v *Volkman* 2005 (2) SACR 402 (K) and the unreported case of Oscar *Pistorius*: *S* v *Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014). Although day-visit assessment is not commonly used, it is employed in some parts of the country such as the Limpopo province. See Pillay 2014 *South African Journal of Psychology* 377 at 378. It appears that this decision to conduct the assessment on an outpatient basis is taken by the professionals involved as it has been stated that an explicit order for the 30-day assessment to take place on an outpatient basis, has only been made in the two cases stipulated above. Pillay points out however that the day-visit option "does not appear to be generally favoured" (presumably by the professionals involved) which in turn contributes to the long waiting lists as inpatient assessments seem to be the norm.

267 Calitz 2006 *SAJP 47* at 48. See *S* v *Thanda* (140060, CA&R348/2014) [2014] ZAECGHC 100 (7 November 2014) at [8] where the court, referring to the fitness assessment of the accused, explained that: "Their finding was made following a period of observation of the accused for almost a full month, during the course of which she underwent psychiatric interviews, physical and neurological examinations, blood tests, and constant observation by the psychiatric nursing staff.". Also *see* Pillay 2014 *South African Journal of Psychology* 377 at 378 who points out that the forensic assessment includes interviews with the accused and family members of the accused, psychometric tests and reports from multidisciplinary teams on the accused person's behaviour generally and interpersonally. Pillay is of the view that the assessment can be completed in a couple of days even though it entails obtaining all these reports and conducting the stated interviews.

268 Africa in *Psychology and Law* at 390, 391. Also se Calitz 2006 *SAJP 47* at 48. See further Pillay

The evaluation focusses on establishing the accused's current cognitive functioning and levels of consciousness. It also aims to establish whether the accused exhibits psychotic symptoms and whether he is able to understand questions and give reasonable answers thereto.[269]

Many accused persons sent for observation may have existing mental illnesses that require treatment. Previously, these accused persons could only receive treatment, if required, once the observation period was completed.[270] Ethical concerns about this practice have been raised, especially in the case of a seriously mentally ill accused.[271] Mentally ill accused persons undergoing observation may, however, receive treatment for pre-existing medical conditions.[272] If an accused has been receiving mental health care treatment prior to his admission for observation, it would be unethical to stop such treatment, and it should be continued.[273]

2014 *South African Journal of Psychology* 48 at 52 who indicates that a detailed psychosocial history is taken of the accused. The accused is evaluated at least once a week according to Africa in *Psychology and Law* at 390. Also see Kaliski, Borcherds and Williams 1997 *SAMJ* 1351 at 1352 where it is indicated that most accused referred for psychiatric observation at the Valkenberg hospital from January to June 1996, had no idea as to why they have been referred for observation or what the outcome after such observation could possibly be.

269 Pillay 2014 *South African Journal of Psychology* 48 at 51. Other aspects that are investigated are the accused's level of understanding of the charges faced, ability to respond to the charges, that is, admit or deny them, ability to explain his or her role, or non-involvement, in the alleged offence, understanding of the wrongfulness of such an offence, understanding of the plea, the obligation to enter a plea, and the implications thereof, understanding of the court context, including the various role players as well as his own role in the process and finally if the accused has a conceptualisation of possible outcomes.

270 Gagiano CA, Van Rensburg PHJ and Verschoor T "Unnecessary committals for forensic observation: Section 77 and 78 of the Criminal Procedure Act 51 of 1977" 1991 (108) *SALJ* 714-718 at 715. Persons who might therefore be in need of treatment, will not receive same for a period of up to two months – if the observation period is extended by the court once as provided for in the Criminal Procedure Act and more in particular sections 79(2)(a).

271 Gagiano, Van Rensburg & Verschoor 1991 *SALJ 714 at 715.* It has been pointed out that there can be no ethical justification for this, especially in the case of a seriously mentally ill patient who is in need of treatment. Refusing this treatment during the observation period, may have serious implications.

272 Pillay 2014 South African Journal of Psychology 48 at 55.

273 Pillay 2014 *South African Journal of Psychology* 48 at 55. It should be noted that the tendency to refuse medication is much higher amongst mentally ill patients in conflict with the law, possibly because the hope is there that if they do not take the medication, they will stay in hospital for longer and thus avoid prison. See Frailing K "The genesis of mental health courts in the United States and their possible applicability for the United Kingdom" 2008 *C.S.L.R* 63-73 at 65. The position in the United States of America is that those that are institutionalised, have the right to refuse treatment that includes the right to refuse medication. The question remains if those under psychiatric observation by order of the court in terms of the Criminal Procedure Act, may refuse treatment, including the taking of medication? Having regard to the right to access to health care (Section 27 of the Constitution) and the specific provision in the National health Act 61 of 2003 that provides for the refusal of treatment, it is likely that these patients may refuse the treatment. (Section 6 of the National Health Act states that the health care user has a right to be informed and to give informed

3.5.4 Who conducts the assessment?

Section 79 states that where an accused is charged with a violent offence such as murder, culpable homicide or rape, the inquiry into the accused's fitness to stand trial must be conducted by a panel of psychiatrists, one of which is appointed for the accused by the court.[274]

Where the charge relates to an offence other than a violent offence, the accused need only be assessed by a single psychiatrist.[275] The majority of the referrals are for non-violent crimes.[276]

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consent, which includes the right to refuse treatment. The health care user is, however, required to sign a release of liability in the event that he refuses the treatment). It should, however, be bourn in mind that refusal of treatment forms part of the right to informed consent which implies that the person so refusing treatment must be able to fully understand the risks and consequences. (Sections 6 and 7 of the National Health Act contain the provisions of informed consent, which was previously only contained in common law). The lack of mental abilities of the patient may necessitate intervention based on his best interest that may include treatment against his will in which case his consent will be irrelevant.

274 Section 79(1)(b)(iii) of the Criminal Procedure Act states that: "(1) Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on-
(b) where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs-
(iii) by a psychiatrist appointed for the accused by the court; and
The three psychiatrists are the medical superintendent of a psychiatric institution or a psychiatrist appointed by him, a psychiatrist appointed by the court but who is not in the full-time employment of the state and the psychiatrist appointed for the accused by the court as stated above. See Kruger *Heimstra Suid-Afrikaanse Strafproses* at 227 and 248. The prosecutor has to establish from each psychiatrist and the clinical psychologist (if applicable) if he is available to conduct the requested psychiatric evaluation prior to referring the matter to the relevant professionals.

275 Section 79(1)(a) of the Criminal Procedure Act applies in the event of the charge against the accused being one of a minor offence, or one "other than one referred to in paragraph (b)" That is paragraph 79(1)(b) of the Criminal Procedure Act. Also see Schutte 2013 *South African Journal of Bioethics and Law* 64 at 64 who gives example of such offences as including common assault, theft, common robbery and housebreaking. Schutte explains further that odd behaviour of the accused during arrest, in court or during custody was a more prominent reason for referral to a single psychiatrist than the case is with referrals to a panel of psychiatrists. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 227. Also see comments on this topic in National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016) at 38 where it is stated that the 30-day period is excessive where the accused is charged with a minor crime and that a single psychiatrist can usually complete the requisite processes pertaining to the assessment within a 7 day period.

276 Schutte 2013 *South African Journal of Bioethics and Law* 64 at 65 where a study at Sterkfontein hospital conducted in 2010 is reported on. 55% of the referrals in terms of section 79 was for non-violent crimes and thus necessitated an observation by a single psychiatrist only. The remainder 45% required the appointment of a panel of psychiatrists as the charge that the accused faced involved violence. The fact that the majority of mentally ill persons are referred to observations for minor offences, is very relevant for purposes of this research, as most Mental Health Courts that

Those referred for fitness assessments to a single psychiatrist (cases of non-violent crimes) [277] appear to be found unfit to stand trial more often than those referred to panels for observation.[278] This, according to Schutte,[279] proves that those with serious mental illnesses, more often than not, commit minor offences rather than serious offences such as murder. It could, however, also prove that a single assessment psychiatrist errs on the side of caution by rather finding a person unfit to stand trial to ensure that he receives treatment. In the case of a panel of psychiatrists, views are challenged, and arguably only those that are *seriously* unfit to stand trial are identified as such. The fact remains that the majority of accused persons sent for fitness assessment are found fit to stand trial.[280]

Previously only psychiatrists could conduct a fitness assessment.[281] Even though psychologists are qualified to conduct these assessments, they are not by default part of the assessment team and specifically have to be appointed by the court, as is clear from the wording of the Criminal Procedure Act.[282] The court is, however, not obliged to appoint

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originated in other jurisdictions, initially only considered cases of mentally ill persons who committed minor offences. See the detailed discussion of the Mental Health Courts as they originated in Canada and selected states of the United States of America as discussed in chapters 4 and 5 of this research. It is only much later that some Mental Health Courts started to consider more serious offences. See for example the Brooklyn Mental Health Court in the United States of America (as discussed in chapter 5 of this research) where felonies are also considered. Many Mental Health Courts still only consider minor offences.

277 Section 79(1)(a) of the Criminal Procedure Act.

278 Schutte 2013 *South African Journal of Bioethics and Law* 64 at 65-67 point out that a recent study conducted at Sterkfontein hospital found that the majority of accused persons referred for observation for fitness to stand trial with regard to non-violent crimes, were found unfit to stand trial. 55.5% of those referred for fitness assessments for non-violent crimes in this study and who were thus assessed by a single psychiatrist, was found unfit to stand trial. At 66 the author explains that odd behaviour of the accused during arrest, in court or during custody was a more prominent reason for referral to a single psychiatrist than the case is with referrals to a panel of psychiatrists. The study found however that of those assessed by a panel of experts as provided for in cases where serious violence is involved (Section 79(1)(b) of the Criminal Procedure Act.) only 33.3% were found unfit to stand trial. The majority of the accused who were referred to the panel for being unable to instruct counsel, were found fit to stand trial. The defence attorney's difficulty to communicate or get instructions from his client is more commonly associated with referrals to panels of psychiatrist than with referrals to a single psychiatrist.

279 Schutte 2013 *South African Journal of Bioethics and Law* 64 at 67, 68. The author further states that this finding disproves previous studies that averred that persons with schizophrenia for example mostly commit violent crimes, especially murder.

280 See the discussion of the profile of the mentally ill accused in chapter 2 of this research. Also see Kaliski, Borchers and Williams 1997 *SAMJ* 1351 at 1351. Also see in general Calitz *et al 1996 SAMJ* 734-737. See further Gagiano, Van Rensburg and Verschoor 1991 *SALJ* 714-718. See further Schutte 2013 South African Journal of Bioethics and Law 64 at 67. Also see Calitz *et al* 2006 *SAJP* 47 at 49.

281 The position was amended by section 68 of the Criminal Law (Sexual Offences and Related matters) amendment Act 32 of 2007 read with the Schedule relating to Laws amended or repealed by section 68 of the Act. Also see Pillay 2014 *South African Journal of Psychology* 377 at 379.

282 Section 79(1)(b)(iv) of the Criminal Procedure Act states that an accused shall be assessed "(iv) by a clinical psychologist where the court so directs." Also see Kruger *Heimstra Suid-Afrikaanse*

a clinical psychologist to conduct the assessment.[283] It is not clear what criteria will be considered to determine whether the appointment of a clinical psychologist is necessary or not.[284] Pillay [285] laments the fact that psychologists are not appointed regularly in practice in accordance with this section, despite the fact that the legislature clearly acknowledges the capability of a psychologist to conduct the required forensic assessment. He advocates for the routine appointment of clinical psychologists whenever a forensic mental health assessment is ordered by the court in terms of either section 77 or 78.[286]

Section 79(1)(b) of the Criminal Procedure Act is read to mean that three psychiatrists have to observe the person referred for observation in the event of the accused being charged with a violent crime.[287] Previously the requirement that an accused had to be assessed by three psychiatrists only pertained to murder cases but has now been extended to all violent crimes.[288] This requirement could lead to postponement of the court proceedings because the psychiatrists might not always be available on the given court date to explain their findings to the court. Psychiatrists further report problems with regard to logistics, for example, not being informed that the patient has already been transferred to the psychiatric

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Strafproses at 248. Also see Pillay 2014 *South African Journal of Psychology* 377 at 378 who points out that the fact that a psychologist may now also be appointed to the panel, acknowledges the psychologists competence to perform forensic assessments.

283 Pillay 2014 South African Journal of Psychology 48 at 52.

284 Pillay 2014 *South African Journal of Psychology* 48 at 52, 54 explain that courts tend to appoint clinical psychologists in cases where the actions of the accused might be indicative of psychological processes rather than a diagnosable mental illness. For criminal capacity assessments they are appointed when the alleged crime seem particularly emotionally charged, for instance where the accused was stabbed multiple times.

285 Pillay 2014 *South African Journal of Psychology* 377 at 379 who points out that a clinical psychologist is however seldom appointed by the court, despite the provision in the Criminal Procedure Act that provides for it. This practice raises questions about the motive of the legislature in including psychologists as competent persons to conduct forensic assessments as there has been pressure from this profession to be included in the past. Pillay ponders on whether the inclusion was done to pacify the profession or if it was truly done as an acknowledgement of the skills of this profession to assist with forensic assessments. Pillay points out further that 10% of the training of clinical psychologist focusses on forensic mental health and most forensic assessment facilities provide training to psychologists in this regard.

286 Pillay 2014 *South African Journal of Psychology* 377 at 379. He is of the view that it will reduce the waiting lists for purposes of these assessments since there are more psychologists in the country than psychiatrists.

287 Section 79(1)(b) specifically refers to murder, culpable homicide and rape as such violent crimes. Also see in general the case of *S* v *Pedro* 2015 (1) SACR 41 (WCC) where the previous versions of the Criminal Procedure Act with regard to the appointment of the panel of experts to conduct the assessment on the accused are discussed.

288 Bateman 2005 *SAMJ* 208 at 212. Also see Kruger *Mental Health Law in South Africa* at 165 who explain that the initial position was that three psychiatrists were required to assess a person only if the sentence for the charge that the accused faced, was the death penalty. This was prior to the amendment brought about by the Criminal Law Amendment Act 105 of 1997.

hospital for observation.[289] This causes further delays in the process. The general lack of availability of private psychiatrists makes the appointment of three psychiatrists as required by section 79(1) impractical in certain provinces.[290]

Upon a closer reading of section 79 as it currently stands,[291] it appears that where the accused is charged with murder, culpable homicide, rape or another charge involving serious violence, the court must appoint at least two psychiatrists; one acting for the state [292] and one acting for the accused as appointed by the court.[293] A third psychiatrist who should not be in the full-time service of the state may be appointed by the court.[294] Section 79(1) reads as follows: (note in particular the wording of section 79(1)(b)(ii)).

> *(1) Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on-*
>
> *(a) where the accused is charged with an offence other than one referred to in paragraph (b), by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court; or*
>
> *(b) where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs-*
>
> *(i) by the medical superintendent of a psychiatric hospital designated by the*

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289 Bateman 2005 *SAMJ 208 at 212.* Particular reference is made to the Valkenberg Psychiatric hospital in this instance. Those psychiatrists who visit detention centres for purposes of visits with accused persons also reported problems. Detention centres often have difficulty identifying which accused persons have to be psychiatrically observed. This leads to delays in the process as psychiatrists who visit prisons in order to conduct an assessment often have to postpone these appointments as the relevant persons cannot be located for the consultation at the given time. These challenges are acknowledged by the relevant authorities as is evident in Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 85.

290 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 248. Also see *S* v *Lubisi 2003 (2) SACR 589 (T). Also see S* v *Pedro 2015 (1) SACR 41 (WCC)* at [35] where the court points out further that the low tariffs that were offered to private psychiatrists to conduct the court ordered psychiatric assessments, made those psychiatrists that were available unwilling to assist due to the low fee structure.

291 Amended by the Judicial Matters Amendment Act 66 of 2008. Of particular importance is the amendment of section 79 (1)(b)(ii) and the insertion of subsection 13 into section 79. These changes were effected by section 10 of the said amendment Act. These changes were influenced by the shortage of psychiatrists and cost considerations. This is according to Pillay 2014 *South African Journal of Psychology* 48 at 51.

292 Section 79(1)(b)(i) of the Criminal Procedure Act.

293 Section 79(1)(b)(iii) of the Criminal Procedure Act. Also see Schutte 2013 *South African Journal of Bioethics and Law* 64 at 64. See further Pillay 2014 *South African Journal of Psychology* 48 at 51 where it is confirmed that at least 2 psychiatrists must be appointed in the case where there was serious violence involved in the alleged offence.

294 Section 10 of the Criminal Matters Amendment Act 66 of 2008 amended section 79 of the Criminal Procedure Act. See *S* v *Pedro* 2015 (1) SACR 41 (WCC) [24] where the confusion brought about by this amendment is discussed in detail and where the position prior to this amendment and thereafter is discussed.

court, or by a psychiatrist appointed by the medical superintendent at the request of the court;

(ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State unless the court directs otherwise, upon application of the prosecutor, in accordance with directives issued under subsection (13) by the National Director of Public Prosecutions;

(iii) by a psychiatrist appointed for the accused by the court; and

(iv) by a clinical psychologist where the court so directs.

Section 79(13) referred to in section 79(1)(b)(ii) above provides the following:

> *(13) (a) The National Director of Public Prosecutions must, in consultation with the Minister, issue directives regarding the cases and circumstances in which a prosecutor must apply to the court for the appointment of a psychiatrist as provided for in subsection (1) (b) (ii) and any directive so issued must be observed in the application of this section.*

The wording of section 79(1)(b)(ii) appears to indicate that a third psychiatrist is necessary unless it is otherwise ordered. The wording of section 79(13), however, suggests that two psychiatrists will automatically be appointed and that application must be made to have a third psychiatrist appointed. These two provisions seem to be in direct contrast.[295] Be that as it may, it appears that the provisions of section 79(13) are being followed in practice as directives on applying for the appointment of a third psychiatrist have already been issued in accordance with section 19(13).[296]

The court in *S* v *Pedro*, however, indicated that the correct interpretation of these two sections is that application should be made to dispense with the appointment of a third psychiatrist and that any directive issued in terms of section 79(13) should be read with the view to apply whichever criteria is set out therein for dispensing with the requirement to appoint a third psychiatrist.[297] Three psychiatrists are therefore appointed unless an application is brought to dispense with the appointment of a third psychiatrist. This reasoning is followed because section 79(1)(b)(ii), which seems to indicate that three psychiatrists should be appointed, is the dominant provision as far as the appointment of a

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295 See *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [48] where Rogers J, in considering the interpretation problems with the appointment of panels of psychiatrists to conduct court ordered psychiatric observations, mentioned that various interpretation of the current position could lead one to conclude that "….something went wrong in the formulation of s 79(13)". The court analysed the current position after the amendment of the Criminal Procedure Act with regard to the number of psychiatrists that should be appointed for observation of an accused charged with a violent crime.

296 National Prosecuting Authority of South Africa, "Mental Observation Directives" *https://www.npa.gov.za/sites/default/files/Library/Criminal-Procedure-Act-Mental-Observation Directives.pdf* (Date of use: 20 February 2014).

297 *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [60].

private psychiatrist is concerned, and section 79(13) is ancillary thereto.[298]

According to the Mental Observation Directive issued by the National Prosecuting Authority,[299] the prosecution may only apply for the appointment of a third psychiatrist upon the written authority of the Director of Public Prosecutions.[300] Factors that will play a part in the motivation to apply for a third psychiatrist include the seriousness of the offence, the complexity of the evidence, whether the accused person wishes the court to appoint a psychiatrist of his choice; and, the history of the particular accused person (e.g. previous observations of the accused person).[301] According to the *Pedro* judgment, these criteria should be used not to determine in which circumstances a third psychiatrist should be appointed but rather in which cases the appointment of a third psychiatrist can be dispensed with.[302]

It appears, therefore, that the court may appoint a minimum of one psychiatrist in the case of charges of a non-violent nature[303] and a maximum of three psychiatrists, plus a clinical psychologist in cases involving serious violence [304] to conduct the fitness assessment.

It is stated earlier that the inquiry into fitness to stand trial is distinctly different to that into criminal capacity. The fitness assessment is concerned with the current state of mind of the accused and is therefore not retrospective. The state of mind of the accused at the time of the offence is irrelevant for purposes of this assessment. Hence, the offence is not of central importance. The question arises then why we have specific provisions for fitness assessments in terms of the number of professionals that have to assess the accused, depending on the seriousness of the offence? If the inquiry is truly not retrospective, then

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298 *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [59].

299 The directive was issued in 2014 by the National Prosecuting Authority of South Africa, https://www.npa.gov.za/sites/default/files/Library/Criminal-Procedure-Act-Mental-Observation-Directives.pdf (Date of use: 20 February 2014).

300 Section 79(1)(b)(ii), of the Criminal Procedure Act (as amended).

301 These factors are listed in National Prosecuting Authority of South Africa, https://www.npa.gov.za/sites/default/files/Library/Criminal-Procedure-Act-Mental-Observation-Directives.pdf (Date of use: 20 February 2014) at 1.

302 *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [59-60].

303 In the event of the charge against the accused being one of a minor offence, or one "other than one referred to in paragraph (b)" That is paragraph 79(1)(b) of the Criminal Procedure Act. Also see Schutte 2013 *South African Journal of Bioethics and Law* 64 at 64 who gives examples of such offences as including common assault, theft, common robbery and housebreaking. Also see section 79(1)(a) of the Criminal Procedure Act. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 227.

304 Section 79(1)(b)(i) to (iv) of the Criminal Procedure Act. Also see *S* v *Pedro* 2015 (1) SACR 41 (WCC) at {68}. "For all these reasons, I consider that three psychiatrists, including a private psychiatrist, must be appointed when the case falls within s 79(1)(b) unless the court, upon application by the prosecutor, directs that a private psychiatrist need not be appointed, in which case there must be two psychiatrists. In either event, the court may appoint a clinical psychologist."

the seriousness of the offence should not be relevant and should not dictate the number of professionals to assess an accused's fitness. Is a distinction possibly drawn between the fitness assessment for accused persons who are charged with serious versus less serious crimes because a different level of fitness is required from the one group versus the other?

3.5.5 Report drafted after assessment

The Criminal Procedure Act makes provision for expert witnesses to provide reports on the accused's ability or inability to understand and follow court proceedings.[305]

After the assessment period, a forensic conference is held by the mental health practitioners involved where a diagnosis is made, and the final report on the accused's triability is compiled for the court.[306] The report should indicate whether the inquiry was aimed at establishing fitness to stand trial or criminal capacity,[307] the diagnosis [308] and, if the purpose of the inquiry was to establish fitness to stand trial, an opinion on if the accused is fit to stand trial or not.[309] Only one report is drafted for submission to the court, even where there is more than one psychiatrist who conducted the assessment.[310] The accused is entitled to a copy of the report.[311] Where a clinical psychologist was appointed by the

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305 Section 79(3) read with section 79(4) of the Criminal Procedure Act.

306 Calitz *et al* 2007 *SAJP* 147 at 148. Also see section 79(4) of the Criminal Procedure Act that sets out the detail that should be contained in the report submitted to the court by the person who conducted the relevant inquiry. The section reads that: "(4) The report shall- (a) include a description of the nature of the enquiry; and (b) include a diagnosis of the mental condition of the accused; and (c) if the enquiry is under section 77 (1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence; or (d) if the enquiry is in terms of section 78 (2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or mental defect or by any other cause."

307 Section 79(4)(a) of the Criminal Procedure Act.

308 Section 79(4)(b) of the Criminal Procedure Act. Also see Joubert *et al Strafprosesreg* 11th ed at 251. See further Pillay 2014 *South African Journal of Psychology* 48 at 50 who points out that it is not the diagnosis in itself that renders a person fit or unfit to stand trial but that the functional impairment of the individual has to be assessed as well.

309 Section 79(4)(c) of the Criminal Procedure Act. Also see Du Toit et al *Commentary on the Criminal Procedure Act* 13-5 and 13-6.

310 Kruger Mental Health Law in South Africa at 165.

311 Section 79(3) of the Criminal Procedure Act states that: "(3) The relevant report shall be in writing and shall be submitted in triplicate to the registrar or, as the case may be, the clerk of the court in question, who shall make a copy thereof available to the prosecutor and the accused." Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-27. Section 13(3) of the Mental Health Care Act makes provision for a health care provider to temporarily deny a mental health care user access to his health records if disclosure of the information contained in such records will seriously prejudice the user (section 13(3)(a)), or if the disclosure will cause the accused to conduct himself in a manner that may seriously prejudice him or those around him. This limited protection to therapeutic privilege does not seem to be extended to the criminal justice setting, as the Criminal Procedure Act does not contain a similar proviso or reference to the provision in the Mental Health

court, the findings of the clinical psychologist are submitted in a separate report.[312]

The report is considered during a trial-within-a-trial to determine the triability of the accused. If the psychiatric report is unanimous [313] and not contested by the accused or prosecution, it may be accepted by the court without hearing evidence.[314] If the report is not unanimous, the court must decide on the matter by hearing evidence from either party, including the accused, or from the professionals who conducted the inquiry.[315] Evidence may also be heard from persons who were not involved in the inquiry.[316] Any person who gives evidence may be cross-examined.[317] The court may still accept the report after hearing the evidence referred to above.[318]

Misunderstandings often occur between lawyers and psychiatrists when reports do not touch upon certain issues which the lawyer would have liked to have investigated. Lawyers often assume that the mental health care practitioner will investigate a certain issue [319] which lawyers may deem relevant to the particular case. The mental health care practitioner, however, need only assess what is required in terms of the court order that was issued in respect of the accused person's psychiatric observation. There is no

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Care Act.

312 Du Toit et al *Commentary on the Criminal Procedure Act* at 13-30. The report by the panel of psychiatrists appointed under section 79(2)(ii) must be signed by a psychiatrist. The view of the psychologist is submitted in a separate report.

313 This appears to be the case in most instances. See for example Schutte 2013 *South African Journal of Bioethics and Law* 64 at 65 who discuss a study conducted at Sterkfontein hospital. In all cases where more than one psychiatrists had to observe the accused – thus in cases that involved serious violence – the psychiatrists were in agreement on both the diagnosis and the finding as if the accused is fit to stand trial or not or criminally responsible or not.

314 Section 77(2) of the Criminal Procedure Act. See Joubert *et al Strafprosesreg* 11th ed at 251. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 229 who points out that, where the accused does not have legal representation, the court must establish whether the accused opposes the report prior to making an order in accordance therewith, be it that the accused is fit or unfit to stand trial. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-6 and 13-26. See further S v *Sithole* 2005 (1) SACR 311 (W) at 313E-F where it is confirmed that the court may act on a unanimous report rendered by the experts involved. Also see *De Vos* v *Minister of Justice and Constitutional Development* WCC case.at [8]. Also see *S* v *Vika* (14519) [2014] ZAWCHC 155 (14 October 2014) at [23]. In this case, the magistrate was entitled to make such a finding without further evidence regarding the accused's mental condition because the psychiatric report was unanimous and provided the psychiatric report be not disputed either by the prosecutor or by the accused.

315 Section 77(3) of the Criminal Procedure Act. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 229. Also see Joubert *et al Strafprosesreg* 11th ed at 251. See further Kruger *Mental Health Law in South Africa* at 164. Also see *De Vos* v *Minister of Justice and Constitutional Development* WCC case at [8].

316 Du Toit et al Commentary on the Criminal Procedure Act at 13-6.

317 Section 77(3) read with section 77(4) of the Criminal Procedure Act.

318 In *S* v *Kavin* 1978 (2) SA 731 (W) the state disputed the report rendered by the experts. After hearing evidence, the court accepted the report by the experts and dismissed the states objection.

319 Kaliski *Psychological Assessment in South Africa* at 5.

obligation on a psychiatrist to entertain any requests to investigate a particular issue at the insistence of the legal representative, or any other party, during the assessment period.

The report drafted by the mental health care practitioners who conducted the assessment of fitness to stand trial will serve to assist the court in making a finding as to if the accused is, in fact, triable or not.

3.6 Findings after assessment and consequences thereof

3.6.1 Introduction

After the assessment, the court considers the psychiatric report and makes a finding on whether the accused is fit to stand trial or not.[320] All previous psychiatric reports on the mental condition of the accused must be placed before the court before a finding in respect of the accused's fitness to stand trial can be made.[321] The relevance of previous psychiatric reports as to the accused's current state of mind for purposes of fitness is unclear. Consideration of previous psychiatric reports could arguably be seen as contradicting the principle that a fitness finding pertains to the current state of mind of an accused. It also seems to contradict the fact that a fitness assessment is not retrospective which could be interpreted to mean that previous psychiatric information about the accused should also not be relevant.

The final decision concerning competency to stand trial is a legal one as it is ultimately taken by the court.[322] The court is, however, always guided by expert opinion as it is not an expert in the field of psychiatry and will, in most instances, not deviate from the recommendations made by the psychiatrists and psychologists.[323] The mental health care practitioner cannot make pronouncements on *ultimate issues,* such as if the accused is really unfit to stand trial or criminally responsible.[324] He can merely express an opinion that

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320 Du Toit et al Commentary on the Criminal Procedure Act at 13-6.

321 Du Toit et al *Commentary on the Criminal Procedure Act* at 13-4, 13-28. This also applies to cases where the criminal capacity of the accused is at issue. Also see *S* v *Motshekgwa* 1993 (2) SACR 247 (A).

322 Louw in Psycholegal Assessment in South Africa at 45. Also see Du Toit et al Commentary on the Criminal Procedure Act at 13-5.

323 See in general *S* v *McBride* 1979 (4) SA 313 (W). It has been stated that the intent of sections 77 to 79 is that, where an issue of mental illness arises, the court will be guided by expert evidence. See Du Toit et al *Commentary on the Criminal Procedure Act* at 13-1, 13-11. Also see *S* v *Mabena* 2007 (1) SACR 482 (SCA) at [16] where it was stated that "'Mental illness' and 'Mental defect' are morbid disorders that are not capable of being diagnosed by a lay court without the guidance of expert psychiatric evidence. An inquiry into the mental state of an accused person that is embarked upon without such guidance is bound to be directionless and futile".

324 Kaliski, Borcherds and Williams 1997 *SAMJ* 1351 at 1354 where they emphasise that the

can guide the court in reaching its final decision.[325]

The court makes a final decision regarding fitness, and where the accused is found unfit to stand trial, the court must make an order regarding the way forward in the case, which may include detention of the accused.[326] The finding pertaining to fitness may be made in the absence of the accused, whereas the finding as to the detention of the accused, particularly when the accused is declared a state patient, may not be made in his absence. [327]

The finding as to fitness can be made at any time before the trial commences [328] or during the trial at any time prior to sentencing.[329] If a finding of unfit to stand trial is made after conviction, but before sentencing, the proceedings are set aside, and the relevant order in terms of section 77(6) of the Criminal Procedure Act is made.[330] The setting aside of proceedings any time after the accused entered a plea shall lead to acquittal.[331] Where the charges are withdrawn prior to a plea being entered, the accused is not entitled to a verdict of acquittal in respect of the particular charges.[332] Where the prosecution decides to cease

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psychiatrist should not make pronouncements of issues of criminal responsibility.

325 Kaliski *Psychological Assessment in South Africa* at 5. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-5, 13-6. Also see *S* v *Magongo* 1987 (3) SA 519 (A) where the court a quo found that an accused was not criminally responsible without having followed the proper procedure in terms of section 78. No psychiatric report was before the court on the issue of criminal capacity. On appeal, the matter was referred back to the court a quo with instructions to follow the proceedings as set out in section 78 of the Criminal Procedure Act. The court a quo ordered that the accused be detained in a psychiatric institution as a state patient. This order was set aside by the court of appeal. This case illustrates the delays that can be caused if the court does not accept the guidance from mental health care practitioners in matters concerning the criminal capacity of an accused. The same principle applies to matter involving fitness to stand trial.

326 Kruger *Heimstra Suid-Afrikaanse Strafproses at* 230. Also see section 77(6) of the Criminal Procedure Act that, inter alia, provides for the accused to be detained as a State patient in terms of section 42 of the Mental Health Care Act or an involuntary mental health care user in terms of section 32 of the Mental Health Care Act.

327 See *S* v *Eyden* 1982 (4) SA 141 (T). Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 230 who confirms that an order declaring the accused a state patient, may not be made in the accused's absence.

328 Du Toit et al *Commentary on the Criminal Procedure Act* at 13-3 indicates that the issue is usually raised before the trial commences and hence the finding is made before the trial commences.

329 The order pertaining to fitness can thus be made even after conviction but prior to sentencing. See in general *S* v *April* 1985 (1) SA 639 (NC) where the court found that the accused was unfit to stand trial after conviction but before sentencing in the Magistrates Court. See further *S* v *van As* 1989 (3) SA 881 (W) where the Supreme Court, upon reviewing the case, set aside the proceedings after it became clear (after conviction) that the accused was not able to conduct a proper defence. The accused was subsequently detained as a state patient. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-3, 13-4.

330 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 225. Section 77(6) provides that a court may order the detention of an accused as an involuntary mental health care user or as a state patient.

331 Section 6(b) of the Criminal Procedure Act.

332 Section 6(a) of the Criminal Procedure Act. Also see Kruger *Mental Health Law in South Africa* at 159 who points out that, at the time, the withdrawal of charges against a mentally ill accused, was a common occurrence especially where the charges against them were for minor offences such as

the prosecution of an accused who entered a plea, and whose fitness to stand trial is at issue, such an accused must be found not guilty [333] and released. Should the accused require further mental health care services, he may be treated in terms of the Mental Health Care Act as a mental health care user [334] outside the criminal justice system.

The Criminal Procedure Act prescribes an elaborate procedure in the event that an accused is found unfit to stand trial. The position of an accused found fit to stand trial seems procedurally less complicated. The consequences of a finding of unfitness are explored below, followed by a discussion of the consequences of a finding of fitness.

3.6.2 Finding of unfit to stand trial

3.6.2.1Introduction

An accused found unfit to stand trial may not be tried while he is incapable of understanding the proceedings.[335] A trial on the facts may, however, be held to establish the unfit accused's actual involvement in the crime that he stands accused of.[336] The outcome of the trial on the facts guides the court to make the most suitable order in terms of section 77(6) of the Criminal Procedure Act.[337]

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minor assault.

333 This will for example be where the crime is a non-violent one where property worth less than R1 000.00 is involved; where the facility to which the accused is referred for observation does not have the required facilities to cater for the type of treatment required for the accused, or where the psychiatrist at the institution to which the accused has been referred, advises the prosecutor that there is a less drastic way of ensuring that the accused receives the required mental health care treatment. See Kruger *Heimstra Suid-Afrikaanse Strafproses* at 227 for more detail. Also see *S* v *M* 1989 (3) SA 887 (W) 890D-H, 891E. See also Joubert *et al Strafprosesreg* 11th ed at 251.

334 Kruger Heimstra *Suid-Afrikaanse Strafproses* at 227.

335 *S* v *Mabena* 2007 (1) SACR 482 (SCA) at [12]. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-3. Also see Burchell *South African Criminal Law and Procedure* at 282 who confirms that this is a principle of Criminal Law. See further Joubert *et al Strafprosesreg* 11th ed at 21.

336 Section 77(6)(a) of the Criminal Procedure Act. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses at* 230. Section 77 of the Criminal Procedure Act was amended by the Criminal Matters Amendment Act 68 of 1998 to provide for the court to consider evidence to determine whether an accused found unfit to stand trial actually committed the act in question. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 219 who points out that this amendment was brought about by amending section 77(6)(a) of the Criminal Procedure Act by making provision for a trial on the facts of the matter which does not constitute an official trial for purposes of finding the accused guilty or not guilty.

337 The orders available to the court in terms of section 77(6) depends on if violence was involved in the crime that the mentally ill accused is charged with or not. Only accused persons charged with violent crime and found to have been involved in it can be declared a state patient, which is the most restrictive order that the court can make with regard to a mentally ill accused person who is not triable.

3.6.2.2 Trial on facts

A trial on the facts only takes place if it is deemed to be in the interest of the accused or where there is uncertainty about whether or not the accused was actually involved in the commission of the crime.[338] The burden of proof for purposes of this inquiry is on a balance of probabilities.[339]

The trial on the facts is conducted by first examining the available evidence and determining if it shows, on a balance of probabilities, that the accused committed the crime in question.[340] The element of fault is not considered during the trial on facts.[341] During the trial on the facts, the court will have limited evidence at its disposal as the criminal trial would, at the stage when the finding as to fitness is made, in many cases not have been concluded and in most, not even have commenced.[342] This very fact could, according to Louw,[343] probably explain why the lesser onus of proof applies. He points out further that this could lead to an innocent person being found guilty of an offence [344] if the court does not consider all the evidence as it would during the course of a criminal trial. The opposite is, by implication, also true, viz a person who in actual fact committed the act may be found not to have committed the act in question due to the lack of certain evidence. It is, however, possible for a court that finds it impossible to make a determination on the accused's involvement based on the information before it, to order that further information

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338 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 230. Kruger submits hat a trial on the facts will occur most of the time. Also see *S* v *Vika* (14519) [2014] ZAWCHC 155 (14 October 2014) at [21] where it is stated that, "Upon finding that the accused was mentally unfit to stand trial, the magistrate should have acted in accordance with s 77(6)(a), not s 78(6). And importantly, before he could make a direction in accordance with s 77(6)(a), the magistrate was required to determine whether, on a balance of probabilities, the accused committed the alleged act of sexual penetration." The court in this matter seems to be of the view that a trial on the facts must always be held before a finding in terms of section 77(6) can be made.

339 Section 77(6) of the Criminal Procedure Act. Also see *S* v *Sithole* 2005 (1) 311 (W) at 136D. The burden of proof with regard to the guilt of the accused has to be proved beyond reasonable doubt. See Louw in *Psycholegal Assessment in South Africa* at 43. See further Du Toit et al *Commentary on the Criminal Procedure Act* at 13-6.

340 Kruger Heimstra *Suid-Afrikaanse Strafproses* at 230.

341 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 230. Also see *S* v *Sithole* 2005 (1) SACR 311 (W) at 315H-I where it was stated, "The phrase 'has committed the act in question' obviously carries no connotation of *mens rea* or criminal responsibility and is intended to refer purely to the physical commission of the *actus reus*." Also see *De Vos* v *Minister of Justice and Constitutional Development* WCC case at [13] where the court refers to the above quoted paragraph from the Sithole judgment.

342 Louw in Psycholegal Assessment in South Africa at 43.

343 Louw in Psycholegal Assessment in South Africa at 43.

344 Louw in Psycholegal Assessment in South Africa at 43.

be brought before it in order for such a determination to be made.[345]

Kruger,[346] however, points out that the purpose of this trial on the facts is not to reach an official judgment or finding but is rather an additional inquiry aiming to aid the court in reaching a decision pertaining to if and where the accused should be detained.[347] Kruger's view on section 77(6)(a) is supported by Du Toit AJ, who expressed the following view on behalf of the court:

> *the subsection, in my view does not envisage any enquiry in the nature of a trial or a 'determination' or 'finding' in the sense of a verdict or a judgment. Any such procedure would be completely inappropriate since the person who allegedly committed the act by definition is incapable of understanding the proceedings. All that appears to be required is that, before directing that an accused be detained and/or treated in terms of the appropriate provisions of the Mental Health Act the court should satisfy itself as to what actus reus, if any, he or she has committed.*[348]

After a trial on the facts, the accused is not convicted or acquitted, but instead, the court makes an order as set out in section 77(6) of the Criminal Procedure Act.[349] The orders that the court may make are explored below.

3.6.2.3Orders that can be made after trial on facts

The nature of the act committed and the evidence placed before the court to prove that the accused was involved in the alleged criminal act will guide the court in terms of the order to

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345 Kruger *Heimstra Suid-Afrikaanse Strafproses at* 230. This is only done if the court is satisfied that such further information should be brought to the court in the interest of the accused to determine if he in fact committed the crime in question.

346 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 230. Also see *S* v *Sithole* 2005 (1) SACR 311 (W) at 314H-315A.

347 Meaning to assist the court in deciding if the accused should be detained in a psychiatric hospital or if he should be detained in a mental health care facility in terms of the Mental Health Care Act rather than detained as a state patient. The distinction between the two s significant, especially with regard to periods of release. See section 37 and 47 of the Mental Health Care Act in this regard.

348 *S* v *Sithole* 2005 (1) 311 (W) at 135H-I. Also see *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [89] where the court had the following to say about the inquiry into the question if the accused committed the act in question: "Where the psychiatric evaluation concludes that the person lacks capacity to understand the proceedings, the enquiry mandated by s 77(6)(a) is not into the question whether the accused committed the offence with which he is charged (i.e. whether on a balance of probability he could be convicted of the offence) but rather whether the accused 'committed the act in question'. In context, the expression 'the act in question' has reference to the *actus reus* elements of the offence with which the accused is charged. If the lawmaker had intended the court to enquire into the question whether the accused would probably be convicted of the charged offence if and when he became capable of understanding the proceedings, this would have been said. The use of the words 'committed the act in question' points to a more limited enquiry."

349 More particularly, an order in terms of section 77(6)(a)(i) or (ii) of the Criminal Procedure Act. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses at* 230. Also see Kruger *Mental Health Law in South Africa* at 164 who confirms the principle that a person who cannot follow the proceedings cannot be tried. See further Du Toit et al *Commentary on the Criminal Procedure Act* at 13-6.

be made.[350] The court must [351] make an order that the acused either be treated as a state patient or an involuntary mental health care user.[352]

The court does not have the discretion to make any order other than one of those listed in section 77(6).[353] The effect of these provisions is that an accused who is unfit to stand trial will be detained, regardless of if it is proved that he was involved in the commission of the crime or not.[354] Recently the Constitutional court in *De Vos* v *Minister of Justice*

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350 Louw in *Psycholegal Assessment in South Africa* at 43. The court used to have no choice but to declare the person a State President's patient prior to the amendment of the Criminal Procedure Act by the Criminal Maters Amendment Act 68 of 1998 that came into force on 28 February 2002. The position has been amended by legislation and this is no longer the only order a court is allowed to make. The court is guided in its decision by *inter alia* the seriousness of the offence committed. See Section 77(6(of the Criminal Procedure Act (as amended). Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 230. Also see the discussion of the trial on the facts earlier in this chapter.

351 The court does not have discretion to make a finding outside the parameters of section 77(6), it is obliged to make one of the orders as set out in this section. See Kruger *Heimstra Suid-Afrikaanse Strafproses at* 230. The court will, however, not be obliged to make an order in terms of section 77(6) where the state withdraws its charges. See *S* v *Kahita* 1983 (4) SA 618 (K). Also see *De Vos v Minister of Justice and Constitutional Development* WCC case at [11] where the lack of a discretion for orders pertaining to persons who are found unfit to stand trial is confirmed.

352 Section 77(6)(a) provides as follows: "If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court shall direct that the accused—

(i) in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002; or

(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence—

(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002,

and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106(4) to be acquitted or to be convicted in respect of the charge in question."

353 *De Vos* v *Minister of Justice and Constitutional Development* WCC case at {10}, [11} where the court compares section 77(6) with the orders that a court can make in terms of section 78(6) where a person is found not criminally responsible due to mental illness. Section 78(6) grants the court a wide discretion in terms of the orders that can be made, including the condition or unconditional release of a person found not guilty due to mental illness whereas this is not an option in terms of section 77(6(. This was the main issue before the court for adjudication. The Constitutional court confirmed in *De Vos* v *Minister of Justice and Constitutional Development* CC case at [19] that the wording of section 77(6) cannot be interpreted in any way other than that it is peremptory and does not leave the court with a discretion in terms of which order to make in a particular case.

354 Schutte 2013 *South African Journal of Bioethics and Law* 64 at 64 observes that the mentally ill accused population is clearly divided into two groups through the workings of section 79, namely

Constitutional Development [355] considered this undesirable situation and ordered that section 77(6)(ii) be amended to the effect that the court has the discretion in respect of an unfit accused found to have committed a non-violent offence or found not to have committed the offence at all, to be released conditionally or unconditionally.[356]

The consequences of detention as a state patient and an involuntary mental health care user are discussed below.

i) *State Patient*

Where an unfit accused is charged with murder, culpable homicide, rape or another crime involving violence, and the court finds on a balance of probabilities that the accused did, in fact, commit the act, the court must order that the accused be treated as a state patient in terms of the Mental Health Care Act.[357]

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those that are charged with violent offences and those charged with non-violent offences although both will be detained upon a finding of unfit to stand trial. The distinction between these two groups, are emphasised by the fact that only a mentally ill accused who is found unfit to stand trial and who has committed a violent offence, can be treated as a state patient in terms of section 42 of the Mental Health Care Act. State patients are only released upon an order by a judge in chambers and detention can last for extended periods. For those who committed non-violent offences, the harshest "sentence" is an order for involuntary treatment in terms of the Mental Health Care Act.

355 *De Vos N.O and Another* v *Minister of Justice and Constitutional Development and Others; InRe: Snyders and Another* v *Minister of Justice and Constitutional Development and Others* 2015 (1) SACR 18 (WCC) (herein referred to as "*De Vos* v *Minister of Justice and Constitutional Development* WCC case").

356 *De Vos* v *Minister of Justice and Constitutional Development* CC case at [68]. Also see the detailed discussion of this case later in this chapter.

357 Section 77(6)(a)(i) of the Criminal Procedure Act read with section 47 of the Mental Health Care Act. Only an accused charged with a crime involving serious violence, can, when found to have been mentally ill at the time of committing the offence, or unfit to stand trial be declared a state patient and detained as such in terms of section 47 of the Mental Health Care Act. (See Section 78(6)(b)(i) regarding lack of criminal capacity). Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-14. Also see Milton J "Law Commission project 89: Declaration and detention of state patients" 1998 (11) *SACJ* 228-233 *at* 233 who points out that the Law Reform Commission's recommendation that those who committed violent crimes should be detained inevitably whilst those accused of "other" crimes should be subjected to civil commitment procedures as provided for in the Mental Health Act of 1973 is neither "logical, reasonable or just". He argues that the conclusion of the Commission assumes that, because a person was mentally ill at the time of committing the crime, he must still be so mentally ill that he needs to be detained in a mental institution indefinitely. This is of course not necessarily so. He might have recovered from his mental illness after some treatment. Section 78 of the Criminal Procedure Act as it currently stands has, despite Milton's concerns, been amended to the extent that it does distinguish between those that committed serious offences, and those that committed less serious offences. Also see Sections 47 of the Mental Health Care Act that regulates the detention and discharge of state patients. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses at* 231. See further Du Toit et al *Commentary on the Criminal Procedure Act* at 13-7. See further *De Vos* v *Minister of Justice and Constitutional Development* WCC case at [9], [15]. Interesting to note is the concern raised by the psychiatrists who conducted the observation in this case as they found that the accused is unfit to stand trial and because he was

The order that an accused be detained as a state patient must be made in the presence of the accused.[358] Such an accused is neither found guilty nor acquitted.[359] It is merely a finding to bring the proceedings to a close.[360] The implication of detention as a state patient is that the accused shall be detained in a psychiatric hospital or prison until a judge in chambers orders his release.[361] Kaliski [362] states that the rationale for detaining the mentally ill state patient indefinitely is because it is unsure how long it will take to stabilise the illness or if it will respond to treatment at all. This view is prefered to the view that detention of the mentally ill is necessary for public safety.[363]

The Mental Health Care Act provides for the periodic review of the mental state of a state patient within six months of the order and thereafter every 12 months.[364] This

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charged with a violent crime will have to be declared a state patient. The psychiatrists cautioned in their report that since the accused (Mr Snyders) had moderate intellectual retardation, this would mean that his detention as state patient could be indefinite as he would never recover and that such treatment seems unfair and inappropriate. See this judgment at [23].

358 *S* v *Eyden* 1982 (4) SA 141 (T). Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-22.

359 Du Toit et al Commentary on the Criminal Procedure Act at 13-6.

360 Kruger Heimstra *Suid-Afrikaanse Strafproses* at 226.

361 Section 47 of the Mental Health Care Act. Also see Cassim 2004 Codicillus 17 at 20. Also see Louw in *Psycholegal Assessment in South Africa* at 43. Prior to the amendment of the Criminal Procedure Act to the effect that the seriousness of the crime should play a part in determining if the accused should be detained as a state patient if he is found unfit to stand trial, someone accused of stealing a loaf of bread who is mentally ill, could be declared a state patient in the same way as someone accused of murder who was found unfit to stand trial. The Criminal Procedure Act prior to its amendment by the Criminal Matters Amendment Act – which came into force on 28 February 2002 - did not take the seriousness of the crime into consideration when declaring an accused a state patient. Snyman 1988 *Acta Juridica* 128 at 149 is of the view that the seriousness of a crime should play a part and was in favour of an amendment to the legislation to include such consideration. Snyman points out that prior to the amendment of the Act, even though the Act seemed to have intimated that the seriousness of the crime should not have played any role at all, certain attorneys general ordered that the charges against individuals who were found unfit to stand trial but who committed a minor offence, be dropped and that they be detained as involuntary users in terms of Mental Health legislation, rather than state patients. The amendments to the Criminal Procedure Act, seem to be in line with the practice that emerged prior to its amendments and in the interest of fairness and justice to ensure that someone that committed a minor offence, is not detained in a psychiatric hospital indefinitely. See Du Toit et al *Commentary on the Criminal Procedure Act* at 13-7 where the position after amendment is discussed and where it is clear that the seriousness of the offence does indeed play a part in the orders that the court may make. A person who did not commit a crime of a violent nature, cannot be declared a state patient and cannot be treated as such in terms of the Mental Health Care Act, but can be treated as an involuntary mental health care user in terms of the Mental Health Care Act.

362 Kaliski S "Does the insanity defence lead to an abuse of human rights?" 2012 (15) *Afr J Psychiatry 83-87* at 85.

363 Snyman states that this detention of the mentally ill, in institutions should not be seen as punishment, rather a measure in the interest of society. See Snyman J 1988 *Acta Juridica* 128 at 148, 149.

364 Section 46(1) of the Mental Health Care Act.

measure ensures that a state patient is not detained indefinitely.[365]

Detention in a psychiatric hospital as a state patient does not provide protection against prosecution for the offence with which the accused was initially charged.[366] If the accused regains his ability to follow the trial proceedings, his trial will commence at that point.[367]

The fact that provision is made for the accused to stand trial once he regains his ability to follow the proceedings implies that the condition that the accused is suffering from is treatable [368] and that the accused in question can recover from his condition, or at the very least, progress to a state where the illness is managed, be it with medication and/or therapy.[369] Intellectual disability is, however, not *treatable,* and the prospect of standing trial once the ability to understand the proceedings have been regained falls away for those found unfit to stand trial as a result of intellectual disability.[370] These individuals face indefinite detention once declared a state patient.[371]

A state patient can be released by order of a judge in chambers.[372] A lengthy process is prescribed for an application for a state patient's discharge from care.[373] The Mental

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365 When the review is conducted as referred to in section 46(1), the report on the review must contain information on the treatment of the state patient forthwith, the merits of granting leave of absence to the accused (section 45) or the discharge of the state patient. A complete discharge may be granted by a judge in chambers in terms of section 47(6) of the Mental Health Care Act.

366 The only requirement is that the accused must at the point when the proceedings are resumed, be able to follow the proceedings. See Kruger *Heimstra Suid-Afrikaanse Strafproses* at 231 and *S* v *Leeuw* 1987 (3) SA 79 (A).

367 Section 77(7) of the Criminal Procedure Act. See Louw in *Psycholegal Assessment in South Africa* at 43. Also see Cassim 2004 Codicillus 17 at 20. See further Du Toit et al *Commentary on the Criminal Procedure Act* at 13-3 who adds that the trial rarely continues if and when an accused regains his ability to stand trial. Also see Joubert *et al Strafprosesreg* 11th ed at 252.

368 Africa in *Psychology and Law* at 408, endnote 9.

369 See in general Stevens 2013 *THRHR* 252-260 for a discussion of the issues involved in subjecting those found unfit to stand trial to treatment with psychotropic medication. He also considers if the accused person has a right to refuse such treatment (at 255-256).

370 Africa in *Psychology and Law* at 408, endnote 9. Also see *De Vos* v *Minister of Justice and Constitutional Development* CC case at [6] where the court explains that three psychiatrists found the accused (Mr Snyders) unfit to stand trial due to mental retardation. The psychiatrists, however, expressed concerns over declaring the accused a state patient as this would entail that the accused must be detained indefinitely. Since the accused's condition (mental retardation) cannot be treated to a state where it will improve, the accused faces indefinite detention. The psychiatrists were concerned that this is not in the best interest of the accused.

371 See *De Vos* v *Minister of Justice and Constitutional Development* WCC case at [22] where the psychiatric report drafted for the court warns that since there is no prospect of recovery for the accused who suffered from Down Syndrome, he faced indefinite detention in a psychiatric facility and that such indefinite detention was undesirable. Also see *De Vos* v *Minister of Justice and Constitutional Development* CC case at [6].

372 Section 47 of the Mental Health Care Act.

373 Section 47 of the Mental Health Care Act. Also see Kruger Heimstra Suid-Afrikaanse Strafproses at

Health Care Act provides for applications for discharge to be brought by any of the state patient himself, an official *curator at litem* or administrator if appointed, the superintendent of the facility where the state patient is treated, the medical practitioner administering the mental health care treatment and rehabilitation services, spouse, next of kin or any other person authorised to act on behalf of the state patient.[374] An application for discharge cannot be brought within 12 months from a previous application for discharge having been dismissed.[375]

The judge may, instead of ordering the state patient's discharge, rather opt to reclassify the accused and order that he be treated as an involuntary or assisted user.[376] Applications for detention or discharge of state patients are not considered by a Mental Health Review Board [377] , perhaps leaving state patients vulnerable to unreasonably long periods of detention.

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231 who explains that in practice, the head of the health establishment where the state patient receives treatment, sends the application for discharge to the Department of Defence who in turn sends it to the Registrar of the relevant court in order for the application to be considered by a judge in chambers. The Department of Defence is the official curator ad litem of the state patient in this instance. Bateman 2005 SAMJ 208 at 212 explains that it is very difficult to convince a judge that a person that was once found unfit to stand trial, is no longer mentally ill or that such a person will now take his medication and will in general "behave". Under the previous mental health legislation, Mental Health Act of 1973, an equally laborious process was prescribed to apply for the discharge of a state patient.

374 Section 47(1)(a) – (g) of the Mental Health Care Act. Also see *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [85], State patients could, according to the 1973 Mental Health Act, only be released if a judge in chambers ordered such release upon an application brought by their official curator ad litem. See Section 29 of the Mental Health Act. In terms of the 1973 Mental Health Act, this was the Attorney General. The practice was that the Attorney General would only request this release if the superintendent of the institution where the person involved was detained, was willing to almost guarantee that the individual, if released, would not commit a similar offence again. See Milton J "Law reform: The Criminal Matters Amendment Act 1998 brings some sanity (but only some) to the defence of insanity" 1999 (12) *SACJ* 41-48 at 41. Releases, were therefore few and far between.

375 *S v Pedro* 2015 (1) SACR 41 (WCC) at [85]. Also see Section 47(4)(a) of the Mental Health Care Act. Also see *De Vos* v *Minister of Justice and Constitutional Development* CC case at [36], footnote 41 where it is confirmed that an application for discharge can only be brought once every 12 months.

376 Section 47(6)(b) of the Mental Health Care Act. Also see *S* v *Siko* 2010 JOL 25861 (ECB) at [8] where it is stated that it is much harder to secure the discharge of a state patient than to secure the discharge of a person being treated as an involuntary mental health care user in terms of section 37 of the Mental Health Care Act. See further *S* v *Dlali* (3/2015) [2015] ZAECBHC 2 (27 February 2015) at [34] where this is confirmed.

377 A Mental Health Review Board does not have the jurisdiction to order or confirm the release of a state patient as is the case with an assisted or involuntary mental health care user. Section 19 of the Mental Health Care Act sets out the functions and powers of the Mental Health Review Board and refers to tasks relating to assisted and involuntary mental health care users as well as mentally ill prisoners but no mention is made of state patients. Since the other categories of mental health care users are mentioned specifically, it makes sense that the legislature would have referred to state patients specifically if the intention was that the Review Board should be involved in decisions regarding their further treatment or release for example. This fact may still leave the state patients more vulnerable than other categories of users, to unreasonably long periods of detention.

ii) *Involuntary mental health care user*

If the court finds that an unfit accused committed an act other than the violent acts set out above [378] or that the accused did not commit the offence in question, [379] he shall be detained as an involuntary mental health care user at a mental health care facility in terms of the Mental Health Care Act.[380]

As alluded to earlier, when an application for involuntary care is brought to the head of the health establishment for a patient outside of the criminal justice system, such involuntary care is only continued if the need, therefore, has been confirmed after a 72-hour assessment period.[381] The 72-hour assessment period is arguably not applicable to mentally ill accused persons in respect of whom an order for involuntary care is made in accordance with section 77(6) of the Criminal Procedure Act.[382] Even though a mentally ill accused is assessed by mental health professionals during the fitness assessment, such an assessment does not focus on the criteria for involuntary care as set out in the Mental Health Care Act.[383]

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378 Acts involving serious violence such as murder, culpable homicide or rape. (Section 77 (6)(a)(i) of the Criminal Procedure Act.

379 Section 77(6)(a)(ii) of the Criminal Procedure Act.

380 Section 77(6)(a)(ii) of the Criminal Procedure Act. Also see section 37 of the Mental Health Care Act that regulates the detention of involuntary mental health care users. See further Louw in Psycholegal Assessment in South Africa at 43 and further Kruger Heimstra Suid-Afrikaanse Strafproses at 231. See further Du Toit et al Commentary on the Criminal Procedure Act at 13-7. These persons cannot be detained as state patients as only accused persons who are charged with violent offences can be so detained in terms of section 42 of the Mental Health Care Act. Also see *De Vos* v *Minister of Justice and Constitutional Development* WCC case.at [9].

381 Section 34 of the Mental Health Care Act.

382 This view may be supported by the opinion of Pillay 2014 South African Journal of Psychology 48 at 56 where he writes with regard to outpatient treatment. He refers to accused persons undergoing observation and states that such observations should be considered on a day-visitor basis which has the same meaning as outpatient, but the author reckons that he cannot use the same terminology that is used for patients since persons referred for observation by the courts, are not patients in the strict sense of the word.

383 The requirements for involuntary care is set out in section 32 of the Mental Health Care Act which states that:

"32. Care, treatment and rehabilitation of mental health care users without consent A mental health care user must be provided with care, treatment and rehabilitation services without his or her consent at a health establishment on an outpatient or inpatient basis if –

(a) an application in writing is made to the head of the health establishment concerned to obtain the necessary care, treatment and rehabilitation services and the application is granted;

(b) at the time of making the application, there is reasonable belief that the mental health care user has a mental illness of such a nature that –

(i) the user is likely to inflict serious harm to himself or herself or others; or

(ii) care, treatment and rehabilitation of the user is necessary for the protection of the financial interests or reputation of the user; and

(c) at the time of the application the mental health care user is incapable of making an

In terms of the Mental Health Care Act, involuntary mental health care treatment and rehabilitation services are provided to mental health care users who refuse treatment and who need such treatment for their own protection or the protection of others.[384] An element of dangerousness must be present. As pointed out in *De Vos* v *Minister of Justice Constitutional Development* [385] , the assessment for fitness to stand trial does not make provision for an assessment of dangerousness, nor does the court enquire into it before making an order for involuntary care.[386] The decision that an accused should receive involuntary care is therefore not based on the Mental Health Care Act criteria but on arbitrary legal criteria depending on the type of charges that the accused faces.

It appears that there is no room to consider the capacity of the accused to make an informed decision as to the need for mental health care treatment and rehabilitation services as the case would normally be for matter falling outside the criminal justice system. The very basis of involuntary care in the Mental Health Care Act is the lack of the ability to make an informed decision about the need for treatment. An order by the criminal court for the unfit accused to receive involuntary care places the accused in the category of involuntary care without the accused actually meeting the legislative requirements for this category of care. It appears that the fact that the order for involuntary care is made by the court makes strict adherence to the requirements in the Mental Health Care Act pertaining to a particular category of treatment unnecessary.

It is possible that an accused may be amenable to mental health care treatment or at least not opposed to it, in which case the accused, technically if the criteria as set out in

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informed decision on the need for the care, treatment and rehabilitation services and is unwilling to receive the care, treatment and rehabilitation required."

384 Section 1 of the Mental Health Care Act sets out the definition as follows: "involuntary care, treatment and rehabilitation" means the provision of health interventions to people incapable of making informed decisions due to their mental health status and who refuse but require such services for their own protection or for the protection of others. Also see section 33 of the Mental Health Care Act that sets out the procedure to apply for the involuntary admission of a user.

385 *De Vos N.O and Another* v *Minister of Justice and Constitutional Development and Others; InRe: Snyders and Another* v *Minister of Justice and Constitutional Development and Others* 2015 (1) SACR 18 (WCC) (herein referred to as "*De Vos* v *Minister of Justice and Constitutional Development* WCC case").

386 *See De Vos* v *Minister of Justice and Constitutional Development* WCC case at [49} where it is pointed out that "…s 77(6)(a) does not require, or even permit, the court to enquire into either the potential danger to society posed by the accused person or the individual needs or circumstances of such person. Although medical experts are required to assess the accused person's mental capacity, they are not called upon to express any view as to whether or not he or she constitutes a danger to society or whether involuntary hospitalisation is an appropriate or proportionate treatment option".

the Mental Health Care Act are applied, falls within the definition of a voluntary or assisted mental health care user.[387] The fact that an accused is found unfit to stand trial does not mean that he is unfit to take any other decisions and may very well have the capacity to make an informed decision about the need for mental health care treatment and rehabilitation services.

Perhaps the 72-hour assessment period should be expressly made applicable to those in respect of whom an order for involuntary care is made by the court. In this manner, mental health care professionals can assess the mental health care need of the individual rather than subjecting the accused to care based on an arbitrary decision taken by the court. If the intention of an order for involuntary care by a court is indeed treatment and not punishment, there should not be objections against this approach. Following this approach may increase the accused's chances of regaining fitness and will contribute to the speedy delivery of justice.

The Mental Health Care Act promotes the least restrictive method of care treatment and rehabilitation, and subjecting an accused, in respect of whom an order for involuntary care is made, to the 72-hour assessment period will ensure that he too receives the least restrictive care that can possibly be provided having regard to his particular mental health care needs. This is essential since many accused persons found unfit to stand trial are found not to have committed a crime at all and should, therefore, ideally, be treated in the same manner as a person who encounters the mental health care system outside of the criminal justice system.

The mental condition of an involuntary mental health care user is reviewed six months after the commencement of the treatment and thereafter every 12 months.[388] These persons will be discharged from such involuntary care once it is established, during the periodic review or otherwise, that such involuntary mental health care is no longer required.[389] The Review Board may order the discharge of involuntary mental health

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[387] Section 25 of the Mental Health Care Act provides for voluntary care for those who are able to take an informed decision regarding the need for mental health care treatment and rehabilitation services. Section 26 of the Mental Health Care Act provides for assisted care, treatment and rehabilitation services for those incapable of taking informed decisions but who do not refuse the treatment.

[388] Section 37(1) of the Mental Health Care Act.

[389] Section 37 and 38 of the Mental Health Care Act. Section 37 provides for the discharge of the involuntary mental health care user if, during the periodic review, the Review Board is of the view that the user should be discharged. Section 38 allows for the head of the health establishment to discharge the user if he is of the view that the user no longer suffers from a mental illness. If the user is willing to receive further treatment, the user will forthwith be treated as a voluntary mental health care user. Section 38(2) of the Mental Health Care Act read with section 25 thereof. If the

care users.[390] The Registrar of the High Court must be informed of the discharge of an involuntary mental health care user.[391]

In the case of an accused who was treated on an involuntary basis by order of the criminal court and who is no longer so detained, this person will probably be deemed to have regained his fitness to stand trial, and the criminal trial may continue at this stage.[392]

The question arises as to why an accused that is charged with a serious offence but not convicted must be declared a state patient, whereas it is not the case with someone who committed a non-violent offence, as the latter is detained as an involuntary mental health care user. If fitness is truly distinctly different from the inquiry into criminal capacity and concerned with the present state of mind, surely the order as to the manner of detention should be dictated by the mental health care needs of the accused rather than the type of charges against him? This is especially so considering that no provision for the assessment of the dangerousness of the accused is made during the fitness assessment. It almost appears as if this provision is based on the assumption that an unfit accused charged with a serious offence requires stricter measures of confinement during treatment than those accused of less serious crimes. This, despite the fact that the accused has not been convicted of any offence.

3.6.2.4 Review of decision regarding fitness in terms of section 77(6)

The finding by a court that an accused is unfit to stand trial is not subject to automatic review in terms of section 302(1)(a) of the Criminal Procedure Act.[393] Related hereto is the

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user is not willing to receive further treatment and the head of the health establishment is satisfied that this person no longer suffers from a mental illness, such person must be discharged and the high court must be informed of such discharge. Section 38(3) of the Mental Health Care Act read with section 37(6) of the Mental Health Care Act.

390 Section 37(5) of the Mental Health Care Act.

391 Section 37(6) of the Mental Health Care Act.

392 See chapter 4 of this research for the discussion of the "keep fit" order where an accused who has regained his fitness may be detained in a psychiatric facility awaiting his trial if the court is of the view that the accused will become unfit again if he is detained in the correctional facility awaiting trial. Such an option is currently lacking in the South African system. A suggestion to incorporate such an order is made in chapter 6 of this research.

393 *S* v *Blaauw* 1980 (1) SA 536 (K). Also see Joubert *et al Strafprosesreg* 11th ed at 383. Also see *S* v *Ramokoka* and more recently, *S* v *Zondi* 2012 (2) SACR 445 (KZP). Also see *Maluka* v *S* (A197/2013) [2014] ZAGPPHC 862; 2015 (2) SACR 273 (GP) (31 October 2014). The court in the *Maluka* judgment referred to the judgment in *Ramokoka* and stated that: "RAMOKOKA however took a different approach and even though the court recognised that the Legislature did not create an automatic right of review in respect of orders made in terms of section 77(6) of the Act, it took the position that 'in view of the potential for serious prejudice to an accused person where an order is

fact that an order by a magistrate declaring an accused a state patient does not have to be approved by a judge in chambers.

In *S* v *Malcolm* [394] the magistrate made an order in terms of section 77(6) of the Criminal Procedure Act declaring the accused a state patient, but the form on which the order was made suggested that this order had to be confirmed by a judge in chambers.[395] It was found that the judge has no part to play in the initial decision to have a person declared a state patient as a result of not being fit to stand trial.[396] The judge in chambers only plays a part in the decision regarding the further detention or release of state patients.[397] Willis J confirmed in *S* v *Ramokoka* [398] that an order made in terms of section 77(6) of the Criminal Procedure Act does not have the *automatic consequence* of being put in front of a judge in chambers for confirmation.[399]

In addition, a special review does not apply to a finding of fitness. The provisions pertaining to special review [400] only apply to sentenced persons and persons who have been convicted but not yet sentenced.[401] These review provisions are therefore not applicable to

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made in terms of s 77(6), some kind of review mechanism seems desirable.' On that basis the court concluded that as 'a matter of good practise, magistrates should refer their orders made in terms of section 77 (6) to the High Court for review'. Also see *S* v *Dlali* (3/2015) [2015] ZAECBHC 2 (27 February 2015) at [34].

394 1998 (1) SASV 577 (OK). (Hereinafter referred to as "*S* v *Malcolm*".

395 *S* v *Malcolm* at 581A-C.

396 *S* v *Malcolm* at 581B-C. Also see the discussion of this case in Kruger *Heimstra Suid-Afrikaanse Strafproses* at 226.

397 *S* v *Wills* at 108A-D. Also see the discussion of this case in Kruger *Heimstra Suid-Afrikaanse Strafproses* at 226. Section 36 of the Mental Health Care Act makes provision for judicial review of a decision that a mental health care user must continue to be treated as an involuntary mental health care user. Section 34(7) of the Mental Health Care Act compels a Review Board to submit documentation pertaining to the decision to continue to treat a mental health care user as an involuntary mental health care user, to the Registrar of the High Court for consideration. This is understood to mean that the decision to treat a person as an involuntary mental health care user must be confirmed by the High Court and confirms the Judge's involvement in the decision regarding the further treatment of the mental health care user. If these provisions will apply in a case where the court orders an accused to be detained in terms of section 77(6) is doubtful as part of the documents that need to be submitted to the registrar is the findings on the 72 hour assessment period which the accused would not have been compelled to undergo if his detention as an involuntary user is the result of an order in terms of the Criminal Procedure Act. Nevertheless, the periodic reviews as provided for in section 37 of the Mental Health Care Act apply to all involuntary mental health care users.

398 2006 (2) SACR 57.

399 *S* v *Ramokoka* 2006 (2) SACR 57 at [11]. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-7, 13-8. See further *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [106].

400 Section 304 of the Criminal Procedure Act. Also see *S* v *Ramokoka* 2006 (2) 57 (W) at [13].

401 Section 304(A) of the Criminal Procedure Act. Also see *S* v *Ramokoka* 2006 SACR 57 (W) at [13]. See further See further *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [106] where it is pointed out that the automatic review does not apply because an order in terms of section 77(6) does not have the consequence that an accused is "convicted" and it does not constitute a "sentence".

those detained in terms of section 77, because persons detained in terms of section 77, have not been convicted or sentenced.

Bearing in mind the serious impact that a finding of unfitness to stand trial may have on the accused, some form of review is, however, desirable.[402] In *S* v *Ramokoka*,[403] Willis J was of the view that magistrates should, as a matter of good practice, submit decisions taken in terms of section 77(6) to the high court for review.[404] Willis J resorted to using the common-law review powers of the high court [405] and reviewed an order given in terms of section 77 of the Criminal Procedure Act taken by the court *a quo* in the *Ramokoka* case supra and set it aside.[406]

Since there is no mechanism in place for the automatic review of a decision that an accused is unfit to stand trial, or the manner of detention following such finding, it might be worth exploring the possibility of expanding the powers of the Mental Health Review Boards to review decisions by courts to have accused persons detained as state patients or involuntary mental health care users. This is explained later in the research.

3.6.2.5Appeal against finding of unfit to stand trial

An accused found unfit to stand trial may appeal against this finding but only if the finding was based on facts other than averment made by the accused.[407] Should the appeal

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402 *S* v *Ramokoka* at [12]. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-8. Also see in general the unreported judgment of *Maluka* v *S* (A197/2013) [2014] ZAGPPHC 862; 2015 (2) SACR 273 (GP) (31 October 2014).

403 S *v Ramokoka* at [16].

404 *S* v *Ramokoka* at [11], [30]. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-8. The view taken in the *Ramokoka* judgment was confirmed and followed by the High Court in the unreported judgment of *Maluka* v *S* (A197/2013) [2014] ZAGPPHC 862; 2015 (2) SACR 273 (GP) (31 October 2014) at [8]. Also see *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [107] where it is pointed out that the High Court has jurisdiction to review cases heard in lower courts. This is provided for in terms of section 22(1) of the Superior Courts Act 10 of 2013 that states that the proceedings of a lower court may be brought under review in the High Court by virtue *inter alia* of a 'gross irregularity in the proceedings'. The court further held at [108} that "The High Court also has an inherent power to review the proceedings of lower courts on the basis of the constitutional principle of legality".

405 *S* v *Ramokoka* at [14]. Also see Joubert *et al Strafprosesreg* 11th ed at 393. These review powers are however only used in exceptional cases where it appears that there will be a gross injustice if the high court does not interfere.

406 *S* v *Ramokoka* at [30]. Caution was however taken not to have the accused released into society due to the potential danger that the accused posed to society in this particular instance.

407 Section 77(8)(a)(ii) of the Criminal Procedure Act. Also see Kruger Heimstra *Suid-Afrikaanse Strafproses* at 231. See further Cassim 2004 Codicillus 17 at 20. Also see Kruger *Mental Health Law in South Africa* at 168 who explains at footnote 110 that the position that an accused can only appeal against a finding of unfit to stand trial if he did not aver himself that he is not triable, is probably so to avoid appeals by the accused without merit. See also Joubert *et al Strafprosesreg* 11th ed at 252.

succeed, the case is referred back to the court *a quo* for the trial to proceed as per normal.[408] The effect of a successful appeal in this instance is, therefore, that the accused is deemed fit to stand trial and should stand trial in the court *a quo.* It is important to note that the state may not appeal against a finding of unfitness to stand trial, only the accused may do so.[409]

3.6.3 *Constitutionality of section 77(6) challenged*

Recently, the provisions of section 77(6) were found unconstitutional by the high court in the case of *De Vos* v *Minister of Justice Constitutional Development*.[410] The case concerned two mentally ill accused persons, one accused of murder and the other of rape.[411] The validity of section 77(6)(i) and (ii) was attacked. In effect, the fate of a mentally ill accused person who is found unfit to stand trial was at issue.[412] It was argued on behalf of the accused persons that this section was in violation of a mentally ill accused person's right to equality, dignity as well as freedom and security of person.[413]

The right to freedom and security of a person received a lot of attention in the arguments put before the court.[414] The court had to consider whether the detention of mentally ill accused persons in terms of section 77(6) is arbitrary or without just cause so as to

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408 Section 77(1) of the Criminal Procedure Act. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 231.

409 Kruger Heimstra *Suid-Afrikaanse Strafproses* at 231. Also see Du Toit et al Commentary on the Criminal Procedure Act at 13-7.

410 *De Vos N.O and Another* v *Minister of Justice and Constitutional Development and Others; InRe: Snyders and Another* v *Minister of Justice and Constitutional Development and Others* 2015 (1) SACR 18 (WCC). This case was decided in September 2014.

411 The first accused, Mr Stuurman, was accused of stabling a 14-year-old girl to death when he himself was only 14 years old. He sustained a head injury at the age of five, which left him severely mentally handicapped. He was sent for observation by the Oudtshoorn regional court and the finding was that he is unfit to stand trial – although the three psychiatrists differed in their reasons for this finding, the finding was unanimous. The second accused, Mr Snyders who was born with Down Syndrome and had cognitive impairments, was accused of raping a girl who, at the time of the trial was 11 years old. The rape was alleged to have taken place some 5 to 6 years prior to the trial. Mr Snyders was sent for observation by the Blue Down's Magistrates court and was found unfit to stand trial. The report indicated that he had moderate mental retardation.

412 *De Vos* v *Minister of Justice and Constitutional Development* WCC case.at [2].

413 These rights are protected in sections 9,10 and 12 respectively of the Constitution. See *De Vos* v *Minister of Justice and Constitutional Development WCC case*.at [33]. It was also contested because it violates the rights of children in terms of section 28(2) of the Constitution. The position of children and thus the part of the judgment of the court dealing with the position of children will not be discussed here since the position of children in conflict of the law does not form part of this research.

414 Section 12(1)(a) of the Constitution states that '[e] everyone has the right to freedom and security of the person, which includes the right - (a) not to be deprived of freedom arbitrarily or without just cause'.

constitute a violation of the constitutional right to freedom and security of the person.[415]

In considering the fairness of section 77(6)(ii), the court's attention was drawn to the discrepancies between this section and section 32 of the Mental Health Care Act in terms whereof an accused who is found unfit to stand trial is to be detained if it is found that he committed a non-violent offence or did not commit any offence at all.[416] For a person to be admitted as an involuntary mental health care user in terms of the Mental Health Care Act, the person has to suffer from a mental illness, be a danger to himself or others and must be unwilling to undergo treatment.[417] When the court orders an accused to be detained as an involuntary mental health care user because he is unfit to stand trial, no provision is made for an assessment of whether or not the person is a danger to himself or society in order to meet the criteria for an involuntary mental health care user as defined in the Mental Health Care Act. It appears that an order in terms of section 77(6)(ii) *overrides* the need to assess the elements as identified in section 32 of the Mental Health Care Act, which sets out the criteria for treatment as an involuntary mental health care user.[418]

This may result in a mentally ill accused being treated as an involuntary mental health care user, whereas such a person might not be a danger to anyone and may be willing to accept treatment.[419] The willingness of a mental health care user to accept treatment and the ability to make decisions regarding the need for treatment places him in a different category of mental health care treatment and rehabilitation services that are less restrictive.[420]

When considering if the detention is for a just cause, the court noted that:

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415 *De Vos* v *Minister of Justice and Constitutional Development* WCC case.at [38].

416 *De Vos* v *Minister of Justice and Constitutional Development* WCC case.at [40], [42].

417 Section 37 of the Mental Health Care Act. Also see *De Vos* v *Minister of Justice and Constitutional Development* WCC case.at [40].

418 The applicability of the 72-hour assessment period as provided for in section 34 of the Mental Health Care Act also comes into question. The 72-hour assessment period is conducted in order to determine if further mental health care treatment and rehabilitation is necessary or not. In the event that the court makes an order in terms of section 77(6) the decision has been taken, albeit by the court and not a mental health care professional, that further mental health care treatment and rehabilitation services are necessary.

419 *De Vos* v *Minister of Justice and Constitutional Development* WCC case.at [41], [42].

420 In terms of the Mental Health Care Act, a person who is willing to accept treatment is treated as a voluntary mental health care user and a person who is not capable of taking a decision regarding the need for treatment but who does not object thereto, is treated as an assisted mental health care user. The discharge of these categories of users are much easier than that of a patient detained as an involuntary mental health care user or a state patient in terms of sections 37 and 47 of the Act respectively.

> *It is a fundamental principle of our law that when there is an interference with physical liberty of a person, the party causing the interference bear 'the burden to justify the deprivation of liberty, whatever form it may have taken, that is, to convince the court that the deprivation of liberty is not arbitrary and for a just cause.*[421]

The Minister of Justice and Constitutional Development as the respondent in the *De Vos* matter had to convince the court that the detention of Mr Stuurman and Snyders, in this case, was not arbitrary but for a just cause. The reasons for advanced was that such detention was necessary for the protection of the accused and society at large, as mentally ill persons may pose a danger to themselves and society.[422] It is important to note, however, that as pointed out above, the dangerousness of the accused is never assessed before a finding of *unfitness to stand trial* is made or before the court orders the detention of an unfit accused. To state that the detention is because the accused might pose a danger to himself or society is based on an arbitrary assumption about persons with mental illness and not on the actual circumstances of the accused before the court. This amounts to arbitrary decision-making.[423]

The court acknowledged that there might be circumstances in which the involuntary detention of mentally ill persons is justified and that such detention in those circumstances serves a legitimate purpose.[424] The court, however, importantly pointed out that:

> *It is equally well-recognised, however, that not every person with a mental illness or mental defect is a danger to society or requires to be detained in an institution. This is so because there are varying degrees of mental illness and various types of mental disability, and institutionalisation is not invariably required or indeed appropriate. And herein lies the rub because s 77(6)(a) does not require, or even permit, the court to enquire into either the potential danger to society posed by the accused person or the individual needs or circumstances of such person.*[425]

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421 *De Vos* v *Minister of Justice and Constitutional Development* WCC case.at [41], [43] relying on the case of Zealand v Minister for Justice and Constitutional Development 2008 (4) SA 458 (CC) at [24\, [25].

422 *De Vos* v *Minister of Justice and Constitutional Development* WCC case.at [41], [46], [47] where the case of the respondent is set out as that the deprivation of freedom in the case of persons detained because they are mentally ill, "gives effect to legitimate governmental objectives, which were identified by the respondents as being the following: (a) An accused person with a mental illness, who is found to have committed a serious or violent act, poses a potential danger to society. The community must accordingly be protected from such persons and the State must fulfil its obligation to provide safety and security for the people of South Africa. (b) The DPP further contended that s 77(6)(a) is 'designed primarily to protect the interest of the accused person' and that it is necessary 'to protect the mentally ill person from danger to him, as well as the public from possible danger from the accused person'.

423 In other jurisdictions, such as Canada, provision is made for the assessment of dangerousness before a disposition is made. This can be ordered by either the court or the Review Board. See chapter 4 of this research for a discussion on the role of the Review Board in this process.

424 *De Vos* v *Minister of Justice and Constitutional Development* WCC case.at [48].

425 *De Vos* v *Minister of Justice and Constitutional Development* WCC case at [49].

The court found that section 77(6)(a) dictates a *predetermined and mandatory outcome* [426] that deprives the court of using its discretion with regard to an appropriate order having due regard to the facts of the individual case.[427] This lack of discretion can lead to serious consequences where the mechanical application of a rule can lead to injustice in some instances. Judicial discretion has a very important role to play to ensure justice.[428]

The court found that the provision in section 77(6) that compelled a court to declare an accused person charged with a violent crime and who is unfit to stand trial, a state patient [429] can give rise to an *arbitrary and irrational result* amounting to an infringement of the accused's right to freedom and security of the person.[430]

As with all constitutional rights, the limitation clause in the Constitution had to be considered to establish if the limitation of the right to freedom of movement was justifiable. The court, however, found that it was not and that there were less restrictive ways to achieve the goal set by section 77(6). The court was of the view that there is no reason why the court in cases of section 77(6)(i) should not have the same discretion as a court dealing with a case in terms of section 78(6)(i) and further, with section 77(6)(ii) cases, there are alternatives available before admitting a person as an involuntary mental health care user in terms of the Mental Health Care Act.[431] The court did not indicate what such alternatives might be. This could conceivably be to treat the accused as an assisted user or on an outpatient basis or to release the person on conditions.

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426 *De Vos* v *Minister of Justice and Constitutional Development* WCC case at [49].

427 *De Vos* v *Minister of Justice and Constitutional Development* WCC case at [49].

428 *De Vos* v *Minister of Justice and Constitutional Development* WCC case at [50] where the court quoted from the judgment of Ngcobo J, writing for the majority in *Director of Public Prosecutions, Transvaal* v *Minister of Justice and Constitutional Development* where it was stated that: "The importance of judicial discretion cannot be gainsaid. Discretion permits judicial officers to take into account the need for tailoring their decisions to the unique facts and circumstances of particular cases. There are many circumstances where the mechanical application of a rule may result in an injustice. What is required is individualised justice, that is, justice that is appropriately tailored to the needs of the individual case. It is only through discretion that the goal of individualised justice can be achieved. Individualised justice is essential to the proper administration of justice."

429 An accused is detained as a state patient until a judge in chambers orders his release and this could potentially give rise to lengthy periods of detention.

430 *De Vos* v *Minister of Justice and Constitutional Development* WCC case at [52]. In reaching its conclusion, the court compared the options available to a court when dealing with a case under section 78(6), with the options available to a court under 77(6), and was unable to find a rational explanation for the difference. Section 78(6) includes the option to order the conditional or unconditional release of an accused found not guilty because of mental illness whereas the option of discharge is not available when a person is found unfit to stand trial. The court found this to be unjust. The court went on to deal with the infringement of section 28(2) of the Constitution with regard to the rights of children in the criminal justice system since Mr Stuurman was a child himself when he allegedly committed the crime. Due to the scope of this work, this part of the judgment, although very interesting and relevant, is not included in this work.

431 *De Vos* v *Minister of Justice and Constitutional Development* WCC case at [65].

Section 77(6)(i) and (ii) were declared unconstitutional by the high court and the order suspended for a period of 24 months to enable the legislature to cure the invalidity.[432] Out of concern for the situation that the two accused persons may find themselves in, pending the amendment of the legislation, the court made an order pertaining to how matters that fall under section 77(6)(i) and (ii) should be dealt with in the interim. The court made the following order:[433]

> *(c) During the period of suspension, section 77(6)(a)(i) is deemed to read as follows (words inserted by this order are underlined and words omitted are deleted):*
>
> *'(i) in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be ~~detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002~~*
>
> *(aa) detained in a psychiatric hospital or prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;*
>
> *(bb) be admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;*
>
> *(cc) released subject to such conditions as the court considers appropriate; or*
>
> *(dd) released unconditionally.'*
>
> *(d) During the period of suspension, sub-paragraph 77(6)(a)(ii) is deemed to read as follows (words inserted by this order are underlined):*
>
> *'(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence –*
>
> *(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;*
>
> *(bb) released subject to such conditions as the court considers appropriate; or*
>
> *(cc) released unconditionally.*

The Court emphasised that the reading-in suggested is merely an interim measure and not intended to prescribe to the legislature how these provisions should be corrected.[434] It is submitted, however, that the reading in of the words as suggested by the court will remedy the situation and render the provisions fair and just to those who are found unfit to stand trial.

In this judgment, the court compared the provisions and consequences of a finding of not criminally responsible as provided for in section 78 and those of a finding of unfit to stand trial as provided for in section 77. The court identified those provisions that create

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432 *De Vos* v *Minister of Justice and Constitutional Development* WCC case at [72].

433 *De Vos* v *Minister of Justice and Constitutional Development* WCC case at [72].

434 *De Vos* v *Minister of Justice and Constitutional Development* WCC case at [70].

inequality between those that fall under section 77 and those that fall under section 78.[435] A provision that adds to such inequality is the fact that when an accused does not quite meet the criteria for the section 78 defence (not criminally responsible), the lack of criminal capacity (diminished capacity) may still be taken into account during sentencing.[436] Such an accused's mental illness is taken into account later in the proceedings and softens the impact of the traditional criminal justice system, as far as sentencing is concerned. Three categories of persons under section 78 exist, namely, those that are criminally responsible, those that lack criminal responsibility, and those that have diminished criminal capacity who do not meet the criteria of the first two categories.

There is no similar provision for those that fall under section 77. An accused is considered either fit to stand trial or unfit to stand trial. No provision is made for those who do not quite meet the criteria for unfitness yet have a mental illness. If the accused suffers from a mental illness that does not affect his fitness, he will be found fit to stand trial despite the presence of a mental illness. The mental illness is not considered further in the proceedings, and the accused is dealt with in the same manner as those who do not have a mental illness. A need is identified for the acknowledgement of the third category of persons under section 77, namely those who are fit to stand trial but mentally ill.

The *De Vos* matter was taken to the Constitutional court for confirmation of the order of invalidity of section 77(6)(i) and (ii).[437]

The Constitutional court agreed with the court *a quo* that the provisions of section 77(6)(a)(i) [438] are peremptory and that it deprives the court of exercising judicial

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435 To illustrate, section 77 provides for persons who are found not to have committed a crime to be detained whereas section 78 provides for persons who have committed a crime to be released unconditionally. This will be remedied by the suggested reading-inn of words as proposed by the court in the De Vos case. An accused found not fit to stand trial, may have to face a criminal trial in future whereas the case of someone who was found not criminally responsible is finalised with a not guilty verdict.

436 Section 78 (7) of the Criminal Procedure Act states that: "(7) If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused."

437 See *De Vos* v *Minister of Justice and Constitutional Development* CC case.

438 Section 77(6)(ii) states that: "(6) (a) If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court shall direct

discretion.[439]

The Constitutional court further agreed with the court *a quo* that the routine imprisonment of an unfit accused who have been found to have committed the offence in question is not acceptable and should only be employed as a "stop-gap" measure where such an accused awaits the availability of a bed a hospital for treatment and where the court is of the view that such an accused presents a danger to himself and others if released awaiting such availability.[440] Where no such threat of harm exists, an order similar to that provided for in section 35(1)(f) of the Constitution [441] or 79(2)(c) of the Criminal Procedure Act [442] should be considered.[443] These provisions enable the court to exercise discretion – at least in so far as the waiting period for purposes of treatment as a state patient is concerned. The court eventually found with regard to section 77(6)(a)(i) that:

> *Section 77(6)(a)(i) operates rationally subject to certain qualifications. Imprisonment should only be available to accused persons who pose a serious danger to society or themselves. If an accused person does not pose a serious danger to society or themselves, then resources alone cannot dictate that an accused person be placed in prison. If resources alone require an accused person to be kept in prison, then to this extent, section 77(6)(a)(i) is inconsistent with the Constitution and is invalid. If resources are significantly constrained such that a bed in a psychiatric hospital is unavailable, then a presiding officer should be able to craft an appropriate order that encompasses treating the accused as an outpatient, for example, by extending the bail conditions or any other appropriate order pending the availability of a bed in a psychiatric hospital.*[444]

The court, however, found that it is permissible to order the detention of an accused in a psychiatric hospital after being found unfit to stand trial and having committed the serious offence in question.[445] Such detention, the court reckoned, serves the purpose of care and

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that the accused- (i) in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;"

439 *De Vos* v *Minister of Justice and Constitutional Development* CC case at [19].

440 *De Vos* v *Minister of Justice and Constitutional Development* CC at [47].

441 Section 35(1)(f) states that: (1) Everyone who is arrested for allegedly committing an offence has the right— *(f)* to be released from detention if the interests of justice permit, subject to reasonable conditions."

442 Section 79(2)(c) states that: "The court may make the following orders after the enquiry referred to in subsection (1) has been conducted- (i) postpone the case for such periods referred to in paragraph (a), as the court may from time to time determine; (ii) refer the accused at the request of the prosecutor to the court referred to in section 77 (6) which has jurisdiction to try the case; (iii) make any other order it deems fit regarding the custody of the accused; or (iv) any other order."

443 *De Vos* v *Minister of Justice and Constitutional Development* CC at [48].

444 *De Vos* v *Minister of Justice and Constitutional Development* CC at [63].

445 In terms of section 77(6)(a)(i) that deals with persons accused of serious crimes involving violence.

treatment, and for this reason justifies the infringement of the accused's liberty. The safeguards built into section 47 of the Mental Health Care Act, particularly with regard to discharge measures, are sufficient according to the court to protect the accused's rights.[446]

With regard to section 77(6)(a)(ii),[447] the Constitutional court found that:

> *Section 77(6)(a)(ii) also operates rationally only in respect of an accused person who is likely to inflict harm to himself or others or requires care, treatment and rehabilitation. To the extent that section 77(6)(a)(ii) prescribes that all accused persons must be institutionalised, regardless of whether they are likely to inflict harm to themselves or others and do not require care, treatment and rehabilitation in an institution, it is inconsistent with the Constitution and stands to be invalidated. The mere fact that an accused person brushes shoulders with the criminal justice system is not a just cause for institutionalisation and renders the provision constitutionally invalid in respect of such persons.*[448]

The court analysed the criteria for involuntary admission as set out in the Mental Health Care Act and pointed out that the provisions of section 77(6)(a)(i) effectively create a pathway for an accused through the criminal justice system to be admitted as an involuntary user where he would not have met the criteria had he not been in the criminal justice system.[449] The court pointed out that not all mental illnesses can be treated (such as Downs Syndrome, for instance) and that institutionalisation of a person with this condition will not serve the purpose of treatment as the condition will not improve.[450]

The court agreed with the applicant's contention that section 77)(6)(a)(ii) perpetuates stereotyping in that it nurtures the perception that all persons with mental illnesses are dangerous.[451] It violates the mentally ill accused's person's right to equality and dignity.[452]

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446 *De Vos* v *Minister of Justice and Constitutional Development* CC at [35]-]38].

447 Section 77(6)(a)(ii) states that: "(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence-(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002,"

448 *De Vos* v *Minister of Justice and Constitutional Development* CC at [66].

449 The court explains at]]45] that: If the accused person is committed involuntarily, he may only be institutionalised if— "any delay in providing care, treatment and rehabilitation services or admission may result in the—
(i) death or irreversible harm to the health of the user;
(ii) user inflicting serious harm to himself or herself or others; or
(iii) user causing serious damage to or loss of property belonging to him or her or others."
Accordingly, without a court order, the accused would not be able to be institutionalised involuntarily unless (i), (ii) or (iii) above can be established. Thus, absent one of the above criteria, if an accused has committed no offence, institutionalisation cannot follow under the Mental Health Care Act. In effect, then, accused persons are more readily institutionalised under the Criminal Procedure Act without the ordinary safeguards prescribed by the Mental Health Care Act.

450 The objective of treatment in itself is therefore not sufficient to justify an infringement of a person's liberty. See *De Vos* v *Minister of Justice and Constitutional Development* CC at [55].

451 *De Vos* v *Minister of Justice and Constitutional Development* CC at [56].

452 *De Vos* v *Minister of Justice and Constitutional Development* CC at [56].

The court pointed out that there is a Constitutional duty in terms of section 7 of the Constitution to promote the equality of, especially, persons disadvantaged by past practices.[453] Such persons include persons with disabilities.[454] The court opined that the trial on the facts is not an adequate procedural safeguard against the deprivation of liberty since the outcome is automatic institutionalisation as an involuntary user even where the trial on facts shows that the accused was not involved in the alleged offence.[455]

The court found that section 77(6)(a)(ii) is unconstitutional as it amounts to an arbitrary deprivation of freedom under section 12 of the Constitution.[456] The court found that such deprivation could not be justified in terms of the limitation clause.[457]

On the discrepancies in discretion provided for in section 77 and 78 of the Criminal Procedure Act, the Constitutional court was of the view that:

> *Finally, the fact that section 78 provides for a wider discretion when dealing with accused persons, who at the time of the commission of the offence are found not to have had capacity, is of no moment. The distinction made between the options provided for under section 77(6)(a)(i) of the Criminal Procedure Act on the one hand, and section 78(6) on the other, is not irrational. They deal with different enquiries and different possible outcomes. Section 78 deals with a person who commits an offence and who, by reason of a mental illness or an intellectual disability, was incapable of appreciating the wrongfulness of the act or of acting in accordance with an appreciation of the wrongfulness of the act. If it is established that at the time of the offence, the person did not have the requisite appreciation or ability to act in accordance therewith, the accused must, for that reason, be found not guilty. It is only then that the several options in section 78(6) become available. Sections 77 and 78 serve different purposes, and that is why section 78(6) provides a wider range of options. An accused, dealt with in terms of section 78(6), may have no mental illness at the time of the court proceedings, in which case mandating hospitalisation would be patently irrational. Thus the different prescripts of the provision are but a red herring.458*

The Constitutional court consequently did not agree with the court *a quo's* suggested reading in of the provisions of section 78(6) into section 77(6)(a)(i).[459] The Constitutional court did, however, order that reading in is appropriate with regard to section 77(6)(a)(ii).[460] Section 77(6)(a)(ii) now reads, from the date of the judgment:

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453 *De Vos* v *Minister of Justice and Constitutional Development* CC at [56].
454 *De Vos* v *Minister of Justice and Constitutional Development* CC at [56].
455 *De Vos* v *Minister of Justice and Constitutional Development* CC at [58].
456 *De Vos* v *Minister of Justice and Constitutional Development* CC at [58]. The court again refers to article 14 of the United Nations Convention on the Rights of Persons with Disabilities, which dictates that the presence of a disability in itself can never warrant the depravation of liberty.
457 Section 36 of the Constitution. See *De Vos* v *Minister of Justice and Constitutional Development* CC at [59].
458 *De Vos v Minister of Justice and Constitutional Development* CC at [39].
459 *De Vos* v *Minister of Justice and Constitutional Development* CC at [61].
460 *De Vos* v *Minister of Justice and Constitutional Development* CC [67], [69].

(ii) *where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence—*

(aa) *be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act 17 of 2002;*

(bb) *be released subject to such conditions as the court considers appropriate; or*

(cc) *be released unconditionally.*

In considering the appropriate remedy, the court acknowledged that the interest of society had to be taken into account as well.[461]

The judgment goes a long way to safeguard the rights of mentally ill accused persons. The amendment of section 77(6)(a)(ii) is especially helpful to accused persons who committed minor offences and those who did not commit the offence at all as the option is now available to be released unconditionally.[462]

The option of conditional release may create space in the criminal justice system for treatment programmes in order for the accused to become fit to stand trial.

3.6.4 Finding of fit to stand trial

If the court finds that the accused is fit to stand trial, the criminal proceedings simply continue.[463] A fitness finding does not imply the absence of a mental illness. An accused with a serious mental illness can and have been found fit to stand trial.[464]

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461 *De Vos* v *Minister of Justice and Constitutional Development* CC at [62]. The Constitutional court points out that the court *a quo* did not deal with the interplay between the Mental Health Care Act and the Criminal Procedure Act when dealing with mentally ill accused persons. For this reason, the court indicated that the remedy in this case has to be a progressive one.

462 See the amended section 77(6)(a)(ii) as set out in the *De Vos* v *Minister of Justice and Constitutional Development* CC case at [69]. These amendments do not have retrospective force.

463 Section 77(5) of the Criminal Procedure Act. Also see Louw in *Psycholegal Assessment in South Africa* at 43. See further Cassim 2004 Codicillus 17 at 19-20. See further Kruger *Heimstra Suid-Afrikaanse* at 229, 230. Note that if the trial proceeds and the accused is found guilty, the accused may appeal against his conviction as well as the finding made in terms of section 77(5) namely that he was fit to stand trial. If the appeal succeeds, the conviction and sentence will be set aside and the appeal court will make an order in terms of section 77(6) of the Criminal Procedure Act. See Kruger *Heimstra Suid-Afrikaanse Strafproses* at 231. Also see Joubert *et al Strafprosesreg* 11th ed at 251.

464 See chapter 2 of this research where it is pointed out that a number of accused persons with mental illnesses such as schizophrenia and major depression are found fit to stand trial. *They* do not always meet the criteria to be declared unfit to stand trial. See Africa in *Psychology and Law* at 389. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 198 who specifically mention that persons with serious mental illness do not always meet the incompetence to stand trial criteria and are, consequently, found fit to stand trial and sent to prison. See also Slobogin, Rai and Reisner *Law and the Mental Health System* 1020 where various studies revealed that in approximately 30% of matters, those with serious mental illnesses sent for observation are found fit

In the event that the accused is fit to stand trial but mentally ill, no further consideration is given to the presence of the mental illness during the trial unless either party raises the fitness issue again. The issue of mental illness is otherwise only relevant if the accused decides to raise a lack of criminal capacity as a defence.

An accused found fit to stand trial is transferred back to prison/jail, where he awaits his trial. The negative effect of incarceration of those with mental illnesses has been pointed out. Mental health care services for awaiting trial prisoners are not readily available, and it is likely that the mental illness will go untreated whilst the accused awaits trial.[465] Detention in prison awaiting trial is a particular concern in cases of a person with an intellectual disability. Intellectually disabled accused persons should not be sent to prison awaiting trial as this is a potentially destructive and hazardous environment for a fragile mind and can expose the intellectually disabled accused to abuse.[466] Most accused persons awaiting a fitness assessment, among whom may be persons with intellectual disabilities,[467] are, however, kept in prison awaiting such an assessment.[468]

Fit but mentally ill accused persons may be released on bail pending their trial, although this is not routinely done.[469] Where an accused with a mental illness is released on bail, mental health treatment during this time can be obtained on a voluntary basis if the accused seeks assistance.

As pointed out earlier,[470] criminal behaviour may be a symptom of an untreated mental illness. Lack of treatment may cause the mentally ill person to clash with the criminal justice system again in future, perpetuating the revolving door phenomenon.

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to stand trial.

465 See the discussion of the lack of facilities and trained staff in correctional facilities and psychiatric institutions as discussed in chapter 2 of this research.

466 Calitz *et al* 2007 *SAJP* 147 at 151. Also see *De Vos* v *Minister of Justice and Constitutional Development WCC case* at [22] where the psychiatrists that assessed the accused for fitness in this case expressed concern about the fact that he will face indefinite detention in the event that he is found unfit and declared a state patient to be detained in a psychiatric institution indefinitely.

467 Calitz et al 2007 SAJP 147 at 148 reports that in a study conducted in the Free State between 1993 and 2003, it was found that 80 of the 1203 awaiting trial prisoners were intellectually disabled. This constitutes 6.7% of awaiting trial prisoners in the Free State. At 149 the authors explain that 62.5% of the group were diagnosed with mild intellectual disability whilst 20% of this group was also diagnosed with epilepsy.

468 Bateman C "The insanity of a criminal justice system" 2005 (95) *SAMJ* 208-212 at 208.

469 As indicated earlier in this chapter, mentally ill accused persons are not readily released on bail due to possibly a perceived perception that they might pose a danger to society. See the discussion of bail under the section on the Constitution earlier in this chapter.

470 See the discussion of reasons for contact with the criminal justice system as discussed in chapter 2 of this research. One of the reasons for the increase in number of mentally ill persons in the criminal justice system is that crime is often a result of a treatable but untreated mental illness.

3.6.4.1Appeal against finding of fit to stand trial

If the accused is convicted, he may only lodge an appeal against the finding of *fit to stand trial* after conviction [471] but not directly after the finding of fitness as this finding constitutes an interim finding which is arrived at during a trial within a trial.[472] Should the appeal succeed, the accused's conviction and sentence will be set aside, and the appeal court will make an order in terms of section 77j(6) as it deems fit.[473] The effect of this successful appeal is that the accused is deemed unfit to stand trial and should never have been tried by the court *a quo*. The state does not have a right of appeal under section 77.[474]

3.7 Conclusion

It is clear from the discussion of the relevant procedural aspects pertaining to fitness to stand trial that there are some challenges that have to be addressed.

The position of accused persons found unfit to stand trial is regulated in detail, and safeguards are built into the system to ensure the protection of their rights and that their vulnerability in having a mental illness is attended to. This is bolstered by the decision in the *De Vos* matter that makes it possible for unfit accused persons charged with minor offences to be released with or without conditions. Even though the court expanded the options in terms of orders available to the court where an accused is found unfit to stand trial, the court's discretion on how to deal with a mentally ill accused is still limited in that only a list of specific orders can be made.

It might be worth considering expanding the powers of the Review Board to assist with the decision on what the most appropriate way is to deal with the particular mentally ill accused. Specialised skills are resident in the Review Board, which skills can be employed to determine the type of assessments required and the type of treatment that the accused should undergo to achieve the best results.

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471 Du Toit et al *Commentary on the Criminal Procedure Act* at 13-7. Section 77(8)(a)(i) of the Criminal Procedure Act. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 231. See further Cassim 2004 Codicillus 17 at 20 and Kruger *Mental Health Law in South Africa* at 168. See also Joubert *et al Strafprosesreg* 11th ed at 252.

472 Section 77(8)(a)(i) of the Criminal Procedure Act. Also see Du Toit et al *Commentary on the Criminal Procedure Act* at 13-6, 13-7.

473 Section 77(9) of the Criminal Procedure Act states that: "(9) Where an appeal against a finding in terms of subsection (5) is allowed, the court of appeal shall set aside the conviction and sentence and direct that the person concerned be detained in accordance with the provisions of subsection (6)." Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 231.

474 Du Toit et al Commentary on the Criminal Procedure Act at 13-7. Also see Kruger Mental Health Law in South Africa at 168.

The position of accused persons found fit to stand trial but who has a mental illness is not well regulated in South Africa. In fact, no mention is made of this category of persons in current legislation. Although the majority of persons sent for fitness assessments are found fit to stand trial, many may still suffer from a mental illness, although it might not be of such a nature that it affects their fitness. An accused with a serious mental illness can be found fit to stand trial. The seriousness of the mental illness *per se* is not indicative of fitness or unfitness. The cases of seriously mentally ill but fit accused persons may still be processed through the traditional criminal justice system.

These persons may raise the insanity defence later in the trial, but, as pointed out earlier, the presence of a mental illness does not presuppose a lack of criminal capacity. The fact that a person currently suffers from a mental illness does not imply that he suffered from a mental illness at the time of committing the offence. For these persons, the issue of mental illness will not be raised again during the trial unless fitness becomes an issue again. The mental illness is likely to go untreated and likely to worsen as the fit, but mentally ill accused awaits trial in prison.

4 CHALLENGES IN THE TRADITIONAL CRIMINAL JUSTICE SYSTEM AS IT PERTAINS TO THE MENTALLY ILL ACCUSED

4.1 Introduction

From the discussion above, a number of challenges in the criminal justice system as it pertains to mentally ill accused persons can be identified. The discussion below groups the challenges together in main themes being: delays in fitness assessments, high cost of fitness assessments, lack of training and specialised skill, and the disregard for mental illnesses that do not affect fitness. The final obstacle pertains to the lack of diversion options for fit but mentally ill accused persons. This research suggests that many of the identified challenges could be remedied by the implementation of a Mental Health Court, and the manner in which this can be achieved is briefly touched upon throughout this summary of challenges.

4.2 Delays in fitness assessment

The delays in fitness assessments potentially frustrate the accused’s constitutional right to

a speedy trial [475] and the victim's expectations that justice should be served.[476]

As pointed out above, once an order for a fitness assessment is made, the accused often has to wait for long periods for an available bed at a specialised psychiatric facility where the assessment can be done. The two main reasons to which this long waiting period can be ascribed are a shortage of beds in these specialised facilities and a shortage of forensic mental health personnel at these facilities to conduct these assessments.[477]

Other reasons that contribute to the long waiting lists for assessments are the fact that psychiatrists, rather than clinical psychologists, are routinely appointed to conduct these assessments whilst there is a shortage of psychiatrists in the country; the fact that assessments are largely done in hospitals with stays of up to 30 days at a time; the limited number of facilities in the country at which these assessments can be conducted; and the fact that the justice department relies on the resources of the Department of Health for conducting these observations.[478]

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475 Section 35(3) of the Constitution makes provision for this right. See Joubert *et al Strafprosesreg* 11th ed at 285, 286 for a detailed explanation of what the right to a speedy trial entails and the possible effect that a delay in proceedings can have on an accused. They point out that a delay in the finalisation of the trial could affect the accused's right to freedom of movement, and could also potentially damage the accused's reputation, or he may lose employment due to his continued absence from work because he is incarcerated, awaiting trial. A delay in the finalisation of the trial may also have a negative effect on the proceedings itself as witnesses may not be able to give an accurate account of events if it is too long after the incident or witnesses may no longer be available to testify at the trial. Also see Pillay 2014 *South African Journal of Psychology* 48 at 48 who points out that the fact that the criminal trial cannot continue until after the 30-day observation period has taken place in itself causes a delay in the trial.

476 Pillay 2014 *South African Journal of Psychology* 377 at 379, 380 who refers to the famous saying by Martin Luther King that "justice too long delayed is justice denied" and applies it the survivors and victims of crimes firstly, and secondly to the accused who's trial is being delayed by the forensic mental health process.

477 Pillay 2014 *South African Journal of Psychology* 377 at 378 points out that there are very few psychiatrists in South-Africa and even less that specialise in the field of forensic psychiatry. There are almost four times as many clinical psychologists than psychiatrists in South Africa. (see this source at 378 and 379). Also see the discussion regarding the shortage of facilities at psychiatric institutions in chapter 2 of this research. See further Pillay 2014 *South African Journal of Psychology* 48 at 51 where it is indicated that there are only 10 facilities across South Africa where court ordered forensic assessments could be conducted. Also see *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [2] where it is indicated that the accused had to wait for many months before a bed for observation became available at Valkenberg hospital. In the unreported judgment of S v *Vika* (14519) [2014] ZAWCHC 155 (14 October 2014) the accused had to wait 11 months for a bed to become available at Valkenberg hospital [5-6]. In another unreported judgment of *S* v *Dlali* (3/2015) [2015] ZAECBHC 2 (27 February 2015) the accused had to wait approximately 7 months before a bed at the Fort England psychiatric hospital became available.[3-6]. Also see *De Vos* v *Minister of Justice and Constitutional Development* CC case at [44] where the shortage of beds in psychiatric facilities is accepted as common cause.

478 Pillay 2014 South African Journal of Psychology 48 at 49 who points out that a major challenge facing correctional facilities with regard to accused persons in detention awaiting psychiatric

The assessment period can last for 30 days with a possibility of an extension of another 30 days. The trial is postponed pending the fitness assessment.[479] The assessment can indicate that the accused is fit to stand trial, in which case he goes through the normal criminal justice channels, which includes waiting in prison for his day in court. Bail is not routinely granted to accused persons with mental illnesses, although this is permitted.[480] Because of the assessment time, waiting for a bed to become available and waiting, after the assessment, for the court to reveal the fitness finding, the accused with a mental illness that was sent for assessment possibly spends more time in the criminal justice system than someone accused of the same crime, but in respect of whom, fitness is not at issue. Such a person will not be subjected to the waiting periods associated with the fitness assessment as explained above.

In addition to the long delays caused by the scarcity of resources at psychiatric institutions, delays are exacerbated by the fact that the criminal courts are experiencing backlogs due to case overloads.[481] These caseloads have a negative effect on remand detainees as they wait in prison for their cases to be heard.[482]

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observation, is that there is no statutory obligation on the Department of Health to make services available for these purposes and this leads to persons often being detained for up to two years in certain instances, awaiting the availability of a bed in a health facility for purposes of the observation. These waiting periods are acknowledged and touched upon in Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20paper%20on%20Remand%20Detention%20in%20SA%20Draft%20Final.pdf (Date of use: 26 August 2016) at 74. Also see the discussion chapter 2 of this research about the scarcity of facilities at psychiatric institutions tasked with conducting psychiatric observations.

479 Since the fitness issue can be raised at any point during the proceedings prior to sentencing, a postponement for purposes of the psychiatric observation (fitness assessment) can be requested at any point in time during the trial. See Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20paper%20on%20Remand%20Detention%20in%20SA%20Draft%20Final.pdf (Date of use: 26 August 2016) *at* 40. Also see Pillay 2014 South African Journal of Psychology 48 at 48 who points out that the trial cannot continue until the psychiatric observation has been conducted.

480 Schutte 2013 *South African Journal of Bioethics and Law* 64 at 67 discusses the findings of a study done at Sterkfontein hospital which indicates that the majority of accused persons who were eventually found unfit to stand trial, was denied bail and that the presence of a mental illness rather than the seriousness of the charges against the accused, appeared to be the deciding factor as to if bail should be granted or not. Also see the discussion of the potential discrimination against accused persons with mental illness at the bail stage under the discussion of Constitutional provisions earlier in this chapter.

481 Institute for security studies "Criminal (In)justice in South Africa. A civil society perspective" (Institute for Security Studies, Pretoria, 2009) https://www.issafrica.org/uploads/Book2009CrimeInJust.pdf (Date of use: 14 September 2016) at 106 where it is indicated that across South Africa there is approximately 1 000 000 new cases before the courts annually. In 2008, it was reported that regional courts had a 35% case backlog (at xvi). Also see Pillay 2014 *South African Journal of Psychology* 48 at 48 who states that there is a huge backlog of cases involving 30-day observation periods.

482 The case backlogs result in long waiting periods for remand detainees before their cases go on trial.

Most of the accused persons referred for the 30-day psychiatric observation, are found fit to stand trial.[483] The accused may be diagnosed with a mental illness, but it does not affect his ability to follow the proceedings. One could argue that such referrals were unnecessary to begin with. It should, however, be born in mind that there is a legal obligation on a court to refer an accused for psychiatric observation once a mere suspicion of mental illness arises.[484] A reasonable possibility that the accused may be suffering from a mental illness or defect is sufficient for the obligation of referral upon the court to arise.[485]

Possible unnecessary referrals suggest that there is a need for clear reasons to be given by courts for referring an accused person for psychiatric observation.[486] Unfortunately, many accused sent for observation try to manipulate the system to rather be detained in a mental institution than face the full force of the law in a criminal trial.[487] This may also be an indication that the current system is not ideal and needs a fresh approach with the aim of cost- and time-saving.[488] Mental Health Courts are proposed as an alternative to the current fitness assessment system that can achieve all these objectives. This suggestion is discussed in more detail later in this research.

Schizophrenia, which is diagnosed most often during forensic assessments, is usually diagnosed at a fairly early stage, after which a therapeutic programme is started with the patient. A view exists that it is not necessary to refer these persons for a full 30-day

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The delays caused by psychiatric observations contribute to the long waiting periods. It is reported in Institute for Security Studies https://www.issafrica.org/uploads/Book2009CrimeInJust.pdf (Date of use: 14 September 2016) at 106 that 44% of the 50 284 remand detainees in South Africa in 2008, had to wait at the very least three months in order for their cases to go on trial.

483 Calitz *et al* 2007 *SAJP* 147 at 147. Persons found fit to stand trial may be diagnosed with a mental illness, even a serious mental illness, but such diagnosis in itself does not render the accused unfit to stand trial. Persons with serious mental illness may be found fit to stand trial.

484 Section 77(1) of the Criminal Procedure Act states that: "(1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79."

485 Kruger *Mental Health Law in South Africa* at 163. Also see Du Toit et al *Commentary on the Criminal Procedure Act* 13-4. Also see S v Tom and Others 1991 (2) SACR 249 (B) at 250H-251C.

486 Note the observation by Schutte 2013 *South African Journal of Bioethics and Law* 64 at 67 that evidence given by the accused himself about his mental illness, should possibly not be regarded as a ground for referral as all of the accused who raised this issue themselves and gave evidence about their own mental illness in court, were found fit to stand trial in this particular study conducted at Sterkfontein hospital in 2010.

487 Bateman 2005 *SAMJ 208* at 212 points out that this fact was confirmed by Dr Linda Hering, Director of Mental Health Facilities for the Western Cape at the time.

488 Pillay 2014 *South African Journal of Psychology* 48 at 56 advocates for a fresh approach to the psychiatric observation of mentally ill persons and the problems associated therewith such as the delays caused by the fact that only psychiatrists are routinely appointed to do these observations whilst they are not readily available due to the scarcity of psychiatrists in the country. He advocates for the fresh approach to focus on reduced recidivism as well.

observation period but that evidence by a member of the primary care team should be sufficient to prove that he suffers from a mental illness. Gagiano *et al* [489] submit that referring this person for observation will not add to the knowledge that the court could gain from a member of the primary care team. Resources and money spent on *observing* these individuals should rather be spent on community programmes where they can receive support. In the Free State in 1990, more than 1000 individuals with schizophrenia were part of such a community program.[490] This suggestion supports the notion of a Mental Health Court where diversion programmes are implemented in the form of community programmes.

Outpatient care could assist in reducing delays in fitness assessment since this would not entail a waiting period for an available bed at a psychiatric hospital for assessment on an inpatient basis. South African case law has not suggested that outpatient assessment for fitness to stand trial is an option, whereas this has been ordered in cases of assessment for criminal capacity.[491] Most assessments in South Africa are done on an inpatient basis where the accused is admitted for a 30-day observation period. Pillay [492] promotes that the assessments be conducted on an outpatient basis, which will in and of itself save costs. He also submits that the entire observation process can be conducted in only a few days and that a 30-day period is not necessary.[493] This is in line with the view of Oosthuizen and Verschoor [494] that 30 days is generally excessive for purposes of psychiatric observation. A view exists that the assessment by a single psychiatrist for a non-violent crime can be

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489 Gagiano, Van Rensburg and Verschoor 1991 *SALJ 714* at 716.

490 Gagiano, Van Rensburg and Verschoor 1991 *SALJ 714* at 717.

491 The court does not usually specifically order that the 30-day assessment must take place on an outpatient or "day-visitor" basis. This has only been ordered in *S* v *Volkman* 2005 (2) SACR 402 (K) and the unreported case of Oscar *Pistorius S* v *Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014). Although day-visit assessment is not commonly used, it is employed in some parts of the country such as the Limpopo province. See Pillay 2014 *South African Journal of Psychology* 377 at 378. It appears that this decision to conduct the assessment on an outpatient basis is taken by the professionals involve as it has been stated that an explicit order for the 30-day assessment to take place on an outpatient basis, has only been made in the two cases stipulated above. Pillay points out however that the day-visit option "does not appear to be generally favoured" (presumably by the professionals involved) which in turn contributes to the long waiting lists as inpatient assessments seem to be the norm.

492 Pillay 2014 South African Journal of Psychology 377 at 379. Also see Pillay 2014 South African Journal of Psychology 48 at 49.

493 Pillay 2014 *South African Journal of Psychology* 377 at 379. Also see Pillay 2014 *South African Journal of Psychology* 48 at 49. See, however, National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016) at 38 who reckons that the 30-day period may be justifiable where the accused has to be assessed by a panel of experts but that it is indeed excessive in the event where only one psychiatrist is required to conduct the assessment.

494 See in general Oosthuizen and Verschoor 1993 *SAS* 155-164.

conducted within a 7-day period.[495] Shortening the observation period will, in itself, reduce delays in the observation process and will further reduce costs associated with it.

It is suggested that fitness assessments should be done on an outpatient basis,[496] especially since assessments for fitness to stand trial are clinically less complicated than assessments of criminal capacity.[497] Fitness assessments have, in fact, been taking place on such a basis in the Limpopo province for some time now.[498] This will open up beds in psychiatric facilities for seriously mentally ill patients in dire need of inpatient treatment.[499]

The number of professionals appointed by the criminal court to conduct the assessment in terms of section 79 of the Criminal Procedure Act possibly also contributes to delays in the fitness assessment process. Up to three psychiatrists together with a clinical psychologist can be appointed to assess the fitness of an accused, depending on the seriousness of the offence. This causes delays as the availability of these professionals must be considered for purposes of assessment and presentation of their subsequent report to the court (or giving evidence thereon at a later stage). In addition, appointing many specialists obviously has huge cost implications.

4.3 High cost of fitness assessments

Assessments for fitness to stand trial are time consuming and expensive.[500] In 1991 the

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495 This is especially possible in the event of a single psychiatrist assessing the accused. See National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016). See further Pillay 2014 *South African Journal of Psychology* 48 at 55 who opines that the assessment can be conducted during 2 or 3 day visits to the psychiatric hospital and need not be done on an inpatient basis.

496 Pillay 2014 *South African Journal of Psychology* 48 at 55 points out that there is no prohibition in the Criminal Procedure Act against assessments for fitness to stand trial on a day-visitors basis. The author uses "day visitor" rather than "outpatient" as the accused persons that are sent for observation are, in his view, not patients. Assessments on a day-visitor basis poses challenges of its own, such as transport to and from the psychiatric facility, but this could be arranged with the assistance of the police service. The author acknowledges that day-visitor type assessments may not be suitable for all accused, especially where there is a risk that the accused may abscond but states that these type of assessments will ensure far less admissions to psychiatric hospitals for fitness assessments. The hospital system must remain in place as it will be necessary in certain cases.

497 Pillay 2014 South African Journal of Psychology 48 at 50.

498 Pillay 2014 *South African Journal of Psychology* 48 at 55 where it is pointed out that 80% of all accused persons in Limpopo is assessed on a day-visitor basis.

499 Pillay 2014 South African Journal of Psychology 48 at 55.

500 Pillay 2014 *South African Journal of Psychology* 377 at 379 referring to assessments for fitness to stand trial as well as assessments fir criminal capacity. This is especially so because most assessments in South Africa is done on an inpatient basis where the accused is admitted for a 30-day observation period. Pillay promotes that the assessments be conducted on an outpatient basis, which will in itself save costs. He also submits that the entire observation process can be conducted in only a few days and that a 30-day period is not necessary.

cost for a 30-day observation period amounted to R16 500.[501] The cost for a 30-day psychiatric observation period per accused raised to approximately R80 000.00 in 2005.[502] The period could be extended by the court if necessary, which has further cost implications. The fact that the forensic expenditure comprised a large portion of a psychiatric hospital's budget[503] raises huge concerns with regard to the resources available for the other patients.

Unnecessary referrals result in costs for the Department of Health.[504] The high cost of fitness assessments should, in and of itself, be a deterrent for unnecessary referrals for observation. Unnecessary referrals should be avoided [505] at all cost. However, courts have an obligation to refer accused persons for observation when mental illness is raised as a concern.

Psychiatric observation on a day-visitor (or outpatient) basis could assist in reducing costs together with shorter observation periods since opinion exists that the current 30-day period is generally excessive.

4.4 Lack of training and specialised skill

In some instances, the high figures of mentally ill persons in prisons might be attributed to ignorance and lack of training on the part of the police force. Knowledge of identifying the behaviour of a person, who might possibly suffer from a mental illness, will go a long way to ensure that mentally ill suspects are treated appropriately. Educating them about the option to take a person to the hospital for observation [506] rather than pressing charges should assist in reducing the number of persons with mental illness in the criminal justice system.

Further, it is clear from certain judgments that magistrates are not always familiar with the correct procedure to follow in cases where fitness is at issue as opposed to cases where criminal capacity is at issue.[507] The problem is exacerbated by the fact that proper review

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501 It cost R550.00 per day to keep a patient for psychiatric observation. Gagiano, Van Rensburg and Verschoor 1991 *SALJ 714* at 715.

502 Kruger *Heimstra Suid-Afrikaanse Strafproses* at 226, 249. See, however, Pillay 2014 *South African Journal of Psychology* 48 at 55 who estimates that a 30-day psychiatric observation cost the state approximately R30 000.00 in 2005.

503 Gagiano, Van Rensburg and Verschoor 1991 *SALJ 714* at 715. In 1990 forensic services comprised 50% of the psychiatric hospital's budget.

504 See Kaliski, Borcherds and Williams 1997 *SAMJ* 1351 at 1354 who confirms this fact and adds that the observation periods are time-consuming. Also see Kruger *Heimstra Suid-Afrikaanse Strafproses* at 249 where the cost of a 30-day assessment is said to have been R80 000 in 2005.

505 Kruger Heimstra *Suid-Afrikaanse Strafproses* at 249.

506 As provided for in section 40 of the Mental Health Care Act.

507 See for instance *S* v *Pedro* 2015 (1) SACR 41 (WCC) at [5] where the accused, charged with culpable homicide, was found unfit to stand trial and lacking criminal capacity. The accused was

mechanisms are not in place for orders made in terms of section 77.[508] Considering the serious consequences that a finding of unfitness to stand trial can have on the accused, some form of review is most definitely desirable.

Gagiano *et al* [509] opine that the fact that section 77 to 79 of the Criminal Procedure Act provides that any court can refer a person for psychiatric observation without prior consultation with anyone – including a mental health care practitioner - contributes to the high number of psychiatric assessment referrals. Their objection seems to suggest that the involvement of mental health care skills in the early stages of the court process might help manage the number of mentally ill persons in the criminal justice system.

Gagiano *et al* [510] submit that only cases where there are complicated diagnostic problems should be referred for observation and then only once the presiding judge or magistrate has heard evidence from a forensic psychiatrist or district surgeon with training in forensic psychiatry.[511] The essence of this is that specialised skills with regard to mental illness are

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found not guilty in terms of section 78(6) and an order was made for him to be detained as an involuntary mental health care user, rather than as a state patient as section 77(6)(a)(i) of the Criminal Procedure Act prescribes. The court found at [81] that: "Where, by contrast, an accused is not capable of understanding proceedings as contemplated in s 77, he cannot in the nature of things enter a plea and the question of his criminal responsibility at the time of the alleged offence cannot be judicially determined in accordance with s 78. An accused who by reason of mental illness or mental defect is not capable of understanding the proceedings may or may not also have lacked criminal responsibility at the time he perpetrated the alleged offence; either way, he must be dealt with in accordance with s 77, not s 78. This means that he can be found neither guilty nor not guilty; no verdict is entered, and instead a direction must be made in accordance with either sub-para (i) or (ii) of s 77(6)(a). There are several cases in which erroneous verdicts in terms of s 78(6) have on this basis been set aside on review (see, for example, *S* v *Matumbela* Case 104/02/2012 WCHC Reference 2/13; *S v Hendricks* Case B690 WCHC Ref No 13195)." Also see *S* v *Vika* (14519) [2014] ZAWCHC 155 (14 October 2014) where an accused who was found unfit to stand trial was found "not guilty" in terms of section 78(6) of the Criminal Procedure Act. The Magistrate in this case also did not follow the correct procedure with regard to the appointment of the panel for psychiatric observation (only two psychiatrists and a clinical psychologist was appointed and no application was brought (as stipulated in the *Pedro* matter) to dispense with the requirement for a third psychiatrist). The magistrate did also not consider the psychiatric report in open court.

[508] See the discussion of the review earlier in this chapter.

[509] Gagiano, Van Rensburg and Verschoor 1991 *SALJ* 714 at 715. "Unnecessary referrals" is understood to mean referrals of which the result is that the accused referred for observation, had no mental illness at all. Neither his fitness to stand trial or criminal capacity is thus affected. The authors are further of the view that the District surgeons lack of knowledge of psychiatry and the fact that the district surgeon does not consult a psychiatrist on matters of psychiatry, may also contribute to referrals of persons who may very well have no mental illness at all. The authors opine that the humiliation for a potentially sane person being locked up in a psychiatric ward is imaginable and it is submitted that this should only happen if the accused himself is raising the mental illness as an issue. In particular where the accused raises the insanity defence.

[510] Gagiano, Van Rensburg and Verschoor 1991 *SALJ 714* at 716.

[511] Gagiano, Van Rensburg and Verschoor 1991 *SALJ* 714 at 716, 717 where it is suggested that consultation with the forensic team will serve as a further sifting procedure to ensure that only those that present difficult diagnostic problems are sent for observation.

required in the criminal justice system. The Mental Health Court initiative acknowledges that mental health issues require the application of specialised skills and employs mental health professionals on-site at the court. Mental Health Courts aim to have observations performed on-site by qualified psychiatrists and/or psychologists [512] who will be able to recognise signs of mental illness. Only those in serious need of treatment or in respect of whom observation is essential will be sent for off-site assessments. This approach will relieve the burden on the mental health care institutions that are currently burdened with psychiatric observations of all mentally ill accused.[513]

The scarcity of skills in the forensic setting may be lightened somewhat by the fact that psychologists are now also allowed to conduct these forensic inquiries if the court so directs.[514] New challenges may arise since some conditions (such as battered wife syndrome) are not recognised by psychiatrists as a mental illness, whilst they are indeed recognised by psychologists.[515] Whilst such conditions might not necessarily affect a person's capacity to stand trial, it might increase the number of persons with mental illness found fit to stand trial, falling into the category of accused persons for whom no provision is made in the current Criminal Procedure Act.

The deterioration of the mental state of the accused whilst incarcerated has been proven a real risk and could be avoided if Mental Health Courts are introduced where assessments are done on-site and prolonged detention prior to such assessment is eliminated.

4.5 Disregard for mental illnesses that do not affect fitness

What contributes to the disregard for a mental illness that does not affect an accused's fitness to stand trial is the fact that the discretion of the court is limited when deciding on the way forward for a mentally ill accused person where the issue of fitness to stand trial is concerned. Even though the provisions of section 77(6)(a)(ii) will be brought in line with those in section 78 after the recent judgment in *De Vos*, it is submitted that the court's

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[512] See Pillay 2014 *South African Journal of Psychology* 377 at 378 who points out that, the fact that the Criminal Procedure Act provides for psychologists to be appointed to the panel for forensic assessments in terms of section 79 of the Criminal Procedure Act, confirms that the legislature views a psychologist as competent to conduct forensic assessments. Pillay also advocates for the routine appointment of psychologists to the panel of experts whenever the court orders assessment in terms of section 77 and 78 of the Criminal Procedure Act.

[513] This is at least the case in South Africa according to Schutte 2013 *South African Journal of Bioethics and Law* 64 at 67.

[514] Section 79 makes provision for the appointment of a psychologist to the panel of mental health professionals that are required to conduct an assessment in terms of section 77 or 78.

[515] Spamers *A Critical Analysis of the Psycholegal Assessment of Suspected Criminally Incapacitated Accused Persons as Regulated by the Criminal Procedure Act* at 29.

discretion is still very limited as no provision is made for the court to order a treatment programme, for example, or to specifically order treatment in order for the accused to become f*it to stand trial*.

Where an accused is found fit to stand trial, and such an accused suffers from a mental illness, the court does not have discretion to divert the accused or make any other order besides that criminal proceedings shall continue as per normal.[516]

4.6 Lack of diversion options for the fit but mentally ill accused

Diversion of mentally ill accused persons away from the criminal justice system into the mental health care system will ensure that accused persons who are mentally ill will receive treatment and rehabilitation necessary to avoid or at the very least limit the chances of recidivism. This, in turn, leads to a safer society as there will be less crime. Despite this fact, no formal diversion options for mentally ill accused persons are available in South Africa.

Gagiano *et al* [517] suggest that those with known psychiatric disorders, as well as those who clearly exhibit signs of mental illness, should not be referred for observation in terms of the Criminal Procedure Act. Instead, they suggest, the state should, in these instances and in particular where accused of minor offences, withdraw the charges against the accused and refer him for psychiatric treatment in terms of mental health legislation.[518] In this way, these individuals are removed from the criminal justice system. This is what Mental Health Courts aim to achieve. To remove, especially those who committed petty crimes, from the criminal justice system and divert them into some sort of therapeutic programme to enhance their chances of rehabilitation which might, in certain instances, merely entail placing the patient on proper and effective medication.

Cassim suggested that the mentally ill accused in South Africa should be treated in the mental health care system rather than the criminal justice system.[519] She points out that

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516 Section 77(5) of the Criminal Procedure Act states that: "(5) If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings shall be continued in the ordinary way."

517 Gagiano, Van Rensburg and Verschoor 1991 *SALJ* 714 at 715. The writers refer to the Mental Health Act of 1973 as it was in force at the time of writing their article. Also see Kruger Mental Health Law in South Africa at 159 who points out that it was common when the Criminal Procedure Act just came into operation that charges against mentally ill accused persons charged with minor offences such as minor assault, was withdrawn.

518 Gagiano, Van Rensburg and Verschoor 1991 SALJ 714 at 715.

519 Cassim 2004 Codicillus 17 at 27. Also see this source at 24, 25 where she suggests the British

diverting the mentally ill away from the criminal justice system will relieve the burden of backlogs on the criminal courts resulting in cost- and time-saving in the long run.[520] These suggestions are in line with the concept of diversion that Mental Health Courts envisage in that the mentally ill accused is diverted away from the criminal justice system into the mental health care system.

The benefit of diversion away from the criminal justice system, as an alternative to traditional prosecution, is acknowledged and implemented to a certain extent in the South African criminal justice system for certain groups of offenders, such as child offenders. There is, however, currently no formal diversion options for mentally ill accused persons. Removal of mentally ill accused from society as state patients or involuntary health care users is not a form of diversion but rather part of an adversarial approach to criminal procedure.

Existing alternatives to traditional prosecution as currently employed in South Africa are explored below.

5 ALTERNATIVES TO THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM FOR THE MENTALLY ILL ACCUSED

5.1 Introduction

As pointed out above, it is not ideal for a person with a mental illness to encounter the criminal justice system. The position of the person who has a mental illness but who is fit to stand trial is of particular concern as his case will be processed through the criminal justice system, and he will have to face a normal criminal trial. No special provision is made for the diversion of these accused persons. It is submitted that alternatives to traditional prosecution for these accused persons must be considered.

The suggested alternative is a Mental Health Court to which all cases involving mental illness can be channelled. From cross-jurisdictional research, assessments will then be performed on-site by a multidisciplinary team, ensuring speedy processing of cases and diversion of mentally ill accused persons away from the already overburdened criminal justice system. Assessments by a multidisciplinary team such as that envisaged by the

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model where those that are unfit to plead, are dealt with by the mental health care system rather than the criminal justice system.

520 Cassim 2004 Codicillus 17 at 27. Also see Pillay 2014 *South African Journal of Psychology* 48 at 48.

Mental Health Court movement may assist in alleviating the burden on psychiatrists. If assessments are done quicker and mentally ill accused persons have diverted away from the criminal justice system, it means that the number of remand detainees in prison will, as a result, decline, which in turn will assist with the problem of overcrowding in prisons. The use of a Mental Health Court is, in essence, an example of formal diversion.

Diversion, as mentioned earlier, is not unusual in the South African context, although it has never been formalised in the case of mentally ill accused as it has, for example, for child offenders. The framework for such a diversionary approach is, however, already apparent in the South African adjectival framework.

The South African Department of Correctional Services defines the purpose of diversion as:

> *The purposes of diversion are the disposal of cases in a manner that equips the accused with the necessary life-skills, enables him/her to attain personal growth, and where the accused is not encumbered with a criminal record* [521]

It is necessary to consider the extent to which the concept of diversion has been incorporated into the South African criminal justice system to establish whether there is room for diversion of the mentally ill accused in South Africa in the form of Mental Health Courts.

5.2 *Diversion in South Africa*

There is a need for legislation to deal specifically with special groups of remand detainees such as "mentally challenged" or "legally insane" persons.[522] Each institution that houses mentally ill remand detainees should have a programme for mentally ill persons who have been labelled as a special group of detainees in need of special programmes.[523] Lack of

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521 Diversion away from the criminal justice system is addressed in Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 24.

522 The terminology used by the Department of Corrections is not the same as that used in the Criminal Procedure Act (section 77 and 78 in particular) but there is no doubt that the reference to "legally insane" and "mentally challenged" accused refers to those in the criminal justice system that is in need of mental health care services. See Department of Correctional Services. *Discussion Document on Management of Remand Detainees in Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 53, 54.*

523 The Department of Correctional Services acknowledges that special measures must be taken to protect the human rights of remand detainees and mentions remand detainees with mental illness in particular. See Department of Correctional Services: "Strategic plan for 2015/2016-2019/202" http://www.gov.za/sites/www.gov.za/files/Strategic%20Plan%202015-2016%20-_2019-2020_a.pdf (Date of use: 9 September 2016) at 21. Also see the detail in Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 45.

resources, however, remain a problem. In addition, the Department of Correctional Services acknowledges the need for training of its staff on dealing with "mentally challenged" remand detainees.[524]

5.2.1 Background

Diversion of the mentally ill is not a new concept in the South African law as traces thereof can be found in the 1973 Mental Health Act, which provided for a police officer to apply for a reception order if he came across a person whom he believed was mentally ill and not properly cared for.[525] This provision could, for instance, be used where a mentally ill person was a public nuisance, and it was not desirable to channel this person through the criminal justice system.[526] This provision was, however, not used often.[527] The current Mental Health Care Act contains a similar provision and provides that the police may use the necessary constraining measures to apprehend such a person.[528] The Act empowers the police to, instead of arresting the presumably mentally ill person, take the individual to the hospital for psychiatric evaluation[529] to determine if the person requires further involuntary treatment.[530] If there is no sign of mental illness after the assessment period, the apprehended person will be discharged.[531] If the police are made aware of this procedure, and proper training thereon is provided, many a mentally ill dwelling the streets and at risk of being apprehended for public indecency, for example, can be picked up from the streets and taken to hospitals for treatment rather than being taken to police cells and channelled

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524 The need for training is set out in the white paper drafted by the Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 12. The training needs were further identified and addressed in the Draft white paper by Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20paper%20on%20Remand%20Detention%20in%20SA%20Draft%20Final.pdf (Date of use: 26 August 2016) at 15.

525 Section 14 of the Mental Health Act of 1973. Also see Kruger *Mental Health Law in South Africa* at 160.

526 Kruger *Mental Health Law in South Africa* at 160. This person would then be sent for treatment at an institution by way of a reception order in terms of the Mental Health Act of 1973.

527 Kruger Mental Health Law in South Africa at 160 footnote 70.

528 Section 40 of the Mental Health Care Act. See in particular section 40(8), which provides that: "A member of the South African Police Service may use such constraining measures as may be necessary and proportionate in the circumstances when apprehending a person or performing any function in terms of this section." This raises potential concerns about the treatment of mentally ill accused persons by the police, especially if there is a lack of understanding from the side of the police regarding the symptoms of some mental illnesses.

529 With a form MHCA 22 in the Mental Health Care Act. The head of the health establishment where the police decides to take the individual to, approves the admission on a form MHCA 07.

530 Section 34(3)(b) of the Mental Health Care Act.

531 Section 34(3)(a) of the Mental Health Care Act. If the user consents to further treatment, then the user may be treated as a voluntary mental health care user in terms of section 25 of the Mental Health Care Act.

through the criminal justice system. This type of diversion initiative can be labelled as pre-booking diversion that is aimed at preventing the mentally ill person's contact with the criminal justice system.

Pre-arrest diversion programmes will be most effective in limiting the number of mentally ill persons in the criminal justice system. Mental illnesses are, however, often only detected after the accused has formally entered the criminal justice system after arrest. Any diversion initiative after an arrest could be labelled as a post-booking or post-arrest diversion option if South Africa were to establish Mental Health Courts.[532]

The question arises if there are any post-arrest diversion options available to a mentally ill accused in the South African criminal justice system? This question is investigated below.

5.2.2 Current post-arrest diversion options in South Africa

Diversion in South Africa is either formal or informal.[533] The difference between the two being that informal diversion does not follow a set programme, but it entails that the prosecutor can be innovative with regard to the programmes that the accused should complete.[534]

Currently, formal diversion exists for child offenders in terms of the Child Justice Act 75 of 2008 and is very successful, as is evident from the reduction in the number of children in remand detention.[535] Informal diversion is usually applicable in the case of petty crimes.[536] Where informal diversion is considered, the accused is required to acknowledge liability for the offence.[537] Participation in such informal diversion programmes is completely

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532 See the discussion of diversion in chapter 2 of this research for the general categories of diversion options. The terms pre-booking and post-booking are used in chapter 2. The researcher, however, proposes that the terms pre-arrest and post-arrest are clearer descriptors of the stage in the criminal process at which the particular diversion option occurs.

533 Diversion options in South Africa is discussed in National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016) at 24-29.

534 Informal diversion leaves more room for creative problem solving. See National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016) at 29 for detail on informal diversion.

535 The reduction in the number of child offenders, is discussed in Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 53. It is reported here that children accused of crimes in detention decreased with 86.9% from the introduction of the Child Justice Act shortly after 2007 to 2012. Also see National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016).

536 National Prosecuting Authority of South Africa *Awaiting Trial Detainee Guidelines.* *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use 17 August 2016) at 29.

537 This requirement is in line with the principle of taking responsibility for one's actions as promoted by

voluntary.[538] Compliance with the diversion programme usually leads to the withdrawal of the charge(s) against the accused.[539] Once the prosecutor decides to divert the accused, a note to this effect must be made in the docket of the accused, and the investigation diary must be endorsed with the outcome.[540]

Post-arrest diversion programmes "recruit" their participants from accused persons awaiting trial. A large group of these potential participants will be in remand detention. The Department of Correctional Services sets out to reduce the number of remand detainees by focussing on diversion at three main stages of the pre-trial phase, namely prior to the first court appearance, at the first court appearance and after the first court appearance.[541]

Diversion at the first court appearance has been identified as a way in which overcrowding of remand detainees can be reduced [542], but no initiatives specifically relevant to mentally ill accused persons have been introduced. The National Prosecuting Authority's policy on prosecution makes provision for the prosecutor to exercise his discretion pertaining to prosecutions and has the option to decline to prosecute and opt for pre-trial diversion or the non-criminal resolution of the matter.[543] Once again, however, there is no formal programme specifically for the mentally ill in place as there is in the case of child offenders,

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therapeutic jurisprudence that is typically applied in diversion programmes. See National Prosecuting Authority of South Africa *.http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf (*Date of use 17 August 2016) at 29 where the requirement that the accused must admit his involvement in the crime is stated.

538 The voluntary nature of diversion is stressed in National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf (*Date of use 17 August 2016) at 29.

539 The accused will have to submit a certificate of completion or some sort of proof of completion of the diversion programme at the end of the diversion program. National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf (*Date of use: 17 August 2016) *at 29.*

540 The practice of endorsing the file is explained in National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf (*Date of use: 17 August 2016) at 30.

541 These stages are explained in more detail in Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 54. The focus on the three pre-trial stages is also discussed in the discussion document by Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016).

542 Overcrowding presents the Department of Correctional Services with huge challenges. Mentally ill accused persons awaiting psychiatric observation contributes to this problem. Diversion at the first court appearance (not specifically a mentally ill accused) is aimed at diverting accused persons away from the criminal justice system as early as possible. See Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 54.

543 National Prosecuting Authority of South Africa "*Prosecution Policy* 2013" https://www.npa.gov.za/sites/default/files/Library/Prosecution%20Policy%20%28Final%20as%20Revised%20in%20June%202013.%2027%20Nov%202014%29.pdf/ (Date of use: 2 July 2016) at 4, 5.

for example.

The relevant part of the pre-trial process at which diversion can occur and that the mentally ill accused could possibly benefit from is only after the first court appearance. The fast-tracking of "mental observation" has been identified as a method to reduce the number of remand detainees in prison, of which mentally ill persons form part.[544] These initiatives, however, are reported to be ineffective due to the scarce resources in South Africa [545], resulting in accused persons waiting for excessive periods of time for a bed to become available for assessment.[546] This accentuates the need for specialised initiatives to speed up the process for those accused of crimes and burdened with mental illness. Although initiatives such as fast-tracking are applicable to the mentally ill, they cannot be seen as a form of diversion as they are specifically aimed at swift movement through the system as opposed to removal from the system of criminal justice.

Diversion usually has rehabilitation as its aim so that the accused can eventually be reintegrated into society as a productive citizen.

5.3 Rehabilitation

In a white paper issued by the Department of Correctional Services, the following definition of rehabilitation is provided:

> *Rehabilitation is the result of a process that combines the correction of offending behaviour, human development and the promotion of social responsibility and values. It is a desired*

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544 As mentioned earlier, the large number of remand detainees, among whom are the mentally ill accused, presents a huge problem to the state. See Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) *at* 54.

545 Resource shortages refer to the shortage of facilities at which forensic assessments can be conducted as well as a shortage of psychiatrists to conduct such forensic assessments. South Africa has a serious shortage of psychiatrists. Suggestions have been made that clinical psychologists should be allowed to conduct these assessments in order to relieve the strain on the small number of psychiatrists who are called upon to do these assessments. The resource shortages in South Africa is also confirmed in a discussion document by the Department of Correctional Services http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf (Date of use: 17 August 2016) at 18. Also see the discussion in chapter 2 of the South African forensic setting where the resource shortages are discussed.

546 This is according to the guidelines drafted by National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016) *at 37* highlights that those psychiatric hospitals where assessments can be done generally experience huge staff shortages and logistical challenges causing a backlog in cases awaiting psychiatric observation. Also see the *De Vos* v *Minister of Justice and Constitutional Development* CC case at [44] where shortage of beds in psychiatric facilities is confirmed.

> *outcome of processes that invoke both departmental responsibilities of Government and social responsibilities of the nation.*[547]

The white paper further states that rehabilitation should be viewed as a holistic phenomenon incorporating and encouraging social justice, social responsibility, empowerment with life skills and other skills, active participation in democratic activities and a contribution to making South Africa a better place to live.[548] It should therefore be viewed as much more than just a strategy to prevent crime.

A rehabilitation intervention targets a specific aspect of an individual, for example, his mental illness, with the purpose and aim of reducing the likelihood of him re-offending because of it.[549] The medical model in psychiatry aims to achieve "clinical recovery".[550] This entails curing the illness, or the illness being in remission, or where this seems to be impossible, the aim is control of the symptoms over the long term.[551] What exactly would constitute a cure or long-term control of symptoms is determined by the psychiatrist. This approach has to lead to criticism, and the concept of personal recovery is rather promoted.[552] This entails that the psychiatrist works in a partnership with the patient where the recovery of the patient no longer only depends on the medication prescribed.[553]

Forensic rehabilitation is a lengthy process. It entails that a multidisciplinary team form "long term therapeutic alliances" with their patients.[554] A problem within the multidisciplinary

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547 In a white paper issues by the Department of Correctional services, it is stated that the Department is shifting its focus from punishment to rehabilitation. See Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 38.

548 The holistic approach to rehabilitation is explained further in Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 38.

549 Muntingh L Research Paper Nr. 10: *Offender rehabilitation and reintegration: Taking the White Paper on Corrections forward* (Civil Society Prison reform initiative 2005). Also available at http://cspri.org.za/publications/researchreports/Offender%20rehabilitation%20and%20reintegration%20%20taking%20the%20White%20Paper%20on%20Corrections%20forward%20(Research%20Paper%20No.%2010).pdf (Date of use: 12 February 2015) at 6.

550 Kaliski SZ and De Clercq HG "When coercion meets hope: Can forensic psychiatry adopt the recovery model?" 2012 (15) *Afr J Psychiatry 162-166* at 164.

551 Kaliski and De Clercq 2012 *African Journal of Psychiatry 162* at 164.

552 Kaliski and De Clercq 2012 *African Journal of Psychiatry 162* at 164. Institutions applying this philosophy have to revisit their approaches to treatment and largely, the paternalistic approach in psychiatry.

553 Kaliski and De Clercq 2012 *African Journal of Psychiatry 162* at 164. When considering the treatment plan for the patient, factors such as the patient's culture, religion, aspirations and personal circumstances have to be taken into consideration. The submission is that the use of this model might motivate the multidisciplinary team to make use of creative risk assessment methods by for example incorporating creative risk monitoring mechanisms for "dangerous patients" and releasing patients easier instead of keeping "dangerous patients" locked up. (See this source at 166).

554 Kaliski and De Clercq 2012 *African Journal of Psychiatry 162* at 162. In the "normal" non-forensic

team is sometimes that the members of the team subscribe to different paradigms, which may have an impact on the treatment programmes as the team is not in agreement as to what the aim of the programme is or should be.[555] Patients may also encounter different multidisciplinary teams, and if such a team has worked with a particular forensic patient in the past, they may harbour negative prejudices towards the patient.[556] Many forensic patients have comorbid conditions and might, for this reason, not respond to efforts from a multidisciplinary team.[557] These potential problems are, however, not insurmountable, and it is submitted that the benefits of a multidisciplinary approach far outweigh the potential drawbacks of such an approach.

Some in the field of correctional service elect to avoid the term rehabilitation as it originated from the field of medicine and presupposes that there is a pathological condition in the individual that needs to be addressed.[558] For this reason, the term reintegration is often preferred as it explains the ultimate goal, namely to reunite the offender with his community.[559] What complicates this issue is the fact that often the very people that are required to support the mentally ill accused in the process of reintegration were a victim of his violent behaviour in the past.[560] Re-entry refers to the physical transfer of an incarcerated person back into society and encompasses both rehabilitation and reintegration.[561]

South Africa releases approximately 6 000.00 people from jail per month [562] with the hope that these individuals will make a constructive contribution to society and that they will, most importantly, not re-offend. For this reason, rehabilitation and reintegration programmes are of the utmost importance. Diversion programmes such as those offered in Mental Health

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psychiatric setting, the patients contact with a multidisciplinary team is fragmented as there is a high patient turnover and patients generally stay for a shorter period.

555 Kaliski and De Clercq 2012 *African Journal of Psychiatry 162* at 162.

556 Kaliski and De Clercq 2012 *African Journal of Psychiatry 162* at 162.

557 Kaliski and De Clercq 2012 *African Journal of Psychiatry 162* at 166.

558 Muntingh Research Paper Nr. 10: *Offender Rehabilitation and Reintegration: Taking the White Paper on Corrections Forward* at 6.

559 Muntingh Research Paper Nr. 10: *Offender Rehabilitation and Reintegration: Taking the White Paper on Corrections Forward* at 6-8 explains that reintegration introduces a social dimension, which is in contrast with the focus of rehabilitation, which is on law abidance, and avoidance of risk /behaviour. It is a process of support that starts at incarceration and continues after the offender's release. Successful reintegration is illustrated by an individual's ability to function in different spheres of his life such as family and work and to avoid re-offending.

560 Kaliski and De Clercq 2012 *African Journal of Psychiatry 162* at 164.

561 Muntingh Research Paper Nr. 10: *Offender Rehabilitation and Reintegration: Taking the White Paper on Corrections Forward* at 8, 9.

562 Muntingh Research Paper Nr. 10: *Offender Rehabilitation and Reintegration: Taking the White Paper on Corrections Forward* at 5.

Courts are aimed at the rehabilitation of the accused persons through treatment.

The Department of Correctional Services in South Africa is shifting the focus of the penal system from punishment to rehabilitation.[563] The Department of Correctional Services identified mentally ill persons in the criminal justice system as a special group of persons that pose a challenge for them in the correctional setting.[564] The focus of rehabilitation is also in line with the goal of the Mental Health Care Act that promotes the utmost level of independent functioning as the ultimate goal of rehabilitation.[565] The Mental Health Care Act further promotes rehabilitation in a community setting.[566] Mental Health Courts will achieve this goal, as will be demonstrated in later chapters.

The implementation of a Mental Health Court aimed at diverting the mentally ill accused away from the criminal justice system can assist in achieving the goals set by the Department of Correctional Services as set out above, as well as going some way to resolving the procedural issues identified earlier in this chapter.

5.4 Mental Health Courts for South Africa?

South Africa, as a signatory to the International Convention on the Rights of Persons with Disabilities, is obliged to provide health and social services to mentally ill persons to enable them to live in the community.[567] Even though Mental Health Courts are not the cure-all solution,[568] the support that the Mental Health Court provides to mentally ill accused persons could bring South Africa one step closer to fulfilling this obligation in terms of this

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563 This shift is evident from the white paper issued by the Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 5.

564 For other groups in detention that require special care, see Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 9.

565 Section 1 of the Mental Health Care Act in the definition of "rehabilitation". Landman and Landman *The Mental Health Care Act* at 14.

566 Section 4 of the Mental Health Care Act. Also see Landman and Landman *The Mental Health Care Act* at 14.

567 Article 19 of United Nations Convention on the Rights of Persons with Disabilities. Also see Barrett J and Shandler R *Mental Disorder in Canadian Criminal Law* (Carswell Toronto 2006) at 1-30.

568 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-29 where it is pointed out that society should aim for crime prevention and social integration if it is to ensure the fair and respectful treatment of persons with mental disorders. Also see Nolan JL "The international problem solving court movement: A comparative perspective" 2011 (37) *Monash University Law Review* 259-279 at 270 where the differences between approaches and attitudes to problem solving courts in and outside the United States of America is discussed and where it is acknowledged that those involved in Mental Health Courts in Canada are willing to acknowledge that Mental Health Courts are not the ultimate solution but only part thereof, this is different to the radical approach held by those involved in the problem solving court movement in the United States of America who believe that it is a much larger part of the solution, if not the ultimate one.

International Convention.

There are currently no formal diversion programmes for mentally ill accused persons in South Africa. Introducing Mental Health Courts into the South African criminal justice system will therefore not constitute a duplication of a current diversion option. What is more, the use of specialised courts in the criminal justice system through which rehabilitation programmes may be offered is not a foreign concept in South Africa. Equality courts, children's courts and domestic violence courts are examples of specialised courts that have been part of the South African legal system for some time now.

Mental Health Courts for South Africa are promoted for their common sense approach and for the underlying logic of the operation of these courts.[569] Therapeutic jurisprudence, as the vehicle through which justice is delivered in these courts, creates opportunities for the law to address the underlying issue that caused the accused to clash with the law in the first place. Reducing recidivism as one of the major goals of these courts leads to a safer society. In addition, Mental Health Courts aim to achieve cost-saving.[570] It is simply more cost-effective in the long term to treat a mentally ill individual in a non-prison setting.[571]

The South African Department of Correctional Services identified mentally ill persons in remand detention as a vulnerable group.[572] It has further been acknowledged that inadequate provision is made for the management of the mentally ill remand detainee throughout the entire process from arrest to detention.[573] A need for an initiative such as a Mental Health Court that focusses specifically on mentally ill persons clearly exists.

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569 Fisher C "Towards a new understanding of mental health courts" 2015 (54) *The Judge's Journal* 8-13 at 8, 9. Those in favour of these courts assumed that untreated mental illnesses, contribute to criminal behaviour and that treatment combined with judicial supervision will keep defendants engaged in treatment programmes and will lead to reduced recidivism.

570 Slinger E and Roesch R "Problem-solving courts in Canada: A review and a call for empirically-based evaluation methods" 2010 (33) *International Journal of Law and Psychiatry* 258-264 at 260. This is a goal of all problem solving courts, including drug courts and community courts.

571 Heerema M "An introduction to the mental health court movement and its status in Canada" 2005 (50) C*rim.L.Q* 255-282 at 63. Also see Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 259 who points out that the cost of incarcerating a mentally ill accused is almost twice as much as incarcerating a non-mentally ill accused.

572 Besides the mentally ill accused persons in detention, the vulnerable groups further include pregnant women and the elderly. See the White Paper by the Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 11. For more detail on the vulnerable groups in the correctional setting, see Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20paper%20on%20Remand%20Detention%20in%20SA%20Draft%20Final.pdf (Date of use: 26 August 2016) at 64.

573 The gaps in the management process is explained in Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 19.

The Department of Correctional Services has identified mentally ill inmates, including remand detainees, as a special group that pose a challenge for them in the correctional setting.[574] The South African Department of Correctional Services acknowledges that it is the ideal that mentally ill persons should not be accommodated in prison but that they should rather be diverted to organisations with the necessary knowledge to cater for their specific needs.[575] It is submitted that Mental Health Courts can offer the required knowledge to cater for the unique challenges that mental illness brings to the criminal justice system. The challenge is, of course, to make space for this initiative within the existing criminal justice system.

The structural and procedural framework for an initiative such as a Mental Health Court is available within the South African criminal justice system. It is now a matter of determining what the best model would be to implement within the said framework to best cater for the unique challenges that the mentally ill accused bring to the South African criminal justice system.

The time is ripe for the introduction of an initiative such as Mental Health Courts in South Africa as the Department of Correctional Services in South Africa is shifting the focus of the South African penal system from punishment to rehabilitation.[576] Since these courts primarily aim to channel accused persons into treatment, such courts can offer a solution for the challenges that the Department of Correctional Services face with regard to mentally ill accused persons. The focus on rehabilitation is also in line with the goal of the Mental Health Care Act, which promotes the utmost level of independent functioning as the ultimate goal of rehabilitation.[577] The Mental Health Care Act further promotes rehabilitation

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574 The list of special categories of offenders for whom special provision within the correctional setting should be made are children, female offenders, offenders with disabilities, elderly offenders, first time offenders, offenders with long and/or life sentences, offenders that are foreign nationals and mentally ill offenders. See the White Paper drafted by the Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 75.

575 The preference for diversion of the mentally ill accused as well as the need for specialised skill with regard to mental illness is discussed further in Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 75. This White paper sets out the goals of the Department of Correctional Services for the next 20 years commencing 2005.

576 The shift in focus is emphasised in the white paper by Department of Correctional Services http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (Date of use: 22 August 2016) at 5.

577 Section 1 of the Mental Health Care Act in the definition of "rehabilitation". Also see Landman and Landman *The Mental Health Care Act* at 14.

in a community setting.[578] Mental Health Courts will achieve this goal.

Diversion to Mental Health Courts could alleviate overcrowding of correctional facilities and could assist in reducing pre-trial delays associated with fitness assessments. These are only some of the benefits that a Mental Health Court has to offer.

6 CONCLUSION

From the discussion of the South African adjectival law, it is clear that the manner in which cases of mentally ill accused persons are dealt with in the South African criminal justice system is not ideal. Their trials are often unduly delayed by the fact that resources in forensic facilities where assessments are done are scarce, resulting in mentally ill accused persons having to wait in prison for a bed to become available.

From the challenges highlighted above, it is clear that alternatives to traditional prosecution for persons with mental illness must be considered in an attempt to limit delays in the finalisation of cases, reduce costs of forensic assessments, ensure that persons with the necessary skill are involved in cases involving mental illness and lastly, provide an alternative to traditional prosecution for the mentally ill accused in the form of diversion.

The position of the mentally ill but fit accused, whose cases are currently processed through the normal criminal justice process, require particular attention. No consideration is given to the fact that the accused may have a mental illness once he is found fit to stand trial. This accused is sent back to prison awaiting his trial date. Such a person may require mental health care treatment pending trial but is at risk of not receiving it due to the lack of mental health resources in South African prisons.[579]

Considering the negative impact that incarceration has on persons with mental illnesses, it is submitted that a diversion programme aimed at diverting mentally ill accused persons away from the criminal justice system is essential. It has been suggested that the mentally ill accused in South Africa should be treated in the mental health care system rather than the criminal justice system.[580] Diverting the mentally ill accused away from the criminal justice system will relieve the burden of backlogs on the criminal courts with cost- and time

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578 Section 4 of the Mental Health Care Act. Also see Landman and Landman *The Mental Health Care Act* at 14.

579 Refer to the discussion of South African prisons in chapter 2 of this research.

580 Cassim 2004 Codicillus 17 at 27. She suggested that we should follow the British model where those that are unfit to plead, are dealt with by the mental health care system rather than the criminal justice system. (see this source at 24, 25).

savings in the long run.[581] This is in line with some of the advantages that have been identified by the proponents of Mental Health Courts.

The need for intervention by specialists on mental health in the criminal justice system has been identified by Gagiano *et al.*[582] Mental Health Courts create the mechanism and opportunity to do just that. Mental Health Courts can assist in diverting the mentally ill away from the criminal justice system into the mental health care system, where they can receive proper treatment services and reduce the occurrence of the revolving door phenomenon.

Mental Health Courts for South Africa should be explored, especially when considering the benefits resulting through their use in Canada and the United States of America (discussed in the following chapters). Chapters 4 and 5 consider two different Mental Health Court models employed in Canada and the United States of America. These two models are studied with the view of selecting aspects thereof that could enhance the position of the mentally ill accused in the South African criminal justice system within the researcher's proposal of Mental Health Courts for South Africa.

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581 Cassim 2004 Codicillus 17 at 27. Also see Pillay 2014 *South African Journal of Psychology* 48 at 48 who points out that cases involving 30-day observation periods are contributing to the backlog and caseloads on the courts.

582 See in general Gagiano, Van Rensburg and Verschoor 1991 *SALJ* 714-718.

CHAPTER 4

MENTAL HEALTH COURTS IN CANADA

1 INTRODUCTION

This chapter explores the Mental Health Court model in Canada. The investigation into the role of the Mental Health Court in Canadian criminal justice begins by exploring the structure and legal framework of the Canadian criminal justice system for the convenience of the reader. A brief overview of the relevant provisions pertaining to the mentally ill accused in the relevant pieces of legislation such as the Constitution of Canada [1] and the Criminal Code of Canada [2] is included, followed by a summary of the Canadian court structure (including the role of the Review Boards).

This chapter will focus mainly on procedural issues affecting the mentally ill accused in the Canadian criminal justice system. The focus is further narrowed to pre-trial issues and, in particular, assessments of fitness to stand trial. The focus on fitness assessments is motivated by the fact that one of the main functions of the Mental Health Court in Canada is to conduct fitness assessments and, subsequently, to provide an alternative measure to criminal prosecution for those who are fit to stand trial but nonetheless mentally ill.

The chapter explores the procedure for assessing fitness to stand trial that commences in the traditional criminal justice system. The test for fitness and the actual assessment thereof are explored. The role of the Mental Health Court during this process is highlighted where relevant.

Diversion in the Canadian criminal justice system is explained whereafter the focus shifts to the particular Mental Health Court model employed in Canada. The goals and underlying principles of the Canadian Mental Health Court are explored. The Toronto Mental Health Court in Ontario is the focus of this chapter as it was the first Mental Health Court in Canada and remains the only full-time Mental Health Court.[3] Significant discrepancies

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1 The Constitution Act of 1982 (hereinafter referred to as the "Constitution of Canada").

2 Criminal Code, RSC 1985, c C-46 (hereinafter referred to as the "Criminal Code").

3 Ryan S and Whelan D "Diversion of offenders with mental disorders: Mental health courts" 2012 (1) *Web Journal of Current Legal Issues* 1-18 at 8. Also see Schneider RD, Bloom H and Heerema M *Mental Health Courts – Decriminalizing the Mentally Ill* (Irwin Law Canada 2007) at 34, 97 who state that Mental Health Courts originated in Canada, and more particularly in Toronto, Ontario. This court opened its doors in 1998. This Court's emergence is attributed to the efforts of the founding judge,

between the dynamics of the Toronto Mental Health Court and other Mental Health Courts in Canada are highlighted where necessary.

The procedural dynamics of the Canadian Mental Health Court are studied with particular reference to the eligibility criteria for referral to this court. The Canadian Mental Health Court follows a two-phased approach. The two phases for which the eligibility criteria differ are discussed in some detail.

A synoptic analysis of the successes and challenges of the Mental Health Court model employed in Canada is included. A brief comparison between the South African system as explained in chapter 3 and the Canadian system as it pertains to mentally ill accused persons concludes this chapter.

2 LEGAL FRAMEWORK RELATING TO MENTALLY ILL ACCUSED UNDER CANADIAN CRIMINAL LAW

2.1 Introduction and background

Historically the mentally ill in Canada were detained in psychiatric institutions.[4] The mentally ill were often treated in a questionable manner, including the routine administration of electric shock treatment and forced sterilisation.[5]

Justice Edward (Ted) Ormston. His motto for this Court was "close the book and open your heart". See Heerema M "An introduction to the mental health court movement and its status in Canada" 2005 (50) C*rim.L.Q* 255-282 at 271. See further Barrett J and Shandler R *Mental Disorder in Canadian Criminal Law* (Carswell Toronto 2006) at 1-29 who confirms that the first Mental Health Court in Canada opened its doors in 1998. This was one of the first Mental Health Courts in the world.

4 McLachlin B "Medicine and the law: The challenges of mental illness" 2010 (33) *Dalhousie Law Journal* 15-33 at 18. This was the case until the latter part of the 20th century. Also see Read A "Psychiatric deinstitutionalization in BC: Negative consequences and possible solutions" 2009 (1) *University of British Columbia Medical Journal* 25-26 at 25. Also see Court JMP, Simpson AIF and Webster CD "Contesting mad versus bad: The evolution of forensic mental health services and law at Toronto" 2014 (22) *Psychiatry, Psychology and Law* 918-936 at 921 where it is explained that the first temporary asylum in Canada opened in 1841.

5 This was especially the case in Canada in the 1950's and 1960's. See McLachlin B 2010 *Dalhousie Law Journal* 15 at 18, 19. Legislation in Canada at the time (Sexual Sterilization Act, SA 1928, c 37; Sexual Sterilization Act, SBC 1933, e 59) provided for such forced sterilisation. In some instances, the legislative requirements pertaining to such forced sterilisations were not met which led to claims for damages against the government. In one instance, a young girl (Leilani Muir) was irreversibly sterilised at the age of 14 years whilst under the impression that she is undergoing an appendectomy. She brought an action for damages many years later and was awarded a generous amount of damages. See the case of *Muir* v *Alberta* (1996), 36 Alta LR (3d) 305, 132 DLR (4th) 695 (QB). Also see a discussion of the case in McLachlin B 2010 *Dalhousie Law Journal* 15 at 18. After the success of this case, the court heard more claims from victims who suffered under the inappropriate application of the relevant sterilisation legislation and the Government eventually spent

Persons with mental illness who were exposed to the criminal justice system were initially treated in the same manner as any other person, in that mental illness was not considered as mitigating.[6] Mentally ill accused persons were detained with other convicted criminals and only isolated from the convicted offenders where their behaviour caused disruption.[7]

Later, when mental illness was acknowledged as a factor in criminal proceedings, the automatic and indefinite detention of those with mental illness in the criminal justice system was ordered.[8] The Canadian criminal law and procedure, however, developed over time and altered the position.[9] It is no longer presumed that those with mental illnesses in the criminal justice system are dangerous and, for that reason, alone need to be detained.[10] Mental illness became an issue that criminal courts had to deal with more often. The Supreme Court of Canada stated that:

$142 million in settlement of these claims. See further Shea G *Redress Programs Relating to Institutional Child Abuse in Canada* (Law Commission of Canada, 1999). Also available at http://dalspace.library.dal.ca/bitstream/handle/10222/10443/Shea%20Research%20Redress%20Programs%20EN.pdf?sequence=1 (Date of use: 24 July 2012) at 7. Also See United Nations General Assembly resolution 46/119, *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* A/RES/46/119 (17 December 1991) http://www.un.org/documents/ga/res/46/a46r119.htm (Date of use: 13 August 2016) which now prohibits the forced sterilisations of mentally ill persons. See principle 11 and 12 in particular that states, "sterilisation shall never be carried out as a treatment for mental illness".

6 McLachlin B 2010 *Dalhousie Law Journal* 15 at 20. This position was inherited from the English law from which system Canada derived its criminal law. Also see *Winko* v *Forensic Psychiatric Institute* (1999) 25 C.R (5th) 1 (S.C.C) at [17] where the common law position is confirmed.

7 Court, Simpson and Webster 2014 *Psychiatry, Psychology and Law 918* at 920. The mentally ill were detained with all other types of persons including debtors, persons awaiting trial and hardened criminals. The appalling conditions in which female mentally ill inmates were detained are discussed and it is pointed out that they were often held in cages below the ground with only straw to sleep on.

8 McLachlin B 2010 *Dalhousie Law Journal* 15 at 23. Also see Court, Simpson and Webster 2014 *Psychiatry, Psychology and Law* 918 at 919 where the history of the treatment of the mentally ill in conflict with the law is discussed and where it is pointed out that even where an accused person was acquitted on account of mental illness, the result was indefinite detention in a gaol.

9 Canadian criminal law is mainly derived from English common law. Mewett AW *An Introduction to the Criminal Process in Canada (Carswell Ontario 1996)* at 4. Also see Coughlan S *Criminal Procedure (Irwin Law Toronto 2012)* at 39. The power to create criminal law only vested in the Canadian parliament as from 1867 with the enactment of the Constitution Act 1867 (U.K), 30 & 31 Vict, c.3.

10 McLachlin B 2010 *Dalhousie Law Journal* 15 at 23. Also see Canadian Mental Health Association "Police and mental illness: Increased interactions" http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 5 where it is stated that it is a myth that all persons with mental illnesses are dangerous. It is only a small group of persons with serious and persistent mental illnesses that are potentially dangerous. The report notes that the role of the media in portraying persons with mental illnesses as dangerous and antisocial should not be underestimated in creating the perception among the general population that persons with mental illnesses are dangerous.

> *In every society there are those who commit criminal acts because of mental illness. The criminal law must find a way to deal with these people fairly, while protecting the public against further harms. The task is not an easy one.*[11]

Canada's criminal justice system is adversarial.[12] Both federal and provincial laws govern criminal law and criminal procedure.[13] Where federal and provincial legislation overlap, provincial legislation must give way to federal legislation.[14] Any reference to provincial laws in this chapter will be limited to the laws of Ontario since the Mental Health Court, as it operates in Toronto, Ontario, will be studied in this chapter.

The Constitution of Canada and the Criminal Code create the framework within which substantive issues relating to mentally ill accused persons are considered. These are discussed below.

2.2 *The Constitution of Canada*

The Constitution of Canada is the supreme law of Canada; all other legislation is subject to it and only valid in so far as it is consistent with the Constitution.[15] The Charter of Rights and Freedom [16] form part of the Constitution [17] and is applicable to both provincial and

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11 In *Winko* v *Forensic Psychiatric Institute* (1999) 25 C.R (5th) 1 (S.C.C) at [1].

12 Van der Wolf M, van Marle H, Mevis P and Roesch R "Understanding and evaluating contrasting unfitness to stand trial practices: A comparison between Canada and the Netherlands" *International Journal of Forensic Mental Health* 2010 (9) 245-258 at 258.

13 There are two branches of criminal law in Canada. The first being criminal law reserved for the federal government which has jurisdiction over criminal law and criminal procedure. Section 91(27) of the Constitution Act of 1867 gives the federal government this jurisdiction. Also see Roach K, Berger BL, Healy P and Stribopoulos J *Criminal Law and Procedure Cases and Materials* 10th ed (Emond Montgomery Publications Toronto Canada 2010) at 3. Secondly there is the criminal law within the provincial jurisdictions. Provinces have exclusive jurisdiction over certain aspects in the province such as property and civil rights and all aspects of a local or private nature. The provinces derive this jurisdiction from section 92(15) of the Constitution Act of 1876 which also lists the areas of the law in respect whereof provinces will have exclusive jurisdiction. Provinces may also impose a fine or punishment, including imprisonment in the course of enforcing the law of the province. See Mewett *An Introduction to the Criminal Process in Canada* at 1, 2. Also see Roach et al Criminal Law and Procedure at 8 where it is pointed out that provinces are responsible for establishing reformatories where sentences of less than 2 (two) years are served whereas the federal parliament has the responsibility to establish and maintain penitentiaries where sentences of more than two years are served. See sections 91 and 92 of the Constitution of Canada.

14 Mewett *An Introduction to the Criminal Process in Canada* at 3. See, however, Roach et al Criminal Law and Procedure at 10, 11 where it is pointed out that the Canadian courts are hesitant to declare provincial legislation invalid because of its clash with federal laws.

15 Section 52(1) of the Constitution of Canada contains the supremacy provision. Part 1 of the Constitutions Act of December 8, 1981 contains a Charter of Rights and Freedoms containing rights of all persons. See *Stuard D, Delisle R and Qigley T Learning Canadian Criminal Procedure 9th ed (Thomsom Carswell Toronto 2008)* at 30, 31. (similar to the Bill of Rights in the South African Constitution of 1996). Also see Mewet*t An Introduction to the Criminal Process in Canada* at 17.

16 Hereinafter referred to as the "Charter".

17 The Charter constitutes part 1 of the Constitution. See Stuart D *Charter Justice in Canadian Criminal Law* at 1. Also see Roach et al Criminal Law and Procedure at 3.

federal laws.[18] The most relevant provisions as they pertain to mentally ill accused persons are discussed below.

Section 15 of the Charter is of particular importance to the position of a mentally ill accused person. It guarantees equal protection for everyone under the law and prohibits discrimination on the ground of *inter alia* mental disability.[19]

Section 6 of the Charter provides that an arrested person charged with an offence shall be presumed to be innocent until proven guilty[20] and consequently has the right not to be denied reasonable bail without just cause.[21]

Section 11(b) of the Charter states that an accused has the right to be tried within a reasonable time.[22] This right is of particular relevance to mentally ill accused persons since pre-trial issues such as fitness assessments can often cause substantial delays due, *inter alia*, to the lack of available beds at psychiatric facilities at which assessments can be conducted. The remedy for a violation of the right to be tried within a reasonable time is a stay of proceedings.[23] It must be proven, however, that the delay caused prejudice towards the accused.[24]

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18 Section 32(1) of the Charter. See Stuart D *Charter Justice in Canadian Criminal Law* 3rd ed (Carswell Toronto 2001) at 1.

19 Section 15(1) of the Charter reads as follows "every individual is equal before and under the law and has the right to the equal protection and equal benefits of the law without discrimination, and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

20 Section 6 of the Criminal Code. The proof of someone's guilt must be done at a public hearing by an independent and impartial tribunal. Section 11(d) of the Charter. Also see Mewett *An Introduction to the Criminal Process in Canada* at 29 who explains that the right to be presumed innocent until proven guilty entails that, as soon as a charge is laid against an accused, the opposite of the allegation making out the charge is deemed to be the truth until such time as the prosecution who laid the charge, can prove that the allegations on which the charge is based, are true. See further Roach et al Criminal Law and Procedure at 7.

21 Section 11(*e*) of the Charter protects the right of the accused "not to be denied reasonable bail without just cause."

22 Section 11((b) of the Charter. What a "reasonable time" is will depend on the circumstances of each case. The longer the delay, the more it will have to be justified. The Court in *R* v *Askon* (1990) 2 S.C.R 119, 75 O.R (2d) 673, 79 C.R (3d) 273, 59 C.C.C (3d) 449, 74 D.L.R. (4th) 355, 49 C.R.R. 1, 42 O.A.C. 81, 113 N.R. 241 stated that delays caused by the system will also count against the prosecution. A scenario that comes to mind regarding mentally ill accused is delays caused by the shortage of beds in psychiatric institutions to which the accused person is referred for psychiatric observation.

23 Coughlan *Criminal Procedure* at 56. This remedy is however not available if the delay is due to the actions of the accused. Also see Stuart *Charter Justice in Canadian Criminal Law* at 317.

24 *R* v *Morin* [1992] 1 S.C R 771. Prior to this judgment, it was easier to apply for a stay of proceedings, especially in large urban jurisdictions where there is a higher case load. See for example the case of *R* v *Askov* [1990] 2 S.C.R 1199. Coughlan *Criminal Procedure* at 56 points out that applications for stay of proceedings have been on the increase in Ontario over the last couple of

Section 7 of the Charter grants every person the right to life, liberty, and security of the person.[25] The rights provided for in the Charter are not absolute and may be limited as prescribed by law and as can be justified in a free and democratic society.[26] An individual's right to liberty may, for example, be limited if it is in accordance with the principles of fundamental justice.[27] This section protects persons from; *inter alia,* illegal detention and arbitrary arrests.[28] In addition, everyone has the right not to be arbitrarily detained or imprisoned.[29] Should a person be arrested or detained, they have the right not to be subjected to cruel or unusual treatment or punishment.[30] The detained accused must be informed of the reasons for the detention.[31] A detained accused has the right to instruct counsel without delay [32] and to have the validity of the detention challenged by way of *habeas corpus.*[33] A detained accused is entitled to immediate release if the detention is found invalid.[34] D*etention* denotes some form of "compulsory restraint of a person's liberty".[35]

The assessment of mentally ill accused persons is further addressed in the Criminal Code.

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years and states that the issue of institutional delays will have to be considered by the highest court.

25 Section 7 of the Charter reads "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof accept in accordance with the principles of fundamental justice".

26 Section 1 of the Charter. Also see Stuart *Charter Justice in Canadian Criminal Law* at 2, 3. See further Roach et al *Criminal Law and Procedure* at 7 who explain that any law that is not consistent with the Charter is, according to section 52 of the Charter "to the extent of the inconsistency, of no force and effect".

27 Section 7 read with section 9 of the Charter. Also see Stuart *Charter Justice in Canadian Criminal Law* at 1, 2. See further Roach et al *Criminal Law and Procedure* at 7.

28 Mewett An Introduction to the Criminal Process in Canada at 19.

29 Section 9 of the Charter. Also see Mewett *An Introduction to the Criminal Process in Canada* at 22 where it is explained that sections 7 and 9 should be read together and that section 7 is more general than section 9 in that it enables the court to consider any justifiable detention whereas section 9 prohibits any baseless detention or imprisonment. See further Roach et al *Criminal Law and Procedure* at 7 and further at 171 where it is explained that the purpose of the protection that section 9 of the Charter offers is that it protects the individual from state interference. See further in general *R* v *Grant* 2009 2 S.C.C. 253 where it is stated that the liberty protected includes mental liberty in the sense that it includes making decisions free from state interference.

30 Section 12 of the Charter.

31 Section 10(a) of the Charter.

32 Section 10(b) of the Charter. Also see Roach et al *Criminal Law and Procedure* at 7 where the right to instruct counsel is emphasised.

33 Where a person is detained against his will, he may apply for the writ of habeas corpus If the person who is detaining the applicant cannot show that the detention is lawful, the court shall order the release of the applicant. See Mewett *An Introduction to the Criminal Process in Canada* at 24, 25 and 213, 214 for a detailed discussion of this common-law remedy that has now been codified in the Charter under section 10 thereof.

34 Section 10(c) of the Charter.

35 Mewett *An Introduction to the Criminal Process in Canada* at 23. Also see in general *R* v *Therens,* [1985] 1 S.C.R 613 38 A. L.R (2d) 99, 45 C.R (3d) 97, 32 M.V.R. 153, {1985} 4 W.W.R. 286, 18 C.C.C (3d) 481, 13 C.R.R. 193, 18 D.L.R (4th) 655, 59 N.R 122, 40 Sask R. 122. The courts have identified some factors to be taken into account to determine if a person was indeed *detained.* See *R* v *Morin* (1987), 36 C.C.C (3d) 225, 21 O.A.C 38.

2.3 *The Criminal Code*

2.3.1 Introduction

Part XX.1 of the Criminal Code sets out the provisions pertaining to those with mental disorders in the criminal justice system.[36] Traditionally the Criminal Code was interpreted strictly to give the accused the benefit of the doubt. Recently, however, the strict interpretation method is used only when there is ambiguity in the Code.[37]

The Criminal Code, based on the British Criminal Code, was amended over time to provide for the psychiatric assessments of the mentally ill accused.[38] These amendments serve to address the stereotyping and stigmatisation that the mentally ill accused had to endure in the past.[39] The new regime of dealing with mentally ill accused persons as set out in part XX.1 of the Criminal Code provides a "rational and more humane method of dealing with

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[36] Schneider RD *Annotated Ontario Mental Health Statutes* 4th ed (Irwin Law Toronto 2007) at 407. Also see Coughlan *Criminal Procedure* at 289. The Criminal Code was based on the British Criminal Code. The British Criminal Code was never enacted but was adopted by Canada as its first Canadian Criminal Code in 1892. See Salhany RE *Canadian Criminal Procedure* 6th ed (Canada Law Book Toronto 2015) at 1, 2. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 19. The British Criminal Code was influenced by the Criminal Lunatics Act 800 (U.K) 39, which was the first acknowledgement of the fact that mentally ill persons will encounter the Criminal Justice System and that they should not be dealt with in the same manner as non-mentally ill accused. Those found not guilty due to mental illness could only either be released into the community or be imprisoned indefinitely. The Criminal Lunatics Act 1800 (U.K) 39 introduced the option that a mentally ill person may be detained and then released at the pleasure of His Majesty. The Act was the result of the case of Rex v Hadfield 27 State Trials (N.S 1281 (1800) England. Mr Hadfield fired a shot at King George III and was found not guilty due to "insanity" at the time of the shooting. Lord Kenyon expressed his concern that the only two options available to the court was either to send the accused back to prison or to have him admitted indefinitely. Mr Hadfield in this instance was sent back to prison. Also see in general Court, Simpson and Webster 2014 *Psychiatry, Psychology and Law* 918-936.

[37] Roach *et al Criminal Law and Procedure* at 37. It should be noted that the Criminal Code does not contain all the criminal law of Canada, as other legislation exists on a federal level that imposes criminal sanctions. See Mewett *An Introduction to the Criminal Process in Canada* at 5. An example would be Income Tax legislation.

[38] Schneider, Bloom and Heerema *Mental Health Courts* at 19 and 20 explain that Part XX.I of the Criminal Code as it stands today, is the result of the proclamation of Bill C-30. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-9.

[39] Stuart *Charter Justice in Canadian Criminal Law* at 440, 441. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-9. Also see *Winko* v *Forensic Psychiatric Institute* (1999) 25 C.R (5th) 1 (S.C.C) at [85] where it is stated that: "The stereotype of the 'mad offender' too often led to the institutionalization of an acquitted accused or worse, incarceration in prisons where they were denied the medical attention they required and were subjected to abuse. By forcing an accused to face indefinite detention at the pleasure of the Lieutenant Governor in Council, on the assumption that such confinement was necessary for purposes of public safety, it encouraged the characterization of mentally ill people as *quasi-criminal* and contributed to the view that the mentally ill were always dangerous, a view we now know to be largely unfounded. In many cases, indeed, it treated people who had committed no crime and were indeed not capable of criminal responsibility worse than true criminals, sometimes using jails as the places of detention."

such persons".[40] The new system focuses on assessment and treatment [41] and as a result introduces a therapeutic element.

The 1991 case of *R* v *Swain* [42] was a strong impetus for the above amendments.[43] The Supreme Court of Canada found the indefinite detention of a person found not guilty due to mental illness unacceptable and a violation of the right not to be arbitrarily detained as provided for in section 9 of the Charter.[44] The court based its finding on the fact that not all

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[40] Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-9. Also see *R* v *Swain* [1991] I S.C.R. 933 at 1015 where it is stated, "While the assumption that persons found not guilty by reason of insanity may well be rational, I hasten to add that I recognize that it is not always valid. Whilst past violent conduct and previous mental disorder may indicate a greater possibility of future dangerous conduct, this will not necessarily be so. Furthermore, not every individual found not guilty by reason of insanity will have such a personal history". See further Luther G and Mela M "The top ten issues in law and psychiatry" *Sask L Rev* 2006 (69) 401-440 at 418 where the view is expressed that the amendments to the Criminal Code after Swain ensures that those found not criminally responsible or unfit to stand trial is treated fairly and that this is the mission of the Review Boards set up in terms of the amended Criminal Code to deal with such accused persons.

[41] *Winko* v *Forensic Psychiatric Institute* (1999) 25 C.R (5th) 1 (S.C.C) at [39].

[42] *R* v *Swain* [1991] I S.C.R. 933. Mr Swain was charged with assault following a uncanny incident in which he attacked his wife and two children. After the incident, Mr Swain received psychiatric medication and treatment and was functioning well on bail in the community. His trial took place more than one year after the commencement of his release on bail. At the trial the Crown raised the insanity defence over the objection of Mr Swain. This resulted in Mr Swain being found not guilty by reason of insanity with the result that he was placed in strict custody without review. (*R* v *Swain* [1991] I S.C.R. 933 at 935a). Also see the discussion of the case in Schneider, Bloom and Heerema *Mental Health Courts* at 19, 20. Also see Mackay R "Insanity and fitness to stand trial in Canada and England: A comparative study of recent developments" 1995 (6) *The Journal of Forensic Psychiatry* 121-138 at 122 who explains that this inflexible form of treatment of the mentally ill was modelled on the English Criminal Lunatics Act of 1820. This strict custody entailed that the court had no opportunity to enquire if the accused actually needed to be detained or not and the court could not exercise any discretion in this regard. (*R* v *Swain* [1991] I S.C.R. 933 at 943E-F where it is pointed out that the judge is required to order confinement without a hearing (this is in accordance with the old provisions of the Criminal Code (section 542(2)) which has subsequently been amended as a result of this case). Mr Swain appealed against this decision to the Ontario Court of Appeal, arguing that such right of the Crown to raise the defence over his objection, infringed his right to liberty and security of the person as contained in the Charter. His appeal was unsuccessful, His subsequent appeal was however successful and the court found that his Charter rights have indeed been infringed. It is explained in Roach *et al Criminal Law and Procedure* at 780 that the purpose of the common law rule that enabled the Crown to raise the insanity defence over the objection of the accused, was to ensure that persons who were "insane" at the time of commission of the offence were not found guilty in cases where such person refuses to admit or give evidence that he was indeed insane at the time of commission of the offence. The second objective was to protect society from potentially dangerous persons who required hospitalisation. Also see the discussion of this case in Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-6, 1-7.

[43] More particularly for the enactment of Bill C-30. See Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 122. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-6, 1-9 for a discussion of the *Swain* case that prompted the enactment of the abovementioned Bill that changed the way Canadian criminal law dealt with mentally disordered accused persons. Also see Harradence H "Re-applying the standard of fitness to stand trial" 2012 (59) *Crim.L.Q* 511-558 at 512 who confirms that the *Swain* judgment was a strong impetus for the legislative amendments.

[44] *R* v *Swain* (1991) S C R 933 at 943J-944A. Also see Stuart *Charter Justice in Canadian Criminal Law* at 358. Also see Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 122 where this type of

mentally ill accused persons are dangerous and therefore necessitating detention.[45] The court's view was that an accused found not guilty by reason of insanity should be assessed for dangerousness within a reasonable period of time so as to avoid infringing the accused's right to liberty and the right to be free from arbitrary detention.[46]

The court's order entailed that Parliament had to amend the legislative provisions pertaining to strict custody of a mentally ill accused within a period of 6 (six) months from the date of judgment. As a result, Bill C-30 was introduced, setting out the comprehensive procedure to be followed when dealing with mentally disordered accused,[47] including provisions for review of mentally ill accused persons.[48]

Bill C-30 also introduced the definition of "unfitness to stand trial" and further created Review Boards.[49] One important impact of Bill C-30 is that it amended some terminology in the Code. For example, the words "disease of the mind" and "natural imbecility" that was previously used to refer to a mentally ill person were removed from the Code and replaced by a reference to a person suffering from a "mental disorder" which is more respectful.[50]

Even though the *Swain* judgment was handed down in a matter involving the insanity defence, the principles highlighted therein are equally applicable to other persons with mental illness, especially the notion that not all persons with mental illness are dangerous

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detention is referred to as "strict custody" and where it is explained that it was found unconstitutional due to the lack of procedural safeguards for those found to be "legally insane". See further Roach *et al Criminal Law and Procedure* at 777.

45 See Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 123 for a discussion of the Supreme Court's finding in *R* v *Swain*. Also see Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) at 2 where it is pointed out that there is a false perception amongst the community that persons with mental illness are dangerous.

46 Section 7 to 9 of the Charter. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 19, 20 for a discussion of the case and the findings of the various courts involved.

47 The Bill was preceded by a working Paper by the Law Reform Commission of Canada in which the contents of the Bill was proposed. See Schneider, Bloom and Heerema *Mental Health Courts* at 20. Also see Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 246. See, however, Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-8 where it is explained that there were certain provisions in the Bill that were not accepted and passed and these related to hospital orders, capping of dispositions and dangerous mentally ill accused persons.

48 Section 672.82 of the Criminal Code. One very important impact of Bill C-30 is that it amended some terminology in the Code. For example, "not guilty by reason of insanity" was replaced by "not criminally responsible on account of mental disorder". These changes were effected in 1992. The words "disease of the mind" and "natural imbecility" was also removed from the Code. See Schneider, Bloom and Heerema *Mental Health Courts* at 21. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-11 where it is pointed out that the term "mental disorder" is used in the Criminal Code instead of the aforementioned terms.

49 Harradence 2012 *Crim.L.Q* 511 at 511.

50 These changes were effected in 1992. See Schneider *Annotated Ontario Mental Health Statutes* at 411. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-11.

and therefore necessitating detention.[51]

The provisions of the Criminal Code, as far as they pertain to fitness to stand trial in particular and alternative methods of prosecution, are essential for this research as they create the basis upon which the Mental Health Court initiative is based.[52]

The Criminal Code explains the terms *unfit to stand trial* and *not criminally responsible*. Only the definitions are highlighted below. An examination of the order for assessment to determine fitness to stand trial, the test to determine same, and the consequences of a finding of unfit to stand trial and fit to stand trial, are discussed under the heading of procedural aspects relating to the mentally ill accused under Canadian criminal law below.

2.3.2 Fitness to stand trial

The Criminal Code contains a definition of what is to be understood under "unfit to stand trial".[53] Fitness to stand trial is, therefore, to be understood by what it is not, as the Criminal Code defines unfitness rather than fitness.

The definition of "unfitness" reads as follows:[54]

> *means unable on account of mental disorder [55] to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so and in particular unable on account of mental disorder to*
> *Understand the nature or object of the proceedings,[56]*
> *Understand the possible consequences of the proceedings, or*
> *Communicate with counsel.[57]*

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51 See Byrick K and Walker-Renshaw B *A practical guide to Mental Health and the Law in Ontario* (Ontario Hospital Association Toronto 2012) at 76 where the *Swain* judgment and the impact that it had on the development of mental health law is discussed.

52 Many Bills that dealt with mental health issues were introduced resulting in the amendment of the relevant sections of the Criminal Code dealing with mentally ill accused. There are, however, provincial policies that deal specifically with the diversion of mentally ill accused persons to Mental Health Courts and these will be discussed in detail when the procedural dynamics of Mental Health Courts are examined later in this chapter.

53 Prior to the Criminal Code, the concept of "fitness" was not defined even though the concept that a person must be able to follow the proceedings at his trial in order to be tried, dates back to the earliest common law provisions. See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-11.

54 Section 2 of the Criminal Code. Also see Coughlan *Criminal Procedure* at 290.

55 Coughlan *Criminal Procedure* at 289 points out that the mental disorder for purposes of rendering a person not fit to stand trial, is the same requirement set in section 16 of the Criminal Code in respect of a mental disorder that would render a person not criminally responsible on account of mental disorder. The presence of a mental disorder is the first leg of the test for fitness to stand trial according to Coughlan. The second leg of the test consists of the remainder of the provisions of section 2 as set out above.

56 This includes an understanding of the roles of the court officials. See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-4.

According to the definition, the accused must therefore be diagnosed with a mental disorder, which disorder must have a definite impact on the accused's ability to understand the nature or possible consequences of the proceedings or to communicate with his counsel.[58] Fitness to stand trial only pertains to the accused's involvement in the criminal proceedings and the extent to which his ability to participate therein, as set out above, is affected by his mental illness. The focus is on the accused's *current* state of mind and not his state of mind at the time of the commission of the alleged offence. The latter is relevant for purposes of a determination of criminal capacity.

2.3.3 Not criminally responsible

Section 16 of the Criminal Code states that a person shall not be held criminally responsible for an act or omission performed whilst suffering from a mental disorder, which rendered him incapable of appreciating the nature of the act or incapable of knowing that it was wrong.[59] Case law confirms that the accused must also be unable to apply the knowledge regarding the nature of the act as referred to above in order not to be held criminally responsible, even though this is not an express requirement in terms of the Criminal Code.[60] As stated in *R* v *Chaulk*:[61] "The section embodies the policy of the law that such persons are sick as opposed to blameworthy and should be treated rather than punished". Criminal capacity pertains to the impact that the mental illness had on the accused at the time of the commission of the alleged offence and is considered during sentencing.

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57 Of the three sub-requirements listed in section 2 of the Criminal Code, the requirement that the accused must be able to communicate with Counsel, attracted the most attention. See Coughlan *Criminal Procedure* at 290. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-3.

58 Newby D and Faltin R "The very essentials of fitness for trial assessment in Canada" 2008 (47) *Journal of Offender Rehabilitation* 185-207 at 186. Also see section 2 of the Criminal Code. Also see Parliamentary Information and Research Service *Current issues in Mental Health in Canada: Mental Health and the Criminal Justice System* (Library of Parliament Ottawa Canada 2013) at 2. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-1. A low standard has been set to determine if an accused is capable of communicating with his legal representative. All that is required is that the accused must be able to communicate the facts relating to the alleged offence. Coughlan *Criminal Procedure* at 290. Also see Van der Wolf et al 2010 *International Journal of Forensic Mental Health* 245 at 245.

59 Section 16(1) of the Criminal Code. Also see Mewett *An Introduction to the Criminal Process in Canada* at 179. The terminology utilised prior to 1992 was the insanity defence but it was replaced with "not Criminally Responsible on Account of Mental Disorder" NCR in short. See Schneider *Annotated Ontario Mental Health Statutes* at 410, 411. The defence of not criminally responsible because of mental illness only became available to accused persons charged with summary conviction offences after the 1992 amendments to the Criminal Code. See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-13. Prior to these amendments the defence was only available to those accused of indictable offences.

60 See *R* v *Charest* (1990), 57 C.C.C. (3d) 312 (Que. C.A.).

61 (1990), 62 C.C.C (3rd) 193 at p 217.

Since this research is primarily concerned with pre-trial issues, the assessment of criminal capacity and the consequences in the event that a lack of criminal capacity is established will not be canvassed further unless the context of the discussion on fitness issues dictates otherwise.[62]

2.4 *Mental Health Legislation*

Provincial mental health legislation in Canada mostly applies to the civil commitment of mentally ill persons.[63] Each province has its own mental health laws.[64] The requirements

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[62] It needs to be mentioned though that the Not Criminally Responsible Reform Act came into force in July 2014. (S.C 2014. C.6). Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-30. The three main aims of this Act is to ensure that public safety is the main consideration when dealing with accused persons found not criminally responsible on account of mental illness; to provide for a mentally ill accused to be classified as "high risk" and to ensure the involvement of victims when dealing with persons found not criminally responsible on account of mental illness. See the Not Criminally Responsible reform Act itself (Bill C-14). The effect of the enactment of this Act is that it amended certain sections of the Criminal Code that applies to accused persons found not criminally responsible because of mental illness. A court may find that a person found not criminally responsible on account of mental illness, is a "high risk" with due consideration to the nature of the offence, any pattern of repetitive behaviour of which the offence forms part, the current mental state of the accused, reports from experts who have assessed the accused, and whether the accused is willing to receive treatment. The consequence for the accused is that there is no possibility for him to be discharged and he must be detained in hospital until a Judge of the Superior Court lifts the designation of "high risk" person. Section 67.64 states that the finding of an accused being a high risk is available in cases where the court is satisfied that the accused will use violence that will endanger the lives of others, or where the crime committed is so brutal that it is an indication of risk of physical or psychological harm to another. Section 672.64(2) of the Criminal Code that was inserted by the Not Criminally Responsible reform Act sets out the factors that have to be considered when declaring an accused a "high risk". Such a finding is however only possible with regard to adults (section 672.64) and may only be made by a court and not by a Review Board. See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-31, 1-32. Section 672.64(3) of the Criminal Code. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-31 where the automatic hospital detention that follows a decision that an accused is a "high risk" accused, is criticised mainly because it eliminates the assessment of dangerousness that is required in respect of every accused in respect of whom a disposition has to be made and does not allow for each case to be decided individually based on the merits of the matter. This criticism is made with the finding of the court in the *Winko* decision in mind. Once the "high risk" status of the accused has been revoked, he must then be treated as an accused found not criminally responsible because of mental illness who does not pose a high risk to the public and a disposition, including an absolute discharge is available to such an accused. The dispositions as set out in section 672.54 of the Criminal Code may be ordered in respect of an accused that is not a high risk to the safety of society. A finding of a person with mental illness being a "high risk" cannot be made in respect of a person who has been found unfit to stand trial but only in respect of a person found not criminally responsible on account of mental illness Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-310.

[63] Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 1 where it is pointed out that health is generally a provincial matter whilst criminal law, as stated above, is usually a federal matter. The Ontario Mental Health Act R.SO 1990 (hereinafter referred to as the "Ontario Mental Health Act") for example provides for the treatment of voluntary, informal and involuntary patients. Reference is made to the mentally ill accused persons and provision made for the detention of such persons under section 25 of this Act.

[64] Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 255. In Ontario, for

for civil commitment in all provinces are the same, namely, that the accused must have a mental illness and must pose a danger to the self or others.[65]

The Ontario Mental Health Act makes provision for two categories of mental health care users, namely voluntary [66] and involuntary.[67] Provision is also made for a 72-hour assessment period prior to continuing with involuntary care.

Section 21 of the Ontario Mental Health Act makes provision for a judge to order an assessment of an accused who appears before him and whom he suspects may have a mental illness.[68] A judge may issue a treatment order in terms of the Ontario Mental health Act of not more than two months.[69] An order for assessment or treatment may not be made unless a psychiatric facility has confirmed the availability of its services for the relevant accused.[70] A report must be submitted to the judge on the mental state of the accused.[71]

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example, see the Mental Health Act, R.S.O. 1990, and, the Health Care Consent Act 1996.

65 Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 255. The author points out further that some provinces, however, lack a functional definition of mental illness. Provinces also differ on how strict their civil commitment requirements are.

66 Also referred to as an "informal patient" and defined in section 1 of the Ontario Mental Health Act as ""informal patient" means a person who is a patient in a psychiatric facility, having been admitted with the consent of another person under section 24 of the *Health Care Consent Act, 1996*". Such patient may not be restrained (see section 14 of the Act). The status of an informal patient can be changed to that of an involuntary patient upon the filing of a certificate of involuntary admission by a physician. (See section 19 of the Act).

67 Defined in section 1 of the Ontario Mental Health Act as ""involuntary patient" means a person who is detained in a psychiatric facility under a certificate of involuntary admission, a certificate of renewal or a certificate of continuation". A person will be admitted as an involuntary patient if he is incapable of taking an informed decision regarding the need for care and if the lack of treatment could lead to harm to himself or others (see section 20 (1.1) of the Act). Section 20(4) of the Act states that a certificate of involuntary care will have the effect that "An involuntary patient may be detained, restrained, observed and examined in a psychiatric facility, (a) for not more than two weeks under a certificate of involuntary admission." The period may be extended through a certificate of renewal (see section 20(4)(b)(i) to (iv) for the applicable periods of renewal). The status of an involuntary patient may be changed to informal upon the completion of relevant form by the physician, even before the initial period of detention according to the certificate of informal detention has expired - see section 20(7).

68 Section 21(1) of the Ontario Mental Health Act. The section states, "Where a judge has reason to believe that a person who appears before him or her charged with or convicted of an offence suffers from mental disorder, the judge may order the person to attend a psychiatric facility for examination."

69 Section 22 of the Ontario Mental Health Act states that "Where a judge has reason to believe that a person in custody who appears before him or her charged with an offence suffers from mental disorder, the judge may, by order, remand that person for admission as a patient to a psychiatric facility for a period of not more than two months." Also see Ontario Ministry of the Attorney General Criminal Law Division *Practice Memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* (Ontario Ministry of the Attorney General Ontario 2006) at 10.

70 Section 23 of the Ontario Mental Health Act reads that "A judge shall not make an order under section 21 or 22 until he or she ascertains from the senior physician of a psychiatric facility that the services of the psychiatric facility are available to the person to be named in the order. R.S.O. 1990, c. M.7, s. 23." Also see Ontario Ministry of the Attorney General Criminal Law Division *Practice*

Even though the criminal justice system often looks at the provincial mental health facilities in order to conduct assessments and treat accused persons in the criminal justice setting [72], the provisions of the Mental Health Legislation for purposes of assessment for fitness to stand trial is of lesser importance since fitness assessments via the Mental Health Court takes place on-site. Reference will, however, be made to the legislation of the Ontario province throughout the research where relevant.

In order to better elucidate the dynamics of the Criminal Code as it pertains to the mentally ill accused, the structure of the Canadian criminal justice system is briefly surveyed below. The synoptic elucidation is intended to better contextualise the status of Mental Health Courts within the criminal justice system.

3 STRUCTURE OF THE CANADIAN CRIMINAL JUSTICE SYSTEM

3.1 Introduction

This section focuses on the structure of the Canadian criminal justice system within which issues relating to fitness to stand trial are considered. The structure of the criminal justice system is set out briefly, including the levels of courts and the type of offences considered by them. The role of Review Boards is discussed, and the position of the Mental Health Court within the criminal justice structure is set out synoptically since Mental Health Courts are discussed in detail later in this chapter.

An understanding of the types of offences and the jurisdiction of the courts over them are of particular relevance to the Mental Health Court model in Canada since only certain types of offences qualify for the diversion component of the Mental Health Court.

3.2 Criminal courts

The Canadian criminal justice system follows an accusatorial approach.[73] Since the enforcement of the Criminal Code is generally delegated to the provinces, the attorney

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Memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion at 10.

71 Section 21(2) of the Ontario Mental Health Act.

72 Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 2. Also see section 25 of the Ontario Mental Health Act that reads "Detention under the Criminal Code (Canada) 25. Any person who is detained in a psychiatric facility under Part XX.1 of the Criminal Code (Canada) may be restrained, observed and examined under this Act and provided with treatment under the Health Care Consent Act, 1996. 2000, c. 9, s. 8."

73 Mewett An Introduction to the Criminal Process in Canada at 29.

general of the province is the principal law officer of the Crown [74] through whom all public prosecutions are conducted.[75]

The Constitution gives provinces the authority to establish courts within their territorial jurisdiction.[76] The classification of offences impacts the jurisdiction and criminal process followed in a particular court.[77] The Criminal Code allocates jurisdiction over offences to the various courts created through the said constitutional provision.[78]

In essence, there are two main types of offence, namely: indictable offences and summary conviction offences.[79] An indictable offence generally has a higher maximum penalty than a summary conviction offence.[80] Indictable offences are subdivided into three categories,

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74 Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 3. Enforcement of other federal legislation such as the Income Tax Act is the responsibility of the attorney general of Canada and not the provincial attorney generals. See Coughlan *Criminal Procedure* at 43 who explains that there is an attorney general in the Federal government and in each of the provinces. The attorney general may be represented by agents. See section 2 of the Criminal Code. Also see *R* v *Light* (1993), 78 C.C.C (3d) 221 at 253 (B.C.C.A). Also see Schizophrenia society of Ontario *The Justice Process, a guide for families.* http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx (Date of use: 20 September 2016) at 1 where it is explained that the Crown is the attorney for the state who seeks justice for the public.

75 Public prosecutions are those in which the Crown prosecutes whereas private prosecutions are those in which someone other than the attorney general or someone authorised to act on his behalf, drives the prosecution. Private prosecutions are rare and are only conducted where the public prosecutor decided not to proceed with a public prosecution due to either lack of evidence or the fact that prosecution will not be in the best interest of the public. See Coughlan *Criminal Procedure* at 40 footnote 46.

76 Section 92(15) of the Constitution of 1867. Also see Coughlan *Criminal Procedure* at 40.

77 Coughlan *Criminal Procedure* at 37 such as the court procedure to be followed, the jurisdiction of the court, police powers, methods of ensuring attendance and the interim release of an accused who is about to stand trial on a particular type of charge. It also affects sentencing as well as the method of appeal. (see this source at 39).

78 Coughlan *Criminal Procedure* at 40 footnote 20.

79 This distinction was drawn at common law where indictable offences were triable only by a judge and jury and summary conviction offences were triable by a justice of the peace sitting without a jury. See Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 6. The classification of the offence is not necessarily an indication of the seriousness thereof. See Coughlan *Criminal Procedure* at 37 where it is pointed out that some violent offence can be prosecuted via summary conviction whereas some less serious property offences has to be prosecuted via indictment. He points out further that the current classification of offences cannot always be rationalised by reference to its seriousness and that the development of an increasing number of hybrid offences, is proof of this fact – hybrid offences grants the prosecution the opportunity to choose to proceed via summary conviction or indictment. See however Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 6 who opines that those offences triable by indictment only are the more serious offences. The current classification system has been criticised as unnecessarily complex (see this source at 39) and an impediment to the development of Canadian Criminal Procedure law. See in general Law Reform Commission of Canada *Our Criminal Procedure* (Ottawa Law Reform Commission of Canada 1988).

80 Coughlan *Criminal Procedure* at 37. Also see this source at 39 who points out that those serving sentences for indictable offences will serve such sentence in a federal penitentiary. Sentences of more than two years are served in federal penitentiaries. Section 743(1) of the Criminal Code.

namely: superior court exclusive indictable offences, which are the very serious offences,[81] absolute jurisdiction offences that are the least serious offences [82] and all other indictable offences not covered by the previous two categories.[83]

Summary conviction offences are generally offences that are punishable with a maximum prison term of 6 months and/or a fine not exceeding $2 000.00.[84] Whether an offence is a

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81 Superior court exclusive indictable offences are the very serious offences such as murder, piracy, treason and crimes against humanity. These offences must be heard by the superior court of criminal jurisdiction. See Mewett *An Introduction to the Criminal Process in Canada* at 70, 71. Also see Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 6, 7 who confirm that the most serious indictable offences are given into the exclusive jurisdiction of the superior court of criminal jurisdiction. In Ontario for example, the court is called the Supreme Court of Justice. See further Salhany *Canadian Criminal Procedure* at 1-7.

82 These include theft under $5 000 and some minor property and fraud offences. A provincial court judge must hear these offences. This implies that the accused will be tried in the court of criminal jurisdiction and not the supreme court of criminal jurisdiction. Also see Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 6 who confirm that these are the least serious indictable offences that will be heard by a provincial court judge. See however Salhany *Canadian Criminal Procedure* at 1-7 who indicates that the absolute jurisdiction of a provincial court judge may be superseded by the jurisdiction of the superior court of criminal jurisdiction. This means that a superior court of criminal jurisdiction may hear a case of theft of goods to the value of less than $5 000. See for example the case of *R* v *Holliday (1973) 12 C.C.C (2d) 56 (Alta S.C.* App Div) where the superior court of criminal jurisdiction found the value of the stolen goods to be less than $200 (which was the limit for provincial court cases at the time) and could even thereafter proceed to trial the case The accused does not have an election by whom he wants to be tried and is automatically subjected to the trial method of the court under which jurisdiction the particular type of indictment falls. Mewett *An Introduction to the Criminal Process in Canada* at 70, 71. Also see Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 6, 7 where it is explained that absolute jurisdiction means that the provincial court has the absolute right to trial the less serious indictable offence in the sense that the jurisdiction is not dependant on the accused electing to be tried in this court. It does however not have exclusive jurisdiction and other courts may hear less serious indictable offences should a case come before them. See further Salhany *Canadian Criminal Procedure* at 1-5.

83 In this case, the accused has an election as to the method of the trial in the court of criminal jurisdiction. Salhany Canadian Criminal Procedure at 1-8. Mewett *An Introduction to the Criminal Process in Canada* at 68, 79 for a summary of the three options in respect of a trial in the court of criminal jurisdiction.

84 Mewett *An Introduction to the Criminal Process in Canada* at 69, 71, 72 where it is explained that all provincial offences are summary conviction offences. Nothing prohibits a province from stating that an offence will be an indictable offence but there are doubts about the constitutionality thereof. Most provincial legislation pertaining to the process to follow in a summary conviction offence mirrors the content of the Criminal Code pertaining to the federal procedure to be followed in respect of summary conviction offences. Part XXVII of the Criminal Code sets out the procedure to follow in federal matters. Some provinces such as Ontario for example, have their own procedural legislation for provincial offences committed. Ontario has a Provincial Offences Act in terms whereof a Provincial Offences Court is established which is presided over by a provincial court judge or a justice of the peace. There is no preliminary inquiry in this type of court. See Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 7. Also see Mewett *An Introduction to the Criminal Process in Canada* at 69. See further Coughlan *Criminal Procedure* at 38 who points out that sentences of less than two years are served in a provincial jail – it is thus most likely that a sentence for a summary conviction offence will be served in a provincial jail.

summary conviction offence or not will be stated by the particular provincial legislation.[85]

Where the option is available to prosecute the offence as either a summary conviction or an indictable offence, such an offence is known as a *hybrid offence*.[86] The Crown elects which route to follow, and the appropriate procedure ensues.[87]

There are three levels of criminal courts. The lowest level of court is the summary conviction court, followed by the court of criminal jurisdiction. The highest level of court in Canada is the superior court of criminal jurisdiction.[88] A brief discussion of each of these follows.

The first and lowest level of courts in Canada is the summary conviction courts.[89] These

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85 Mewett *An Introduction to the Criminal Process in Canada* at 69. These offences must be heard by a provincially appointed judge in the area where the offence was committed and proceedings must commence within 6 months from the date of the alleged offence.

86 Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 7. Also see Salhany Canadian Criminal Procedure at 1-3 who gives impaired driving as an example of a hybrid offence. See however Coughlan *Criminal Procedure* at 35, 36 where it is pointed out the hybrid offences should not be seen as a third category of offences as they do not follow a separate procedure but the offence is merely designed to fall under either procedure at the election of the prosecutor. This source further at 36 states that hybrid offences are treated as indictable offences until the prosecution has made an election in terms of which process to follow forthwith. Also see The Interpretation Act R.S.C 1985 c 1-21 section 34. *R* v *Gougeom; R* v *Heasler; R* v *Gray* (1980), 55 C.C.C (2d) 218 (Ont, C.A) Similarly, if proceedings commence in the summary convictions court prior to the prosecution having chosen the mode of process, it will be assumed that the election was to proceed via summary conviction. See Coughlan *Criminal Procedure* at 54. Also see Mewett *An Introduction to the Criminal Process in Canada* at 70, 71. Also see this source at 73 for a schematical explanation of how hybrid offences fit into the Canadian criminal court system.

87 The decision by the Crown will determine the court that will try the matter, Mewett *An Introduction to the Criminal Process in Canada* at 70, 71. Also see Coughlan *Criminal Procedure* at 36 footnote 3 where it is indicated that hybrid offences are treated as indictable offences until decided otherwise. Also see The Interpretation Act R.S.C 1985 c 1-21. See further Salhany *Canadian Criminal Procedure* at 1-4. Where hybrid offences are proceeded with by way of summary conviction, the maximum sentence in respect of some of these hybrid offences is more than 6 (six) months. Offences that attract these higher sentences include sexual assault as provided for in section 271 of the Criminal Code and assault with the intent to do bodily harm as provided for in section 267 of the Criminal Code. The maximum penalty for these offences since 1994 is now 18 months. See Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 7, 8. These offences must be heard by a provincially appointed judge in the area where the offence was committed and proceedings must commence within 6 months from the date of the alleged offence. See Section 786(2) of the Criminal Code. See Mewett *An Introduction to the Criminal Process in Canada* at 69, 71. Also see Coughlan *Criminal Procedure* at 54 and further at 37, 51 where it is pointed out that the 6 (six) month rule can be relaxed if the Crown and the accused consent thereto.

88 Note that these are not necessarily three separate courts, but represent the three levels of courts. Mewett *An Introduction to the Criminal Process in Canada* at 67. All summary convictions are heard in a Provincial Court in front of a Provincial Court judge without a jury. A summary conviction court is thus a provincial court. See Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 7.

89 Section 785 of the Criminal Code explains the meaning of a Summary Conviction court. See Mewett *An Introduction to the Criminal Process in Canada* at 69. Also see Salhany *Canadian Criminal Procedure* at 1-4.1 who stresses that all summary conviction offences must be heard by a summary conviction court.

courts are presided over by a provincial court judge [90] and hear only cases involving summary conviction offences that are mainly minor offences.[91] The accused need not appear in person in this court unless the court requires such a personal appearance.[92] There is no preliminary inquiry in summary conviction proceedings.[93]

The second level of courts comprises the court of criminal jurisdiction that has jurisdiction over all indictable offences that are not supreme court exclusive offences.[94] These courts have jurisdiction over an accused if he was found, arrested, or detained in custody in the territorial jurisdiction of the particular court of criminal justice.[95] These courts of criminal justice can appear in three forms, but all with equal jurisdiction.[96] The main difference between the forms of this court is that it is presided over by either a judge and jury or a judge only depending on the election of the accused.[97]

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[90] Mewett *An Introduction to the Criminal Process in Canada* at 69. A justice of the peace may also sometimes preside over these courts but it is unusual for this to be the case. They physical presence of the accused is not required at the proceedings of the summary conviction court and his lawyer or other agent may represent him. The judge may however order that he be present in accordance with section 800(2) of the Criminal Code. Also see Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 7.

[91] Mewett *An Introduction to the Criminal Process in Canada* at 69. Also see Coughlan *Criminal Procedure* at 40 where these courts are also referred to as “provincial courts”.

[92] The accused may be represented by an agent or by Counsel. See Salhany Canadian Criminal Procedure at 1-19.

[93] Stuard, Delisle and Quigley Learning Canadian Criminal Procedure at 8.

[94] These courts thus have general jurisdiction over all indictable offences, except for those listed in section 469 of the Criminal Code. See Coughlan *Criminal Procedure* at 40. Also see Mewett *An Introduction to the Criminal Process in Canada* at 68.

[95] Section 470 of the Criminal Code.

[96] Mewett An Introduction to the Criminal Process in Canada at 68.

[97] Firstly there is the court presided over by a superior court judge and a jury. Also referred to as the court of general session, or session of the peace. This court will preside over those indictments in respect whereof the accused elected to be tried by judge and jury. See Mewett *An Introduction to the Criminal Process in Canada* at 68. Also see Coughlan *Criminal Procedure* at 35. Secondly, there is the court that is presided over by a superior court judge only who hears cases of those accused that elect to be tried by judge without jury. Mewett *An Introduction to the Criminal Process in Canada* at 68. Also see Coughlan *Criminal Procedure* at 35. In either of these first two methods of trial, a preliminary inquiry may be held at the request of the accused or the Crown. Section 535 of the Criminal Code. Also see Coughlan *Criminal Procedure* at 60, 254. A preliminary inquiry serves as a screening mechanism to rule out prosecutions with little or no merit. Coughlan at 254 is of the opinion that the role of preliminary inquiries are becoming less important, especially since the amendment of the Criminal Code in 2004 which had the effect that a preliminary inquiry is no longer an automatic part of the criminal proceedings, but is only held upon request of either of the parties. Coughlan at 255 points out further that a preliminary inquiry will most often be requested by the accused as it grants him an opportunity to test the strength of the case against him and get information on the evidence that will be levied against him at the trial. The issues in respect of which a preliminary inquiry should be held, must be specified by the accused prior to submitting a request for a preliminary inquiry, the inquiry will no longer cover the entire case, as was the position prior to the amendments of the Criminal Code in 2004. The Scope of the inquiry is defined by section 535 of the Criminal Code. See Coughlan *Criminal Procedure* at 259-262 for detail on the scope of the preliminary inquiry. The accused do not always have this election and that the Criminal Code

Lastly, the superior court of criminal jurisdiction is the highest court in each province [98] and is presided over by a federally appointed judge.[99] The default mode of trial in this court is trial by judge and jury [100] unless the attorney general has consented to a trial without a jury.[101] The accused cannot exercise election as to the mode of trial.[102]

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sometimes prescribes that certain offences be heard in a certain court. See for example section 469 and 553 of the Criminal Code. See this source at 35 where it is pointed out that a preliminary inquiry is held in a provincial court and only after it is evident that there is enough evidence to proceed with a trial, will the trial proceed in the superior court of criminal jurisdiction. A plea is, however, only entered at the trial and not at the preliminary inquiry. See Coughlan *Criminal Procedure* at 60. Thirdly, there is the court that is presided over by a provincial court judge who hears the cases of accused who chose to be tried by provincial court judge without jury. The choice between being tried by a superior court judge and a provincial court judge affects the procedure of the trial to follow. Mewett *An Introduction to the Criminal Process in Canada* at 68. Also see Coughlan *Criminal Procedure* at 35 and further at 60 where it is explained that section 555(1) of the Criminal Code provides for a trial in front of a provincial judge to be converted into a Preliminary Inquiry where appropriate. In the case of a trial in a provincial court, the accused waives his right to request a preliminary inquiry. See Coughlan *Criminal Procedure* at 41.

98 Section 2 of the Criminal Code sets out the names of these Courts in every province as: "superior court of criminal jurisdiction" means (*a*) in the Province of Ontario, the Court of Appeal or the Superior Court of Justice, (*b*) in the Province of Quebec, the Superior Court, (*c*) in the Province of Prince Edward Island, the Supreme Court, (*d*) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Appeal or the Court of Queen's Bench, (*e*) in the Provinces of Nova Scotia, British Columbia and Newfoundland, the Supreme Court or the Court of Appeal, (*f*) in Yukon, the Supreme Court, (*g*) in the Northwest Territories, the Supreme Court, and (*h*) in Nunavut, the Nunavut Court of Justice; Also see Salhany *Canadian Criminal Procedure* at 1-4.

99 Mewett *An Introduction to the Criminal Process in Canada* at 67. Judges of these courts are appointed by the federal parliament. See Roach et al Criminal Law and Procedure at 8. These courts are also often referred to as the Supreme or Superior Court of the Province or the court of Queen's Bench. In Ontario, this court is called the Ontario Court of Justice (General Division).

100 Section 471 of the Criminal Code. A criminal trial is mostly conducted by way of judge and jury although the jury may be dispensed with under certain circumstances. See Mewett *An Introduction to the Criminal Process in Canada* at 68. Also see Coughlan *Criminal Procedure* at 35, 36 where he points out that the Criminal Code in section 471 creates the impression that trial by judge and jury is the default trial method for indictable offences but that such impression is wrong since the Code creates exceptions for the hearing of many types of offences elsewhere in the Code.

101 Section 473(1) of the Criminal Code. The jury will be dispensed with only with the consent of the Attorney General and the accused. See Mewett *An Introduction to the Criminal Process in Canada* at 68. Also see Coughlan *Criminal Procedure* at 35, 60. See further Salhany *Canadian Criminal Procedure* at 1-5.

102 "Election" means the formal step in the criminal proceedings where the accused has the option to choose between the various forms of trials available in the criminal court of jurisdiction. Section 536 of the Criminal Code makes provision for this election. Mewett *An Introduction to the Criminal Process in Canada* at 70. Also see Coughlan *Criminal Procedure* at 41. Also see this source at 35 and further at 60 where it is pointed out that where an accused does not make an election as to the preferred trial method, a trial by judge and jury shall be held. Also see Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 6 where this is confirmed in accordance with Section 565(1)(c) of the Criminal Code. The Criminal Code, however, provides that certain offences can only be heard by certain courts in which case the accused will not have the election as referred to above. See Coughlan *Criminal Procedure* at 35 and 40 where it is explained that offences listed in section 553 of the Criminal Code for example can only be heard by a provincial court as they are not deemed serious enough to warrant a trial by jury. On the other hand, offences contained in section 469 of the Criminal Code, has to be heard by the superior court due to its serious nature. These offences include for example murder. The accused may also in certain instances re-elect the mode

Superior courts have jurisdiction over all indictable offence.[103] Practically, the offences actually heard by the superior court are earmarked as *Supreme Court exclusive offences*.[104] These are typically treason, piracy, murder and include conspiracy to commit any of these crimes.[105] This court has jurisdiction over an accused if the accused was found, arrested, or detained in custody in the territorial jurisdiction of the particular court.[106]

Mental Health Courts are criminal courts that form part of the Canadian criminal justice system to which accused persons with mental health issues may be diverted and provide for an alternative prosecution method as provided for in the Criminal Code.[107] The jurisdiction of this court depends on the practice directive that has been issued by the Ministry of the Attorney General in each province.[108] Only certain types of offences are heard by Mental Health Courts [109] as informed by the specific diversion programme of the

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of trial once the proceedings have commenced. Section 561 of the Criminal Code. Also see Coughlan *Criminal Procedure* at 41. See further Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 7. Also see Salhany *Canadian Criminal Procedure* at 1-12, 1-18 for a detailed discussion of the circumstances under which an accused may re-elect his mode of trial. The Crown may, however, in certain instances override the election of the accused and orders that a trial by jury be held despite the accused's election. Coughlan *Criminal Procedure* at 35. Also see Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 7. For instance where the offence is punishable with more than five years imprisonment. (Section 568 of the Criminal Code).

103 Section 468 of the Criminal Code. Also see Coughlan *Criminal Procedure* at 40.

104 Generally the more serious offences such as murder where only this Superior court has jurisdiction. See section 469 of the Criminal Code for a complete list of crimes over which the superior court of criminal jurisdiction shall have exclusive jurisdiction. See Mewett *An Introduction to the Criminal Process in Canada* at 68, 70. Also see Coughlan *Criminal Procedure* at 40, 59, 60 who explains that section 468 read with section 469 of the Criminal Code reveals that the Superior Court of Criminal Jurisdiction has exclusive jurisdiction over those offences listed in section 469 and that the court of criminal jurisdiction has general jurisdiction over all other indictable offences not so listed in section 469 of the Criminal Code.

105 Treason is an offence in terms of section 47 of the Criminal Code. Piracy is an offence in terms of section 74 of the Criminal Code. Murder is an offence in terms of section 235 of the Criminal Code. Conspiracy to commit any of these crimes constitutes an offence in terms of section 469(e) of the Criminal Code.

106 Section 470 of the Criminal Code.

107 Section 717 of the Criminal Code makes provision for alternative prosecution methods in certain circumstances. Also see Legal Aid Ontario "LawFacts: A legal information resource from legal aid Ontario" http://lawfacts.ca/mental-health/court (Date of use: 22 September 2016) where the Mental Health Court's status as a criminal court is confirmed.

108 The Ministry of the Attorney General in Ontario for example issued a Practice memorandum for the diversion of mentally disordered accused persons. This document sets out which offences are eligible for diversion to the Mental Health Court. See Ontario Ministry of the Attorney General Criminal Law Division *Practice Memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion.*

109 There are certain offences that will not be considered for diversion. These are typically serious offences such as murder and sexual offences. See for example the lists of divertible offences in Ontario for purposes of diversion for mentally ill accused persons as set out in Ontario Ministry of the Ontario Ministry of the Attorney General Criminal Law Division *Practice Memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 3, 4, 5. These offences are listed as murder, manslaughter, infanticide, criminal negligence causing death; causing death or bodily harm by dangerous or impaired driving; any offence causing serious bodily harm; simple impaired driving

particular province.[110]

Each province is required to establish a Review Board. A Review Board is a very important role player in the criminal proceedings for accused persons found unfit to stand trial or not criminally responsible. Review Boards function separately from Mental Health Courts as set out below.

3.3 Review Boards

In accordance with the Criminal Code, a Review Board must be established in each province.[111] Review Boards are independent.[112] Review Boards are tasked with holding disposition hearings and reviewing dispositions made by courts [113] concerning any accused in respect of whom the court rendered a verdict of unfit to stand trial or not criminally responsible due to mental disorder.[114] Approximately 900 mentally ill accused appear in

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or driving with a prohibited blood alcohol concentration; offences involving firearms; criminal organisation offences; kidnapping; spouse/partner offences child abuse; offences involving child pornography sexual offences including sexual assault, interference and exploitation, invitation to sexual touching and incest; specific hate offences home invasions; and perjury.

110 See for example Ontario Ministry of the Attorney General Criminal Law Division *Practice Memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion*. In terms of this document, sexual offences and offences involving firearms for example cannot be diverted. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 107.

111 In accordance with S672.38 of the Criminal Code. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 18 where it is pointed out that the establishment of Review Boards can be traced back to the 17th century. Also see Mewett *An Introduction to the Criminal Process in Canada* at 177. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-9 who explains that the Review Board system replaced the system that existed prior to the 1992 amendments to the Criminal Code and addressed the concerns raised by the court in the *Swain* decision in that the new system avoided arbitrary and indefinite detention. Also see Court, Simpson and Webster 2014 *Psychiatry, Psychology and Law* 918 at 929 where it is pointed out that these Review Boards are established federally but administered provincially. See further Harradence 2012 *Crim.L.Q* 511 at 548 who points out that the Review Boards were established with the insertion of the fitness provisions in the Criminal Code in 1992.

112 Schneider, Bloom and Heerema *Mental Health Courts* at 18.

113 "Disposition" means an order made by a court or Review Board under section 672.54 of the Criminal Code or an order made by a court under section 672.58 of the Criminal Code. Amendments to the Canadian Criminal Code made it possible for the court to hold a disposition hearing immediately after handing down the verdict. These court-ordered dispositions are however subject to review by the Review Board. See Schneider, Bloom and Heerema Mental Health Courts at 21. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 7-2 where it is indicated that the Review Boards have exclusive jurisdiction over all review hearings.

114 S672.38(1) of the Criminal Code. See further Mewett *An Introduction to the Criminal Process in Canada* at 177. Also see Schneider, Bloom and Heerema Mental Health Courts at 18 where it is pointed out that a person who falls within the jurisdiction of a Review Board shall be referred to as "an accused". See further Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 5 where it is confirmed that the Review Board has jurisdiction over all those accused found unfit to stand trial or not criminally responsible.

front of the Ontario Review Board every year.[115]

Review Board review the state of the relevant mentally ill accused persons directly after the verdict of unfitness or non-criminal responsibility and thereafter at least once every 12 months.[116] The Review Boards decide where an unfit person or a person found not criminally responsible will be detained, what level of security is required during such detention and when they can be released.[117]

The power of the Review Board to make the final decision is curtailed in some instances. Only a court and not a Review Board can find that an accused, who is found not criminally responsible because of mental illness, is a "high risk" person.[118] Only a court and not a Review Board may order a stay of proceedings in respect of an accused that is permanently unfit to stand trial as this ensures that due consideration is given to public safety.[119]

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115 Schneider, Bloom and Heerema *Mental Health Courts* at 21.

116 Section 672.81(1) of the Criminal Code. See *Winko* v *Forensic Psychiatric Institute* (1999) 25 C.R (5th) 1 (S.C.C) at [28]. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 21. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-9 who confirms that a review of the mental state of the accused must usually take place once a year. See however section 672.81(2) of the Criminal Code that states that such a review may take place within 24 months provided the accused has legal representation and that all parties consented thereto. Section 672. 81(1), reviews can also be held if the restrictions on the liberty of the accused are increased or when the accused requests such a review. Reviews may be extended to only take place every 36 months in the case of high risk accused persons according to section 672.81 (1.31) of the Criminal Code. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 98. See further Court, Simpson and Webster 2014 *Psychiatry, Psychology and Law* 918 at 929 where it is confirmed that the condition of mentally ill accused persons had to be reviewed annually. These Review Boards replace the advisory boards that previously advised the Lieutenant Governor on these issues. See Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 128. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-25, 1-38 where it is indicated that these advisory review boards were introduced in 1964 and remained in operation until the establishment of Review Boards in 1992 that were vested with the power to make dispositions. Also see Luther and Mela 2006 *Sask L Rev 401* at 418.

117 Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx (Date of use: 20 September 2016) at 2.

118 Section 672.64(1) of the Criminal Code. See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-36 who expresses concern about the fact that power is being taken away from the Review Board, especially having regard to the fact that these Boards contain expertise in the field of mental health and further the fact that courts have always relied heavily on and respected the findings of Review Boards.

119 Section 672.851 of the Criminal Code states that a Review Board may only recommend a stay of proceedings. The final decision is to be taken by the court after due consideration of the factors listed in the subsections of section 672.851 such as if a stay of proceedings will be in the interest of the proper administration of justice. Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-22, 3-42.1. See further Luther and Mela 2006 *Sask L Rev 401* at 419 where it is confirmed that the Review Board does not have the jurisdiction to order a stay of proceedings. Also see Harradence 2012 *Crim.L.Q* 511 at 552 where it is stated that a stay of proceedings will only be

The Review Board follows a multi-disciplinary approach, as is evident from its constituency. A judge of the Federal Court, or the provincial court or a person qualified for such appointment, or a retired judicial officer, chairs the Review Board.[120] The Board must consist of not less than 5 (five) members [121] , at least one of whom must be entitled to practice psychiatry under the laws of the province, and at least one other member must have training and experience in the field of mental health (where only one member is entitled to practice psychiatry).[122]

The Review Board may make its own rules and procedures subject to the approval of the Lieutenant Governor.[123] Proceedings before a Review Board are inquisitorial and informal in nature.[124] Review Board hearings are often held in a hospital boardroom, and witnesses

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ordered if the accused is not a threat to public safety.

120 Section 672.4(1) of the Criminal Code. The constituency of a Review Board is also set out in Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 2. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 7-6.

121 Section 672.38(1) of the Criminal Code prescribes the number of members on the Review Board. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 86. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 7-6. Also see Court, Simpson and Webster 2014 *Psychiatry, Psychology and Law* 918 at 929 where it is stated that the Board must consist of at least 5 members and that 3 members will form a quorum. See further Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 2 where it is explained that he other members on the Review Board are community members and a lawyer (besides the chairperson).

122 Section 672.39 of the Criminal Code. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 7-6. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 86 where it is explained that in circumstances where not all the members of a Review Board can meet, at least three members may meet provided that two out of the three members are the Chairperson and a psychiatrist. See further Harradence 2012 *Crim.L.Q* 511 at 550 where it is pointed out that at least one member of the Board must be a psychiatrist and it may further have members who are psychologists – the latter is not compulsory.

123 S672.44 of the Criminal Code. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-20, 2-14.15 who explains that some of the powers that the Review Board has in terms of this provision to make its own rules and procedures is to order psychiatric assessments of accused persons in order to arrive at a suitable disposition, to issue a summons for the appearance of the accused and to make orders with regard to publication bans on the identity of either the accused or the victim if this is deemed to be in the interest of justice. The Ontario Review Board has published its rules of procedure available at www.orb.on.ca. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 101.

124 Section 672.5(2) of the Criminal Code states that proceedings before the Review Board may be as informal as is appropriate in the circumstances. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 7-3, 8-4.3 where it is explained that even though cross-examination is allowed in these proceedings such cross-examination is much less confrontational than in criminal proceedings. This is in line with the more inquisitorial and less formal nature of the proceedings in front of the Review Board. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 101.

need not testify under oath.[125]

Where the Review Board holds a disposition hearing, it must be an open hearing at which the accused may attend and give evidence.[126] Where the accused does not have legal representation, the Review Board may assign counsel to the accused if they are of the view that it is in the interest of justice.[127]

The Review Board may make a number of dispositions. It may order the unconditional discharge of an accused who was found not criminally responsible because of mental illness and who does not pose a threat to society.[128] The Review Board cannot release an accused found unfit to stand trial unconditionally, but the court may order a stay of proceedings in respect of such an accused.[129] Where an accused poses a threat to society, he may be conditionally discharged, or an order may be made for his detention in the hospital.[130] As of 2005, the Review Board has the discretion to order assessments of an accused person for purposes of making the most appropriate disposition.[131]

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125 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 8-4.3 where it is pointed out that a court reporter must also be present to record the proceedings of the Review Board, including the testimony given by witnesses which need not be given under oath.

126 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-9. These hearings may also take place in *absentia* in appropriate circumstances. The accused may also be barred from attending the hearing in circumstances where the accused is disruptive or where the presence of the accused at the hearing will be detrimental to his recovery. These grounds are set out in section 672.5(10)(b) of the Criminal Code.

127 Section 672.5(8)(b) of the Criminal Code. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 7-8.2, 7-8.3.

128 Schneider, Bloom and Heerema *Mental Health Courts* at 21. This, however, only applies to an accused that has been found not criminally responsible and does not apply to an accused that has been found unfit to stand trial. See Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 129.

129 Section 672.851 of the Criminal Code states that a Review Board may only recommend a stay of proceedings. The final decision is to be taken by the court after due consideration of the factors listed in the subsections of section 672.851 such as if a stay of proceedings will be in the interest of the proper administration of justice. Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-22, 3-42.1. Also see Luther and Mela 2006 *Sask L Rev 401* at 419 where it is pointed out that the requirement that a stay of proceedings should be in the interest of justice is an additional requirement not envisaged by the *decision in R* v *Demers [2004\ 2* S.C.R 489, 2004 S.C.C 46. Also see Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 250.

130 Schneider, Bloom and Heerema *Mental Health Courts* at 21 reiterates the importance of available resources in the forensic system in order for the Review Boards to be effective. Also see Mewett *An Introduction to the Criminal Process in Canada* at 177. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-18.

131 Section 672.12.1 as inserted in 2005 through Bill C-10. Section 672.12.1 sets out when assessments may be ordered by the Review Board and reads as follows:
"1 The Review Board that has jurisdiction over an accused found not criminally responsible on account of mental disorder or unfit to stand trial may order an assessment of the mental condition of the accused of its own motion or on application of the prosecutor or the accused, if it has reasonable grounds to believe that such evidence is necessary to
(a) make a recommendation to the court under subsection 672.851(1);

Non-compliance with the disposition order or failure to attend to an assessment as ordered by the Review Board is not an offence.[132] The police may, however, be approached for assistance to ensure the presence of the accused at the assessment as ordered or to, for example, attend a psychiatric hospital for treatment as part of the conditions for discharge.[133]

Parties may appeal against the disposition made by either a Review Board or a court to the court of appeal in accordance with the normal rules of court.[134]

Now that the structure of the criminal justice system within which the procedure functions has been explained, an explanation of the relevant procedural issues pertaining to fitness to stand trial follows. Reference is only made to assessment for criminal capacity in order to highlight the differences between the two types of assessments where relevant. The

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(b) make a disposition under section 672.54 in one of the following circumstances:
- (i) no assessment report on the mental condition of the accused is available,
- (ii) no assessment of the mental condition of the accused has been conducted in the last twelve months, or
- (iii) the accused has been transferred from another province under section 672.86; or

(c) determine whether to refer to the court for review under subsection 672.84(1) a finding that an accused is a high-risk accused." Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 78. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-14.13 where it is explained that the Review Board has to carry the costs of independent assessments ordered by the Review Board. It was confirmed in *R* v *Taylor* that a Review Board does not have the jurisdiction to order that any other party pay the costs." See *Ontario (Attorney General)* v *Ontario (Review Board)* 2010 Carswell Ont 267 (sub. nom. R v Taylor) 2010 ONCA 35 (Ont C.A).

132 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-26. It was suggested that non-compliance with disposition or assessment orders should be classified as an offence. This was, however, not accepted by parliament as caution was raised to respect the Charter rights of the accused. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 101.

133 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-27, 2-37. The Police are, however not allowed to detain the accused prior to the assessment or disposition hearing. This, according to Barrett *et al* is a gap in the system that will hopefully be addressed soon to ensure proper compliance with the orders of the Review Board. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 94.

134 Section 672.72 of the Criminal Code. Also see *Winko* v *Forensic Psychiatric Institute* (1999) 2 S.C.R (5th) 1 (S.C.C) at [28]. Where the Review Board made a disposition that the accused be treated in hospital, that particular hospital may for example appeal against the finding of the Review Board should the hospital not have beds available to treat the relevant mentally ill accused person. See Schneider, Bloom and Heerema *Mental Health Courts* at 28 where it is reported that hospitals indeed successfully appealed against dispositions made by the Review Board. The authors point out that such appeal might influence the Review Board's mandate to make a disposition that protects public safety and that is least restrictive to the accused. This in turn may affect the Review Board's mandate to make a disposition that protects public safety and that is least restrictive to the accused. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 102 where it is pointed out that these appeals are governed by the provisions of the Criminal Court and the Ontario Court of Appeal's Criminal Appeal rules. Also see Court, Simpson and Webster 2014 *Psychiatry, Psychology and Law* 918 at 929.

assessment for fitness is a distinct inquiry from the assessment for criminal capacity.[135] This research focuses on the former.

4 PROCEDURAL ASPECTS RELATING TO FITNESS ASSESSMENTS UNDER CANADIAN CRIMINAL LAW

4.1 Introduction

The procedural issues surrounding fitness to stand trial are canvassed below, including how the order for assessment is made, the test for determining fitness to stand trial, and the consequences of a finding of *unfit to stand trial* as opposed to a finding of fitness. Challenges with fitness assessments are pointed out throughout the discussion of the procedural issues pertaining to fitness.

One of the primary functions of a Canadian Mental Health Court is to assess an accused's fitness to stand trial [136] since fitness is a prerequisite to participate in any of the Mental Health Court programmes. A clear understanding of what fitness to stand trial entails is therefore necessary.

4.2 Overview

The earliest formulation of the fitness requirement as it pertains to Canada can be traced back to the English common law of the 17th Century.[137] The requirements at that time for fitness to stand trial were that the accused had to be able to understand the consequences of the crime and the pleas available to him. He also had to be able to identify the necessary information to build a defence.[138] Although the concept of fitness was developing and an understanding emerged of what it should entail, there was no formal definition of "fit to stand trial" contained in the Criminal Code at the time.[139] Provisions pertaining to fitness to stand trial and the assessment thereof were inserted into the

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135 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-14.1 where it is specifically pointed out that having criminal capacity and being able to testify in one's own case, is not a prerequisite for being found fit to stand trial.

136 Schneider, Bloom and Heerema *Mental Health Courts* at 92, 97. Also see Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 128.

137 Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 185. Also see Harradence 2012 *Crim.L.Q* 511 at 517 where the development of the fitness test as it is applied in Canada is explored. See this article for a discussion of relevant English case law that contributed to the fitness test that was eventually used in Canada.

138 Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 185.

139 Harradence 2012 *Crim.L.Q* 511 at 511 who points out that prior to 1992 the Criminal Code did not contain a definition of fitness to stand trial.

Criminal Code in 1992.[140]

The justification for a doctrine that provides for unfitness is fairness since it would be completely unfair to try a person who is not capable of understanding the proceedings against him.[141] The rationale behind the fitness provisions is, *inter alia,* to protect the accused's right to a fair trial and to answer to the charges against him.[142]

The Criminal Code contains a presumption of fitness and states that everyone shall be presumed fit to stand trial unless it is proved on a balance of probabilities that the accused is unfit to stand trial.[143] The provisions pertaining to fitness to stand trial only apply as long as a verdict has not been handed down.[144]

A vital right of an accused in the Criminal Code is to be present in court during his entire

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140 Section 2 of the Criminal Code. Prior to 1992, the provisions regarding fitness to stand trial were spread across the Criminal Code. It is only after the 1992 amendments that the provisions regarding assessment for fitness to stand trial was consolidated and inserted in one place in the Criminal Code, namely, section 2. See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-12, 3-2. Also see Schneider *Annotated Ontario Mental Health Statutes* at 407. See further Coughlan *Criminal Procedure* at 289, 290. Also see O'Shaughnessy RJ "AAPL practice guideline for the forensic psychiatric evaluation of competence to stand trial: Canadian legal perspective" 2007 (35) *The Journal of the American Academy of Psychiatry and the Law* 505-508 at 505. See further Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 185, 186 who is of the view that the guidelines contained in the Criminal Code is far more strict than the common law requirements pertaining to when a person will be "unfit to stand trial". Prior to the codification of the common law position pertaining to fitness to stand trial, the position was regulated by criteria derived from case law. Also see Parliamentary Information and Research Service *Current Issues in Mental Health in Canada* at 2. For the position of mentally disordered persons in the Canadian Criminal Justice system prior to 1992, see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-1, 1-13.

141 Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 249, 245 where it is stated, "It is based on the principle that it is fundamentally unfair to allow defendants who are unable to understand the legal proceedings or communicate with their attorneys to proceed with trial." This author points out that the "moral dignity" of the criminal justice system is related to its fairness.

142 Harradence 2012 *Crim.L.Q* 511 at 513. These rights are protected in the Charter as discussed earlier in this chapter. This author argues that, considering the rationale behind the fitness provisions, the cognitive capacity test employed to test fitness is not effective and does not achieve the goal of protecting these rights of the accused. See the discussion of the cognitive capacity test later in this chapter.

143 See Section 672.22 and 672.23(2) of the Criminal Code. Also note that the measure of proof required for fitness to stand trial, is that of "on a balance of probabilities" which is not as harsh as the usual standard of proof used in criminal trials, namely "beyond reasonable doubt". Also see Coughlan *Criminal Procedure* at 290. Also see Parliamentary Information and research service *Current issues in Mental Health in Canada* at 8, footnote 6 where it is explained that "the balance of probabilities standard of proof requires that something is more likely than not, in contrast to the general criminal law standard, which is beyond a reasonable doubt, a higher standard". Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 80.

144 Schneider *Annotated Ontario Mental Health Statutes* at 408. The scope of this research does not allow for a discussion of the issues arising from the situation where an accused becomes unfit to stand trial after a verdict has been handed down. For a discussion on the issue of fitness to stand trial post-verdict, see Schneider *Annotated Ontario Mental Health Statutes* at 408, 409.

trial [145] and to make full answer and defence at his trial.[146] This implies the physical and mental presence of the accused at the trial.[147] Where a mental condition renders an accused incapable of defending himself because he cannot understand the proceedings or the charge against him and cannot, due to the mental condition instruct counsel so as to defend his case, such an accused shall not be tried as long as the mental condition rendering him so incapable persists.[148]

An accused whose fitness to stand trial is in issue has the right to legal representation.[149] Where a mentally ill accused does not have legal representation, such an appointment must be made before the court proceedings may continue.[150]

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[145] Section 650(1) of the Criminal Code. Sections 650(1)(1.1) and 650(1)(1.2) makes provision for an exception to this rule in cases where the trial occurs via video link. Section 650(2) provides for further exceptions to the general rule for instance that an accused may be kept out of court during a trial regarding his fitness to stand trial if the court is of the view that hearing the issue will have an adverse effect on the accused (section 650(2)(c). Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-33. An accused will be deemed to have waived his right to be present at his trial where he absconded (Section 475(a)(a) of the Criminal Code) and the trial may proceed in his absence. A verdict may also be reached and a sentence handed down in his absence in these circumstances (Section 475(1)(b)(i)). Also see Stuard, Delisle and Quigley *Learning Canadian Criminal Procedure* at 6, 7. Where the accused is charged with a summary conviction offence, he need not be personally present in court and a lawyer or other agent can appear on his behalf, unless the judge orders that the accused appears personally. (See section 800(2) of the Criminal Code).

[146] Mewett *An Introduction to the Criminal Process in Canada* at 175. The trial must take place in open court. See Section 486(1) of the Criminal Code. The court may however exclude the public from part of the trial if the court deems it to be in the interest of the public morals or the proper administration of justice.

[147] Schneider Annotated Ontario Mental Health Statutes at 407. Also see Byrick and Walker-Renshaw A practical guide to Mental Health and the Law in Ontario at 81. See further Bloom H and Schneider RD Mental Disorder and the Law: A Primer for Legal and Mental Health Professionals (Irwin Law Toronto 2006) at 60.

[148] Mewett *An Introduction to the Criminal Process in Canada* at 175. Also see Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 245 who adds that the principle that the accused must be fit to stand trial is because it would be fundamentally unfair for a mentally ill accused who cannot participate in his own defence to stand trial.

[149] Section 672.24 of the Criminal Code. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 92

[150] Section 672.24(1) of the Criminal Code. Also see Coughlan *Criminal Procedure* at 292. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-24. See further Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 81. Where the accused does not qualify for Legal Aid, the costs for legal representation shall be borne by the Attorney General as far as the accused cannot pay for the fees (Section 672.24(2) of the Criminal Code). Where the Attorney General and the appointed legal representative cannot agree on the fees to be paid, the Criminal Code makes provision for the costs to be taxed. Schneider, Bloom and Heerema *Mental Health Courts* at 92, 441 where it is pointed out that Counsel may often find himself in a difficult situation where the Counsel is for example paid for by a family member who then also gives "instructions". The mentally ill accused however remains the client of counsel and counsel must be sure to follow the instructions of the client and not the family member, even though the instructions of the family member might sound more rational. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-6, 2-7 where it is emphasises that legal representation for the period of the proceedings prior to the assessment having been ordered is of cardinal importance.

There has been a rapid increase in the number of accused persons being referred for fitness evaluations in Canada.[151] The majority of those sent for fitness evaluations are found fit to stand trial.[152] With these high numbers of accused persons found fit to stand trial, suspicions arose that the assessments of fitness to stand trial was used for other purposes such as treating psychotic illnesses [153] of those who would not otherwise have had access to mental health care were it not for their clash with the criminal justice system.[154] Fitness assessments were sometimes ordered literally to stabilise an accused person's mental state.[155] This suspicion was strengthened by evidence that the average number of days for a fitness assessment remained 25 days even after the amendment of the Criminal Code, which introduced a 5-day assessment period.[156]

Where there is doubt about the fitness of the accused, the accused's fitness to stand trial has to be assessed by suitably qualified persons, and the court may make an order for assessment to this effect.

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151 O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 506. For confirmation of the increase in fitness referrals, see Toronto Mental Health Court "Overview of the Court" http://www.mentalhealthcourt.ca/pages/2/Overview.htm (Date of use: 21 July 2015) where it is pointed out that the number of mentally ill persons in the Canadian criminal justice system in general rose rapidly since the 1990"s. Also see Court, Simpson and Webster 2014 *Psychiatry, Psychology and Law 918* at 929 who observed that the demand for forensic services increased rapidly after the amendments to the Criminal Code in 1992 brought about by the provisions of Bill C-30. Also see Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 251 who states that fitness assessments are more often requested than assessments for criminal capacity.

152 O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 507 reported that 79% of those evaluated for fitness to stand trial on an inpatient basis, were found fit to stand trial and 74% of those evaluated for fitness on an outpatient basis, were found fit to stand trial. Also see in general Zapf PA and Roesch R "Fitness to stand trial, characteristics of remand since the 1992 Criminal Code amendments" *Canadian Journal of Psychiatry* 1998 (43) 287-293 who's study found that 90% of all the accused sent for fitness evaluations in their study, was found fit to stand trial. See further Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 188 where this figure is confirmed – although reported as 11% of all referrals being found not fit to stand trial. See in general Roesch R, Ogloff JR, Hart SD, Dempster RJ, Zapf PA and Whittemore KE "The impact of Canadian Criminal Code changes as remands and assessments of fitness to stand trial and criminal responsibility in British Columbia" 1997 (42) *Canadian Journal of Psychiatry* 509-514.

153 See in general Zapf and Roesch 1998 *Canadian Journal of Psychiatry* 287. Also see R O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 507. Also see Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 188.

154 O'Shaughnessy 2007 The Journal of the American Academy of Psychiatry and the Law 505 at 507.

155 Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 188. Also see Barrett and Shandler Mental Disorder in Canadian Criminal Law at 3-23 where it is confirmed that assessment orders are often extended to afford treatment to the patient. The authors caution that this practice should not be encouraged.

156 The possible reason for this average of 25 days for treatment could be that psychotropic medication takes several weeks before positive results are achieved. See Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 188.

4.3 *The order for assessment of fitness to stand trial*

This discussion explores by whom the order for assessment is made, the content of the order, at which point in the proceedings such order can be made and on what grounds it can be made.

The Criminal Code provides for the court to order an assessment of the mental condition of the accused for purposes of fitness to stand trial.[157] An assessment order can be made by a summary convictions court as well [158], i.e. the lowest level of the three levels of courts in Canada. Assessments may therefore be ordered by trial courts and also by courts which, for example, hear the bail application of the accused.[159] Mental Health Court may also make assessment orders.[160]

The formal assessment can be requested on application by the accused or the prosecution.[161] The Crown has an obligation to raise the fitness issue where he believes

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157 Section 672.11 of the Criminal Code sets out the 6 instances in which a court may make an assessment order. This section states that "A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine
(a) whether the accused is unfit to stand trial;
(b) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1);
(c) whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly born child;
(d) the appropriate disposition to be made, where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial has been rendered in respect of the accused;
(db.) whether a finding that the accused is a high-risk accused should be revoked under subsection 672.84(3); or
(e) whether an order should be made under section 672.851 for a stay of proceedings, where a verdict of unfit to stand trial has been rendered against the accused". Section 21 of the Ontario Mental Health Act provides for an assessment of the mental state of the accused to be conducted and reported on.

158 Schneider *Annotated Ontario Mental Health Statutes* at 429. This was one of the amendments brought about by the amendment of the regime pertaining to the treatment of the mentally ill accused person in the criminal justice system that was brought about by the provisions of Bill C-30 that resulted in the changes to the Criminal Code pertaining to mentally ill accused persons. See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-11.

159 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-1 who adds that sentencing courts and appellate courts may also order assessments.

160 Legal Aid Ontario *http://lawfacts.ca/mental-health/court* (Date of use: 22 September 2016). Also see Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 7 where specific provision is made for admission of the accused to hospital for an assessment.

161 Section 672.12 of the Criminal Code. Also see Roach et al Criminal Law and Procedure at 778. See further Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 77. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-18. See further Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 251 who point out that the Crown may sometimes raise the fitness issue in order to secure the confinement of the accused in

that the accused may be unfit to stand trial.[162] Where the application for assessment is unopposed, evidence of possible lack of fitness is sufficient, however, where such an application is opposed, the Crown must adduce evidence that there are reasonable grounds to believe that the accused suffers from a mental illness that may have an effect on his fitness.[163] The burden of proof pertaining to unfitness is on the party who raises the issue.[164] The standard of proof required for proving unfitness to stand trial is on a balance of probabilities.[165]

The assessment can further be ordered by the court by its own motion if it has reasonable grounds to believe that the accused is unfit to stand trial.[166] All that is needed is reasonable ground to believe that an assessment is necessary to determine whether the accused is, in fact, unfit to stand trial or not.[167]

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order to gain information about his mental state, especially where the accused intends to raise the insanity defence – the Crown can gain insight into the basis upon which the insanity defence will be raised and can prepare therefore. The Crown may further simply raise the fitness issue in order to delay the criminal proceedings, presumably so that they may have more time to prepare for the trial. Also see Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx (Date of use: 20 September 2016) at 15 where it is explained that the fitness issue can be raised by any party to the proceedings.

162 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-20.2. The Crown counsel will usually raise the fitness issue informally with the accused's legal representative. If after such discussion the Crown counsel is still concerned about the accused's fitness, there is an obligation on such counsel to raise it in court.

163 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-14.19. The Crown has to convince the court that such an assessment is necessary.

164 Section 672.23(2) of the Criminal Code. Also see Coughlan *Criminal Procedure* at 290. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-24. The exception to the rule is where the accused has allegedly regained his fitness to stand trial, in such a case the presumption of fitness no longer applies and the party that alleges the recovery has to prove same on a balance of probabilities. See section 672.32(1) of the Criminal Code. Also see Mewett *An Introduction to the Criminal Process in Canada* at 147 where he highlights the fact that the only instance, in which an accused will have the burden of proof in a criminal case, is when he raises the issue of mental incompetence.

165 Section 672.22 and 672.23(2) of the Criminal Code. Also see Coughlan *Criminal Procedure* at 290. See further Schneider *Annotated Ontario Mental Health Statutes* at xv. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-24.

166 Section 672.12(1) of the Criminal Code. Also see Coughlan *Criminal Procedure* at 290. See further Parliamentary Information and research service *Current issues in Mental Health in Canada* at 3. See also Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-12, 2-1, 2-18. However, in a summary conviction case the court can only grant the application for assessment if it is raised by the accused or if the prosecution shows reasonable grounds upon which the belief that the accused is unfit to stand trial, is based. The court cannot order an assessment out of its own here. See section 672.12 (2) of the Criminal Code. See further Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 128.

167 Barrett and Shandler Mental Disorder in Canadian Criminal Law at 2-2. Also see Ontario Ministry of the Attorney General Criminal Law Division Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion at 10 where it is confirmed that the Crown or the Defence must be ready to establish such reasonable belief in order to obtain an order for assessment.

The fact that the Criminal Code provides for an assessment to be ordered, does not compel a court to make such an assessment order. The court still has discretion in ordering the assessment.[168] Where it is obvious to the court that an accused is unfit to stand trial, an assessment may be considered redundant [169] , and matters may proceed to the fitness hearing without a fitness assessment having been conducted. The only instance where ordering an assessment is mandatory is where it is necessary to determine if an accused is permanently unfit to stand trial so that a stay of proceedings can be ordered.[170]

The assessment order must contain specific information with regard to the details of the assessment. The assessment order must specify the service or person who is to make the assessment or the hospital where it is to be done.[171] It further has to indicate whether the accused is to be detained in custody for the duration of the assessment order.[172] Lastly, the order should indicate the period for which the order shall be in force, which should include travelling time to and from the place where the assessment should take place.[173]

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168 See the use of the word "may" in section 672.11 that sets out the purposes for which the court may order an assessment and section 672.12 for the purposes for which a Review Board may order an assessment. See however Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-8, 3-17 where the view is expressed that a fitness hearing should be mandatory except in cases where there is no reason to doubt the fitness of the accused.

169 Barrett and Shandler Mental Disorder in Canadian Criminal Law at 3-20.3.

170 Section 672.851(5) of the Criminal Code. Which reds that "(5) If the court holds an inquiry under subsection (3) or (4), it shall order an assessment of the accused." See, however, Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-14.11, 3-42.2 where it is pointed out that if the Review Board recommended the stay of proceedings the court will already be in possession of an assessment report and may simply confirm that finding without ordering a new assessment, despite the mandatory language employed by section 672.851.

171 See *R* v *Gray* 2002 169 C.C.C (3d) 194 (BLC). S.C) at [47] where the court ordered an assessment to be done at a private facility by medical practitioner experienced in conducting such assessments. It was found on appeal that the judge exceeded her jurisdiction, as a specific person cannot as such be ordered to conduct an assessment. Rather, it should be a person associated with the particular facility and experienced in forensic mental health (and licenced to practice in the particular province) that should conduct the assessment. Also see the form 48 in terms whereof the assessment order is made where a space is duly left for the court to fill in the name of the psychiatric institution where the assessment is to be conducted. See Annexure B to this research for an example of this form.

172 There is a presumption that assessments will take place out of custody. See Schneider *Annotated Ontario Mental Health Statutes* at xv. Also see section 672.16 and 672.17 of the Criminal Code.

173 An assessment for fitness to stand trial lasts for 5 (five) days unless otherwise agreed upon or so ordered by the court. See Section 672.14(1) of the Criminal Code. Section 672.13(1) of the Criminal Code sets out the requirements for an order for assessment. Section 672.13(2) sets out the forms that must be used by a court (From 48) and a Review Board (Form 48.1) when making the assessment orders. See an example of Form 48 attached to this research as Annexure B. Failure to use the forms will not affect the validity of the order for assessment, as the use of these forms is not mandatory. See Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 78 where the content of an assessment order in terms of section 672.13 of the Criminal Code is discussed. An assessment order is accompanied by a From 8 in terms of the Ontario Mental Health Act, which allows for the transport and admission of the accused to the relevant psychiatric facility. See Ontario Ministry of the Attorney General Criminal Law Division *Practice*

It is important to note that assessments for fitness to stand trial shall only last for five days unless otherwise ordered by the court.[174] The accused and the prosecution may agree to a longer period for assessment, not exceeding 30 days.[175] The assessment period may be extended for a further period provided that the entire period of assessment may not exceed 60 days in total.[176] An accused may be subjected to a further period of assessment only if it

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memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion at 10.

[174] Section 672.14(2) of the Criminal Code limits the time period for assessment for purposes of determining fitness to stand trial to 5 (five) days. These days are calculated with exclusion of public holidays and the time it takes the accused to be transported to and from the facility where the assessment will be taking place. The order may be made for a longer period if the court so orders. See section 672.1.2 and 672.14(1) of the Criminal Code. Section 672.13(1) of the Criminal Code sets out the requirements for an order for assessment. Section 672.13(2) sets out the forms that must be used by a court (Form 48) and a Review Board (From 48.1) when making the assessment orders. Failure to use the forms will not affect the validity of the order for assessment, as the use of these forms is not mandatory. Also see O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 505. Also see Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 188 who report that according to research done, the average day for a fitness assessment is 25 days. See further Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 128 who confirms the periods. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-34, 3-5 who confirms that assessments for fitness to stand trial can generally be conducted in a short time period. Also see Schneider *Annotated Ontario Mental Health Statutes* at 434 who explains that opinion exists that the period for the assessment starts running from the date the assessment order is made and not from the date that the accused is admitted in hospital. This position could however put pressure on mental health care professionals to rush the assessment once the accused finally reaches the specific hospital. This may also imply an extra appearance for the counsel of the accused in that he may have to apply for an extension of the initial period of assessment. Especially in the case of assessments for fitness to stand trial that should last only 5 days, counsel for the accused will be heading back to court if the accused has not been transferred after, for example, the third day since the assessment order was made. The more practical approach seems to be to calculate the period from the day of the accused's admission to hospital indicated in the assessment order. Persons awaiting assessments for fitness to stand trial should however not be detained in correctional facilities for prolonged periods awaiting assessment. See *Phuneuf* v Ontario 2010 ONCA 901 at [28]. Also see Ministry of Health and Long-term Care http://www.health.gov.on.ca/en/common/ministry/publications/reports/mentalhealth/framework.pdf (Date of use: 26 August 2015) at 4 where it is pointed out that persons with mental illness that is kept in a correctional setting is at higher risk of experiencing more severe symptoms of mental illness and are at a higher risk of homelessness once they are released. These accused persons are further often isolated from mental health care for as long as they are kept in the correctional facility. Finally, see Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 15 where the practicalities of the court process is explained and it is stated that a fitness assessment usually lasts for 5 days but that the parties can agree for it to last 30 days, or even 60 days.

[175] Section 672.14(2) of the Criminal Code, Also see O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 505. Also see Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 188. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-12, 2-34 who confirms that assessments for fitness is generally limited to 5 days and up to 30 days upon consent.

[176] According to section 672.15(1) of the Criminal Code read with section 672.15(2) and 672.14(3) of the Criminal Code that provides for an initial order for a 60 day observation period when special circumstances exist. Also see Mewett *An Introduction to the Criminal Process in Canada* at 176. See further Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 128 who confirms that the maximum period for observation can be 60 days. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-12, 2-34 as well as Byrick and Walker-Renshaw *A practical guide to*

is for another purpose.[177]

A statutory presumption exists that the assessment for fitness to stand trial will take place out of custody.[178] This presumption applies to assessment orders made by courts as well as Review Boards.[179] Despite this presumption in the Criminal Code, the majority of assessments take place in custody.[180] If an assessment occurs in custody, it is usually done at a psychiatric hospital.[181] The assessment order may not contain a provision that forces the accused to submit to psychiatric or any other treatment during the assessment period.[182] Such treatment may, however, be provided if the accused consents thereto.[183]

Mental Health and the Law in Ontario at 79. See further Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx (Date of use: 20 September 2016) at 15. Also see Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 10 where it is pointed out that an "in-custody" assessment for fitness to stand trial may not last longer than two months.

177 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2.34 where the example is used of an accused who was assessed and found fit to stand trial. Later in the trial, the criminal responsibility of the accused was in question and in such circumstances it is permissible to have the accused assessed again but this time for purposes of establishing his criminal capacity.

178 Section 672.16 of the Criminal Code reads as follows: "672.16 (1) Subject to subsection (3), an accused shall not be detained in custody under an assessment order of a court unless

(a) the court is satisfied that on the evidence custody is necessary to assess the accused, or that on the evidence of a medical practitioner custody is desirable to assess the accused and the accused consents to custody;

(*b*) custody of the accused is required in respect of any other matter or by virtue of any other provision of this Act; or

(*c*) the prosecutor, having been given a reasonable opportunity to do so, shows that detention of the accused in custody is justified on either of the grounds set out in subsection 515(10)."

Also see Schneider *Annotated Ontario Mental Health Statutes* at xv. It is only if a conclusion cannot be reached that the patient will be admitted for assessment. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-14.15.

179 See section 672.16 for the presumption where an assessment order was made by a court. See section 672.121 for the presumption where an assessment is ordered by a Review Board. In the latter case, assessments shall take place out of custody unless

(a) the accused is currently subject to a disposition made under paragraph 672.54(c);

(b) the Review Board is satisfied on the evidence that custody is necessary to assess the accused, or that on the evidence of a medical practitioner custody is desirable to assess the accused and the accused consents to custody; or

(c) custody of the accused is required in respect of any other matter or by virtue of any other provision of this Act.

180 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-21. The reason for this is inter alia due to lack of facilities to do these assessments out of custody.

181 Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 187. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 94 where it is pointed out that Ontario has 12 registered psychiatric facilities where assessments can be done, one of which is a maximum secure facility. These facilities are also designated to provide treatment to those under disposition orders of the court or review board. See further Legal Aid Ontario http://lawfacts.ca/mental-health/court (Date of use: 22 September 2016).

182 Section 672.19 of the Criminal Code. Also see O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 505. See further Byrick and Walker-Renshaw *A practical*

Where the order states that the assessment must take place in custody, an accused is usually kept in a correctional facility pending such assessment. The practice in Canada to detain an accused in prison whilst awaiting psychiatric observation has been criticised, and calls have been made to have the practice abolished.[184] This exact practice was challenged in *R* v *Hussein.*[185] The court found that this practice violates the right to liberty and the right not to be arbitrarily detained.[186] These rights obviously have to be weighed up against the public's right to safety.

The Ontario Court of Appeal, however, expressed the view that the *Hussain* case was incorrectly decided and that remand in a detention centre awaiting assessment is not unlawful *per se*.[187] The court found that an accused in respect of whom an assessment was ordered need not be transferred to a psychiatric facility immediately and may, in fact, be detained in a correctional facility pending transfer to the relevant hospital. The court focussed on the use of the word "custody" in the Criminal Code and pointed out that it clearly provides for the accused to be detained during the assessment period; this includes being detained in a correctional facility, for example, awaiting transfer to a psychiatric

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guide to Mental Health and the Law in Ontario at 80.

183 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-14.15 who explains that where such treatment is given by hospital authorities without the consent of the accused, they will have to show that such treatment, for example treatment to stabilise the accused, is justified under provincial mental health legislation.

184 McLachlin B 2010 *Dalhousie Law Journal* 15 at 23. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 223 who points out that this has been a contentious issue in jurisprudence for some time.

185 *R* v *Hussein* (2004), 191 CCC (3rd) 113 (Ont S.C.J). The case concerned two accused persons who had to undergo psychiatric evaluation. Two individuals before the Ontario Supreme Court of Justice brought an Application, challenging the practice of detaining an accused in jail pending the availability of beds in a psychiatric institution for purposes of psychiatric assessment. One accused was detained for 32 days before being transferred to a psychiatric hospital for the assessment and the other was detained for 29 days awaiting transfer for the assessment. It should be noted at this juncture that the average waiting period for an accused awaiting assessment in a South African correctional facility, is at least 3 months. See chapter 2 of this research for the discussion of the delays experienced in the South African criminal justice system with regard to assessments for fitness to stand trial.

186 R v Hussein (2004), 191 CCC (3rd) 113 CR (6th) 368 (Ont Sup Ct J) at [33], [26]. Also see McLachlin B 2010 *Dalhousie Law Journal* 15 at 25, 26 for a discussion on how the shortage of facilities affects the referral of children for psychiatric assessment. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-23, 2-24 for a discussion of the controversy around the *Hussain* case in which it was found that the right to liberty is infringed by being detained in a jail awaiting psychiatric assessment.

187 See *Phuneuf* v *Ontario* 2010 ONCA 901. The accused in this case waited 16 days to be transferred to a psychiatric institution. Instead of challenging the assessment order, she instituted a civil claim for wrongful detention and it is in this judgment of the civil case, that the finding was made that the *Hussain* decision could not be interpreted to mean that an accused have to be transferred to a forensic facility immediately upon the assessment order being granted without a "stop-over" at a correctional facility, but rather meant that the assessment must take place before the expiry date of the assessment order.

hospital. As far as the *Hussain* case is read to mean that an accused must be transferred to a psychiatric hospital immediately without going to a detention centre first, the Ontario Court of Appeal found that *Hussain* was decided incorrectly.[188]

The Court of Appeal, however, stressed the importance of not detaining mentally ill persons in correctional facilities for too long as such a setting creates the risk that the mentally ill accused person's condition will deteriorate.[189] The court recommended that bail be considered for an accused in respect of whom mental illness is in issue and for whom a bed at the psychiatric hospital where the assessment must be performed is not immediately available.[190] Where such a person is not granted bail due to, for example, concerns for public safety and consequently detained in a correctional facility awaiting transfer to a psychiatric facility for assessment, the court suggested that such a person be brought before the court within a "couple of days" from the order for a "bed check", to see if space in a relevant assessment facility has become available.[191]

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188 *Phuneuf* v *Ontario* 2010 ONCA 901 at [17], [19]. See *however* in general *Centre for Addiction and Mental Health* v *R* 2012 ONCA 342 where the court pointed out that there may be circumstances that warrants the immediate transfer of an accused to a psychiatric facility such as where it is apparent that if the transfer is delayed it will affect the accused's chances to become fit to stand trial under a treatment order granted for this purpose.

189 *Phuneuf* v Ontario 2010 ONCA 901 at [28]. Also see Ministry of Health and Long-term Care *A Program Framework for: Mental Health Diversion/ Court support services* (2006) http://www.health.gov.on.ca/en/common/ministry/publications/reports/mentalhealth/framework.pdf (Date of use: 26 August 2015) at 4 where it is pointed out that persons with mental illness that is kept in a correctional setting is at higher risk of experiencing more severe symptoms of mental illness and are at a higher risk of homelessness once they are released. These accused persons are further often isolated from mental health care for as long as they are kept in the correctional facility.

190 *Phuneuf* v *Ontario* 2010 ONCA 901 at [29]. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-29, 2-5, 2-22 where it is pointed out that these provisions are included to ensure that mentally ill accused persons are not unnecessarily detained. Note that assessment order issued by a court takes precedence over a bail hearing. See Section 672.17 of the Criminal Code. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 80. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-5 where it is pointed out that since an assessment order given by a court takes precedence over an accused's bail hearing, the court may therefore not consider bail whilst an assessment order issued by the court is underway. The same does not apply to an assessment order issued by a Review Board. In the latter case, the court may grant an accused bail. This could create difficulty in ensuring the accused attends to the assessment as ordered by the Review Board.

191 *Phuneuf* v *Ontario* 2010 ONCA 901 at [30]. The court however points out that judges in these proceedings routinely make enquiries about the availability of beds in facilities before they make an assessment order and generally try to limit the detention time in a facility for the accused to the absolute minimum. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-29. In *Phaneuf* v *Ontario 2010 ONCA* 901 at [29], [30] the court explains that it is often the case that an accused who is awaiting assessment, poses a safety risk to society. In such an instance, the court must make an order for the incarceration of the accused pending the assessment. The judge can, depending on the circumstances of the case, make specific orders as to the place of detention pending the assessment. In this particular case, the court ordered that that the accused be brought back to court within a few days in order to check the availability of beds.

An assessment for fitness to stand trial can be ordered at any point in time during the proceedings [192] prior to the verdict.[193] The order is usually made prior to arraignment [194] and the commencement of the trial and before the accused enters a plea.[195] Where the issue is raised during a preliminary inquiry, the judge may proceed to try the fitness issue[196] or postpone it to not later than such time, as the accused is required to answer the charge (arraignment).[197]

Where the accused elects trial by judge and jury as the mode of trial, the trial judge has discretion as to if it wants to put the issue of fitness to stand trial before the jury.[198] Where there is insufficient reason to doubt the accused's fitness to stand trial, the judge will be justified in not putting the issue to the jury.[199] The judge has the discretion to postpone the

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192 Section 672.12 of the Criminal Code. Also see Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 187. Also see Parliamentary Information and research service *Current issues in Mental Health in Canada* at 3 where it is confirmed that the fitness issue can be raised at any point during the proceedings. See further A Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-12 and 2-1, 3-18. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 77.

193 Coughlan *Criminal Procedure* at 291. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 81. See further A Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-12, 2-8 where it is stated that most assessment order made at the pre-trial stage is to determine fitness to stand trial or criminal capacity whereas most assessment orders made after the trial but prior to the verdict, is to determine the appropriate disposition for the particular accused.

194 This is where the information about the charge is read out to the accused. See Mewett *An Introduction to the Criminal Process in Canada* at 70. See further Coughlan *Criminal Procedure* at 59 who explains that the arraignment is the accused's first appearance in court on which occasion he is required to answer the charge. Also see Schneider *Annotated Ontario Mental Health Statutes* at 408 where it is indicated that the issue of fitness to stand trial mostly arises prior to arraignment. See further Parliamentary Information and research service *Current issues in Mental Health in Canada* at 3 where it is stated that the issue of fitness is usually raised at the first appearance or at the bail hearing.

195 Mewett *An Introduction to the Criminal Process in Canada* at 175, 176. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 141 where it is indicated that fitness issues usually arise very early in the proceedings, even before a bail hearing. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-23 who confirms that the fitness issue is often raised at the first appearance of the accused. Where a hybrid offence is the object of the charge against the accused, the judge must postpone the fitness hearing until after the Crown has elected whether to proceed by indictment or summarily. See Coughlan *Criminal Procedure* at 291. Also see Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx (Date of use: 20 September 2016) at 15 where it is stated that the fitness issue is usually raised during the first court appearance or at the bail hearing

196 Section 672.27 of the Criminal Code. Also see Mewett *An Introduction to the Criminal Process in Canada* at 77 , 78 for an explanation of what a preliminary inquiry entails.

197 Section 672.23(2)(a) of the Criminal Code. Also see Coughlan *Criminal Procedure* at 291. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-28.

198 Schneider *Annotated Ontario Mental Health Statutes* at 438. Also see in general *R* v *Kolbe* (1974), 27 C.R. (N.S.) 1 (Alta S.C.A.D.) and *R* v *Wolfson* [1965] 3 C.C.C 304 (Alta.C.A.).

199 *R* v *Wolfson* [1965] 3 C.C.C 304 (Alta.C.A.). Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-17 where it is confirmed that the court does not have to hold a fitness

hearing of the fitness issue until the Crown presented its case and it is time for the accused to present his case.[200] The effect of this is that if the accused is acquitted at the close of the Crown's case, the fitness issue will not be heard at all.[201] The judge also has the discretion to postpone the fitness hearing until such time as evidence has been heard on whether the accused actually committed the offence.[202] This practice addresses concerns regarding the possibility that an accused who raises the fitness issue early in the proceedings, and who is then found unfit, might be detained indefinitely in a psychiatric hospital (if he is found permanently unfit, for example) without his involvement in the crime actually having been established.[203]

Reasonable grounds for ordering a fitness assessment must exist. These reasonable grounds need not be derived from medical evidence.[204] Reasonable *grounds* in this context include evidence of significant confusion or evidence of hallucinations and delusions affecting the accused's comprehension of the proceedings or ability to participate.[205] Evidence of marked impairment of mood, or if the accused is suicidal, mute, apathetic or is unable to concentrate, should suffice as reasonable grounds to order a fitness assessment.[206] Incomprehensible communication by an accused, if the accused laughs for no reason or talks to himself, may also suggest problems with fitness.[207] However, it was

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inquiry if there is no reasonable ground to doubt the accused's fitness to stand trial.

200 Section 672.25 (2)(b) of the Criminal Code. Also see Coughlan *Criminal Procedure* at 291. See further Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 125 who confirms that the judge may postpone the fitness issue until the Crown has completed its case.

201 Section 672.3 of the Criminal Code. Also see Coughlan *Criminal Procedure* at 291.

202 Coughlan *Criminal Procedure* at 291. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-24.

203 Mewett *An Introduction to the Criminal Process in Canada* at 178 explains that concerns have been raised about the fact that a potentially innocent mentally ill accused whose guilt is yet to be proved, may be sentenced to indefinite detention in a psychiatric hospital. This concern has partly been addressed by the practice that the hearing on the issue of fitness may be postponed until later in the proceedings in order to afford the accused the opportunity to move to have the charges against him dismissed if it appears that the prosecution does not have a prima facie case against him. If the motion succeeds, the accused will be found not guilty without the fitness issue being heard. The consequence is that if there is indeed a mental illness involved, the accused will not be treated or referred for treatment, at least not in the criminal justice context. The accused may, however, still voluntarily seek treatment from the mental health care system.

204 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-12. Prior to the 1992 amendments to the Criminal Code, referrals for assessment for fitness to stand trial had to be based on medical evidence. Evidence by the police, social worker or own observations by the court may suffice as evidence.

205 Schneider Annotated Ontario Mental Health Statutes at 431, 432. Also see Byrick and Walker-Renshaw A practical guide to Mental Health and the Law in Ontario at 77.

206 See Schneider *Annotated Ontario Mental Health Statutes* at 431, 432 for a detailed list of scenarios that should suffice as reasonable grounds for the court to order an assessment for fitness to stand trial. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 142 for a table of good and bad reasons for a court to order an assessment for fitness to stand trial.

207 Schneider, Bloom and Heerema *Mental Health Courts* at 141, see Table 10 on this page for a list of

found that communication difficulties in itself, such as those that a deaf person may encounter, will not suffice as a reasonable ground to order an assessment as this is not a mental disorder but a communication disorder.[208]

On the other hand, the mere fact that an accused suffers from a mental illness will not *per se* stand as a reasonable ground to order an assessment. The illness has to have an influence on the fitness of the accused in order for an assessment to be ordered.[209] This may have the unfortunate consequence that not all accused persons with mental illness are assessed for fitness, and some mental illnesses may go undetected.

It should be noted that mental illness is not synonymous with unfitness.[210] Similarly, the mere fact that an accused is homeless, or has a history of psychiatric treatment, should not be taken as sufficient reason to order an assessment for fitness to stand trial without signs of mental illness co-existing with homelessness or psychiatric history.[211] Where there are no such grounds to believe that an accused is unfit to stand trial, there is no obligation on a court to order an assessment, especially if it appears that such an assessment is requested merely to manipulate the criminal proceedings.[212]

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overly odd behaviour in court or custody that may be suggestive of fitness problems. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-20 where examples from case law is discussed that illustrates the type of behaviour that a court may consider reasonable where the court itself has witnessed the odd behaviour.

208 See *R* v *Isaac* 2009 ONCJ 662, 2009 Carswell Ont 8642, 250 C.C.C (3d) 565 (Ont C.J at [21], [26], and [27] where the court expressed the view that the issue at hand was one of a lack of schooling, not of mental illness. The accused was deaf, not mentally ill. The court stated that Part XX.I of the Criminal Code was aimed at persons with mental illnesses and expressed the view that it did not think that it was parliament's intention to include all other disabilities under those provisions pertaining to assessment for fitness to stand trial. The application for assessment was dismissed. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-33.

209 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-14.16, 3-7. Also see *R* v *John Doe* 2011 ONSC 92 Carswell Ont 58 (Ont S.C.J) at [39], [40] where this was confirmed. In this case the Crown's request for an assessment was turned down. The Crown based its application for a fitness assessment on the possibility that the accused may suffer from a mental illness that may affect his criminal capacity.

210 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-18. Also see Viljoen JL, Roesch R and Zapf PA "An examination of the relationship between competency to stand trial, competency to waive interrogation rights and psychopathology" 2002 (5) *Law and Human Behavior* 481-506 at 483.

211 See Schneider *Annotated Ontario Mental Health Statutes* 431, 432 for a comprehensive list of reasons or scenarios that Schneider submits will not constitute a "reasonable ground" for the court to order an assessment for fitness to stand trial. These scenarios include requests by the family that the accused be hospitalised and not detained in jail, where the accused is seen muttering to himself or where he interrupts the proceedings, or is angry and loud with no evidence of a mental disorder being present. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 142.

212 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-4.2. Also see in general *R* v *B* (B) 2009 Carswell Ont 1083 Ont S.C.J where a request for an assessment for fitness to stand trial was brought immediately after the court refused to declare a mistrial. There was no evidence to

Where an order for assessment is made, the accused will be tested to determine his fitness to stand trial. The nature of the test for fitness to stand trial is explained below.

4.4 Test for fitness to stand trial

Section 2 of the Criminal Code, which contains the definition of *unfit to stand trial*, in effect sets out the test for fitness.[213] According to section 2 of the Criminal Code, the aspects to consider are the accused's understanding of the nature or object of the proceedings, the accused's understanding of the possible consequences of the proceedings or his ability to communicate with his legal representative.[214]

The limited cognitive capacity test is employed to determine fitness to stand trial.[215] The test was established in 1992 in the case of *R* v *Taylor* [216] where the accused allegedly stabbed counsel who acted for the Law Society. He was a lawyer himself and had a good understanding of the proceedings and the technicalities thereof, but could not communicate with his counsel properly because he suffered from paranoid schizophrenia, as confirmed

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suspect that the accused is unfit to stand trial and the accused did not have a history of mental illness. After the court's refusal to grant a mistrial the accused suddenly became suicidal and consulted a psychiatrist who recommended that the accused be assessed for fitness to stand trial but did not exclude the possibility that the accused may be using the suicidal threats to disrupt the criminal process. This, together with the timing of the request for the assessment and the fact that the accused had no psychiatric history, convinced the court not to grant the request for an assessment, as there were no reasonable grounds to rebut the presumption of fitness in this instance.

213 See Schneider, Bloom and Heerema *Mental Health Courts* at 148.

214 Section 2 of the Criminal Code. Also see the discussion of the definition of unfitness to stand trial earlier in this chapter.

215 Schneider *Annotated Ontario Mental Health Statutes* at 409, 144. Also see Coughlan *Criminal Procedure* at 290 who confirms that this test and not the "analytical capacity test" is used. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-7 who confirms the use of the "limited cognitive capacity" test over the "analytical capacity" test. Also see Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 124 who confirms the court's preference for the limited capacity test.

216 *R* v *Taylor* (1992), 22 O.R. (3d) 323 (C.A) (hereinafter referred to as *R* v *Taylor)*. The position was approved in *R* v *Whittle* [1994] 2 S.C.R 914 and affirmed in *R* v *Jobb,* 2008 SKCA 156. Also see a brief discussion of the *Taylor* case in O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 506. In accepting this test, the court in *R* v *Taylor* rejected the "analytic capacity" test. The analytical capacity test requires that the accused, in addition to understanding the court process and his legal predicament, must be able to act rationally and in his best interest. See Schneider, Bloom and Heerema *Mental Health Courts* at 144. Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 125 points out the position in Canada pertaining to the test to be used for fitness, is in line with that used in England. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 81. See further Harradence 2012 *Crim.L.Q* 511 at 526 who indicates that this was the first case in which an appellate court had to consider the provisions of the newly formulated section 2 of the Criminal Code that contained the definition of unfitness and the criteria to be applied when it is considered.

by two psychiatrists at trial.[217] The limited cognitive capacity test was employed to establish his lack of fitness. It was concluded on appeal in *Taylor* that the limited cognitive capacity test succeeds in striking a balance between the rules relating to fitness assessments and the accused's constitutional right to have a trial within a reasonable time.[218] The minimum cognitive capacity test was set in Ontario, and other jurisdictions are not mandated to follow the precedent [219] , although the judgment seems to have been followed in other jurisdictions as well.[220]

The limited cognitive capacity test entails that a person shall be fit to stand trial if he has a rudimentary factual understanding of the legal dilemma that he finds himself in.[221] The accused need not have a rational understanding of the legal proceedings, nor is it required of him to be able to act in his best interest.[222] Even if these requirements are met, it does

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217 *R* v *Taylor* at 553. See discussion of the case in Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 186. This case is also discussed in Schneider, Bloom and Heerema *Mental Health Courts* at 143, 144 and in Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-6 – 3-14.2.

218 *R* v *Taylor* (1992), 77 C.C.C (3d) 551. Also see O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 506. See further Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 187. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3.8 and in particular at 3-2 where it is stated that the right to control one's own defence and the right to liberty and to be brought before a court within a reasonable time are all rights that often have to be weighed up against another in the "fitness regime". See however this source at 3-10 where it is questioned whether the court managed in striking a correct balance between the relevant rights that had to be considered. Also see Harradence 2012 *Crim.L.Q* 511 at 512 where it is stated that the result of the *Taylor* judgment is that it placed a disproportionate focus on expediency.

219 O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 506. Some recognition was however given to the position by the Supreme Court of Canada in the case of *R* v *Whittle* [1994] 2 S.C.R 914 which dealt with the accused's cognitive ability to waive rights rather than the issue of fitness to stand trial.

220 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-3 where reference is made to cases in other states than Ontario where the *Taylor* judgment has been followed such as Quebec. Also see Harradence 2012 *Crim.L.Q* 511 at 612 who points out that the test has become the standard test to apply for fitness in Canada. The author promotes the development of a new test that focusses on the accused's ability to take a rational decision and that focusses on the accused's right to choose.

221 This entails that the accused must be able to communicate the facts relating to the offence. Coughlan *Criminal Procedure* at 290. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-18 who states that as long as the accused has a basic understanding of what is happening in the criminal process and is able to communicate with his lawyer, he will be found fit to stand trial. All that is required in order to be found fit to stand trial is that an accused must be able to give a factual account of matters to their legal representatives with no requirement that such an account must be rational and that the accused must be able to analyse the account of events. O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 506. Also see Coughlan *Criminal Procedure* at 290. Also see Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 246 where the strict nature of the test is confirmed at it is pointed out that the accused need only have a "rudimentary understanding" of the criminal process in order to be found fit to stand trial. Also see Harradence 2012 *Crim.L.Q* 511 at 512.

222 *R* v *Taylor,* (1992), 77 C.C.C (3d) 551. 17 C.R (4th) 371 at 567, a finding of the Ontario Court of

not necessarily constitute a true understanding of the legal dilemma as it can be argued that true understanding would imply rational understanding.

An accused, who understands the proceedings and the parties involved and is able to instruct counsel, will be found fit to stand trial, despite the fact that he suffers from a mental illness.[223] The mental illness in itself does, therefore, not render an accused unfit.[224]

The cognitive capacity test became the standard test for fitness assessments in Canada.[225] Opinion exists that the cognitive capacity test is too restrictive and that the bar for fitness is set too low with the consequence that the test will not necessarily identify all individuals who are, in fact, unfit to stand trial.[226] The result might be that persons stand trial that may have been found unfit to stand trial if a different test or a criterion other than the cognitive

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Appeal, Schneider *Annotated Ontario Mental Health Statutes* at 409. Also see Coughlan *Criminal Procedure* at 290. See further O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 506 where the *Taylor* case is discussed. See further Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 187. Also see Roach et al Criminal Law and Procedure 779. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-7 where it is confirmed that the accused need not be able to act in his own best interests. It is also pointed out that there are many accused persons who do not raise mental illness as an issue who take decisions that are not in their best interests such as choosing not to follow the advice of their counsel. See further Byrick and Walker-Renshaw A practical guide to Mental Health and the Law in Ontario at 81 where it is confirmed that only a basic understanding of the proceedings and the charges against the accused is required. Also see Harradence 2012 *Crim.L.Q* 511 at 512 who highlights that a big point of criticism against the cognitive capacity test is that it does not require rational understanding by the accused.

223 Coughlan *Criminal Procedure* at 290. *R* v *Trecroce* (1980) 55 C.C.C (2d) 202 (Ont. C.A.). Also see Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 187. Also see Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 246 who explains that this could mean that someone with paranoid delusions will not *per se* be found unfit to stand trial but only if such delusions affect the accused's ability to instruct counsel and the latter cannot, on account of the delusions, represent the accused due to inability to obtain instructions from him for instance.

224 *R* v *Trecroce* (1980) 55 C.C.C (2d) 202 (Ont. C.A.). Also see Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 247.

225 Harradence 2012 *Crim.L.Q* 511 at 512. The author adds, however, that it is often applied without considering the consequences thereof.

226 Barrett and Shandler Mental Disorder in Canadian Criminal Law at 3-1. Also see O'Shaughnessy 2007 The Journal of the American Academy of Psychiatry and the Law 505 at 506. Also see Bloom H and Schneider RD Mental Disorder and the Law: A Primer for Legal and Mental Health Professionals (Irwin Law Toronto 2006) at 76-78 where the view is expressed that persons with depression or paranoia for example will have their cognitive abilities in tact but might not be fit to stand trial due to their depressive state for example. Also see Byrick and Walker-Renshaw A practical guide to Mental Health and the Law in Ontario at 81 for criticism of the cognitive capacity test. The test has been labelled as too restrictive. See O'Shaughnessy 2007 The Journal of the American Academy of Psychiatry and the Law 505 at 506. Also see in general Schneider RD and Bloom H "R v Taylor: A Decision not in the best interests of some mentally ill accused" 1995 (38) Crim L Q 183-205. Also see Harradence 2012 Crim.L.Q 511 at 527, 531 who is critical of the judgment in Taylor stating that the fitness test was made too narrow and that it is not in touch with the realities of mental illness and the impact thereof on the accused.

capacity test was used.[227] It is argued that the analytical capacity test would be a better tool to use to determine fitness than the limited cognitive capacity test used in the *Taylor* judgment, as the analytical capacity test would seek to establish the extent to which the mental illness influences the accused's ability to make decisions.[228]

The Court of Appeal in *Taylor supra,* however, warned that the adoption of a very high threshold for fitness to stand trial, which will possibly result in more persons being found unfit to stand trial, will have a negative impact on the principle of fundamental justice in terms whereof an accused has the right to have his trial finalised without undue delay.[229] As pointed out earlier, fitness assessments are time-consuming and cause delays in the finalisation of a trial due *inter alia* to lack of resources for assessments. The increased number of persons that could be found unfit to stand trial by employing a higher threshold will also put pressure on the mental health care system to provide care for those found unfit to stand trial.[230]

The Canadian Psychiatric Association and the Canadian Bar Association hold the view that a higher level of functioning (for purposes of fitness to stand trial) should be required.[231]

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227 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-14 where examples are given of situations where persons may not meet the criteria for "unfitness" but in the opinion of some, these persons may very well be unfit to stand trial for example, someone suffering from major depression may act in a self-destructive manner which is not in line with protecting his best interests at all. Another example given is of an "intellectually limited" accused who may believe that he deserves punishment and may not appreciate the extent and consequences of the position that he finds himself in. This confirms that even where a person does not meet the criteria of unfitness as set out in the Taylor case, they may very well be unfit to stand trial.

228 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-7. It is also argued that het use of this test will ensure a fair trial for the accused. The test employed in the United States of America in fact focuses more in the impact that the mental illness has on the accused's capacity to take decisions. This will be discussed in chapter 5 of this research.

229 As provided for in section 11(b) of the Charter. Also see Coughlan *Criminal Procedure* at 293. See further Schneider *Annotated Ontario Mental Health Statutes* at 438 and Schneider, Bloom and Heerema *Mental Health Courts* at 144. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-8 where it is pointed out that a delay in processing the case of the accused also translates in delayed justice for the victim of the crime. Also see Schneider *Annotated Ontario Mental Health Statutes* at 438 where it is pointed out that autonomy of the accused in the criminal justice system implies an ability to choose the defence that he wants to put forward and that the accused should be allowed to do so. The accused should then also assume the risks involved in such a decision including the delays that will be brought about if the fitness issue is raised. It should be pointed out that this argument is more applicable to the scenario where the accused raises the insanity defence and not so much where the issue of fitness to stand trial is raised. This is so since the fitness issue can be raised by any party and where the prosecution raises the issue, there is little that he accused can do about it and has to wait for the result of the fitness assessment. The accused has more of a choice as to the defence that he wants to present when he is found fit to stand trial. It should also be noted that unfitness to stand trial is not a defence *per se* as a trial will not follow if the accused is indeed found not fit to stand trial.

230 Barrett and Shandler Mental Disorder in Canadian Criminal Law at 3-8.

231 O'Shaughnessy 2007 The Journal of the American Academy of Psychiatry and the Law 505 at 506.

Recommendations have been made to review the definition of fitness to stand trial to provide for a higher threshold, but this has yet to be acted upon.[232]

The test for fitness is applied during the assessment period. What exactly the assessment entails is discussed below.

4.5 Assessment of fitness to stand trial

Fitness to stand trial is assessed with a focus on the accused's current mental state. His mental state at the time of the alleged offence is irrelevant for the purposes of this inquiry.[233] Fitness to stand trial, however, has an element of prospectivity in that the accused must be able to follow the proceedings, conduct a proper defence and instruct counsel *throughout his trial* in order to conduct his defence.[234] For this reason, an accused whose mental abilities fluctuate will probably be deemed unfit to stand trial, as a state of sustained fitness is generally required.[235]

The assessment is conducted by a medical practitioner or any other person who has been designated by the Attorney General to do so.[236] It appears that only one mental health

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232 Calls were further made for the test to be simplified. See O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 506. Also see Harradence 2012 *Crim.L.Q* 511 at 543 where the recommendations as contained in the report of the Standing Committee on Justice and Human Rights are discussed. The recommendations pertain to expanding the fitness test to test for "real" ability to communicate and instruct counsel.

233 Schneider *Annotated Ontario Mental Health Statutes* at 409. Also see Coughlan *Criminal Procedure* at 289. See, however, Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-3, 3-4 who is of the view that the first two requirements of fitness to stand trial as set out in the Criminal Code are straight forward and easy to determine. It is often the ability to communicate with counsel that is difficult to determine.

234 Schneider *Annotated Ontario Mental Health Statutes* at 410. Also see Lurigio RJ and Snowden J "Putting therapeutic jurisprudence into practice: The growth, operations, and effectiveness of mental health courts" 2009 (2) *The Justice System Journal* 196-218 at 206 where the Mental Health Court model employed in the United States of America is discussed but where it is highlighted that the continued fitness of an accused is something that has to be considered during Mental Health Court proceedings as well.

235 Schneider *Annotated Ontario Mental Health Statutes* at 410 where it is pointed out that caution should in particular be applied when assessing the psychotic patient, whose mental state might fluctuate from the one minute to the next. The fact that he was assessed in a moment of clarity is not necessarily an indication of what his state of mind will be like at the trial. See for example in general the case of *R* v *Adam* 2013 ONSC 373 where the accused's mental health fluctuated throughout the proceedings. The court eventually found that the accused is unfit to stand trial in such circumstances. See, however, *R* v *Miller* 2011 BCSC 1292 where the accused suffered from a neurological disease (Huntington's Disease). The accused was found fit to stand trial but the trial judge allowed that the issue be revisited later if the accused's neurological condition deteriorates because of the disease.

236 Section 672.1(1) of the Criminal Code defines assessment as ""assessment" means an assessment by a medical practitioner or any other person who has been designated by the Attorney General as being qualified to conduct an assessment of the mental condition of the accused under an

practitioner is required to conduct the fitness assessment.[237] The fact that persons other than medical practitioners can be designated to conduct assessments makes it possible for qualified mental health practitioners such as forensic psychologists to be appointed to conduct assessments.[238]

The assessment entails a clinical assessment as well as an interview [239] with the accused to determine his ability to conduct a defence and instruct counsel.[240] The accused is questioned on his understanding of the role of the officials in court and the consequences that may follow should he be found guilty.[241] Questions are directed at the accused in order to determine if any disorientation or delusions are present.[242]

The subjective interpretation of the very concept of *fitness to stand trial* and the fact that the three requirements set out in the Criminal Code for purposes of fitness are not very specific

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assessment order made under section 672.11 or 672.121, and any incidental observation or examination of the accused". The definition of assessment was amended in 2005 to widen the scope of persons that can be appointed to conduct the assessments, previously, only medical practitioners could conduct such assessments. Also see Viljoen, Ogloff and Zapf 2003 *Canadian Psychology* 369 at 372 where it is confirmed that only medical practitioners were allowed to conduct assessments prior to the amendment of the Criminal Code. For historical background on how psychology became relevant to the law and how it was incorporated therein, see Viljoen, Ogloff and Zapf 2003 *Canadian Psychology* 369 at 372.

237 See Form 48 in terms whereof the assessment order is made which only allows the court to indicate the name of the person or institution where the assessment is to be conducted. See Annexure B to this research for form 48. This is in contrast to the position in South Africa where more than one mental health practitioner must conduct the assessment depending on the seriousness of the offence. On the J138A form used in the South African system to order an assessment, provision is made for the names of the mental health practitioners to be filled in. See Annexure A to this research.

238 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-19, 2-20 where it is pointed out that the development that persons other than medical practitioners may conduct assessments, are in line with developments in the United States of America. The forensic mental health care systems in the United States of America is discussed in chapters 5 of this research. Also see Viljoen, Ogloff and Zapf 2003 *Canadian Psychology* 369 at 372 where it is explained that the reason why medical practitioners (who do not necessarily have knowledge of psychiatry) is allowed to conduct psychiatric assessments, is to provide for cases in remote areas where psychiatrists might not be available to provide such service.

239 Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 190, 192 explain two models developed to gather information from the accused whose fitness to stand trial is at issue. See the explanation of the FIT-R (fitness interview test – revised) and the BFFTT (basic fitness for trial test), the latter was redesigned to consist of a multiple choice questionnaire.

240 Schneider, Bloom and Heerema *Mental Health Courts* at 148-151. Also see Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 250 where it is pointed out that court ordered fitness assessments are paid for by the state. Also see Legal Aid Ontario http://lawfacts.ca/mental-health/court (Date of use: 22 September 2016) where it is pointed out that there might be more than one interview depending on the length of the assessment.

241 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-4 where further questions that might be put to the accused are discussed. These include questions about the accused's understanding of why he is in court, including how he got there and if he can talk to his lawyer about the crime that he has been charged with.

242 Barrett and Shandler Mental Disorder in Canadian Criminal Law at 3-5.

creates problems within the context of fitness assessments.[243] Since the fitness concept is interpreted subjectively and therefore potentially differently by each professional involved, the possibility that professionals may differ in their opinions on if a particular accused is fit to stand trial or not is augmented.

The court may order that a report be submitted by the person who conducted the assessment.[244] The Criminal Code does not make the submission of a report compulsory, as is clear from the use of the word "may" in section 672.2(1) of the Criminal Code.[245] If a report is drafted, it must be made available to the Crown and the accused [246] but may be withheld from the accused in certain circumstances.[247] The report becomes part of the court record.[248] The trial judge is not bound by the reports submitted to the court, and these reports are therefore not indicative of the final decision on fitness that will be made by the court.[249] The report must be sent to the relevant Review Board that assists in determining

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243 Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 192.

244 Section 672.2(1) of the Criminal Code. See Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 80 where it is stated that an assessment order usually contains a provision that the person who conducts the assessment should submit a report on the assessment to court. Where the assessment order entails that a report should indeed be filed, such report is drafted by the person who conducted the assessment and filed with the court or Review Board that ordered the assessment. See Section 672.2(2) of the Criminal Code. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-19, 2-20 where it is explained that the report should be addressed to the court and copies filed to be handed to the Crown and the defence. See Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 80 where it is pointed out that the report should be addressed to the Registrar of the particular court for the attention of the particular judge who made the order. Also see Legal Aid Ontario *http://lawfacts.ca/mental-health/court* (Date of use: 22 September 2016) where the practice of filing a report after a fitness assessment in Ontario is confirmed.

245 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-38 indicates that in cases where there are concerns about the privilege between solicitor and client with regard to the information in the report, the court will not request the submission of a report or may request that it be filed with the defence counsel only. See Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 247 who indicates that a fitness assessment usually results in a report filed with the court. See, however, the provisions of sections 21(2) and 22(2) of the Ontario Mental Health Act that provides for the assessment of a mentally ill accused and for a treatment order of such an accused respectively. In terms of these sections, the senior physician is compelled to file a report with the court that ordered such an assessment or treatment.

246 Section 672.2(4) of the Criminal Code. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 80 who explains that the court staff will make a copy of the report available to the relevant parties.

247 Section 672.51(3) of the Criminal Code. This is where the disclosure would have a negative effect on the recovery or treatment of the accused or where the disclosure of the report to the accused will endanger a third person's life. See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-38.1.

248 Barrett and Shandler Mental Disorder in Canadian Criminal Law at 2-38.1.

249 *R* v *Hogan* (1985), 21 C.C.C (3d)285 (B.C.C.A). See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-21, 2-38.1 who confirms that the report drafted by the person who conducted the assessment is merely a recommendation to the court. See, however, Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 247 who indicates that courts rarely deviate from the recommendations as contained in fitness reports.

the appropriate disposition to be made in the particular case.[250]

As soon as the assessment is completed, but not later than the last day of the assessment period, the accused must appear before the court or the Review Board that made the assessment order.[251] A fitness hearing is held to determine if the accused is, in fact, fit to stand trial or not.[252] At this hearing, the report drafted during the assessment period is considered together with all the other available evidence.[253] Should it appear that an accused refused to co-operate with the psychiatrist for purposes of an assessment ordered by the Crown, the trier of fact may draw an adverse inference from such refusal.[254]

The finding pertaining to the fitness of the accused will determine the path of the accused within the criminal justice system. The consequences of an unfitness finding are explored below.

*4.6 Personal and procedural consequences of a finding of not fi*t to stand trial

A finding of not fit to stand trial can have serious consequences for a mentally ill accused and can result in deprivation of liberty for a substantial period of time.[255] A finding of unfitness applies to all the charges against the accused and need not be established in respect of each separate charge.[256] If found unfit, the accused's plea will be set aside, and

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250 Sections 672.2(1) to (4) of the Criminal Code. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 238.

251 Section 672.191 of the Criminal Code. See Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 80 where it is stated that the accused must appear before the Review Board or court as soon as the assessment is done, especially if it is completed in a shorter time than the period for which the assessment was ordered. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-21, 2-34 who explain that this provision was added to ensure that mentally ill accused persons are not detained for unnecessary long periods for purposes of an assessment.

252 The issue is heard and determined by the presiding judge in the case where the accused elected trial by judge with no jury. Where the issue arises in respect of an accused that elected to be tried by a judge and jury, and the issue arises before the trial commenced, a special jury will be elected to hear the fitness issue. Mewett *An Introduction to the Criminal Process in Canada* at 176, 177. Also see Coughlan *Criminal Procedure* at 291. With the consent of the accused, this special jury may then also hear the case relating to the charge for which he stands trial. See Section 672.26(1) of the Criminal Code. Where the fitness issue arises during the course of the trial the same jury will merely be instructed to direct their attention to the fitness issue and will have to decide on the fitness issue. Section 672.26(b) of the Criminal Code.

253 Mewett *An Introduction to the Criminal Process in Canada* at 176. Also see Legal Aid Ontario http://lawfacts.ca/mental-health/court (Date of use: 22 September 2016).

254 Barrett and Shandler Mental Disorder in Canadian Criminal Law at 2-62-263.

255 Schneider, Bloom and Heerema *Mental Health Courts* at 143. Also see Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 189 who confirms that a finding of "not fit to stand trial" can result in the accused staying in a psychiatric hospital for a considerable period.

256 Barrett and Shandler Mental Disorder in Canadian Criminal Law at 3-28.

any jury that has been convened will be discharged.[257] Neither a conviction nor an acquittal is made in respect of an unfit accused.[258] The proceedings are stayed until the accused regains fitness, if at all.[259]

After the finding of unfitness, a disposition hearing must be held by either the court or the Review Board.[260] The preference in practice seems to be to refer the matter to the Review Board for a disposition at the outset.[261]

Prior to the disposition hearing, the Crown may bring an application to the court for a treatment order with the view of securing treatment for the accused so that he can recover sufficiently to stand trial.[262] This treatment, however, excludes psychosurgery [263] and electroconvulsive therapy.[264] Such treatment order may only be made by a court, including

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257 Section 672.31 of the Criminal Code. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-48.

258 Mewett An Introduction to the Criminal Process in Canada at 177.

259 Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 250 who adds that there is no time limit to this temporary stay of proceedings.

260 Coughlan *Criminal Procedure* at 292.

261 Mackay 1995 The Journal of Forensic Psychiatry 121 at 129. Also see Barrett and Shandler Mental Disorder in Canadian Criminal Law at 3.37.

262 Section 672.58 read with 672.59(1 and 672.61 of the *Criminal Code* provides for a court to order treatment for an accused to render him fit to stand trial. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 97, 143. Also see Coughlan *Criminal Procedure* at 292. Also see Mewett *An Introduction to the Criminal Process in Canada* at 177 footnotes 2. See further Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 189. See further Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 129. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-33. Lastly, see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 80. Also see Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 15 where it is explained that this is sometimes referred to as a "make fit" order.

263 "Psychosurgery" is defined in section 672.61(2) of the Criminal Code as: "...means any procedure that by direct or indirect access to the brain removes, destroys or interrupts the continuity of histologically normal brain tissue, or inserts indwelling electrodes for pulsed electrical stimulation for the purpose of altering behaviour or treating psychiatric illness, but does not include neurological procedures used to diagnose or treat intractable physical pain, organic brain conditions, or epilepsy, where any of those conditions is clearly demonstrable". Section 49 of the Ontario Mental Health Act also prohibits the provision of psychosurgery to an accused detained pursuant to the provisions of the Criminal Code. Section 49 reads as follows: "Psychosurgery 49.(1)Psychosurgery shall not be administered to an involuntary patient, to a person who is incapable of giving or refusing consent to psychosurgery on his or her own behalf for the purposes of the Health Care Consent Act, 1996, or to a person who is remanded or detained in a psychiatric facility pursuant to the Criminal Code (Canada).1992, c. 32, s. 20 (39); 1996, c. 2, s. 72 (30)."

264 Section 672.61(1) of the Criminal Code. Coughlan *Criminal Procedure* at 292. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-36.2. Electro-convulsive therapy is defined in section 276.61(2) of the Criminal Code as "…means a procedure for the treatment of certain mental disorders that induces, by electrical stimulation of the brain, a series of generalized convulsions". Section 49 of the Ontario Mental Health Act also prohibits the provision of psychosurgery to an accused detained pursuant to the provisions of the Criminal Code. Section 49 reads as follows: "Psychosurgery 49.(1)Psychosurgery shall not be administered to an involuntary

a Mental Health Court, whereas a Review Board lacks such authority.[265] A treatment order will, however, only be made if it is certain that without the relevant treatment, the accused is likely to remain permanently unfit to stand trial.[266] These orders are often made in respect of persons with schizophrenia or bipolar disorder who can often return to a state of fitness with antipsychotic drug treatment.[267] The hospital or physician, who must administer the treatment, must consent to such treatment order.[268] A treatment order may be made without the consent of the accused but only for a maximum of 60 days.[269]

If the accused recovers during the 60-day treatment period and is fit for trial, the accused is referred back to the criminal court for a fitness hearing. If the accused is found fit to stand trial at such hearing, the criminal proceeding continues.[270] The party asserting that the

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patient, to a person who is incapable of giving or refusing consent to psychosurgery on his or her own behalf for the purposes of the Health Care Consent Act, 1996, or to a person who is remanded or detained in a psychiatric facility pursuant to the Criminal Code (Canada). 1992, c. 32, s. 20 (39); 1996, c. 2, s. 72 (30)."

265 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-39. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 102. A treatment order may also be made by a Mental Health Court.

266 Section 672.59(2)(b) of the Criminal Code. The court also has to be satisfied that it is the least restrictive treatment available and that the risk of harm is not disproportionate to the anticipated benefit. Also see Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 130 who points out that medical evidence has to be led to show that the accused will remain unfit if he does not receive the relevant treatment.

267 Centre for Addiction and Mental Health v R 2012 ONCA 342 at [39]. Also see Byrick and Walker-Renshaw A practical guide to Mental Health and the Law in Ontario at 83.

268 Section 672.62 of the Criminal Code. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-36, 3-36.1 where some of the practical challenges experienced by hospitals in this regard is discussed. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 82, 83. Also see section 23 of the Ontario Mental Health Act that provides that a treatment order may only be made once the psychiatric hospital where it is to be provided confirms the availability of its services to the particular accused.

269 Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 130. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-11 where it is pointed out that this is the only instance where the court may compel a mentally disordered accused to undergo treatment. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 83 where the unique nature of the authority to order treatment without the patient's consent or substituted consent by an authorised person is discussed. See further Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 256 who confirms that the unfit accused's consent is not required for the order or for the treatment that he will receive during this period. Section 22 of the Ontario Mental Health Act makes provision for the a judge to order that an accused with a mental illness receives treatment at a psychiatric hospital for a period not exceeding 2 months. See further *Centre for Addiction and Mental Health* v *R* 2012 ONCA 342 at [39] where the court explains that the purpose of these treatment orders are to assist those that can regain fitness through for example anti-psychotic drug treatment which usually has an effect within 30 to 60 days. (one to two months). Also see Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx (Date of use: 20 September 2016) at 15 that states that treatment as a consequence of a "make fit" order is done without the consent of the accused and that this is the only instance where the law allows treatment of an accused person without consent.

270 Section 672.32(1) of the Criminal Code that states, "A verdict of unfit to stand trial shall not prevent

accused has recovered to such an extent that he is now fit to stand trial, bears the onus of proving such on a balance of probabilities.[271] The accused may, however, despite being found fit to stand trial, be detained in hospital until the trial commences if the Review Board is of the view that the accused may become unfit to stand trial again should he be discharged pending the trial.[272] This is referred to as a "keep fit" order.[273] This would typically be the case for an accused who, even though fit to stand trial, suffers from a mental illness.[274] If, after the treatment period in terms of the treatment order, the court finds that the accused is still unfit to stand trial, the trial will proceed as in a case where no such treatment order was made, in that a disposition hearing may be held by the court or the matter may be referred to the Review Board to decide on the appropriate disposition.[275]

The court or Review Board (depending on if the disposition hearing is conducted by the court or the Review Board) may, on application of either of the parties or of its own accord, order an assessment of the accused where information that can be obtained from such assessment is needed to decide on an appropriate disposition.[276] Such an assessment

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the accused from being tried subsequently where the accused becomes fit to stand trial". Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-24 where it is pointed out that where it has to be proved that an accused has recovered from his unfitness, the presumption of fitness no longer applies. The criminal proceedings that continues after an accused is found fit to stand trial, may also include referral to the Mental Health Court. Also see Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 247 who states that the majority of accused persons that were initially found unfit, are eventually sent to court as fit after having received treatment during this time, mostly by way of psychotic medication.

271 Section 672(32)(2) of the Criminal Code states that "(2) The burden of proof that the accused has subsequently become fit to stand trial is on the party who asserts it, and is discharged by proof on the balance of probabilities".

272 Section 672.49(1) of the Criminal Code. Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 130. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-39. The Review Board thus has the same power as the court to order that a person remain in hospital despite the fact that they are found fit to stand trial. The aim is to protect the accused's mental state, as there is a risk that it will deteriorate if he is transferred to a correctional facility without proper psychiatric services. See also Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 81 who is of the view that the accused may be detained until completion of the trial.

273 Section 672.29 of the Criminal Code. See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-33 where it is pointed out that the court may order that the accused remains in hospital even though he is fit to stand trial if the court is concerned about the accused's mental state should he be sent back to the correctional facility where psychiatric services are limited. Also see .Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 82. See further Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 15.

274 It is specifically these individuals that may benefit from a Mental Health Court where accused persons who are fit to stand trial but mentally ill can be diverted away from the Criminal Justice system.

275 As provided for in section 672.45 of the Criminal Code. Also see Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 130. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3.34.

276 A disposition as provided for in section 672.54 of the Criminal Code. Also see section 672.121 of the Criminal Code, which empowers a Review Board to order an assessment of the accused under

might be necessary where for instance there is no assessment report on the accused available, where assessment information on the accused is outdated, or where the accused has been transferred from another province.[277] The reason why a report might not be available is that, as discussed earlier, the Criminal Code does not make it compulsory for a mental health professional to file an assessment report with the court unless the court specifically requests it. This could lead to duplication of assessments which impacts costs and available resources. This could easily be remedied by making the filing of an assessment report compulsory, regardless of whether the court made an order to this effect.

The psychiatric report, if available, must be made available to all parties involved in the disposition hearing.[278] Such information may, however, be withheld from the accused if the court is of the view that disclosure of the information to the accused will be detrimental to the accused or a third party.[279]

Due process is followed at the disposition hearing [280] at which the accused is entitled to be present [281] and legally represented.[282] The court may make a disposition if it is satisfied that the accused is indeed unfit to stand trial [283] and if the court deems it necessary for a

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certain circumstances. Also see section 672.11.(d) of the Criminal Code that provides specifically for an assessment order to be made where the goal of such an assessment is to determine the appropriate disposition for a person found not fit to stand trial. See further Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 78.

277 In terms of section 672.86 of the Criminal Code. See section 672.121(b) for the circumstances under which the Review Board may make an assessment order. These circumstances include an assessment where the accused was assessed more than 12 months ago and assessment information is thus out-dated.

278 Section 672.51(2) of the Criminal Code.

279 Section 672.51(3) of the Criminal Code states that "(3) The court or Review Board shall withhold some or all of the disposition information from an accused where it is satisfied, on the basis of that information and the evidence or report of the medical practitioner responsible for the assessment or treatment of the accused, that disclosure of the information would be likely to endanger the life or safety of another person or would seriously impair the treatment or recovery of the accused". This provision seems to incorporate the concept of therapeutic privilege in the law where information may be withheld from a patient where non-disclosure is in the interest of such patient. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 2-38.1.

280 Mewett An Introduction to the Criminal Process in Canada at 177.

281 Section 672.5(9) of the Criminal Code. This right is however subject to certain exceptions set out in section 672.5(10 of the Criminal Code, for example where the accused disrupts the proceedings, to such an extent that it is not feasible to attempt to continue with the hearing in the presence of the accused (section 672.5(10)(b)(i)). The provisions of section 672.5(13) of the Criminal Code is also relevant here in that it allows the court or Review Board to communicate with an accused via close-circuit television where the accused is not present in court. Also see Harradence 2012 *Crim.L.Q* 511 at 550.

282 Section 672.5(7) read with section 672.8(a) of the Criminal Code. Also see Harradence 2012 *Crim.L.Q* 511 at 550.

283 Mewett An Introduction to the Criminal Process in Canada at 177.

disposition to be made without delay.[284] This is particularly the case where the verdict is that the accused is unfit to stand trial and poses no risk to the public. The disposition made by the court is reviewed by the Review Board.[285]

If the court is of the opinion that more information is necessary in order to make an appropriate disposition, the matter is referred to the Review Board, and the accused will fall under the jurisdiction of such Review Board.[286] The Review Board is provided with a transcript of the court proceedings and all other documents [287] and must make a disposition.[288] The accused may be remanded in custody in a psychiatric hospital pending the disposition hearing by the Review Board.[289]

The Review Board must make a disposition that is necessary and appropriate in the circumstances with due consideration to public safety, the mental disorder of the accused and other needs of the accused, as well as the reintegration of the accused into society.[290]

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284 Section 672.45(2) of the Criminal Code. Also see Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 129 who points out that the court must be satisfied that it could readily make this order immediately. If there is doubt the matter must be referred to the relevant Review Board. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 8-1 where it is explained that where a disposition hearing is conducted by a court and not a Review Board, the procedures that govern the Review Board during such proceedings shall apply.

285 The Review Board must review the disposition within 90 days from date of the order. See Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 82, 97.

286 Section 672.45(1.1), 672.47 of the Criminal Code. Also see Mewett *An Introduction to the Criminal Process in Canada* at 177. See further Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 129. Also see 672.121 of the Criminal Code, which empowers a Review Board to order an assessment of the accused under certain circumstances. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-37.

287 Section 672.45 (1.1) where the court does not hold a disposition hearing and section 672.52(2) where the court held a disposition hearing.

288 Section 672.47(1) of the Criminal Code. See Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 82, 97 where it is explained that, where the court does not hold a disposition hearing, the Review Board must have such a hearing within 45 days but where the court made a disposition, the Review Board must have a hearing within 90 days to review the disposition granted by the court. For more on these reviews, see Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx (Date of use: 20 September 2016) at 15 where these time frames for the Review Board hearing to be held is set out.

289 Section 672.46(2) of the Criminal Code. Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 8-3. This is however not the default position. The status quo in terms of detention or non-detention that existed prior to the court referring the matter to the Review Board will remain unless the court makes a different order to vary such status. Section 672.46(1) of the Criminal Code states that any other order made by the court prior to the disposition being heard by the Review Board, for example, conditional discharge, shall remain in force until the Review Board ordered the relevant disposition.

290 Section 672.54 of the Criminal Code after amendment by the Not Criminally Responsible Reform Act. Also see Schneider, Bloom and Heerema Mental Health Courts at 21. Also see Mewett *An Introduction to the Criminal Process in Canada* at 177. See further Roach et al Criminal Law and Procedure at 777. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 7-33 where the public nature of the hearings is discussed.

The safety of the public is now the paramount consideration after the latest amendment of the Criminal Code.[291] Prior to the amendment of the Criminal Code, a disposition had to be made that was least restrictive and onerous on the accused with due consideration to the safety of the public and the accused's mental condition.[292] The focus seemed to have shifted from the liberty of the accused to the safety of the public.[293] The Supreme Court of Canada,[294] however, held that a disposition that is "necessary and appropriate" should necessarily be made within the framework of what the "least onerous and restrictive" disposition would be having regard to public safety, the mental disorder of the accused, his other needs and his reintegration into society. Although the safety of the public is the main consideration, no victim impact statements are allowed at a disposition hearing of an accused found unfit to stand trial since the presumption of innocence still applies.[295]

The dispositions that may be made in respect of an unfit accused can take the form of a discharge subject to certain conditions [296] or detention in a hospital subject to such conditions as the court or Review Board determine.[297]

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291 The Criminal Code was amended by the Not Criminally Responsible Reform Act Bill C-14. The principle of the safety of the public, including the victim, being the paramount consideration is echoed in the directive issued by the Ontario Attorney General in the context of considering a stay of proceedings as well. See Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 5.

292 Section 672.54 of the Criminal Code. Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-9 explain that the Review Boards succeed in keeping the focus on the treatment of the mentally ill accused person whilst ensuring public safety. Also see Mewett *An Introduction to the Criminal Process in Canada* at 177. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 21. See further Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 129.

293 The requirement of the disposition being the least restrictive on the accused has fallen away. This is after the amendment of the Criminal Code by the Not Criminally Responsible Reform Act that sets public safety as paramount consideration. See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-34 who predicts that this amendment might be challenged on the basis that it violates the accused's Charter rights.

294 *Penetanguishene Mental Health Centre* v *Ontario (Attorney General)* 2004 S.C.C 20.2004 Carswell Ont 1136 at [56]. The accused in this case was found not criminally responsible on a charge of assault with a weapon and was placed in a medium security facility from where he was later transferred to a high security facility. The accused suffered from paranoid schizophrenia with a personality disorder displaying antisocial traits. The accused averred that his detention in a secure facility violates his Charter rights. The court however found that this is not the case. The court found that the word "appropriate" used in section 672.54(b) and (c) necessarily has to be interpreted in the context of what is the least restrictive disposition for the accused with due consideration to the public safety, mental condition of the accused and his ultimate reintegration into society.

295 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-24 where it is pointed out that victim impact statements are allowed at disposition hearings where the accused is found not criminally responsible because of mental illness and that such impact statements may be presented verbally in court unless ordered otherwise. This is, however, impermissible where an accused was fount unfit to stand trial.

296 Section 672.54(b) of the Criminal Code. Also see Coughlan *Criminal Procedure* at 292.

297 Section 672.54(c) of the Criminal Code. Also see Coughlan *Criminal Procedure* at 292.

The accused found unfit to stand trial cannot be discharged unconditionally.[298] This practice has been criticised because accused persons found not criminally responsible because of mental illness may well be discharged unconditionally.[299] This is especially grounds for concern if regard is had to the fact that the latter group of mentally ill accused persons have actually been found guilty of committing the crime that they have been accused of, whereas those who are unfit to stand trial due to mental illness, are yet to stand trial in order for their guilt or innocence to be established.[300]

The Supreme Court of Canada considered the absence of a provision for the absolute discharge of a permanently unfit accused in *R* v *Demers.*[301] The Court found that it is indeed unconstitutional that there is no possibility for a permanently unfit accused of being released after a finding of unfitness.[302] The court, however, proposed that a permanent stay of proceedings against such an accused rather than an absolute discharge be implemented.[303] The court explains that:

> *The unavailability of an absolute discharge relates to the fact that the accused has not been tried, rather than the presumption that the accused is guilty or dangerous.*[304]

The court's approach is welcomed, as the accused is no longer subject to the infringement of his liberty by being detained indefinitely. The difference between an absolute discharge versus a stay of proceedings is of little to no consequence to the mentally ill accused [305] since either one ensures his freedom and that he will not face a trial with regard to the charges brought against him in future.

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298 Coughlan *Criminal Procedure* at 292. Section 672.54(a) of the Criminal Code. Also see Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 129.

299 Section 672.54 of the Criminal Code.

300 See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-22, 1-23 who shares this point of criticism and who is sceptical of the current regime and points out that a court might very well soon have to determine if this is in line with an accused's Charter rights.

301 *[2004\ 2* S.C.R 489, 2004 S.C.C 46. (Hereinafter referred to as the "*Demers* case".)

302 *The Demers* case at [56]]. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-42 who points out that without the option to be released unconditionally, an accused who remains permanently unfit will remain under state supervision for as long as a case can be proved against them, even in the absence of any dangerousness. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 90. See further Luther and Mela 2006 *Sask L Rev 401* at 419. Also see Harradence 2012 *Crim.L.Q* 511 at 551, 552 where it is explained that this judgment rectified the unfair situation that existed for permanently unfit accused in that it declared the practice of indefinite detention of such accused unconstitutional.

303 The *Demers* case at [60], [64].

304 The *Demers* case at [34].

305 See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-22 where it is pointed out that the court in the *Demers* decision suggested that permanently unfit accused persons should be absolutely discharged. Parliament however opted for the permanent stay option as no determination of responsibility for the crime has been made.

As a result of this finding in the *Demers* case, Bill C-10 was promulgated which amended the Criminal Code to the effect that a permanent stay of proceedings may be ordered in respect of an accused who is permanently unfit to stand trial.[306] Where an accused appears to be permanently unfit to stand trial, an assessment must be ordered to determine if an order for the stay of proceedings should be made.[307] Only a court, and not a Review Board, may order a stay of proceedings as this ensures that due consideration is given to public safety.[308] If a stay of proceedings is ordered, the accused is released as a stay of proceedings renders any disposition given by a Review Board of no effect.[309] If a stay of proceedings is not ordered, the unfit accused remains under the jurisdiction of the Review

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306 Section 672.851 of the Criminal Code as amended by Bill C-10 promulgated in 2005. A permanent stay of proceedings may be ordered if the court is convinced that the accused will not ever regain his fitness to stand trial, that the accused does not pose a significant threat to society and that such stay of proceedings will be in the interest of the administration of justice (section 672.851(7). The order to stay the proceedings against the accused, is made with due consideration to the seriousness of the offence, the impact that a stay of proceedings may have on public confidence in the judicial system and the time that has lapsed since the commission of the offence. This provision was inserted after the court's decision in the *Demers* case where it was evident that the accused will never regain fitness to stand trial. It was found that the lack of a provision for an absolute discharge for an accused who remains unfit to stand trial but who poses no threat to society violates section 7 of the Charter. The court declared the relevant provisions invalid and ordered that the law be amended within 12 months from the order in order to remedy the unconstitutional provisions, see {60}, {66} of the judgment. Also see Roach et al Criminal Law and Procedure 779. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-21. See further Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 250. See further Schneider *Annotated Ontario Mental Health Statutes* at 473 where it is explained that the situation prior to the introduction of Bill C-10 was that an accused who had a brain injury for example, could remain subject to the jurisdiction of the Review Board forever, since he will never regain fitness to stand trial. The Review Board's jurisdiction was not based on the question if the accused posed a danger to society but merely if the accused has a mental disorder. See further Harradence 2012 *Crim.L.Q* 511 at 552.

307 Section 672.11(e) of the Criminal Code. This is done in cases where an accused appears to be permanently unfit to stand trial and unlikely to recover.

308 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-22. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 91 where the safety of the public is highlighted as one of the primary considerations where a court considers ordering a permanent stay of proceedings. See further Luther and Mela 2006 *Sask L Rev 401* at 419.

309 Section 672.851(9) of the Criminal Code. An order for the stay of proceedings will only be made if it is clear that the accused is and will remain unfit to stand trial, that he does not pose a significant threat to the public and that a stay of proceedings is in the interest of the proper administration of justice in this case (see section 672.851(7). Whether such stay will be in the interest of the proper administration of justice, is determined by giving due considerations to submissions made by the prosecution or the accused regarding (*a*) the nature and seriousness of the alleged offence; (*b*) the salutary and deleterious effects of the order for a stay of proceedings, including any effect on public confidence in the administration of justice; (*c*) the time that has elapsed since the commission of the alleged offence and whether an inquiry has been held under section 672.33 to decide whether sufficient evidence can be adduced to put the accused on trial; (see section 672.851(8)). Also see the *Demers* case at [64] where the court indicates that other factors that might have an influence on the decision to stay proceedings is the nature of the accusation, previous medical records of the accused and whether the accused is taking medication for his condition. Also see Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 255 who confirms that the accused may, subsequent to the decision in *Demers* be released. Hospitalisation may, however, also be ordered.

Board [310] where his fitness will be reviewed periodically.[311] These reviews continue until such time as the accused is found fit to stand trial, found permanently unfit to stand trial or until such time as it is found that the Crown no longer has any evidence to support a case against the accused.[312] If during such review [313] the Review Board finds that the accused is fit to stand trial, the accused is referred back to court, and the criminal proceedings shall continue as per usual.[314]

The Criminal Code provides for the examination of the evidence against the accused bi-annually, a provision that was included to avoid the detention of an accused without the Crown actually having a case against him.[315] Where a *prima facie* case against the accused cannot be proved, or where the court is of the view that evidence is no longer sufficient, the accused may be acquitted.[316]

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310 Section 672.851(9) of the Criminal Code. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-43.

311 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-38, 3-39 where it is stated that the Review Board reviews the fitness status of the accused annually. Also see Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 250 who explain that the Review Board reviews a decision of unfitness within 90 days and thereafter annually.

312 Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx (Date of use: 20 September 2016) at 15. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-38.

313 The Review Board is required to conduct periodic reviews on the state of accused persons found not fit to stand trial. Section 672.81 of the Criminal Code. Also see Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 189.

314 Section 672.48(2) of the Criminal Code. Also see Parliamentary Information and research service *Current issues in Mental Health in Canada* at 3. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-33. This entails that the court holds a fitness hearing again and if it is confirmed that the accused is fit, the criminal proceedings shall continue. Also see Harradence 2012 *Crim.L.Q* 511 at 550.

315 Section 672.33 of the Criminal Code provides for these inquiries into the evidence against the accused every two years until the accused is tried or acquitted. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-12. See further Coughlan *Criminal Procedure* at 292 who points out that such a review can also be done sooner where the accused avers that the Crown is no longer able to prove its case against the accused. See further Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 130. Section 672.33(1.1) provides that the period for the review of the evidence may be extended if it is in the interest of the proper administration of justice. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-34 and 3-41. See further Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 250. Lastly, see Harradence 2012 *Crim.L.Q* 511 at 550.

316 As provided for in section 672.33(6) of the Criminal Code. Mewett *An Introduction to the Criminal Process in Canada* at 178. Also see Coughlan *Criminal Procedure* at 292 who states that the accused is then "entitled" to an acquittal. See further Mackay 1995 *The Journal of Forensic Psychiatry* 121 at 130. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-40. See again Coughlan *Criminal Procedure* at 292 who points out that the procedure for these hearings, to determine if there is still sufficient evidence, is not set out in the Criminal Code and can be conducted by way of affidavit. See further Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 250. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 91.

The Crown and the accused may appeal against a finding of unfit to stand trial [317] and/or a stay of proceedings.[318] The Appeal court generally refers the matter to the Review Board as the courts generally lack the expertise to decide on an appropriate disposition.[319] The Ontario Court of Appeal acknowledged the important function of the Review Boards by stating:

> *In the present case, the board had to review extensive psychiatric material and consider somewhat conflicting psychiatric opinions. In doing so, the board was required to assess the mental condition of the accused, the dangerousness of the accused, the treatment prospects of the accused, and the treatment regime, which would best fit the dictates of s. 674.54. All of these judgments called into play the board's medical expertise and its knowledge of the various facilities available within the mental health system. This court has neither that expertise nor that knowledge…*[320]

It is evident that the criminal courts, including the appellate courts, acknowledge the specialised skills that the Review Board has to offer and that they make use thereof during cases involving accused persons with mental illness.

The finding of unfit to stand trial is not valid indefinitely as an accused may be tried once he recovers, if at all, and becomes fit to stand trial.[321] The position of such an accused and an accused who was found fit from the outset of the criminal proceedings is discussed below.

4.7 Consequences of a finding of fit to stand trial

The consequences of being found fit to stand trial are equally serious, especially for an

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317 Section 675(3) and 676(3) of the Criminal Code. Also see Coughlan *Criminal Procedure* at 292 who interprets sections 675(3) and 676(3) to include an appeal against a finding of fit to stand trial. The wording of these sections however specifically refer to a finding of unfit to stand trial. See further Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 11-12.

318 Section 672.852(1) of the Criminal Code. An order not to grant such a stay of proceedings may however not be appealed against. See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-43.

319 In *R* v *Packham (1994) (*Peckham v. Attorney General of Ontario (1994), 93 C.C.C. (3d) 443 (Ont. C.A.*)* the fact that the review courts lack the skill and expertise to decide on the appropriate way to deal with these accused persons have been spelt out by the Ontario Court of Appeal. The court, however, reasserts his position as the final decision maker in appeals and states that, at [39] "…if after due regard to the board's advantaged position and its expertise, the court concludes that the disposition is unreasonable, it must intervene." Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 11-3. Also see Harradence 2012 *Crim.L.Q* 511 at 514 where it is stated that the "significant expertise" of the Review Boards and their efforts in protecting the procedural rights of mentally ill accused persons are acknowledged.

320 *R* v *Packham (1994) (*Peckham v. Attorney General of Ontario (1994), 93 C.C.C. (3d) 443 (Ont. C.A.*) at [39].*

321 Section 672.32(1) of the Criminal Code. Also see Mewett *An Introduction to the Criminal Process in Canada* at 177. The party who alleges that the accused has regained his fitness to stand trial, bears the burden of proving same on a balance of probabilities.

accused who, even though fit to stand trial still suffers from a mental illness.[322] The majority of those sent for fitness assessments are found fit to stand trial.[323] The reason for this could possibly, at least partially, be due to the low threshold of the test for fitness, as explained earlier.

Where an accused regains his fitness to stand trial, he shall be deemed fit to stand trial, and the criminal trial against such an accused may proceed as per normal. The question as to if this accused will, in fact, be tried when he regains his fitness depends heavily on the discretion of the prosecution.[324] Where the offence that the accused has been charged with is a minor offence, or where the accused was detained in a psychiatric hospital prior to regaining fitness, the prosecution may very well decide not to proceed if there has been a long lapse of time since the alleged offence and the account of witnesses are no longer reliable as a result of this.[325]

It should be mentioned at this stage that eligible mentally ill accused persons found fit to stand trial can be diverted away from the criminal justice system to the Mental Health Court for treatment programmes. The eligibility criteria and other important aspects of the Mental Health Court are discussed later in this chapter as part of the procedural dynamics of Mental Health Courts.

Where an accused is found fit to stand trial and is not diverted to the Mental Health Court, the criminal proceedings continue as per usual as if the fitness issue was never raised.[326] If

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322 See Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 247 who reports on studies conducted that indicates that accused persons with psychosis can be perfectly capable of standing trial. Also see Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 1 where it is acknowledged that persons with mental disorders and /or developmental disabilities are often found fit to stand trial and that this compels consideration of alternatives to formal adjudication of their cases in criminal court. See the discussion of Mental Health Courts later in this chapter as an example of one such alternative employed on Ontario.

323 O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 507. Also see Zapf and Roesch 1998 *Canadian Journal of Psychiatry* 287-293 who's study found that 90% of all the accused sent for fitness evaluations in their study, was found fit to stand trial. See further Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 188 where this figure is confirmed – although reported as 11% of all referrals being found not fit to stand trial. See further in general Roesch *et al* 1997 *Canadian Journal of Psychiatry* 509-514 and O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 507 reported that 79% of those evaluated for fitness to stand trial on an inpatient basis, were found fit to stand trial and 74% of those evaluated for fitness on an outpatient basis, were found fit to stand trial. Also see Chaimowitz GA and Ferencz J "Cost savings associated with fitness to stand trial assessments in detention centres: A pilot program" 1999 (44) *Canadian Journal of Psychiatry* 808-810.

324 Mewett An Introduction to the Criminal Process in Canada at 177.

325 Mewett An Introduction to the Criminal Process in Canada at 177, 178.

326 Section 672.28 of the Criminal Code. Also see Coughlan *Criminal Procedure* at 292. See further

there is a change in circumstances and it appears later in the trial that the accused might be unfit to stand trial, the issue may be raised again.[327]

There is no provision made for an appeal against a finding of fit to stand trial as soon as it has been made. The issue may, however, be raised on appeal together with an accused's appeal against his conviction or the Crown's appeal against his acquittal.[328]

4.8 Conclusion

As is evident from the discussion above, a detailed system has been created to deal with those found unfit to stand trial in that the Review Boards have to review findings of unfitness and dispositions made in respect of such persons. Every possible safety net has been built into the system to ensure that a person found unfit to stand trial is dealt with fairly.

Accused persons with mental illnesses that are found fit to stand trial do not fall under the jurisdiction of the Review Boards and are theoretically exposed to the harsh realities of the traditional criminal justice system. As pointed out earlier, the majority of accused persons sent for fitness assessments are found fit to stand trial, arguably due to the low threshold set for fitness. The low threshold translates into persons being found fit to stand trial who would perhaps have been found unfit had another test for fitness been used. Many of these persons, although found fit under the low threshold test, have a mental illness. Once found fit to stand trial, no further consideration is given to the fact that the accused suffers from a mental illness in the traditional criminal justice process.

Mental Health Courts, however, provide an alternative to traditional prosecution for those found fit but mentally ill. In response to the unique challenges that mental illness brings to the criminal justice system, specialised solutions such as Mental Health Courts have been introduced to deal specifically with the fit but mentally ill accused in the Canadian criminal justice system. It is necessary to explore the functioning of Mental Health Courts as they

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Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 189. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-33. See further Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 81.

[327] Coughlan *Criminal Procedure* at 290. See further Schneider, Bloom and Heerema *Mental Health Courts* at 141 who points out that fitness can arise at more than one point in the proceedings. It is further observed that it is not unusual for fitness findings about an accused to differ on the various occasions of observation.

[328] This is in line with the rule against interlocutory appeals. See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 11-4.

operate in Canada and the diversion option that they offer to mentally ill, but fit accused persons.

Before the specific diversion programme as a component of the Canadian Mental Health Court is discussed, an overview of diversion in Canada is given.

5 DIVERSION AWAY FROM THE CANADIAN CRIMINAL JUSTICE SYSTEM

What follows is a general discussion of diversion in Canada and serves as background to the discussion of Mental Health Courts. Mental Health Courts offers diversion programmes within their framework.

The number of persons with mental illnesses entering the criminal justice system in Ontario, increased by 27% since 1995.[329] This high number raised legitimate concerns. One of the primary objectives of the 2012 Mental Health strategy for Canada is to reduce the number of persons with mental illness in the criminal justice system.[330] Another objective is to ensure the availability of services and support for the mentally ill persons that encounter the criminal justice system.[331] Alternatives to traditional prosecution could create an opportunity for the achievement of these objectives.

Part XXIII of the Criminal Code makes provision for alternative sentencing measures.[332] Although the term "sentencing" is used, it relates to non-judicial proceedings such as diversion and would thus include post-charge diversion programmes such as Mental Health

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329 For more detail on the increase in the number of persons with mental illness that come into contact with the criminal justice system annually, see Ministry of Health and Long-term Care http://www.health.gov.on.ca/en/common/ministry/publications/reports/mentalhealth/framework.pdf (Date of use: 26 August 2015) at 4. Also see National Judicial Institute *Problem-solving in Canada's courtrooms. A guide to therapeutic justice* (National Judicial Institute Canada, 2011) at 9 where it is confirmed that persons with mental illness are overrepresented in the Canadian criminal justice system. See further Harradence 2012 *Crim.L.Q* 511 at 514 where the increase in the number of mentally ill persons in the criminal justice system is confirmed. The author traces the increase back to the amendments to the Criminal Code in 1992.

330 Mental Health Commission of Canada *Changing Directions, Changing Lives: The Mental Health Strategy for Canada* (Mental Health Commission of Canada Alberta 2012) at 46-55.

331 Centre for addiction and mental health *Evidence Summary: Mental Health Diversion Framework in Canada* (April 2014) http://eenet.ca/wp-content/uploads/2014/04/Mental-Health-Diversion-Policy-Frameworks_April2014-Final.pdf (Date of use: 12 August 2016) at 3. Forensic services have been under pressure due to the increase in numbers of mentally ill persons in the criminal justice system. The need for increased availability of services and support for the mentally ill accused in the criminal justice system is acknowledged and discussed in Ministry of Health and Long-term Care http://www.health.gov.on.ca/en/common/ministry/publications/reports/mentalhealth/framework.pdf (Date of use: 26 August 2015) at 4.

332 Section 716 of the Criminal Code defines alternative methods as: "means measures other than judicial proceedings under this Act used to deal with a person who is eighteen years of age or over and alleged to have committed an offence".

Courts. An alternative to prosecution is a method of diverting an accused away from the criminal justice system and should not be seen as an extension of the criminal justice system.[333]

The theory behind these alternative measures is that such an alternative programme rather than prosecution can adequately protect the interest of society.[334] For this reason, the implementation of any diversion programme is subject to the requirement that the programme is appropriate given the interest of society and the victim.[335]

Diversion can take many forms depending on the stage of the criminal process at which it occurs.[336] Diversion can occur prior to the accused's first court appearance or thereafter, after a bail application or after an evaluation for fitness to stand trial.[337] Diversion may aim to prevent contact with the criminal justice system altogether, or it may be in the form of court support services where assistance is rendered to persons with mental illness who are already in the criminal justice system.[338] Potential benefits of diversion programmes include

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333 Coughlan *Criminal Procedure* at 281. Also see Centre for addiction and mental health http://eenet.ca/wp-content/uploads/2014/04/Mental-Health-Diversion-Policy-Frameworks_April2014-Final.pdf (Date of use: 12 August 2016) at 4, 5 where the various types of diversion are discussed.

334 Coughlan Criminal Procedure at 281.

335 Section 717.(1) of the Criminal Code states "Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society…". Also see section 717(1)(b) of the Criminal Code which reads as follows: "(*b*) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;" Also see Coughlan *Criminal Procedure* at 281. This principle is also acknowledged in Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 5.

336 Parliamentary Information and research service *Current issues in Mental Health in Canada* at 4 where it is confirmed that diversion can occur at various stages during the criminal proceedings. See further in general Hartford K *Best Practice in Four Cities in South-western Ontario: The Interface between people with mental illness and the criminal justice system* (2003) http://www.hsjcc.on.ca/Resource%20Library/Mental%20Health%20and%20Justice%20Reports/Best%20Practices%20in%20Four%20Cities%20in%20Southwestern%20Ontario%20-%202003-05.pdf (Date of use: 12 March 2013) for the creative ways in which communities have responded to the issue of mentally ill persons in contact with the criminal justice system.

337 Schneider, Bloom and Heerema *Mental Health Courts* at 35. Also see Rieksts M "Mental health courts in Canada" *LawNow* 2008 (33) 31-34 at 33 where it is confirmed that diversion can occur at any stage of the criminal proceedings. Diversion, however, mostly occurs before the trial begins according to Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 6.

338 The aim of a particular diversion programme depends largely on the stage in the criminal proceedings at which the programme intervenes. See Ministry of Health and Long-term Care http://www.health.gov.on.ca/en/common/ministry/publications/reports/mentalhealth/framework.pdf (Date of use: 26 August 2015) at 3.

reduced recidivism and reduced caseloads on the criminal justice system.[339]

As pointed out earlier, very low requirements are set for a person to be considered fit to stand trial. This undoubtedly contributes to the fact that the majority of those sent for fitness assessments are found fit to stand trial.[340] A finding of fitness does not imply that the accused does not have a mental illness, as suspicion of mental illness was the basis for the referral for assessment for fitness in the first place. It may simply mean that his mental illness does not affect his fitness, as determined by the low threshold test (cognitive capacity test) explained above. Consequently, there are a large number of persons who are found fit to stand trial who are nonetheless mentally ill.

The case of fit but mentally ill accused would usually revert to the criminal court for the criminal trial to continue without further consideration being given to his existing mental illness unless he raises mental illness as a defence, of course. This accused person is sent back to the correctional facility to await his trial. The negative impact of the correctional setting on a person with a mental illness is explained earlier in this chapter. In addition to the general negative effect of the correctional setting on a person with mental illness, these persons are at a higher risk of re-offending if their mental illness is not treated.[341] Mental health resources in correctional facilities are not always available to those in need thereof. For these accused persons, alternative sentencing methods and diversion away from the criminal justice system are optimal.

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339 The reduced recidivism could be attributed to the improved access to mental health care services that is available through diversion programmes. See Ministry of Health and Long-term Care http://www.health.gov.on.ca/en/common/ministry/publications/reports/mentalhealth/framework.pdf (Date of use: 26 August 2015) at 3.

340 O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 507. Also see Zapf and Roesch 1998 *Canadian Journal of Psychiatry* 287-293 who's study found that 90% of all the accused sent for fitness evaluations in their study, was found fit to stand trial. See further Newby and Faltin 2008 *Journal of Offender Rehabilitation* 185 at 188 where this figure is confirmed – although reported as 11% of all referrals being found not fit to stand trial. Also see Viljoen, Ogloff and Zapf 2003 *Canadian Psychology* 369-514 and O'Shaughnessy 2007 *The Journal of the American Academy of Psychiatry and the Law* 505 at 507 reported that 79% of those evaluated for fitness to stand trial on an inpatient basis, were found fit to stand trial and 74% of those evaluated for fitness on an outpatient basis, were found fit to stand trial. Also see Chaimowitz and Ferencz 1999 *Canadian Journal of Psychiatry* 808-810 where the latter figure is confirmed.

341 This is referred to as the revolving door principle where mentally ill accused persons move in and out of jail, committing petty crimes. See *Phuneuf* v *Ontario* 2010 ONCA 901 at [28] where this phenomenon is explained. Also see National Judicial Institute *Problem-solving in Canada's courtrooms. A guide to therapeutic justice* 10. See further Ministry of Health and Long-term Care http://www.health.gov.on.ca/en/common/ministry/publications/reports/mentalhealth/framework.pdf (Date of use: 26 August 2015) at 4 where it is pointed out that persons with mental illness that is kept in a correctional setting is at higher risk of experiencing more severe symptoms of mental illness and are at a higher risk of homelessness once they are released. These accused persons are further often isolated from mental health care for as long as they are kept in the correctional facility.

A requirement for an alternative measure to be used is that the accused must be legally represented and must consent freely to participate in the alternative programme.[342] It must be certain that there is sufficient evidence to prosecute the accused, and the accused must, in order to be allowed to make use of such an alternative measure, accept responsibility for the act or omission that forms the basis of the charges against the accused.[343] Where the diversion pertains to a mentally ill person, the acknowledgement of involvement in the alleged offence is not a prerequisite for admission to the diversion programme since the accused may not have the mental capacity to do so meaningfully.[344]

Diversion is usually employed where the charges are minor or where the accused has very limited past contact with the criminal justice system.[345] A distinction is made between

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342 Section 717(1)(c) and (d) of the Criminal Code reads as follows: "(c) the person, having been informed of the alternative measures, fully and freely consents to participate therein;" and " (d) the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;" Also see Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 6.

343 Sections 717(e) to (g) of the Criminal Code reads as follows: "(*e*) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;" and "(*f*) there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and""(*g*) the prosecution of the offence is not in any way barred at law." Also see Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 6 where the basic requirements for diversion in Ontario is set out. These are listed as: The accused suffers from a mental disorder that is treatable; There is a reasonable prospect of conviction if the case were to go to trial; The offence is eligible for diversion - only Class I and some Class II offences are eligible; A designated mental health facility and/or community support agency has been found that can accept the accused; and the accused consented to participating in the diversion programme (rather than going through trial). Also see Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 5, 6 where the requirements for diversion in Ontario is set out.

344 Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 6. See this source at 5, 6 where the requirements for diversion of the mentally ill accused in Ontario is set out as: "(1) There is a reasonable prospect of conviction of the offence charged and that the prosecution is not barred at law; (2) it is in the public interest, as defined in the practice memorandum on Charge Screening, to discontinue the prosecution; (3) The offender's involvement is voluntary, in that the accused, or substitute decision maker, knows of the right to counsel and the right to a trial on the merits; (4) the accused, defence counsel, or substitute decision maker is aware that, if the accused is charged with subsequent offences, Crown counsel may seek to introduce evidence of the accused's participation in the treatment or other alternative measures programme to which the accused is being diverted, as well as the allegations underlying the current charges; i.e. that in the event of subsequent charges, the Court may be informed of the prior diversion of the accused and the subject matter of the prior charges, subject to the usual rules of evidence; (5) if diversion measures include the mentally disordered offender attending at a mental health facility or physician's office or clinic, confirmation that the facility or physician considers the offender a suitable candidate and that the treatment plan can begin within a reasonable period of time."

345 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-47. Also see Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 250 who encourages criminal justice systems to find solutions outside of the criminal law for cases involving minor crimes and where the

presumptively divertible, discretionary, and non-divertible offences.[346] These categories correlate with the seriousness of the crime but do not necessarily exclude violence under divertible offences.[347] Offences that fall within the discretionary category can be diverted if the Crown so decides after consideration of the type of offence and the circumstances of the accused, the community and the victim.[348] Diversion for more serious offences is, however, less common.[349]

Where diversion is employed, the charges against the accused are provisionally stayed, and the accused is offered the opportunity to make use of a treatment programme where appropriate.[350]

Most jurisdictions in Canada employ diversion models, although only some are formally set out in policies.[351] These diversion programmes are province-specific. A formal diversion

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accused has a mental illness.

346 Ryan and Whelan 2012 *Web Journal of Current Legal Issues* 1 at 8. The divertible, presumptively divertible and non-divertible offences are also set out in Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* 3, 4, 5. For a detailed discussion of the relevant classes of offences, see Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx (Date of use: 20 September 2016) at 5 where it is explained that these offences are also referred to as Class I, II, or III offences. Class I is the very minor offences such as shoplifting, causing a disturbance and possession of a small amount of illegal substance. Class II offences refer to breaking and entering, uttering of a threat, simple assault and public mischief. Class III is the most serious offences and include sexual offences, murder and culpable homicide. Class I offences are presumptively divertible, Class II, discretionary divertible and Class II is non-divertible.

347 Schneider, Bloom and Heerema *Mental Health Courts* at 88.

348 See Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 5 where it is further stated that, the closer the offence resembles a divertible offence (Class I offence) the more likely it is that the Crown will agree to diversion. Examples include assault where the victim was not a spouse or partner and where no weapon was used.

349 See Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 3 where it is explicitly stated that in Ontario, Class III offences will not be considered for diversion, these are the very serious offences such as murder. Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-47. The person accused of a more serious crime does however have an opportunity to apply for the stay of proceedings even if he is not diverted.

350 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-47. This is the case even if there is a prima facie case against the accused. Also see Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx (Date of use: 20 September 2016) at 6 where it is pointed out that this is the case with participants of the Mental Health Court. Also see Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 5 where the safety of the public, including the victim, is set as the paramount consideration in the decision regarding the stay of proceedings.

351 Some diversion programmes operate on an informal basis. See Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-47 where it is explained that diversion programmes for

programme to a Mental Health Court has been established in Ontario by way of the Crown practice memorandum on diversion duly authorised by the Attorney General of Ontario.[352] It is specifically aimed at mentally disordered accused persons who are fit to stand trial yet mentally ill to such an extent that their condition warrants access to alternatives to prosecution.[353] The practice memorandum specifically states that protocols for diversion to Mental Health Court must be put in place where Mental Health Court support services do exist in the province, which is indeed the case in Ontario.[354]

For this reason and for purposes of this research, the focus of the specific Mental Health Court models employed in Canada will fall on the province of Ontario.

6 THE MENTAL HEALTH COURT MODEL IN CANADA

6.1 Introduction and background

Due to a better understanding of what mental illness is and the availability of new treatment methods,[355] new solutions to the challenges that mental illness brings to the criminal justice system can be explored. One such specialised solution is a Mental Health Court. These courts acknowledge the principle that the criminal behaviour of persons with mental illness is mainly a health issue rather than a criminal law matter.[356] Mental Health Courts offer a

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accused persons with mental illness exist in for example Ontario and British Columbia. Also see Rieksts 2008 *LawNow* 31 at 33 where it is explained that Nova Scotia for example has an adult diversion programme in the absence of a specialised Mental Health Court.

352 Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 1. Also see Schneider *Annotated Ontario Mental Health Statutes* at 678 to 688. These alternative programmes must be authorised by the Attorney General of the particular province. Section 717(1)(a) of the Criminal Code states: "(*a*) the measures are part of a programme of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province;" Diversion to Mental Health Courts is authorised by the Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion*. This practice memorandum is issued by the Ontario Ministry of the Attorney General and Mental Health Courts are thus an approved alternative measure as referred to in section 717 of the Criminal Code. See further Schneider *Annotated Ontario Mental Health Statutes* at 678 to 688.

353 Ontario Ministry of the Attorney General Criminal Law Division Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion at 1. Also see Schneider Annotated Ontario Mental Health Statutes at 678.

354 Ontario Ministry of the Attorney General Criminal Law Division Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion at 3. Also see Schneider Annotated Ontario Mental Health Statutes at 679.

355 This includes a wider variety of medication for mental illness being available. McLachlin B 2010 *Dalhousie Law Journal* 15 at 16, 17.

356 Bakht N "Problem solving courts as agents of change" 2005 (50) *Crim.L.Q* 224-254 at 245. Also see National Judicial Institute *Problem-solving in Canada's courtrooms. A guide to therapeutic justice* at 9. See further Slinger E and Roesch R "Problem-solving courts in Canada: A review and a call for

unique justice process for persons with mental illness.[357] The focus is therapeutic jurisprudence as opposed to retributive justice.

Solutions such as Mental Health Courts contribute to the development of the law in as far as it relates to the mentally ill accused in the criminal justice system because specialised knowledge and skills are applied in these courts [358], and the law has to adjust to incorporate such knowledge and skill.

In essence, Mental Health Courts provide an alternative to normal criminal sanctions by designing and providing unique programmes that focus on the individual's specific mental health care needs.[359] It is a form of diversion where the focus is less on guilt and punishment and more on the treatment of the mental illness.[360] This approach is welcomed, especially since mental illness is the main cause of disability in Canada.[361]

The first official diversion programme for mentally ill accused persons in Ontario was introduced in 1994 [362], and it closely resembled what is now known as Mental Health Courts. The Mental Health Court in Ontario was the first in Canada and one of the first in

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empirically-based evaluation methods" 2010 (33) *International Journal of Law and Psychiatry* 258-264 at 258 who state that the idea of Mental Health Courts confirm the view that criminal behaviour is not always a consequence of choice, but may sometimes be a consequence of circumstance.

357 Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/3392a3b5-43f1-4818-8e8c-45fcb1c15603/diversion_-_a_guide_for_families__final_.pdf.aspx (Date of use: 31 August 2015) at 3.

358 Barrett and Shandler Mental Disorder in Canadian Criminal Law at 1-29.

359 Parliamentary Information and research service *Current issues in Mental Health in Canada* at 4. Also see Rieksts 2008 *LawNow* 31 at 32 where it is stressed that the focus in the Mental Health Court is on the individual as opposed to the overall goal of the criminal justice system, namely, punishment.

360 See Parliamentary Information and research service *Current issues in Mental Health in Canada* at 4 where it is explained that the objective of diversion is to address the "root causes of crime through early intervention". Also see Rieksts 2008 *LawNow* 31 at 32. Also see National Judicial Institute *Problem-solving in Canada's courtrooms. A guide to therapeutic justice* at 9.

361 World Health Organisation. World Health Report: Mental Health: New Understanding, New Hope. http://www.who.int/whr/2001/en/whr01_en.pdf (Date of use: 29 May 2014). In Canada, it is estimated that approximately 20% of society will suffer from a mental illness at some point in their lives. (See McLachlin B 2010 Dalhousie Law Journal 15 at 16 and see Health Canada A report on Mental Illness in Canada at 7. It should be noted that the other 80% of society would not remain unaffected by the fact that 20% of the society has a mental illness. The other 80% of society will be affected directly or indirectly by this fact when a friend, close relative, acquaintance or colleague suffer from a mental illness. See Health Canada A report on Mental Illness in Canada http://www.phac-aspc.gc.ca/publicat/miic-mmac/sum-eng.php (Date of use: 24 July 2012) at 3.

362 Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 107 who explain that the first diversion programme in Canada was set out in the Crown Policy Manual of 1994. Also see Bloom and Schneider *Mental Disorders and the Law* at 102. See further Schneider, Bloom and Heerema *Mental Health Courts* at 34, 103 where it is explained that Mental Health Courts emerged from the model of Drug Courts, the first of which was established in Canada in the mid 1990's.

the world.[363] This court opened its doors on 11 May 1998 and is the only full-time Mental Health Court in Canada.[364] In 2005, there were only two official Mental Health Courts in Canada.[365] Many jurisdictions in Canada are developing diversion programmes for mentally ill accused persons or have pilot projects in place,[366] suggesting that more Mental Health Courts will be established in Canada.

The Toronto Mental Health Court was established because of the rise in the number of mentally ill persons entering the criminal justice system.[367] Other motivators for the establishment of this particular Mental Health Court, was the fact that the mental illness of an accused was not properly considered in the traditional criminal justice system and the fact that there were serious delays in resolving pre-trial issues such as fitness to stand trial, assessment and treatment orders.[368] Diversion was not fully explored by the traditional

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363 Schneider, Bloom and Heerema Mental Health Courts at 97. Also see Slinger and Roesch 2010 International Journal of Law and Psychiatry 258.at 259. This Court's emergence has been attributed to the efforts of the founding judge, Justice Edward (Ted) Ormston. His motto for this Court was "close the book and open your heart". See Heerema 2005 *Crim.L.Q* 255 at 271.

364 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-29 who confirms that the first Mental Health Court in Canada opened its doors in 1998. Also see Toronto Mental Health Court http://www.mentalhealthcourt.ca/pages/2/Overview.htm (Date of use: 21 July 2015) at 1. Also see Bakht 2005 *Crim.L.Q* 224 at 246. Also see Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 259 where it is pointed out that other Mental Health Courts such as the one in New Brunswick, operates on a part-time basis and only sits every second Friday. See further Legal Aid Ontario *http://lawfacts.ca/mental-health/court* (Date of use: 22 September 2016) where it is explained that some Mental Health Courts in Ontario sit every day whilst others sit once or twice a week. Also see National Judicial Institute *Problem-solving in Canada's courtrooms. A guide to therapeutic justice* at 7 where it is confirmed that the Mental Health Court in Toronto opened its doors in 1998 and was the first of its kind in Canada.

365 Heerema 2005 *Crim.L.Q* 255 at 280. See also Legal Aid Ontario *http://lawfacts.ca/mental-health/court* (Date of use: 22 September 2016) where it is pointed out that not all courts that perform the function of a Mental Health Court, is known as a Mental Health Court, they sometimes operate under a different name.

366 Schneider, Bloom and Heerema *Mental Health Courts* at 107. Some of these projects are formal whilst others are informal diversion programmes. Also see Ministry of Health and Long-term Care http://www.health.gov.on.ca/en/common/ministry/publications/reports/mentalhealth/framework.pdf (Date of use: 26 August 2015) at 3.

367 The rise in numbers is discussed in chapter 2 of this research where the emergence of Mental Health Courts in Canada is discussed in more detail. Also see Ministry of Health and Long-term Care http://www.health.gov.on.ca/en/common/ministry/publications/reports/mentalhealth/framework.pdf (Date of use: 26 August 2015) at 4.

368 Van de Veen S L "Some Canadian Problem Solving Court Processes" paper presented at the Canadian Association of Provincial Court Judges Pre-Institute Conference, September 2003, St John's, Newfoundland National Judicial Institute 2003. Also available at http://www.aija.org.au/TherapJurisp06/Papers/VandeVeen2D.pdf at 19. It is stated that many cases of persons with mental illness, do not belong in the criminal justice system to start with and this view was part of the impetus behind establishing the Toronto Mental Health Court. Also see Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 260 who confirms that the concerns regarding delays in finalising pre-trial issues was a big force behind the establishment of the Toronto Mental Health Court and that it is in fact one of the goals of the court to reduce such delays. Also

criminal court. The Toronto Mental Health Court in Ontario was established to address these and other issues.

The Toronto Mental Health Court has a comprehensive mandate illustrated by the goals of the Mental Health Court discussed below.

6.2 *Goals of the Mental Health Court in Canada*

The main objective of Mental Health Courts is to divert the mentally ill away from the criminal justice system and to reroute these individuals to the mental health care system.[369] Mental Health Courts are specially designed to address the needs of mentally ill accused persons and aim to balance the needs of the mentally ill accused and public safety.[370]

Every Mental Health Court sets its own goals because the establishment of these courts are informed by the specific needs of the community that the Mental Health Court serves.[371] The specific goals of the Mental Health Court in Toronto form the basis of the discussion of the goals of a Mental Health Court in Canada. Having said that, the description of the goals and features of Ottowa Mental Health Court as explained by the Chief Justice of the Ontario Court of Justice, at the opening of this Mental Health Court, resonated with the goals of the Toronto Mental Health Court and was explained as follows:

> The Ottawa Mental Health Court is an example of a progressive movement within criminal justice systems in North America and elsewhere in the world to create "problem solving courts". These courts, with collaborative interdisciplinary teams of professionals and community agencies, attempt to identify and to deal with some of the underlying factors contributing to criminal activity, which have often not been very well-addressed by the

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see Toronto Mental Health Court http://www.mentalhealthcourt.ca/pages/2/Overview.htm (Date of use: 21 July 2015) at 1. Also see Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 260.

369 Parliamentary Information and research service *Current issues in Mental Health in Canada* at 4. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 34. See further Rieksts 2008 *LawNow* 31 at 31-33 where it is explained that some jurisdictions have separate diversion programmes for mentally ill accused persons that do not take the form of a specialised court. This is the case in Nova Scotia for example.

370 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-29. Also see Rieksts 2008 *LawNow* 31 at 31, 32 who is of the view that if the mental health issues of accused persons are not addressed, the objective of serving the public interest, is not achieved.

371 The Mental Health Court in St Johns, New Brunswick, for example, set its specific goals as follows: i) To offer an effective mechanism for dealing with those with a mental disability who are involved in the criminal justice, system; ii) To provide accused with the least restrictive intervention or treatment; iii) To protect the rights of the accused and society and the integrity of the justice system; and iv) To hold those accused accountable for their actions. See *Heerema 2005 Crim.L.Q 255* at 273. See further Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 260 where it is pointed out that the goals of a specific Mental Health Court depends on, *inter alia,* the resources available in that particular community.

conventional criminal justice process. The goal is to satisfy the traditional criminal law function of protection of the public by addressing in individual cases the real rather than the apparent causes that lead to conflict with the law.[372]

Mental Health Courts serve to bridge the gap between the criminal justice system and the mental health care system to prevent those that encounter both systems from falling between the cracks of these two systems. Mental Health Courts attempt to enhance the cooperation of the two systems with each other.[373]

The two primary goals of the Toronto Mental Health Court are to expedite the finalisation of pre-trial issues, in particular, fitness to stand trial and to reduce recidivism.[374] Assessments for fitness to stand trial should be dealt with expeditiously in the criminal justice system. According to the Criminal Code, the default period for conducting a fitness assessment is five days.[375] Delays in fitness assessments in the traditional criminal justice system are, however, rife. Mental Health Courts manage through on-site assessments to expedite fitness assessments. Before this court came into operation, accused persons had to wait for long periods in prison before the issue of fitness to stand trial was heard.[376] This

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372 McLachlin B 2010 *Dalhousie Law Journal* 15 at 26. Also see Rieksts 2008 *LawNow* 31 at 31 who agrees that the criminal courts are not equipped to identify and deal with mental health issues of accused persons. This means that the underlying cause of criminal behaviour in these instances, namely mental illness, is not addressed and the primary objective of the criminal justice system to address the public safety, is not achieved.

373 Heerema 2005 *Crim.L.Q* 255 at 263. Also see Rieksts 2008 *LawNow* 31 at 32.

374 Schneider*, Bloom and Heerema Mental Health Courts* at 92, 97. Also see Toronto Mental Health Court http://www.mentalhealthcourt.ca/pages/2/Overview.htm (Date of use: 21 July 2015) at 1 where it is stated that the primary objectives of the Toronto Mental Health court is to address pre-trial issues of mentally ill accused persons and to slow down the revolving door phenomenon (The movement of mentally ill accused persons in and out of the criminal justice system, is referred to as the "revolving door" principle). This is confirmed in National Judicial Institute *Problem-solving in Canada's courtrooms. A guide to therapeutic justice* at 10. Also see Van de Veen "Some Canadian Problem Solving Court Processes" at 19 where it is pointed out that the function of assessing accused persons for fitness to stand trial was initially aimed at those accused persons in custody and whose fitness were in issue. Also see Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 260. Also see Rieksts 2008 *LawNow* 31 at 32. Schneider who was one of the first Mental Health Court judges, explained that the primary objective of this particular Mental Health Court was to deal expeditiously with issues of fitness to stand trial. A further goals of the Toronto Mental Health Court, is to put people with mental illness into the hands of the mental health care system and to reduce the criminalisation of people with mental disabilities. See Schneider*, Bloom and Heerema Mental Health Courts* at 92, 97. Also see *Heerema 2005 Crim.L.Q 255* at footnote 39, 263 and footnote 81, 271. Also see Rieksts 2008 *LawNow* 31 at 32. Also see National Judicial Institute *Problem-solving in Canada's courtrooms. A guide to therapeutic justice* at 7 where it is confirmed that the Mental Health Court in Toronto is characterised by the fact that it focusses in expediting pre-trial issues such as fitness assessments.. See further Ryan & Whelan 2012 (1) *Web Journal of Current Legal Issues* 1 at 8.

375 Section 672.14(1) of the Criminal Code. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-5.

376 Heerema 2005 *Crim.L.Q* 255 at 271 indicates that accused persons had to wait up to two weeks. See however Schneider, Bloom and Heerema *Mental Health Courts* at 52, 53 who estimate that mentally ill accused had to wait up to four weeks in jail before they were assessed for fitness to

resulted in mentally ill accused spending more pre-trial days in custody than accused who did not present with mental health issues.[377]

The goal to reduce recidivism of mentally ill accused persons [378] is achieved by, *inter alia,* providing assistance to the mentally ill accused after completion of the court programme through its court workers [379] to obtain the social assistance that he needs, including connection with a mental health facility.[380]

It is a secondary objective of the Toronto Mental Health Court to process cases of those in respect of whose fitness to stand trial is not at issue but who wish to enter a plea of not criminally responsible.[381] The full trial on the issue of criminal responsibility, especially if such plea is contested, is, however, conducted in the criminal court unless the parties agree to proceed with the trial in the Mental Health Court.[382] Parties would opt for a trial in the Mental Health Court because of the specialised knowledge that the staff of this court have to offer. Many accused enter the Mental Health Court in Toronto because they want to plead guilty or bring a bail application with the specialised assistance of the Mental Health Court personnel.[383] The Mental Health Court provides assistance with these cases as part of the non-diversion component of its mandate.

The goals of the Mental Health Court are achieved through implementing therapeutic jurisprudence in the procedures that it employs. Therapeutic jurisprudence is one of the

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stand trial. These waiting periods are much longer in the South African context, anything from three months to two years. See the discussion of the challenges in the South African forensic setting as discussed in chapter 2 of this research and the procedural challenges that contribute to the delays as discussed in chapter 3 of this research.

377 Schneider, Bloom and Heerema *Mental Health Courts* at 92, 97.

378 Schneider, Bloom and Heerema *Mental Health Courts* at 97. Also referred to as the "revolving door" principle as explained above. Also see Rieksts 2008 *LawNow* 31 at 32.

379 Also referred to as "court support workers". See Schneider, Bloom and Heerema *Mental Health Courts* at 119-121 for a list of duties entrusted to the court support worker, including consultation with the participant and his family and providing information about community resources. Also see Centre for addiction and mental health Evidence Summary: Mental Health Diversion Framework in Canada April 2014 at 4 where the court workers are described as "navigators of the legal system" since they help to connect the mentally ill with the available resources.

380 Schneider, Bloom and Heerema Mental Health Courts at 6, 98.

381 Schneider, Bloom and Heerema Mental Health Courts at 6, 98. These cases may include persons whose fitness has been restored and who now wish to raise the insanity plea. See Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 251 who explains that 12% of persons who eventually succeeds with the insanity plea was found unfit to stand trial at some point prior in the proceedings.

382 Schneider, Bloom and Heerema Mental Health Courts at 6 and further at 99,102.

383 The Mental Health Court assists those who do not qualify for the diversion component of the court in various ways. For more on this support, see Toronto Mental Health Court "Overview of the Court" available at http://www.mentalhealthcourt.ca/pages/2/Overview.htm (date of use 21 July 2015) at 1. Also see Schneider, Bloom and Heerema Mental Health Courts at 6 and further a 98, 99.

underlying principles of the Mental Health Court.

6.3 *Underlying principles of the Mental Health Court model in Canada*

Since there is no set model for a Mental Health Court, there is no *recipe* for a successful Mental Health Court.[384] What Mental Health Courts in a particular jurisdiction, however, have in common is their underlying principles. The following have been identified as underlying principles in various Mental Health Courts across Canada, including the Toronto Mental Health Court.

6.3.1 Therapeutic jurisprudence

Mental Health Courts see therapeutic jurisprudence as a way to use the law as a force to secure constructive rehabilitative outcomes.[385] Mental Health Courts ultimately subscribe to the belief that some criminal acts are seen as manifestations of treatable conditions.[386] These courts are treatment orientated and focus on the future welfare of the accused.[387] The focus on treatment enables the court to implement therapeutic jurisprudence in ways that can uniquely contribute to the court's aim to achieve therapeutic outcomes.

What sets this court apart from traditional criminal courts, from a therapeutic perspective, is the atmosphere in the court.[388] The manner in which the judicial officers conduct themselves can contribute enormously to the therapeutic outcomes of the court process. A sense of dignity and respect for the accused is fostered. The accused is addressed by his first name, and all attempts are made to humanise their experience of the specialised court.[389] In the Toronto Mental Health Court, the judicial officers conduct the processes in a

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384 This is one of the major differences between the Mental Health Court and the Drug Court model. The latter has fixed procedures in place. With Mental Health Courts, courts often differ with regard to procedure and even goals, depending on the objectives that the particular court chose to focus on. See Rieksts 2008 *LawNow* 31 at 33 where it is stated that the general outline of Mental Health Court models are similar even though they might differ with regard to procedure and policies. Also see Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 260 where it is confirmed that there is no "blueprint" for a Mental Health Court and that the concept in each region is guided by, for example, the available resources in the specific area.

385 Rieksts 2008 *LawNow* 31 at 32.

386 Heerema 2005 *Crim.L.Q* 255 at 279.

387 This focus is evident from the follow up programmes that Mental Health Courts often have to ensure that the accused does not re-offend. See Heerema 2005 *Crim.L.Q* 255 at 279.

388 Schneider, Bloom and Heerema *Mental Health Courts* at 7. Also see this source at 19 where it is stated that a health orientated atmosphere exists at the Toronto Mental Health Court. Also see Bakht 2005 *Crim.L.Q* 224 at 246.

389 Schneider, Bloom and Heerema *Mental Health Courts* at 53. Also see Bakht 2005 *Crim.L.Q* 224 at 247 who explains that the rules of evidence and procedure at the Toronto Mental Health Court are relaxed which contributes to a non-adversarial atmosphere at the court.

more informal manner and in a conversational tone.[390] This contributes to the more relaxed and non-adversarial atmosphere, which encourages the mentally disordered accused to participate fully in the proceedings.[391] This is in stark contrast to the adversarial style subscribed to in criminal court, where the accused is often the object of the process and not the subject of restorative justice.

One of the goals of therapeutic jurisprudence is to benefit the accused by addressing mental illness as the underlying cause of criminal behaviour.[392] This is achieved through court-monitored rehabilitation programmes and the involvement of a multi-disciplinary team at the Mental Health Court.[393]

6.3.2 Voluntary participation

In Toronto, diversion and participation in the Mental Health Court are voluntary,[394] and for this reason, the court support worker for the diversion obtains consent from the participant for such participation.[395]

An accused may opt-out of the Mental Health Court process at any point in time without being penalised for doing so, except during the parts of the process for which his consent is

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390 Schneider, Bloom and Heerema *Mental Health Courts* at 53. Also see Legal Aid Ontario http://lawfacts.ca/mental-health/court (Date of use: 22 September 2016) where it is stated that Mental Health Courts are generally less formal than traditional courts.

391 Bakht 2005 *Crim.L.Q* 224 at 247. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 53. Also see National Judicial Institute *Problem-solving in Canada's courtrooms. A guide to therapeutic justice* at 10 where the non-adversarial nature of Mental Health Courts are confirmed. For more on the atmosphere in the court, see further Van de Veen "Some Canadian Problem Solving Court Processes" at 19. Also see Heerema 2005 *Crim.L.Q* 255 at 278 who stresses the fact that Mental Health Courts should not feel like normal court to the participant as that would completely defeat the therapeutic purpose of the court.

392 National Judicial Institute Problem-solving in Canada's courtrooms. A guide to therapeutic justice at 10.

393 Rieksts 2008 *LawNow* 31 at 32.

394 Schneider, Bloom and Heerema *Mental Health Courts* at 6, 100. Also see Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 259, 261 who also state that most diversions in other jurisdictions in Canada are voluntary. This is a prescribed requirement for diversion of the mentally ill accused as set out in Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 6.

395 Section 717(1)(c) of the Criminal Code sets as a requirement for any alternative measure to be used, that the accused must consent freely to such alternative measure. Section 717(2) states that an accused person who expresses the wish to have his case dealt with by the court, shall not be subjected to alternative measures. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 120, 121 for a list of duties of the court support worker, one of which is to obtain consent from the participant. The court support worker is involved throughout the criminal justice system, from consulting with the Crown or defence attorneys about the diversion of a potential client, to developing a sentencing plan or a bail release plan.

not required.[396] The accused's consent is not required to conduct an official fitness assessment.[397] The accused's consent is further not required where the accused is subjected to treatment as part of a treatment order, aimed at rendering him fit to stand trial and as provided for in the Criminal Code.[398] Except for these parts of the assessment process, the accused can opt out of the Mental Health Court at any time. His case would then revert to the criminal court for a traditional hearing.

6.3.3 Multi-disciplinary court team

The collaborative and multidisciplinary team approach acknowledges that specialised skills in the field of mental health can assist the criminal justice system to identify and deal with the mental health issues of accused persons.[399] The multi-disciplinary team in Mental Health Courts consists of lawyers, the judge, probation officers, a psychiatrist, a psychologist, mental health nurse(s) and a caregiver(s) [400] , all with special training and/or extensive experience in the field of mental health. [401]

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396 Schneider, Bloom and Heerema *Mental Health Courts* at 6 and further at 88, 89 where it is pointed out that the position in the New Brunswick Mental Health Court is exactly the same. In order for an accused to gain access to the Mental Health Court programme in the first place, he has to acknowledge his involvement in the crime that he is accused of. The fact that the accused initially accepted responsibility for the act or omission accused of in order to gain access to the alternative measure in the form of the diversion program, is not admissible in the criminal proceedings in the criminal court to which the accused's case reverts in the event that he opts out of the Mental Health Court programme. See section 717(3) of the Criminal Code.

397 Schneider, Bloom and Heerema *Mental Health Courts* at 6, 92, 100. One of the motivations for insisting that the mentally ill accused has legal representation during this stage of the proceedings, is probably because this part of the proceedings in the Mental Health Court is not voluntary and the accused hence needs to be legally represented to protect his rights. They point out further that this is one of the major differences between Canadian Mental Health Courts and those in North America. Also see Ryan & Whelan 2012 *Web Journal of Current Legal Issues* 1 at 8 where it is confirmed that the actual fitness assessment is not voluntary and the accused's consent is not required, nor can he opt out at this point.

398 Schneider, Bloom and Heerema *Mental Health Courts* at 6, 79, 100. Also see section 672.58 of the Criminal Code that provides for a court to make a treatment order that lasts for a maximum of 60 days in order to render the accused fit to stand trial.

399 Rieksts 2008 *LawNow* 31 at 32. Accused persons benefit from therapy, education and care provided by the mental health care workers that form part of the multidisciplinary team. Also see Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx (Date of use: 20 September 2016) at 6 where the collaborative and non-adversarial approach of the team in the Mental Health Court is emphasised.

400 Heerema 2005 *Crim.L.Q* 255 at 273. Also see Van de Veen "Some Canadian Problem Solving Court Processes" at 20.

401 Heerema 2005 *Crim.L.Q* 255 at 265. Also see Rieksts 2008 *LawNow* 31 at 32. See further Schneider, Bloom and Heerema *Mental Health Courts* at 7 who opine that a professional from either the legal or mental health fields should only become involved in the Mental Health Court if he is philosophically orientated to a therapeutic outcome for the mentally ill accused. The profiles of the judge and other members of the team should convey the specialised skills needed for this type of

Two permanent Crown attorneys and two duty counsel staff the Toronto Mental Health Court.[402] Nine social workers serve as mental health workers.[403] A psychiatrist attends court daily to perform assessments and is involved in diversion programmes housed in the court.[404] The court support workers consisting of the administrative staff and court clerks are a crucial part of the Mental Health Court team as they meet face to face with court participants or potential participants for initial screening of fitness to stand trial, consult with the legal representatives, and draw up sentencing plans and bail release plans.[405] They also liaise with community services to link the mentally ill accused with community-based treatment.[406]

The aim of the multi-disciplinary team is to collectively draft a unique treatment plan that will best address the particular individual's needs and challenges.[407] Two very important traits that this team as a unit should have is perseverance and dedication as they often work in difficult circumstances with patience-trying accused persons within the criminal justice system.[408]

The Toronto Mental Health Court has offices next to the court to provide space for the mental health workers, psychiatrists, and duty counsel to perform their duties within close proximity to the court.[409] This Mental Health Court has its own holding cells so that mentally

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court. Also see National Judicial Institute *Problem-solving in Canada's courtrooms. A guide to therapeutic justice* at 10.

402 Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 1 explains that Duty Counsel is a legal representative paid by the state and is present in most courts.

403 See Van de Veen "Some Canadian Problem Solving Court Processes" at 21 where it is explained that the social workers are Mental Health Court workers with special knowledge of the mental health care system. They assist the accused with referral to the most appropriate agency and assist with logistics such as securing an appointment. Also see Bakht 2005 *Crim.L.Q* 224 at 247.

404 Toronto Mental Health Court http://www.mentalhealthcourt.ca/pages/2/Overview.htm (Date of use: 21 July 2015) at 1. Also see Court, Simpson and Webster 2014 *Psychiatry, Psychology and Law* 918 at 931 where it is explained that the Law and Mental Health Program in Canada deployed psychiatrists to the Mental Health Court and other courts on a daily basis to either conduct assessments or give testimony at trials. See further Legal Aid Ontario *http://lawfacts.ca/mental-health/court* (Date of use: 22 September 2016) where it is pointed out that not all Mental Health Court in Canada has a psychiatrist on site as it is especially rare in smaller communities.

405 Schneider, Bloom and Heerema Mental Health Courts 120, 121.

406 National Judicial Institute Problem-solving in Canada's courtrooms. A guide to therapeutic justice at 10. Also see Schneider, Bloom and Heerema Mental Health Courts 120, 121.

407 Schneider, Bloom and Heerema *Mental Health Courts* 6. Also see Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 6 where it is pointed out that a pure medical approach is not necessarily the best for all mentally ill individuals. A pure medical approach entails taking of medication and/or undergoing psychiatric care. Some persons may require additional social assistance such as housing.

408 Heerema 2005 *Crim.L.Q* 255 at 277.

409 Bakht 2005 *Crim.L.Q* 224 at 246. The psychiatrists are available at the Toronto Mental Health Court

ill accused persons can be kept close by but still safe. Such holding cells at the court itself also address public safety concerns.[410]

Diversion of the mentally ill accused requires multi-system coordination.[411] The diversion component of the Ontario Mental Health Court, similarly, relies strongly on the existence and strength of the resource pool from which the court can draw for its rehabilitation programmes. Where the diversion includes that the accused must attend a psychiatric facility or clinic, such facility or clinic must confirm that it is able to provide the specific service and that it can commence with the necessary treatment soon.[412] Framework documents have been drafted to explain the role of various stakeholders in an attempt that the clarity that such documents bring will strengthen the collaboration between the various service providers.[413]

The goals and underlying principles of Mental Health Courts set out above lay the foundation for the discussion of the procedural dynamics of the Mental Health Court. The procedural dynamics of the Mental Health Court are discussed below.

7 PROCEDURAL DYNAMICS OF A MENTAL HEALTH COURT IN CANADA

7.1 Introduction

Few publications have been produced on the procedure followed in the Canadian Mental Health Courts,[414] and the researcher had to source this information from informal, often secondary sources.

Diversion in Canada is reserved for non-violent offences, but the Mental Health Court is not

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five days a week.

410 Toronto Mental Health Court http://www.mentalhealthcourt.ca/pages/2/Overview.htm (Date of use: 21 July 2015) at 1. Also see Bakht 2005 *Crim.L.Q* 224 at 246.

411 Centre for addiction and mental health http://eenet.ca/wp-content/uploads/2014/04/Mental-Health-Diversion-Policy-Frameworks_April2014-Final.pdf (Date of use: 12 August 2016) at 3. The Mental Health Court is only as strong and efficient as its support services.

412 Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 6 where such confirmation is set as a pre-requisite for diversion into a treatment program. Also see Heerema 2005 *Crim.L.Q* 255 at 277. Also see Court, Simpson and Webster 2014 *Psychiatry, Psychology and Law* 918 at 931 that stresses the importance of collaboration between all the service providers involved in the forensic mental health care setting and that such collaboration becomes even more important when resources are strained. The resources must be able to cater for all the types of services that those that come before the Mental Health Court might need, for example counselling, substance abuse, crisis intervention programmes, relationship counselling, assistance for housing and basic needs and assistance for acquiring social assistance.

413 Ministry of Health and Long-term Care *A Program Framework for: Mental Health Diversion* at 4.

414 Slinger and Roesch 2010 International Journal of Law and Psychiatry 258 at 261.

barred from providing assistance, other than a diversion programme, to those accused persons who do not qualify for such diversion due to, for example, the seriousness of the offence. Some Mental Health Courts only deal with fitness assessments whilst others also consider bail hearings and finalise the cases of those who enter a guilty plea.[415] The Toronto Mental Health Court is one of the Mental Health Courts that consider bail hearings and provide assistance to those who do not necessarily qualify for the diversion component of the Mental Health Court. Procedural rules are often relaxed to facilitate the meaningful participation of the mentally ill accused in the Mental Health Court process.[416] The Mental Health Court, as such, is thus not a diversion programme, but it offers a diversion component within its framework.[417]

The discussion that follows explores the junctures at which accused persons are referred to the Mental Health Court and the different phases of the Mental Health Court process. The manner in which the court assists those accused persons who do not qualify for the diversion component of the Mental Health Court is discussed after the exposition of the different phases in the Mental Health Court process.

7.2 *Referral to a Mental Health Court*

Referral to the Mental Health Court can occur at any stage of the criminal proceedings and can be requested by any party to the proceedings as soon as it becomes clear that there is a mental health issue. The pre-requisite for a referral at any stage is that the accused indicates his willingness to participate in the Mental Health Court process.[418]

Referral to the Mental Health Court is voluntary, and an accused may withdraw from the referral at any time prior to him entering the programme phase of the Mental Health Court proceedings.[419] The individual has to be willing to accept responsibility for his part in the

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415 See also Legal Aid Ontario *http://lawfacts.ca/mental-health/court* (Date of use: 22 September 2016).

416 National Judicial Institute Problem-solving in Canada's courtrooms. A guide to therapeutic justice at 10.

417 Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/3392a3b5-43f1-4818-8e8c-45fcb1c15603/diversion_-_a_guide_for_families__final_.pdf.aspx (Date of use: 31 August 2015) at 3 that states that Mental Health Courts are about more than diversion, it offers a unique justice process for persons with mental illness.

418 Rieksts 2008 *LawNow* 31 at 33. Also see Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 6 who explains that the Crown may suggest diversion but that it is mostly the defence attorney who suggests diversion and shows why the accused is eligible for it.

419 Rieksts 2008 *LawNow* 31 at 33. The only exception to the rule prior to the programme phase, is that

criminal act that he stands accused of [420] and must be willing to participate and cooperate with the Mental Health Court team. Whether diversion to a Mental Health Court is appropriate in a particular case is within the complete discretion of the Crown.[421]

There are generally two phases in the Mental Health Court, namely the admission phase and the programme phase.[422] The eligibility criteria for each of these phases may differ. The remainder of the discussion on the Mental Health Court procedure will be dealt with under these two separate phases.

7.3 *Admission phase*

The admission phase starts with the referral of the accused by the criminal court to the Mental Health Court.[423] The trial court (criminal court) may, for example, refer the accused to the Mental Health Court for an assessment of fitness to stand trial.[424] The Mental Health Court can deal with all issues of fitness to stand trial in the admission phase, regardless of

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the accused cannot opt out of the Mental Health Court if the fitness assessment is in progress as his consent is not required for this part of the process. See Schneider, Bloom and Heerema *Mental Health Courts* at 6.

420 This requirement is in line with section 717(1)(e) of the Criminal Code that sets the acceptance of responsibility for the act or omission of accused of, as a requirement to participate in an alternative measure such as a diversion program. If the accused is not capable of acknowledging his involvement as requested, he will not be referred to the Mental Health Court.

421 Schneider, Bloom and Heerema *Mental Health Courts* at 6 and further at 88. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-47 where it is pointed out that this is an important part of the Crown's prosecutorial discretion. Also se Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion at 6* where this discretion is confirmed and where factors to be taken into account when exercising this discretion is discussed. These include, the need to maintain public confidence in the administration of justice; public safety, including the potential harm to the public posed by the offender's non-compliance with supervision or treatment; the relative seriousness of the alleged offence (including considerations of the injury to victims and the number of victims); the victim's views and any information regarding victim impact, including a victim impact statement; the offender's criminal record, including withdrawals, stays, outstanding charges, and prior diversions; any prior psychiatric record; current mental status and any current psychiatric assessment; in jurisdictions where there are Mental Health Court support workers, the likelihood of compliance with any direction or plan suggested by the worker; information from, and views of, the immediate family, substitute decision-maker and/or institutional care-giver; frailties in the prosecution, e.g. staleness, technical nature of offence; whether the consequences of the prosecution would be unduly harsh to the offender, the victim or witnesses in the case, owing to factors such as age, health or relationship to other parties in the case. Also see Legal Aid Ontario http://lawfacts.ca/mental-health/court (Date of use: 22 September 2016) who points out that it is not the judge that decides if a case will be diverted or not, but the Crown.

422 Rieksts 2008 *LawNow* 31 at 33.

423 Rieksts 2008 *LawNow* 31 at 33.

424 Schneider, Bloom and Heerema *Mental Health Courts* at 6, 90. A court may only refer an accused for an assessment for fitness to stand trial if reasonable grounds exist that the accused is unable to follow the proceedings or is unable to instruct counsel in such a way as to properly conduct his defence. See the discussion earlier in this chapter of what would constitute reasonable grounds for referral to a fitness assessment.

the seriousness of the offence [425] , since this phase is not the diversion component of the Mental Health Court which diversion is reserved for those accused of less serious offences.

The admission phase is the first phase in the Mental Health Court process, during which it is determined whether the accused is eligible for the programme phase.[426] The admission phase itself consists of four stages, namely: presentation, eligibility, compliance and acceptance.[427] The various stages and what they entail are discussed below.

7.3.1 Presentation stage

Presentation refers to the accused's first appearance in the Mental Health Court after his referral from the criminal court. The accused is provided with legal representation upon his first appearance in the Mental Health Court [428]

It can be confirmed at the presentation stage that the accused must undergo a fitness assessment, as fitness is a non-negotiable requirement for admission to the programme phase.[429] Accused persons charged with violent crimes who will not qualify for the programme phase of the Mental Health Court may still be referred to the Mental Health Court for a fitness assessment/determination. The assessment may be the only function that the Mental Health Court is required to fulfil in such a case.

As mentioned earlier, one of the primary goals of the Mental Health Court is to expedite fitness assessments. The Mental Health Court's ability to expedite the evaluation is due to the multidisciplinary court team that is available at the Mental Health Court. The Mental Health Court hears all matters referred to it by the trial court on the same day, and the fitness assessment is conducted on that same day.[430] Psychiatrists work in this court every

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425 Schneider, Bloom and Heerema *Mental Health Courts* at 88. This is also the case with the Nova Scotia Mental Health Court. See Rieksts 2008 *LawNow* 31 at 33. Also see Rieksts 2008 *LawNow* 31 at 33.

426 Rieksts 2008 *LawNow* 31 at 33.

427 Rieksts 2008 *LawNow* 31 at 33.

428 This is also referred to as "presentation" of the accused to the Mental Health Court. See Rieksts 2008 *LawNow* 31 at 33. The legal representative appointed is usually a member of the Mental Health Court team who provides information about the Mental Health Court programmes and provides legal advice. The accused may also elect to make use of private counsel as long as continuity of the involvement of such private counsel can be confirmed.

429 Rieksts 2008 *LawNow* 31 at 33, 34.

430 Bakht 2005 *Crim.L.Q* 224 at 247. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 97. See further Van de Veen "Some Canadian Problem Solving Court Processes" at 20. See National Judicial Institute *Problem-solving in Canada's courtrooms. A guide to therapeutic justice* at 10 where it is explained that in the Toronto Mental Health Court the multi-disciplinary team consisting of a forensic psychiatrists, on-site duty counsel, court workers, and social workers are available to assess the fitness of the accused to stand trial immediately, thus eliminating delays in treatment that

day and assist with the assessment during the first court appearance.[431] A fitness assessment is conducted, either by the Mental Health Court itself or by another agency on the Mental Health Courts request. If the Mental Health Court is of the view that, after the initial screening during the accused's appearance in the Mental Health Court, further assessment is required, the Mental Health Court team conducts a stand-down assessment that naturally takes longer.[432]

If an accused is found fit to stand trial during the presentation stage, the proceedings continue to the next stage in the Mental Health Court. The second stage of the admission phase considers the eligibility criteria for the specific Mental Health Court programme.

7.3.2 Eligibility stage

The second stage of the admission phase concentrates on assessing the accused's eligibility for the programme phase (the diversion component) of the Mental Health Court. The eligibility criteria for each specific Mental Health Court programme may differ from one court to another depending on the nature of the programme offered.[433]

The Canadian Mental Health Court still accommodates any accused person with a mental illness at this stage in the proceedings, regardless of the seriousness of the offence. Only those accused persons who committed non-violent offences are, however, allowed into the diversion programme offered in the Mental Health Court, which forms part of the

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can have detrimental effects on the mentally ill offender. Also see Ryan & Whelan 2012 *Web Journal of Current Legal Issues* 1 at 8 who points out that the same-day assessments is probably possible because the Toronto Mental Health Court is a full time Mental Health Court that means that it has forensic psychiatrists available on its premises on a daily basis.

431 Schneider, Bloom and Heerema *Mental Health Courts* at 97.

432 Schneider, Bloom and Heerema *Mental Health Courts* at 97. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-5 who explains that even though fitness can be determined in a short time, there are instances in which a longer period is required to establish fitness with certainty. Also see Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 10 where it is stated that the court may also be requested to make an order in terms of sections 21 or 22 of the Ontario Mental Health Act for the assessment of the accused in order to determine his appropriateness for diversion due to mental illness. Where an accused is sent to a psychiatric facility for such an assessment or for assessment for fitness to stand trial, such an order is accompanied by a Form 8 in terms of the Ontario Mental Health Act to provide for the transport and admission of the accused to the psychiatric facility.

433 Parliamentary Information and research service *Current issues in Mental Health in Canada* at 4. Also see Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 260. See further Legal Aid Ontario http://lawfacts.ca/mental-health/court (Date of use: 22 September 2016).

programme phase (the second phase) of the Mental Health Court.[434]

The eligibility criteria for the Toronto Mental Health Court diversion programme is that the accused must be fit to stand trial,[435] must admit his involvement in the alleged offence,[436] and must voluntarily consent to participate in the alternative programme.[437] These requirements are in line with the provisions in the Criminal Code that provides for alternative sentencing methods. Referral to such an alternative method, Mental Health Courts, in this case, will only be allowed if there is sufficient evidence to link the accused to the crime that he is charged with.[438]

The eligibility criteria for the Toronto Mental Health Court can be divided into the mental health criteria and the legal criteria, although these are not specifically labelled as such in the literature consulted.

7.3.2.1 Mental health criteria

As stated above, the accused must be fit to stand trial. The accused must, however, have a mental illness but must be capable of making a voluntary choice to participate in the Mental Health Court programme.[439] The degree of mental illness required for acceptance into the Canadian Mental Health Court programme varies from court to court. Some require a formal diagnosis, whilst others do not.[440] Although mental illness is a primary requirement for diversion into a court-monitored mental health programme, not all persons suffering from a mental illness will qualify for diversion [441] since Mental Health Courts support a holistic approach.[442]

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434 Schneider, Bloom and Heerema *Mental Health Courts* at 100.

435 An admission requirement for any Mental Health Court programme is that the accused must be fit to stand trial. See Rieksts 2008 *LawNow* 31 at 34. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 127-129 where a modified fitness test is proposed that mental health care professionals could use to assess the accused's fitness at the Mental Health Court.

436 An admission of involvement cannot be used against the accused if criminal proceedings does commence at a later stage. Section 7171(1)(3) of the Criminal Code. Also see Coughlan *Criminal Procedure* at 281.

437 Section 717(1) (c), (d) and (e) of the Criminal Code. Also see Coughlan *Criminal Procedure* at 281. Also see Rieksts 2008 *LawNow* 31 at 33 where it is explained that the consent to participate in such alternative programme, includes consent to mental health treatment and admission that treatment for the mental illness is necessary. See further Rieksts 2008 *LawNow* 31 at 34.

438 See the general discussion on diversion in Canada earlier in this chapter. Also see the provisions of section 717 of the Criminal Code where alternative sentencing methods are discussed.

439 Heerema 2005 Crim.L.Q 255 at 264.

440 Heerema 2005 *Crim.L.Q* 255 at 265.

441 Parliamentary Information and research service *Current issues in Mental Health in Canada* at 4.

442 Parliamentary Information and research service *Current issues in Mental Health in Canada* at 4.

If an accused is not fit to stand trial, the accused's case is referred back to the criminal court for the proceedings in that court to take their course.[443] An unfit accused does not qualify for the second phase of the Mental Health Court process. The Mental Health Court may make a treatment order in terms of the provisions of the Criminal Code for the accused to become fit to stand trial.[444] Where the accused is still unfit after such treatment period, the case of the accused will revert to the criminal court where the Review Board has jurisdiction to order an appropriate disposition in respect of such an accused in line with the provisions of the criminal code.[445] The Mental Health Court may be requested to assist the Review Board with the determination of an appropriate disposition.

7.3.2.2 Legal criteria

Diversion into a court-monitored diversion programme in Canada can generally be accomplished where the offence is of a minor nature and does not involve violence.[446] Serious offences will not trigger diversion in Ontario.[447] The practice memorandum states that offences such as murder, sexual offences, kidnapping, child abuse, and offences involving firearms are not eligible for diversion regardless of the circumstances of the accused.[448] Admission into the Mental Health Court treatment programmes as the second phase of the Mental Health Court proceedings is, therefore, reserved for those charged with

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443 Rieksts 2008 *LawNow* 31 at 34.

444 Schneider, Bloom and Heerema *Mental Health Courts* at 97. Also see section 672.58 of the Criminal Code that provides for a court to make a treatment order that lasts for a maximum of 60 days in order to render the accused fit to stand trial. This is known as a "get fit" order. Such treatment order may also be requested by the Crown.

445 The dispositions that may be made are set out in section 672.54 of the Criminal Code. A permanent stay of proceedings may be ordered if the court or Review Board is of the opinion that the accused is permanently unfit to stand trial. Also see Rieksts 2008 *LawNow* 31 at 33.

446 Schneider, Bloom and Heerema *Mental Health Courts* at 34, 35. Other requirements for diversion are that the safety of the public must not be compromised by the diversion; his mental disorder must be amenable to treatment and the proposed mental health care facility or practitioner must agree to accept the individual for treatment. Also see Rieksts 2008 *LawNow* 31 at 34.

447 Schneider, Bloom and Heerema *Mental Health Courts* at 35.

448 Other offences that will not trigger diversion is manslaughter, causing death or bodily harm by dangerous or impaired driving, offences involving child pornography, specific hate offences, home invasions and perjury. Also see Schneider *Annotated Ontario Mental Health Statutes* at 680. See further Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 107. Also see Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 12, 13 that lists all the charges that will not trigger diversion, regardless of the circumstances of the accused. These are: murder, manslaughter, infanticide, criminal negligence causing death; causing death or bodily harm by dangerous or impaired driving; any offence causing serious bodily harm; simple impaired driving or driving with a prohibited blood alcohol concentration; offences involving firearms; criminal organisation offences; kidnapping; spouse/partner offences; child abuse; offences involving child pornography sexual offences including sexual assault, interference and exploitation, invitation to sexual touching and incest; specific hate offences; home invasions; and perjury.

less serious offences.[449]

The typical cases dealt with in the Toronto Mental Health Court, for example, include shoplifting, annoying passers-by on the street, or breaking into a home to retrieve belongings that were left behind after being evicted by the property owner.[450] Offences such as theft and possession, mischief, fraud and false pretences, food and accommodation fraud as well as causing a disturbance are eligible for diversion.[451] Whether diversion will be allowed in these cases depends on the circumstances of the accused.[452]

As part of the deliberations pertaining to the accused's eligibility for the programme phase, the prosecutor must indicate that either the Crown is willing to withdraw the charges against the accused upon completion of the programme or that he is willing to agree to a non-custodial sentence for the particular accused.[453]

Since a mentally ill but fit person accused of a violent crime will not be eligible for the programme phase of the Mental Health Court, his case will revert back to the criminal court after the fitness assessment unless he wants to make use of the expertise in the Mental Health Court for purposes of resolving his case by entering a guilty plea or for purposes of a bail application that is discussed later in this chapter.

If the accused meets the eligibility criteria, the case proceeds in the Mental Health Court to

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[449] Schneider, Bloom and Heerema *Mental Health Courts* at 6 and further at 100. Also see Toronto Mental Health Court http://www.mentalhealthcourt.ca/pages/2/Overview.htm (Date of use: 21 July 2015) at 1. In New Brunswick, the criteria for eligibility for the Mental Health Court programme is that any accused; who is suffering from a mental illness or intellectual disability; who has been charged with a minor offence; Is fit to stand trial; and accepts responsibility for his actions will be allowed into the programme.

[450] Heerema *2005 Crim.L.Q 255* at 266. Also see the discussion under diversion earlier in this chapter where the various offences and their diversion criteria are discussed with reference to the three classes of offences.

[451] Ontario Ministry of the Attorney General Criminal Law Division Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion at 4. Also see Schneider Annotated Ontario Mental Health Statutes at 680. Also refer to the three classes of offences as discussed earlier in the chapter. The classification of an offence has an impact on if it can be the subject of diversion or not.

[452] Particular consideration is given to the question whether the accused before the court is a first offender, although diversion of these types of offences is not reserved for those who are first time offenders. Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 4. Also see Schneider *Annotated Ontario Mental Health Statutes* at 680.

[453] Rieksts 2008 *LawNow* 31 at 34. The Crown may decide to withdraw the charges against the accused if the charge relates to a minor offence and there is no threat to public safety. See Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 6.

the last two stages, namely the compliance and acceptance stages.

7.3.3 Compliance and acceptance stages

Once it is established that the accused is fit to stand trial and meets the legal eligibility criteria for diversion, a joint decision is taken by the court and the accused pertaining to his willingness and ability to submit to a court-monitored treatment programme.[454] The accused may, for example, at this point, decide to rather proceed with the trial in the criminal court, in which case the matter is referred back to the trial court for a trial.[455]

Should the accused, however, wish to participate in the programme phase, the accused formally applies to the Mental Health Court for admission to the treatment programme. This application entails an acknowledgement that the accused suffers from a mental illness, that treatment, therefore, is necessary and confirms that the accused consents to such treatment, including the taking of medication.[456] The orders that a Mental Health Court may make in the case of a mentally ill accused person are not limited to the taking of medication and psychiatric treatment.[457]

The granting of the application for admission concludes the acceptance stage as the last stage in the admission phase. Once the admission phase is complete, the accused may

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454 Rieksts 2008 *LawNow* 31 at 34.

455 Schneider, Bloom and Heerema *Mental Health Courts* at 90, 102. Also see Rieksts 2008 *LawNow* 31 at 32 where it is reiterated that the focus in the Mental Health Court falls on treatment and rehabilitation of the accused rather than punishment. Also see Ryan & Whelan 2012 *Web Journal of Current Legal Issues* 1 at 8 where the voluntary nature of participation in the Mental Health Court is confirmed and in particular the fact that the accused may decide to opt out at any point in time – except for those part of the proceedings for which his consent is not required as pointed out earlier in this chapter.

456 The consent to the treatment that will be offered in the court monitored programme, must be given voluntary as reiterated by *Heerema 2005 Crim.L.Q 255* at 266. Also see Rieksts 2008 *LawNow* 31 at 34.

457 Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 7, 8 where the dispositions that a court may make when dealing with the case of a mentally ill accused are set out. These are: admission to a hospital for assessment; referral to a psychiatrist/mental health worker, or to an agency with expertise in mental disorders/developmental disabilities; a supervision, care or treatment plan, including a community treatment order under the Mental Health Act (see section 7, infra) offered by family, legal guardian, substitute decision-maker, community facility, or counsel; admission to a programme suited to the developmentally disabled offender which addresses the need for individual deterrence and rehabilitation; establishing support in the community, including adequate housing and on-going contact with social/community worker; counselling sessions which focus on individual deterrence and rehabilitation; community service work; an apology to the victim or others affected; restitution or compensation to the victim or the community; stay of the charge, if the apprehension/charge has had sufficient impact on the offender, or the offender has already taken restorative measures, or intervention such as treatment or counselling, and/or the offence(s) is(are) being adequately addressed in the community.

now move on to the programme phase (the diversion component).[458]

7.4 Programme phase of the Mental Health Court

The diversion component found in the Canadian Mental Health Courts is post-charge but pre-plea diversion programmes.[459] It is identified as a post-charge model because the accused has already been arrested and charged but is a pre-*plea* model as the accused is never arraigned, nor is a guilty plea required for access to the Mental Health Court programme.[460]

Since this phase of the court programme not only differs from court to court but from one case to another, only a general discussion of the elements of this phase is possible. The discussion will focus on the unique treatment programme and the sanctions imposed in the event of non-compliance with the treatment programme.

7.4.1 Unique treatment programme

Since the accused consented to treatment, including taking medication during the acceptance stage of the admission phase, a unique treatment programme is designed for him by the multi-disciplinary team. Court proceedings may be adjourned to afford the court workers time to develop the treatment plan.[461]

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458 Rieksts 2008 *LawNow* 31 at 34.

459 Hartford, Carey and Mendonca 2007 *Journal of Behavioral Health Services and Research* 198 at 199. A distinction is drawn between *pre-plea* and *post-plea* diversion programmes that both fall into the post-charge diversion category. See Schneider, Bloom and Heerema *Mental Health Courts* at 76. Also see Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 5 where diversion after arrest but before the trial is labelled as pre-trial diversion or court diversion (see 25 of this source). Also see Ryan & Whelan 2012 *Web Journal of Current Legal Issues* 1 at 8 where the Canadian Mental Health Court model is labelled as a pre-adjudication model.

460 Schneider, Bloom and Heerema *Mental Health Courts* at 76. These authors point out that most American models of the Mental Health Court, is characterised as "post-plea" models as a guilty plea is often a prerequisite for admission into the diversion program. See chapter 5 of this research for a detailed discussion of American Mental Health Courts. The Supreme Court of Queensland established a Mental Health Court that closely resembles the Canadian model and more in particular the model of the Toronto Mental Health Court in Canada. See Schneider *Bloom and Heerema Mental Health Courts* at 108. Where the accused is referred to the Mental Health Court for a hearing on criminal capacity or where the Mental Health Court is requested to assist with such hearing, there must be prima facie evidence that there is a link between the mental disorder and the alleged criminal offence. Schneider, Bloom and Heerema *Mental Health Courts* at 88. See however Hartford, Carey and Mendonca 2007 *Journal of Behavioral Health Services and Research* 198 at 198 where Mental Health Courts (in Alberta, Canada) are described as a post-plea diversion programme.

461 Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 8 where it is stated that an

The court team converses with the accused to determine the nature of the accused's mental health care needs. This discussion is led by the judge and added to by the other multi-disciplinary team members. After the discussion, the team develops a unique and suitable treatment plan for the accused, lasting anything from 6 weeks to two years.[462] The treatment plan can include psychological treatment, occupational training, access to housing and other social services [463] or any combination of services or treatment that the particular individual requires to re-integrate into the community.

The accused is required to sign an acceptance form indicating his agreement to the programme specifically designed to address his mental health care needs.[464] The accused must report to the Mental Health Court periodically on the progress with the treatment programme.[465]

Where the accused successfully completed the Mental Health Court programme, the charges against him may be dismissed,[466] or prosecution may be stayed.[467] In the event

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adjournment can be requested in order for the treatment team to organise the treatment plan, to stabilise the accused or to secure, for example, housing for the accused if needed. More than one adjournment may be required, depending on the unique circumstances of the accused and his treatment needs.

462 The specific treatment programme depends on various factors such as the seriousness of the offence. See Parliamentary Information and research service *Current issues in Mental Health in Canada* at 4. Also see Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 2. Also see Schneider *Annotated Ontario Mental Health Statutes* at 6 where it is stated that the medical model, which entails the use of medication and psychiatric treatment, is not necessarily sufficient for all mentally ill accused as some may also require some form of social assistance such as housing.

463 Schneider, Bloom and Heerema *Mental Health Courts* at 6. Also see Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 7, 8 for the various dispositions that the court can make. Also see Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx (Date of use: 20 September 2016) at 6 where it is explained that not all Mental Health Court programmes involve the taking of medication but it may form part of the treatment programme.

464 Heerema 2005 *Crim.L.Q* 255 at 273. Also see Rieksts 2008 *LawNow* 31 at 33.

465 The accused must return to court periodically during the treatment period (between 7 and 12 months long) to give progress reports. *Heerema 2005 Crim.L.Q 255* at 267. In New Brunswick the accused is required to sign an admission form should he opt to participate in the Mental Health Court programme. Also see Rieksts 2008 *LawNow* 31 at 33 who reports that at the St John Mental Health Court, the accused must report to the court every 2 weeks.

466 Section 717(4)(a) of the Criminal Code. Also see Coughlan *Criminal Procedure* at 282. See further Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 2. Also see Schneider *Annotated Ontario Mental Health Statutes* at 679. The Crown Policy states that where the offence is a minor offence and no risk to public safety exists, it may very well be in the public interest to simply withdraw the charges. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 6 and further at 89. See further Heerema 2005 *Crim.L.Q* 255 at 272 who points out that the decision as to if the charges are dropped or stayed, depends on the province that he accused finds himself in. In New Brunswick Upon completion and "graduation" from the programme the charges could be

that the charges are dismissed or stayed, the accused is free and no longer subject to the jurisdiction of the Mental Health Court. There is no conviction in such a case.[468]

Not all accused persons that enrol for the programme phase of the Mental Health Court complete the programme. Sanctions for non-compliance with the treatment programme are discussed below.

7.4.2 Sanctions for non-compliance

Where an accused failed to comply with the treatment conditions, certain sanctions can be employed, for instance, he can be ordered to appear in front of the Mental Health Court more frequently than initially agreed upon.[469] The treatment plan is often adjusted in an attempt to ensure compliance with the treatment plan.[470] Generally, jail time as a sanction is avoided in the Canadian Mental Health Courts.[471]

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dropped by the Crown. If the Crown decides to proceed with the case, the court will usually impose a non-custodial sentence. Also see Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 261 who confirm that the general practice in Canada is to have charges against an accused dropped upon successful completion of the Mental Health Court programme.

467 The Attorney General delegated his authority to stay proceedings i.t.o Section 579 of the Criminal Code to all Crown Counsel. Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion* at 8 where it is stated that the court may order a stay of proceedings if the accused has undergone treatment and/or the offence has been adequately addressed in the community. It is further explained here that, while the completion of the treatment programme should not be set as condition for the stay of proceedings, I might very well be in the public interest to ensure that the accused is stabilized The Crown should therefore be satisfied that the accused has been accepted into a treatment programme or has been stabilised I the community before the charges are stayed. The final decision about the stay of proceedings is only made once it is sure that the accused is stabilised. See the discussion of R v *Demers e*arlier in this chapter where the court held that a stay of proceedings might be ordered in respect of a permanently unfit accused provided that such an accused does not pose a threat to public safety. An accused that successfully completed the Mental Health Court programme will be in the same position procedurally as a permanently unfit accused who does not pose a threat to public safety.

468 Schneider, Bloom and Heerema *Mental Health Courts* at 6 and further at 89. This is so because no guilty plea is required for admission into the Mental Health Court programme.

469 Rieksts 2008 *LawNow* 31 at 34. Also see Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 261. See further Ryan & Whelan 2012 *Web Journal of Current Legal Issues* 1 at 8.

470 Ryan & Whelan 2012 Web Journal of Current Legal Issues 1 at 8.

471 Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258* at 261. In the United States jail time is more often used as a sanction for non-compliance. Obvious criticism can be levied against this practice having regard to the research that shows the negative impact that a correctional setting may have on a person with a mental illness. This point is canvassed in more detail in chapter 5 where the American Mental Health Court model is discussed. Also see Ryan & Whelan 2012 *Web Journal of Current Legal Issues* 1 at 8 where it is confirmed that Canadian Mental Health Courts generally avoid using jail time as a sanction. Mental Health Courts in the United States of America sometimes use jail time as a sanction for non-compliance. See chapter 5 for more on sanctions for non-compliance within the American Mental Health Court

The "ultimate" sanction for non-compliance of a court ordered treatment programme is that the case of the accused reverts to the criminal court for the matter to be tried. The fact that the accused participated in the programme may be taken into consideration for motivating that the charges be dismissed.[472] Where, however, the state decides to proceed with the charges, the sentence will be reduced to acknowledge participation in the Mental Health Court programme.[473] The accused's admission to his involvement in the crime that he is charged with when he entered the programme phase of the Mental Health Court cannot be used against the accused in future criminal proceedings.[474]

7.5 *Mental Health Courts role in respect of accused who do not qualify for the programme phase*

The Toronto Mental Health Court assists accused persons who do not qualify for the programme phase of the Mental Health Court or who chose not to participate in the Mental Health Court programme. Assistance is offered in the instance of bail hearings, disposition hearings, and guilty pleas.

Once the participant is found fit to stand trial, he may not want to participate in the programme phase of the Mental Health Court or may not qualify for the programme phase due to the violent nature of the offence with which he has been charged. He may choose for his case to revert to the criminal court for a traditional bail hearing.[475] Alternatively, the accused may remain within the Mental Health Court for a bail hearing or resolve the matter with a guilty plea.[476]

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472 Section 717(4)(b) of the Criminal Code. Also see Coughlan Criminal Procedure at 282.

473 Heerema 2005 *Crim.L.Q* 255 at 267. Also see Rieksts 2008 *LawNow* 31 at 33 who is of the view that the decision that the Crown will either withdraw the charges or agree to a non-custodial sentence, has to be taken as early as during the admission phase of the Mental Health Court.

474 Section 7171(1)(3) of the Criminal Code. Also see Coughlan Criminal Procedure at 281.

475 Schneider, Bloom and Heerema *Mental Health Courts* at 6, 102. Also see Ryan & Whelan 2012 *Web Journal of Current Legal Issues* 1 at 8.

476 Schneider, Bloom and Heerema *Mental Health Courts* at 6, 90, 98. It often happened that mentally ill accused persons pleaded guilty to a minor offence in a desperate attempt to get out of jail. Also see Mewett *An Introduction to the Criminal Process in Canada* at 12 who explains that a guilty plea has many advantages for the state in that it saves time and costs because an investigation into the crime is made unnecessary by a guilty plea and it saves witnesses the effort to come to court to testify and many procedural difficulties are avoided. Also see Schizophrenia society of Ontario http://www.schizophrenia.on.ca/getmedia/3392a3b5-43f1-4818-8e8c-45fcb1c15603/diversion_-_a_guide_for_families__final_.pdf.aspx (Date of use: 31 August 2015) at 3 where it is confirmed that mentally ill accused persons sometimes enter the Mental Health Court only to resolve the matter with a guilty plea. This is preferred since their mental condition is taken into consideration. Also see Ryan & Whelan 2012 *Web Journal of Current Legal Issues* 1 at 6 where the option to remain in the Mental Health Court to resolve the case with a guilty plea is confirmed. See further Legal Aid

If bail is granted by the Mental Health Court, the bail conditions will usually contain some conditions for compliance with a treatment plan whilst out on bail.[477] An accused assessed for fitness at the Mental Health Court and who was found fit to stand trial can be released on bail even on the same day that he was so assessed.[478]

If the accused chooses to resolve his case in the Mental Health Court with a guilty plea, rehabilitation rather than punishment is the focus during sentencing.[479] It is trite that "A just sentence must fit the offender as well as the offence".[480] Sentencing is a delicate process of weighing up the societal goals of sentencing and the moral blameworthiness of the offence against the backdrop of the needs and conditions of the community.[481] Mental disorder is generally regarded as a mitigating factor during the sentencing process.[482]

It should be noted that the court does not have any jurisdiction to order that the accused serve his sentence in a psychiatric hospital.[483] This may, however, be possible as part of a conditional sentence, where the hospital agrees to accommodate the accused.[484] Persons with mental illness generally cope poorly in prison [485] hence, if possible, an alternative to incarceration for those accused persons should be considered.

Ontario http://lawfacts.ca/mental-health/court (Date of use: 22 September 2016) where it is pointed out that not all Mental Health Courts provide assistance beyond the fitness assessment.

477 Schneider, Bloom and Heerema *Mental Health Courts* at 6 and further at 102.

478 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-5 where submissions by presiding officers of the Ontario Mental Health Court made at the meetings of the Standing committee on Justice and Human Rights are discussed.

479 Schneider, Bloom and Heerema Mental Health Courts at 93. Also see Ryan & Whelan 2012 Web Journal of Current Legal Issues 1 at 8.

480 Schneider, Bloom and Heerema *Mental Health Courts* at 99.

481 *R* v *C.A.M* (1996) 1 S C R 500 Lamer C.J.C. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 99.

482 Schneider, Bloom and Heerema *Mental Health Courts* at 99, 100. Reasons for this practice are *inter alia* that a reduced sentence may ensure that the accused receives much needed psychiatric treatment. This has to be contrasted with the consideration that sentences may not be lengthened to facilitate treatment in custody. Also see *R* v *Wallace* (1973) II C.C.C (2[d]) 95 (Ont C.A.) and *R* v *Luther* (1971) 5 C.C.C (2[d]) 354 (Ont C.A.), *R* v *Lee* (1985) N.S J No. 421 (C.A.) Other reasons for considering mental illness during sentencing is that the accused is viewed as less reprehensible. See *R* v *Pegg* (1987) 24 O.A.C 74 (C.A.); *R* v *Barker* (1995) M.J No. 154 (Prov. Ct.). Also see Ontario Ministry of the Attorney General Criminal Law Division *Practice memorandum: Mentally Disordered/Developmentally Disabled Offenders: Diversion at* 9 where it is indicated that the court must consider community planning, treatment or observation options for such accused persons. Involvement in a treatment programme will serve as mitigation during sentencing.

483 *R* v Deans (1977) 37 C.C.C (2d) 221 (Ont C.A.) Also see Schneider, Bloom and Heerema *Mental Health Courts* at 100.

484 *R* v *Jacobish* (1997) N. J No. 225 (C.A.); *R* v *McCullough* (1983) A.J No. 858 (C.A.). Also see Schneider, Bloom and Heerema *Mental Health Courts* at 100.

485 *R* v *Brown* (1972) 8 C.C.C. (2d) 13 (Ont C.A.); *R* v *Shanawaz* (2000) 40 C.R. 5th 195 (Ont C.A.). Also see Schneider, Bloom and Heerema *Mental Health Courts* at 99.

Bearing this in mind, the Toronto Mental Health Court gives due consideration to the possibility that even though the mental illness was present during the commission of the offence, its effect is not such that it should impact the verdict.[486] On the other hand, the mental disorder should be taken into consideration during the sentencing process, especially where it becomes apparent that the accused did not raise the issue of mental illness during his trial, despite the fact that such an issue could have had a significant impact on his plea or trial.[487]

The parties may agree to hold the hearing on the criminal capacity of the accused in the Mental Health Court because of the special skills that it houses.[488] The Mental Health Court may also be of assistance to the criminal court during a disposition hearing of an accused who is found unfit or not criminally responsible as provided for in the Criminal Code.[489]

7.6 Conclusion

The Toronto Mental Health Court phases and stages therein follow a logical flow in line with the underlying logic associated with Mental Health Court, as mentioned earlier. The Toronto Mental Health Court provides assistance to every accused person in respect of whom mental illness is at issue, except those who do not agree to their referral to the Mental Health Court in the first place.

Once in the Mental Health Court process, accused persons are free to opt-out at any time. This practice confirms the voluntary nature of the Mental Health Court process. This choice is only limited during the official fitness assessment and whilst undergoing a treatment order made by the criminal court.

The Toronto Mental Health Court provides an opportunity for mentally ill accused persons charged with divertible offences to avoid the traditional criminal justice process. These persons draw the greatest advantage from these courts since their charges can be dismissed upon completion of the Mental Health Court treatment programme.

The Toronto Mental Health Court, however, also assists those who do not qualify for diversion due to, for instance, the serious nature of the charges against the accused. This practice ensures that the specialised knowledge and skill in the Mental Health Court is

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486 Schneider, Bloom and Heerema *Mental Health Courts* at 99.
487 Schneider, Bloom and Heerema *Mental Health Courts* at 99.
488 Schneider, Bloom and Heerema *Mental Health Courts* at 6 and further at 98.
489 Section 672.54 of the Criminal Code provides for a court to hold disposition hearings.

available to all mentally ill accused persons and not only those who committed minor offences. Although those charged with serious offences will not qualify for a Mental Health Court treatment programme, they do indeed qualify for the court's assistance during a bail hearing and/or during a hearing involving a lack of criminal capacity. A mentally ill person charged with a serious offence can also resolve his case with a guilty plea in the Mental Health Court, where his mental illness will be taken into account during sentencing that would not necessarily have been the case in a traditional criminal court.

Mental Health Courts succeed in making specialised services and skills available to accused persons who would otherwise not have had access to it had their cases been processed through the traditional criminal justice system. The Toronto Mental Health Court offers an effective therapeutic response to persons with mental illness in the Canadian criminal justice system.

8 EVALUATING THE SUCCESS OF THE MENTAL HEALTH COURTS IN CANADA

8.1 Introduction

Mental Health Courts are still in their infancy. Few studies have been done on the effectiveness of the Mental Health Court in Canada, as this has to be measured over a period and follow up studies are not always conducted for this purpose.[490] Some may argue that the lack of proof of effectiveness should discourage further development of Mental Health Courts. The opposite may then also be argued, namely that, in the absence of studies disproving the effectiveness of Mental Health Courts, there is no reason why Mental Health Courts should not be promoted as a therapeutic response to mentally ill accused persons in the criminal justice system.

The only measure currently available to assess the effectiveness of Canadian Mental Health Courts is to consider whether the Mental Health Court achieved its main objectives that are discussed earlier in this chapter.

Preliminary findings on the effectiveness of the Mental Health Court in Canada are presented here.[491] Existing concerns about some aspects of the Mental Health Court model employed in Canada are highlighted, and responses thereto are included under the

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490 Hartford, Carey and Mendonca 2007 *Journal of Behavioral Health Services and Research* 198 at 200. Also see Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258.*at 259 who points out that most of the effectiveness studies have not been published.

491 Heerema 2005 *Crim.L.Q* 255 at 268-270.

discussion of each of these concerns.

8.2 *Successes*

As stated previously, the two main goals of the Toronto Mental Health Court is to expedite pre-trial issues, particularly fitness to stand trial, and to reduce recidivism amongst mentally ill offenders. These goals seem to have been achieved and can be labelled as a success of the Mental Health Court. In addition, the Mental Health Court has proved to result in cost saving to the criminal justice system. Each of these successes is briefly discussed below.

8.2.1 Reduced delays in trial

Prior to the establishment of the Toronto Mental Health Court, mentally ill accused persons spent unnecessary time in custody awaiting psychiatric assessment.[492] These waiting periods caused unnecessary delays in the finalisation of the accused trial.

With the implementation of the Toronto Mental Health Court, these waiting periods have been significantly reduced if not eliminated due to the fact that fitness assessments are conducted by psychiatrists on-site [493] at the Mental Health Court within approximately half an hour.[494] Referral for assessment to a psychiatric institution is no longer the default position but rather reserved for those more complex cases that warrant a longer assessment period. The liberty of the accused is not infringed unnecessary, and he may even be released on bail on the same day of his assessment, provided he was found fit to stand trial and does not pose a danger to society.[495]

These expeditious assessments by the Mental Health Court result in enormous savings as hospital beds are no longer occupied by these accused for several days for purposes of assessment.[496] These speedy assessments have also pacified some criticism against the

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492 Schneider, Bloom and Heerema *Mental Health Courts* at 6 and further at 98. Also see this source at 52, 53 where it is pointed out that prior to the establishment of the Ontario Mental Health Court, had to wait approximately 4 weeks in jail before they could be assessed for fitness to stand trial. See, however, *Heerema 2005 Crim.L.Q 255* at 271 who estimates the average time that mentally ill accused had to wait to be assessed for fitness to stand trial, at two weeks and not four weeks.

493 Schneider RD "Mental disorder in the court" 1998 *Criminal Law Association Newsletter* 57-57 at *57*.

494 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-5 where submissions by presiding officers of the Ontario Mental Health Court made at the meetings of the Standing committee on Justice and Human Rights are discussed. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 127-129 where an amended fitness test is proposed to test fitness for trial and fitness for diversion.

495 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-5.

496 Schneider, Bloom and Heerema *Mental Health Courts* at 98.

unreasonable infringement upon the liberty of mentally ill accused when having to attend lengthy hospital-based fitness assessments.[497] In fact, the same day assessments conducted by the Mental Health Court team should eradicate these concerns altogether.

8.2.2 Lower recidivism

Before Mental Health Courts were established, the mentally ill accused was released back into society without any social assistance such as housing or connection with a mental health facility and was at greater risk of re-offending.[498] The possibility of re-offending posed a threat to public safety.

The Toronto Mental Health Court is reducing recidivism of its Mental Health Court participants by closing the gap between the criminal justice system and the mental health care system.[499] Mental Health Courts aim to reduce recidivism by ensuring that the accused receives the particular treatment required for his condition. An evaluation of the pilot project phase of the Mental Health Court in New Brunswick, being the first three years, has shown that 71% of the individuals, who completed the programme through the court, have not reoffended.[500]

In addition, persons with mental illness that come into contact with the criminal justice system have better access to mental health care through court support programmes, and this has resulted in better care and quality of life of mentally ill accused persons.[501]

It should be reiterated, however, that reduction in recidivism could only really be measured over an extended period as the "rehabilitated" offenders, even though they have not re-offended in the period that formed the subject of a particular research project might re-offend after the study is concluded.

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497 Schneider, Bloom and Heerema *Mental Health Courts* at 98.

498 Schneider, Bloom and Heerema *Mental Health Courts* at 6, 98 where it is pointed out that where an accused is released in this manner without a connection to community mental health services, all the progress that had been made during the treatment of the accused in order to render him fit to stand trial, was lost as the treatment ceased upon release from custody.

499 Heerema 2005 *Crim.L.Q* 255 at 272, footnote 90. Also see Toronto Mental Health Court http://www.mentalhealthcourt.ca/pages/2/Overview.htm (Date of use: 21 July 2015) at 2. Also see Ministry of Health and Long-term Care *A Program Framework for: Mental Health Diversion* at 3.

500 Recidivism, although not stated as a specific objective of this particular Mental Health Court, is in line with the overall objectives of the Mental Health Court movement. Heerema 2005 *Crim.L.Q* 255 at 267 at footnote 62 and at 274 footnote 92.

501 Ministry of Health and Long-term Care *A Program Framework for: Mental Health Diversion* at 3. This report also indicates that court support services such as those offered in the Mental Health Court reduced hospitalisation of mentally ill persons in contact with the criminal justice system. Also see Rieksts 2008 *LawNow* 31 at 34.

8.2.3 Cost-effectiveness

These courts not only appear to be financially viable but actually succeed in saving costs. Cost-saving for the correctional facilities has been identified due to the fact that Mental Health Courts succeed in expediting pre-trial issues as fewer accused persons are kept in detention awaiting psychiatric assessment.[502]

Expeditious fitness assessments by the Mental Health Court result in enormous savings as hospital beds are no longer occupied for several days for purposes of assessment.[503] Mentally ill accused persons whose cases are channelled through the Mental Health Court receive treatment in, mostly, community-based programmes that mean that they do not rely on the correctional facility to provide mental health services.

If it is accepted that Mental Health Courts reduce recidivism, a further cost-saving could be identified as fewer persons with mental illnesses will be re-arrested, and the revolving door phenomenon would have been limited.

From the successes highlighted above, it appears that the Toronto Mental Health Court is reaching its goals.

8.3 Concerns

The two main points of concern levied against the Canadian Mental Health Court model is with regard to voluntary participation in the court programme and the preferential treatment of persons in the Mental Health Court programme.

8.3.1 Voluntary participation

It is argued that incentives such as the prospect of a possible stay of proceedings upon completion of the Mental Health Court programme serve as a tool to coerce the accused to participate in the Mental Health Court programme and consequently renders the participation in the Toronto Mental Health Court programme non-voluntary.[504]

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502 Slinger and Roesch 2010 *International Journal of Law and Psychiatry 258.*at 259 who points out that it costs twice as much to incarcerate an accused with a mental illness than one without such mental illness.

503 Schneider, Bloom and Heerema *Mental Health Courts* at 98.

504 Heerema 2005 *Crim.L.Q* 255 at 266. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 6 and further at 89.

Schneider *et all's* [505] response to this criticism is simply to emphasize that participation in the Canadian Mental Health Court model is completely optional. They add further that the decision to stay the proceedings against an accused is in any event completely within the Crown's discretion [506] and therefore not guaranteed at all.

The fact that the accused can opt-out of the Mental Health Court programme at any given time, except during a fitness assessment and a treatment order, confirms the voluntary nature of participation therein. The voluntariness of the Mental Health Court programme has, however, been found not to be stressed enough at the point where the accused is placed before the choice between participating in the Mental Health Court programme or having the case processed through the traditional criminal justice system.[507] In an attempt to address this criticism, the voluntary nature of the accused's participation in the Mental Health Court programme should be stressed to the accused, initially when he enters the programme and throughout the programme [508] to empower him to take his own decision about continuation therewith. This should reduce concerns about coercion.

8.3.2 Preferential treatment of offenders by the mental health care system

Concerns have been raised that Mental Health Court participants will skip the line to receive services first, ahead of those equally entitled thereto but who are outside the Mental Health Court programme and/or the criminal justice system.[509] In an already overtaxed mental health care system, it is seen as a real risk that these participants may absorb the mental health care services that should be equally available to those outside of the system.[510] It is unsure if Mental Health Courts have indeed had this effect.[511]

Canadian courts take a strict approach to resource availability when it comes to the treatment of a mentally ill accused released conditionally, where part of their conditional release is to receive treatment. The court emphasises that such conditional release cannot

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505 Schneider, Bloom and Heerema *Mental Health Courts* at 6 and further at 90.

506 Schneider, Bloom and Heerema *Mental Health Courts* at 88, 89. Also see Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 3-47 where it is pointed out that where a decision is taken to withdraw the charges against the accused, it is usually done based on public policy where the public would generally not require criminal charges to remain over such an accused.

507 Heerema 2005 *Crim.L.Q* 255 at 268 footnote 66 and further at 270.

508 Heerema 2005 *Crim.L.Q* 255 at 280.

509 Schneider, Bloom and Heerema *Mental Health Courts* at 32. Also see Heerema 2005 *Crim.L.Q* 255 at 270. See further Luther and Mela 2006 *Sask L Rev 401* at 424 who discusses this phenomenon as queue-jumping in the forensic mental health setting.

510 Heerema 2005 *Crim.L.Q* 255 at 270.

511 Heerema 2005 *Crim.L.Q* 255 at 270.

be denied because of a lack of resources within the particular province.[512]

More resources should be made available, and perhaps specific resources should be allocated to individuals in the Mental Health Court programme.[513] This will ensure that there are sufficient resources for all in need thereof. To this end, Heerema states that the funding for the social services used by the Mental Health Courts should increase.[514]

8.4 *Suggested improvements to the Canadian Mental Health Court model*

Having regard to the concerns above and other considerations regarding diversion in Canada and the effectiveness of the Mental Health Court model, it has been suggested that the model be supplemented by a pre-booking programme.

The current design of the Mental Health Court framework results in the accused's first interaction with the Mental Health Court only after arrest, thus, after he encountered the criminal justice system, he is arrested and incarcerated. The contact of the mentally ill accused with the criminal justice system can be limited even further by employing pre-booking diversion. A pre-booking diversion programme aims to completely avoid contact with the criminal justice system, thus be diverted away from it before charges are laid.[515]

Pre-booking diversion programmes require the co-operation and sensitisation of the police.[516] Training in this regard may be necessary. Police need to acquire skills that will

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512 Luther and Mela 2006 *Sask L Rev 401* at 425 where case law from different provinces are discussed and where it is clear that the courts expect provinces to make treatment services available where needed. See in particular the judgment of the Supreme Court of Ontario in *R* v *Nault* (2002) 59 O.R (3d) 388, 159 O.A.C, 391 (C.A) at [17]] where it was held that: "It cannot be up to the will of any province to effectively preclude the imposition of conditional sentences by failing to provide sufficient supervisory resources". The same argument could apply to diversion programmes.

513 This would be in line with the objective set by the Mental Health Commission of Canada in their 2012 Mental Health Strategy for Canada where the availability of resources and services to mentally ill persons in the criminal justice system, was identified as a priority together with the goal of reducing the number of mentally ill persons in the criminal justice system. See Centre for addiction and mental health *Evidence Summary: Mental Health Diversion Framework in Canada* at 3.

514 Heerema 2005 *Crim.L.Q* 255 at 277.

515 Centre for addiction and mental health *Evidence Summary: Mental Health Diversion Framework in Canada* at 4. Also see Heerema 2005 *Crim.L.Q* 255 at 275. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 72-74 for a discussion on the various pre-booking programmes available in Canada.

516 Schneider, Bloom and Heerema *Mental Health Courts* at 35. When the accused is arrested and the police observe strange behaviour, they may request that the accused be examined by a physician as a method of informal assessment and as an initial indicator of the accused's state of mind. Arresting an accused is usually only necessary where a serious offence is committed, or where the accused fails to identify himself, or where it is believed that the accused will intimidate witnesses or tamper with evidence. Arrest and detention is not the preferred method of ensuring a persons' appearance at trial and is only employed as a last resort. Where the accused is arrested, however, and not

equip them to identify a person with a mental illness, how to deal with such persons and which resources are available to assist with the relevant mental health services. Lack of training can lead to unfortunate consequences for the mentally ill accused. In one instance, for example, the police killed a mentally ill person during an arrest.[517] A need was identified to prevent the mentally ill from encountering the law in the first place.[518] In response to this need, it is now a requirement that all new police officers in Ontario undergo mental health training where they learn to respond to situations involving possible mental illness.[519]

Even where training is provided, the practicalities of adequately dealing with cases involving mental illness remains a challenge. The police can, for example, according to the Ontario Mental Health Act, upon encountering a person that committed an offence who appears to be mentally ill, accompany the person to a psychiatric institution to have the individual assessed instead of filing criminal charges.[520] The obstacle that police officers face, however, is that according to the Act, they have to wait for the assessment to be complete

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released for such informal assessment or any other reason, a bail hearing will have to take place. See Mewett *An Introduction to the Criminal Process in Canada* at 32 and 176. Also see Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 2 where this type of diversion is referred to as "pre-arrest diversion".

517 McLachlin B 2010 *Dalhousie Law Journal* 15 at 30, 31. One such person, Byron DeBassige, suffered from Schizophrenia but had stopped taking his medication. The police picked him up for sniffing glue, an incident of which his probation officer was unaware. Byron later stole two lemons for which he paid with his life, as police shot him after he failed to put down his knife upon demands to do so by the Police. There were at least nine similar cases in the previous 2 decades in Canada and improvements have been made with regard to Police training in this regard. Anon "Corronor's inquest: System fails mentally ill" Editorial, 13 October 2010 Toronto Star. Also available at http://www.thestar.com/opinion/editorials/article/874295--coroner-s-inquest-system-fails-mentally-ill (Date of use 25 July 2012).

518 Anon "Corronor's inquest: System fails mentally ill" Editorial, 13 October 2010 Toronto Star. Also available at http://www.thestar.com/opinion/editorials/article/874295--coroner-s-inquest-system-fails-mentally-ill (Date of use 25 July 2012).

519 Centre for addiction and mental health Evidence Summary: Mental Health Diversion Framework in Canada at 4.

520 Section 17 of the Ontario Mental Health Act. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 35. Also see Mewett *An Introduction to the Criminal Process in Canada* at 14, 15 where it is explained that Canada has various police forces. Many provinces such as Ontario and Quebec have their own police force. Police forces can also be established at municipal level. See further Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 107 who confirms the discretion that the police has in these circumstances. Also see Lastly, see Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 3 where it is explained that the police may decide to take the accused to a doctor for medical attention. The doctor may then decide to issue a Form 1 Application for Psychiatric Assessment in which case the accused will be admitted to hospital for a period of 72 hours for a more in depth assessment. If the doctor finds that the person is not a threat to himself or others, the doctor may discharge him after the 72 hour assessment period. Note that South Africa has a similar provision in its Mental Health Care Act 17 of 2002. See chapter 3 of this research for discussion thereon.

before they can relinquish custody to the psychiatric facility.[521] These officers are often frustrated as these individuals are released from the psychiatric institution shortly after being admitted, only to commit the same offence again.[522]

Pre-booking programmes will allow the police to take only those who merit criminal law interventions into the system and not those that primarily require other forms of social assistance.[523] Police may, for example, decide to merely take the person home, or connect the person with community mental health services, depending on its availability.[524]

Pre-booking programmes can further assist in avoiding stigmatisation in that a mentally ill person is labelled as a "forensic patient" if he enters the mental health care system through the criminal justice system, whereas this is not the case if he enters the mental health care system prior to arrest.[525]

Some minor offences, whilst technically crimes, are more a product of issues stemming from mental disabilities rather than from criminal intentions.[526] From this perspective, pre-booking programmes make perfect sense, as these individuals do not belong in the criminal justice system to start with.

9 COMPARISON OF CANADIAN SYSTEM WITH SOUTH AFRICAN SYSTEM

9.1 Introduction

The purpose of this section is to highlight the major differences between the manner in which the Canadian criminal justice system approaches cases involving accused persons

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521 Section 17 of the Ontario Mental Health Act. Also see Byrick and Walker-Renshaw *A practical guide to Mental Health and the Law in Ontario* at 35. See further Schneider, Bloom and Heerema *Mental Health Courts* at 35.

522 Read A 2009 UBCMJ 25 at 25 where it is stated that many persons in psychiatric hospitals are released before they are stabilised (between 10 and 20 percent) and these persons are often admitted to hospital again within 30 days. Also see Canadian Mental Health Association http://www.cmha.bc.ca/files/policesheets_all.pdf (Date of use: 13 March 2015) *at* 1. See further Also see Schneider, Bloom and Heerema *Mental Health Courts* at 34, 35.

523 Heerema 2005 *Crim.L.Q* 255 at 261.

524 Centre for addiction and mental health *Evidence Summary: Mental Health Diversion Framework in Canada* at 4. Police may also decide to involve emergency response teams or accompanying the accused person to hospital after arresting the person in terms of the provincial Mental Health Act. Also see Schizophrenia society of Ontario *http://www.schizophrenia.on.ca/getmedia/d252fe01-ab2a-429c-bd6b-5322115c4204/justice_process_guide.pdf.aspx* (Date of use: 20 September 2016) at 2 where it is explained that the police can consider alternatives to arrest for the mentally ill accused, for instance, the police may warn the accused or call in a crisis team to assist.

525 Schneider, Bloom and Heerema *Mental Health Courts* at 72. Also see Centre for addiction and mental health *Evidence Summary: Mental Health Diversion Framework in Canada* at 4.

526 Heerema 2005 *Crim.L.Q* 255 at 256, 276.

with mental illness and the approach that the South African criminal justice system follows in this regard.

The processes and their purposes will not be repeated here, and this section serves as a summary of what has already been discussed in this chapter and chapter 3, but in the context of differences between the two systems. Only major differences will be pointed out, or those that have or could potentially have a major impact on the mentally ill accused in the criminal justice process.

9.2 Legislation

The Canadian Criminal Code contains elaborate provisions relevant to mentally ill accused persons. The strength in this lies therein that multiple pieces of legislation need not be consulted in this regard, possibly limiting confusion. Assessments are, however, often conducted in terms of the provincial mental health legislation such as the Ontario Mental Health Act in this instance.

In South Africa, the position pertaining to fitness assessments are contained in the Criminal Procedure Act as well as the Mental Health Care Act and the Correctional Services Act. All these pieces of legislation operate on a national level and are administered by different government departments, with the possible result being that the pieces of legislation are not necessarily integrated in practice.

Canadian legislation contains a presumption of fitness to stand trial, something that is absent from South African legislation. This may have an impact on the burden of proof. In Canada, because the legislation creates the presumption of fitness, the burden of proof to rebut the presumption is on the party that raises the issue.

Both Canadian and South African legislation makes provision, in its mental health legislation, for the police to take a mentally ill person to a hospital for treatment rather than arresting him, which could be seen as a form of pre-trial diversion. In both jurisdictions, it does not seem to be used very often.

9.3 Review Boards

Canadian Review Boards play a very active role in reviewing the decisions of the courts with regard to persons found not fit to stand trial and not criminally responsible. Canadian Review Boards have the authority to make dispositions and to order assessments of accused persons found unfit or not criminally responsible by a court. Review Boards form

an integral part of the criminal justice proceedings. The role and duties of the Review Board are spelt out in the Criminal Code that confirms its integral role in the criminal justice proceedings.

South African Review Boards play a very limited part in the criminal justice process. They cannot order assessments for purposes of fitness to stand trial or criminal capacity. South African Review Boards merely review findings for assisted and involuntary detention in the civil and mental health care context and not the criminal justice context. The only jurisdiction that Review Boards have in the criminal justice setting is to review the transfer of a person to and from maximum security facility and the periodic review of mentally ill prisoners. Decisions of heads of health establishments are reviewed after the fact. Review Boards are not an integral part of the criminal justice system. The finding by a court that a person is unfit to stand trial or not criminally responsible is not reviewed by the Review Board. No mention is made of the Review Board in the Criminal Procedure Act.

The constituency of the Review Boards in both jurisdictions, however, seem to be similar in that it must consist of 5 members drawn from the legal field and the mental health field, respectively. Meetings must be attended by at least three.

9.4 Treatment orders

The Canadian system makes provision for a treatment order, known as a "get fit" order lasting no longer than 60-days in order for the accused to receive treatment aimed at rendering him fit to stand trial. Although the South African legislation makes provision for a person to be tried once he regains fitness to stand trial, there is no specific provision for an order for treatment aimed specifically at rendering an accused fit to stand trial.

The Canadian system also provides for a "keep fit" order which entails that an accused who has been found fit to stand trial can be detained in a psychiatric hospital awaiting his hearing if the Review Board is concerned about the mental health of the accused whilst awaiting the trial date. South African legislation lacks such a provision.

9.5 Persons conducting assessments

In Canada, only one mental health professional is required to assess an accused for fitness regardless of the seriousness of the charges against the accused.

In South Africa, one mental health care professional need only assess accused persons charged with non-violent offences, whereas those accused of violent offences must be

assessed by more than one mental health care professional. The latter arrangement is resource-intensive and time consuming for obvious reasons.

9.6 *Referral for fitness assessment*

In the Canadian system, it is discretionary to refer an accused for a fitness assessment. An assessment may even be discarded if the court reckons that an assessment will be superfluous since the presence of a mental illness is clear. This built-in discretion may prevent huge numbers of accused persons with suspected mental illnesses from being sent for observation. It may, however, also have the consequence that not all accused persons are sent for observation who should have ideally been sent for observation.

In contrast to the above, a South African court is obliged to refer an accused for a fitness assessment once a suspicion arises that the accused may suffer from a mental illness that may have an impact on his ability to follow the proceedings. This may lead to a huge number of mentally ill accused persons being referred for observation. A backlog may arise if resources are not allocated accordingly to deal with the huge number of referrals. These backlogs may cause delays in the finalisation of the trial and may further contribute to overcrowding in correctional facilities since accused persons awaiting psychiatric observation are most often kept in correctional facilities whilst awaiting assessment.

An interesting difference between the Canadian and the South African system with regard to fitness assessments is that it is not compulsory in the Canadian system to file a written report after an assessment (although this is mostly done), whereas this is mandatory in the South African system. Lack of written reports may lead to delays and duplicate assessments where the same mental health professionals are not available to report on their findings.

9.7 *Option of diversion*

A glaring gap in the South African legislative framework, compared to that of Canada, is the provision made in the Canadian Criminal Code for alternatives to the traditional criminal justice process for mentally ill accused persons, which provision enables the establishment of Mental Health Courts. There is no formal diversion programme in place in South Africa for mentally ill accused persons, except for the provision included in the mental health legislation that provides for the police to take a presumably mentally ill person to a psychiatric hospital for observation. The observation is an alternative to arrest and incarceration.

The lack of formal diversion measures for the mentally ill accused means that the fit but mentally ill accused will face a traditional criminal trial and be incarcerated in a correctional setting that is particularly counter-therapeutic for the mentally ill person, as pointed out earlier. Diversion creates an opportunity to employ therapeutic jurisprudence, which is not an option within the current South African framework.

10 CONCLUSION

It is evident from the discussion of the legal framework and procedures for assessment for fitness to stand trial that Mental Health Courts are well established in the Canadian criminal justice system. The specialised skill and knowledge that these courts have to offer are acknowledged by the criminal justice system and notably by the Ontario Court of Appeal, as discussed above.

The test for fitness employed in Canada is critiqued for setting the bar too low, with the result that the majority of those sent for fitness assessments are found fit to stand trial. Mental illness, which was the basis for the fitness referral in the first place, may still be present and affect the functioning of the accused, although not his ability to stand trial.

Mental Health Courts aim to assist with the high number of fitness assessments and to provide an alternative to traditional prosecution in the form of diversion. The diversion component of the Mental Health Court is reserved for those who committed non-violent crimes. The Mental Health Court, however, still assists those accused persons with mental illness who may, for whatever reason, not qualify for the diversion component of the Mental Health Court.

Mental Health Courts provide essential support to mentally ill but fit accused persons in the Canadian criminal justice system. As pointed out above, ample structures and safety nets are in place for unfit accused persons in the form of the Review Board. The Mental Health Court is an attempt to provide a safety net for the mentally ill but fit accused, who would otherwise have been channelled through the traditional criminal court system without his mental illness being considered at all once he has been found fit to stand trial. Ignoring the mental illness of the fit accused raises the risk of recidivism and endangers public safety.

What is clear is that the Canadian criminal justice system acknowledges the need for and makes use of mental health professionals in cases where mental illness is involved. Where an accused is found unfit to stand trial, the expertise of the Review Board is relied upon to determine the appropriate disposition. The Review Board may even call on the assistance

of the Mental Health Court at times. Where an accused is fit to stand trial, diversion to the Mental Health Court is provided for where the multidisciplinary team can assist in determining the best way forward for the particular accused.

It appears, from the discussion above, that the Mental Health Court has achieved its main objectives, namely to expedite fitness assessments and to reduce recidivism and that this in itself constitutes the success of the particular model employed in Canada. It is acknowledged that Canadian Mental Health Courts is not the ultimate solution to the issues affecting mentally ill persons in the Canadian criminal justice system, but it is a step in the right direction to ensure that specialised skills are utilised in cases involving mental illness.[527]

Since there is no fixed model for a Mental Health Court, the model in the United States of America will be analysed and compared with the one employed in Canada. This analysis will enable the researcher to identify the most suitable model or desirable aspects of the model for possible implementation in South Africa. The Mental Health Court model in the United States of America is explored in chapter 5.

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527 Barrett and Shandler *Mental Disorder in Canadian Criminal Law* at 1-29 where it is pointed out that society should aim for crime prevention and social integration if it is to ensure the fair and respectful treatment of persons with mental disorders. Also see Nolan JL "The international problem solving court movement: A comparative perspective" 2011 (37) *Monash University Law Review* 259-279 at 270 where the differences between approaches and attitudes to problem solving courts in and outside the United States of America is discussed and where it is acknowledged that those involved in Mental Health Courts in Canada are willing to acknowledge that Mental Health Courts are not the ultimate solution but only part thereof, this is different to the radical approach held by those involved in the problem solving court movement in the United States of America who believe that it is a much larger part of the solution, if not the ultimate one.

CHAPTER 5

MENTAL HEALTH COURTS IN THE UNITED STATES OF AMERICA

1 INTRODUCTION

This chapter explores the Mental Health Court model in the United States of America. The structure and legal framework of the American criminal justice system are briefly examined. This examination includes a brief overview of the American legislative framework as it pertains to the mentally ill accused in the American criminal justice system with specific reference to the Constitution of the United States of America [1] and relevant criminal procedure legislation. The American court structure is explained briefly in order to contextualise the jurisdiction of Mental Health Courts.

The focus of this chapter falls mainly on procedural issues affecting the mentally ill accused in the American criminal justice system. The focus of the procedural issues is further narrowed down to those relevant to fitness to stand trial. Considerations relating to criminal capacity are not of pertinent importance to this research and will only be referred to in passing or where the specific context calls for it.

The extent to which diversion for mentally ill accused persons is provided for in the American criminal justice system is considered before exploring the relevant model of the Mental Health Court employed in the United States of America. The goals and underlying principles of the American Mental Health Court are explained.

The procedural dynamics of Mental Health Courts are studied, including the juncture at which diversion to the Mental Health Court occurs, the eligibility criteria, and the sanctions employed by the Mental Health Court for non-compliance with a court-ordered treatment programme. The Brooklyn Mental Health Court in New York is used to illustrate the processes of a Mental Health Court in the United States of America. The choice to focus on the Brooklyn Mental Health Court is informed by the fact that it is a very dynamic court that also considers cases involving violence. This model can thus be fruitfully contrasted with the one employed in Canada because of the procedural and conceptual differences

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[1] Constitution of the United States of America. (Hereinafter referred to as the "American Constitution").

between the two jurisdictions.

The choice of the Brooklyn Mental Health Court is further informed by the fact that one of the goals of this court was to establish a Mental Health Court model that could be replicated in other jurisdictions that wish to establish a Mental Health Court.[2] The planning and implementation processes for this court were thus undertaken with great care, and these are relatively well documented.

A short analysis of the successes and challenges of the American Mental Health Court model is undertaken. Suggestions for improving the American model are briefly explored. A brief comparison between the South African position and the American Mental Health Court model is included, followed by a comparison between the American Mental Health Court model and the Canadian Mental Health Court model, which concludes this chapter.

2 LEGAL FRAMEWORK RELATING TO MENTALLY ILL ACCUSED UNDER AMERICAN CRIMINAL LAW

2.1 Introduction and background

In the latter part of the 17th century, individuals with mental illness in the United States of America were mostly cared for by their families.[3] Where these individuals showed signs of violence, they were transferred to jails.[4] State hospitals later accommodated mentally ill individuals to the extent that half of all beds in state hospitals were occupied by psychiatric

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2 See in general O'Keefie K The Brooklyn Mental Health Court Evaluation: Planning, Implementation, Courtroom Dynamics, and Participant Outcomes (Centre for Court Innovation New York 2006).

3 Torrey EF, Stieber J, Ezekiel J, Wolfe SM, Sharfstein J, Noble JH and Flynn LM *Criminalizing the Seriously Mentally Ill.* The Abuse of Jails as Mental Hospitals (Public Citizen's Health Research Group and the National Alliance for the Mentally ill 1992) at 9, 10 explain that "Lunatics" were allowed into general hospitals for treatment in the middle of the 18th century. The first general hospital to treat a "lunatic" with the Pennsylvania hospital in Philadelphia. The Eastern Lunatic Asylum in Williamsburg, Virginia was the first hospital that catered exclusively for individuals with serious mental illnesses and opened its doors in 1773. Private Asylums were established in the early 19th century but operated on the principle that patients were discharged from these Asylums if they could no longer afford it, regardless of if they still required treatment. Examples of such institutions are the McLean Asylum outside Boston, which opened in 1818, Bloomingdale Asylum in New York, which opened in 1821, and the Hartford Retreat that opened its doors in 1824.

4 Torrey *et al Criminalizing the Seriously Mentally Ill* at 9, 12. An Act passed in Massachusetts in 1694 entitled "An Act for the Relief of Idiots and Distracted Persons" provided for this. Also see this source at 45 that explains that the states of Idaho and Montana are among the states that have most frequently used jails to keep the seriously mentally ill in need of involuntary hospitalisation until such time as a psychologist examined him and confirmed that he needed involuntary care, after which the person remained in jail until a bed in a psychiatric institution became available.

patients.[5]

The above notwithstanding, it was common and cost-effective for the mentally ill to be housed in jails with convicted offenders.[6] Jails and prisons became "surrogate mental hospitals" for the mentally ill.[7]

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5 Slate RN, Buffington-Vollum JK and Johnson WW *The Criminalization of Mental Illness: Crisis and Opportunity for the Justice System 2nd ed* (Carolina Academic Press North Carolina 2013) at 29. State psychiatric hospitals were eventually established in the 1800's. 75 public psychiatric hospitals were built by the year 1880. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 11. The first efforts towards the organised treatment of the mentally ill were the establishment of the Eastern Lunatic Asylum in Williamsburg in Virginia in 1773. See *Slate,* Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 24, 25. The first psychiatric hospital that accommodated mentally ill accused persons was the State Lunatic Asylum at Worcester. More than half the patients this hospital received in its first year was from jails and prisons. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 10, 11. There were various other public asylums that opened their doors but the one in Worcester was considered the model to be followed by other institutions that opened their doors in the 10 years subsequent to the establishment of the Asylum at Worcester. Public psychiatric hospitals were opened in 8 states (for example Georgia, Ohio, New Hampshire and New York) subsequent to the Asylum in Worcester opening its doors. The work of Reverend Dwight was a strong imputes for the change that came about in the manner that mentally ill individuals were treated in the United States of America. He pleaded that the mentally ill should be treated in hospitals, rather than in jails and prisons. Another person that was responsible for early reform of the treatment of the mentally ill, was Dorothy Dix, a passionate retired teacher who made it her mission to ensure better conditions for the mentally ill who were by default detained in jails. Ms Dix visited prisons, jails and almshouses, recorded her findings and reported it to the legislature.

6 Deutch A *The Mentally Ill in America. A History of Their Care and Treatment from Colonial Times 3rd ed* (Columbia University Press New York 1946) at 172. There were few public hospitals and it was cheaper to confine the mentally ill in jail. For example in 1820 in New York it cost $0.50 cents to $1.00 per day to hold an individual in jail whilst it cost over $2.00 per day to house that same individual in an Asylum. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 55. The authors further explain that the first complete mental illness census in America, was done in 1880 during which 91 959 people were identified as "insane". Only 0.7% of all prisoners were mentally ill at the time. It is cheaper for a mentally ill person to be kept in jail, rather than in a state psychiatric hospital. To treat a mentally ill person in a state psychiatric hospital, cost approximately $250 per day whereas it costs approximately $46 for such a person to be kept in a county jail. The cost per day for a mentally ill person to be treated in a shelter is approximately $44. Shelters generally do not offer psychiatric services and a person in need of mental health care would therefore not benefit from this option. It is therefore most defiantly cost effective for a state to discharge mentally ill persons from state psychiatric hospitals into the community where the costs are absorbed by shelters or in many instances unfortunately, jails. See in particular Torrey *et al Criminalizing the Seriously Mentally Ill* at 12, 40, 55 Table 4.1 that sets out the costs for different types of Medical and Psychiatric services. The fiscal benefit of refusing to admit mentally ill individuals into state psychiatric hospitals in the first place is clear.

7 *Torrey et al Criminalizing the Seriously Mentally Ill* at 45, 50. Also see *Slate, Buffington*-Vollum and Johnson *Criminalization of Mental Illness* at 43 where it is suggested that prisons filled up as psychiatric hospitals were closing down, suggesting a direct link between the closing down of hospitals and the increased number of mentally ill persons in the criminal justice system. Also see Rich WJ "The path of mentally ill offenders" 2009 (89) *Fordham Urban Law Journal* 89-119 at 100 who is of the view that the jails in Los Angeles, New York and Chicago are presently, the three largest mental health care institutions in the United States of America. He points out further that the very fact that the person has been incarcerated, which is characterised by disruption of the person's life and a high stress environment complicates mental health care treatment. For purposes of diagnosis and treatment, time, stability and sustained therapy is required. This is simply not possible

As the number of hospitals decreased as a consequence of the deinstitutionalisation movement, the number of mentally ill persons in jails increased.[8] The figure of mentally ill offenders in contact with the criminal justice system has been increasing by approximately 10% per annum.[9] In the general population of the United States of America, mental illness is the main cause of disability.[10]

Up to 15% of all criminal cases involve mental illness.[11] Cases involving fitness to stand trial increased in recent years while those involving the insanity defence decreased.[12] There are approximately 60 000.00 (sixty thousand) competency hearings in the United States of America annually.[13] The increase in fitness referrals can be ascribed to various

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in a jail or prison setting due to the very nature of incarceration. Mental Health treatment does not reach all mentally ill inmates. See Lerner-Wren G "Mental health courts: Serving justice and promoting recovery" *Annals Health L 2010 (19) 577-593.*at 581 where she points out that only one in three state prisoners, one in four federal prisoners and one in six jail inmates receive mental health treatment whilst incarcerated. The most common form of treatment being prescription medication. Also see Odegaard AM "Therapeutic jurisprudence: The impact of mental health courts on the criminal justice system" 2007 (83) *North Dakota Law Review* 225-259.at 225 who confirms the increase in numbers of mentally ill persons in the United States of America.

8 Torrey et al Criminalizing the Seriously Mentally Ill at 41. Also see Rossman SB, Willison JB, Mallik-Kane K, Kim K, Debus-Sherrill S and Downey PM Criminal Justice Interventions for Offenders with Mental Illness: Evaluation of Mental Health Courts in Bronx and Brooklyn, New York (USA National Institute of Justice 2012) at 1. In 1999, it was estimated and reported by the Department of Justice that there were over 250 000.00 mentally ill offenders in prison in the United States of America. See Department of Justice "Mental health and treatment of inmates and probationers" http://www.churchandprison.org/files/3483016/uploaded/Mental%20Health-%20mhtip.pdf (Date of use: 2 July 2012) at 1. It was reported in 2005, that his number has grown to 310 000.00 and to 700 000.00 in 2009. Frailing K "Issues affecting outcomes for mental health court participants" 2009 C.S.L.R 145-157 at 147. Also see Lerner-Wren 2010 Annals Health L 577 at 580 for a breakdown of the percentages of federal and state inmates as well as local jail prisoners who suffered from mental illnesses as at 2006.

9 Schneider RD, Bloom H and Heerema M *Mental Health Courts – Decriminalizing the Mentally Ill* (Irwin Law Canada 2007) at 22. This is the same percentage as in Canada. See chapter 4 of this research for more detail on the Canadian statistics. Also see Torrey *et al Criminalizing the Seriously Mentally Ill* at 9 where it is explained that the first survey that was done in 1880 during which survey it was found that persons with serious mental illnesses comprise 0.7% of the prison population. This number grew to 7.2% in a survey done in 1992.

10 This is also the case in Canada. See in general World Health Organisation. *World Health Report: Mental Health: New Understanding, New Hope.* http://www.who.int/whr/2001/en/whr01_en.pdf (Date of use: 29 May 2014).

11 Rogers and Shuman Fundamentals of Forensic Practice at 151.

12 Parry Criminal Mental Health and Disability Law at 84. Also see Slovenko R Psychiatry in Law / Law in Psychiatry 2nd ed (Routledge New York 2009) at 171.

13 Helfgott JB (Ed) *Criminal Psychology, Volume 3* (Praeger California 2013) at 286. Also see Melton GB, Petrila J, Poythress NG, Slobogin C, Lyons PM Jr and Otto RK *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* 3rd ed (Guilford Press New York 2007) at 82. See further Rogers and Shuman *Fundamentals of Forensic Practice* at 151 where it is indicated that competency assessments vary from between 50 000 to 60 000 annually. See also Shea SE "Representing clients with mental disabilities" 2013 (XXVIII) *Public Defence Backup Centre Report* 8-16 at 8 who sets the number of fitness referrals at 60 000.

reasons, among which is the use of these assessments as a tactical delay of the trial.[14]

The increase in numbers, as stated above, results in courts having to deal more often with cases involving mental illness. The criminal justice system is an adversarial and accusatorial system.[15] It has to find ways to deal with cases involving mental illness within its existing legislative and procedural framework.

The relevant legislative framework, within which the cases of mentally ill accused are dealt with, is discussed below, starting with the American Constitution, followed by criminal procedure legislation and mental health legislation.

2.2 *The American Constitution*

The American Constitution contains a Bill of Rights, which provide for the protection of individual rights.[16] The Bill of Rights comprises the first ten amendments to the American Constitution.[17] Further amendments to the Constitution are also relevant, although they do not form part of the Bill of Rights.[18] The most relevant amendments for purposes of the mentally ill accused in the criminal justice system are discussed below.

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14 Slobogin, Rai and Reisner *Law and the Mental Health System at* 1020, 1021. Other reasons are that accused persons are sent for these assessments in a hope that they will get some interim mental health treatment, which they were not entitled to in the civil system because they lacked the dangerousness requirement. A factor that might be contributing to the increases may also be the fact that judges generally grant motions for fitness referrals regardless of whether there is evidence that such an assessment is indeed necessary.

15 Welch C and Fuller JR *American Criminal Courts. Legal Process and Social Context* (Elsevier Amsterdam 2014) at 155. Also see Burnham *Introduction to the Law and Legal System of the United States* at 80, 269. Adversarial refers to the requirement that the state should "shoulder the entire load "in a criminal case, where as accusatorial refers to the fact that the prosecutor, as the representative of the state, presents the entire case against the accused.

16 Hemmens C, Brody DC and Spohn CC *Criminal Courts. A Contemporary Perspective* (Sage Los Angelas 2013) *at* 34, 35. The Bill of Rights consist of all the amendment rights that pertain to individuals and are set out in articles I to X of the Bill of Rights. These amendments did not form part of the initial Constitution but was added later and was part of the Constitution when it was ratified in 1791. Contributors to the Constitution included Federalists who were strongly in favour of a centralised government, and states rightists who were less in favour of a strong centralised government. This is possibly part of the reason why there is a federal system that co-exists with a state system in the United States today. Also see Albanese JS *Criminal Justice* 5th ed (Pearson Boston 2013) at 106 where it is pointed out that one of the main goals of the Bill of Rights is protect individuals against the arbitrary use of power by the state.

17 *Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective* at 35. 23. Individual rights are protected under the first 8 amendments. These individual rights were added to address the concern of state rightists that a centralised government might infringe the rights of the individuals. It was only in the 20th century that these individual rights contained in the amendments, were made applicable to actions of the state. Also see Albanese *Criminal Justice* at 106.

18 Amendments 11 to 15 were added after the Civil War to protect slaves from the government interfering in their individual rights. These amendments that implicate individual rights are collectively referred to as Reconstruction Amendments. See *Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective* at 44.

The 5th and 14th Amendments provide for the protection of the due process rights of the accused.[19] Due process is concerned with procedural justice that is due to all persons whenever they are threatened with the loss of life, liberty, or property at the hands of the state.[20]

The 6th Amendment provides for the accused's right to be legally represented during the trial.[21] This not only means the right to have a lawyer present during the trial but also for the accused to be represented by a lawyer during all the important stages of the criminal proceedings, which includes the period between being charged and appearing on trial.[22] It is during this time that the fitness issue may arise. An accused must therefore have legal

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19 Article V (5th amendment) of the Bill of Rights of the American Constitution reads as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The 14th Amendment also protects the due process rights of the accused and section 1 thereof reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The 14th Amendment was added after the civil war and made the due process clause enforceable on state level and not just against the federal government. See Albanese *Criminal Justice* at 106.

20 Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at 11.

21 Slobogin C, Rai A and Reisner R *Law and the Mental Health System Civil and Criminal Aspects* 5th ed (Thomson West United States of America 2009) at 1006 where it is pointed out that the 6th Amendment also provides for the right to confront one's accusers and to present evidence and points out how important fitness is in order to be able to properly exercise these rights. The 6th amendment is contained in article VI of the American Constitution and reads as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence." Also see Albanese *Criminal Justice* at 254. The 6th Amendment further guarantees a trial by jury for persons accused of all offences that are not petty crimes - these are crimes punishable by a prison sentence of more than 6 months. See Burnham W *Introduction to the Law and Legal System of the United States* 5th ed (West United States of America 2006) at 309. The federal jury consists of 12 jurors whereas the jury in state courts may be not less than 6. Currently, 33 states use a jury system where there must be at least 6 jurors. Although the prosecution also has a right to a jury trial even if the accused does not particularly want such a trial. See in general *Singer* v *United States* 380 US 24,34 (1965). The 6th Amendment further states that a trial shall take place in public, unless the accused waives this right. The First amendment provides the press and the public with a corresponding right to have access to trial proceedings.

22 Burnham Introduction to the Law and Legal System of the United States at 302. Also see Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at 42 where some of the important phases are identified as the preliminary hearing, the arraignment, the trial itself and any appeal that may follow. See further Albanese *Criminal Justice* at 256 who adds the first appearance to the stages during which an accused is entitled to legal representation.

representation at the time when the fitness issue is raised pre-trial.[23] The right to counsel during trial exists for persons accused of felonies as well as for those accused of misdemeanours where a conviction could result in a single day in jail.[24] Where an accused cannot afford legal representation, an appointment must be made at the state's expense.[25]

The 6th Amendment further guarantees each accused the right to a speedy trial.[26] The purpose of this right, which attaches once the accused is arrested or charged, is three-fold: to prevent "undue and oppressive" incarceration prior to trial; to minimise concern and anxiety about public accusations and lastly, to limit the possibility that the accused will not be able to defend himself because of undue and long pre-trial delays.[27] If it can be proved that this right was violated, the relief available to the accused is that the charges are dropped.[28] Mentally ill accused persons are often detained for prolonged periods of time

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[23] Marks LK, Dean RS, Dwyer M, Girese A and Yates JA *New York Pretrial Criminal Procedure* 2nd ed (Thomson West 2007) at 522, 523 where the argument is explored that because competency assessments are not "interrogations", the right to legal representation arguably does not apply to competency proceedings. The fact that evidence can come forth from a fitness assessment is the main reason why the right to legal representation during these assessments are said to apply.

[24] Burnham *Introduction to the Law and Legal System of the United States* at 312. Also see Albanese *Criminal Justice* at 256 where it is explained that this right was initially only available to persons accused of felonies under federal law. It was extended to persons accused of misdemeanours in the late 90's and to other stages of the criminal proceedings including police questioning and preliminary hearings.

[25] Albanese *Criminal Justice* at 256, 258 points out that this is very significant as the majority of jail inmates are indigent. The cost to provide indigent defendants with legal representation amounts to approximately 2.3 billion dollars annually.

[26] The relevant part of the 6th amendment states that: "the accused shall enjoy the right to a speedy and public trial". Burnham *Introduction to the Law and Legal System of the United States* at 307. Also see *Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective* at 41. See further Albanese *Criminal Justice* 254, 265 where it is explained that the Speedy Trial Act was introduced to ensure that criminal trials proceed to court within 100 days – the Act does not apply to civil cases which results in the fact that civil cases currently take much longer to finalise.

[27] Burnham *Introduction to the Law and Legal System of the United States* at 307. If, after arrest, the prosecutor convinces the judge during an initial *ex parte* review of the case, that there are sufficient grounds for a prosecution, a complaint is filed which serves as the charging instrument throughout the trial, whereas the complaint is replaced with an indictment or information in the case of a felony. Also see the source at 272 where it is explained that the review must take place within 48 hours after arrest. The judge doing the review may get further information from the victim or the prosecutor but not the legal representative of the accused. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 116, 290 where it is explained that proceeding by way of Information instead of a grand jury indictment is more efficient since it eliminates the need to compile a jury and to present evidence. The information contains the official charge in the case of a felony where no grand jury is to be used. See Welch and Fuller *American Criminal Courts* at 134. Also see Albanese *Criminal Justice* at 110.

[28] Burnham *Introduction to the Law and Legal System of the United States* at 307. In order to succeed with this relief, it has to be considered whether the time of detention was uncommonly lengthy, whether the delay was caused more by the accused or by the prosecution, and whether the accused suffered prejudice because of the delay. See *Doggett* v *United States* 505 U. S 647, 651 (1992). Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 41, 42 where it is explained that each case is assessed on its own merit to determine if the accused was

pre-trial awaiting assessment for fitness to stand trial. These waiting periods can have a negative impact on the accused's right to a speedy trial.[29]

The 8th Amendment states that excessive bail shall not be required. The same Amendment further protects citizens from cruel and unusual punishments.[30] This right ties in with the right to liberty in that deprivation of freedom through the denial of bail limits the mentally ill accused's freedom of movement.

In addition to the Federal Constitution, every state has its own Constitution.[31] If there are discrepancies between federal law and state law, including the state's constitution, the federal law will enjoy preference, and the state law will have to be amended to bring it in line with the federal law.[32]

Since the discussion of the procedural dynamics of the Mental Health Courts later in this chapter is based on the Brooklyn Mental Health Court, New York, relevant provisions of the New York Constitution and statutes will be discussed in this chapter as required.

The Constitutional rights set out above must be respected within the criminal justice system where issues pertaining to fitness to stand trial arise. The relevant criminal procedure legislation is considered below.

2.3 Criminal Procedure legislation

The United States Code [33] is the federal guide to criminal law and procedure, whereas each state may enact its own legislation with regard to criminal and criminal procedural law. An overview of the Federal legal instruments and those relevant to the state of New York is provided below.

2.3.1 Introduction

Criminal law in the United States of America is mostly enacted at state level.[34] Every state creates crimes through statute, which may inevitably mean that some definitions of crimes

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indeed brought to trial without unnecessary or unreasonable delays and various factors can be considered as relevant in a particular case.

29 Slobogin, Rai and Reisner *Law and the Mental Health System* at 1021.

30 Article VIII (8th amendment) to the Bill of Rights in the American Constitution states that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

31 Welch and Fuller *American Criminal Courts* at 114, 281. Also see Albanese *Criminal Justice* at 86.

32 Welch and Fuller *American Criminal Courts* at 116. Also see Albanese *Criminal Justice* at 86, 87.

33 Hereinafter referred to as "the US Code".

34 Welch and Fuller *American Criminal Courts* at 115. Also see Albanese *Criminal Justice* at 87, 106.

may differ from one state to the next, as well as the penalty that may be imposed in the event of a conviction.[35] Every county within a state can further create ordinances that are contained in a criminal or penal code that applies to that particular county only.[36] Further sources of criminal law in the United States of America are case law and administrative regulations.[37]

Each state governs its own Criminal Procedure. In the case of New York, the criminal procedure is governed by the New York Criminal Procedure Law.[38] Criminal procedures safeguard the rights of persons in the adjudication process whilst also safeguarding the interests of the community.[39] Criminal procedure, which embodies the ideal of due process, prescribes what the police may and may not do when processing a criminal case and further aims to protect constitutional rights to liberty and freedom of speech.[40] The procedures in courts vary depending on the type of offence that is under consideration.[41] The main stages of the overall process can, however, be identified.[42]

The definitions of fitness to stand trial and non-criminal responsible are set out in the US Code, and the New York CPL are explored below.

2.3.2 Fitness to stand trial

The US Code contains provisions regarding fitness to stand trial and states that an inquiry into the competence of the accused to stand trial shall be held if:

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35 Albanese *Criminal Justice* at 227 point out that the definitions of murder and robbery for example are similar across states but that the penalties for these crimes may vary from state to state.

36 Albanese *Criminal Justice* at 87.

37 Albanese *Criminal Justice* at 87. The precedent system is applied in the US but judges sometimes deviate from it when they are of the view that the decision was incorrect or that it is time to develop the law in a new judgment. Administrative regulations may contain provisions that create criminal offences when there is non-adherence to the regulations. Regulations made by the Environmental Protection Agency is one such example.

38 New York Criminal Procedure Law (available at http://ypdcrime.com/cpl/article10.htm) (Hereinafter referred to as New York CPL).

39 Albanese *Criminal Justice* at 92, 109. This is particularly important in criminal cases since the states resources is vast compared to that of an individual.

40 Welch and Fuller *American Criminal Courts* at 119. Procedural due process is concerned with police powers during the processing of a criminal case whereas substantive due process is concerned with the protection of Constitutional rights.

41 Welch and Fuller *American Criminal Courts* at 132.

42 Welch and Fuller *American Criminal Courts* at 132. Some courts tend to combine some of the main stages such as the preliminary hearing stage and the bail stage. Other courts use additional stages, such as witness conferences prior to trials.

The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defence.[43]

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[43] 18, U.S.C, § 4241 (2006). The entire section 4241 reads "§4241. Determination of mental competency to stand trial to undergo post release proceedings
(a) Motion To Determine Competency of Defendant.-At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defence.
(b) Psychiatric or Psychological Examination and Report.-Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).
(c) Hearing.-The hearing shall be conducted pursuant to the provisions of section 4247(d).
(d) Determination and Disposition.-If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defence, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalise the defendant for treatment in a suitable facility-
(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and
(2) for an additional reasonable period of time until-
(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or
(B) the pending charges against him are disposed of according to law;
whichever is earlier.
If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.
(e) Discharge.-When the director of the facility in which a defendant is hospitalised pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defence, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defence, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.
(f) Admissibility of Finding of Competency.-A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity

At state level, the New York CPL refers to an "incapacitated person" as:

> *…a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense.*[44]

Once doubt about the accused's fitness arises, a referral to determine his fitness must be ordered; there is no discretion in this regard.[45]

2.3.3 Not criminally responsible

The US Code makes provision for the insanity defence to be entered where an accused:

> *…as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.*[46]

The accused bears the burden of proving that he suffered from a mental illness at the time of the offence.[47]

New York CPL makes provision for a plea of not criminally responsible by reason of mental

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as a defence to the offense charged, and shall not be admissible as evidence in a trial for the offense charged."

[44] New York CPL section 730.10(1). Also see Marks *et al New York Pretrial Criminal Procedure* at 510.

[45] This is evident from the use of the word "shall" in 18 U.S.C § 4241 (2006). "…the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defence." This obligation also exists on state level according to New York CPL 730.30(1) that states, "...the court wherein the criminal action is pending must issue an order of examination when it is of the opinion that the defendant may be an incapacitated person." See further Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 1.

[46] 18 U.S.C §17 (2006). Section 17 states
"§17. Insanity defence
(a) Affirmative Defense.-It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
(b) Burden of Proof.-The defendant has the burden of proving the defense of insanity by clear and convincing evidence."

[47] 18 U.S.C §17(b). The insanity defence sparked controversy when John Hinkley was acquitted on account of mental illness, for attempted murder of President Reagan in 1982. See Winslade and Ross *The Insanity Plea* (New York 1983) at 181, 182. See further Du Toit E, De Jager, FJ, Paizes A, Skeen A St Q and Van der Merwe SE, *Commentary on the Criminal Procedure Act* (Juta Cape Town 2012) at 13-1.

disease or defect and prescribes the procedure to be followed in such a case.[48]

As pointed out earlier, this research is mainly concerned with pre-trial issues, and thus criminal capacity issues, which are considered at the sentencing phase, will therefore not be discussed in detail in this chapter.

2.4 Mental Health Legislation

In terms of the Americans with Disabilities Act,[49] states and municipalities are prohibited from discriminating against any person based on disability and must ensure that persons with disabilities are reasonably accommodated.[50] This obligation to provide reasonable accommodation applies to courts and diversion programmes as well.[51] Mental Health Courts fulfil part of this responsibility since they provide for the processing of cases involving those with mental illnesses in the criminal justice system.

America's Law Enforcement and Mental Health Project Act [52] was passed in 2000, which made federal funding available to states which wished to implement Mental Health Courts or mental health diversion programmes.[53] The Mentally Ill Offender Treatment and Crime Reduction Act[54] was introduced in 2004 to encourage better collaboration between the criminal justice system and the mental health care system.[55]

Since this chapter focuses on the dynamics of the Brooklyn Mental Health Court, the legislation and procedure of New York will be incorporated in this chapter where necessary. The New York Mental Hygiene Law [56] is sometimes referred to in the context of fitness assessments and will be referred to where necessary.

The basic legal framework as discussed above sets the background for the discussion of

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48 New York CPL section 220.15.

49 Americans with Disabilities Act of 1990. 42, U.S.C Chapter 126.

50 Bernstein R and Seltzer T "Criminalization of people with mental illness: The role of Mental Health Courts in system reform" 2003 (7) D C L Review 143-162 at 145, 146.

51 Bernstein and Seltzer 2003 D C L Review 143 at 146.

52 Pub. L. No. 106-515, 114 Stat. 2399 (2000) (codified as amended in scattered sections of 42 U.S.C.)

53 Bernstein and Seltzer 2003 *D C L Review* 143 at 144. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 12. See further Lurigio RJ and Snowden J "Putting therapeutic jurisprudence into practice: The growth, operations, and effectiveness of mental health courts" 2009 (2) *The Justice System Journal* 196-218 at 204.

54 (S 194) of 2004.

55 42 U.S.C. section 3797aa (2006). Also see Odegaard 2007 *North Dakota Law Review* 225.at 248.

56 This piece of legislation provides for various types of admissions under various types of circumstances. Nowhere in the Act is the word "fitness" or "competency" found and it is unclear whether this Act is used as a vehicle to conduct fitness assessments or not.

the structure of the American criminal justice system below. The below synoptic overview is included to contextualise the jurisdiction of Mental Health Courts in the American system of criminal law and procedure.

3 STRUCTURE OF THE AMERICAN CRIMINAL JUSTICE SYSTEM

3.1 Introduction

This section explains the American criminal justice system with a particular focus on the dual court system. A brief explanation of the state court system followed by the federal court system is included. Reference is made to the New York state courts where appropriate as the relevant state for purposes of the analyses of the Mental Health Court model later in this chapter. It should be noted that the American criminal justice system does not make use of Review Boards, as is the case in the Canadian system; hence, no discussion on Review Boards is included under this section.

3.2 Criminal Courts

There are two court systems in the United States of America, the federal system and the state court system consisting of 50 separate judicial systems in various states.[57] Each state has its own court of last resort that ultimately determines what the law in that particular state is. The United States Supreme Court has the final say about the federal law that applies to all states.[58]

In principle, all hearings take place in open court, as this is a requirement of federal constitutional law.[59] One judge, on the other hand, adjudicates pre-trial motions, which take place in chambers.[60]

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57 Burnham *Introduction to the Law and Legal System of the United States* at 167. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 92. This type of system is also referred to as the dual court system. See further Welch and Fuller *American Criminal Courts* at 96. Also see Albanese *Criminal Justice* at 90, 228 where reference is made to the term dual court system.

58 Burnham Introduction to the Law and Legal System of the United States at 167.

59 The 6th amendment to the Constitution states that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence." Also see Burnham *Introduction to the Law and Legal System of the United States* at 168.

60 Burnham *Introduction to the Law and Legal System of the United States* at 167, 168. These include

Before the state and federal court structures are discussed, it is necessary to distinguish between the types of offences that could come before the courts for adjudication.

There are two types of offences over which courts have jurisdiction. Misdemeanours are less serious crimes that attract a sentence of less than a year,[61] and felonies are the more serious offences that are punishable by death or imprisonment of more than one year.[62] Certain courts only have jurisdiction to hear one or the other type of offence, as will be explained below. Whether the accused is charged with a felony or a misdemeanour has an impact on the pre-trial procedures available to the accused.[63]

The state court structure differs from the federal court structure. These two structures will be discussed below, starting with the state court structure.

3.2.1 State Court structure

The state court structure differs from state to state, with some being more complicated than others.[64] State courts, in their various forms, have jurisdiction over every conceivable cause of action, only limited by that which constitutes federal law.[65] Since crimes are defined in state laws, the majority of criminal cases are heard in the state courts.[66] The

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arraignments and bail hearings as well as motions for a determination of competency for fitness to stand trial.

61 Offences lower than felonies and generally those punishable by fine, penalty forfeiture, or imprisonment other than in a penitentiary. Under federal law, and most state laws, any offence other than a felony is classified as a misdemeanour. Certain states also have various classes of misdemeanours. Also see Welch and Fuller *American Criminal Courts* at 129. Burnham *Introduction to the Law and Legal System of the United States* at 173. Also see this source at 269 where a third type of offence is explained namely the "high misdemeanours". These crimes are punishable with imprisonment of up to two years. Another category of offences is "civil infractions". These are typically not punishable by imprisonment but can be resolved by the payment of a fine – this is often the case in traffic violations.

62 Burnham Introduction to the Law and Legal System of the United States at 173, 269. Also see Welch and Fuller American Criminal Courts at 129. Felonies are defined as "A serious crime, characterized under federal law and many state statutes as any offense punishable by death or imprisonment in excess of one year". Also see Welch and Fuller American Criminal Courts at 129.

63 Burnham Introduction to the Law and Legal System of the United States at 269.

64 *Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective* at 103 who uses New York as an example of a state that has a complicated court structure, where the structure even differs from county to county. Also see Welch and Fuller *American Criminal Courts* at 96 where it is pointed out that the state court structure is not prescribed in the Constitution, for this reason, every state may choose its own and it may differ dramatically from one state to the next.

65 Burnham Introduction to the Law and Legal System of the United States at 188. Also see Welch and Fuller American Criminal Courts at 96.

66 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 102. Indicate that 98% of all cases in the American criminal justice system are heard in state courts. Also see Welch and Fuller *American Criminal Courts* 96 who confirms that the majority of the cases in America are heard by the state courts. See further Albanese *Criminal Justice* at 227 where it is confirmed that the majority of criminal cases are heard in state courts because most felonies are defined by state

state prosecutors, sometimes referred to as the District Attorney, represent states.[67] The typical state court structure consists of four tiers of courts: court of limited jurisdiction, a court of general jurisdiction, intermediate appellate courts and the final appellate court.[68]

Firstly, the lowest level of courts in a state is the courts of limited original jurisdiction that only has jurisdiction to hear misdemeanours.[69] The jurisdiction in some of these courts has been extended to lighten the load on the superior courts.[70] As a result, these courts also handle preliminary hearings and arraignments in felony cases.[71]

These courts also hear bail applications and take decisions on if an accused should be held

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laws.

67 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 132. The physical court work is done by the assistant prosecuting attorneys.

68 Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at 103. Also see Albanese *Criminal Justice* at 227 who classifies the level of courts according to jurisdiction rather than hierarchy, thus stating that there are three types of courts in a state namely those with limited jurisdiction (such as domestic violence and small claims court), those with general jurisdiction (Circuit courts) and those with appellate jurisdiction (courts of appeal and Supreme court of the state). Also see Burnham *Introduction to the Law and Legal System of the United States* at 167 who explains that there are two main types of courts in the United States of America, the trial courts that are the lowest courts and the appellate courts.

69 Burnham *Introduction to the Law and Legal System of the United States* at 173. Also see Welch and Fuller *American Criminal Courts* at 83 where it is explained that courts with limited jurisdiction may only hear misdemeanour cases and less serious felonies. Courts with general jurisdiction are tasked with hearing cases involving felonies. See further Albanese *Criminal Justice* at 227 where it is stated that courts of limited jurisdiction hear cases involving minor criminal offences, traffic and motor vehicle violations as well as ordinance violations. These courts are also referred to as magistrate courts, county courts, local courts and municipal courts. See Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 103. Also see Marks *et al New York Pretrial Criminal Procedure at* 530. Welch and Fuller *American Criminal Courts* at 96. Sometimes states create specialised courts at this lower level of courts, such as a Small Claims Courts. These courts are also referred to as "Justice of the Peace" since the person presiding is not necessarily a judge or a lawyer, but often a layman. Generally it is not permissible for parties to be presented by legal practitioners in this court. Procedure is very informal and there is no option of appeal from a decision reached in this court. See Burnham *Introduction to the Law and Legal System of the United States* at 174. An aggrieved party does however have the right to apply for a trial to run afresh in a higher court.

70 Burnham Introduction to the Law and Legal System of the United States at 173.

71 Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at 103. Also see Welch and Fuller *American Criminal Courts* at 132 where it is pointed out that no preliminary hearing takes place in misdemeanour cases, this process takes place in felony cases only. Defendants in cases involving misdemeanours further have no right to a jury and the process of arraignment does not apply to them. Also see this source at 133 where it is explained that a court of limited jurisdiction does not have jurisdiction to accept a guilty plea in a felony case but may handle the case up to this point, which includes the initial appearance or pre-trial hearing. Arraignment is the part of the process where the charges are put to the accused and he is asked to plea to it. See Burnham *Introduction to the Law and Legal System of the United States* at 275. See further Albanese *Criminal Justice* at 111 where it is explained that the judge explains the charges to the accused from the information or grand jury indictment in front of him in terms whereof it was found that there is enough evidence to bind the accused over for trial.

over for trial.[72] An accused's first appearance is usually in a lower court at which point he may apply for bail or be diverted to the Mental Health Court.[73] A bail hearing may be held even where an accused was found incompetent to stand trial, as long as the defence counsel could provide sufficient facts to allow a judge to set bail.[74]

Where the charge against the accused is a misdemeanour, the accused may enter a plea at his first court appearance, and the case may proceed to trial immediately in the event that the accused pleads not guilty.[75] Where the accused pleads guilty to a misdemeanour charge, the sentence may be handed down immediately, or a date is set for a sentencing hearing.[76]

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72 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 104. Also see Welch and Fuller *American Criminal Courts* at 132.

73 Burnham *Introduction to the Law and Legal System of the United States* at 272, 273 where the nature of financial bail and non-financial bail is discussed. The inability of an accused to pay bail should not disqualify him from qualifying for it, but the presiding officer must then still consider his financial position during such process. The right to be released on bail is provided for in the eighth amendment to the Constitution that states that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. " Also see *Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective* at 42, 43, 291 where it is stressed that there is no Constitutional right to bail but that the Eight Amendment merely states that an excessive amount shall not be required in order to be released on bail. Many indigent criminal defendants remain in jail until their trials since they cannot afford any amount of bail. Also see Welch and Fuller *American Criminal Courts* at 133 where it is pointed out that bail is often set during the first appearance of the defendant in misdemeanour cases. Also see Albanese *Criminal Justice* at 109 who points out that the first appearance is usually in a lower court such as a municipal court. See further Rogers R and Shuman DW *Fundamentals of Forensic Practice: Mental Health and Criminal Law* (Springer USA 2005) at 89. Also see Welch and Fuller *American Criminal Courts* at 133, although reference is not made to Mental Health Courts *per se*, the fact that the defendant can be diverted to a court monitored programme at this juncture is confirmed.

74 Parry J *Criminal Mental Health and Disability Law, Evidence and Testimony* (American Bar Association United States of America 2009) at 92. This was for instance the case in *Massachusetts* v *Torres 806 N.E 2nd 895 (Mass 2004).* Also see Rogers and Shuman *Fundamentals of Forensic Practice at* 86 where it is pointed out that research regarding evaluative issues for purposes of bail determinations are lacking. What is clear is that issues of non-appearance and community safety have to be considered during the evaluative process. See however Bernstein and Seltzer 2003 *D C L Review* 143 at 146 where the observation is made that persons with mental illness are generally less likely to be released on bail. Bail will not be granted if the accused is a flight risk or a risk to the safety of the community. Burnham *Introduction to the Law and Legal System of the United States* at 307. This is referred to as "preventive detention "and has been used more since the 1980's. See further Welch and Fuller *American Criminal Courts* at 115, 134. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 291. For more details on bail determinations see in general Rogers and Shuman *Fundamentals of Forensic Practice* at 89-92. Also see Albanese *Criminal Justice* at 109.

75 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 291. See further Albanese *Criminal Justice* at 110. In practice, however, the trial does not proceed immediately; rather a date is set for a trial on some future date. See Burnham *Introduction to the Law and Legal System of the United States* at 273.

76 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 291. If the accused is found guilty, or if he pleaded guilty, a date will be set for a sentencing hearing. A pre-sentence report is drafted by a probation officer with regard to all the factors that could impact the sentence of

The judges that preside over first appearances [77] usually do not have jurisdiction to accept a plea in felony cases, and for this reason, when the proceedings reach the stage where a plea has to be entered, a date is set for a preliminary hearing, a process that only takes place in felony cases.[78]

Some states, such as New York, have as many as 2 500 local trial courts of limited jurisdiction, whilst other states have none.[79] Mental Health Courts are limited jurisdiction

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the accused, including his criminal history. A victim impact statement is often allowed as part of this process. See Burnham *Introduction to the Law and Legal System of the United States* at 277. This report addresses issues in the accused's background that could impact the sentencing and is drafted by an agency that is separate from the court, often called the "probation department". The allowance of a victim impact statement is a recent development in the US criminal justice system and is being used in more and more states.

77 Judges in courts of general jurisdiction. See Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 291. Also see Albanese *Criminal Justice* at 109 where it is explained that most first appearances take place in municipal court, which is the lower tier of the court system.

78 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 291. Also see Welch and Fuller *American Criminal Courts* at 133 where it is confirmed that courts of limited jurisdiction do not have jurisdiction to accept a plea in felony cases. See further Albanese *Criminal Justice* at 110. The first appearance constitutes a screening of the charge. Burnham *Introduction to the Law and Legal System of the United States* at 27, 275. Also see Welch and Fuller *American Criminal Courts* at 133 where the other important developments in a pre-trial hearing is explained as including that the charges are explained to the defendant and that the defendant is informed of his rights. See further Albanese *Criminal Justice* at 109. It has to be shown at the preliminary hearing that there is enough evidence to proceed to trial. See Burnham *Introduction to the Law and Legal System of the United States* at 275. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 116. This is also referred to as being "bound over" for trial. See further Welch and Fuller *American Criminal Courts* at 133. Also see Albanese *Criminal Justice* at 110. This preliminary examination/pre-trial hearing may however be waived by the accused and the case can proceed to arraignment from there. Burnham *Introduction to the Law and Legal System of the United States* at 274. The accused may for example be aware of a defect in the prosecutor's case and does not want to alarm him to it during the preliminary examination. The accused may also want to waive the preliminary hearing because he does not want the prosecution's witnesses to put their testimony on record at this point. These preliminary examinations or hearings have good discovery value but is most often waived by the accused. Also see Welch and Fuller *American Criminal Courts* at 135 where it is explained that in misdemeanour cases where the defendant pleads not guilty, there is no preliminary hearing and the case may proceed directly from the initial appearance to the arraignment phase. The prosecution often secures a grand jury indictment, which makes the holding of a preliminary enquiry unnecessary. The indictment contains the formal charges against the accused. Burnham *Introduction to the Law and Legal System of the United States* at 275. Every accused has the right to be indicted by a grand jury as provided for in the 5th amendment to the American Constitution. The right does not apply to state criminal courts although some states prefer to obtain a grand jury indictment rather than an Information, which is the alternative to a grand jury indictment and filed directly with the court by the prosecutor. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 39 where it is explained that the purpose of this right is to ensure that the accused is only prosecuted if there is sufficient evidence to do so. The grand jury is a mechanism to protect the individual from baseless prosecutions by the state. Grand juries usually consist of anything between 6 and 23 members. See Albanese *Criminal Justice* at 110. Where a preliminary examination or hearing is held, the charges are very seldom dropped. See Burnham *Introduction to the Law and Legal System of the United States* at 274.

79 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 103. California and Illinois are examples of states that do not have any trial courts of limited jurisdiction. These courts

courts that only have jurisdiction over specific cases and aim to address a specific problem.[80] It is compulsory to refer the case to the Brooklyn Mental Health Court if a competency examination is ordered in this district.[81]

Secondly, there are the trial courts of general original jurisdiction.[82] This court has jurisdiction over all felonies and appeals from lower courts.[83] Some states have trial courts with specialised jurisdiction that adjudicate over matters of a particular type.[84] Specialised courts are considered equal in jurisdiction to the circuit courts, although this is not the case in all states.[85]

Cases in intermediate appellate courts, also known as "courts of appeal", are heard by

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sometimes do not form part of the state court structure as they are established and funded by local county authorities. Also see Marks *et al New York Pretrial Criminal Procedure at* 4 where it is explained that the courts in the state of New York are referred to as "local courts" and "supreme courts".

80 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 437. Also see Welch and Fuller *American Criminal Courts* at 448 where it is explained that specialised courts in the United States are limited jurisdiction courts that seek to solve specific problems of the criminal justice system that require focussed expertise.

81 Steadman HJ, Redlich AD, Griffin P, Petrila J and Monahan J "From referral to disposition: Case processing in seven mental health courts" 2005 (23) *Behavioural Science and Law* 215-226 at 219. In Brooklyn, all individuals referred for competency evaluations to determine fitness to stand trial or criminal capacity, must be referred to the Mental Health Court.

82 Burnham *Introduction to the Law and Legal System of the United States* at 169, 173. Trial courts constitute the biggest number of courts in the USA with 1498 judges that staff the California trial courts for example. Also see Welch and Fuller *American Criminal Courts* at 98. See further Albanese Criminal Justice at 228 who states that generally, there is a court of general jurisdiction in every County. This amounts to more than 3 200 of these courts nationwide. They are also referred to as district courts, superior courts, circuit courts or, in the case of New York, "Supreme courts". See Burnham *Introduction to the Law and Legal System of the United States* at 173. The highest court in New York for which the name Supreme Court is usually reserved, is referred to as the "Court of Appeals". Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 104. See further Welch and Fuller *American Criminal Courts* at 98. See also Albanese Criminal Justice at 227. Also see Marks *et al New York Pretrial Criminal Procedure at* 4. One judge presides over this court of first instance in a state and must make a finding on the facts and arguments presented. See Burnham Introduction *to the Law and Legal System of the United States* at 167 who explains that the trial is presided over by one judge with or without a jury depending on the type of the case and the choice of the parties.

83 Burnham *Introduction to the Law and Legal System of the United States* at 173. Also see Welch and Fuller *American Criminal Courts* at 98, 83 where it is explained that courts of general jurisdiction concern themselves with serious felonies. See further Albanese *Criminal Justice* at 228. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 104.

84 Burnham Introduction to the Law and Legal System of the (United States at 173. Examples of these are surrogate's courts (These courts hear mental commitment and guardianship matters of adults who are not able to handle their own affairs) juvenile courts (If a case involving a juvenile is not heard by the surrogate's court (also known as the probate court) then the juvenile court hears the matter) and courts of claim (These courts handle all money claims against the state).

85 Burnham *Introduction to the Law and Legal System of the United States* at 173. In some states the specialised courts are considered inferior to Circuit Courts.

three judges.[86] There is a right of appeal to this court from a trial court as this court has the task of correcting errors made by the trial court.[87] These courts have mandatory jurisdiction when it comes to appeals, meaning that they must hear all appeals lodged with them from lower courts.[88] The majority of states have intermediate appellate courts.[89]

The final appellate court, which is the court of last resort in the state, is referred to as the "Supreme Court" and is usually provided for in a state's constitution.[90] Cases in these courts are heard by between 5 and 9 justices.[91] The Supreme Court has the task of overseeing the development of the law and hears appeals from lower courts.[92] The state appellate court has the last say on the law of the state.[93] Where the state in which the Supreme Court is situated has an intermediate appellate court, this Supreme Court has discretionary jurisdiction and can choose which appeals it wishes to hear.[94] Not all states have the double layer appeal system.[95] For a party that loses in this court, their only option

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86 Welch and Fuller *American Criminal Courts* at 98 where it is explained that these courts are also referred to as appellate courts, superior courts and courts of special appeals. Also see Burnham *Introduction to the Law and Legal System of the United States* at 169.

87 Burnham *Introduction to the Law and Legal System of the United States* at 169. Also see Albanese *Criminal Justice* at 228 who confirms that these courts hear appeals from the courts of general jurisdiction and have the duty to correct errors made by lower courts. Where an error is detected the case is usually referred back to the trial court for reconsideration.

88 Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at 105.

89 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 104 explain that 39 of the states do have intermediate appellate courts. Also see Welch and Fuller *American Criminal Courts* at 98 where it is pointed out that states such as Delaware and Nevada do not have intermediate appellate courts. Also see Albanese Criminal Justice at 228 who specifies that 11 states have no intermediate courts of appeal.

90 Burnham *Introduction to the Law and Legal System of the United States* at 169. The judges presiding in a Supreme Court is referred to as "Justices "whereas those that preside in a trial court or appeal court is referred to as "Judge". Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 105. See further Welch and Fuller *American Criminal Courts* at 98 where it is pointed out that some states refer to this court as the court of appeals. Also see Albanese *Criminal Justice* at 228.

91 Burnham *Introduction to the Law and Legal System of the United States* at 169. See however Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 105 who states that the number of judges vary between 3 and 9.

92 Burnham Introduction to the Law and Legal System of the United States at 169. Also see Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at 104, 105. See further Albanese Criminal Justice at 228 who confirms that these courts hear appeals from courts of general jurisdiction. In some cases appeals are mandatory such as in cases where the death penalty is imposed.

93 Burnham *Introduction to the Law and Legal System of the United States* at 174. Also see Albanese *Criminal Justice* at 228. Supreme Courts in states where there are no intermediate appellate courts have mandatory jurisdiction, meaning that they must hear all appeals lodged with them. See Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 105.

94 Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at 105. Also see Burnham Introduction to the Law and Legal System of the United States at 169.

95 Burnham *Introduction to the Law and Legal System of the United States* at 169 who points out that New York has the double appeal system in place. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 105 where it is explained that the less populated states do

is to appeal to the US supreme court of appeal but may only appeal to such court if their case involves a constitutional issue or a matter of federal law.[96]

3.2.2 Federal court structure

Since Mental Health Courts form part of the state court structure in New York, the federal court structure is discussed in less detail. The purpose of this brief overview of federal courts is mainly to show the hierarchy of federal courts.

Federal courts have limited jurisdiction as they may only draw their powers of jurisdiction from the Constitution.[97] These courts have exclusive jurisdiction over federal criminal law cases and cases involving a violation of the American Constitution.[98] The federal government is represented in these courts by the US Attorney's Office.[99]

The federal court system has jurisdiction over all the states.[100] When state law claims are

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not have intermediate appellate courts, which result in these states not having the double appeal layer. See further Albanese *Criminal Justice* at 228 where it is pointed out that there are 11 states that do not have the double layer of appeal as they do not have the intermediate appellate courts.

96 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 106. Also see Albanese *Criminal Justice* at 228 where it is explained that the only way that a state case can ever be heard in a federal court is on appeal when there is a federal Constitutional issue that remains unsettled and that the US Supreme Court decides to hear.

97 Burnham *Introduction to the Law and Legal System of the United States* at 188. Also see *Hemmens*, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 96, 98. The federal court jurisdiction is divided into federal question jurisdiction and diversity jurisdiction. Federal question jurisdiction involves cases where the plaintiff relies on a federal law question to succeed with his case and includes disputes between states or where the Constitution conferred the jurisdiction on the court. Federal courts have exclusive jurisdiction over matters involving cases where the US is a party to the case or where the case involves different states. See further Albanese *Criminal Justice* at 228. Diversity jurisdiction involves cases between citizens from different states or between a citizen and a foreigner. There must however be a minimum amount of claim of $75 000 involved. See Burnham *Introduction to the Law and Legal System of the United States* at 174, 188-190. Diversity jurisdiction was mainly created to ensure the fair treatment of the party who is not a citizen of the state of the other party to which court he would naturally have wanted to go.

98 Burnham *Introduction to the Law and Legal System of the United States* at 189. These courts further have exclusive jurisdiction over bankruptcy matters as well as copyright infringement matters. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 99, 96 where it is pointed out that Congress increased the number of federal crimes leading to an increase in the criminal matters heard by Federal courts, which previously mainly heard civil matters. Only about a third of the cases are criminal cases. Also see Albanese *Criminal Justice* at 228. Burnham *Introduction to the Law and Legal System of the United States* at 174.

99 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 132. Attorney's general are political appointments and likely to change with the appointment of a new president. The work of the Attorney General is mostly conducted by the Assistant Attorney whose appointment is not politically motivated. Every district has an Attorney General allocated to them. Also see Welch and Fuller *American Criminal Courts* at 279.

100 The Federal state structure is much smaller if compared to all the state court structures. Burnham *Introduction to the Law and Legal System of the United States* at 174. To illustrate this, the author

adjudicated in the federal court, the state law is applied with regard to all substantive matters, but federal procedural law applies.[101]

The lowest level of courts in the federal system is the courts of limited jurisdiction, also known as magistrate courts and are often established to assist the district court with its caseload by, for instance, handling the bulk of pre-trial issues for the district judges.[102] The United States Claims Court, Tax Court and Military Court and Court of Veterans Appeal are some examples of specialised (limited) jurisdiction courts.[103]

The next layer of courts in the federal system is the federal trial courts of general jurisdiction, which consists of the 94 United States District Courts, more or less one per state.[104] The majority of federal cases are heard in these courts.[105] These courts do not

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points out that there are about 29 000 state judges whilst there are only 850 federal judges. The difference in the number of cases heard by the state courts versus the federal courts is astronomical in that more than 100 million cases were heard in state trial courts in 2008, whereas only 58 000 were heard by the Federal Appeals court in that same year.

101 This is in line with the conflict-of-laws notion where the forum hearing the dispute is allowed to follow its own procedure. See Burnham *Introduction to the Law and Legal System of the United States* at 192.

102 Albanese *Criminal Justice* at 228. See further Welch and Fuller *American Criminal Courts* at 91 that states that pre-trial issues handled by Magistrates on behalf of the District court judges include bail applications and search warrants. These courts are presided over by Magistrates and form a layer of trial courts that fall under the district courts. District judges appoint Magistrates and assign judicial tasks to them. The Magistrates are allocated cases from the district courts and assist in fulfilling the duties of the district court.

103 Burnham *Introduction to the Law and Legal System of the United States* at 175. The United States Claims Court handles claims against the federal government. The Tax Court hears matters involving federal tax. Also see Albanese *Criminal Justice* at 228 where it is stated that courts such as the Tax Court are courts of limited jurisdiction as indicated by the name of the court, which implies that they only hear cases involving certain subject matter. Other examples are the veterans appeal court that hears matters regarding benefits for veterans and the foreign intelligence surveillance court who hears applications by the attorney general to use wiretaps in the interest of national security. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 97 who adds Federal Administrative Agencies and Boards to the list of forums with specialised court jurisdiction on the federal court level. These courts are often referred to as "article 1 courts" as they are presided over by "article 1 judges" who are appointed for a specific period of time only. Also see Welch and Fuller *American Criminal Courts* at 88, 89 these courts are also referred to as "legislative" courts as they are created by statute and not the Constitution. They are presided over by judges that are appointed for a limited period of time, often 8 years. There is a reluctance to create more courts with specialised jurisdiction with a preference being that federal cases of all kinds should be heard by "article 111 judges" who preside over all types of cases and are appointed for life. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 98 where it is confirmed that federal judges are appointed for life whereas state court judges are appointed for a limited period of time. Also see Welch and Fuller *American Criminal Courts* at 88, 89 where it is explained that these judges preside over courts created in the Constitution and are appointed to do so for life. These courts include the U. S District courts, circuit courts of appeals and the U. S Supreme court.

104 The US Bankruptcy Court also falls on this tier. The U S Court of International Trade and the US court of Federal Claims are also trial Courts. See Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 97, 98. Some bigger states such as California have up to four district

hear as many cases as the state trial courts as they only hear cases where the federal Constitution or congressional statute is applied.[106] These courts also have jurisdiction over petitions for *habeas corpus.*[107]

The federal courts of appeal, also known as circuit courts, form the next layer of federal courts.[108] They consist of 12 regional circuit courts and one court of appeal for the federal circuit.[109] These courts hear civil and criminal appeals from the various district courts, specialised federal courts, such as the US Court of International Trade and from some administrative agencies such as the Department of Health and Human Services.[110] These courts also hear *habeas* corpus petitions.[111] Every appeal court, or circuit court, is allocated a number of states over which they have jurisdiction.[112] Appeals are heard by a

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courts. Also see Welch and Fuller *American Criminal Courts* at 90. Also see Albanese *Criminal Justice* at 229. Burnham *Introduction to the Law and Legal System of the United States* at 174. These courts are found in 94 districts across America. Where a state has a bigger population, such a state might have more than one district. New York, for example, has four districts. (north, east, south and west). Smaller, less populated states such as Montana constitute a district on its own.

105 Albanese *Criminal Justice* at 229. These courts have 2 judges per court, although only 1 judge presides over a trial. Burnham *Introduction to the Law and Legal System of the United States* at 174. Some larger districts such as the Southern district of New York, has 28 judges at its district court. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 98 where it is pointed out that each district also have magistrate judges that assists the federal judges in trials. Also see Welch and Fuller *American Criminal Courts* at 92 where it is stated that criminal cases start in the District Court although they refer some of their functions, particularly the pre-trial issues, to the Magistrates Courts.

106 Burnham Introduction to the Law and Legal System of the United States at 175. Also see Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at 99.

107 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 99. In 2006, this court heard approximately 55 000 *habeas corpus* petitions. In the same year, a total of approximately 88 000 criminal matter served before this court.

108 Burnham Introduction to the Law and Legal System of the United States at 175. Also see Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at 97, 99.

109 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 97, 99. See also Burnham *Introduction to the Law and Legal System of the United States* at 175. The author explains in footnote 37 that the reason for this name is because of the fact that judges used to travel a specific route through the country, usually on horseback and held court sessions in particular districts as they went along their route. Also see Welch and Fuller *American Criminal Courts* at 90, 92. See further Albanese *Criminal Justice* at 229.

110 Burnham *Introduction to the Law and Legal System of the United States* at 175. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 99. District courts are the courts of first instance in the federal court system. One third of the approximately 50 000 appeals heard by these courts in 2005 were criminal cases. Also see Welch and Fuller *American Criminal Courts* at 93. Also see Albanese Criminal Justice at 229 and in particular the diagram on this page that shows the Federal courts from which appeals are lodged to the courts of appeals. These courts include the US Tax Court,, US court of Federal /Claims,, and US court of Veterans appeals to name a few.

111 Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective a 99.

112 Burnham *Introduction to the Law and Legal System of the United States* at 175. The division is not determined geographically. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 99. Also see Albanese *Criminal Justice* at 229.

bench of 3 judges.[113] These courts are intermediate courts of appeal, which lighten the load on the Supreme Court and hear most appeals in the United States of America.[114] Since one circuit court need not follow the decision of another,[115] a ruling on a federal issue in one state may differ from that in another.[116] These discrepancies can be addressed by the United States Supreme Court, which has jurisdiction to review decisions by the federal circuit courts.[117]

The United States Supreme Court is the highest court in the United States of America and is the only court that is specifically created by the federal Constitution.[118] Its function is to hear appeals from the federal courts of appeal and to hear appeals from state courts where a federal matter is concerned.[119] The court consists of nine (9) justices.[120] The court can

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113 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 99, 100. Also see Welch and Fuller *American Criminal Courts* at 93.

114 Welch and Fuller *American Criminal Courts* at 93. Also see Albanese *Criminal Justice* at 229.

115 Burnham *Introduction to the Law and Legal System of the United States* at 175, 176. The decisions of these courts only have persuasive value for another circuit court. The effect is that there may be various decisions pertaining to federal law, depending on the circuit court that handed down the decision.

116 A ruling on a federal issue in New York, which forms part of the second circuit, may differ from that in California that forms part of the ninth circuit. See Burnham *Introduction to the Law and Legal System of the United States* at 176. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 101.

117 Burnham *Introduction to the Law and Legal System of the United States* at 176. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 100, 101 where it is explained, however, that the Supreme Court only takes approximately 100 cases of the 9000 cases that they receive to review. If the case does not involve a difference in opinion between state circuit courts or does not involve an issue of federal Constitutional law, the Supreme Court may decide not to hear the case.

118 Burnham *Introduction to the Law and Legal System of the United States* at 176. The court is situated in Washington D.C. Although it is created by the Constitution, its composition and jurisdiction is determined by Congress. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 97, 100. Also see Welch and Fuller *American Criminal Courts* at 94. The other courts were created through statutes. See further Albanese *Criminal Justice* at 229.

119 Burnham Introduction to the Law and Legal System of the United States at 176. Also see Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at 100, 101. See further Welch and Fuller American Criminal Courts at 93 where it is explained that these courts do not hear cases afresh but its function is mainly to review decisions taken by lower courts. Cases affecting Ambassadors or other foreign ministers are heard by this court Burnham Introduction to the Law and Legal System of the United States at 176. Jurisdiction over this particular issue is assigned to the court by Article III Section 2 of the Constitution of the USA. Also see Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at 100 where it is explained that these courts have original jurisdiction to hear matters between the US and foreigners. Also see Welch and Fuller American Criminal Courts at 83 where it is explained that original jurisdiction implies that a court may hear a case from the start and make a ruling on the facts. Courts of limited and general jurisdiction both have original jurisdiction.

120 All the justices sit together to hear all matters. See Burnham *Introduction to the Law and Legal System of the United States* at 176. In the history of the court it had as little as 5 and as many as 10 Justices. One of the justices is the Chief Justice of the United States Burnham *Introduction to the Law and Legal System of the United States* at 176. The other 8 justices are referred to as "associate justices". Also see Albanese *Criminal Justice* at 229. See further *Hemmens, Brody and Spohn*

decide which cases it will accept and accepts a relatively small number annually.[121] The court takes cases involving disputes between states, cases involving conflicts between the findings of state and federal courts, and cases that aim to resolve constitutional questions.[122]

The legislative framework within which cases involving mentally ill accused persons are considered and the rather complicated American court structure creates the framework within which procedural issues pertaining to mentally ill accused persons must be considered. The discussion of the procedural aspects that follow focuses on issues pertaining to fitness to stand trial, and reference to assessments for criminal capacity will only be made where the context so requires.

4 PROCEDURAL ASPECTS RELATING TO FITNESS TO STAND TRIAL UNDER AMERICAN CRIMINAL LAW

4.1 Introduction

The procedural prescripts regarding fitness to stand trial are set out below. The discussion commences with an overview of the concept of fitness and assessment thereof in the American criminal justice system. The discussion will further focus on the order for assessment of fitness to stand trial, the test employed to determine fitness to stand trial and the actual assessment. The findings that can be made after the fitness assessment are discussed with consideration to the consequences of such findings.

4.2 Overview

It is a prerequisite in every state, as part of the due process protection, that an accused

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Criminal Courts. A Contemporary perspective at 101, 102 where it is pointed out that the number of justices are decided by Congress and that the number of judges have not been changed in 100 years. The author reckons it is unlikely that it will change in the near future.

121 The decision to accept a case is not based on merit and has no binding precedential value. See Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 101. It accepts approximately 100 of 9000 applications for review annually. A petition to the Supreme court to review a case is done by a petition called a "writ of certiorari". This is effectively an instruction sent from the Supreme court to a lower court to furnish the Supreme Court with the record of proceedings so that the Supreme court may consider it – once they have decided to review the case. Also see Welch and Fuller *American Criminal Courts* at 95 who confirm that the court hears approximately 1 percentage of the cases filed with it that amounts to approximately 100 cases a year. See further Albanese *Criminal Justice* at 229 who states that of the 5 000 cases that reaches the Supreme court, less than a quarter of them are heard.

122 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 101. Also see Albanese *Criminal Justice* at 229.

must be fit to stand trial in order for any criminal proceedings against him to continue.[123]

The idea of fitness to stand trial is also referred to as; "triability",[124] "competency to stand trial," or "adjudicative competency" [125] and has its origin in English common law.[126] The rules on fitness originated in cases where the accused had a physical condition, for example, a heart attack, that rendered him incapable of coming to court to stand trial.[127] A person that is absent mentally should similarly not be put on trial,[128] as this would simply be unfair and immoral.[129] Fitness to stand trial thus refers to an accused's physical and mental presence.

The requirement that an accused should be physically and mentally present during the trial aims to preserve the fairness and dignity of the criminal justice system in the United States of America.[130] The competency requirement further serves one of the goals of the criminal justice system, namely specific deterrence.[131] If the individual is unfit to stand trial and,

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[123] Marks *et al New York Pretrial Criminal Procedure at* 509, 510. Also see in general *Pate* v *Robinson 406 US 715* (1972).where this principle is confirmed.

[124] Slovenko Psychiatry in Law / Law in Psychiatry at 171.

[125] Helfgott *Criminal Psychology* at 281.

[126] Slate, Buffington-*Vollum and* Johnson *Criminalization of Mental Illness* at 303. Also see Helfgott *Criminal Psychology* at 281. See further Slobogin, Rai and Reisner *Law and the Mental Health System at* 1005 who adds that the concept of fitness dates back to the 17th century. Also see this source in general where fitness to stand trial is viewed as part of "competency to proceed". See also Albanese Criminal Justice at 89 where it is explained that the American criminal law and justice system is generally derived from the English common law. See further Marks *et al New York Pretrial Criminal Procedure at* 510. Lastly, see Shea 2013 *Public Defence Backup Centre Report* 8 at 8.

[127] Slovenko *Psychiatry in Law / Law in Psychiatry* at 171. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1005 where the development of the fitness concept is discussed. The English courts had to determine if an accused was "mute by malice" and thus refusing to co-operate or 'mute by visitation of God" which made the accused incapable of participating. In the first instance, weight on the accused's chest was increased to the point where he will become willing to co-operate, in the latter case, the accused was spared this torture.

[128] Slovenko *Psychiatry in Law / Law in Psychiatry* at 171. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1005 where it is explained that unfitness were at first only applied to those who were physically mute or deaf but later also applied to the "lunatics".

[129] Slobogin, Rai and Reisner *Law and the Mental Health System at* 1005, 1006 where it is emphasised that the moral aspect of the fitness requirements underlies many of the substantive and procedural aspects pertaining to mentally ill accused persons and assists in preserving the dignity and integrity of the criminal justice system.

[130] Helfgott *Criminal Psychology* at 282. Also see Slovenko *Psychiatry in Law / Law in Psychiatry* at 171. See further *Slate,* Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 302 where the question of relevance of a person's capacity to stand trial is questioned against the backdrop of having committed a crime against society. The authors state that the importance of capacity or competence in this context is to secure the moral dignity of the criminal justice system and to safeguard individuals' rights within the system. See further Slobogin, Rai and Reisner *Law and the Mental Health System at* 1006 where it is explained that the fitness requirement aims to protect the dignity of the criminal justice system on the one hand and the rights of the accused on the other. The rights of society are also considered through striving to keep the integrity of the criminal justice system intact.

[131] Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 302.

consequently, incapable of understanding why he is being punished, he will not be deterred from further criminal acts, and the criminal justice system would have failed in reaching its goal of deterrence.

Fitness entails that an accused must be able to understand the nature and purpose of the proceedings,[132] the charges against him and be able to participate meaningfully in conducting his defence.[133] The mere fact that someone who suffers from a mental illness has amnesia[134] or has a particularly low IQ does not automatically render him unfit to stand trial.[135] Triability is determined by legal criteria and not by medical or psychological standards meaning that the court is the final decision maker in fitness cases.[136]

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132 The accused must have a rational and factual understanding of the proceedings in order to be regarded fit to stand trial. See Parry *Criminal Mental Health and Disability Law* at 91. These requirements were set in the case of *Dusky v. United States*, 362 U.S. 402 (1960). Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 152.

133 Helfgott *Criminal Psychology* at 282. Also see Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness at 302.

134 State v Pellerin 286 So. 2d 639 (La. 1973). Also see Slovenko *Psychiatry in Law / Law in Psychiatry* 179. See further Parry *Criminal Mental Health and Disability Law* at 102. There are various factors that have to be considered by a court in the case of an accused who allegedly suffers from amnesia in order to determine if he is fit to stand trial, *inter alia,* the temporary or permanent nature of the amnesia. The level of prejudice to the accused if he is tried without being able to retrieve his memories, is an important focus point in cases involving amnesia. Where an accused with amnesia is tried and is convicted, it might have to be determined after such conviction, whether the trial was fair to the accused. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 155. See further Slobogin, Rai and Reisner *Law and the Mental Health System at* 1009. Also see Marks *et al New York Pretrial Criminal Procedure at* 543 where it is stated that an accused who suffers from amnesia will likely go through the entire process of determining his fitness, which may include a fitness hearing but that amnesia per se, does not automatically render n accused unfit to stand trial.

135 Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness at 301. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 154. See further Slobogin, Rai and Reisner *Law and the Mental Health System at* 931, these authors refer to incompetence in general but also discuss competency in the criminal law context at 1007 They promote a narrow interpretation of incompetence. Also see Marks *et al New York Pretrial Criminal Procedure at* 516.

136 Slovenko *Psychiatry in Law / Law in Psychiatry* at 181. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 932-934 where the opinion that different levels of competency should apply depending on the decision to be taken (medical treatment, making of a will, standing trial or pleading guilty). The opposite view, that the type of decision to be taken should not matter in the level of competency required, is also analysed with a strong focus on equality of the rights that stand to be impacted by the decision. The concern is also raised that, if there is a ranking of competency, then the competency standard for some of these decisions will have to be lowered which in itself brings new concerns with it. Opinions by psychologists and psychiatrists of course inform this decision and the courts tend to agree with the opinions of the mental health professionals in 90% of cases. See further this source at 1025, 1026 where it is reiterated that it is the mental health professionals and not the lawyers that has the specialised skills to actually determine if a particular accused is fit to stand trial or not. Also see Marks *et al New York Pretrial Criminal Procedure at* 538 where it is explained that fitness hearings are "fact-specific" meaning that it is required of the court to consider various opinions on the accused's fitness. The court ultimately has to take a decision on the fitness issue having due regard to all the facts (including the expert opinions) before it. The court is not bound by the expert opinions (see this source at 542). Lastly, see Shea 2013 *Public Defence*

To allow a person who is mentally ill to stand trial, will impact on his right to take decisions regarding his liberty [137] and will impact his right to due process [138] as provided for in the 5th and 14th Amendment to the American Constitution.[139]

Under American law, an accused is presumed fit to stand trial until the contrary is proven.[140] An accused consequently does not have a right to a hearing on fitness unless the issue is raised specifically.[141] Section 730 of New York CPL [142] sets out the rules to be applied to ensure that an unfit accused does not stand trial.

The discussion that follows will be general discussions of the order for assessment, the test employed, the actual assessment, and the consequences of the court's finding with

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Backup Centre Report 8 at 10 who confirms that it is the court that makes the final decision on triability.

137 Helfgott *Criminal Psychology* at 282 who states that by doing so, the person will in actual fact be prevented from taking decisions concerning their liberty. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 930, 931 where the importance of respecting a person's autonomy to make decisions are emphasised. Such autonomy is however, sometimes, affected by a mental condition that impacts on such true autonomy and it is in such cases that the state is justified to intervene and limit the liberty of such person in his own best interests.

138 Due process can be defined as "procedural justice that is due to all persons whenever they are threatened with the loss of life, liberty or property at the hands of the state." See Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 11. Also see Albanese Criminal Justice at 91 where the growing importance of due process, due to the growth of the population and the fact that the law is enforced by strangers, is stressed.

139 Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness at 302. Also see Slovenko *Psychiatry in Law / Law in Psychiatry* at 171 where it is pointed out that the fitness rules aim to protect the accused's right to a fair trial. Article V (5th amendment) of the Bill of Rights of the American Constitution reads as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The 14th Amendment (section 1 thereof) reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Also see Albanese Criminal Justice at 91 who confirms that due process is provided for in the 5th and 14th amendment of the American Constitution.

140 Parry *Criminal Mental Health and Disability Law* at 100. The United States Supreme Court ruled in *Cooper* v *Oklahoma* 517 U.S 348 (1996) 20 MPDLR 314 that this presumption stands and overturned any scheme that places a burden on the accused to prove his incompetence with clear and convincing evidence. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 155 where it is pointed out that a court may require an accused to prove incompetence but only on a preponderance of probabilities and not a standard higher than that. Also see Slobogin, Rai and Reisner *Law and the Mental Health System* at 1024 where the standard of proof is confirmed. Further see this source at 931 where it is stated that fitness should always be presumed until the contrary is proven. Also see Marks *et al New York Pretrial Criminal Procedure at* 512, 542.

141 Shea 2013 *Public Defence Backup Centre Report* 8 at 9.

142 Hereinafter referred to as "New York CPL".

particular reference to New York criminal procedure law.

4.3 *The order for assessment of fitness to stand trial*

The discussion of the order for assessment will focus on the juncture in the criminal proceedings at which this order can be made, on whose request it can be made and what the content of the order should be.

The issue of competency to stand trial can be raised at any time during the proceedings prior to sentencing.[143]

The judge, the prosecution, the defence attorney, or the defendant himself can raise the issue.[144] The prosecution may request an enquiry into the fitness of the accused in fulfilment of its duty to seek justice and to protect society.[145] An accused may not oppose such a request brought by the prosecution.[146] The defence attorney may raise the fitness issue even where the accused objects to it being raised.[147] The burden to prove, on a

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143 18 U.S.C §4241 states that the issue may be raised at any time prior to sentencing. "(a) Motion To Determine Competency of Defendant.-At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant." Also see section 730.30(1) of the New York CPL which states that "At any time after a defendant is arraigned upon an accusatory instrument other than a felony complaint and before the imposition of sentence, or at any time after a defendant is arraigned upon a felony complaint and before he is held for the action of the grand jury, the court wherein the criminal action is pending must issue an order of examination when it is of the opinion that the defendant may be an incapacitated person." Also see Marks *et al New York Pretrial Criminal Procedure at* 511. See however Parry *Criminal Mental Health and Disability Law* at 99 and also see Helfgott *Criminal Psychology* at 282 who indicate that the fitness issue may be raised at any time prior to conviction and not sentencing. See further Shea 2013 *Public Defence Backup Centre Report* 8 at 10.

144 Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness.at 301. Also see Slovenko *Psychiatry in Law / Law in Psychiatry* at 172, 173 where he explains that, where the fitness issue is raised by the prosecution it is referred to as "preventive detention" whereas the term 'medical immunity" is used where the issue of triability is raised by the defence. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1019. Also see 18 U.S C §4241 where it is spelled out that, "the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."

145 Slovenko Psychiatry in Law / Law in Psychiatry at 173.

146 Slovenko Psychiatry in Law / Law in Psychiatry at 173.

147 Slobogin, Rai and Reisner *Law and the Mental Health System at* 1022. This is in line with the standards set by the American Bar Association and is allowed as part of the attorney's duty to safeguard the integrity of the judicial system. Also see this source at 1023 for criticism of this approach. See further Marks *et al New York Pretrial Criminal Procedure at* 510 where it is pointed out that where the accused's attorney insists on an examination of his client's mental state, an order for such an examination will not be granted unless there is evidence in support of the suspicion that

preponderance of probability, that the accused is indeed unfit rests with the party that raised the issue.[148]

Triability is sometimes used strategically in criminal proceedings as a delay tactic by the defence or as a way to lay the foundation for mitigating circumstances where the prospect of succeeding with the insanity defence looks bleak.[149] The prosecution, on the other hand, may raise the triability issue in an attempt to ensure a lengthy commitment of the accused in controversial cases and to avoid the pre-trial release of an accused.[150]

Whatever the motive behind bringing an application for a fitness assessment might be, the US Code and New York CPL place an obligation on the court to grant a motion for a determination of competency where there is reasonable cause to believe that the accused is suffering from a mental illness which affects his ability to understand the proceedings and conduct a proper defence.[151] The obligation to hold an inquiry arises from the fact that the

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the particular defendant may be incompetent to proceed to trial.

148 Slobogin, Rai and Reisner *Law and the Mental Health System at* 1020 where it is stated that the tendency seems to be that incompetence has to be proved by the party raising the issue, it is not stated as a given that this is necessarily the case in all states. Also see Marks *et al New York Pretrial Criminal Procedure at* 542 where it is confirmed that the burden of proof for purposes of unfitness is on a preponderance of probability. See, however, Shea 2013 *Public Defence Backup Centre Report* 8 at 10 who opines that the burden of proof is on the state to show on a preponderance of probabilities that the accused is indeed fit to proceed to trial.

149 Slovenko R *Psychiatry in Law / Law in Psychiatry* at 171. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1021 where this strategic use of fitness referrals have been cited as one of the reasons contributing to the increase in the number of fitness referrals over the last number of years.

150 Slovenko R Psychiatry in Law / Law in Psychiatry at 171. Also see Slobogin, Rai and Reisner Law and the Mental Health System at 1020, 1021.

151 U. S Code Title 18, section 4241 (a) reads as follows: "(a)Motion To Determine Competency of Defendant. - At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 296. Section 730.3 of the New York CPL contains a similar provision. Where the court is satisfied that there is a bona fide concern about the accused's mental state the judge is obliged to hold an inquiry with regard thereto although there is no obligation to put the issue to a jury. See Parry *Criminal Mental Health and Disability Law* at 84. Also see 18 U.S.C §4241 which sets "reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense" as a requirement for ordering a competency assessment. Slovenko *Psychiatry in Law / Law in Psychiatry* at 171. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 155, 156. See further Parry *Criminal Mental Health and Disability Law* at 98. Also see *Pate* v *Robinson 406 US 715* (1972). The legal representative of the accused has a duty to draw the possible incompetence of the accused to the

conviction of an incompetent person will be a serious violation of due process.[152]

The belief that the accused suffers from a mental illness must be the foundation for the court to order a fitness assessment. The court should, however, not order an assessment merely because an accused has a history of psychiatric treatment. The court should rather consider whether the accused is orientated to time and place, understands the roles of the parties in court and whether he can establish a working relationship with his legal representative.[153] If the court doubts the accused's ability on any of these basic understanding requirements, there could be said to be grounds for an examination of the accused's mental state. The fact that an accused uses psychiatric medication or has attempted to commit suicide, for example, is not sufficient proof of incompetence to stand trial or that an examination of fitness is necessary.[154]

A court may not waive the competency issue just because an accused appears rational and alert during the trial.[155] An accused, however, does not have the right to have his mental

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court's attention, failing which the accused might appeal stating that the legal representation was ineffective. See further Slobogin, Rai and Reisner *Law and the Mental Health System at* 1018 where it is pointed out that such an obligation is in line with the due process clause. Also see this source at 1023 where it is pointed out that such an obligation, which is also in line with the American Bar Association Standards, could prove to be very costly for the justice system if every accused in respect of whom a concern about his mental illness is raised has to be assessed for fitness. It also means hospitalisation, delays and extra court time. The option of appealing against a process where the fitness issue was not raised is open to the accused to safeguard his rights and it is put forward in this source that an appeal in these instances is cheaper to the system rather than raising the fitness issue in every single possible case. Lastly, see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 296. Also see Marks *et al New York Pretrial Criminal Procedure* at 512 who emphasises the use of the word "must" in section 730.30 of the New York CPL that directs that the court must order an examination of the accused' mental state where it appears that the accused may be incompetent. Also see Slovenko *Psychiatry in Law / Law in Psychiatry* at 180. Also see Slobogin, Rai and Reisner *Law and the Mental Health System* at 932. Also see this source at 1026 where it is pointed out that California is one of the few states where fitness issues are put to a jury on the request of the accused.

152 *Rogers and Shuman Fundamentals of Forensic Practice* at 155. Due process entails *inter alia* the protection of the procedural rights of an individual when he stands to lose his liberty in the criminal process and is protected under the 5th and 14th Amendment to the American Constitution. See Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 39.

153 Marks *et al New York Pretrial Criminal Procedure* at 513. Other issues that the court should consider before ordering an assessment is whether the accused has sufficient intelligence and judgment to listen to the advice of counsel and, based on that advice, appreciate the fact that one course of conduct may be more beneficial to him than another; and whether the accused is sufficiently stable to withstand the stresses of the trial without suffering a serious prolonged or permanent breakdown.

154 See Marks *et al New York Pretrial Criminal Procedure at* 515, 516 where reference is made to various cases in which these facts are confirmed. The authors also add that the mere fact that an accused is disruptive during court proceedings does not mean that an accused must be assessed for fitness. A very low IQ is also not necessarily sufficient grounds to order a fitness examination.

155 Slovenko *Psychiatry in Law / Law in Psychiatry* at 173. Also see *Pate* v *Robinson* 406 US 715 (1972) where the Supreme Court held that the trial court could not dispense with the issue of

state investigated if there is no evidence suggesting that such an investigation is necessary.[156] An accused will not be entitled to a competency hearing where he deliberately tries to become incompetent by taking an overdose of medication or refusing to eat.[157]

Where the judge is satisfied that grounds for a fitness assessment exist, the judge may decide that mental health experts should assess the accused.[158] The order for assessment in the state of New York is addressed to the Director of the relevant institution where the assessment is to take place.[159] Two mental health practitioners must be appointed to perform the assessment.[160] The assessment shall last for a period of 30-days [161] and can be conducted on an outpatient basis in cases where the accused was not in custody when the order for assessment was made.[162]

Judges reported that they generally grant a motion for a fitness referral, often without even requiring evidence that such an assessment is necessary.[163] This could be a contributing

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competency just because the accused appeared rational during the trial. In this case, the accused committed a number of violent acts including murdering his wife and baby where after he tried to commit suicide. The court held that, considering the violent nature of his actions and the fact that he had a history of irrational behaviour, the competency issue had to be investigated.

156 Marks *et al New York Pretrial Criminal Procedure* at 512 who adds that the insistence by defense counsel that his client's mental state needs to be investigated is not enough to secure such an investigation if there is no evidence supporting it.

157 Parry Criminal Mental Health and Disability Law at 98.

158 18 U.S.C §4241(b) which reads as follows: "Psychiatric or Psychological Examination and Report.— Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c)." Also see Slobogin, Rai and Reisner *Law and the Mental Health System* 1019. See further Parry *Criminal Mental Health and Disability Law* at 84 who explains that the judge determines the need for a competency hearing through conversations with the accused and his counsel. Also see Marks *et al New York Pretrial Criminal Procedure at* 513, 514 where the importance of the judge personally observing the behaviour of the accused in the courtroom is stressed.

159 Section 730.10(4) of the New York CPL defines director as: ""Director" means (a) the director of a state hospital operated by the office of mental health or the director of a developmental centre operated by the office of mental retardation and developmental disabilities, or (b) the director of a hospital operated by any local government of the state that has been certified by the commissioner as having adequate facilities to examine a defendant to determine if he is an incapacitated person, or (c) the director of community mental health services."

160 Marks *et al New York Pretrial Criminal Procedure at* 521. Section 730.20(1) of the New York CPL states that: "…Upon receipt of an examination order, the director must designate two qualified psychiatric examiners, of whom he may be one, to examine the defendant to determine if he is an incapacitated person. In conducting their examination, the psychiatric examiners may employ any method that is accepted by the medical profession for the examination of persons alleged to be mentally ill or mentally defective. The court may authorize a psychiatrist or psychologist retained by the defendant to be present at such examination."

161 New York CPL 730.20(4).

162 New York CPL 730.20(2).

163 Slobogin, Rai and Reisner *Law and the Mental Health System* at 1021, referring to a study done of

factor to the increase in the number of fitness assessments observed recently in New York.

The requirements to be considered fit to stand trial have been alluded to above. The exact test employed to determine fitness requires closer examination.

4.4 Test for fitness to stand trial

The initial goal of the test for triability was to identify only those with serious cases of mental illnesses and to excuse only those from the trial.[164] The opinion of a mental health practitioner was not required, a common-sense approach was used instead, an approach that is still advocated.[165]

The test for fitness assessments was established in 1960 in the case of *Dusky* v *United States* [166] *,* and the court has not deviated from the standard set in this case.[167] The court focussed on the fact that an accused must be able to consult with his legal representative with a reasonable degree of rational understanding and must have a rational and factual understanding of the proceedings against him.[168] Slovenko [169] labels these requirements as the communicative and cognitive ability of the accused. He stresses that the court must acquaint itself with the mental condition of the accused and not merely establish that the accused is orientated to time and place. This test established in the *Dusky case* represents a minimal constitutional standard on competency that generally applies in all states.[170] Failure by the accused to meet any part of the test will render him unfit to stand trial.[171]

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judges in North Carolina. See however Marks *et al New York Pretrial Criminal Procedure* at 512, 513 where it is stressed that this should not be the case. Fitness examinations should not be ordered without evidence indicating that such an examination is warranted.

164 Slovenko Psychiatry in Law / Law in Psychiatry at 181.

165 Slovenko Psychiatry in Law / Law in Psychiatry at 181.

166 *Dusky v. United States*, 362 U.S. 402 (1960). (Hereinafter referred to as the "*Dusky case").* Also see Albanese Criminal Justice at 98. Also see Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness at 303 where it is confirmed that the test for fitness was established in the case even though it was incorporated into American law much earlier through the English common law as explained above. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1006. See further Marks *et al New York Pretrial Criminal Procedure at* 509, 510.

167 Rogers and Shuman Fundamentals of Forensic Practice at 151. Also see Slovenko Psychiatry in Law / Law in Psychiatry 172.

168 See in general the *Dusky* case. Also see Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness at 303. See further Slovenko *Psychiatry in Law / Law in Psychiatry at* 172 who points out that the requirement that the accused must be able to put forward a rational defence stems from the 17th century. See further Parry *Criminal Mental Health and Disability Law* at 91.

169 Slovenko Psychiatry in Law / Law in Psychiatry at 173.

170 Slovenko Psychiatry in Law / Law in Psychiatry at 172. Also see Parry Criminal Mental Health and Disability Law at 98. See further Slobogin, Rai and Reisner Law and the Mental Health System at 1006.

171 Rogers and Shuman Fundamentals of Forensic Practice at 152.

The first part of the test focuses on the accused's ability to consult with counsel rationally.[172] The basic capacity of the accused to communicate coherently is under investigation here.[173] The accused must be able to identify tangible evidence and provide information pertaining to viable defences such as an alibi.[174] This prong of the test does not require a certain ideal level of intellectual capacity but merely a *reasonable* degree of rational understanding.[175] A higher level of rational understanding is, however, required when the alleged offence is more complex, such as securities fraud, as opposed to a less complex crime such as assault.[176] The focus of this part of the test falls on the capacity to consult rather than the choice to consult since an accused can delay his trial by refusing to co-operate with a lawyer, regardless of his capacity to do so.[177] For this reason, courts are hesitant to find that an accused lacks the capacity to stand trial merely because of disruptive courtroom behaviour.[178]

The second part of the test, as laid down in the *Dusky* case, is to examine the extent to which the accused has a factual and rational understanding of the proceedings, including the charges against him.[179] The factual understanding requirement refers to the accused's

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172 Rogers and Shuman *Fundamentals of Forensic Practice* at 152, 153. Also see this source at 178 where it is pointed out that this part of the test is particularly challenging for forensic mental health practitioners because they never get the opportunity to observe the interaction between the accused and the legal representative. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1006 who is of the view that this part of the tests assesses the accused's ability to function within the criminal process, consulting with counsel is only part of such assessment.

173 Rogers and Shuman *Fundamentals of Forensic Practice* at 164. This question investigates the accused's ability to communicate understandably, whether he functions as an autonomous person motivated by self-interest and whether the accused has a "reality-based working relationship" with his legal representative.

174 Slobogin, Rai and Reisner *Law and the Mental Health System* at 1009 where it is stated that the accused must for instance be able to explain their side of the story to their legal representative. The accused must be able to, for example, assist his lawyer in handling the case through considering settlement options. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 153. Also see this source at 163 where the prototypical items that would indicate an inability to consult with counsel are discussed. These include inability to convey one's thoughts coherently, incapacity to make decisions, and irrational perceptions about the case or defence counsel. These inabilities could be caused by an array of reasons, *inter alia,* thought disorders and psychosis.

175 Rogers and Shuman Fundamentals of Forensic Practice at 153.

176 Slobogin, Rai and Reisner *Law and the Mental Health System* at 1007. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 153.

177 Rogers and Shuman *Fundamentals of Forensic Practice* at 153. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1007 where it is explained that the choice not to consult a legal representative is a rational choice and unless such choice is influenced by irrational thoughts, such refusal not a reason for a finding of unfitness.

178 Marks et al New York Pretrial Criminal Procedure at 516. See further Rogers and Shuman Fundamentals of Forensic Practice at 153. Also see *United States* v *Holme*s (1987).

179 Slobogin, Rai and Reisner *Law and the Mental Health System at* 1006, 1008 where it is explained that the accused's understanding of the charges against him forms part of the assessment of the accused's ability to function within the criminal process. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 154. There is a view that this second part of the test should

basic knowledge of proceedings and the role players in the courts.[180] The accused has to understand the circumstances he finds himself in and the consequences of a possible conviction.[181] Factual understanding only is insufficient and must be supplemented by rational understanding.[182] The assessment of a rational understanding of the proceedings centres on whether the accused has "reality-based" perceptions about the legal system and whether he can take decisions based on reality.[183] A mental disorder does not necessarily impair one's perception of reality. The *Dusky* standard for lack of rational understanding requires a serious impairment of cognitive abilities due to mental disorder.[184] The *Dusky* standard is based on functional abilities and the impact that the mental disorder has on the accused's competency related capacities.[185] The level of understanding required in order to be found fit to stand trial is not very high.[186]

It was argued that a higher degree of fitness is required when an accused intends to represent himself, which implies that the accused is waiving his right to legal

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be subdivided into two separate prongs. The benefits of dividing the test into three separate parts, would mostly be for purposes of clinical evaluation and will not impact the legal consequence of the separate findings much.

180 Rogers and Shuman *Fundamentals of Forensic Practice* at 154. Also see this source at 163 where it is indicated that the accused's lack of understanding of the role of the judge or defence counsel, or the charges against him will indicate a lack of factual understanding of the proceedings. An unawareness of the seriousness of the charges against him and the possible penalties will also be an indication of lack of factual knowledge of the proceedings. See Slobogin, Rai and Reisner *Law and the Mental Health System* at 1007 where it is pointed out that an accused's refusal to be informed of the functions of the role players in order to gain an understanding thereof, is not sufficient for a finding of unfitness.

181 Rogers and Shuman Fundamentals of Forensic Practice at 154.

182 Slobogin, Rai and Reisner *Law and the Mental Health System at* 1007. Also see Shea 2013 *Public Defence Backup Centre Report* 8 at 9. The rational understanding requirement is in contrast with the fitness test used in Canada where a rational understanding is not necessarily required for fitness. The test employed in Canada requires "true understanding" which does not necessarily mean rational understanding. See the discussion of the fitness test utilised in Canada in chapter 4 of this research.

183 Rogers and Shuman *Fundamentals of Forensic Practice* at 154, 164 where it is indicated that the lack of awareness of the accused's involvement in the proceedings is an indication that the accused lacks rational understanding of the proceedings. This might be evident if the accused denies the possibility of being found guilty or if the accused appears uninterested in the verdict and its possible impact.

184 Rogers and Shuman *Fundamentals of Forensic Practice* at 155. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 935, 1007 where other competency tests are discussed and where it is pointed out that most of them focus on the cognitive ability of the decision-maker.

185 Rogers and Shuman *Fundamentals of Forensic Practice* at 155, 161, 162 where different models that can be used by forensic mental health professionals to operationalise the *Dusky* test are discussed. The discrete abilities model that divides the *Dusky* standard into three separate but related prongs seems preferable.

186 Slobogin, Rai and Reisner *Law and the Mental Health System at* 1007 point out that the accused need not understand everything perfectly in order to be fit to stand trial. The threshold to be found fit to stand trial is not very high. A similar position exists in Canada (see chapter 4 of this research) with the result that some accused persons who are in fact not fit to stand trial are eventually put on trial because of the low threshold set for fitness.

representation.[187] It was, however, held that the constitutional standard of fitness as set out in the *Dusky* case applies regardless of if an accused intends to represent himself or not.[188] States are, however, free to impose additional due process standards to protect the rights of such an accused.[189]

The legal standard for fitness in the USA is regarded as clear, consistent and uniform, which in turn gives professionals conducting these assessments certainty with regard to exactly what it is that should be measured for purposes of fitness.[190] Slovenko [191] opines that the minimum standard for fitness set by the *Dusky* case is vague but that this, in actual fact, allows the judge to exercise discretion in each case, guided by the particular circumstances of each mentally ill accused.

The assessment for fitness to stand trial that is conducted by mental health professionals is investigated below.

4.5 Assessment of fitness to stand trial

The discussion of the fitness assessment includes an investigation into the purpose of the assessment, what exactly the assessment entails, where the assessment may be conducted, and the duration thereof and by whom they are conducted.

The assessment aims to test the general ability of the accused to follow the proceedings

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187 Parry *Criminal Mental Health and Disability Law* at 91 where reference is made to circuit court decisions where the constitutional standard for fitness was interpreted in a way that supports a higher degree of fitness requirement where accused persons intend to represent themselves. See also Slobogin, Rai and Reisner *Law and the Mental Health System at* 1034 where case law is discussed that supports the view that the standard is the same for fitness as for competency to take the decision to waive the right to counsel or to plead guilty. See in general the case of *Godinez* v *Moran* 509 U. S 389 (1993). (Hereinafter referred to as the "*Godinez* case").

188 See in general the *Godinez* case. Also see Parry *Criminal Mental Health and Disability Law* at 91. Also see Rogers and Shuman *Fundamentals of Forensic Practice at* 160, 161 where the *Godinez* case is discussed where the argument was raised that a higher standard of competency is required to plead guilty or to waive counsel than for fitness to stand trial. This argument was ultimately rejected by the court, although the court acknowledged that there are differences in the assessments for these various types of competencies. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1056, 1057.

189 Parry *Criminal Mental Health and Disability Law* at 91. Resultantly differences apply across jurisdiction with regard to due process to follow with regard to establishing fitness to stand trial on the one hand and fitness to waive legal representation or to plead guilty on the other. See this source at 95-97 for a discussion of the position in the various states within the United States of America.

190 Rogers and Shuman Fundamentals of Forensic Practice at 151.

191 Slovenko *Psychiatry in Law / Law in Psychiatry* at 172. Some states such as New Jersey and Florida refined the meaning of competency for purposes of fitness hearings in their particular state but still subject to and in line with the Constitutional principle of competency laid down in the *Dusky* case.

rather than the competence of the accused to take a particular procedural decision, such as waiving his right to legal representation.[192] The assessment focuses on the actual capacity rather than on the willingness of the accused to demonstrate his ability to follow the proceedings and communicate with his legal representative.[193]

The assessment pertains to the current mental state of the accused and is, therefore, "forward-looking" as opposed to "backwards-looking", as is the case with assessment for criminal capacity, which concerns itself with the mental state of the accused at the time of the commission of the alleged offence.[194] Information disclosed by an accused during a mental health assessment is inadmissible in subsequent proceedings pertaining to the question of guilt.[195]

Some argue that a prediction of the accused's future capabilities is irrelevant in investigating his current fitness to stand trial.[196] Slovenko,[197] however, opines that the true question pertaining to triability and where the diagnosis is truly relevant is in determining the *restorability* of the accused's mental state that pertains to future capabilities. Triability, he argues, can be achieved by educating the accused or managing his anxiety with medication.

The fitness status of an accused, which is treated with medication, may change over time

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192 Parry *Criminal Mental Health and Disability Law* at 92. This is in line with the decision in the *Dusky case* and the later judgment in the *Godinez case*. Some states however still focus the assessments on the competence of the accused to take the particular decision, such as the decision to plead guilty or waive legal representation, rather than on the general competence of the accused to follow the proceedings.

193 Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness at 303. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1007.

194 Slovenko *Psychiatry in Law / Law in Psychiatry* at 171. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 153. See further Slobogin, Rai and Reisner *Law and the Mental Health System at* 1007 where it is clarified that the assessment will therefore look at the accused's present ability to consult with counsel and to understand the proceedings. The authors are of the view that a prediction of the accused's future behaviour is not relevant for purposes of this assessment, although it may become relevant if the accused's ability to testify for example or to display appropriate courtroom behaviour throughout the trial will impact on his right to a fair trial. Also see Marks *et al New York Pretrial Criminal Procedure at* 510.

195 Parry *Criminal Mental Health and Disability Law* at 86. Except in certain limited circumstances where it may be used to rebut evidence relating to a mental state defence. Also see Marks *et al New York Pretrial Criminal Procedure at* 549. See further section 730.20(6) of the New York CPL. Also see Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 1.

196 Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 303. See, however, Slobogin, Rai and Reisner *Law and the Mental Health System at* 1008 where the ability of the accused to testify and display appropriate courtroom behaviour throughout the trial are future considerations that may impact on the accused's right to a fair trial if he is found fit to stand trial knowing that he may encounter difficulties in these areas during the trial.

197 Slovenko Psychiatry in Law / Law in Psychiatry at 181.

due to the effect of the medication.[198] Regular and or abrupt changes in medication causes trauma and could cause long-term negative effects to the mental stability of an accused.[199] The condition of an accused with mental retardation is more static as the condition will not improve with treatment and is permanent.[200]

Assessments are done by way of psychological testing, which includes intelligence testing, combined with a neurological examination and a clinical interview.[201] The objective of the interview is, *inter alia,* to diagnose the accused since a diagnosis sets the parameters for the interview and assessment.[202] The accused's abilities are evaluated in line with the

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198 Parry Criminal Mental Health and Disability Law at 103.

199 *Rich 2009 Fordham Urban Law Journal 89* at 102. When inmates are transferred from prison to jail or between prisons, their medication is often discontinued, even if just temporarily or changed as each correctional facility have their own rules regarding medication provision, subject to budgetary constraints and policy regulations. Also see Lerner-Wren *2010 Annals Health L 577* at 581 who confirms that medication is the most common form of treatment for those suffering from mental illness in the criminal justice system. Even so, this form of treatment is only provided to one in three state prisoners, one in four federal prisoners and one in six jail inmates.

200 Parry *Criminal Mental Health and Disability Law* at 103. Unique methods have developed to assess the fitness of an accused with mental retardation. One such technique is the CAST-MR technique (Competence Assessment for Standing Trial for Defendants with Mental Retardation). See this source at 269 where it is stated that the theoretical focus of an assessment for mental retardation should be a developmental one. Specialised training is required to employ these assessment techniques on persons with mental retardation. Forensic professionals have mostly gained the knowledge and experience to assess mental retardation for purposes of fitness to stand trial. A court found that a state psychologist lacks the "experience and familiarity" to properly assess an accused with mental retardation for fitness. See *New Jersey* v *M.J K 849 A.2nd* 1105 (N.J Super Ci. App. Div. 2004). Also see Marks *et al New York Pretrial Criminal Procedure at* 543 who explains that an accused with mental retardation will, however, not necessarily be regarded as unfit to stand trial. According to Parry *Criminal Mental Health and Disability Law* at 116 some states allow judges to find an accused with mental retardation, whose mental condition is irreversible, permanently unfit without them having to undergo further evaluations.

201 Psychological tests essentially aim to measure the behaviour of the person being assessed against that of persons in a similar group. Such tests provide useful information on the accused's cognitive functioning and can provide a more detailed analysis of the accused's mental state than a clinical interview done in isolation from other methods of assessment. The neurological testing tests the reflexes, sensory perception and motor abilities and can detect medical conditions that influence the overall mental condition of the person being assessed. See Parry *Criminal Mental Health and Disability Law* at 285. The interview entails taking down the history of the accused and a mental status examination. The history taken includes information about the development of the accused and the aim is to determine when certain conditions or behaviour started to emerge. The employment history and mental health treatment history is also obtained. The information gathered in the interview is subjective from the perspective of the person being assessed and concern has been voiced about this aspect of the clinical interview. Parry *Criminal Mental Health and Disability Law* at 285, 286. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 168, 169 where the goal of an interview with the accused is discussed. One such goal is to diagnose the accused which diagnosis gives structure to the clinical assessment that the forensic professional has to do.

202 Rogers and Shuman *Fundamentals of Forensic Practice* at 11, 168, 169. Another goal with the interview is to determine the response style of the accused that could indicate malingering. The authors caution however that, some accused persons with mental illness may choose to limit their exposure to mental health practitioners hoping to "hide" a current episode for example. Malingering

prongs identified in the *Dusky* case.[203] The forensic mental health practitioner examines the ability of the accused to communicate, make decisions, and establish relationships.[204] These interviews are generally regarded as very reliable.[205] The clinical assessment tools to assess fitness may vary depending on the mental state of the accused.[206]

Assessments for fitness to stand trial were historically conducted at hospitals over lengthy periods.[207] Today, however, fitness assessments may take place on an inpatient or outpatient basis.[208] Recently, assessments have been taking place on an outpatient basis.[209] The New York CPL specifically provides for outpatient assessments where the director is of the opinion that admission to hospital is not essential for purposes of the assessment.[210] Assessments can be conducted at the correctional facility where the

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should be validated by concrete evidence rather than deduced from "oddities" in the accused's clinical presentation. Also see Slovenko *Psychiatry in Law / Law in Psychiatry* at 174 who points out that before proper models for assessment of triability was employed, the court was mainly interested to determine the dangerousness of the accused as that would determine if detention was required.

203 Rogers and Shuman *Fundamentals of Forensic Practice* at 169. The accused is also assessed through methods that comprise of personality profiling, cognitive ability testing and detection of malingering. See Parry *Criminal Mental Health and Disability Law* at 285.

204 Parry *Criminal Mental Health and Disability Law* at 288 who explain that during the interview, the mental status of the accused is assessed by considering *inter alia*, general appearance, mood and responsiveness, quality and quantity of speech, clarity of thinking, alertness and concentration and impulse control. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 168.

205 Rogers and Shuman *Fundamentals of Forensic Practice* at 11. The reliability of unstructured interviews is questionable as it was found that misdiagnosis occurs about 50% of the time where unstructured interviews are used. A number of structured interview techniques could be employed. See Parry *Criminal Mental Health and Disability Law* at 287 for a list of structured interview techniques that may be used. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 168 who point out that many forensic mental health practitioners prefer to gather some background information on an accused referred for assessment but cautions against such background check as the psychiatric history of the accused might be irrelevant to the current referral. The gathering of such background information may raise ethical and privacy concerns as well.

206 Shea 2013 *Public Defence Backup Centre Report* 8 at 9 where the standardised test for fitness utilised for persons with mental retardation is discussed.

207 Slobogin, Rai and Reisner Law and the Mental Health System at 1019.

208 The New York CPL at 730.20(2) provides for outpatient care and states, "2.When the defendant is not in custody at the time a court issues an order of examination, because he was theretofore released on bail or on his own recognizance, the court may direct that the examination be conducted on an outpatient basis and at such time and place as the director shall designate. If, however, the director informs the court that hospital confinement of the defendant is necessary for an effective examination, the court may direct that the defendant be confined in a hospital designated by the director until the examination is completed." Section 730.20(3) provides for the assessment to be conducted at the correctional facility if the accused is still in custody and states, " When the defendant is in custody at the time a court issues an order of examination, the examination must be conducted at the place where the defendant is being held in custody. If, however, the director determines that hospital confinement of the defendant is necessary for an effective examination, the sheriff must deliver the defendant to a hospital designated by the director and hold him in custody therein, under sufficient guard, until the examination is completed".

209 Slobogin, Rai and Reisner Law and the Mental Health System at 1019. Also see Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 1.

210 See section 730.20(3) of the New York CPL. Also see Marks *et al New York Pretrial Criminal*

accused is detained.[211] If the accused is out on bail, for example, the assessment is conducted at a local clinic unless the director is of the opinion that the accused must be admitted to the hospital for purposes of the examination.[212] Conducting fitness assessments at community clinics on an outpatient basis may eliminate the tactical use of fitness assessments as delaying tactics since such assessments will be conducted much faster than those done in psychiatric hospitals will.[213]

The court may, however, order that an accused be admitted to a psychiatric hospital for the fitness assessment to be conducted on an inpatient basis.[214] Such an assessment shall last for no longer than 30-days [215] with the option to extend the period by a further 30-days.[216] This period is earmarked for the initial determination of fitness and a prediction of the possibility of restoration of fitness.[217]

Fitness assessments are conducted by two mental health care professionals.[218] The

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Procedure at 523.

211 Shea 2013 *Public Defence Backup Centre Report* 8 at 9.

212 Section 730.20(2) of the New York CPL. Also see Slobogin, Rai and Reisner Law and the Mental Health System at 1019. See further Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 1.

213 Slobogin, Rai and Reisner *Law and the Mental Health System at* 1021 where research results show that a fitness assessment conducted in a short period of time is likely to reach the same conclusion as a fitness assessment conducted over a long period of time in a psychiatric hospital. For this reason, outpatient fitness assessments are promoted. Also see Slovenko Psychiatry in Law / Law in Psychiatry at 182 who points out that on-site assessments of accused persons detained in a correctional facility is promoted as it would avoid long periods of detention for the mentally ill accused all together and would result in ultimate cost saving.

214 Section 730.20(3) of the New York CPL. Also see Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 1. This would be the situation where the accused is out on bail but the needs to be assessed on an inpatient basis (see section 730.20(2) of the New York CPL) or where the accused is detained in a correctional facility the court is of the view that assessment cannot be conducted on site at the facility but that hospitalisation is required for the assessment - see section 730.20(3) of the New York CPL.

215 Section 730.20(4) of the New York CPL states: "Hospital confinement under subdivisions two and three shall be for a period not exceeding thirty days, except that, upon application of the director, the court may authorize confinement for an additional period not exceeding thirty days if it is satisfied that a longer period is necessary to complete the examination. During the period of hospital confinement, the physician in charge of the hospital may administer or cause to be administered to the defendant such emergency psychiatric, medical or other therapeutic treatment as in his judgment should be administered."

216 Section 730.20(4) of the CPL. Also see Marks *et al New York Pretrial Criminal Procedure at* 523, 524. See further Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 1.

217 Parry Criminal Mental Health and Disability Law at 115.

218 Section 730.20(1) of the CPL refers to the assessors as "psychiatric examiners". Also see Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 1 who confirms that two psychiatric examiners must be appointed by the director of the relevant facility to conduct the assessment. The director may designate himself as one of the psychiatric examiners conducts the assessment. Also see Shea 2013 *Public Defence Backup Centre Report* 8 at 9 who explains that the assessment can be conducted by two psychiatrists, or two psychologists or one from each discipline.

capabilities of psychologists to conduct forensic assessments were acknowledged by the courts in 1962 [219] and legislated in the late 1980's.[220] The New York CPL specifically authorise both psychiatrists and psychologist to conduct assessments for fitness to stand trial in the state of New York.[221] The court may further order that a mental health practitioner of the accused's choice is also present at the fitness assessment.[222]

An accused who refuses to co-operate with the mental health examiners may forfeit his right to a competency hearing.[223]

Mental health care practitioners who conducted a fitness assessment of the accused must

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219 This was acknowledged in the case of *Jenkins* v *United States* 307 F.2d 637 (D.C. Cir. 1962). The court held that the competency of a psychologist to assist the court with an assessment as to if an accused suffers from a mental illness, does not depend on whether the person can be called a psychologist. It rather depends on the question if he completed the relevant course offered on forensic psychology and if he has the appropriate practical experience that followed after completion of such a course. If so, there is no reason to exclude the expert opinion of psychologists pertaining to whether an accused suffers from a mental illness or not. (see the *Jenkins* case at 645). Even though the United States government has invested generously in the development of psychiatrists and psychologists, these professional services are not available to those in most need thereof. In 1990, there were 200 000.00 psychologists, psychiatrists and psychiatric social workers in the United States of America. The majority of these professionals are however concentrated in affluent areas where there is approximately 1 psychiatrist for every 250 citizens. In less affluent areas such as Jersey City, there is only 1 psychiatrist for every 13 000.00 residents. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 52. Also see Torrey EF *Nowhere to Go: The Tragic Odyssey of the Homeless Mentally Ill* (Harper and Row New York 1988) at 4.

220 See Marks *et al New York Pretrial Criminal Procedure at* 521, 522 for details of the relevant legislation. Prior to this statute, only psychiatrists could conduct assessments with the exception of cases where it was believed that the accused was mentally "defective" rather than "mentally ill".

221 Some other health care professionals are also sometimes permitted to conduct these assessments. Parry *Criminal Mental Health and Disability Law* at 85. Also see this source at 269-273 for the different theoretical approaches that mental health professionals might employ depending on their training. The focus areas may include cognitive behavioural, biological, development (especially important when assessing persons with mental retardation) and psychodynamic. Also see Marks *et al New York Pretrial Criminal Procedure at* 521. Section 730.20(1) of the New York CPL indicates that psychiatrists and psychologists may be used for these assessments and states, "The appropriate director to whom a criminal court issues an order of examination must be determined in accordance with rules jointly adopted by the judicial conference and the commissioner. Upon receipt of an examination order, the director must designate two qualified psychiatric examiners, of whom he may be one, to examine the defendant to determine if he is an incapacitated person. In conducting their examination, the psychiatric examiners may employ any method that is accepted by the medical profession for the examination of persons alleged to be mentally ill or mentally defective. The court may authorize a psychiatrist or psychologist retained by the defendant to be present at such examination." Also see Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 1 who point out that in New York under the CPL, psychologists and psychiatrists are used for assessments. Also see Shea 2013 *Public Defence Backup Centre Report* 8 at 9.

222 Section 730.20(1) of the New York CPL. Also see Shea 2013 *Public Defence Backup Centre Report* 8 at 9.

223 See Marks *et al New York Pretrial Criminal Procedure at* 545 at footnote 23 and 24 where cases are mentioned where the accused forfeited his right to a competency hearing because of repeated refusal to co-operate with the mental health examiners. This approach by the courts is criticised for the fact that such refusal could possibly be a by-product of a mental illness.

draft a report containing their findings, which is submitted to court.[224] If the experts that assessed the accused are in disagreement, a third mental health professional must be appointed to conduct an assessment and file a report.[225] The reports must be provided to the defendant and the district attorney.[226] Even though it is accepted that courts and not mental health practitioners are the final decision-makers on competency issues, courts tend to follow the recommendations contained in these reports,[227] hence many states make

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224 Section 730.20(5) compels the filing of reports by the psychiatric examiners to the director of the relevant facility. Marks *et al New York Pretrial Criminal Procedure at* 524 who explains that specific forms have been developed for the experts to submit their opinions to the court. The forms provide for a declaration by the psychologist /psychiatrist that they are properly qualified and duly registered as such and provide a space to indicate the diagnosis and the prognosis of the accused. The psychologist / Psychiatrist is expected to indicate whether in their opinion the accused is competent to stand trial or not. They are further required to specify the aspects of the proceedings in respect whereof the accused lacks capacity. The order for an assessment is done with a form 16(a) and the report is contained in a form 16(b). See Annexure C to this research for an example of the form used for the assessment order. Also see section 730.10(8) of the New York CPL which reads as follows: "8. "Examination report" means a report made by a psychiatric examiner wherein he sets forth his opinion as to whether the defendant is or is not an incapacitated person, the nature and extent of his examination and, if he finds that the defendant is an incapacitated person, his diagnosis and prognosis and a detailed statement of the reasons for his opinion by making particular reference to those aspects of the proceedings wherein the defendant lacks capacity to understand or to assist in his own defense."

225 Section 730.20(5) of the New York CPL. The section reads as follows: "Each psychiatric examiner, after he has completed his examination of the defendant, must promptly prepare an examination report and submit it to the director. If the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person, the director must designate another qualified psychiatric examiner to examine the defendant to determine if he is an incapacitated person. Upon receipt of the examination reports, the director must submit them to the court that issued the order of examination. The court must furnish a copy of the reports to counsel for the defendant and to the district attorney". Also see Marks *et al New York Pretrial Criminal Procedure at* 522. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1019. See further Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 1 who explains that the reports are first submitted to the director who then appoints a third psychiatrist if the initial two reports are note unanimous. Only once all the reports are received are they submitted to the court. Also see Shea 2013 *Public Defence Backup Centre Report* 8 at 10 where the appointment of a third mental health practitioner in the event that there is a disagreement pertaining to fitness between the first two mental health practitioners so appointed, is confirmed.

226 Section 730.20(5) of the New York CPL.

227 Slobogin, Rai and Reisner *Law and the Mental Health System at* 1019 where studies conducted at various courts are discussed and it is concluded that the majority of the courts follow the recommendations in the reports. These studies also found that actual hearings to determine the fitness of the accused were rarely held and where they were held, they were very informal. Parry *Criminal Mental Health and Disability Law* at 273 explains that the conclusions that mental health practitioners reach after assessment, are often confusing because of the terminology used by them. Also, terms such as *illness, disorder* and *disability* are often used interchangeably, creating interpretation problems for the court. Courts on the other hand, are also not consistent in the use of descriptive terminology and often use words such as *mental illness, mental retardation* and *disability* and *handicap* interchangeably. The author makes reference to case law and statues about mental illness that do not employ the same terminology as far as mental health issues are concerned. Tension may exist between the roles of mental health professionals and the rules of the law particularly because the law aims to work with definitive standards whereas psychology and psychiatry are used to working with ambiguity, unpredictabilities and variety. See this source at 292 where it is explained that mental health practitioners may further feel the subtle pressure to testify in

provision for a finding on fitness to be made based on this report only, unless any party to the proceedings objects thereto.[228]

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favour of the "side" that recruited them to conduct the assessment of the accused. This pressure has to be managed. See further Rogers and Shuman *Fundamentals of Forensic Practice.*at 10 where differences in approach of mental health practitioners to human behaviour versus the approach of lawyers are highlighted. The law assumes that it is appropriate to hold individuals accountable for their actions whereas psychology and psychiatry follows a more individual approach to behaviour acknowledging that behaviour differs from one person to the next. Parry *Criminal Mental Health and Disability Law* at 294. The mental health practitioner might experience conflicts between the confidentiality rules that apply in a normal therapeutic relationship with his patient, versus those that apply in a forensic setting. The mental health practitioner may have difficulty marrying the dual liability that he faces towards his patient on the one hand and the court on the other. Rogers and Shuman *Fundamentals of Forensic Practice* at 15 who point out that there is often a gap between the theoretical research in forensic psychology and practice because mental health practitioners struggle to stay up the date with developments and, in addition, acceptance of new methods are slow as practitioners tend to continue with methods which has been tried and tested. See Rogers and Shuman *Fundamentals of Forensic Practice at* 57-81 for a detailed discussion on the nature of the mental health profession and the expert testimony given by them.

228 Slobogin, Rai and Reisner *Law and the Mental Health System at* 1019. This is the case in 24 of the states. This is also the position in the state of New York. Often, these reports are the only information that the court has on the mental state of the accused See in general Marks *et al New York Pretrial Criminal Procedure* at 522. In the state of New York, where the mental health practitioners agree on the competency or incompetency of the accused to proceed to trial and where these findings are not contested by either party to the proceedings, the court may accept these findings without holding a hearing on the fitness issue. Marks *et al New York Pretrial Criminal Procedure at* 525, 526. Also see section 730.50(1) of the New York CPL which states that: "When a superior court, following a hearing conducted pursuant to subdivision three or four of section 730.30 of this article, is satisfied that the defendant is not an incapacitated person, the criminal action against him or her must proceed. If it is satisfied that the defendant is an incapacitated person, or if no motion for such a hearing is made, it must adjudicate him or her an incapacitated person, and must issue a final order of observation or an order of commitment. When the indictment does not charge a felony or when the defendant has been convicted of an offense other than a felony, such court (a) must issue a final order of observation committing the defendant to the custody of the commissioner for care and treatment in an appropriate institution for a period not to exceed ninety days from the date of such order, provided, however, that the commissioner may designate an appropriate hospital for placement of a defendant for whom a final order of observation has been issued, where such hospital is licensed by the office of mental health and has agreed to accept, upon referral by the commissioner, defendants subject to final orders of observation issued under this subdivision, and (b) must dismiss the indictment filed in such court against the defendant, and such dismissal constitutes a bar to any further prosecution of the charge or charges contained in such indictment… When the indictment charges a felony or when the defendant has been convicted of a felony, it must issue an order of commitment committing the defendant to the custody of the commissioner for care and treatment in an appropriate institution or, upon the consent of the district attorney, committing him or her to the custody of the commissioner for care and treatment on an outpatient basis, for a period not to exceed one year from the date of such order. Upon the issuance of an order of commitment, the court must exonerate the defendant's bail if he or she was previously at liberty on bail; provided, however, that exoneration of bail is not required when a defendant is committed to the custody of the commissioner for care and treatment on an outpatient basis. When the defendant is in the custody of the commissioner pursuant to a final order of observation, the commissioner or his or her designee, which may include the director of an appropriate institution, immediately upon the discharge of the defendant, must certify to such court that he or she has complied with the notice provisions set forth in paragraph (a) of subdivision six of section 730.60 of this article. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1019. Often, these reports are the only information that the court has on the mental state of the accused.

Where the findings are not unanimous or are contested, or the court deems it necessary, then a hearing on the fitness issue must be held.[229] The accused has a right to be present at such a hearing, and either party may call witnesses.[230] This hearing takes place in open court.[231]

If, after this hearing, the court finds that the accused is fit to stand trial, the criminal trial continues as per usual.[232] These persons may also be diverted to the Mental Health Court, as discussed later in this chapter.

If, after the competency hearing, the court is unable to conclude that the accused is fit to stand trial, a new order for assessment (examination) for fitness to stand trial is issued, and new mental health practitioners must be appointed for this purpose.[233]

Where the court concludes that an accused is unfit to stand trial, such finding holds certain personal and procedural consequences for the accused. Some of these are set out below.

4.6 Personal and procedural consequences of finding of unfit to stand trial

Generally, the guilt phase of the criminal proceedings is suspended once an accused is found unfit to stand trial.[234] The prosecution can agree to withdraw the charges against an unfit accused, especially where he is charged with a minor transgression, on the condition that the accused undergoes mental health treatment as an in or outpatient.[235]

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229 Section 730.30(4) of the New York CPL which states that: "When the examination reports submitted to the court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person, or when the examination reports submitted to the superior court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not a dangerous incapacitated person, the court must conduct a hearing to determine the issue of capacity or dangerousness." Also see Marks *et al New York Pretrial Criminal Procedure at* 525, 527. Also see Section 730.30(2) of the New York CPL that deals with the scenario where the accused was found fit to stand trial but where this finding is contested by either party. Also see Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 2.

230 Marks et al New York Pretrial Criminal Procedure at 540.

231 There are circumstances where this will not be the case. See Marks *et al New York Pretrial Criminal Procedure* at 541 at footnote 25 for some examples of cases where this was the case.

232 Marks *et al New York Pretrial Criminal Procedure at* 525. Also see Section 730.40(1) of the New York CPL. See further Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 2.

233 Section 730.30(2). Also see Marks *et al New York Pretrial Criminal Procedure* at 525.

234 Parry *Criminal Mental Health and Disability Law* at 114. Also see Marks *et al New York Pretrial Criminal Procedure at* 510 who states that the normal criminal proceedings as such are suspended pending the assessment of the fitness issue. The consequences of a finding of incompetence to stand trial may vary from jurisdiction to jurisdiction. See Rogers and Shuman *Fundamentals of Forensic Practice at* 156.

235 Parry Criminal Mental Health and Disability Law at 114. Also see Rogers and Shuman

Where charges are not withdrawn, the court must make an observation order or an order of commitment.[236] The purpose of such orders is to return the accused to a state of fitness.[237] The detention orders that the court may make in the event that an accused is found unfit to stand trial are discussed below.

A local criminal court in New York may make a final or temporary order of observation. Where the accused is charged with an offence other than a felony and is found incompetent to proceed to trial, the court makes a final observation order with the effect that the accused is detained in a psychiatric institution for a period not exceeding 90-days.[238] The charges against this accused are dismissed, and the accused may be discharged from the psychiatric institution at any time.[239] A local New York court may only make a temporary observation order in respect of an accused charged with a felony.[240] A temporary observation order lasts for no longer than 90-days and does not end the prosecution against the accused but merely suspends the charges.[241]

The New York Superior Court may make a final observation order or an order of commitment. The Superior Court may, in respect of an accused charged with an offence other than a felony and after a hearing on the fitness of the accused, issue a final

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Fundamentals of Forensic Practice at 156.

236 Where the charges are not dropped the accused is sent to a public health facility for further evaluation and treatment with a view on restoring the accused's fitness. Parry *Criminal Mental Health and Disability Law* at 114. Also see Slobogin, Rai and Reisner *Law and the Mental Health System* at 1031 where it is pointed out that there is no uniformity across states pertaining to when charges should be dropped. Where charges are indeed dropped, it is often done without prejudice. This time period of treatment with the view on restoring the accused's fitness is similar to the "get fit" order provided for in the Canadian system where such an order can be made for a period of 60 days to provide treatment to the accused to become fit to stand trial. If he regains fitness in that time the criminal proceedings may resume. See chapter 4 of this research for a discussion of this order.

237 Parry *Criminal Mental Health and Disability Law* at 113. Also see Slobogin, Rai and Reisner *Law and the Mental Health System* at 1020. See further Albanese *Criminal Justice* at 98.

238 Section 730.40(1) and 730.60(1) of the New York CPL. Also see Marks *et al New York Pretrial Criminal Procedure at* 526, 527, 531. Also see Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 2. See further Shea 2013 *Public Defence Backup Centre Report* 8 at 10.

239 Section 730.60(3) and 730.40(2) of the New York CPL. Also see Marks *et al New York Pretrial Criminal Procedure at* 531.

240 Section 730.40(1) and (2) of the New York CPL. Also see Marks *et al New York Pretrial Criminal Procedure at* 531. Also see Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 2 where it is pointed out further that this local court may make a final observation order in this instance with consent from the District Attorney. Also see Shea 2013 *Public Defence Backup Centre Report* 8 at 10.

241 Section 730.60(2) of the New York CPL. Marks *et al New York Pretrial Criminal Procedure at* 531. The effect of the temporary order of observation made by the local court is the same as a commitment order made by the superior court. Also see Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 2 who explains that charges may be dropped after the expiration of the temporary observation order once it has expired and the accused is still under care.

observation order, lasting for no longer than 90-days.[242] Where the accused is charged with a felony, the Superior Court must issue a commitment order that shall not last for more than one year.[243] The charges against the accused must be dismissed.[244] Treatment aimed at restoring the accused to a state of fitness can be done on an inpatient or outpatient basis.[245]

The automatic 90-day detention period that follows a temporary and final observation order was challenged in court in the case of *Ritter* v *Surles*.[246] The 90-day period was struck down in this case. The CPL has not been amended subsequent to this judgment, but the relevant authority implemented a policy in terms whereof an accused remanded by the court on a final or temporary observation order must be released within 72-hours if that accused does not meet the admission requirements for a voluntary or involuntary user in terms of Mental Hygiene Law which is the relevant mental health legislation in this case.[247]

Procedures are put in place in the event that the accused does not regain fitness after the temporary observation order period or after the initial order of commitment. The court must be informed within 60-days from the expiration of the initial detention period if the accused has regained his fitness or not. If the opinion of the superintendent is that the accused is still incompetent, an order for retention is granted for a further period of one year.[248] If, after this second retention period, the accused is still incompetent, further retention orders may be granted for up to two years at a time.[249] The total time of commitment may not exceed two-thirds of the maximum sentence that an accused charged with the particular felony would have served if found guilty.[250] Upon expiration of this two-thirds period, the charges

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242 Section 730.50(1) of the New York CPL. Also see Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 2.

243 Section 730.50(1) of the New York CPL. Also see Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 2. Also see Marks *et al New York Pretrial Criminal Procedure at* 525, 526.

244 Section 730.50(1) of the New York CPL. Also see Marks *et al New York Pretrial Criminal Procedure at* 526. Also see section 730.60(2) of the New York CPL.

245 Section 730.50 of the New York CPL. Slobogin, Rai and Reisner Law and the Mental Health System at 1020. Also see Parry *Criminal Mental Health and Disability Law* at 113. See further Albanese *Criminal Justice* at 98.

246 144 Misc.2d 945 (1988).

247 See Shea 2013 *Public Defence Backup Centre Report* 8 at 10, 11.

248 Section 730.50(2) of the New York CPL. Also see Marks *et al New York Pretrial Criminal Procedure at* 525, 527. Also see section 730.50(3) of the New York CPL. Also see Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 2. The application for a retention order is brought by the superintendent of the facility where the accused receives treatment.

249 Marks *et al New York Pretrial Criminal Procedure at* 525, 527. Also see section 730.50(3) of the New York CPL. See further Section 730.50(5) of the New York CPL. Also see Seigal http://ybseigel.tripod.com/cpl730.pdf (Date of use: 23 January 2016) at 2.

250 Section 730.50(3) of the New York CPL. Also see Marks *et al New York Pretrial Criminal Procedure*

against the accused must be dropped.[251]

An accused found incompetent by a federal court can be detained for up to four months in an attempt to restore fitness.[252] It has been suggested that an accused found unfit to stand trial should not be detained for a period longer than six months, and if competence is not restored within this time, it is accepted as unlikely that it will be restored at all.[253] Some are of the view that a mentally ill accused can regain fitness within as little as 90-days with the use of medication.[254]

The US Supreme Court held in 1972 in the case of *Jackson* v *Indiana* [255] that there must be a time limit on an accused's detention for these purposes. In this case, a deaf-mute man who was unable to speak, write, or communicate intelligently was charged with robbery. During the trial, it transpired that there was almost no possibility of the accused "recovering" to a state where he would be able to understand the proceedings and was consequently detained for incompetence. The Court held that indefinite detention is not allowed and that, where an accused is detained with the hope that he will become fit to stand trial, such detention must be justified by improvement of the accused towards such a state.[256]

Before the United States Supreme Court's decision in the *Jackson case,* [257] a finding of

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at 525, 527.

251 Shea 2013 *Public Defence Backup Centre Report* 8 at 11.

252 *Rogers and Shuman Fundamentals of Forensic Practice* at 156. See the statutory requirement in this regard contained in 18 U.S.C.A. § 4241, 2003 which states that:
"whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed" and thereafter "for an additional reasonable period of time until—
(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or
(B) the pending charges against him are disposed of according to law; whichever is earlier."

253 Slobogin, Rai and Reisner *Law and the Mental Health System at* 1031. An opinion is discussed here that explains that after the 6 month period, the accused detained for incompetence should either have restored competence, or it will be clear that such a person suffers from mental retardation or brain damages that will not be "cured". Such a person will need further treatment in a different setting. Where there are still cases where fitness is doubtful, a further detention period of up to 6 months is suggested to determine in which of these two categories such a person falls.

254 Slovenko *Psychiatry in Law / Law in Psychiatry* at 182. See chapter 4 of this research for a discussion of the position in Canada where the "get fit" order is made for a period of 60 days implying that there is a belief that fitness can be restored within 60 days.

255 Jackson v Indiana 406 US 715 (1972) (Hereinafter referred to as the "*Jackson* case").

256 The *Jackson* case at *738.* Also see Slobogin, Rai and Reisner *Law and the Mental Health System* at 932. Also see this source at 1027, 1028 for a discussion of the case. See further Marks *et al New York Pretrial Criminal Procedure* at 543 where it is stated that a person that is deaf will not necessarily be deemed unfit to stand trial but if it is clear that such a person will not understand the proceedings, however, he cannot be tried.

257 406 U. S 715 (1972). The accused was charged with petty theft and suffered from mental retardation coupled with deafness and muteness. The accused was found unfit and detained in a

unfitness often resulted in long periods of commitment to secure psychiatric facilities where the focus was not purely on treatment and restoration.[258] The court found in the *Jackson* case that the accused could not be held for longer than is necessary to determine if there is a chance of reasonable recovery in the near future.[259] Where this is not the aim of the detention, the accused must be released, or the proceedings for civil commitment should be started.[260] Subsequent to the case, two types of dispositions were made in respect of unfit accused persons. They were either committed in order for their fitness to be restored or released if restoration seemed unlikely.[261]

Some states implemented legislation in line with the *Jackson* principle that provides for a period of detention to regain fitness to range from anything between 20-days and a year.[262] Other states have yet to implement such limitations.[263] A practice of periodic review of an accused's mental state after a period of 90-days exists in approximately a third of the states. Some states do periodic reviews annually.[264] Most states do not address the periodic review of unfit accused persons in statutes, but a formal procedure exists for the facility where the accused was treated to inform the court that the accused has regained fitness.[265]

An accused who remains unfit may not be detained indefinitely, but proceedings to detain such person in accordance with civil commitment rules must be instituted as soon as it is

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psychiatric institution indefinitely. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 156.

258 Parry Criminal Mental Health and Disability Law at 114.

259 *Jackson* v *Indiana* 406 U. S 715 (1972) at 738. Also see Slobogin, Rai and Reisner *Law and the Mental Health System* at 1020, 1029. See further Marks *et al New York Pretrial Criminal Procedure at* 528.

260 Parry *Criminal Mental Health and Disability Law* at 115. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 156 for a discussion of the case. See further Slobogin, Rai and Reisner *Law and the Mental Health System at* 1028, 1029.

261 Parry Criminal Mental Health and Disability Law at 113, 115.

262 Parry *Criminal Mental Health and Disability Law* at 115 where reference is made to the specific pieces of legislation in selected states that incorporated provisions for guidance on the maximum time allowed keeping an accused for evaluation for purposes of regaining fitness to stand trial. The period that applies in most states is a period of between 6 months and a year – especially to determine restoration of fitness. (see this source at 116). Some states merely indicate a maximum period of detention. Slobogin, Rai and Reisner *Law and the Mental Health System at* 1030. Some states required the immediate civil commitment of an accused person found unfit to stand trial whilst others limited the time for commitment of 18 months. Also see Marks *et al New York Pretrial Criminal Procedure at* 528 for the position in New York where limitations have been implemented in accordance with the *Jackson* ruling.

263 Slovenko *Psychiatry in Law / Law in Psychiatry* at 174. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1031 where it is stated that the majority of the states have not implemented the Jackson provisions or found some way to circumvent it.

264 Parry Criminal Mental Health and Disability Law at 117.

265 Parry Criminal Mental Health and Disability Law at 117.

clear that there is no prospect of the accused ever regaining fitness.[266]

Once the accused regains fitness, the district attorney is informed accordingly, and the trial may proceed.[267] The standards applied to determine if an accused regained fitness are the same as those used in the initial assessment of fitness, where the minimum constitutional standards as laid down in the *Dusky* case apply.[268] States may, however, impose additional requirements to safeguard the rights of the accused during fitness assessments.[269]

Historically, where an accused regained fitness after treatment, he could only return to court if his fitness meant that he did not have to use medication to stay fit.[270] Later, it was permissible to try an accused whilst on medication.[271] An accused, however, had the right to refuse medication and could only be forced to take medication where it could be shown that it was essential for his health or where he posed a danger to himself or others.[272]

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266 Marks *et al New York Pretrial Criminal Procedure at* 528. This is one interpretation of the *Jackson* judgment, namely that the charges against the accused must not necessarily be dropped but that the accused should be detained according to civil commitment rules rather than kept in the criminal justice system. Also see section 730.70 of the New York CPL that states that, if after the retention periods or period of committal or temporary observation order the superintendent is of the view that the accused is so mentally ill that he requires permanent care in a psychiatric facility, the proceedings as provided for in the Mental Hygiene Law, section 31.33 must be followed.

267 Section 730.60(2) of the New York CPL. Also see Marks *et al New York Pretrial Criminal Procedure at* 531, 533 If an indictment is filed during the temporary order for detention, the accused must be arraigned in the Superior Court and the temporary order of observation comes to an end. Also see section 730.40(5) of the New York CPL. Also see Albanese *Criminal Justice* at 98.

268 Parry Criminal Mental Health and Disability Law at 115-116.

269 Rogers and Shuman Fundamentals of Forensic Practice at 152.

270 Slovenko *Psychiatry in Law / Law in Psychiatry* at 174. This was the case where the fitness issue was raised by the prosecutor or judge. An accused who averred that he should not be deemed competent to stand trial because he is using psychiatric medication, was rarely successful with such an argument. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1033.

271 Later it was allowed for an accused taking medication for anxiety for example to be tried. The accused person, however, had the right to refuse such medication, especially in cases where it was argued that it would affect the "true' mental state" of the accused who is planning on raising the insanity defence to such an extent that the jury might not believe that he truly suffered from a mental condition at the time of commission of the offence – because of, for example the calming effect that anti-anxiety medication may have on him during the trial. Slovenko *Psychiatry in Law / Law in Psychiatry* at 176, 177 where a number of cases are discussed where accused persons had to use anti-anxiety or anti-psychotic medication for therapeutic purposes but where this impacted on their ability to demonstrate at trial that they were indeed incompetent at the time of commission of the offence. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1033.

272 Slovenko *Psychiatry in Law / Law in Psychiatry* at 178. A high standard for forced medication is set. It has to be shown that the taking of such medication and the side effects thereof will not affect the fairness of the trial, that it is the least restrictive way of treatment. Also see Parry *Criminal Mental Health and Disability Law* at 118. Also see Rogers and Shuman *Fundamentals of Forensic Practice* at 156 where all the factors that have to be considered before administering medication to a mentally ill accused person against his will, are discussed. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 963-991 for a detailed discussion of the right to refuse psychiatric

4.7 *Consequence of a finding of fit to stand trial*

Most accused persons that are assessed for fitness are found fit to stand trial, including persons with serious mental illnesses such as schizophrenia, bipolar disorder and major depression.[273]

Where the two mental health practitioners agree that the accused is fit to stand trial, and such findings are not contested by any party to the proceedings, the criminal trial may simply continue.[274] The fitness issue may be raised again later in the proceedings if there are grounds to believe that the accused is incompetent to proceed.[275]

It may happen that a marginally incompetent accused person proceeds to trial after a

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treatment, including the taking of anti-psychotic medication against their will. Those who did find themselves institutionalised in Boston in 1975, won a case to confirm that they still have the right to refuse treatment, including taking psychiatric medication. The court in this particular case, confirmed that the mere fact that they were institutionalised, does not mean that they are incompetent to take decisions regarding their care. See Frailing K "The genesis of mental health courts in the United States and their possible applicability for the United Kingdom" 2008 *C.S.L.R* 63-73 at 63-65. The court found that the have the same rights to give informed consent as those individuals not suffering from a mental illness. This case came about after it became known that patients treated for mental illnesses, are often forced to take antipsychotic medication which caused patients to feel heavily sedated and had negative side effects in the long run. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 963-991 for a detailed discussion on the right to refuse psychiatric treatment where the discussion also focusses on those detained after conviction who were initially forced to take psychiatric medication against their will.

273 Slobogin, Rai and Reisner *Law and the Mental Health System at* 1020 who explain that studies revealed that in approximately 30% of matters, those sent for observation are found fit to stand trial. The authors indicate that the number may actually be lower since mental health professionals err on the side of caution with findings of fitness. Concerns have been raised about possible unnecessary referrals. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 198 who specifically mention that persons with serious mental illness do not always meet the incompetence to stand trial criteria and are, consequently, found fit to stand trial and sent to prison. See further Shea 2013 *Public Defence Backup Centre Report* 8 at 8 who indicate that, of the 60 000 fitness referrals annually, only 12 000 are found unfit to stand trial.

274 Marks *et al New York Pretrial Criminal Procedure at* 525. See further Slobogin, Rai and Reisner *Law and the Mental Health System at* 1020. Also see section 730.30(2) of the New York CPL which reads that: "When the examination reports submitted to the court show that each psychiatric examiner is of the opinion that the defendant is not an incapacitated person, the court may, on its own motion, conduct a hearing to determine the issue of capacity, and it must conduct a hearing upon motion therefor by the defendant or by the district attorney. If no motion for a hearing is made, the criminal action against the defendant must proceed. If, following a hearing, the court is satisfied that the defendant is not an incapacitated person, the criminal action against him must proceed..." Also see section 730.40(1) which reads: "1. When a local criminal court, following a hearing conducted pursuant to subdivision three or four of section 730.30, is satisfied that the defendant is not an incapacitated person, the criminal action against him or her must proceed..." Also see section 730.50(1) that has the same wording.

275 Marks *et al New York Pretrial Criminal Procedure at* 517 confirms that fitness is a variable state and for this reason the finding of fitness is not final and does not bar further orders for the assessment of fitness during the trial.

fitness finding.[276] This category of persons is fit to stand trial but mentally ill.[277] This is the group of accused persons who can be diverted away from the criminal justice system towards the Mental Health Court for treatment. This initiative is discussed later in this chapter.

An accused who was refused a competency hearing and consequently proceeded through trial presumed to be competent may appeal against such a finding.[278] If it is found that the accused should have received a fitness hearing, the appeal court will order that the matter returns to the court *a quo* for a competency hearing.[279] If the accused is found to be competent, the initial sentence handed down will stand. If it is found that the accused is unfit, he is entitled to a new trial with regard to guilt or innocence unless the accused remains unfit, in which case fitness has to be established before the trial may proceed.[280] The appeal court may, however, find that a retrospective competency hearing is not fair, mainly due to the lapse of time from the initial trial, which may impact the accused's right to a fair trial.[281] In these cases, the conviction must be reversed, and the accused must be

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276 Slobogin, Rai and Reisner *Law and the Mental Health System at* 1026 where a view is expressed that this could possibly be viewed as a positive result since a person fount fit to stand trial is not subjected to the stigmatisation of a fitness assessment and is spared the delays that is brought about by such assessments. An opinion is also expressed that allowing marginally incompetent accused persons to stand trial ensures that the unfitness standard is applied and reserved for those with serious mental illnesses. Also see Marks *et al New York Pretrial Criminal Procedure* at 543 who explains that an accused may for example suffer from a mental illness such as depression but may be found fit to stand trial.

277 See Marks *et al New York Pretrial Criminal Procedure at* 543 who explains that an accused with depression, or multiple personality disorder, or schizophrenia is not necessarily incompetent to stand trial as they may be able to, despite their mental illness, understand the proceedings and be able to follow them.

278 Slobogin, Rai and Reisner *Law and the Mental Health System* at 1023 where the possibility is discussed that a defence lawyer may decide for strategic reasons not to raise the fitness issue. The view is expressed that it is less costly to the system to manage appeals against cases where the fitness issue was not raised at all, rather than to send each and every accused for a fitness assessment. Also see Marks *et al New York Pretrial Criminal Procedure at* 513, 514 where reference is made to various cases and it is indicated that only where the trial judge failed to exercise his discretion reasonably, will the appeal against the refusal for a competency hearing succeed. It is further pointed out that the trial judge is really in the best position to determine if there is a need for a fitness assessment since he has the benefit of seeing the accused personally, a benefit that the trial judge has over the appeal judges.

279 See the discussion of case law in Slobogin, Rai and Reisner *Law and the Mental Health System at* 1019 where an appeal against a conviction was allowed on the basis that the accused had to be found unfit to stand trial based on *inter ali*a the psychiatric report that was submitted to the court.

280 Parry *Criminal Mental Health and Disability Law* at 99. Also see Rogers and Shuman *Fundamentals of Forensic Practice at* 152 where it is pointed out that failure to address the fitness issue during trial is a well-established ground for appeal.

281 Parry *Criminal Mental Health and Disability Law* at 99. Also see Marks *et al New York Pretrial Criminal Procedure* at 545. See further in general the case of *Pate* v *Robinson* 383 U.S. 375 86 S. Ct. 836, 15 L. Ed . 2d 815 (1966).

retried, if possible, or released.[282]

For the accused person suffering from a mental illness yet deemed fit to stand trial, alternatives to traditional prosecution are available in the criminal justice system. Diversion options in the form of Mental Health Courts are explored below.

5 DIVERSION AWAY FROM THE CRIMINAL JUSTICE SYSTEM

Some writers are of the view that the criminal defence model where decision-makers in the process are often more concerned with the fairness of the process than with the result is not conducive to meeting the treatment needs of individuals with mental illness and could even be considered anti-therapeutic.[283]

Prior to the emergence of problem-solving courts in the mid 1990's, an accused person with mental illness had very little other options than having his case processed through the traditional criminal court [284] unless law enforcement exercised their discretion not to arrest the mentally ill person.[285]

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[282] Parry Criminal Mental Health and Disability Law at 99. Also see Marks et al New York Pretrial Criminal Procedure at 545.

[283] Slate RN "Mental Health Courts" in Mays LG and Gregware PR *Court and Justice* 3rd ed (Waveland Press Inc Long Grove Illinois 2004) at 425.

[284] *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 6. The court could divert an accused into some avenue that the court deemed more suitable or considered alternative sentencing but this was not necessarily aimed at mentally ill persons. See Seltzer T ""Mental health courts: A misguided attempt to address the criminal justice system's unfair treatment of people with mental illnesses" 2005 (11) *Psychology, Public Policy and Law* 570-586 at 584. Also see Albanese Criminal Justice at 261.

[285] Police decide not to file charges in between 10 and 15% of misdemeanour charges and decide not to continue with felony cases in between 30 and 50% of the time. See Burnham *Introduction to the Law and Legal System of the United States at* 270. In apprehending a mentally ill individual, the Police has a discretion as to if the individual will be arrested, or taken to hospital or an emergency room for treatment. See Lamberti and Weisman 2004 *Psychiatr Q* 151 at 153. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 7. The limits of this discretion are contained in the particular laws of the state. A police officer responding to a domestic violence incident in the state of New York for example is obliged to arrest the suspect. See Lamberti and Weisman 2004 *Psychiatr* Q 151 at 154. Prosecutors have a wide discretion to either drop the charges against an accused or dismiss the case. See Burnham *Introduction to the Law and Legal System of the United States* at 271-272. Also see *Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective* at 285 where a study is discussed that indicates that in New York, 43% of felony cases are dismissed by prosecutors. See further Welch and Fuller *American Criminal Courts* at 133, 211 where the wide discretion of prosecutors are confirmed. Also see Albanese *Criminal Justice* at 261. Part of prosecutorial discretion is that there is no obligation on a prosecutor to prosecute a case, even if there is enough evidence to secure a conviction. This wide discretion could lead to abuse and where a defendant finds that the prosecutor's decision to prosecute is based on prejudice based on religion, race or gender, the accused can challenge the particular decision to prosecute on equality grounds. See Burnham *Introduction to the Law and Legal System of the United States at* 272. Also see *Hemmens, Brody and Spohn Criminal Courts. A*

The criminal court possibly became the default avenue for persons with mental illness because of misconceptions about the dangerousness of individuals with mental illnesses or due to ignorance on the part of the judiciary regarding the accommodation of the needs of the mentally ill.[286]

The alternative to prosecution in the American adversarial system is to waive litigation and be diverted away from the criminal justice system.[287] Diversion makes an alternative path in the criminal justice system available to the accused.[288] Diversion acknowledges that treatment and rehabilitation rather than incarceration and punishment are a more appropriate response to an accused with a mental illness.[289] Diversion in the United States of America exists for, for example, first-time offenders, youth offenders, and mentally ill accused persons in order to alleviate the harshness of incarceration for them.[290] Diversion programmes for mentally ill accused persons became more popular because referral to a suitable community-based treatment facility is preferred over-incarceration.[291] This is a welcome development, especially since the safety of mentally ill persons in detention raises serious concerns.[292]

Contemporary perspective at 283, 288. See further Albanese *Criminal Justice* at 261 who explains that the sentencing discretion that lies with the prosecutors have been criticised for giving them too much power in the criminal justice process.

286 Seltzer 2005 Psychology, Public Policy and Law 570 at 584.

287 Albanese *Criminal Justice* at 262. Also see Burnham *Introduction to the Law and Legal System of the United States at* 282 who point out that diversion can also serve as a substitute for incarceration for convicted offenders.

288 Welch and Fuller *American Criminal Courts* at 250. Also see Albanese *Criminal Justice* at 262 who opines that diversion can take place at any stage of the criminal proceedings between the accused being charged and the case being adjudicated. Also see Albanese *Criminal Justice* at 262 who explains that diversions such as these are only allowed if there is no risk to the community. If the accused fails to complete the diversion programme or gets into trouble with the law within the one-year period, the prosecution resumes through the normal court process. This is also referred to as pre-trial intervention (PTI).

289 Bernstein and Seltzer 2003 *D C L Review* 143 at 143. Burnham *Introduction to the Law and Legal System of the United States* 282. Where drug abuse was a contributing factor to the accused's contact with the criminal justice system, rehabilitation programmes would for instance entail that the accused attends counselling or drug treatment as a condition for dropping the charges against him. Also see Welch and Fuller *American Criminal Courts* at 250 where it is pointed out that the charges against the accused are held in abeyance pending completion of the treatment programme. Upon completion, the charges may be dismissed. Also see Odegaard 2007 *North Dakota Law Review* 225.at 250 who argues that processing cases through the Mental Health Court is equally more appropriate than processing cases through the traditional criminal justice system.

290 Burnham Introduction to the Law and Legal System of the United States at 282. Also see Albanese Criminal Justice at 262.

291 Lamberti and Weisman 2004 *Psychiatr Q* 151 at 161.

292 Especially in the first 24 hours of detention as 50% of all suicides committed in jails and prisons, take place within the first 24 hours of incarceration. See Lamberti JS and Weisman RL "Persons with severe mental disorders in the criminal justice system: Challenges and opportunities" 2004 (75) *Psychiatr Q* 151-164 at 151 157. Mentally ill offenders pose a higher suicide risk than other

A driving force behind diversion is therapeutic jurisprudence that considers the benefit for the accused and the community in providing an alternative to prosecution.[293] Diversion programmes in the United States of America assist in reducing case backlogs in courts and alleviating overcrowding in prisons.[294]

Diversion can occur informally or formally at various stages of the court process.[295] Three types of diversions exist in the United States for persons with mental illness in the criminal justice system, namely: police-based diversion, Mental Health Courts and re-entry services.[296] Ideally, intervention should occur at the earliest possible opportunity.[297] Police-based diversion is preventative community-based care where individuals at risk will be identified and provided with treatment before they come into contact with the criminal justice system.[298] These diversions are also referred to as pre-booking diversions, which are aimed at ensuring that the mentally ill individual avoids further contact with the criminal justice system after their first interaction therewith.[299] Pre-booking diversion programmes mostly make use of community mental health services and require the intervention by police officers or crisis intervention teams at the accused's first contact with the criminal justice system.[300] Communities searching for alternatives to criminalising conduct induced

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offenders. Despite guidelines on suicide assessments and monitoring of high-risk inmates having been drafted, these are rarely followed, resulting in the safety of mentally ill offenders, including protection from themselves, being compromised. Lamberti and Weisman 2004 *Psychiatr Q* 151 at 159. Half of all suicides in the California prison and New York jails, occurred in inmates with histories of mental illness. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 12 where the heightened suicide risk of incarcerated persons with mental illness is also mentioned as one of the reasons that motivated the establishment of a Mental Health Court so that these persons can be diverted away from such incarceration into treatment.

293 Rogers and Shuman Fundamentals of Forensic Practice at 87.

294 Burnham *Introduction to the Law and Legal System of the United States* 282. Also see Albanese Criminal Justice 254. Some diversion programmes have been very successful and reported a decrease in the number of arrests after completion of the diversion programme. See Lamberti and Weisman 2004 *Psychiatr Q* 151 161.

295 Rogers and Shuman *Fundamentals of Forensic Practice* 86. The mentally ill accused will usually pass through four general stages in the criminal justice system, namely entry phase, processing phase, corrections- and release phase. See Lamberti and Weisman 2004 *Psychiatr Q* 151 at 152.

296 Draine J, Wilson AB and Pogorzelski W "Limitations and potential in current research on services for people with mental illness in the Criminal Justice system" 2007 (45) *Journal of Offender Rehabilitation* 159-177 at 169. These methods of diversion can in turn be divided into pre-and post-booking diversion programmes.

297 Fiducia CE and Rogers R "Final stage diversion: A safety net for offenders with Mental Disorders" 2012 *Crim Justice Behav* 1-13 at 1. This type of intervention at this very early stage has been described as the "ultimate intercept".

298 Fiducia and Rogers 2012 *Crim Justice Behav 1* at 1

299 Lamberti and Weisman 2004 Psychiatr Q 151 at 154. Also see Draine, Wilson and Pogorzelski 2007 Journal of Offender Rehabilitation 159 at 162.

300 Rogers and Shuman *Fundamentals of Forensic Practice* at 86. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 148 where the importance of availability of community mental health services is stressed as a factor for the success of any diversion programme. Also see Rossman *et al Criminal*

by mental illness, formed "Crisis intervention Teams" (CIT's) [301] which consisted of mental health professionals as well as members of the police and social services who received training in mental illnesses and substance use disorders.[302]

The aim of these teams is to offer immediate diversion for those in need of mental health care.[303] Some of the advantages of diversion by the CIT team are the avoidance of potential psychological harm that could be caused by the trauma of incarceration and the speeding up of the provision of much needed mental health services to the mentally ill who come into conflict with the law.[304] This programme resulted in fewer mentally ill individuals being arrested and fewer injuries to the mentally ill person involved as well as the police officer who responded to the relevant call.[305] Mental Health Courts developed in many

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Justice Interventions for Offenders with Mental Illness at 7. Also see Draine, Wilson and Pogorzelski 2007 Journal of Offender Rehabilitation 159 at 162 where it is stressed that pre-booking programmes rely heavily on police involvement. They add that the aim with pre-booking diversion programmes is to avoid arrest where possible. Diversion at the crime prevention stage, is the earliest juncture at which diversion programmes can operate. At this stage, high risk individuals who may come into contact with the law as a result of their mental illness is identified, and assistance such as medication or social assistance provided in order to prevent interaction with the criminal justice system. Prior to these programmes, an arrest was seen as a positive development in the lives of mentally ill offenders, as they then received mental health care treatment that they could not access prior to their contact with the criminal justice system. See Schneider, Bloom and Heerema *Mental Health Courts* at 70. Pre-booking diversion programmes, entails that a police officer who responds to a call where a mentally ill person is involved, may exercise his discretion in deciding if the person will be charged or not. If not, the particular diversion model will determine how the officer is to deal with the individual for example accompanies him to hospital for emergency psychiatric assessment. See Sirotich F "The criminal justice outcomes of jail diversion programmes for persons with mental illness: A review of the evidence" 2009 (37) J. Am. Acad. Psychiatry Law 461-472 at 462. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 581.

301 *Rich 2009 Fordham Urban Law Journal 89* at 98. This initiative originated from Memphis where training to police and community health departments are still offered. Also see Lamberti and Weisman 2004 *Psychiatr Q* 151 at 154, 183 where it is for example pointed out that Las Vegas has such a CIT (Crisis intervention team).

302 Lamberti and Weisman 2004 *Psychiatr Q* 151 at 153, 155. Lack of training of police officers on issues relating to mental illness, have led to unfortunate incidents where lethal force was used to apprehend a mentally ill individual. This emphasises the importance of proper training to avoid casualties such as these. Also see Slate, Buffington-Vollum and Johnson Criminalization of Mental Illness at 185 however indicate that very few police departments provide training to their police officers on how to deal with persons who might have a mental illness. In some states, such as Los Vagas, specialised training is provided. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 161 where the importance of training of police officials in dealing with mental health issues is emphasised. They also receive empathy training from persons suffering from mental illnesses and are informed of available community mental health care programmes. See Lamberti and Weisman 2004 *Psychiatr Q* 151 at 155.

303 *Rich 2009 Fordham Urban Law Journal 89* at 98. The mentally ill would hence avoid being incarcerated whilst waiting for an assessment of his mental state via the criminal justice system.

304 *Rich 2009 Fordham Urban Law Journal 89* at 98. As a result of its success, similar programmes were introduced in Houston, Portland, Seattle and Albuquerque. See Lamberti and Weisman 2004 *Psychiatr Q* 151 at 155-156. For more information on similar diversion programmes, see this source at 156.

305 Lamberti and Weisman 2004 *Psychiatr Q* 151 at 155.

states as an alternative to the CIT teams.[306]

Mental Health Courts are classified as a "mid-stage" interception model because the Mental Health Court intervenes after formal involvement with the criminal justice system has already occurred through arrest or charges being filed against the mentally ill individual.[307] Mid-stage diversion programmes are implemented at either the pre-booking stage [308] or at the post-booking stage.[309] The latter stage is further divided into the pre-arraignment and post-arraignment stages.[310] Accused persons that qualify for pre-arraignment diversion services are identified by jail staff, pre-trial services, or specialised mental health programmes.[311] Post-arraignment diversion programmes involve a determination of an appropriate disposition and often involve suspension of the criminal charges pending the accused's completion of the treatment programme.[312]

Lastly, mental health services are provided to convicted offenders who are out on probation

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306 Rich 2009 Fordham Urban Law Journal 89 at 99.

307 Fiducia and Rogers 2012 *Crim Justice Behav 1* at 2. Mental Health Courts are among the most publicised mid-stage interventions.

308 "Booking" refers to the part of the process after arrest where the details of the accused are entered into the books of the police and the fingerprints of the accused taken. See Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 97, 116.

309 There are currently post-booking diversion programmes in place in the United States of America, which does not make use of the Mental Health Court model. These post-booking models focus on controlled release from custody and access to psychiatric services. See Draine, Wilson and Pogorzelski 2007 Journal of Offender Rehabilitation 159 at 162 Examples of such programmes are the Jefferson County Kentucky, Mental Health Diversion programme that is aimed at non-violent offenders, charged with either misdemeanours or felonies, has a history of treatment for mental illness and suffers from a chronic mental illness. Participants are sent for pre-trial diversion on a treatment programme that ranges from between 6 months to 1 year upon successful completion of which the charges against him are dropped. See Bernstein and Seltzer 2003 *D C L Review* 143 at 155. Another example is the New York National Project, run by the Centre for Alternative Sentencing and Employment Services. This programme is aimed at prison bound offenders with serious mental illnesses, charges with serious offences. The programme entails an intensive 2-year case management and community supervision programme as an alternative to incarceration upon completion whereof charges are dropped. The National Project also implemented a programme aimed at probationers who default on their probation conditions. Instead of being incarcerated for such violation, they have to complete an intense treatment programme that may include anything from taking medication to attending vocational training See Seltzer 2005 Psychology, Public Policy and Law 570 at 585.

310 Rogers and Shuman *Fundamentals of Forensic Practice* at 86. Also see Draine, Wilson and Pogorzelski 2007 Journal of Offender Rehabilitation 159 at 162 where diversion is divided into two broader categories, namely pre-booking and post-booking diversion options.

311 Rogers and Shuman *Fundamentals of Forensic Practice* at 86. Also see D'Emic MJ "The promise of mental health courts: Brooklyn criminal justice system experiments with treatment as an alternative to prison" 2007 *Criminal Justice* 25-29 at 27 where the view is expressed that pre-arraignment diversion programmes are ideal but that it is not practical in the case of felonies since the justice system has to maintain a balance between the treatment needs of the accused and the interest of society who expects justice, especially in the case of violent felonies.

312 Rogers and Shuman *Fundamentals of Forensic Practice* at 86. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 153.

and who face incarceration should they fail to meet probation conditions.[313] Part of the release process is to ensure that the mentally ill individual is put into contact with the relevant service providers that can provide the mental health treatment needed by the mentally ill individual coming out of the criminal justice system.[314] Such linkages are essential in reducing recidivism by these mentally ill individuals.[315]

Diversion instead of a trial is motivated by pragmatic considerations and is not a constitutional right that an accused can demand.[316] Involvement in any diversion programme is by its very nature voluntary.[317] Diversion determinations and standards for diversion are not necessarily determined by statute or case law but are rather based on discretion.[318] States do, however, have their own legislation that authorises mechanisms for diversion that does not necessarily involve a special court-monitored programme such as a Mental Health Court.[319]

The mentally ill are the group of individuals whose contact with the courts present the most obstacles and are the most problematic.[320] Mental Health Courts aim to overcome at least some of these obstacles.

The remainder of the discussion will focus on diversion to the Mental Health Court with a specific focus on the Brooklyn Mental Health Court.

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313 Fiducia and Rogers 2012 *Crim Justice Behav 1* at 4. Some inmates are released on parole after a period of good behaviour, or are sentenced to probation rather than jail time. These releases are often done conditionally and encompass court mandated treatment orders that the parole- or probation officer has the authority to enforce. The success of enforcing such treatment orders are however often limited by the caseload of the probation officers. See Lamberti and Weisman 2004 *Psychiatr Q* 151 at 160. In some jurisdictions the mentally ill would be convicted and then placed on probation, sometimes with a suspended sentence. Slate *Mental Health Courts* at 429.

314 Lamberti and Weisman 2004 *Psychiatr Q* 151 at 160, 161 where the availability of these services in the community is identified as a problem by probation- and parole officers.

315 Lamberti and Weisman 2004 *Psychiatr Q* 151 at 161. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 184.

316 Rogers and Shuman Fundamentals of Forensic Practice at 87.

317 Welch and Fuller *American Criminal Courts* at 449.

318 Rogers and Shuman *Fundamentals of Forensic Practice* at 92. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 146 where it is explained that every jurisdiction has the ability to divert mentally ill accused persons away from the criminal justice system, either through the discretion not to arrest and prosecute or through a formal diversion programme.

319 Rogers and Shuman *Fundamentals of Forensic Practice* at 87 where details of legislation in selected states are discussed. Mechanisms for diversion to either a specialised court or other diversion programmes include dropping of the criminal charges, treatment as a condition for probation or bail (see this source at 95)

320 Schneider RD *Annotated Ontario Mental Health Statutes* 4th ed (Irwin Law Toronto 2007) at xiii.

6 THE MENTAL HEALTH COURT MODEL IN THE UNITED STATES OF AMERICA

6.1 Introduction

Most Mental Health Court in the United States of America began operations under the auspices of drug courts.[321] The focus on treatment rather than punishment in these courts resulted in reduced recidivism of drug-related offences among the participants of the drug court programme.[322] Mental illness is often a result of substance abuse.[323] Following reports by drug court practitioners that those who battle with mental illnesses do not always fare well in the drug court programmes, the idea of separate Mental Health Courts to deal with mental illness gained momentum.[324]

Although there are many similarities between drug courts and Mental Health Courts, such

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321 Slate *Mental Health Courts* at 423. Also see Frailing 2009 C.S.L.R 145 at 145. Also see *Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at* 436. See further Steadman HJ, Davidson S and Brown C "Law and Psychiatry: Mental health courts: Their promise and unanswered questions" 2001 (52) *Psych Serv* 457-458 at 457. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 11. Drug courts emerged in the United States of America in the late 1980's to offer accused persons with substance addictions the opportunity to complete a drug court programme in lieu of serving a sentence for a drug related offence. Schneider, Bloom and Heerema *Mental Health Courts* at 4, 103. Also see Frailing K 2008 *C.S.L.R* 63 at 68 who reports that as at 2004, there were 1183 drug courts in operation in the United States of America, with 248 in California alone. Also see National Drug Court Institute *Painting the Current Picture: National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States* (Bureau of Justice Assistance and National Drug Court Institute 2011) at 40 (Table 9) where it is reported that this number has grown to 256 drug Courts in California alone. Also see this source at 27 where it is indicated that as at 31 December 2009, drug courts across the United States of America, had 116 300.00 participants in their programmes. Also see Rogers and Shuman *Fundamentals of Forensic Practice at* 88 for detail about the emergence of drug courts and where it is reported that the number of drug courts across the United States of America exceeds one thousand.

322 Schneider, Bloom and Heerema *Mental Health Courts* at 5. Also see Frailing K 2008 *C.S.L.R* 63 at 68 who confirms that drug courts resulted in reduced recidivism amongst the participants of the drug court programmes in comparison to those who did not participate and whose cases were processed through the traditional criminal justice system. See further Rogers and Shuman *Fundamentals of Forensic Practice at* 88.

323 Frailing 2009 C.S.L.R 145 at *152.* Also see Sacks S and Pearson FS "Co-occurring substance use and mental disorders in offenders: Approaches, findings and recommendations" 2003 (67) *Federal Probation* 32-39 at 32 who points out that research on offenders with co-occurring mental illness and substance abuse disorders are scares and need to be conducted in order to establish prevalence and determine cost effectiveness of treatment. Frailing 2009 C.S.L.R 145 at *153* seems to suggest that there might be a need for another specialised court, focussing on those with co-occurring mental illness and substance abuse problems, as this group poses unique challenges to the criminal justice system. Frailing at 153 stresses that, where there is co-occurring conditions, both must be treated, failing which, it will result in an ineffective use of resources as optimal progress will not be achieved.

324 The success of the drug courts sparked the idea to create similar courts for those individuals suffering from mental illnesses. Frailing K 2008 *C.S.L.R* 63 at 68. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 5. See further Fisher C "Towards a new understanding of mental health courts" 2015 (54) *The Judge's Journal* 8-13 at 8. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 11.

as that both follow the therapeutic jurisprudence approach,[325] the target groups that they aim to infiltrate are very different. Drug court participants are involved in the drug court because involvement with drugs is illegal, whereas having a mental illness in itself, of course, is not illegal.[326] Drug courts are in many ways a more straightforward solution than Mental Health Courts because they consider only drug-related offences, whereas this is not the case with a Mental Health Court, [327] as discussed below.

There is no single recipe for how a Mental Health Court operates [328] or should operate. As a result, no two Mental Health Courts function the same.[329] Each Mental Health Court adjusts to the needs of their specific jurisdiction.[330]

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325 Slate *Mental Health Courts* at 424. Also see Frailing K 2008 *C.S.L.R* 63 at 68 for more similarities between drug courts and Mental Health Courts. Also see Welch and Fuller *American Criminal Courts* 99 where the courts with specialised jurisdiction are described as alternative courts that are also known as problem solving courts where therapeutic jurisprudence is applied.

326 Frailing K 2008 *C.S.L.R* 63 at 68. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 11 where it is pointed out that drug courts have more formalised goals and flow processes and may be more willing to employ sanctions than the Mental Health Court due to the different type of defendants that the court deals with (those accused of drug related offences versus those with mental illness).

327 Schneider, Bloom and Heerema *Mental Health Courts* at 6, 103. Also see Steadman, Davidson and Brown 2001 Psych Serv 457 at 458. Also see Frailing 2009 C.S.L.R 145 at 155 who points out that one of the major differences between drug courts and Mental Health Courts is that jail time is more frequently used as a sanction in the drug court than in a Mental Health Court. See further Lurigio and Snowden 2009 *The Justice System Journal* 196 at 214 who states that Mental Health Court issues are more complex than those encountered in the Drug Courts.

328 Steadman *et al* 2005 *Behavoural Science and Law* 215 at 224. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 147 where a study of 20 Mental Health Courts is discussed and the conclusion reached that there is no single model for how Mental Health Courts operate. Also see Fisher 2015 *The Judge's Journal* 8 at 9. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation* at 3 where it is reiterated that each Mental Health Court determines its own processes.

329 Schneider, Bloom and Heerema *Mental Health Courts* at 104. Also see Fisher 2015 *The Judge's Journal* 8 at 3 where it is stated that Mental Health Courts vary greatly with regard to the juncture at which a defendant may enter the court monitored programme, with regard to the treatment programmes and the length of treatment as well as the eligibility criteria in the sense that some allow defendants with developmental disorders to enter the programme whereas others do not. See further O'Keefie *The Brooklyn Mental Health Court Evaluation* at 3 where it is stated that even Mental Health Courts in the same state do not function the same. Lastly, see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 13, 14 for aspects in which courts may differ.

330 Watson A, Hanrahan P, Luchins D and Lurigio A "Mental health courts and the complex issue of mentally ill offenders" April 2001 (52) 4 *Psych Serv* 477-481 at 477. Also see Frailing K "How mental health courts function: Outcomes and observations" 2010 (33) *Int J Law Psychiat* 207-213 at 207. Also see Redlich AD, Steadman HJ, Monahan J, Robbins PC and Petrila J. "Patterns of practice in mental health courts: A national survey" 2006 (30) *Law and Human Behaviour 347-362* at 354 who point out that Mental Health Courts in operation in the same state seem to be very similar as those planning to open a new Mental Health Court, often replicate the existing model in the particular state. The model of the Mental Health Court used, will also depend on if it is initiated by leadership from the community mental health program, police department or legal professionals. See *Rich 2009 Fordham Urban Law Journal 89* at 100. Also see *Rossman et al Criminal Justice Interventions for*

Despite the fact that each Mental Health Court operates differently as guided by the unique issues in its particular jurisdiction, it appears that a court in the United States of America must have certain minimum characteristics in order to be regarded as a Mental Health Court.[331] These include a separate docket for mentally ill offenders;[332] a multi-disciplinary team consisting of mental health and criminal justice practitioners designing treatment plans for mentally ill offenders;[333] relationships with community service providers in order to ensure availability of recommended community treatment services,[334] and court-monitored

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Offenders with Mental Illness at 13.

331 Frailing 2009 C.S.L.R 145 at *149.* Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 150 where these general characteristics of the earliest Mental Health Courts are discussed. *Also see* O'Keefie *The Brooklyn Mental Health Court Evaluation* at 2, 3.. Also see Slate *Mental Health Court* at 424, 428. See further Rogers and Shuman *Fundamentals of Forensic Practice at* 88. Typical elements of a Mental Health Court has been identified as: planning and administration during which stage all the relevant stakeholders (judge and prosecutor as well as community members and mental health care practitioners) should be involved, eligibility criteria (Not every person that is mentally ill will be suitable for a Mental Health Court program. The eligibility criteria has to be clear with reference to the type of offence and whether the court will accept mentally ill persons charged with violent offences), timely processing (Those that are eligible for the programme should be identified as soon as possible and treatment options should be identified without delay.), terms of participation (The mentally ill accused person should not be subjected to excessive court intervention and should not spend more time in the system than he would have had he not had a mental illness. Participants should not be expected to show that they have recovered from the mental illness in order to be released from the program), informed choice (The participant must be placed in possession of all relevant information in order to take an informed and voluntary decision as to his participation in the programme and should also be provided with counsel to assist in the process.), treatment supports and services (The treatment programme for the accused should be individualised and he should not merely be accommodated in a programme where there is space for him without having regard to his particular treatment needs), confidentiality (Only information that is necessary for the treatment staff to properly treat the accused should be made available to the staff.), trained staff (Staff from the criminal justice system must be informed about the role and purpose of the treatment staff positions and visa versa. Staff from the two systems must be able to agree on the treatment goals for a particular accused.), monitored treatment plan (The treatment plan should be monitored by all staff involved and must be adjusted as the treatment needs of the accused changes) and programme evaluation (The programme itself as an instrument through which the accused receives treatments should be monitored and evaluated from time to time. Areas where improvements are necessary should be identified by all stakeholders involved.). See Welch and Fuller *American Criminal Courts* 465, 466 for the ideal elements suggested by the United States Department of Justice. See further Frailing K 2008 *C.S.L.R* 63 at 68.

332 The special dockets usually consist of non-violent misdemeanours. According to Redlich et al 2006 Law and Human Behaviour *347 at 349 this is a definitive feature of the Mental Health Court.* Also see Slate *Mental Health* Courts at 428. Also see Redlich et al 2006 Law and Human Behaviour 347 at 362. *Also see* O'Keefie *The Brooklyn Mental Health Court Evaluation* at 2 where reference is made to this study of 100 Mental Health Courts where they found that it is mostly one judge presiding over cases in the Mental Health Courts.

333 All Mental Health Courts follow a team approach. Hiday VA, and Ray B "Arrests two years after exiting a well-established mental health court" 2010 (61) *Psych Serv* 463-468 at 463. Also see *Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at* 441 who explain that all problem-solving courts are non-adversarial in nature. Also see Fisher 2015 *The Judge's Journal* 8 at 13.

334 There is co-operation by way of memorandums of understanding between agencies in the criminal justice system and those in the mental health care system to ensure co-operation and service delivery to the user. Bernstein and Seltzer 2003 *D C L Review* 143 at 162 point out the importance

treatment programmes and imposition of sanctions for non-compliance.[335]

A non-adversarial approach is a uniform trait in all Mental Health Courts, and the courts function using a team approach.[336] They apply therapeutic jurisprudence, and the participants appear before the Mental Health Court judge frequently.[337] Variables between Mental Health Courts include variations in the admission process to these courts, treatment programmes offered as well as variations in compliance and completion consequences.[338]

Specialised courts such as Mental Health Courts came into existence as it became clear

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of such co-operation in order to achieve successful treatment and reintegration of mentally ill accused persons. Also see Slate *Mental Health Courts* at 428. *Also see* O'Keefie *The Brooklyn Mental Health Court Evaluation* at 2 where reference is made to this study of 100 Mental Health Courts where it was found that these courts typically mandate community mental health treatment that involves inter alia taking medication and adhering to any other requirements set by the court. These other requirements may include obtaining and keeping employment and even doing physical exercises. See Redlich et al 2006 Law and Human Behaviour 347 at *349.* Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 148 where the availability of community mental health services is stressed as an indispensable factor for ensuring the success of any diversion programme aimed at persons with mental illness.

335 The Courtroom process involves clinicians who try to identify signs of mental illness in which event the person is transferred voluntarily from the criminal justice system to the mental health care system for treatment. See Slate *Mental Health Courts* at 428. There is constant judicial supervision and community supervision of the court participants. This entails that the participant appears in front of the Mental Health Court judge at regular intervals at which occasion the participant is then praised or sanctioned, depending on his compliance or not with the prescribed treatment programme. See Redlich et al 2006 Law and Human Behaviour 347 at *349.* With regard to the imposition of sanctions see Redlich et al 2006 Law and Human Behaviour 347-*362.*

336 Hiday and Ray 2010 *Psych Serv* 463 at 463. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective at* 441 who explain that all problem-solving courts are non-adversarial in nature. Also see Fisher 2015 *The Judge's Journal* 8 at 13.

337 Part of therapeutic jurisprudence according to Redlich *et al* is the discretion to have the charges against the participant dropped. Redlich et al 2006 Law and Human Behaviour 347 at 349 Judges give voices to the mentally ill by employing the therapeutic jurisprudence approach. Problem solving court judges, are activist judges who are very aware of the discretion that they have in the problem solving court and who are not afraid to use it. See Nolan JL "The international problem solving court movement: A comparative perspective" 2011 (37) *Monash University Law Review* 259-279 at 263. Also see this source at 264 for some comments by speciality court judges who caution against giving speciality court judges too much discretion and who emphasises that the judge should still maintain some distance from the case and the people involved therein, in order to fairly and impartially dispense justice. See Frailing 2010 *Int J Law Psychiat* 207 at 207. Most Mental Health Courts would require their participants to appear in court at least once a week after enrolment where after the frequency is adjusted depending on the participants progress. If the participants are doing well in the treatment programme, less frequent appearances are required whereas more frequent appearances occur if the participant is doing poorly or not complying with the treatment program. See Redlich et al 2006 Law and Human Behaviour 347 at *355.* Also see this source at 357 who indicate that the bigger Mental Health Courts with more participants, generally required the participants to appear before the judge less frequently. See further Fisher 2015 *The Judge's Journal* 8 at 9.

338 Schneider, Bloom and Heerema *Mental Health Courts* at 104, 105. The authors list the variables with regard to eligibility, admission process, treatment-, compliance- and completion variations in Mental Health Courts across the United States of America. Also see Redlich et al 2006 Law and Human Behaviour 347 at 349.

that criminal courts are ill equipped to deal with the complex issues that mentally ill accused persons present to the criminal justice system.[339]

The Broward County Mental Health Court was the first nationally recognised Mental Health Court in the United States of America.[340] Many Mental Health Courts opened their doors

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339 Frailing 2010 *Int J Law Psychiat* 207 at 207. Also see Draine, Wilson and Pogorzelski 2007 Journal of Offender Rehabilitation 159 at 164 who ascribes the emergence of Mental Health Courts to the lack of effectiveness of traditional court proceedings. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 162. See further Welch and Fuller *American Criminal Courts* at 464. Also see *Odegaard 2007 North Dakota Law Review 225.*at 225. The case of Mr Aaron Wynn motivated the establishment of this particular Mental Health Court. Mr Wynn was suffering from brain damage after a motorcycle accident and was institutionalised for a period of 2 years. Upon his release during a visit to a convenient store, he accidentally knocked over an elderly lady and her groceries. In an attempt to assist the elderly lady, he picked up her groceries and her purse. At this point it was assumed that he was robbing her and the police was called in. The elderly lady eventually died of her fall and Mr Wynn was charged with murder. The grand jury decided to indict him for manslaughter. The grand jury also ordered an investigation that resulted in a report condemning both the criminal justice and the mental health care system for their failure to deal property with persons with mental illness. The charges against Mr Wynn was dropped once the negligence and "deliberate indifference" in both these systems in dealing with Mr Wynn was exposed. See discussion of this case in Slate *Mental Health Court* at 433, 439. His treatment consisted of *inter alia* seclusion where he would be placed in constraints sometimes for days at a time, left to urinate on himself. His attorney reported that he lost his ability to walk while institutionalised as a result of the constraints. The conditions in earlier times when the mentally ill was confined to prison without necessarily having committed a crime, was much worse. See for example Torrey *et al* Criminalizing the Seriously Mentally Ill at 10 where the work of Reverent Dwight is discussed. He explains that he visited a mentally ill person in prison who had no bed or chair, but was left with a heap of hay like that a pig would sleep on.

340 Welch and Fuller *American Criminal Courts* at 465. It is often reported that the first Mental Health Court in America was established in 1997 in Broward County. See Slate, *Mental Health* Courts at 423. Also see Denckla D and Berman G "Rethinking the revolving door" 2001 Centre for Court innovation, New York. www.courtinnovation.org/sites/default/files/rethinkingtherevolvingdoor.pdf (Date of use: 7 March 2011) at 1. See Schneider, Bloom and Heerema *Mental Health Courts* at 4. See further Rogers and Shuman *Fundamentals of Forensic Practice at* 88. Some authors are, however, of the view that the first Mental Health Court in actual fact opened in Marion County, Indiana. See for instance Steadman, Davidson and Brown 2001 Psych Serv 457 at 457 who opine that the first Mental Health Court was established in 1980 in Marion County, Indiana, although it is not generally so acknowledged. This specialised court existed till 1992 at which time it was temporarily suspended. In 1996 it started operating as the PAIR Mental Health Diversion project. The Mental Health Court in Marion County was established in January 1997 whilst the Mental Health Court in Broward County opened its doors in June 1997. See Redlich et al 2006 Law and Human Behaviour 347 at 353 who indicate that the first Mental Health Court was established in Marion County, Indiana in January 1997, followed by the Broward County Mental Health Court in Florida, in June of 1997. Also see *Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective* 439 where it is explained that the PAIR programme that was launched in Marion County was in fact the first Mental Health Court in the United States and that it started in 1996. Prior to the baptism of court monitored mental health treatment programmes as "Mental Health Courts", there were programmes in place that had the same goal as the Mental Health Courts as we know them today. The PAIR (psychiatric Assertive Identification and Referral) programme is one such example. See Luskin ML "Who is diverted? Case selection for court-monitored mental health treatment" 2001 (23) *Law and Policy* 217-236 at 219, 224. This programme was authorised by a 1992 Statute that authorised conditional deferment of criminal proceedings where mental illness was a "contributing factor" to the crime. All the new arrestees at the local jail were assessed by a Psychiatric social worker who also consulted the prison personnel in identifying possible participants for the PAIR

after the Broward County Court commenced its functions.[341] The Brooklyn Mental Health Court opened its doors in 2002 and is regarded as a second-generation Mental Health Court because it considers felonies, and court staff is tasked with monitoring the progress of the accused persons in the court programmes.[342]

From the year 2000, the United States government allocated more funds for the establishment of more Mental Health Courts.[343] In 2003, there were more than 60 Mental Health Courts in North America, including Juvenile Mental Health Courts.[344] In September

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program. Defendants, who showed signs of mental illness, were not automatically considered for diversion, they had to be referred for consideration. The participants had to have a primary diagnosis of a serious mental illness (at 220). Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 438. The aim of PAIR was very much the same as that of the Mental Health Court, namely to divert mentally ill defendants (in this case only those charged with minor offences) away from the criminal justice system, into court monitored treatment programmes. Within the ambit of minor offences, offences committed against the person reduced a defendant's chances of diversion mainly since crimes against the person implied that there was a victim who would want to see justice rather than treatment for the perpetrators. The longer the list of prior convictions, the smaller the chances of diversion as such a person was viewed as a criminal rather than mentally ill. See Luskin 2001 *Law and Policy* 217 at 219, 225. Also see Torrey *et al* *Criminalizing the Seriously Mentally Ill* at 40 where the details of a study of 500 mentally ill persons in San Francisco who have been arrested during the 1970's are discussed. The finding of this study was that these 500 individuals had on average 3 prior convictions. A decision to allow diversion or not, was taken at a weekly roundtable meeting where all relevant parties or their representatives were present, these include the prosecutor, community mental health centre, the public defendant and the Mental Health Association. Luskin 2001 *Law and Policy* 217 at 220. Diversions could not proceed without the agreement of the prosecutor. The progress of the participants was monitored bi-monthly by way of compliance hearings in front of a Magistrate on a special docket. Once diverted, the treatment programmes of PAIR lasted a year, upon completion whereof criminal charges were dropped. Non-compliance with the treatment programme resulted in the criminal proceedings against the defendant going its normal course. See Luskin 2001 *Law and Policy* 217 at 220. Also see Welch and Fuller *American Criminal Courts* at 251 where it is explained that this is the general principle of diversion – to refer cases back to the traditional criminal court where the accused failed to comply with the treatment programme of the diversion programme.

341 These include the King County Mental Health Court in Seattle, Washington, established in 1999, the Anchorage Mental Health Court in Anchorage, Alaska and the Mental Health Court establish in San Bernardino, California in 1999. See Lamberti and Weisman 2004 *Psychiatr Q* 151 at 158. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 11.

342 O'Keefie *The Brooklyn Mental Health Court Evaluation* at 4. Also see Frailing 2009 C.S.L.R 145 at 155 who discuss the Washoe County Mental Health Court as a second generation Mental Health Court where felonies are considered as opposed to the original Mental Health Courts who only considered misdemeanours. See Schneider, Bloom and Heerema *Mental Health Courts* at 106. Second generation Mental Health Court rely on court staff to monitor treatment programmes, whereas the initial Mental Health Courts relied on supervision by community treatment programmes.

343 Schneider, Bloom and Heerema *Mental Health Courts* at 103. Funding for Mental Health Courts in America was made possible by the passing of legislation namely the "America's Law Enforcement and Mental Health Project Bill" passed in 2000 that resulted in $10 million being made available to establish 100 Mental Health Courts. In 2004 the "Mentally Ill Offender and Crime Reduction Act of 2004" resulted in another $50 million being made available for further Mental Health Courts, training of law enforcement officers and the enhancement of treatment available to mentally ill offenders in and outside of prison. See Frailing K 2008 *C.S.L.R* 63 at 70 for more detail on the passing of the relevant legislation.

344 Slate *Mental Health Courts* at 424. As at July 2004, the number had grown to 98. See Frailing 2009

2005, there were 111 Mental Health Courts.[345] As of December 2009, there were approximately 300 Mental Health Courts in operation across the United States of America.[346] The United States of America has clearly taken hold of the Mental Health Court movement faster than Canada.[347] Problem-solving courts such as Mental Health Courts have been described as "the future of justice".[348] The establishment of problem-solving courts in the United States of America is generally met with great enthusiasm.[349]

The goals of Mental Health Courts as problem-solving courts in the United States of America with a particular focus on the goals of the Brooklyn Mental Health Court are explored below.

C.S.L.R 145 at *149.*

345 Schneider, Bloom and Heerema *Mental Health Courts* at 5, 41, 103. The number of courts has grown from 90 in January 2005, see Redlich *et al* 2006 *Law and Human Behaviour* 347 at 352. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 204. See further Redlich et al 2006 Law and Human Behaviour 347 at 352 that indicate that 34 States across the United States of America as at 2005, had at least one Mental Health Court.

346 The exact number as at 31 December 2009 stood at 288. See National Drug Court Institute *Painting the Current Picture* at 39. See however Wollf N, Fabrikant N and Belenko S "Mental health courts and their selection processes: Modelling variation for consistency" 2011 (35) *Law and Human Behavior* 402-412 at 402 who reported that there were only 170 operational Mental Health Courts at the time. See however Welch and Fuller *American Criminal Courts* at 464 where it is reported that there were about 150 Mental Health Courts in operation in the United States of America, a number much smaller than the 288 alluded to above. Also see Albanese *Criminal Justice* at 243 where it is indicated that there are approximately 200 Mental Health Courts in operation across America. Lastly, see Fisher 2015 *The Judge's Journal* 8 at 8 who reports that there were over 300 operational Mental Health Courts in 2010 in 40 states across the United States of America.

347 Heerema M "An introduction to the mental health court movement and its status in Canada" 2005 (50) C*rim.L.Q* 255-282 at 274. Also see the discussion of the Mental Health Court movement in Canada in chapter 4 of this research.

348 It was also described as ""radical, revolutionary, the trend of the future" and further that it is " These were the words used by one of the judges responsible for the establishment of the Phoenix Mental Health Court. See Nolan 2011 *Monash University Law Review* 259 at 262. Another judge involved in the establishment of a problem solving court, described the movement as "a complete revolution in jurisprudence".

349 Nolan 2011 *Monash University Law Review* 259 at 262, 263. This enthusiasm is not always shared by those in other jurisdictions, in this particular instance, an Irish judge had reservations about the almost "evangelical approach" towards problem solving courts that is followed in the United States of America. See O'Keefie *The Brooklyn Mental Health Court Evaluation at* 6 who confirms that all the stakeholders in the state of New York for instance, welcomed the establishment of Mental Health Courts as it already had a number of problem solving courts in the state. See, however, Welch and Fuller *American Criminal Courts* at 102 where Mental Health Courts are specifically listed as a court with specialised jurisdiction. It is pointed out here that specialised courts sometimes has the effect of blurring the line between criminal and non-criminal jurisdiction which creates quasi-judicial systems that could potentially reduce due-process protection and in which state coercion can be disguised as social welfare. Also see Frailing 2009 C.S.L.R 145 at 145. See further Frailing K 2008 *C.S.L.R* 63 at 67 for the main characteristics of problem solving courts. See further *Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective* 436, 437 where domestic violence courts, re-entry courts and homeless courts are added to the list of problem solving courts that emerged in the United States.

6.2 Goals of the Mental Health Court in the United States of America

As specialised criminal courts for the mentally ill accused,[350] these courts are aimed at addressing the underlying cause for the criminal behaviour,[351] which in turn reduces recidivism [352] and protects public safety in the process.

Mental Health Courts aim to respond to the illness that may have been the underlying cause of the criminal behaviour [353] by diverting the mentally ill accused away from the criminal justice system towards treatment and support from the mental health care system.[354] An underlying supposition upon which the Brooklyn Mental Health Court is established is that criminal behaviour is often a symptom or result of untreated or insufficiently treated mental illness.[355] The court's focus is on treatment rather than incarceration.[356] This focus is evident in the fact that they link mentally ill accused persons to treatment [357] as an alternative to incarceration, resulting in improved psychiatric stability (and hopefully a crime-free life) for the offender and improved public safety by focusing on

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[350] Redlich et al 2006 Law and Human Behaviour 347 at 347.

[351] Bernstein and Seltzer 2003 *D C L Review* 143 at 148. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 462. Also see Albanese *Criminal Justice* at 244.

[352] Bernstein and Seltzer 2003 *D C L Review* 143 at 144, 148 where it is stated that the extent to which community mental health care facilities provide access and treatment to the mentally ill, has a big role to play in reducing re-offending. Lack of treatment may lead to re-offending. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 440 where it is reiterated that the goal of all problem-solving courts is to reduce recidivism and to produce productive members of society. Also see Albanese *Criminal Justice* at 244. See further in general Redlich et al 2006 Law and Human Behaviour 347*-362. Also see* O'Keefie *The Brooklyn Mental Health Court Evaluation* at 2 where reference is made to this study of 100 Mental Health Courts where it is stated that All Mental Health Courts aim to reduce recidivism by diverting the mentally ill accused away from the criminal justice system into treatment.

[353] *Rich 2009 Fordham Urban Law Journal 89* at 99. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 160. The aim is to divert the mentally ill accused away from the criminal justice system and to provide the necessary treatment to address the mental illness that might have been the underlying cause of the criminal behaviour. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 437. See further Albanese *Criminal Justice* at 263. See *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 57 where this is stated as one of the underlying principles upon which the Brooklyn Mental Health Court is established.

[354] Frailing 2010 *Int J Law Psychiat* 207 at 207. Also see Parry *Criminal Mental Health and Disability Law* at 191. See further D'Emic 2007 Criminal Justice 25 at 25 with regard to the Brooklyn Mental Health Court in particular. Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 461. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 69 who points out that diversion does not require a speciality court, although the objective of a Mental Health Court is to "divert".

[355] Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 58.

[356] *Rich 2009 Fordham Urban Law Journal 89* at 98. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 148. The court aims to address the mental health needs of the accused as well as public safety issues by linking the mentally ill accused with treatment services instead of incarcerating them. See O'Keefie *The Brooklyn Mental Health Court Evaluation at* 1, 5. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 57.

[357] Draine, Wilson and Pogorzelski 2007 Journal of Offender Rehabilitation 159 at 165.

the rehabilitation of the offender instead of focusing on his punishment.[358] The focus on the treatment of the illness can limit the revolving door effect, which in turn can lead to reduced recidivism and, ultimately, a safer society.[359]

Mental Health Courts aim to improve collaboration between the criminal justice system and the mental health care system since these two systems have not been close collaborators in the past.[360] Effective community health care treatment is essential[361] in order for the Mental Health Court to achieve its reintegration goals.[362]

The initial goal of the Brooklyn Mental Health Court was to divert persons with serious and persistent mental illness away from prison into treatment programmes.[363] The Brooklyn Mental Health Court further aimed to determine eligibility for a court-monitored treatment programme within 21-days from the first court appearance.[364] These were the main goals

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358 Bernstein and Seltzer 2003 *D C L Review* 143 at 148.

359 *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 6, 57, 58. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation* at iii, 2. The revolving door phenomenon entails that persons with mental illness flow in and out of the criminal justice system.

360 Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 454. A reason for this might be because a big difference between these two systems, is that the mental health care system focusses on patient centred treatment and care whilst the criminal justice system is driven by public safety and individual responsibility. See Draine, Wilson and Pogorzelski 2007 Journal of Offender Rehabilitation 159 at 170. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 7, 57 where better collaboration between these two systems is set as an objective that the Brooklyn Mental Health Court wish to achieve.

361 Bernstein and Seltzer 2003 *D C L Review* 143 at 161 point out that practices that could hinder the achievement of these goals, is the use of counter-therapeutic practices by Mental Health Courts such as insisting on a guilty plea for entrance into the Mental Health Court programme since this will hinder the accused's reintegration and chances on housing and employment. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 212 where the availability of community resources for purposes of the Mental Health Court programmes is stressed.

362 These courts also aim for the successful reintegration of the mentally ill accused person into the community. In order to achieve these goals, effective community health care treatment is essential. See Bernstein and Seltzer 2003 *D C L Review* 143 at 161. The author also mentions reduced recidivism as another important goal.

363 D'Emic 2007 Criminal Justice 25 at 25. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* v where it is stated that in the implementation phase of the court (28 months) the court received 262 referrals. Also see this source at 5 where it is stated that the goals of this court should be revised once it's been in operation for a number of years to ensure that it is achieving its intended objectives and to establish the exact scope of its operations. See further *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 13 where it is indicated that the requirement of having a serious or persistent mental illness, is regarded as the legally defined eligibility requirement. The clinical approach to eligibility will refer to, for instance, Axis 1 disorders or other terminology generally use for diagnostic purposes.

364 The average amount of days from the first court appearance to the eligibility determination is 21 days. The determination period for those found not eligible, were 18 days, whereas it was 24 days for those eventually found eligible. See O'Keefie K *The Brooklyn Mental Health Court Evaluation* at 21. The eligibility determination date is the date upon which the psychosocial and psychiatric reports are made available to all the parties involved in the matter. See, however Steadman *et al* 2005 *Behavoural Science and Law* 215 at 221 who reports that the average time it takes for a Mental

of the Brooklyn Mental Health Court.

A secondary goal of this court was to create a Mental Health Court model that could be replicated in other jurisdictions that wished to implement a Mental Health Court.[365] The objectives of the court were to improve the ability of the criminal justice system to identify, assess, and monitor accused persons with mental illness in the criminal justice system.[366]

6.3 Underlying principles of the Mental Health Court model in the United States of America

Whilst the dynamics of each particular Mental Health Court across the United States of America may differ, there are some underlying principles that are observed across all the American Mental Health Courts. The most prominent of these are briefly discussed below. Where the underlying principles overlap with that of the Canadian Mental Health Court's, this fact will be pointed out, and the discussion of the particular underlying principle limited in order to avoid duplication.

6.3.1 Therapeutic jurisprudence

All Mental Health Courts employ therapeutic jurisprudence practices. Therapeutic jurisprudence acknowledges that the law affects the mental and physical health of those in contact with it and seeks to apply social science to examine its current and future impact on these persons, their relationships, and society.[367]

Therapeutic jurisprudence as it pertains to the mentally ill accused is discussed in detail in chapter 2 and 4 of this research, and the principles highlighted during those discussions apply to the American context as well and will not be repeated here.

6.3.2 Voluntary participation

Participation in the Brooklyn Mental Health Court programme is voluntary in that the

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Health Court to reach a decision on if the accused is eligible for the Mental Health Court program, is 32 days. See this source at 218 for a list of the Mental Health Courts that formed part of the study.

365 O'Keefie K The Brooklyn Mental Health Court Evaluation at 5.

366 O'Keefie K The Brooklyn Mental Health Court Evaluation at 5. Also see Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 57.

367 Slate *Mental Health* Court at 424 where therapeutic jurisprudence is defined as "Therapeutic jurisprudence analyses the process of how "substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or anti-therapeutic consequences". Also see this source at 15 where therapeutic jurisprudence is defined as "decisions within the therapeutic jurisprudence framework are made with consideration of future ramifications for individuals, relationships and society long after a person's contact with the criminal justice system has ceased". Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 11.

decision to enrol in the Mental Health Court programme is completely up to the participant.[368]

Mental Health Court participants in the United States of America are offered a choice between participating in the treatment programme of the Mental Health Court, upon completion whereof the charges against them are either reduced or dropped or to proceed with the case through the normal criminal justice system.[369] The dropping of charges serves as an incentive to complete the programme.[370]

Because participation is voluntary, the participants are able to opt-out of the treatment programme [371] and have their case processed by the traditional criminal court at any point in time.[372] The provision for opting out is because these accused persons came to the knowledge of the criminal justice system because they have been charged with criminal conduct and not because they require involuntary mental health care treatment. Forcing them to continue with the court-monitored programme would amount to involuntary mental health care treatment for which they would not have qualified otherwise.[373]

The fact that the accused must be competent to participate in the Mental Health Court

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368 Parry *Criminal Mental Health and Disability Law* at 191. Also see in general Redlich et al 2006 Law and Human Behaviour 347-362*. Also see* O'Keefie *The Brooklyn Mental Health Court Evaluation* at 2 where reference is made to this study of 100 Mental Health Courts. Also see Odegaard 2007 *North Dakota Law Review* 225 at 251 where the importance of voluntary participation is stressed as something that proponents of Mental Health Courts support. The eligible accused may also decline to enrol in the Mental Health Court programme in the first place. *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 70. See further Lurigio and Snowden 2009 *The Justice System Journal* 196 at 211 who warns that if transfer to the Mental Health Court is not voluntary, it will amount to an infringement of the 6th amendment. Where an accused declines to be enrolled in the Mental Health Court programme, his case will revert back to the traditional criminal court. See *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 58.

369 Schneider, Bloom and Heerema *Mental Health Courts* at 6. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 576 where it is highlighted that such dismissal of charges does not happen automatically in all Mental Health Courts and that in the mentally ill accused is often required to request such dismissal of charges that is a complicated process in itself. Some Mental Health Courts would drop the charges immediately once the accused agrees to participate. See however Welch and Fuller *American Criminal Courts* at 250 who explain that with any diversion, the charges are held in abeyance, which implies that the charges are only dropped once the treatment programme has been successfully completed.

370 See Frailing 2009 C.S.L.R 145 at *154. Also see Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 68 where it is explained that, in the Brooklyn Mental Health Court, charges are dropped where the accused was charged with a misdemeanour of a first time felony offence. Where the charge was a violent felony, the charges are not dropped upon completion but the charges are reduced to misdemeanour charges.

371 Schneider, Bloom and Heerema *Mental Health Courts* at 6. Also see this source at 90 where it is reiterated that participation in the Mental Health Court programme is completely optional.

372 O'Keefie The Brooklyn Mental Health Court Evaluation at 27. Also see Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 64.

373 Bernstein and Seltzer 2003 *D C L Review* 143 at 151.

programme, further speaks to the voluntariness of the involvement. The "competence" to participate in the Mental Health Court programme means that an accused must be able to distinguish between the advantages and disadvantages of participation and must be distinguished from "competence" for purposes of standing trial.[374] Competency assessments (for purposes of participating in the Mental Health Court programme) are not done on all intended participants of the Mental Health Court programme, but only if a participant appears "grossly incompetent".[375]

Criticism has been levelled against the purported voluntariness of participation in the American Mental Health Courts because of the requirement in the Mental Health Court to enter a guilty plea in order to enrol in the programme. This criticism is discussed later in this chapter.

6.3.3 Multidisciplinary court team

The Mental Health Court necessitates decisions to be made by members of various professions at different stages in the process,[376] depending on whether the legal or psychiatric aspects are being considered.

The judge,[377] prosecutor, defence attorney and other court staff are all specially trained and have knowledge of the public mental health care system.[378] Case managers and social workers are instrumental in monitoring the compliance of the participants with their particular treatment programmes.[379] The exact staff composition of each Mental Health

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374 In some Mental Health Courts, it is compulsory to refer all matters relating to fitness to stand trial to the Mental Health Court for consideration. The Brooklyn Mental Health Court is an example hereof. See Steadman *et al* 2005 *Behavoural Science and Law* 215 at 219

375 Frailing 2009 C.S.L.R 145 at *152.* If an accused who is deemed to be not fit to stand trial, participates in the Mental Health Court programme the risk exists that critics may say that such participation is coerced in the sense that the participant was not in a position to truly "choose" to participate in the Mental Health Court programme or not.

376 Luskin 2001 *Law and Policy* 217 at 219.

377 Nolan observes that Judges presiding over problem solving courts are generally more creative, result-orientated and compassionate. These judges are identified as "romantic judges" as opposed to the "classical judges" who tend to be more modest and impartial, focussing on interpreting the law. See Nolan 2011 *Monash University Law Review* 259 at 263. See further Bernstein and Seltzer 2003 *D C L Review* 143 at 150.

378 Watson *et al 2001* Psychiatric Services 477. Also see *Rich 2009 Fordham Urban Law Journal 89* at 99 who points out that Judges must be trained to understand the mental illnesses that they will come across in the Mental Health Court over which they are presiding and the treatment modalities for these illnesses. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 150. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 211.

379 Seltzer 2005 Psychology, Public Policy and Law 570 at 580. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 152, 158. See further Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 439.

Court may differ from court to court.[380]

The Brooklyn Mental Health Court team is multidisciplinary and comprises members from the mental health profession and the legal profession. The Brooklyn Mental Health Court has an in-house clinical team consisting of a clinical director, social worker and three case coordinators.[381] The court team meets daily to discuss the progress of participants.[382] The clinical director is responsible for the final clinical eligibility decision at the Mental Health Court and regularly communicates with the judge, the district attorney, and the community partners where treatments to the court participants are provided.[383] The psychosocial assessments are conducted by the social workers at the court during which the psychiatric history of the accused, his support structure, his employment history etc., is considered and reported on.[384]

Forensic co-ordinators at the court have a number of accused' persons dedicated to their care and are responsible for arranging placement for the accused at the relevant community establishment, regularly communicating with that establishment, monitoring the compliance of the defendant with the treatment programme and acting as a liaison between the court and the community treatment establishment.[385] The Brooklyn Mental Health Court employs a psychiatrist on contract who conducts all the psychiatric evaluations of defendants at the court and drafts reports about their psychiatric state to the court.[386] The evaluation lasts approximately 60-minutes and primarily aims to identify a diagnosis and the most appropriate treatment in order to see if the accused is eligible for the court in accordance with the eligibility criteria.[387]

Representatives from the legal profession also form part of the court team. A prosecutor is

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380 O'Keefie K The Brooklyn Mental Health Court Evaluation at 3.

381 D'Emic 2007 Criminal Justice 25 at 27. Also see Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 58.

382 D'Emic 2007 Criminal Justice 25 at 27.

383 O'Keefie *The Brooklyn Mental Health Court Evaluation at* 13. Also see this source at 19 where it is explained that the clinical director has the final say about if an accused meets the psychiatric eligibility criteria for the Brooklyn Mental Health Court. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 60.

384 *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 58, 60. D'Emic 2007 Criminal Justice 25 at 27. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 13. She also takes on the responsibility of forensic co-ordinator for female clients if the need arises.

385 O'Keefie *The Brooklyn Mental Health Court Evaluation* at 14. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 58, 59 where it is pointed out that the Brooklyn Mental Health Court has three forensic co-ordinators. D'Emic 2007 Criminal Justice 25 at 27.

386 O'Keefie The Brooklyn Mental Health Court Evaluation 14.

387 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 59.

dedicated to the Brooklyn Mental Health Court who serves as the liaison from the District Attorney's office and makes the official referral to the Mental Health Court.[388] The prosecutor, on behalf of the Assistant District Attorney, does the initial legal screening, drafts the plea agreements, and has the authority to decline cases.[389] The defence attorneys have to explain the plea agreement to the accused and make sure he understands it and that his participation in the court is truly voluntary.[390] One judge presides over the Mental Health Court and has prior experience of problem-solving court processes.[391]

On the administrative side of the court proceedings, the judge's law secretary and Mental Health Court clerks contribute to the smooth daily operations of the court.[392] The court has a project director that is very active during the planning phase of the court and who is also responsible for staff administration, developing templates of court documents and designing the process of referrals from criminal courts.[393]

The procedural dynamics of the Mental Health Court with a particular focus on the Brooklyn Mental Health Court are discussed next.

7 PROCEDURAL DYNAMICS OF A MENTAL HEALTH COURT IN THE UNITED STATES OF AMERICA

7.1 Introduction

Each Mental Health Court must put procedures in place that exhibit a balance between the constitutional rights of the accused to a fair trial and a legal representative on the one hand

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388 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 58.

389 *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 58. The prosecutor also contacts the complainant to enquire whether he has an objection against the accused participating in the Mental Health Court programme instead of incarceration. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 14. The Assistant District attorney was very involved in the planning stage of the court to develop the criminal eligibility criteria and appropriate dispositions for mentally ill accused persons diverted to the Mental Health Court. He is also responsible for discussing cases regularly with the defense attorney and the clinical director.

390 Defense attorneys representing mentally ill defendants are often from agencies that represent indigent persons. See O'Keefie *The Brooklyn Mental Health Court Evaluation at* 14. These include the Legal Aid Society and the Brooklyn Defender Services. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 59 where it is explained that these attorneys represent the accused throughout the court proceedings.

391 O'Keefie The Brooklyn Mental Health Court Evaluation at 13.

392 O'Keefie The Brooklyn Mental Health Court Evaluation at 14.

393 O'Keefie *The Brooklyn Mental Health Court Evaluation* at 13. The programme director is also responsible for networking and promoting the work of the court at conferences

and the public safety and public health on the other.[394]

There does not seem to be a standard method of case management in Mental Health Courts for the process from the point of referral to the Mental Health Court to the point where a decision is made about whether the accused will be allowed to participate in the Mental Health Court programme.[395] Most Mental Health Court processes do not appear in writing.[396] The procedures of a Mental Health Court are further not static and may change over time.[397]

Mental Health Courts in the United States of America are post-charge diversion programmes that steer mentally ill persons away from the criminal justice system towards court-supervised treatment programmes.[398] Most American Mental Health Court programmes are post-plea programmes since a guilty plea [399] is often a condition for

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394 Bernstein and Seltzer 2003 *D C L Review* 143 at 151. Also see Hemmens, Brody and Spohn *Criminal Courts. A Contemporary perspective* at 437 where it is reiterated that problem solving courts function on the premise that the accused should accept responsibility for his actions. These courts also aim to improve the safety of the community.

395 Steadman et al 2005 Behavoural Science and Law 215 at 224.

396 Bernstein and Seltzer 2003 *D C L Review* 143 at 156.

397 Bernstein and Seltzer 2003 *D C L Review* 143 at 150. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 5 who opines that the goals of a Mental Health Court should also be adjusted if necessary once the court has been in operation for a number of years and the exact scope of its operations etched out.

398 Frailing 2010 *Int J Law Psychiat* 207 at 207. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 76 where they indicate that specialised Mental Health Courts, is the diversion programme most often used in the United States. American Mental Health Courts are identified as "post-plea" diversion programmes where a guilty plea is mostly required for admission into the Mental Health Court programme. This is in contrast with the Canadian Mental Health Court model that is typified as "pre-plea" diversion as the accused is never arraigned, nor is an admission of guilt required. See chapter 4 of this research for a more detailed discussion on the nature of the Canadian Mental Health Court.

399 The defendant may plead guilty, not guilty, no contest or standing mute. A plea of "no contest" results in the accused being found guilty but his admission is not admissible to prove any element of an offence in a civil claim. Such a plea is, however, only possible with the consent of the prosecutor and the judge. See *Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective* at 116, 292. Also see Albanese *Criminal Justice* at 111. This type of plea is also referred to as collateral estoppel. This plea is also known as *nolo contendre.* Lastly, see Burnham *Introduction to the Law and Legal System of the United States* at 281. "Standing mute" means that the accused is refusing to plead to the charges against him. In this instance the court will enter a not guilty plea on the defendant's behalf to preserve his Constitutional rights. See Hemmens, Brody and Spohn Criminal Courts. A Contemporary perspective at 292. Also see Albanese *Criminal Justice* at 112. The majority of cases are resolved by a guilty plea. Very few cases proceed to trial. See Burnham *Introduction to the Law and Legal System of the United States* at 275, 280. In 1995, of the 47 556 persons convicted in the federal court, 91.7% of them, pleaded guilty to their charges. When a guilty plea is entered, the judge has to be convinced that the accused's decision to plead guilty is voluntary and fully informed and further has to be satisfied that the accused did indeed commit the crime. If this cannot be established, the guilty plea will not be accepted and the matter must proceed to trial. Also see *Draine, Wilson and Pogorzelski 2007 Journal of Offender Rehabilitation 159* at 166 who indicates that as many as 95% of all persons plead guilty in order to limit their time in the criminal

admission into this diversion programme.[400] The guilty plea requirement presupposes two basic psycho-legal considerations, namely fitness to stand trial and criminal responsibility.[401] The court can thus not accept a guilty plea if the offender was not fit to stand trial or if there was a clear defence of insanity or lack of criminal responsibility.[402] The main motivation for requiring a guilty plea is to better enforce compliance with treatment in the diversion programme.[403]

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justice system. Also see Slobogin, Rai and Reisner *Law and the Mental Health System at* 1060. A guilty plea can also form part of a plea bargain where the accused pleads guilty in exchange for a reduction in the charges or a special disposition regarding sentencing. See Burnham *Introduction to the Law and Legal System of the United States* at 281. The accused who is charged with armed robbery may for example be allowed to plead guilty to a charge of non-armed robbery. With regard to sentencing, an agreement may be reached on a particular sentence range in exchange for a guilty plea. Plea bargaining has been criticised as being too lenient on the offender. It is still an integral part of the American criminal justice system and withstood constitutional challenges as well. The burden of proof in a criminal trial is beyond a reasonable doubt as pointed out by Burnham Introduction to the Law and Legal System of the United States at 276.

400 Lurigio and Snowden 2009 *The Justice System Journal* 196 at 211 who confirms that many Mental Health Courts require a guilty plea as a requirement to enter the Mental Health Court programme. Also see Rogers and Shuman *Fundamentals of Forensic Practice at* 88. Also see *Schneider Bloom and Heerema Mental Health Courts* at 76 and 104. This differs from the Canadian model of Mental Health Courts, since the Canadian courts are "pre-plea" post-charge diversion programmes where the accused is never arraigned, nor is an admission of guilt required. See chapter 4 of this research for a detailed discussion on the Canadian model of the Mental Health Court. South Australia's diversion program, known as the "Magistrate's Court Diversion Program" is in many respects similar to the American model of the Mental Health Court. (See *Schneider Bloom and Heerema Mental Health Courts* at 108). The regrettable outcome of this programme is that mentally ill offenders may still leave the programme with a criminal record, a consequence that should technically be avoided having regard to the goal of the Mental Health Court movement, namely to decriminalise the mentally ill. Also see Parry *Criminal Mental Health and Disability Law* at 191 where it is pointed out that a guilty plea is a requirement for admission to the Nevada Mental Health Court. See further Bernstein and Seltzer 2003 *D C L Review* 143 at 153 where it is confirmed that most of the initial Mental Health Courts required a guilty plea or a no contest plea for entrance into the Mental Health Court program. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 57 where the Brooklyn Mental Health Court for instance is described as a post-indictment Mental Health Court. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 76. Also see Stafford KP and Wygant DB "The role of competency to stand trial in mental health courts" 2005 (23) *Behav. Sci Law* 245-258 at 246. See further Seltzer 2005 Psychology, Public Policy and Law 570 at 576 where it is pointed out that many Mental Health Courts required a "no-contest" plea where a guilty plea was not obtained. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 57 where the Brooklyn Mental Health Court is identified as a post-indictment Mental Health Court.

401 Schneider, Bloom and Heerema *Mental Health Courts* at 86, 87.

402 Schneider, Bloom and Heerema Mental Health Courts at 86, 87.

403 Schneider, Bloom and Heerema *Mental Health Courts* at 87. Also see Hora PF and Schma WC "Therapeutic jurisprudence" 1998 (82) Judicature 8-12 at 10. See further Seltzer 2005 Psychology, Public Policy and Law 570 at 576. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 153. Some Mental Health Courts follow a "pre-adjudication model" which entails that the charges are held in abeyance pending the mental health treatment of the accused. In many Mental Health Courts the charges are dismissed after successful completion of the treatment programme. Questions have been raised about the meaning of "successful completion" as some mental illnesses which are serious, are of a long term nature and may require years of treatment. Bernstein and Seltzer 2003 *D C L Review* 143 at 153. In some instances dismissal of the charges do not happen automatically

Some Mental Health Courts sit once a week, others twice a week depending on the need in the particular region.[404] The Brooklyn Mental Health Court is housed in the Kings County Supreme Court and hears cases every Tuesday, with cases not yet finalised rolling over to a Thursday.[405] The court is presided over by the same judge every time, one with special training in the field of mental health.[406] The Brooklyn Mental Health Court operates a dedicated Mental Health Court docket.[407] The atmosphere in the Brooklyn Mental Health Court is very relaxed and informal, with the judge often addressing the defendant directly rather than speaking to him through his attorney.[408]

Before the different phases in the American Mental Health Court model are explained, the eligibility criteria are discussed since the phases in the court process refers to the eligibility criteria throughout.

7.2 Eligibility criteria

7.2.1 Introduction

The eligibility criteria differ from court to court, where some Mental Health Courts, for example, do not take cases from mentally ill accused who allegedly committed crimes involving serious violence.[409] Some Mental Health Courts only consider cases of those suffering from a serious mental illness.[410]

The eligibility criteria for Mental Health Court programmes are more suggestive than

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and it is a long process to apply for it. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 211 where this is confirmed.

404 Bernstein and Seltzer 2003 *D C L Review* 143 at 149.

405 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 58.

406 *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 58. Also see Slate *Mental Health* Courts at 431 who stresses the importance of training in order to guarantee the success of a Mental Health Court.

407 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 70. Only mental health matters appear on the court roll.

408 O'Keefie *The Brooklyn Mental Health Court Evaluation* at 35. The judge would for instance have a conversation with the accused, make eye contact or ask questions to the accused in open court. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 72. See further Lurigio and Snowden 2009 *The Justice System Journal* 196 at 208 where it is pointed out that judges often have conversations with participants which contributes to the more informal atmosphere.

409 Rogers and Shuman Fundamentals of Forensic Practice at 88. Also see O'Keefie The Brooklyn Mental Health Court Evaluation at 3.

410 Schneider, Bloom and Heerema *Mental Health Courts* at 104. Also see Redlich et al 2006 Law and Human Behaviour 347 at 349.

deterministic.[411] The process has also been identified as complicated and variable.[412] The selection process that a Mental Health Court chooses to follow may have a direct impact on the performance of the interventions that it offers. [413] For example, if, when the selection takes place, most focus is placed on "treatability", [414] the performance outcomes of Mental Health Court will be higher than when the focus is placed on diagnosis, for example, as not all diagnosed mental illnesses will react equally well to treatment within a certain period of time.

The structure of the decision to allow an accused to participate in the Mental Health Court programme is complex because the Mental Health Court participant must meet certain psychiatric and legal criteria.[415] These criteria are discussed below, with a particular focus on the eligibility criteria of the Brooklyn Mental Health Court.

7.2.2 Clinical/psychiatric eligibility criteria

The mere fact that an accused suffers from a mental illness and is charged with a crime that falls within the eligibility criteria of the Mental Health Court will not ensure acceptance of the accused into the Mental Health Court programme.[416] The psychiatric criteria entail that the accused must suffer from a serious or persistent mental illness for which there is a known treatment, such as schizophrenia, bipolar disorder, or major depression.[417] The

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411 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 403. The fact that the eligibility criteria for Mental Health Courts are more suggestive than deterministic, means that possibility of bias exists in that the tendency might be to only allow accused who has a good chance of success in the programme. This concern has also been picked up by Albanese *Criminal Justice* at 262. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 15 where this concern is also raised and the practice is labelled as "creaming" it is further pointed out that this may lead to distorted research results with regard to the successful outcomes of these courts.

412 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 402.

413 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 403.

414 See Frailing 2009 C.S.L.R 145 at *150* where she points out that the accessibility criteria to the Mental Health Court programmes, was more focused on age and gender than on any legal aspect and that there is a possibility that these courts seem to accept participants not based on the offence committed by the mentally ill offender, but based on the likelihood of the participant benefiting from the treatment. Also see Steadman *et al* 2005 *Behavoural Science and Law* 215 at 220. Who confirms that Mental Health Court staff may be accepting only those referrals that have a high likelihood of successfully completing the treatment, rather than basing such acceptance on diagnosis or any other factor.

415 Luskin 2001 *Law and Policy* 217 at 219. The complexity of the decision is contrasted with the simplicity of the decision to allow an accused to participate in a drug court programme. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 13, 63.

416 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 402. See the criticism against the Mental Health Court movement for the criticism against the impact that this approach may have.

417 O'Keefie *The Brooklyn Mental Health Court Evaluation* at 1,19. These typically include depression, bipolar disorder, schizophrenia and schizo-affective disorder. Also see *Rossman et al Criminal*

accused must suffer from a mental illness and must have criminal charges against him.[418] Whether an accused suffers from a mental illness or not is determined by the mental health care practitioner using the Diagnostic and Statistical Manual (DSM).[419]

Persons with developmental disabilities, personality disorders, brain injury, and dementia are not eligible for the Brooklyn Mental Health Court if this is their only diagnosis.[420] Some other Mental Health Courts accepted individuals diagnosed with mental retardation provided that an arrangement for treatment can be made with the local, regional centre.[421] Individuals who had no mental health history at all are also accepted by some courts to make provision for those cases where the individuals had their first break down.[422]

Clinicians who recommend that an accused be diverted into a Mental Health Court treatment programme have to be objective in their assessment of whether the accused is suited for diversion.[423] What impacts this is the ability of the accused to be treated.[424] Presiding officers may become opposed to diversion if a clinician indiscriminately recommends that every single accused be diverted, despite the repeated failure of prior treatment programmes.[425]

Justice Interventions for Offenders with Mental Illness 13 where it is explained that the eligibility criteria of "serious and persistent mental illness" is the legally defined requirement. The clinically defined requirement for the psychiatric criteria would refer to Axis 1 disorders for example. See this source at 63 for detail on which conditions would typically be considered to be serious and persistent mental illness and which conditions are excluded for purposes of eligibility to the Brooklyn Mental Health Court.

418 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 403.

419 Known as the DSM. The DSM has been transformed through various editions of which the most recent is the DSM-V. The DSM is mostly used by mental health practitioners in America to diagnose mental health issues. See Parry *Criminal Mental Health and Disability Law* at 273-374 at 374. The DSM is recognised by courts as an accepted standard to be used to diagnose mental conditions.

420 *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 63. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation* at iii, 5, 6. This inevitably meant that the court took in fewer people than it would have had it been open to any accused with a mental defect that was not necessarily susceptible to treatment. Also see Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 411, see the details in Table 1 where it is stated that these conditions were accepted in the majority of Mental Health Courts that formed part of this particular study. The fourth court in the sample that did take mental health histories of their applicants, had detailed selection criteria and allowed individuals with an Axis I diagnosis or a diagnosis of borderline personality disorder, provided that the borderline personality disorder is assessed to drive criminal behaviour.

421 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 411, see the details in Table 1 for Court 6 that formed part of the study.

422 Wollf, Fabrikant and Belenko 2011 Law and Human Behaviour 402 at 411, see the details in Table 1 for Court 6 that formed part of the study.

423 Rogers and Shuman Fundamentals of Forensic Practice 92.

424 Rogers and Shuman Fundamentals of Forensic Practice 92.

425 Rogers and Shuman Fundamentals of Forensic Practice 92.

The accused must further be stabilised and fit to stand trial.[426]

7.2.3 Legal eligibility criteria

The legal eligibility criteria pertaining to the type of offence that the accused is charged with.[427] The eligibility criteria have to be clear with reference to the type of offence and whether the court will accept mentally ill persons charged with violent offences.[428]

The eligibility of a case for the Mental Health Court is determined by the Assistant District Attorney before it comes to the Mental Health Court, where a separate assessment for eligibility is conducted.[429] The Assistant District Attorney has a veto right to prevent an accused from participating in a Mental Health Court.[430]

The Mental Health Courts in the United States of America usually only hear cases pertaining to non-violent (misdemeanour) offences.[431] Those who committed more serious offences (felonies) have to be processed through the normal criminal justice system. The recent trend, however, seems to be for Mental Health Courts to consider more serious offences, both in seriousness and type.[432] Some advocate that Mental Health Courts should, in fact, focus on felonies as these specialised courts should focus their resources on offenders who are not suitable for other types of diversion.[433] This, they argue, will

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426 *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 63. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 206 who confirms the fitness requirement for eligibility for a Mental Health Court programme. Also see the discussion of the test for fitness earlier in this chapter.

427 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 63.

428 Welch and Fuller *American Criminal Courts* at 465.

429 O'Keefie *The Brooklyn Mental Health Court Evaluation* at 20. The type of cases over which a particular Mental Health Court has jurisdiction, is further determined by the particular court that houses the Mental Health Court. See Schneider, Bloom and Heerema *Mental Health Courts* at 88.

430 O'Keefie The Brooklyn Mental Health Court Evaluation at 20.

431 Schneider, Bloom and Heerema *Mental Health Courts* at 88. Also see Parry *Criminal Mental Health and Disability Law* at 191 where it is indicated that this was the initial focus of the Mental Health Court but that the goals have changed over time as the justice department became more involved. See however Bernstein and Seltzer 2003 *D C L Review* 143 at 152,153 where this practice is questioned as it might exclude accused persons in need of mental health treatment who, because of their mental illnesses committed more serious offences.

432 Schneider, Bloom and Heerema *Mental Health Courts* at 88. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 576, 577. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 155. Mental Health Courts consider crimes against the person, property and public order. See Luskin 2001 *Law and Policy* 217 at 219.

433 This is the case with the Brooklyn Mental Health court in the early 2000's. Some older Mental Health Courts that are more established, handle more serious offences, such as the Department 95 Court in Los Angeles and the Broward County Mental Health Court in Florida. See Heerema 2005 *Crim.L.Q* 255 at 265. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 577. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 155. The view that Mental Health Courts should focus on serious crime is also expressed by the Bazelon Centre for Mental Health Law

prevent Mental Health Courts from becoming the entry point to mental health services for those who committed quality of life offences and who have been abandoned by the mental health care system.[434]

The Brooklyn Mental Health Court agreed to also hear violent felony cases, but only on a case-by-case basis with the understanding that the prosecutor can veto the offender's participation in the Mental Health Court.[435]

The Brooklyn Mental Health Court opened its doors in 2002 and was initially intended to focus on adult offenders who committed non-violent felonies.[436] Violent felonies were initially excluded due to public safety concerns.[437] Later, the court included violent felonies and "chronic" misdemeanour offenders on a case-by-case basis.[438] Public safety was raised as a major concern by, particularly, the district attorney's office.[439] These concerns were addressed by ensuring that a detailed psychiatric evaluation is done on the accused to assess risk and future violent behaviour.[440] In addition, the judge and prosecutor had the right to reject referral in cases that they believed were not appropriate.[441]

"Criminalization of people with mental illness: The role of mental health courts in system reform" http://www.bazelon.org/LinkClick.aspx?fileticket=xQf5_1grKcI%3D&tabid=104 (Date of use: 17 March 2013) at 3. Also see Christy A, Poythress NG, Boothroyd RA, Petrila J and Mehra S "Evaluating the efficiency and community safety goals of the Broward County mental health court" 2005 (23) *Behav. Sci Law* 227-243 at 299.

434 Seltzer 2005 Psychology, Public Policy and Law 570 at 577. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 155.

435 Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at 6. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 6.

436 D'Emic 2007 Criminal Justice 25 at 25. Also see O'Keefie The Brooklyn Mental Health Court Evaluation at iii. See further Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 57.

437 D'Emic 2007 Criminal Justice 25 at 25. Also see Fisher 2015 *The Judge's Journal* 8 at 10 where it is stated that this was a general exclusion across all Mental Health Courts in the United States of America. Often the funding instrument for a particular court would prohibit the inclusion of violent offences in the programmes that the funding is intended for.

438 O'Keefie *The Brooklyn Mental Health Court Evaluation at* iii, v, 6, 19. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 57 where it is stated that the 80% of the cases heard by Mental Health Court involves felonies. Also see this source at 13, 63 where it is indicated that more and more Mental Health Courts in America are accepting referrals in cases where the offence was of a more serious nature. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation* at 1 who points out that violent felonies are presumed ineligible, but are allowed on a case-by-case basis.

439 O'Keefie The Brooklyn Mental Health Court Evaluation at iv.

440 O'Keefie The Brooklyn Mental Health Court Evaluation at 9.

441 O'Keefie *The Brooklyn Mental Health Court Evaluation at* iv. Also see this source at 9 where it is explained that the District Attorney's office initially insisted on restricted housing for persons in the Mental Health Court programme but this proved unrealistic due to shortage of housing possibilities.

The Brooklyn Mental Health Court was one of the first Mental Health Courts to also consider cases of those suffering from a mental illness charged with a felony.[442] One of the motivations for this decision was "problem-solving justice", which is practiced in problem-solving courts such as Mental Health Courts, where creative solutions are given for cases where social, human, and legal problems interact.[443] Another motivation for dealing with felonies was that research done in a drug court that handled felonies showed that offenders charged with felonies have better outcomes than the offenders charged with a misdemeanour.[444] The Brooklyn Mental Health Court's focus on handling cases involving felonies, including those involving assault, robbery and burglary,[445] are contributing to making treatment available to accused persons who would probably not have received treatment otherwise.[446] Charges involving murder and rape are excluded, regardless of the type of mental illness of the accused.[447]

All misdemeanours are eligible, but these accused persons must be willing to accept a 12-month treatment programme and a possible jail sentence in the event of non-compliance.[448]

Restricted housing is also against mental health care principles as the aim is to ensure independent living of those living with mental illnesses. The compromise was struck that the District attorney could veto any decision to refer a particular case to the Mental Health Court.

442 Fisher C "Building Trust and managing risk: a look at a felony mental health Court" (Centre for Court Innovation) http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at *2.*

443 Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at *2.*

444 One of the main reasons for this is simply that of the stakes are higher, compliance with a court mandate will improve. Someone facing several years in prison is much more motivated to avoid sentencing and will rather work through the programme. Someone who committed a misdemeanour who faces a sentence of a couple of weeks or months, is much more likely to opt for the jail time just for the sake of getting out on the streets again to have access to drugs. See Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) *at 4.* Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 53 where it was found that this was also the case with Brooklyn Mental Health Court participants.

445 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 63. Also see O'Keefie The Brooklyn Mental Health Court Evaluation at 1.

446 During the process of the Brooklyn Mental Health Court considering handling felonies, the mental health care users whose cases were heard by this court before, gave their input. Some of the users reported that they didn't realise their own need for treatment even after being arrested and that short terms in jail where preferable to treatment for them as they did not believe that they needed treatment or that they could benefit from it. A number of the mental health care users thought that the Brooklyn Mental Health Court should only handle felonies because misdemeanours didn't carry enough of a threat of incarceration to motivate an offender to engage in treatment. See Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) *at* 4.

447 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 63.

448 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 63. Also see O'Keefie The Brooklyn Mental Health Court Evaluation at 1.

Misdemeanour offenders generally spend short periods in jail and may not be willing to agree to a period of treatment that could be longer than the time they would be incarcerated if their case were processed through the traditional criminal court.[449]

Now that the eligibility criterion is clear, we have to consider the actual referral of an eligible accused to the Mental Health Court.

7.3 Referral to the Mental Health Court

Referrals to the Mental Health Court are received from judges, defence attorneys, district attorneys, police officers, probation officers, family members and advocacy groups.[450]

A large number of referrals to the Brooklyn Mental Health Court originate from competency to stand trial examination orders.[451] It is compulsory to refer the case to the Brooklyn Mental Health Court if a competency examination is ordered in this district.[452] Where an accused who was found unfit to stand trial has regained fitness, his case is automatically referred to the Brooklyn Mental Health Court unless the prosecutor objects thereto.[453] Most referrals to the Brooklyn Mental Health Court occur after indictment in the criminal court.[454]

Where Mental Health Courts in a particular area are not well known or respected, there will be fewer referrals.[455] Courts that are more integrated into referral sources, such as prisons,

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449 Rossman *et al Criminal Justice Interventions for Offenders with Mental Illness* at 63. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 206. They authors add that what may further deter an accused to sign up for the Mental Health Court programme is the fact that a guilty plea is required.

450 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 405. Defence attorneys were found to be the largest referral source. In two of the six courts that formed the subject of this comparative study, defence attorneys were not the biggest source of referral but they relied on the Mental Health Court clinical staff to identify possible candidates and further relied on a wider variety of referral sources. Also see D'Emic 2007 Criminal Justice 25 at 26. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 67. Some other sources of referral are other Judges or Magistrates, the public defender's office and the Forensic diversion programme. See Steadman *et al* 2005 *Behavoural Science and Law* 215 at 218.

451 Steadman *et al* 2005 *Behavoural Science and Law* 215 at 222. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation* 17 where it is indicated that in the first 2 years of the Brooklyn Mental Health Courts operations, 30% of the referrals were from competency matters.

452 Steadman *et al* 2005 *Behavoural Science and Law* 215 at 219. In Brooklyn, all individuals referred for competency evaluations to determine fitness to stand trial or criminal capacity, must be referred to the Mental Health Court.

453 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 67.

454 *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 67. This is after arraignment where misdemeanour offences are formally charged and felony offences are transferred to the Supreme Court for indictment.

455 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 405. Also see *Rich 2009 Fordham Urban Law Journal 89* at 100 who points out that referral to Mental Health Courts from the rural areas, are not as popular. Reasons for this phenomenon might be the fact that rural areas

will result in them having more sources of referral.[456] A good referral rate is proof that the target population of the Mental Health Courts are being reached.[457]

Despite the Brooklyn Mental Health Court's initial idea to focus on non-violent felony offences, a large number of referrals to the court entail violent offences.[458] The practice emerged that, where an accused who is charged with a violent offence wants to enter the treatment programme, the victim's consent is sought.[459] The victim thus endorses the idea of treatment instead of prison. Although consent is not a requirement, the majority of victims usually agree to treatment rather than jail time for the mentally ill offender.[460]

The average Mental Health Court participant (53% of the sample group) was age 35 or older.[461] Women are more likely to be referred to Mental Health Courts than men are.[462]

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simply lack alternative treatment options such as Mental Health Courts.

456 Some Mental Health Courts rely on the clinical staff to identify candidates for the Mental Health Court programme. See Wolff, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 405 This was the case with two out of the six Mental Health Courts that formed the subject of this comparative study. These courts had to actively "recruit" suitable candidates for the Mental Health Court programme. Reasons attributed to low referrals are lack of training to recognise mental illnesses and the cost involved to transfer a mentally ill accused to a facility for observation, which is often far away. See *Rich 2009 Fordham Urban Law Journal 89* at 100. This may result in the cases of accused persons with mental illness being processed through the traditional criminal justice system.

457 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 405.

458 According to D'Emic 2007 Criminal Justice 25 at 26, 40% of all referrals entail a violent offence. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* v. Research emerged that violent felons can be properly maintained in the community with the necessary support services. See Fisher 2015 *The Judge's Journal* 8 at 10.

459 Rossman *et al Criminal Justice Interventions for Offenders with Mental Illness* at 59. The prosecutor who is the liaison for the District attorney's office at the Mental Health Court, is tasked with contacting the complainant to enquire if there is an objection against the diversion. D'Emic 2007 Criminal Justice 25 at 26. See however this source at 27 where a case is discussed where the victim of assault refused such consent (a young girl who wanted to escape from a life of prostitution, assaulted her pimp who then refused consent for her to enter a treatment programme rather than prison). The district attorney nonetheless allowed the girl to enter the treatment programme.

460 D'Emic 2007 Criminal Justice 25 at 26. Also see Rossman *et al Criminal Justice Interventions for Offenders with Mental Illness* at 58 who explain that the consent is not a requirement.

461 This was the result in a study conducted of 7 Mental Health Courts across America 285 participants formed part of this study. These seven courts were situated at Santa Clara County CA, Orange County NC, Allegheny County PA, Washoe County NV, Brooklyn NY, Bonneville County ID and Orange County CA. For details of the study of these seven Mental Health Courts, see generally Steadman *et al* 2005 *Behavoural Science and Law* 215 –226. Also see this source at 219 where it is explained that at the time, 39% of all prison inmates were 35 years and older. The Mental Health Courts in this study were therefore more likely to deal with older offenders than would be the case in a normal criminal court.

462 Steadman *et al* 2005 *Behavoural Science and Law* 215 at 219. This conclusion was based on the fact that, at the time men made out approximately 90 to 94% of all inmates whilst male Mental Health Court participants comprised 60% of the total amount of Mental Health Court participants in this study. Also see Frailing 2009 C.S.L.R 145 at *150 for detail on* a study at the Marion County Mental Health Court of 305 participants that were diverted between April 1997 and April 1998, revealed that these courts are more likely to accept younger women and older men as participants.

20% of participants were homeless at the time of intake, and 30% were homeless in the five years prior to arrest.[463] Education levels were low.[464] The mental illnesses mostly diagnosed in the Brooklyn Mental Health Court are depression and bipolar disorder.[465] Almost half (46%) of the participants reported having been hospitalised for psychiatric treatment in the year prior to intake, and about a quarter of the participants were on medication at the time of intake.[466] Most accused referred to the Mental Health Court are eventually diagnosed with a mental illness, with a small percentage found not to have any mental illness at all.[467]

Once an accused arrives at the Mental Health Court, he generally goes through two main phases, labelled the admission phase and the programme phase. Labelling the phases as such keeps the discussion in line with that of the Mental Health Court employed in Canada.[468] Each phase, however, consists of a number of stages that differ from those in the Canadian model. These stages are discussed below.

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463 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 64.

464 Only 40% of the participants had a high school diploma. See Rossman *et al Criminal Justice Interventions for Offenders with Mental Illness* at 64. Other interesting demographical information is that 76% of the participants were male and the same percentage (men and women) were never married. Alcohol and drug use in the 6 months prior to the intake into the Mental Health Court programme was very common among participants.

465 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 65. Also see Steadman et al 2005 Behavoural Science and Law 215 at 220. See further Frailing 2009 C.S.L.R 145 at 151 ads that those diagnosed with Schizophrenia or Bipolar mood disorder, were found to be most likely to be accepted into the Mental Health Court program. Mental Health Court participants were most frequently diagnosed with Schizophrenia, schizoid-affective disorder, bipolar disorder and depressive mood disorder Also see Parry Criminal Mental Health and Disability Law at 279 at 285 where the mental illnesses that are most often found in the criminal justice system are discussed. These are Substance related disorders; Mental retardation; Delirium and dementia; personality disorders; Paraphilia; Dissociative disorders; Posttraumatic Stress Disorder; Mood disorders such as depression and bi-polar; schizophrenia. For a diagnosis of schizophrenia to be made, the condition must have persisted for at least 6 months. This serves as a precautionary measure to ensure that this diagnosis is not made in error where the real cause of the behaviour may be temporary psychosis due to external factors.

466 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 65.

467 Steadman *et al* 2005 *Behavoural Science and Law* 215 at 220 explains that In five of the seven courts that formed part of the study, 20% of those referred to the Mental Health Court were found not to have a mental illness or it was uncertain if these individuals suffer from a mental illness. The two other courts in the study, reported that 7% of their referrals were found not to have a mental illness. 76% of those with serious mental illnesses were accepted into the Mental Health Court programme. 44% of those with less serious mental illnesses such as depression and substance abuse disorders were accepted into the programme.

468 The admission phase of the Mental Health Court in the United States of America is sometimes referred to as the “eligibility assessment phase”. See Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 404. The Mental Health Court model employed in Canada is discussed chapter 4 of this research.

7.4 Admission phase

The admission phase consists of four main stages, which are discussed separately below.

7.4.1 First stage: Initial screening

The initial eligibility screening determines if the case is in principle suitable for the Mental Health Court.[469] During this stage, the legal and psychiatric screening criteria is considered. The screening criteria used vary from one Mental Health Court to the next.

Each Mental Health Court has its own "screen out factors" which disqualifies an individual from entering the Mental Health Court programme. These factors may refer to a particular offence or diagnosis.[470]

With regard to the legal criteria, it may be that a particular Mental Health Court considers misdemeanours only or felonies as well.[471]

The mental health diagnosis is further indicative of the accused's eligibility for the Mental

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469 Wolff, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 405. Put differently, this stage investigates how the accused was identified as a potential candidate for the Mental Health Court programme.

470 Further examples of screening out criteria found by Wolff, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 409-411 in a study of 6 Mental Health Courts, are no cases involving extreme violence such as murder or very serious sex offences, or where a gun was used during the crime was considered. An accused with more than 3 felony convictions in the past 10 years, or with any prior murder or sex offence convictions were excluded. Traffic offences are not considered. Accused persons with a violent criminal history are excluded. No felonies that have not been reduced to misdemeanour. No one with prior multiple failures with Mental Health Court programmes and no one residing outside of the county is considered. No violent felonies except if the crime closely linked to mental illness or if victim was a family members. No cases where there is not a clear connection between the crime and mental illness. See table 1 of this source for details of the screening-out criteria of a particular court.

471 Wolff, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 406. The criteria for accepting the cases of those accused of a felony, differed from court to court in that one court considered access to the Mental Health programme for those who committed felonies on a case-by-case basis, whilst others only accepted referrals for those who committed felonies if the charges were reduced to that of a misdemeanour. Some accepted violent and non-violent felonies whilst others only accepted felonies (violent and non-violent) if they were in custody. See Table 1 in Wolff, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 409-411. Also see Redlich et al 2006 Law and Human Behaviour 347 at 354, 357 who indicate that half of all Mental Health Courts in existence in 2005, considered both misdemeanours and felonies. See further Bernstein and Seltzer 2003 *D C L Review* 143 at 147 where it is indicated that from the early stages of the existence of Mental Health Courts, some of these courts considered felonies as well as misdemeanours. See further Lurigio and Snowden 2009 *The Justice System Journal* 196 at 206 where it is explained that certain types of offences, such as sexual offence are generally excluded from Mental Health Court diversion programmes.

Health Court programme.[472] The Brooklyn Mental Health Court allows individuals with a diagnosis of schizophrenia, schizo-affective, bipolar disorder, and major depression.[473] Co-occurring substance abuse or Axis II conditions are accommodated at most Mental Health Courts but not if it is the primary diagnosis.[474]

In some cases, however, Mental Health Courts make use of filtering agents that perform the initial screening task for them.[475] During this screening process, the individual's criminal charges and criminal history, as well as evidence of the mental illness, are compared to the formal eligibility criteria of the particular Mental Health Court.[476]

The last issue during stage one that has to be considered is consent factors. Consultations with victims, prosecutors, and defence attorneys may be held to test their willingness to have the case referred to a Mental Health Court.[477]

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472 Different courts may allow accused persons with different diagnosis into their programmes. Some may allow individuals with Axis 1 mental illness, dementia, organic brain disorder, developmental disabilities or chronic alcoholism with psychosis. See Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 410, see the details in Table 1 for Court 3 for the eligibility criteria of this court. Another Mental Health Court allowed individuals with a diagnosis of Bipolar, schizo-affective or schizophrenia into their programme with the additional requirement that they must be generally disengaged from community treatment. See Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 410. See the details in Table 1 for Court 4 that formed part of the study.

473 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 411, 412, see the details in Table 1 for Court 5 that formed part of the study.

474 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 410, see the details in Table 1 for Court 3 that formed part of the study. Allowing accused with co-occurring mental illness and substance abuse problems into the Mental Health Court programme, addresses the concern raised by Frailing 2009 C.S.L.R 145 at *153* that Mental Health Courts will fail to properly address the needs of their targeted participants if they do not incorporate programmes for substance abuse into their treatment options. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 3 where a further alternative diversion programme has been developed for those with co-occurring mental illnesses who may be excluded from the Mental Health Court programme due to their coexisting mental illnesses.

475 There are typically two filtering agents in this process through which "applications" for participation in the Mental Health Court flows, they are the district attorney or the Mental Health Court co-ordinator See Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 405. The Mental Health Court co-ordinator is also referred to as the Mental Health Court Supervisor or Director. The training level of the Mental Health Court coordinator performing the stage one screening, differed between the courts that formed part of the study. One court stated that the coordinator has Masters or Doctoral level clinical training, whilst another made use of a Masters level clinician at the local jail to perform the screening. See Table 1 in Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 409-411. The primary function of the filtering agent, is two-fold. Firstly, they serve a "clearinghouse" function as all referrals to the Mental Health Court are received centrally by the filtering agents. Secondly, they perform the initial eligibility screening function where they determine if the case is in principle suitable for the Mental Health Court.

476 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 405

477 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 405. At one of the six Mental Health Courts that formed part of this study, the clinical director acted as the filtering agent and took the sole decision on if a case should be referred to the Mental Health Court or not. The willingness

Once an accused meets the initial screening criteria in terms of the type of offence and type of mental illness, he moves on to the second stage of the admission phase.

7.4.2 Second stage: Assessment and eligibility screening

This stage of the assessment is conducted by the Mental Health Court Team and focuses on the assessment of behavioural health problems and related criminal history issues.[478] An accused will be screened for mental illness after his first appearance at the Mental Health Court.[479] The first appearance and screening mostly take place on the same day.[480]

Competency assessments for participation in the Mental Health Court treatment programme are not done on all intended participants of the Mental Health Court programme, but only if a participant appears "grossly incompetent".[481] An accused must be able to identify the advantages and disadvantages of participating in the Mental Health Court programme. This assessment consists of a psychosocial assessment done by a social worker and a psychiatric assessment that is conducted by the resident psychiatrist.[482]

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of the victim, prosecutor or defence attorney to have the matter referred to the Mental Health Court proved to be irrelevant at this particular Mental Health Court. Also see this source at 409, 410.

478 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 406, 409-411. Some Mental Health Courts during this stage require a mental health assessment whilst others rely on a diagnosis obtained from a case record review. Also see Rogers and Shuman *Fundamentals of Forensic Practice* 171-176 where the various assessment tools are discussed and the strengths of each identified. At two of the six Mental Health Courts that formed part of the study, no mental health screening was done. The common denominator at these two courts was that the district attorney, as opposed to a Mental Health Court coordinator (who usually has some form of clinical knowledge) was the filtering agent. In those Mental Health Courts where no mental health screening is done, the decision to allow the individual into the Mental Health Court programme is taken solely on the type of offence committed and the criminal history. See Rogers and Shuman *Fundamentals of Forensic Practice* at 168 who cautions against the gathering of background information on the accused that includes his psychiatric history as such history might not be relevant to the current referral. It is also pointed out in this source that the gathering of such information could raise concern regarding some ethical and privacy issues.

479 *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 67, 69. All the parties agree at this first appearance that the accused should be clinically screened.

480 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 69.

481 Frailing 2009 C.S.L.R 145 at *152.* If an accused who is deemed to be not fit to stand trial, participates in the Mental Health Court programme the risk exists that critics may say that such participation is coerced in the sense that the participant was not in a position to truly "choose" to participate in the Mental Health Court programme or not.

482 O'Keefie *The Brooklyn Mental Health Court Evaluation* at 20. The psychiatric assessment in the Brooklyn Mental Health Court was done on average 11 days after first contact with the court with the legal eligibility assessment taking approximately 2 weeks. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 69 where it is pointed out that where eligibility psychiatric and legal assessments do not run concurrently, the eligibility assessments can take up to one month. Also see D'Emic 2007 Criminal Justice 25 at 26. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 67. The social worker does the psychosocial assessment and the psychiatrist does the psychiatric assessment.

They each draft a report and these are made available to all parties involved.[483] These reports have to show that the accused suffers from a serious and persistent mental illness for which there is a known treatment method since this is a requirement for admission into the court-monitored treatment programme.[484] These reports contain a diagnosis, the psychiatric history of the accused and a risk assessment.[485] An opinion on the accused's eligibility for the Mental Health Court treatment programme is provided.[486]

Where individuals met the required diagnostic criteria of the Mental Health Court, other clinical factors could be taken into consideration for eligibility, such as the fact that the accused is also suffering from a personality disorder which in itself will generally not grant the accused access to the Mental Health Court.[487] Another factor that is considered is the individual's history of treatment and, in particular, if he has a history of non-compliance with treatment, in which event it would be viewed negatively for purposes of eligibility.[488] The link between mental illness and criminal behaviour is further considered together with the violence risk of the individual and his general suitability for the Mental Health Court programme.[489] The clinical director takes the final decision as to the clinical eligibility of the accused.[490]

With regard to the legal criteria, the current charges and criminal history of the individual are considered during this stage.[491] Where the district attorney acted as a filtering agent and conducted the initial screening of the legal criteria (stage 1), this part of the assessment in the second stage will be brief, as it would have been done thoroughly during the initial screening stage.[492] Where the initial screening was done by a Mental Health Court, the Mental Health Court would have focussed more on the mental health

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483 O'Keefie *The Brooklyn Mental Health Court Evaluation* at 20 points out that it is common for the clinical director to have had a discussion with the other parties prior to the Mental Health Court proceedings to discuss the evaluation of the accused.

484 D'Emic 2007 Criminal Justice 25 at 26. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* iii. These illnesses would include depression, bipolar disorder, schizophrenia and schizo-affective disorder.

485 D'Emic 2007 Criminal Justice 25 at 26. Also see this source at 27 where it is indicated that 30% of the participants were diagnosed with depression, 24% with bipolar disorder and 21% with schizophrenia. Almost half of all the court participants also have a drug addiction problem for which they require treatment. See further O'Keefie *The Brooklyn Mental Health Court Evaluation* at 2 who confirms that depression, bipolar disorder and schizophrenia were the most common diagnosis made in the Brooklyn Mental Health Court.

486 D'Emic 2007 Criminal Justice 25 at 26.

487 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 406.

488 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 406.

489 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 406.

490 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 67.

491 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 406.

492 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 406.

assessment during the first stage and less on the criminal history, hence this investigation will be more thorough during the second stage in these instances.[493]

The final step in this stage entails a recommendation by the Mental Health Court Team pertaining to the accused's suitability for the Mental Health Court programme. [494]

Participation in the Mental Health Court programme will not occur if the district attorney, probation officers, mental health care providers, or the defence attorney refuses to allow the case to proceed through the Mental Health Court.[495]

Access to the Mental Health Court programme will further be denied if the accused is considered incompetent to make a decision regarding participation in the Mental Health Court programme.[496] The rationale behind this is that an accused's fitness to stand trial is presupposed if he is participating in the Mental Health Court programme.[497]

An accused may, at the end of the second stage, be denied access to the Mental Health Court programme on diagnostic grounds,[498] service availability grounds [499] or any other valid ground.[500] Such "other" ground may include that the accused is not fit to stand trial.

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493 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 406.

494 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 406. The procedure of consideration by the Mental Health Court Team differed from court to court. Some courts used a method where the team would meet and review cases to reach a decision whereas other courts used an assembly line where decisions are signed off by members of the Mental Health Court team.

495 Steadman et al 2005 Behavoural Science and Law 215 at 222.

496 Steadman *et al* 2005 *Behavoural Science and Law* 215 at 220, 222. Acceptance into the Mental Health Court programme will however be denied if the individual is found to be too unstable too make an informed decision at the time to enrol and participate in the Mental Health Court. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 151 who points out that, although it may seem obvious that a mentally ill accused will choose the Mental Health Court programme over traditional prosecutorial processing, a decision to so participate must be an informed one, well aware of the advantages and disadvantages that participation in the Mental Health Court programme may hold.

497 See Frailing 2009 C.S.L.R 145 at *151* where it is stressed that the offender must be able to identify the advantages and disadvantages of participating in the Mental Health Court programme in order for him/her to be allowed into the relevant program.

498 If the individual does not have an Axis I disorder or no disorder at all, or if the primary diagnosis is that of substance abuse or personality disorder. Admission will also not be granted if the individual does suffer from an Axis I illness but is found not in need of intensive case management. See Steadman *et al* 2005 *Behavoural Science and Law* 215 at 222. Also see Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 406.

499 The required treatment service is either not available or the accused does not meet the diagnostic treatment criteria for the particular service provider. See Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 406.

500 Admission will not be allowed if there is a weak connection between the criminal act and the mental illness, or if the accused has been assessed but is found not to be treatable. Admission will also be denied if the accused is too prone to violence or if the demeanour does not fit the culture of the Mental Health Court. See Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at

7.4.3 Third stage: Evaluation Eligibility screening

This stage entails a final decision by the Mental Health Court judge as to if the accused should be allowed into the Mental Health Court programme or not.[501] Some Mental Health Courts allow the judge to veto the decision by the clinical team to allow the accused to participate in the Mental Health Court programme.[502] The practice in many Mental Health Courts is that the judge meets with the potential programme participant before taking a decision about whether he should be allowed into the Mental Health Court programme.[503] The Judge, however, mostly follows the clinical recommendations.[504]

The accused has the right to refuse participation in the Mental Health Court programme [505] even after the judge approved his participation in the Mental Health Court programme.[506] An accused may decide, after obtaining advice from his legal representative, that the Mental Health Court programme is not the best option for him in a particular set of circumstances.[507]

A fact that might influence the decision of the accused to participate in the Mental Health Court programme is the dropping of the charges against him or the fact that the charges will be reduced from, for example, a felony to a misdemeanour upon completion of the

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406. The accused can also be denied access to the Mental Health Court programme if he is considered too hostile or unmotivated to participate in the Mental Health Care programme or if the accused is considered more appropriate for another speciality court such as a drug court. See Steadman *et al* 2005 *Behavoural Science and Law* 215 at 220.

501 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 407.

502 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 409-411. See Table 1 and in particular the detail captured with regard to Court 1 and Court 6. One Court in the sample has the practice that the Judge must allow the accused to participate in the Mental Health Court programme based on the clinical findings in Stage 1 and 2 of the eligibility assessment. See Table 1 and in particular the detail captured with regard to Court 3. Another Court recorded that, even though the Judge is not obliged to allow the accused to participate as is the case with the previous Court mentioned, their experience is that the Judge almost always follows the clinical recommendations. See Table 1 and in particular the detail captured with regard to Court 4.

503 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 409-411. See Table 1 and in particular the detail captured with regard to Court 1, 3 and 5. Also see Fisher 2015 *The Judge's Journal* 8 at 10 where the importance of the Judge's interaction with the Mental Health Court participant is explained and the impact it has on perceived and actual procedural justice explained.

504 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 4409-411.

505 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 407. The accused has to decide in this stage if he is willing to participate in the Mental Health Court programme or not.

506 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 407.

507 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 407. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 152 where it is pointed out how important it is for the accused to be legally represented when opting to participate in the Mental Health Court programme as the accused is effectively waiving his right to a fair criminal trial by participating in the program.

programme.[508] Facts such as these are often used as incentives to motivate the accused to participate in the Mental Health Court programme.[509]

It has been suggested that the selection processes of Mental Health Courts should perhaps be better documented in order for future research to establish the level of penetration into the target population of Mental Health Courts.[510] This will also assist in testing the validity of the criticism against the Mental Health Court movement that selection bias impacts on criminal justice outcomes of these Courts.[511]

7.4.4 Fourth stage: Acceptance stage

If the accused is found eligible, the matter is adjourned to allow the district attorney to come up with a plea offer and for the treatment team to draft a unique treatment plan for the accused.[512] The forensic coordinator establishes the availability of treatment facilities and programmes where the accused can be assisted.[513]

Once the treatment plan is drafted, the participation contract and guidelines must be reviewed by the defendant and his legal representative before he enters his guilty plea.[514] The accused is usually thoroughly informed of the nature of the treatment programme and what it entails, for example, adhering to a treatment programme and taking prescribed

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[508] Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 407, 409. See Table 1 and in particular the detail captured with regard to Court 4 in the third stage of the eligibility evaluation process.

[509] Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 407.

[510] Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 409.

[511] Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 407.

[512] D'Emic 2007 Criminal Justice 25 at 26. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 21. The clinical team responsible for drafting the treatment plan takes into consideration the psychiatric history of the accused, his criminal and family history as well as his medication needs, social support system and housing needs. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 212 where it is pointed out that a variety of services need to be made available to the Mental Health Court participants in order for its programmes to truly be effective and mentions housing, drug treatment and educational programmes as examples of such services.

[513] O'Keefie The Brooklyn Mental Health Court Evaluation at 21.

[514] O'Keefie *The Brooklyn Mental Health Court Evaluation* at 10. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 6, 89 who confirm that many Mental Health Courts in America requires a guilty plea as a condition for admission to the programme. See further Lurigio and Snowden 2009 *The Justice System Journal* 196 at 211 where the negative consequences of a guilty plea, such as a criminal record is highlighted and it is further pointed out that this can cause the accused to encounter difficulty obtaining housing for instance after completion of the Mental Health Court programme. Also see Stafford and Wygant 2005 *Behavioral Sciences and the Law* 245 at 246. See further Seltzer 2005 Psychology, Public Policy and Law 570 at 576 where it is pointed out that many Mental Health Courts required a "no-contest" plea where a guilty plea was not obtained.

medication.[515] This disclosure should also include details about the consequences of remaining in the criminal justice system.[516] This disclosure should be made prior to a decision taken by the accused to enrol for a Mental Health Court programme so that he can be free to decide to rather remain in the criminal justice process. This would typically be the case where an accused committed a minor offence and realizes that the fastest way "out" for him is through the conventional criminal justice system, as his offence would probably not attract a long prison sentence.[517]

It could be argued that some accused, in order to gain access to the Mental Health Court treatment programme, will be "forced" to plead guilty to an act they possibly did not commit or did not have the criminal capacity to form intent at the time of the alleged offence, rendering him not criminally liable due to mental illness. For this reason, no accused should be allowed to participate in a Mental Health Court programme without having consulted a lawyer first. [518] Legal representation at this stage is further essential since the accused waives his right to a trial the moment that he consents to participate in the Mental Health Court programme. [519]

The defence attorney ensures that the accused understands the terms of the treatment plan, including the sanctions that could be employed for non-compliance.[520] In order for the accused to be allowed into the Mental Health Court programme, he has to agree to participate in the programme.[521] This agreement includes an undertaking to adhere to the treatment programme and conditions attached to it, including sanctions that can be

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515 Schneider, Bloom and Heerema *Mental Health Courts* at 92.

516 Schneider, Bloom and Heerema *Mental Health Courts* at 92. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 574, 575.

517 Schneider, Bloom and Heerema *Mental Health Courts* at 92.

518 Schneider, Bloom and Heerema *Mental Health Courts* at 6 and further at 89.

519 Seltzer 2005 Psychology, Public Policy and Law 570 at 575. In those Mental Health Courts where participants are allowed to withdraw from the programme at any time, it appears that such a waiver of the right to trial is reversible. It is submitted that it should perhaps then rather be seen as a suspension of the person's right to trial rather than a complete waiver, as waiver presupposes a permanent negation of a right. Seltzer recommends that the only way to ensure that this waiver, or rather suspension of the right to trial in the process of consenting to the Mental Health Court programme, is done completely voluntarily, is to appoint legal counsel to the relevant person as soon as he has been identified as a possible candidate for the Mental Health Court.

520 Rossman *et al Criminal Justice Interventions for Offenders with Mental Illness* at 68. The accused has to be informed of all possible consequences of their decision to have their case resolved through the Mental Health Court. See Seltzer 2005 Psychology, Public Policy and Law 570 at 574. The author points out that Defence attorney are obliged to ensure that their clients are aware of all the consequences of choosing a particular court as an option through which to resolve his case.

521 In order for participation in the Mental Health Court programme to be truly voluntary the agreement must not merely be a declaration but an agreement to the treatment terms, including the sanctions that could be employed for non-compliance. Seltzer 2005 Psychology, Public Policy and Law 570 at 574.

imposed for non - compliance, in order for him to be allowed into the Mental Health Court programme.[522] The accused and the judge both sign these documents at the time of entering the guilty plea.[523] The defendant must further sign a consent form to enable the Mental Health Court practitioners to share information with each other and the service providers.[524]

In the Brooklyn Mental Health Court, the accused is required to plead guilty to the criminal charges against him in lieu of accepting him into the Mental Health Court programme.[525]

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522 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 409-411. See Table 1 and in particular the detail captured next to the term "*Participation Requirements" in t*he third stage of the eligibility evaluation process. Those found eligible were mostly referred to the Mental Health Court by defence attorneys or district attorneys. Of those found eligible for the Mental Health Court programmes, approximately 80% agreed to the terms and enrolled in the programme. O'Keefie *The Brooklyn Mental Health Court Evaluation at* 22. This is ascribed to the fact that defense attorneys and district attorneys know the defendant and his behaviour by the time the referral is made. The others did not enrol because they almost served their entire terms or their eventual referral was vetoed by the ADA. Approximately 40% of the accused that applied to the Mental Health Court, were ineligible because they did not meet the clinical eligibility criteria, were too dangerous to be considered for community treatment or because they were unfit to stand trial. See O'Keefie *The Brooklyn Mental Health Court Evaluation at* 22, 23. Some accused persons referred to the Mental Health Court refused to co-operate with the assessment and hence could not be offered an opportunity to participate in the Mental Health Court because their eligibility could not be established. The participant must also agree to the sanctions that may be imposed in the event that he does not comply with the treatment programme. See Parry *Criminal Mental Health and Disability Law* at 191. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 157 where it is explained that the sanctions for non-compliance should ideally be contained in a document that should be made available to the accused when entering the treatment programme so that the accused knows exactly what to expect in the event of non-compliance.

523 O'Keefie *The Brooklyn Mental Health Court Evaluation* at 10. The Brooklyn Mental Health Court has documents available explaining exactly the processes and implications of involvement in the Brooklyn Mental Health Court programme, including the sanctions that may be imposed. This is done in an attempt to be transparent. See D'Emic 2007 Criminal Justice 25 at 27. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation* at iv, 10 who explains that the court in turn signs a memorandum of understanding with the relevant service provider who will be providing the necessary treatment to the defendant. Most Mental Health Courts require the accused to officially accept the treatment programme after it has been proposed to him. See Stafford and Wygant 2005 *Behavioral Sciences and the Law* 245 at 246. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 574 who points out that a mere declaration by the mentally ill defendant is not sufficient for purposes of "voluntary participation" in the Mental Health Court programme..

524 O'Keefie The Brooklyn Mental Health Court Evaluation at 10.

525 Wollf, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 409-411. See Table 1 and in particular the detail captured next to the term "*Participation Requirements" in t*he third stage of the eligibility evaluation process. Note that in the case of Court 5 and 6 a guilty plea is not always required and in the case of Court 2, no plea is required. Also see Draine, Wilson and Pogorzelski 2007 Journal of Offender Rehabilitation 159 at 170. The authors are critical of the fact that accused persons with mental illness who are not willing to admit their guilty, do not receive the mental health services available in the specialised court. There is at least one court in New York that, however, does not require a guilty plea. See Wolff, Fabrikant and Belenko 2011 *Law and Human Behaviour* 402 at 410. See Table 1 and in particular the detail captured with regard to Court 2 and next to the term "*Participation Requirements" in t*he third stage of the eligibility evaluation process. In the Brooklyn Mental Health Court, a guilty plea was required for anyone to enter the court monitored programme with sentencing deferred. See D'Emic 2007 Criminal Justice 25 at 25. Also see

The plea is, however, only entered once the treatment placement has been arranged.[526] The majority of the eligible accused referred to the Mental Health Court agreed to enrol in the Mental Health Court programme.[527]

Once the accused meets the eligibility criteria and agrees to abide by the treatment programme, he proceeds to the programme phase of the Mental Health Court.

7.5 Programme phase

7.5.1 Treatment and monitoring

After entering the guilty plea, the accused is released to treatment and required to appear in court weekly, then bi-weekly during the first three months of the treatment programme.[528] After the initial phase of the programme, the accused appears in court once a month.[529]

Treatment programmes in Mental Health Courts differ in length, and some courts place a limit on the maximum period of treatment, anything from one to two years.[530] In the majority of cases, these limits exceed the possible duration of probation or incarceration that an accused will face if his case is processed through the traditional criminal court.[531] The

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O'Keefie *The Brooklyn Mental Health Court Evaluation* at 1, 27 who confirms that a guilty plea is required from the accused in the beginning of the proceedings. See further Rossman *et al Criminal Justice Interventions for Offenders with Mental Illness* at 61 where it is explained that the accused enters a guilty plea and agrees to a sentence in the event that he does not complete the programme, but the actual sentencing is deferred till after the completion of the programme or to the point where it is clear that the accused will not complete the programme.

526 *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 61. It can take a number of days for the treatment to be arranged during which time the accused must wait in jail or out on bail depending on his circumstances. Once the treatment plan is finalised and placement secured, the accused enters his guilty plea as agreed upon – with sentencing options for if he completes the programme and for if he doesn't. See Rossman *et al Criminal Justice Interventions for Offenders with Mental Illness at* 68. Also see D'Emic 2007 Criminal Justice 25 at 26. See further O'Keefie *The Brooklyn Mental Health Court Evaluation* at 27 who states that the terms of the plea is agreed upon between the judge, prosecution and defense attorney.

527 This was the result of a study conducted in 2005 of seven Mental Health Courts across the United States of America. See Steadman *et al* 2005 *Behavoural Science and Law* 215 at 221.

528 D'Emic 2007 Criminal Justice 25 at 26. The accused is awarded certificates for every phase of the programme that he completes successfully. See however O'Keefie *The Brooklyn Mental Health Court Evaluation* at 28 who indicates that participants are required to appear in court bi-weekly. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 68, 70.

529 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 68, 70.

530 Bernstein and Seltzer 2003 *D C L Review* 143 at 156. See also Lurigio and Snowden 2009 *The Justice System Journal* 196 at 207 where it is pointed out that some treatment programmes only last three months whereas the length of others, depending on the model used, links the length of the treatment programme to the maximum sentence that the accused would have received had his case been processed through the traditional criminal court system.

531 Bernstein and Seltzer 2003 *D C L Review* 143 at 157. The authors add that this may be a factor that discourages mentally ill persons from enrolling in the Mental Health Court programme. Also see

duration depends heavily on the judge's discretion.[532] The defence attorneys were of the view that, If the Mental Health Court was planning to impose programmes of at least one year and potential jail sentences of a year or longer for programme failure, the court would be more suitable to hear felonies as these programme parameters would be disproportionately onerous for misdemeanour offenders facing short jail sentences.[533] It could, however, be appropriate for chronic misdemeanour offenders who, because of their criminal histories of the severity of their current offences, were facing one-year jail sentences.[534]

Different treatment programmes in the Brooklyn Mental Health Court are available to the accused depending on the seriousness of the offence.[535] It was agreed that the treatment plan imposed in the Brooklyn Mental Health Court should never be longer than the sentence that the accused would have received had his case been processed through the traditional criminal justice system.[536] Since persons convicted of misdemeanours generally serve a short period in jail, the Brooklyn Mental Health Court seemed more appropriate for felony offenders and chronic misdemeanour offenders.[537] The individual treatment plans that are developed for the Brooklyn Mental Health Court participants take some time to develop, and in the case of an accused charged with a misdemeanour, the time that it takes to finalise a treatment programme may very well exceed the time that the accused would

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Lurigio and Snowden 2009 *The Justice System Journal* 196 at 207.

532 Bernstein and Seltzer 2003 *D C L Review* 143 at 156.

533 Some Mental Health Courts (for example the Placer County Mental Health Court), have treatment programmes for misdemeanour offenders that last up to 3 years, much longer than the sentence that could have been imposed had the case been processed through the traditional criminal court. See Seltzer 2005 Psychology, Public Policy and Law 570 at 578.

534 Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) *at* 5.

535 Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at 6. Also see D'Emic 2007 Criminal Justice 25 at 25 where it is indicated that the treatment plan for an accused charged with a misdemeanour, was not more than 12 months and a first time felony offender was between 12 and 18 months and for an accused who committed his second felony, the treatment period would be between 18 and 24 months. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation* at 1. See further *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 61.

536 O'Keefie *The Brooklyn Mental Health Court Evaluation at* iii, 8. This is also referred to as "proportionality". This was also the motivation behind not considering cases of persons accused of misdemeanours because persons convicted of misdemeanours generally served a short jail sentence, meaning that the treatment period is likely to exceed the time that the accused would have spent in custody had his case been processed through the conventional criminal justice channels.

537 O'Keefie K *The Brooklyn Mental Health Court Evaluation* at 9. The treatment programmes in the Brooklyn Mental Health Court range from 12 to 24 months depending on the seriousness of the charge against the accused.

have spent in jail under a traditional sentence.[538] The individualisation of the treatment plan for each accused is a very important aspect that contributes to the probability of success in the Brooklyn Mental Health Court-monitored treatment programmes.[539]

The clinical team is responsible for transporting the accused to the treatment facility and for ensuring that he has the medication that he needs for the initial days in treatment.[540] The treatment providers give regular update reports to the court on the accused's treatment.[541]

The Mental Health Court staff regularly communicate with community service providers to implement the therapeutic intervention ordered by the Mental Health Court. These might include; medication management, psychosocial rehabilitation, substance abuse treatment, job training and housing assistance.[542] It is also important that the individual should continue to use the necessary medication after rehabilitation and upon re-entry into society. If this is not continued, the benefits of the treatment programme that the individual went through will disappear, and the risk of recidivism will rise.[543] Assistance might be needed by him to apply for health insurance if he cannot afford the medication, as he will most probably be unemployed at the point in time at which he re-enters his community.[544]

Upon completion of the treatment programme, charges against those charged with misdemeanours and those who are first-time-felony offenders are dismissed.[545] The

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538 O'Keefie K The Brooklyn Mental Health Court Evaluation at 9.

539 Rossman *et al Criminal Justice Interventions for Offenders with Mental Illness* at 68. See *Rich 2009 Fordham Urban Law Journal 89* at 112, 113 who points out that rehabilitation programmes that are tailor made for the particular individual, has the best chance of success. If someone with a mental illness, who also has a substance abuse problem, only receives treatment for the substance abuse, his mental illness will most probably deteriorate as most substance abuse programmes require their participants to stop the use of any medication during the substance abuse rehabilitation programme.

540 O'Keefie K The Brooklyn Mental Health Court Evaluation at 27.

541 D'Emic 2007 Criminal Justice 25 at 27. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 28 where it is explained that the accused must pass through four stages of treatment before he can graduate from the Mental Health Court. These include adjustments in treatment that lasts for three months from plea date, engagement in treatment, progress in treatment and continued progress and preparing to graduate. The Mental Health Court participant is awarded a certificate after completion of each stage to serve as motivation for continuing with the treatment.

542 Watson *et al 2001* Psychiatric Services at 477. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 212.

543 Rich 2009 Fordham Urban Law Journal 89 at 115. Slate Mental Health Court at 429.

544 *Rich 2009 Fordham Urban Law Journal 89* at 113. Also see *Draine, Wilson and Pogorzelski 2007 Journal of Offender Rehabilitation 159* at 161 where it is stressed that the services provided to a mentally ill person should also cater for issues that such person may experience with substance abuse, poverty and homelessness. If not, the effectiveness of the mental health care treatment will be limited, even if the accused has easy access to such treatment.

545 O'Keefie The Brooklyn Mental Health Court Evaluation at 30. Also see Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 69.

charges against those accused of violent felonies, are reduced to a misdemeanour.[546] For the more serious offences (the felonies), the offender still has a criminal record, and his criminal behaviour history is not "deleted" by the fact that he participated in the Mental Health Court programme.[547] Almost 74% of all those that enrolled in the court programme completed the programme.[548] Mental Health Court participants stood at 7560 in 2005, and this number is likely to grow as Mental Health Courts become more established and new courts open their doors.[549]

7.5.2 Sanctions for non-compliance

Where an accused was enrolled in a Mental Health Court treatment programme and failed to complete the programme or comply with the treatment conditions, sanctions for non-compliance are imposed.[550] Sanctions take on many forms and include adjustment to treatment services and more frequent appearances in court.[551] The accused's participation in the treatment programme is monitored by regular contact of the Mental Health Court with the service providers.[552]

A large number of Mental Health Courts use jail time as a sanction for non-compliance.[553]

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546 O'Keefie The Brooklyn Mental Health Court Evaluation at 30. Also see Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 69.

547 Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at *7.*

548 Rossman et al Criminal Justice Interventions for Offenders with Mental Illness at 77.

549 Redlich et al 2006 Law and Human Behaviour 347 at 353, 357. One Mental Health Court reported to have had over 2000 new enrolments over a 12 month period.

550 Bernstein and Seltzer 2003 *D C L Review* 143 at 158.

551 Bernstein and Seltzer 2003 *D C L Review* 143 at 157. 158. Sanctions are imposed for setbacks or non-compliance with a certain phase of treatment and the sanctions range from having to write an essay on a specific topic, to more frequent appearances and even short periods of incarceration. See D'Emic 2007 Criminal Justice 25 at 26, 27. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 28 who confirms that court appearances may be made more frequent as a sanction.

552 O'Keefie The Brooklyn Mental Health Court Evaluation at 28.

553 Bernstein and Seltzer 2003 *D C L Review* 143 at 158. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 207. Some Mental Health Courts use jail time as sanctions for non-compliance with treatment programmes and Mental Health Court participants might therefore find themselves back in jail if they do not comply with treatment, the very place they were trying to avoid by agreeing to participate in the Mental Health Court programme. See further Redlich et al 2006 *Law and Human Behaviour* 347 at 355 point out that some Mental Health Courts however do not use jail time as a sanction at all. Only a small number of courts use jail time as a sanction in more than 50% of their cases. They also found that smaller Mental Health courts with fewer participants who required their participants to appear before the judge more frequently, were more likely to use jail time as a sanction than the bigger Mental Health Courts with more participants who appeared before the judge less often (at 357). Also see Frailing 2009 C.S.L.R 145 at *155. See further D'Emic 2007 Criminal Justice 25* at 25. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* iii. See further *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 57.

This is counter-therapeutic and against the goal of reducing the incarceration of persons with mental illness.[554] Courts should first establish if an accused was able to comply with the treatment programme and only punish him for non-compliance if it can be established that he was able to comply but chose not to do so.[555] Changing the treatment plan may be a more appropriate response since non-compliance might have been caused by the symptoms of the very same mental illness that the accused is being treated in the programme for.[556]

A small number of Mental Health Courts allow an accused to be dropped from the programme as a sanction for non-compliance.[557] The latter is particularly unhelpful as an accused who relapses in mental health treatment is particularly in need of support services.[558]

Those who successfully complete the treatment programme receive a non-jail disposition, whilst those that do not complete serve a jail sentence as initially agreed upon when he entered his guilty plea.[559] It is suggested that where cases revert to the criminal justice system and sentencing is imposed in the criminal court, the time that the accused spent in the Mental Health Court programme, even though he did not complete it, should be taken into account by the criminal court when considering the sentence.[560]

7.6 *Mental Health Court's role for accused persons who do not qualify for the programme phase of the Mental Health Court*

The Mental Health Courts in the US model do not seem to provide any form of support to those who do not qualify for the treatment programme of the court as they can be eliminated during the screening stage depending on the type of offence or mental illness involved.

The American Mental Health Court model, therefore, does not provide assistance to

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554 Lurigio and Snowden 2009 *The Justice System Journal* 196 at 208 where this concern is also highlighted. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 158.

555 Bernstein and Seltzer 2003 *D C L Review* 143 at 158. The authors reiterate that mental health care treatment is much harder to measure than drug treatment and these differences should be born in mind when considering appropriate sanctions for non-compliance with the program.

556 Bernstein and Seltzer 2003 *D C L Review* 143 at 158.

557 Bernstein and Seltzer 2003 *D C L Review* 143 at 158.

558 Bernstein and Seltzer 2003 *D C L Review* 143 at 158.

559 D'Emic 2007 Criminal Justice 25 at 25, 27. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 1, 30.

560 Seltzer 2005 Psychology, Public Policy and Law 570 at 575.

mentally ill but fit accused persons who, for example, have a personality disorder as an only diagnosis and who wish to use the expertise of the Mental Health Court to apply for bail. The cases of these mentally ill but fit accused persons revert to the criminal court after being "screened out" during the very first stage of the admission phase.

The lack of support for those mentally ill accused persons who do not qualify for the Mental Health Court programme is in contrast to the Mental Health Court model employed in Canada where the Mental Health Court assists with, *inter alia*, bail applications of those who do not qualify for the programme component of the Mental Health Court.

8 EVALUATING THE SUCCESS OF MENTAL HEALTH COURTS IN THE UNITED STATES OF AMERICA

8.1 Introduction

Diversion, as such, has many benefits for various parties involved in the criminal justice system. These benefits are also evident in initiatives that serve as vehicles for diversionary initiatives such as the Mental Health Court. The benefit of Mental Health Court diversion for the accused is that he will receive treatment rather than punishment.[561] The criminal justice system benefits since its caseload is reduced when accused persons have diverted away from it,[562] saving costs for the taxpayer in the process.[563]

One thing that the opponents and proponents of Mental Health Courts agree upon is that alternatives to traditional prosecution are needed for persons with mental illness in order to stop the revolving door phenomenon.[564] They also agree that mentally ill accused persons are generally disconnected from mental health services and enter the criminal justice

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561 Welch and Fuller *American Criminal Courts* at 251. Another benefit that the accused has if he opts for diversion is that, if the criminal charges are dropped, he will not have trouble finding employment, applying for a loan or being admitted to University during which process prior convictions are considered.

562 Welch and Fuller *American Criminal Courts* at 251 where the benefits for the prosecutor and the defense attorney are also discussed in that they can say that they did what was in the interest of justice. The defense attorney can say that he spared his client the traditional criminal court experience whereas the prosecutor can still say that he was successful in the case to a certain extent because the accused did not go free but is detained, even if it is for treatment, for a certain period of time. Also see Albanese *Criminal Justice* at 264, 265 where the problems of caseloads for the criminal justice system are discussed.

563 Welch and Fuller *American Criminal Courts* at 251. The cost saving is labelled as a benefit for society as the courts can focus their time and resources on more serious offences. Diversion, which implies treatment, may also reduce recidivism that leads to a safer society in that the accused is less likely to re-offend in future.

564 Odegaard 2007 *North Dakota Law Review* 225 at 254.

system at an alarming rate.[565]

Research on the true successes and challenges of Mental Health Courts is still in its infancy since problem-solving courts in this form are a relatively new phenomenon, and further research on its true successes and challenges are needed.[566] Initial indicators, as discussed below, however, give a preliminary picture of the state of Mental Health Court in the United States of America.

8.2 Success

Initial indicators appear to hint towards the success of Mental Health Courts. It should be noted, however, that many of these studies do not focus particularly on second-generation Mental Health Courts but on Mental Health Courts in general.[567] The results are, nonetheless, useful to consider the success of the concept of a specialised Mental Health Court.

8.2.1 Reduced recidivism

This has a direct impact on public safety as reduced recidivism means less crime, which in turn means a safer society. Research indicates that Mental Health Court participants are less likely to re-offend after completion of the Mental Health Court programme than those whose cases were processed through the traditional criminal justice process.[568] Not only do those who completed the Mental Health Court programme recidivate less, but also less

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565 Odegaard 2007 *North Dakota Law Review* 225 at 254.

566 Fisher 2015 *The Judge's Journal* 8 at 10. This is especially the case with Mental Health Courts. A larger body of research exists with regard to drug courts since they have been in existence for longer. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 4. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 15, 19.

567 O'Keefie K The Brooklyn Mental Health Court Evaluation at 4.

568 Frailing 2009 C.S.L.R 145 at *149.* Also see Christy *et al* 2005 *Behav. Sci Law* 227 at 242 and in general Trupin E and Richards H "Seatle's mental health courts: Early indicators of effectiveness" 2003 (26) *International Journal of Law and Psychiatry* 33-53. Also see Fisher 2015 *The Judge's Journal* 8 at 10. See further O'Keefie *The Brooklyn Mental Health Court Evaluation at* 3. Also see Rossman *et al Criminal Justice Interventions for Offenders with Mental Illness* at 18 where it is further explained that those who went through the Mental Health Court programme and who do offend again, take longer to re-offend than those who did not go through the Mental Health Court programme. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 208 where it is confirmed that most Mental Health Court participants recidivate less but that in a study of the Broward County Mental Health Court, it was found that the recidivism rate amongst Mental Health Court participants and those whose cases were processed through the traditional criminal court, were the same. See further Odegaard 2007 *North Dakota Law Review* 225 at 251 where it is pointed out that research indicates that those participating in Mental Health Court programmes recidivate less, reference is particularly made to the Broward County Mental Health Court. More recent research confirms that recidivism is indeed reduced through involvement with a Mental Health Court. See Fisher 2015 *The Judge's Journal* 8 at 10.

violent crimes are committed by the participants.[569]

Programmes offered by the Brooklyn Mental Health Court are deemed an investment in treatment in order to prevent re-offending, particularly violent crime, by mentally ill persons.[570] These courts have similar positive results to drug courts to which they are closely related.[571]

Outpatient treatment can also be linked with a reduction in crime as the seriously mentally ill will be less likely to commit minor offences, leaving jail cells available for serious criminals. With the mentally ill under treatment, the police will also be able to focus their attention on combatting crimes that are more serious.[572] Since the mentally ill will offend less and since treatment of the mentally ill reduces the potential for them to act violently, outpatient treatment will contribute to a safer society,[573] which of course, cannot be measured in monetary terms. The benefit of outpatient treatment rather than incarceration is also that a mentally ill person receiving outpatient care might be able to lead a productive life and by so doing contribute to the economy by obtaining and keeping employment.[574] Reduced recidivism simply means a safer society.

8.2.2 Lower rate and shorter periods of incarceration

Mental health court participants spent less time in jail and more time in the treatment

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569 McNiel DE and Binder RL "Effectiveness of a mental health court in reducing criminal recidivism and violence" 2007 (164) American Journal of Psychiatry 1395-1403 at 1395. Also see in general Herinckx HA, Swart SC, Ama SM, Dolezal CD and King S "Rearrest and linkage to mental health court services among clients of the Clark county mental health court program" 2005 (56) *Psychiatric Service* 853-857.

570 These benefits have been acknowledged by district attorneys' offices, See Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at 6. Also see Fisher 2015 *The Judge's Journal* 8 at 10 where recidivism is stated as one of the consistent outcomes reported by those who conducted research on the state of Mental Health Courts in the United States of America.

571 Frailing 2009 C.S.L.R 145 at 145, 148. In a programme where prison bound felony offenders were diverted to drug treatment, it was found that, compared to a group of offenders that remained in prison, the treatment of felony offenders in drug rehabilitation centres, had the benefits of lower figures of re-arrest and re-incarceration as well as cost saving: Treatment instead of incarceration results in cost saving for the criminal justice system. Also see Frailing K 2008 *C.S.L.R* 63 at 67. Also see Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at 6. Also see Frailing 2009 C.S.L.R 145 at 148 who points out that the cost of treatment is significantly lower than incarceration costs.

572 Torrey et al Criminalizing the Seriously Mentally Ill at 56. Also see Bernstein and Seltzer 2003 D C L Review 143 at 161.

573 Torrey et al Criminalizing the Seriously Mentally Ill at 56-57.

574 Torrey et al Criminalizing the Seriously Mentally Ill at 57.

programme.[575] Studies found that Mental Health Court participants also spend fewer days in psychiatric hospitals in the year after their graduation from the Mental Health Court programme than the year prior to their enrolment therein.[576] The same results applied with regard to days spend in jail.[577]

The criminal justice system is benefiting from Mental Health Court treatment programmes as the chances of these offenders returning to the criminal court is reduced by participation in such treatment programmes.[578] This, in turn, reduces the anticipated future workload.

8.2.3 Cost-saving

The cost-saving associated with treatment as opposed to incarceration can also be labelled as an advantage for the criminal justice system brought about by Mental Health Courts.[579]

The estimated cost per day to keep a mentally ill person in jail is approximately $46.[580] Having said that, that does not necessarily include psychiatric services, as these services are not available in all jails.[581] Treating a mentally ill person as a psychiatric patient on an

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[575] Albanese *Criminal Justice* at 243. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 3. The psychosocial functioning of Mental Health Court participants have been found to improve during the Mental Health Court treatment programme. See Trupin and Richards 2003 (26) *International Journal of Law and Psychiatry* 33 at 33 . This was also the case in the Brooklyn Mental Health Court according to O'Keefie *The Brooklyn Mental Health Court Evaluation at* viii, 3. Also see *Rossman et al Criminal Justice Interventions for Offenders with Mental Illness* at 17 where it is pointed out that the functioning of those who participated in the Mental Health Court programme improved further than those who did not participate.

[576] Frailing 2010 *Int J Law Psychiat* 207 at 209. Also see Albanese *Criminal Justice* at 243 who confirms that Mental Health Court participants are admitted to psychiatric hospitals less often than accused persons who do not participate in the programme. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* viii where it is indicated that this was also the case for the Brooklyn Mental Health Court. See further Lurigio and Snowden 2009 *The Justice System Journal* 196 at 209.

[577] Frailing 2010 *Int J Law Psychiat* 207 at 209. Also see Fisher 2015 *The Judge's Journal* 8 at 10 who reports that fewer days spent in incarceration is a success of Mental Health Courts reported by those who conducted research on the outcomes across Mental Health Courts in the United States of America. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 3 who explains that it was significantly less in the year subsequent to the completion of the Mental Health Court programme than the year prior to their enrolment therein.

[578] Frailing 2009 C.S.L.R 145 at *150.*

[579] Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at 6. Also see Frailing 2009 C.S.L.R 145 at 148 as well as Frailing K 2008 *C.S.L.R* 63 at 68

[580] Torrey et al Criminalizing the Seriously Mentally Ill at 55.

[581] Torrey *et al Criminalizing the Seriously Mentally Ill* at 55. Also see Albanese *Criminal Justice* at 243 who confirms the cost-saving for the criminal justice system through diversion.

outpatient basis costs in the region of approximately $12 per day.[582]

There are long-term cost savings in opting for treatment rather than incarceration, in that the chances of the person being re-arrested declines, eliminating the costs of another stay in jail.[583] Hospital bills are lower as the outpatient treatment reduces the need for long periods of hospitalisation.[584] Outpatient treatment also results in less use of homeless shelters that in turn also results in a cost-saving for the relevant state.[585]

The fact that less time is spent in hospital and in prison after completing the Mental Health Court programme translates into a cost-saving for the state in that services that had to be provided to these individuals who would come back to jail or hospital, again and again, are no longer required.

8.3 Criticism

A general point of criticism against diversion as such is that diversion programmes weaken the deterrence effect of the law [586] because treatment is favoured over punishment.

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[582] Torrey *et al Criminalizing the Seriously Mentally Ill* at 55. See in particular Table 4.1 that sets out the costs for different types of Medical and Psychiatric services. With regard to cost-saving, Model Outpatient and rehabilitation programmes offer outpatient psychiatric services, rehabilitation, social services, 24-hour crisis-intervention, medical and inpatient psychiatric services as needed as well as room and board. Estimated costs per day for outpatient psychiatric services, 24-hour crisis intervention and rehabilitation treatment is $22 day. Short-term psychiatric hospitalisation and other medical services as needed are estimated at $16 per day. Room and board offered to the seriously mentally ill who do not have another source of income, is estimated at $17 per day. This amounts to $20 000.00 per mentally ill patient per annum. See Torrey *et al Criminalizing the Seriously Mentally Ill* at 56.

[583] Torrey *et al* Criminalizing the Seriously Mentally Ill at 56.

[584] Torrey *et al* Criminalizing the Seriously Mentally Ill at 56. Mentally ill accused who were sent to state psychiatric hospitals in the United States in the 1950's were often sent there for indefinite periods of time without the option to challenge such decision for treatment. This refers particularly to the situation during the 1950's in the United States of America. This stance has been attributed to the paternalistic system at the time. Frailing K 2008 *C.S.L.R* 63 at 63. The average time that a mentally ill person spent in a state hospital during this time was 20 years. The paternalistic nature of the system is well illustrated by the case of Elizabeth Packard who was admitted involuntarily to a state hospital and declared morally insane, because she argued with her husband (who was a minister) about theology. He had her admitted and after being declared morally insane, she lost custody of her children and ownership of her property. She eventually had a trial in front of a grand jury who declared her legally sane but the custody of her children and ownership of her property was never restored. See Slate, Buffington-Vollum and Johnson *Criminalization of Mental Illness* at 29. See further Garner and Hafemeister 2003 *Developments in Mental Health Law* 1 at 4.

[585] Torrey *et al Criminalizing the Seriously Mentally Ill* at 56 See in particular Table 4.1 that sets out the costs for different types of Medical and Psychiatric services. Model Outpatient and rehabilitation programmes offer outpatient psychiatric services, rehabilitation, social services, 24-hour crisis-intervention medical and inpatient psychiatric services as needed as well as room and board (Offered to the seriously mentally ill who do not have another source of income) at approximately $55 per day. This amounts to $20 000.00 per mentally ill patient per annum.

[586] Albanese *Criminal Justice* at 262 where points of criticism against diversion is discussed.

Frailing [587] points out that this concern is particularly strong with regard to drug courts where treatment replaces punishment even where the use of certain drugs is illegal. This concern is less warranted with regard to Mental Health Courts, as it is not illegal to have a mental illness.[588]

The point has been raised that, instead of developing special courts to cater for a small group of persons with unique needs, the criminal justice system and its processes in the broader sense should rather be optimised to incorporate the special services and skills that these specialised courts have to offer.[589] This should no doubt be the long-term goal of any criminal justice system, but the fact remains that mentally ill accused persons present unique procedural, logistical, evidentiary and legal challenges to the criminal justice system that is best served in a specialised court by specially trained professionals with an understanding of these issues.[590] Some specific concerns are highlighted below.

8.3.1 Voluntary participation

Concerns exist about the possible coercive nature of Mental Health Court programmes and the stigma that goes along with it.[591] The prospect of a more lenient disposition in the

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587 Frailing 2009 C.S.L.R 145 at 146.

588 Frailing 2009 C.S.L.R 145 at 146. Also see Frailing K 2008 *C.S.L.R* 63 at 68 who confirms that those participating in the drug court programme, does so because of their involvement in drugs which is illegal, whereas having a mental illness is of course not illegal.

589 Draine, Wilson and Pogorzelski 2007 Journal of Offender Rehabilitation 159 at 166. It is also pointed out that the speciality courts in turn cause the health system to deliver fragmented services according to the treatment needs identified by these courts. The authors point out that the argument that the criminal justice system should seek holistic solutions to improve the system in its entirety rather than creating speciality courts, is most probably drowned out by the speed at which speciality courts are established all over the United States of America. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 148 who promote a comprehensive system of prevention and intervention but who acknowledge that a more short term solution, until the entire system has been revamped, is Mental Health Courts. Also see Fisher 2015 *The Judge's Journal* 8 at 11 where this concern is raised, suggesting that some of the positive aspects of Mental Health Courts that enhances procedural justice – such as adjusting courtroom communication practices - could perhaps be applied in the traditional courts. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 95. The analogy is drawn between the issue of mental illness in the criminal justice system and racism in the criminal justice system. The authors however criticise this analogy, as it has never been suggested that a specialised court be created for a certain race. The suggestion to fix the current system instead of creating a new one, is viable and plausible as far as issues of racism is concerned, but is not the optimal solution for issues surrounding mentally ill offenders as the authors point out at 96 of this source.

590 Schneider, Bloom and Heerema *Mental Health Courts* at 96. Interim solutions must be implemented in order to contain the problem of the increased number of persons with mental illness in the criminal justice system. See Bernstein and Seltzer 2003 *D C L Review* 143 at 148, 162 where it is stated that Mental Health Courts are not the ultimate solution but merely part of it in the broader scope of system reform towards catering better for the needs of accused persons with a mental illness.

591 D'Emic 2007 Criminal Justice 25 at 27. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* iv. Concerns were also raised about coercing the accused to take medication against

Mental Health Court than what the accused would face in the traditional criminal court can be seen as luring the accused into the Mental Health Court programme, thus reducing the true voluntariness of choice to participate.[592] Some scholars are of the view that a person suffering from a mental illness cannot participate "voluntarily" as he is not capable of making a rational decision to participate voluntarily.[593] This concern is bolstered by the fact that most Mental Health Courts do not conduct competency assessments (for participation in the Mental Health Court programme) prior to accepting referrals but only conduct such

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his will, since he has the right to refuse medication. This concern was addressed by including the terms pertaining to the use of medication in the terms and conditions of participation. It is explained in the guidelines for participation that the accused must use the prescribed medication and that failure to do so can result in sanctions being imposed by the Mental Health Court. Since these provisions are included in the guidelines for participation that the accused agrees to when signing the contract at the acceptance stage, it is binding on him and he is deemed to have consented to taking any medication that he is required to take in the programme. O'Keefie *The Brooklyn Mental Health Court Evaluation at* 10. Mental Health Services were concerned that the Mental Health Court process would "bypass" the normal process of having to apply to a civil court to administer medication to a mental health patient against his will. The accused does however have an opportunity to explain the reason for non-compliance with the medication before a sanction is imposed by the Mental Health Court.

592 Schneider, Bloom and Heerema *Mental Health Courts* at 6, 89, 95. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 574 who points out that, if a defendant is placed before the choice of a criminal court, primarily aimed at punishment and a therapeutic court, the choice is, at first glance, an obvious one. See, however, this source at 574, 575 for the concerns raised by the author with regard to voluntary transfer to the Mental Health Court. Schneider, Bloom and Heerema propose that ensuring that participants in the Mental Health Court programme has legal representation, should address the concerns pertaining to voluntary participation. It should also be born in mind that, most accused who are placed before the choice to participate in the Mental Health Court programme, is placed before that choice shortly after they have been arrested and incarcerated and perhaps after spending a night or two in jail. They are thus under severe stress and may choose the Mental Health Court option in the hope that it will be a reprieve from their current situation and a way out of jail, even if only momentarily. See Seltzer 2005 Psychology, Public Policy and Law 570 at 574.

593 Odegaard 2007 *North Dakota Law Review* 225 at 253. The concerns pertained to the ability of the accused to truly understand the consequences of entering a plea and enrolling in the Mental Health Court programme. See O'Keefie *The Brooklyn Mental Health Court Evaluation at* iv, 9. It seems to be a recognised concern that if an accused is not at least able to identify the advantages and disadvantages of participating in the Mental Health Court programme, his participation can be perceived as coerced. See Frailing 2009 C.S.L.R 145 at *152*. The concern is that those in contact with the criminal justice system will be "rerouted" into a programme of therapy that they would not have chosen out of own accord. Treatment becomes a way to avoid prison, a lesser evil and the treatment is thus coercive. See Casey T "When good intentions are not enough: Problem solving courts and the impending crisis of legitimacy" 2004 (57) SMU L Rev 1459-1519 at 1459. It is also argued that this is a form of paternalism of the State enforced over members who are less able to fight such paternalistic acts. To counter this argument, it can be pointed out that study amongst those who have participated in Mental Health Court programmes, reported low levels of perceived coercion amongst the participants. See Schneider, Bloom and Heerema *Mental Health Courts* at 63. Also see Frailing 2009 C.S.L.R 145 at *153* and see further Poythress NG, Petrila J, McGaha A and Boothroyd R "Perceived coercion and procedural justice in the Broward mental health court" 2002 (25) *International Journal of Law and Psychiatry* 517-533 at 519. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 64 who voice their concern about the view that offering a choice between two options (the criminal justice system and the Mental Health Court system) presents a problem in itself. To suggest that all cases should revert to the criminal justice system simply to avoid putting the mentally ill accused before a choice is absurd.

assessments for participants who appear "grossly incompetent".[594] This raises concerns that there might be participants in the Mental Health Court programmes who do not comprehend the result of the choice that they exercised to participate in the programme rather than have their cases processed via the traditional criminal justice system. If it is ensured that all mentally ill offenders have legal representation at the point in the process where they are required to make a decision as to if they want to participate in the Mental Health Court, the legal representative can ensure that his client is not coerced into participation and that he is well informed of all the options and consequences of having a case resolved via a particular forum.

In response to this criticism, it is stressed that the accused is offered the option not to participate in the Mental Health Court programme and various diagnostic tools are available to determine if an individual was competently and rationally choosing to have his case processed through the Mental Health Court.[595] The fact that someone is suffering from a mental illness does not necessarily mean that he is incapable of taking decisions regarding at least some aspects of his life. Studies could, however, not find evidence that the Mental Health Court process was coercive and, in fact, found that judges are going the extra mile to ensure that the rights of those coming through the Mental Health Court are protected.[596]

To ensure that the decision to participate in the Mental Health Court programme is both voluntary and informed, it is advisable that defence counsel with knowledge of mental health issues and available services should be appointed for the accused as soon as possible.[597] Providing the accused the option to withdraw from the programme at any time and to allow his case to revert to the criminal court will further support the notion that

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594 Frailing 2009 C.S.L.R 145 at *152.*

595 Slate Mental Health Courts at 430.

596 Slate *Mental Health Courts* at 430. Participants on the Brooklyn Mental Health Court reported that they do not perceive the process as coercive. See D'Emic 2007 Criminal Justice 25 at 28. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 39. The participants also reported to perceive a higher level of procedural justice, than those accused whose cases were processed through the traditional criminal justice system. See Frailing 2009 C.S.L.R 145 *at 154. Also see* in general Poythress *et al* 2002 *International Journal of Law and Psychiatry* 517-533.

597 To ensure that the accused has full understanding of the programme and its consequences. The Brooklyn Mental Health Court has documents available explaining exactly the processes and implications of involvement in the Brooklyn Mental Health Court programme, including the sanctions that may be imposed. This is done in an attempt to be transparent. See D'Emic 2007 Criminal Justice 25 at 27. Legal representation can explain the content to the accused and ensure that he has full understanding and should be appointed as soon as possible. See Bernstein and Seltzer 2003 *D C L Review* 143 at 152, 153. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 575.

involvement in the Mental Health Court is voluntary.[598] Many American Mental Health Courts do, however, not allow the accused' to opt-out of the Mental Health Court programme once they have enrolled.[599]

No constitutional challenges have been launched in either Canada or America against the Mental Health Court movement, based on the allegation that participation is not voluntary or that those who participate are not capable of taking a proper decision to participate or not.[600] Criticism against the Mental Health Court movement, based on concerns regarding voluntariness, should therefore be considered as cautionary indicators of objections that may be raised against the practices of the Mental Health Court. Such criticism could serve as a motivation to ensure the incorporation of safety measures for the accused against coercion and to streamline the processes in these areas of concern to eliminate similar criticism in future.

8.3.2 Stigmatisation

Concern has been raised about the stigma attached to being singled out as a mentally ill person and that processing the case through a specialised Mental Health Court docket contributes to the marginalisation of the mentally ill accused.[601]

A response to this argument offered by Slate is:

> *..Surely, the possibility of avoiding a criminal record, obtaining appropriate treatment and averting future contact with the criminal justice system as a result of compliance with mental health court requirements and follow-up are less stigmatizing, more encouraging and more compassionate than the repeated and callous recycling of persons with mental illness through the system.*[602]

A further response to the concern is to stress the fact that the treatment that the mentally ill

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598 Bernstein and Seltzer 2003 *D C L Review* 143 at 152. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 63. To curtail this criticism, it is recommended by Schneider Bloom and Heerema that participants in Mental Health Court programmes should be reminded constantly that their participation in the programme is voluntary and that they can revert to the traditional criminal justice system at any time.

599 Schneider, Bloom and Heerema *Mental Health Courts* at 91. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 575 who warns that participants should be allowed to withdraw from the programme at any given time in order for participation in the Mental Health Court programme to truly be recognised as voluntary.

600 Schneider, Bloom and Heerema *Mental Health Courts* at 90

601 Wolff N "Courts as therapeutic agents: Thinking past the novelty of mental health courts" 2002 (30) *Journal of the American Academy of Psychiatry* 431-437 at 434. Also see Lamberti and Weisman 2004 *Psychiatr Q* 151 at 162 where this concern has been raised with regard to diversion programmes in general.

602 Slate *Mental Health Court* at 430, 431.

accused receive in the Mental Health Court is an improvement on the way their interests were served in the traditional criminal justice system.[603]

Some argue that due process is being violated by treating similar cases differently in the sense that a mentally ill accused charged with a particular offence may have the option of treatment instead of incarceration, whereas an accused, who does not suffer from a mental illness, does not have such an option.[604] The fact that treatment is emphasised over procedural rules has been highlighted as a concern and as something, which reduces the protection of procedural rules.[605]

Some scholars argue that the existence of a Mental Health Court actually contributes to the criminalisation of the mentally ill by widening the net with which they can be caught, especially for minor offences.[606] This has been referred to as the phenomenon of "net widening", [607] where the mentally ill now comes into more frequent contact with the law than what would have been the case had there not been these specialised courts.[608] The fact

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603 See in general Stephan S and Winick BJ "A dialogue on mental health courts" 2005 (11) *Psychology, Public Policy and Law* 507-526. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 95.

604 Welch and Fuller *American Criminal Courts* at 103.

605 Welch and Fuller *American Criminal Courts* at 103.

606 Slate *Mental Health Courts* at 430. Also see Lamberti and Weisman 2004 *Psychiatr Q* 151 at 162 who raises the concern of stigmatisation with regard to diversion programmes for the mentally ill offender in general. Also see Redlich et al 2006 Law and Human Behaviour 347 at 348 where the criticism that these courts might actually increase the mentally ill's involvement in the criminal justice system, is highlighted. See further Welch and Fuller *American Criminal Courts* at 252 where this is a point of criticism raised against diversion as such. The argument is that previously, prior to diversion programmes, accused persons arrested for minor offences, might simply have been released because of a lack of evidence or because the court has more serious offences to deal with. The diversion programme may lead to it that such a person, now remains in the criminal justice system through which he access treatment. Also see Albanese *Criminal Justice* at 262 where it is pointed out that prosecutors may opt for diversion where they would not normally have proceeded with a prosecution due to for example lack of evidence. In such a case a person will be kept under the monitoring eye of the court whereas he might have been released had his case gone through the normal criminal procedural channels. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 72. Also see in general Lamb HR, Weinberger LE and DeCuir WJ "The Police and mental health" 2002 (53) *Psych Serv* 1266-1271. See further Seltzer 2005 Psychology, Public Policy and Law 570 at 573 who points out that mentally ill individuals are arrested by police with the aim of "helping" them by getting them into a mental health care treatment programme, even though it is within the criminal justice system. One of the points of criticism is that this type of court might encourage police to arrest mentally ill persons in order to ensure their entrance into the forensic system.

607 Redlich et al 2006 Law and Human Behaviour 347 at 348 where the criticism that these courts might actually increase the mentally ill's involvement in the criminal justice system, is highlighted.

608 Slate *Mental Health Court* at 430. Also see Redlich et al 2006 Law and Human Behaviour 347 at 348 where the criticism that these courts might actually increase the mentally ill's involvement in the criminal justice system, is highlighted. Also see Odegaard 2007 *North Dakota Law Review* 225 at 253 where the concern is highlighted that persons with mental illness might be arrested with the view on entering the Mental Health Court programme whereas persons without mental illness might not

that mentally ill individuals are arrested for purposes of accessing treatment through the Mental Health Court is, according to some critics, taking away the focus of the criminal justice system from the more serious offenders.[609]

The argument is countered by placing the focus on the fact that diversion programmes compensates for the lack of resources in the criminal justice system and allow the court to handle cases that it would previously have been reluctant to dismiss but would have had to dismiss due to lack of resources.[610] It is submitted further that once a proper process is established to channel the mentally ill accused to a Mental Health Court, the police will have more time and resources to focus on more serious offences and offenders as there will be certainty as to where these accused can get assistance, and it will no longer be the responsibility of law enforcement to find a suitable treatment for the individual, but they can merely divert him to the Mental Health Court that will channel the person to the relevant treatment services.

Having regard to the negative effect that arrest and incarceration have on mentally ill individuals and the higher rates of arrests, the question is how it can be seen as a solution to implement a court where it is a requirement that a mentally ill person be arrested before being able to gain access to a Mental Health treatment programme offered by the court?[611] Seltzer warns that this could lead to an increase in the practice of arresting people with mental illnesses for committing misdemeanours, where such an arrest would not necessarily have taken place had the person not suffered from a mental illness.[612]

8.3.3 Privacy concerns

Due to the nature of the programmes offered in the Mental Health Court, where a multi-

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necessarily have been arrested under the same circumstances.

609 Seltzer 2005 Psychology, Public Policy and Law 570 at 583.

610 Welch and Fuller *American Criminal Courts* at 252. This argument is countered by pointing out the rarity of Mental Health Courts initiating prosecutions or imposing custody on participants and further that these courts are set up to foster alternatives to the traditional criminal justice process. See Slate *Mental Health Courts* at 430.

611 Seltzer 2005 Psychology, Public Policy and Law 570 at 573. Seltzer proposes alternatives to Mental Health Courts. See 584, 585 of this source.

612 Seltzer 2005 Psychology, Public Policy and Law 570 at 582. Also see Torrey *et al Criminalizing the Seriously Mentally Ill* at 49 where it is stated that a captain of the Los Angeles Police Department reported that mentally ill persons are often arrested and jailed for their own protection. He phrased it as follows: *"You arrest somebody for a crime because you know* at *least they'll be put in some kind of facility where they'll get food and shelter. You don't invent a crime, but it's a discretionary decision. You might not arrest everybody for it, but you know that way they'll be safe and fed".*

disciplinary team is involved, information sharing about the accused is inevitable.[613] Concerns have been raised about the possible infringement of the participants' privacy rights when disclosing his medical facts in the Mental Health Court.[614]

It has been suggested that these concerns can be curtailed by ensuring that legal representation is appointed for the participant early on in the proceedings [615] and further by limiting the information that is made available to the judge and prosecutor to only what is necessary for them to take the necessary decisions.[616]

Disclosing medical information in criminal proceedings further raises issues of doctor-patient privacy.[617] Mental Health Courts manage this concern in that disclosure of confidential information about the accused in open court is limited to what is necessary.[618] The accused could further simply signs consent to share information [619] , as is the case in the Brooklyn Mental Health Court.[620] Most Mental Health Courts have policies in place to

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613 Schneider, Bloom and Heerema *Mental Health Courts* at 91.

614 This has been highlighted as a concern rather than concrete criticism. See Schneider, Bloom and Heerema *Mental Health Courts* at 91. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 581. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 159. Also see Lamberti and Weisman 2004 *Psychiatr Q* 151 at 157. One of the major challenges in making decisions regarding mentally ill persons in criminal proceedings, is the lack of information about individuals and further that, if the much needed information is shared, such disclosure may possibly violate the mentally ill person's right to privacy.

615 Schneider, Bloom and Heerema *Mental Health Courts* at 91. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 581 where it is stressed that the appointment of legal counsel for the mentally ill accused at an early stage in the proceedings, should assist in addressing some of the privacy concerns as the legal representative can filter for any potentially privileged information. See further Bernstein and Seltzer 2003 *D C L Review* 143 at 152 where it is pointed out that most transfers to the Mental Health Court happens post-arraignment and that legal representation should be arranged for any accused before he takes the decision to transfer his case to the Mental Health Court.

616 Seltzer 2005 Psychology, Public Policy and Law 570 at 581. The same solution was suggested by Bernstein and Seltzer 2003 *D C L Review* 143 at 159.

617 Bernstein and Seltzer 2003 *D C L Review* 143 at 159.

618 Schneider, Bloom and Heerema *Mental Health Courts* at 91. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 576 who opines that the disclosure of private treatment information can be limited if the defence attorney acting for the mentally ill accused, received proper training in mental health issues which includes communicating with a mentally ill accused. The specially trained defence attorney may then also be of assistance to the court in facilitating consent for the disclosure of otherwise privileged information. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 159 who points out that this concern could further be managed by omitting medical information from the public record of court proceedings or having conversations about sensitive medical facts in chambers.

619 Schneider, Bloom and Heerema *Mental Health Courts* at 91.

620 The defendant must further sign a consent form to enable the Mental Health Court practitioners to share information with each other and the service providers. See O'Keefie *The Brooklyn Mental Health Court Evaluation at* 10. Legal representatives could be of assistance in this regard at an early stage in the proceedings when a legal representative is appointed for the mentally ill accused. See Schneider, Bloom and Heerema *Mental Health Courts* at 91. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 581 where it is stressed that the appointment of legal

safeguard the right to privacy of the Mental Health Court participants.[621]

8.3.4 Opposition to long periods of treatment

Treatment under the Mental Health Court programme may take longer than the period that the accused would have spent in incarceration had his case been processed through the traditional criminal justice system.[622] In response to the criticism, it is contended that what must be considered is the long-range goal of stopping the cycle of recidivism typical for this population.[623]

It simply takes time to engage in treatment. A longer course of substance abuse treatment will naturally produce better outcomes over the long run than a shorter one.[624] Patients, who remain under outpatient treatment for a period of six to nine months, or more, while receiving intensive services show fewer hospitalisations, shorter hospital stays, greater adherence to community treatment, fewer acts of violence and fewer instances of victimisation than patients receiving similar services under outpatient commitment orders for shorter periods.[625]

Defence attorneys, during the planning phases of the Brooklyn Mental Health Court,

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counsel for the mentally ill accused at an early stage in the proceedings, should assist in addressing some of the privacy concerns as the legal representative can filter for any potentially privileged information.

621 Seltzer 2005 Psychology, Public Policy and Law 570 at 581. Also see in general Council of State Government's Criminal Justice/ Mental Health Consensus Project: Survey of Mental Health Courts (2003) http://consensusproject.org/topics/news/mhcsurvey(Date of use: 28 March 2014).

622 Slate *Mental Health Court* at 420. Also see Frailing K 2008 *C.S.L.R* 63 at 66 who draws attention to a study that found that those who pleaded not guilty because of insanity spent a much longer time in prison than those who committed similar crimes but who did not raise the defence of not guilty because of insanity. The fears of longer "than usual" periods of confinement are thus well grounded in history. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 577 who points out that at the time there was only one Mental Health Court (West-Virginia Mental Health Court), that placed a limitation on the duration of a treatment programme, the limitation being that it should not be longer than the maximum sentence that could have been imposed had the case been processed through the traditional criminal court. See further Bernstein and Seltzer 2003 *D C L Review* 143 at 156. Also see Odegaard 2007 *North Dakota Law Review* 225 at 254.

623 Slate *Mental Health Court* at 430. It Is reiterated that the focus should be on the long term goal and benefit of a longer mental health care programme, instead of a shorter term of incarceration where no treatment or, at best, insufficient treatment is received without any positive results.

624 A common sense approach to treatment periods seem to be promoted here by Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at 2.

625 The benefits of longer periods of treatment versus shorter ones are illustrated by Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at *4.* Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 53 where it was found that this was also the case with Brooklyn Mental Health Court participants.

stressed the importance of the proportionality principle in the Mental Health Court setting. This entails that the length of court supervision in a programme that is offered as an alternative to incarceration should never be longer than the period of incarceration or probation that the defendant would have received had he followed the normal process through the criminal justice system.[626]

The fact that participation in the treatment imposed by the Mental Health Court is voluntary and an alternative to the traditional criminal court process should not be disregarded when considering the above-mentioned concerns.[627] An accused and his legal representative can therefore weigh up the advantages and disadvantages of participating in the mental health programme. If the accused takes issue with the fact that he will be in treatment for longer than he would have been in jail for relating the particular offence, he can exercise an informed decision not to opt for the Mental Health Court alternative. The negative consequence of this is that mentally ill offenders who committed minor crimes may be deterred from opting for the Mental Health Court programme[628] because they are probably most likely to spend more time in a treatment programme than what they would have spent serving a sentence for an, especially minor offence.

Lengthy periods of treatment could also contribute to discrimination against mentally ill accused persons who already face challenges in the criminal justice system.[629] It is inappropriate for a court to continue to supervise services to an accused beyond the time that an accused would have been incarcerated.[630] If treatment is required beyond the

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626 Bernstein and Seltzer 2003 *DCL Review* 143 at 157. Proportionality is also explained by Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at 4. Also see O'Keefie *The Brooklyn Mental Health Court Evaluation at* 6. The potential sentence a defendant faces for failing to comply with the conditions of release, or the treatment programme ordered by the Mental Health Court, should never be more severe than the sentence that would have been imposed in a conventional court. Also see Frailing 2009 *C.S.L.R 145* at 156 who confirms that, due to jail time being imposed as sanctions for non-compliance, the mentally ill offender may sometimes spend more time in jail whilst in the Mental Health Court programme, than he would have, had his case been processed through the conventional criminal justice process.

627 The fact that the Mental Health Court treatment programme is completely voluntary must be stressed when the concerns in terms of privacy, stigmatisation and coercion is considered. See Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at 5.

628 Seltzer 2005 Psychology, Public Policy and Law 570 at 578.

629 Bernstein and Seltzer 2003 *D C L Review* 143 at 157. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 578 who adds that this could particularly be the case with persons accused of minor offences.

630 Bernstein and Seltzer 2003 *D C L Review* 143 at 157. The authors argue that the court's supervision is because the accused committed an offence and not the fact that the accused is mentally ill.

period that the accused would have spent in jail or prison serving his sentence, such treatment should continue under the supervision of the mental health care system and not the judicial system.[631] The underlying principle of this argument is probably to decriminalise mental illness in the sense that the mentally ill should have as little as possible contact with the law and, in particular, the criminal courts.

A view exists that the focus should fall on the therapeutic objective of the Mental Health Court treatment programmes, and the time that an accused remains under the Mental Health Court's supervision should be guided by the programme needs.[632] If the principle that no treatment programme should exceed the time period of the maximum sentence that could have been imposed in the criminal court as suggested above is applied strictly, this might result in treatment being disrupted or stopped completely for the sake of adhering to this ideal. This could have dire consequences for a mentally ill accused who faces a relapse should his treatment be ceased abruptly.

8.3.5 Sanctions for non-compliance

Mental Health Courts use jail time as a sanction for non-compliance with a treatment programme in the Mental Health Court.[633] The criticism against this practice in American Mental Health Courts is well articulated by Seltzer:

> *if the goal is to lessen the incarceration of people with mental illnesses, then using incarceration as punishment is a perversion of the whole idea of mental health courts*[634]

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631 Seltzer 2005 Psychology, Public Policy and Law 570 at 579. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 157.

632 Bernstein and Seltzer 2003 *D C L Review* 143 at 157. The authors opine that the length of treatment programmes should never exceed the amount of time that the accused would spend in incarceration or probation had his case been processed through the traditional criminal justice process. Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at 4 who reports that Ex-offenders with mental illness were of the opinion that treatment ordered by the Mental Health Court should last for at least 2 years whilst others suggested even longer periods

633 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 470. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 90. Also see Griffin PA, Steadman HJ and Petrila J "The use of criminal charges and sanctions in mental health courts" 2002 (53) *Psych Serv* 1285-1289 at 1285. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 579. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 207. See further in general Redlich AD, Steadman HJ, Petrila J, Monahan J and Griffin PA "The second generation of mental health courts" 2005 (11) *Psychology, Public Policy and Law* 527-538.

634 Seltzer 2005 Psychology, Public Policy and Law 570 at 579. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 212 where jail time as sanction for non-compliance with treatment programmes are criticised, as it is often not helpful for the mentally ill accused to receive jail time. Also see Odegaard 2007 *North Dakota Law Review* 225 at 253 where jail time as a sanction for non-compliance is highlighted as a concern.

The view that the only penalty that a participant in the Mental Health Court programme should face is that his case is treated in a conventional way through the criminal justice system, and only in the event of serious non-compliance[635] is supported.

Due to the nature of the conditions treated in the Mental Health Court programmes, relapses are expected and should not result in a penalty such as incarceration.[636] Where non-compliance occurs, the cause thereof should be investigated to establish if such non-compliance was perhaps a symptom of the mental illness. Non-compliance could also be an indication that the treatment programme should be changed to better address the individual's treatment needs.[637] Punitive sanctions should only be considered once it has been established that the defendant was capable of complying with the treatment programme but deliberately chose not to do so.[638] The individual's participation in the Mental Health Court programme should only be stopped if he expresses the wish to opt-out of the programme.[639] Withdrawal from the programme should not occur for purposes of "punishment" for non-compliance with the programme. Punishing the individual by removing him from the treatment programme is counter-therapeutic and may set the recovery process back significantly. If one of the main objectives of a Mental Health Court is to avoid the negative effects that detainment can have on a mentally ill individual, employing incarceration as a sanction will compromise this objective of the Mental Health

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635 Schneider, Bloom and Heerema Mental Health Courts at 90.

636 Schneider, Bloom and Heerema Mental Health Courts at 90. Also see Redlich *et al* 2005 *Psychology, Public Policy and Law* 527 at 527. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 579 who reiterates that imposing jail time or terminating a treatment programme as a sanction for non-compliance with the treatment programme, is especially devastating for the participant who suffers from a mental illness. Relapses and setbacks are common incidents for persons receiving mental health treatment. Such setbacks occur in the process of establishing what the best possible treatment programme for the individual is and a good example is where a patient does not react favourably to a particular type of medication. See Council of State Government's Criminal Justice/ Mental Health Consensus Project: http://consensusproject.org/topics/news/mhcsurvey(Date of use: 28 March 2014) at 98. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 580 who shares this view.

637 Council of State Government's Criminal Justice/ Mental Health Consensus Project: http://consensusproject.org/topics/news/mhcsurvey(Date of use: 28 March 2014) at 88, 89. Also see Lurigio and Snowden 2009 *The Justice System Journal* 196 at 207 where it is indicated that a number of Mental Health Courts adjust the treatment programme if non-compliance occurs. See further Schneider, Bloom and Heerema *Mental Health Courts* at 90 where the authors suggest that a better response to non-compliance would be to adjust the treatment programme or to monitor the accused's participation in the programme closer. This view was also expressed by the Council for State Government in their report Council of State Government's Criminal Justice/ Mental Health Consensus Project: http://consensusproject.org/topics/news/mhcsurvey(Date of use: 28 March 2014) at 125.

638 Council of State Government's Criminal Justice/ Mental Health Consensus Project: http://consensusproject.org/topics/news/mhcsurvey(Date of use: 28 March 2014) at 89.

639 Schneider, Bloom and Heerema *Mental Health Courts* at 91.

Court.[640]

8.3.6 Guilty plea

The practice in some Mental Health Courts in the United States that require the mentally ill accused to plead guilty [641] in order to participate in the Mental Health Court programme has also been criticised for contributing to the stigmatisation of the mentally ill accused.[642] The mentally ill accused is burdened with a criminal record, which makes his reintegration into the community much harder.[643] Such practices not only contribute to stigmatisation but also the criminalisation of mental illness.[644] The guilty plea is potentially not voluntary, as it has been induced.[645] Concerns have further been raised about the possible discriminatory nature of this practice since non-mentally ill accused persons are not required to plead guilty in order to access services.[646] The accused's rights are effectively reduced since they are compelled to incriminate themselves and plead guilty in order to gain access to the court-monitored treatment programme.[647] The accused is, in effect, denied the right to be presumed innocent until proven guilty.[648] Strong opinion exists that a guilty plea should not be required for participation in a Mental Health Court programme.[649]

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640 Setlzer shares this view. See Seltzer 2005 Psychology, Public Policy and Law 570 at 579.

641 Stafford and Wygant 2005 *Behavioral Sciences and the Law* 245 at 246.

642 Schneider, Bloom and Heerema Mental Health Courts 96.

643 Schneider, Bloom and Heerema *Mental Health Courts* 96. The mentally ill accused might for example struggle to find employment due to his criminal record. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 576-577 and 583. Schneider, Bloom and Heerema *Mental Health Courts* at 87. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 576, 577 where it is highlighted that the fact that the mentally ill accused has a criminal record, will make it difficult for him to retain his housing provided by the state or employment once s/he completes the mental health programme. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 153 where these concerns are reiterated. Insisting on a guilty plea as part of the admission criteria into the treatment programme of the Mental Health Court, could hinder the goal of eventually successfully integrating the accused into the community since a guilty plea will affect the changes of the accused to qualify for housing and employment after completion of the programme since he will still have a criminal record. See Bernstein and Seltzer 2003 *D C L Review* 143 at 161.

644 Schneider, Bloom and Heerema *Mental Health Courts* at 95, 96. Adds to criminalisation of the mentally ill accused, which is what the Mental Health Court is attempting to avoid by diverting the mentally ill accused away from the traditional criminal justice system. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 577.

645 Schneider, Bloom and Heerema *Mental Health Courts* 87. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 160.

646 Bernstein and Seltzer 2003 *D C L Review* 143 at 153.

647 Welch and Fuller *American Criminal Courts* at 103. It is added that the standard of proof for the guilty of the accused is often dropped during problem solving court proceedings, which means that evidence is accepted that would not normally have been accepted to prove the accused's guilt.

648 Welch and Fuller *American Criminal Courts* at 103.

649 Schneider, Bloom and Heerema *Mental Health Courts* at 96. Also see Seltzer 2005 Psychology, Public Policy and Law 570 at 577 who substantiates this point by pointing out that Mental Health Courts are supposed to be less punitive than criminal courts, hence a guilty plea does not fit in with

The guilty plea can, however, be viewed to benefit for the victim of a felony. Should the offender fail in treatment, the offender is sentenced to the jail term agreed upon at the time of the guilty plea.[650] This enables prosecutors to secure a felony conviction without having to conduct trials, thus saving resources and sparing witnesses who are often the victims of the crime from the unpleasant experience of testifying.

8.4 Suggestions for improvement of the American Mental Health Court model

8.4.1 Enforce Mental Health Court orders against service providers

One major frustration with regard to the optimal functioning of Mental Health Courts is that these courts do not have the necessary authority to hold mental health service providers accountable for providing the desired services to the participants.[651] Many service providers merely provide medication and occasionally provide counselling.[652]

One way of giving courts this authority is by giving them the power to decide to which service provider the funds for the services should be channelled and further for the court to exercise its contempt powers.[653]

Another suggestion related to mental health service providers is to incorporate mental health services for offenders into the mainstream mental health system, rather than having a separate parallel court-monitored mental health system for offenders.[654] This will address the frustration that Mental Health Courts are experiencing in terms of a limited amount of services being available to the court.[655] This suggestion is supported by the view that the mental health system should be reformed to be more accessible to those with mental illness and that such system reform should be ongoing whilst Mental Health Courts are put in place to address the immediate problem of the growing number of mentally ill persons in the criminal justice system.[656] The fact that the mental health care system is benefiting

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this goal. Yet, some Mental Health Courts, especially those in the Unites States of America tend to require a guilty plea as a condition for participation in the Mental Health Court.

650 The delivery of justice to the victim of the crime is effectively secured by the accused entering a guilty plea prior to treatment so that, should he fail to complete it, he will be found guilty. Fisher http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPageandPageID=603andcurrentTopTier2=true (Date of use: 7 March 2011) at 6.

651 Seltzer 2005 Psychology, Public Policy and Law 570 at 580. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 159.

652 Seltzer 2005 Psychology, Public Policy and Law 570 at 582.

653 Seltzer 2005 Psychology, Public Policy and Law 570 at 580.

654 Seltzer 2005 Psychology, Public Policy and Law 570 at 581.

655 Seltzer 2005 Psychology, Public Policy and Law 570 at 581.

656 Bernstein and Seltzer 2003 *D C L Review* 143 at 160.

from Mental Health Courts in the sense that their financial obligations in terms of treating mentally ill accused persons have been shifted to the state correctional departments[657] might limit enthusiasm for the much-needed reform.

8.4.2 Supplement with pre-booking programmes

To optimise the impact of these speciality courts, they should not function in isolation but should have some pre-booking programme as well where law enforcement and mental health work together to avoid contact with the criminal justice system for persons with mental illness altogether.[658]

The importance of combining the services of the Mental Health Court with a pre-booking programme is stressed as an important factor to limit arrests of persons with mental illness.[659] The absence of a pre-booking programme co-existing with the Mental Health Court programme might lead to mentally ill persons being arrested in the hope that they can access mental health services through the Mental Health Court [660], which defeats the goal of the Mental Health Court movement, namely to limit the interaction of the mentally ill with the criminal justice system. Seltzer motivates that crime prevention and/or pre-booking programmes [661] rather than post-booking programmes [662] would be more beneficial to the mentally ill in (potential) conflict of the law. She warns that if a court such as the Mental Health Court is not accompanied by the development of pre-booking programmes, mentally ill individuals will continue to be arrested by the police with the goal of getting them into mental health care services.[663] Approximately half of all Mental Health Courts operate in

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657 Bernstein and Seltzer 2003 *D C L Review* 143 at 161.

658 Bernstein and Seltzer 2003 *D C L Review* 143 at 155, 162 where the co-operation is stressed as the way forward for the optimal treatment of persons with mental illness.

659 Bernstein and Seltzer 2003 *D C L Review* 143 at 160.

660 Bernstein and Seltzer 2003 *D C L Review* 143 at 160.

661 A crime prevention diversion programme is where the aim is to intervene prior to police intervention. See Schneider, Bloom and Heerema *Mental Health Courts* at 70. Prebooking diversion programmes is where the individual is diverted to the mental health care system, before a criminal charge is filed. See Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 462. Also see the discussion of diversion programmes earlier in this chapter. Seltzer is of the view that the effectiveness of Mental Health Courts cannot be measured accurately, without considering whether there are initiatives being developed to make mental health care services available to those individuals who are at risk of arrest because of their mental illness. See Seltzer 2005 Psychology, Public Policy and Law 570 at 581.

662 A post-booking diversion programme is where the accused is diverted after having been arrested and charged with a criminal offence. See Schneider, Bloom and Heerema *Mental Health Courts* at 78. Also see the discussion of diversion programmes earlier in this chapter.

663 Seltzer 2005 Psychology, Public Policy and Law 570 at 581.

isolation, without joining forces with a pre-booking programme.[664]

Seltzer goes so far as to say that the increased inflow of those with mental illness into the criminal justice system could better be addressed by filling the treatment gaps with regard to mentally ill persons in the community and further by training police officers on the resources available to the mentally ill individual.[665] If these measures are implemented, a specialised Mental Health Court, according to her, will not be necessary.[666]

8.4.3 Provide specialised assistance to mentally ill accused who do not qualify for diversion

The fact that the Mental Health Court only assists those who qualify for diversion based on criteria such as the treatability of the accused's condition disqualifies many fit but mentally ill accused persons from diversion. The Mental Health Court in the United States should consider providing specialised assistance to those who do not qualify for diversion, yet suffer from a mental illness, regardless of the treatability thereof. It is only through such an approach that the entire fit but mentally ill accused population will be reached and benefit from an initiative such as a Mental Health Court.

9 COMPARISON OF DIVERSION IN THE UNITED STATES OF AMERICA WITH THE SOUTH AFRICAN SYSTEM

9.1 Legislation

The United States legislation contains a presumption of fitness, whereas South African legislation lacks such a provision.

Both the United States system and the South African system places an obligation on a presiding officer to refer an accused for observation once the issue of mental illness is raised.

9.2 Fitness assessments

In the United States of America, two mental health practitioners must assess an accused's

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664 Sirotich 2009 J. Am. Acad. Psychiatry Law 461 at 464.

665 Seltzer 2005 Psychology, Public Policy and Law 570 at 583, 585. Seltzer opines further that Mental Health Courts are in any event not addressing the problem of over-representedness of the mentally ill in the criminal justice system. Presumably because the arrest and accordingly the entrance of the mentally ill accused into the criminal justice system is required in order for him to benefit from the Mental Health Court programme.

666 Seltzer 2005 Psychology, Public Policy and Law 570 at 583.

fitness to stand trial regardless of the seriousness of the offence. In South Africa, the number of persons that must assess an accused's fitness depends on the seriousness of the charges against him.

In the United States of America, a psychologist can, by default, be appointed to conduct a fitness assessment. A psychiatrist need not be appointed to conduct the assessment with the psychologist as two psychologists can be appointed to conduct the assessment. In South Africa, an application must especially be made for a psychologist to be appointed as part of the assessment team. The psychologist alone, however, cannot conduct a fitness assessment. This arrangement in South Africa arguably contributes to delays in fitness assessments due to the shortage of psychiatrists in South Africa, as pointed out above.

Both jurisdictions provide for a third psychiatrist to conduct an assessment where the mental health practitioners who conducted the first fitness assessment do not agree on their finding or where the first assessment's finding is opposed by the accused or the prosecution.

The default period for a fitness assessment in both jurisdictions is 30-days.

9.3 Out-patient treatment

The New York CPL specifically makes provision for fitness assessments to be conducted on an outpatient basis where appropriate. The South African legislation lacks such a provision, and the default position is that assessments are conducted on an inpatient basis. Some assessments on an outpatient basis have occurred in selected instances.

9.4 72-hour assessment period

After a finding of unfitness, an accused in respect of whom an order for detention is made may be released within 72-hours if they do not meet the criteria for voluntary or involuntary care in terms of the Mental Hygiene Law. In South Africa, even though the Mental Health Care Act contains the 72-hour provision, it is arguably not applied to accused persons found unfit to stand trial and in respect of whom an order for detention is made pursuant to the provisions of the Criminal Procedure Act.

10 COMPARISON OF THE MENTAL HEALTH COURT MODEL IN THE USA WITH THAT OF CANADA

10.1 Legislation

Both jurisdictions contain a legislative presumption of fitness.

The Canadian system leaves room for the judge to exercise his discretion in respect of referring an accused for a fitness assessment, whereas the US criminal justice system places an obligation to refer an accused for an assessment where a mental health issue arises.

In Canada, the assessment period for fitness is limited to 5-days, whereas in the USA, it is set at 30-days.

In Canada, the fitness assessment is conducted by one mental health practitioner, whereas it is conducted by two in the United States of America. The seriousness of the charges against the accused is not a factor in deciding how many mental health practitioners should assess an accused, as is the case in South Africa.

10.2 Fitness test

The fitness test used in the United States of America requires that the accused has a rational understanding of the case against him, whereas there is no such requirement in the Canadian fitness test.

10.3 Mental Health Court model

10.3.1 Goals of the Mental Health Court

A goal that the Toronto Mental Health Court and the Brooklyn Mental Health Courts have in common is that they aim to divert mentally ill accused persons away from the criminal justice system into treatment programmes to address the underlying cause of the criminal behaviour.

The Toronto Mental Health Court aims to expedite pre-trial issues with regard to fitness. It is evident through its functioning, as explained in chapter 4, that the processes are all geared towards moving the accused out of the criminal justice system as soon as possible. The expeditious resolution of pre-trial issues is not one of the primary objectives of the Brooklyn Mental Health Court, although the court aims to establish fitness for diversion

within 21 days.

The Brooklyn Mental Health Court is specifically aimed at enhancing the collaboration between the criminal justice system and the mental health care system and sets out to establish a model of Mental Health Court that can be transplanted in other jurisdictions. The Toronto Mental Health Court's goals are more focused on its immediate community, where it aims to bridge the gap between the criminal justice system and the mental health resources available to those in the system.

10.3.2 Referral to the Mental Health Court

In the United States of America and specifically in New York, it is compulsory to refer any case in which mental illness is an issue to the Brooklyn Mental Health Court. In Canada, it is not compulsory to make such a referral as the criminal court may order an assessment and make a disposition where they deem it appropriate.

In Canada, higher courts such as appellate courts often approach the Mental Health Court for assistance in matters involving mental illness. This is presumably not the case in the United States of America since this court does not provide assistance to those with mental illnesses who do not qualify for diversion.

In Canada, all accused persons may be referred to the Mental Health Court for a fitness assessment regardless of the seriousness of the offence. Such an assessment may be the only function that the Mental Health Court performs in that particular case since persons accused of serious offences do not qualify for the diversion component of the Canadian Mental Health Court. In the American Mental Health Court, persons accused of serious crimes will not necessarily be assessed for fitness by a Mental Health Court since being accused of a violent crime is one of the screen-out factors that is applied during the first stage of the Mental Health Court process, unless the Mental Health Court specifically decides to deal with violent crime.

10.3.3 Eligibility criteria

With regard to the psychiatric eligibility criteria, the American Mental Health Court places a lot of emphasis on the treatability of a certain mental health diagnosis for purposes of admission into the Mental Health Court treatment programme. The Brooklyn mental health court requires that the accused must have a serious mental illness for which there is a known treatment. The Canadian model focuses less on treatability, presumably because it provides services to those who do not qualify for the diversion component of the court as

well. For those accused who do qualify for diversion, a formal mental health diagnosis is not necessarily required. The Toronto mental health court seems to assist accused persons with serious and less serious mental illnesses.

Both systems exclude persons with mental retardation and personality disorders from their treatment programmes if an accused person has such a condition as an only diagnosis.

With regard to the legal criteria, the American Mental Health Court considers cases involving serious violence as well, thus not only misdemeanours. The Canadian Mental Health Court provides assistance to all accused persons, regardless of the seriousness of the offence but only allows those charged with minor offences into the diversion component of the Mental Health Court.

10.3.4 Voluntary participation

The practice that allows Mental Health Court participants to opt-out of the Mental Health Court programme at any time differs from the position in the Canadian Mental Health Courts where there are certain parts of the Mental Health Court proceedings during which a participant cannot leave the proceedings.

Many Mental Health Courts in North America, however, do not allow participants to opt-out of diversion programme once enrolled.[667] This practice can attract criticism from those already sceptical of the true voluntary nature of Mental Health Court participation. Voluntary participation in the Mental Health Court programme is absolutely imperative, and if this is not the case, singling out mentally ill individuals for separate and different treatment by the Mental Health Court could constitute a possible violation of equal protection guarantee under the American Constitution, as well as contravening the provision in the Americans With Disabilities Act [668] that prohibits discrimination by a state programme. [669]

10.3.5 Guilty plea

In the USA, a guilty plea is often set as a prerequisite for participation in the Mental Health Court programme. This is the practice in New York. This attracts warranted criticism. The

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[667] Schneider, Bloom and Heerema *Mental Health Courts* at 91. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 152.

[668] 1990 (42 U.S.C. § 12101

[669] Seltzer 2005 Psychology, Public Policy and Law 570 at 574. Also see Bernstein and Seltzer 2003 *D C L Review* 143 at 150. The 14th Amendment to the American Constitution guarantees equal protection to all under the law.

requirement of a guilty plea for participation presupposes fitness and criminal capacity, which may not necessarily, by default, be present in each particular case.

In Canada, the accused need only admit his involvement in the crime that he is accused of, and such admission may not be used against him in the event that his case is processed through the traditional criminal court at a later stage.

10.3.6 Diversion programmes

The Canadian Mental Health Court has a diversion component attached to the court but is not a diversion programme as such. The American model seems to be a diversion programme as such since it does not assist an accused person who does not qualify for the court-monitored diversion programmes offered in the Mental Health Court.

10.3.7 Sanctions for non-compliance with treatment programme

The American Mental Health Court, and in particular the Brooklyn Mental Health Court, employs jail time as a sanction for non-compliance. The Canadian Mental Health Court specifically avoids this sanction due to the potential anti-therapeutic nature thereof. It is also clear how incarceration can be seen as contradicting the very goal of the Mental Health Court, namely to reduce the mentally ill accused person's contact with the criminal justice system.

11 CONCLUSION

The problem-solving court movement gained significant momentum in the United States of America, as is evident from the high number of Mental Health Courts that have been established across the country.

The fitness test, as laid down in the *Dusky* judgment, is widely accepted across the United States of America as clear and rational. Even so, the standard set to be found fit to stand trial is not very high. The majority of those sent for fitness assessments in the United States of America is found fit to stand trial.

The American court structure and, particularly, the court structure in Brooklyn, New York, provides for all cases involving mental illness to be referred to the Brooklyn Mental Health Court. This Mental Health Court has a strict initial screening phase during which screening out criteria with regard to the type of offence and type of illness is applied. Many persons with mental illnesses may be screened out at this early stage and not have access to the

services offered at the Brooklyn Mental Health Court.

The Mental Health Court model employed in the Brooklyn Mental Health Court is vastly different from that employed at the Toronto Mental Health Court. The Brooklyn Mental Health Court considers serious offences for diversion as well, widening the net of persons that could benefit from the Mental Health Court treatment programmes. The Brooklyn Mental Health Court, however, focus heavily on treatability as an eligibility element, which in turn could exclude a number of persons from the treatment programmes.

Notably, the requirement of a guilty plea in the American model raises concerns, and the necessity thereof is questioned. Similarly, the use of jail time as a sanction for non-compliance with the court treatment programme is potentially counter-therapeutic and does not truly serve the objectives that the Mental Health Court aims to achieve.

The fact that in both these systems, Mental Health Courts are allowed to determine their own processes makes the idea of a Mental Health Court viable in other jurisdictions and allows processes to be adjusted in line with the constitutional and procedural framework within which it functions.

The next chapter will explore aspects of a viable Mental Health Court model for South Africa, bearing in mind the existing criminal procedural requirements and constraints.

CHAPTER 6

MENTAL HEALTH COURTS FOR SOUTH AFRICA – A RECOMMENDATION

1 INTRODUCTION

The previous chapters explored the position of the mentally ill accused person in the South African criminal justice system and explained the relevant psychological aspects related thereto. Challenges facing the South African criminal justice system and the forensic system, in particular, were highlighted. The suggestion of a South African Mental Health Court as a therapeutic response to mentally ill accused persons was made early on in this research, and the ways in which this court could address certain challenges in the current system were pointed out throughout.

The Mental Health Court models as they are employed in Canada and the United States of America were analysed, and consideration was given to the concerns regarding each model. The manner in which these courts contribute to the therapeutic outcomes of cases involving mentally ill accused persons became clear as the discussion of each of these models progressed.

This final chapter summarises the research findings in each previous chapter and answers the main research questions posed. Finally, this chapter proposes a Mental Health Court model for South Africa by suggesting procedural dynamics for such a court and some legislative amendments in order to facilitate this initiative. This proposal is made by considering the positive attributes of the two Mental Health Court models considered earlier in this research with due regard to the unique South African context in which such a court will have to function.

2 SUMMARY OF RESEARCH FINDINGS

2.1 Introduction

This section summarises the research findings of each chapter synoptically. No new insights are offered in this section as it purely serves as an overview of the discussions contained in each chapter.

2.2 Chapter 1

This first chapter pointed out that mental illness can become relevant during criminal proceedings because of a lack of fitness to stand trial or criminal capacity. Since this research focussed on pre-trial issues, aspects relating to fitness were discussed in detail rather than criminal capacity.

The chapter explained that the research is motivated by the fact that the number of mentally ill persons in the criminal justice system is increasing globally. Persons with mental illness are mostly arrested for petty crimes.

The chapter explained that the majority of accused persons assessed for fitness to stand trial are found fit to stand trial. It explained that an accused could, according to the current provisions of the South African Criminal Procedure Act, be found either fit to stand trial or unfit to stand trial. It highlighted the fact that an accused can be found fit to stand trial despite the fact that he has a mental illness. It was submitted that the latter group of accused persons form a third group in the fitness continuum, namely: fit, but mentally ill.

The chapter pointed out that the position of the fit but mentally ill accused is not regulated by the South African Criminal Procedure Act and the only option for such an accused is to proceed to trial through the normal criminal justice processes. No further consideration is given to the mental illness unless the fitness issue is raised again later in the proceedings or unless the accused raises a lack of criminal capacity as a defence.

The fit but mentally ill accused are often incarcerated awaiting trial. Incarceration has a detrimental effect on the mental state of a mentally ill accused. Mental health care in correctional facilities is not always available to those awaiting trial, and this lack of treatment could lead to inappropriate behaviour or re-offending. This is known as the revolving door phenomenon where mentally ill accused persons come into conflict with the law repeatedly.

The chapter explained that this research was dedicated to exploring an alternative to traditional prosecution for the fit but mentally ill accused. Such an alternative requires that skills from non-legal fields, especially mental health, be applied in the criminal justice system.

This research proposed the implementation of Mental Health Courts as a specialised alternative to traditional prosecutions for mentally ill accused persons in South Africa. The study of the Mental Health Court movement and its various models were explored in this

research with the ultimate aim to propose a similar alternative to traditional prosecution for South African accused persons who are fit to stand trial but nonetheless mentally ill.

Important concepts as they were used and relied on throughout the research were explained, and the research was demarcated here. The choice of jurisdictions in the research, namely that of Canada and the State of New York in the United States of America, was motivated as predominantly guided by the Mental Health Court model they employ.

Finally, the limitations of the research were set out, in particular, that the research would not include detailed consideration of mental illness in the context of criminal capacity and would further not include the involvement of the mentally ill person in civil litigation. Chapter 1 concluded with a short overview of the chapters which followed.

2.3 Chapter 2

This chapter provided the background to the research and contextualised the issues involved.

The chapter offered a brief overview of the historical treatment of mentally ill persons and what the causes of mental illness were believed to be. The position in South Africa was highlighted throughout. It was shown that mentally ill persons were treated badly in the past and that little consideration was given to their human rights.

It was established that there is a link between mental illness and criminal behaviour despite disagreements on this issue. Mentally ill persons are mostly arrested for petty crimes and most often suffer from schizophrenia. Failure to take prescribed medication combined with homelessness is often associated with arrests of mentally ill persons.

The forensic setting was explained as the environment in which the expertise of the legal field on the one hand, and those in the mental health care field on the other, meet in the criminal justice system to address issues of mental illness. The interplay between these two fields was briefly pointed out, and the involvement of prisons and psychiatric institutions as facilities that mentally ill accused persons encounter were discussed. Potential challenges were pointed out throughout the discussion, *inter alia*, overcrowding in prisons, lack of mental health care services in prisons, and the lack of available beds in psychiatric institutions where forensic assessments can be conducted. Psychiatric facilities further lack the professional staff to conduct these assessments.

The chapter suggested that considering all the challenges of the current system, an alternative to traditional prosecution for the mentally ill accused should be considered. Diversion options as alternatives to the traditional criminal justice system were discussed with a brief overview of the main types of diversion. This discussion on diversion was generic and not jurisdiction-specific since such jurisdiction-specific discussions are contained in chapters 3 to 5.

Therapeutic jurisprudence as the driving force behind diversion programmes was discussed in detail with a particular focus on its nature and implementation in the criminal justice setting. The criticism levied against therapeutic jurisprudence was explored and responses to such criticism offered. The discussion on therapeutic jurisprudence concluded that the potential benefit of this approach outweighs the criticism levelled against it.

A discussion of Mental Health Courts as a suggested new approach to the mentally ill in the criminal justice system was included, focussing on the underlying principles of therapeutic jurisprudence and the aims thereof.

Mental Health Courts as an alternative to traditional prosecution for mentally ill accused persons was discussed with a focus on the general goals of such courts. The emergence of Mental Health Courts in Canada and the United States of America was discussed as the backdrop against which the establishment of a Mental Health Court for South Africa should be considered since many of the reasons for the emergence in these jurisdictions are equally applicable in South Africa. These reasons include the overrepresentation of persons with mental illnesses in the criminal justice system and the long delays experienced in finalising fitness issues during trial.

A large portion of chapter 2 constituted discussions on non-legal issues, which are pertinently relevant to this research since the law has to adjust to address issues created in various fields of discipline.

2.4 Chapter 3

The South African legal framework within which the mentally ill accused's case is processed formed the focus of this chapter. The relevant legislative provisions were discussed to explain the parameters within which the case of a mentally ill accused person is considered. The Constitution, Criminal Procedure Act, Mental Health Care Act, and Correctional Services Act were discussed in particular. These Acts were discussed in detail since especially the Criminal Procedure Act and the Mental Health Care Act are ultimately

the legislative provisions that will have to be amended to make provision for a Mental Health Court in South Africa. The development of these pieces of legislation was included to show some of the progress with the treatment of the mentally ill in the criminal justice system that has been made to date.

The focus of the chapter shifted to procedural issues surrounding fitness to stand trial. The purpose of a fitness assessment was explored first, followed by the order for a fitness assessment with a focus on the content of the order and the juncture at which it can be made. The two-prong test for fitness was discussed. The actual assessment was discussed with a focus on the duration and place thereof.

Some provisions in the Criminal Procedure Act pertaining to the appointment of mental health professionals to conduct assessments were highlighted as problematic, and questions were posed about the true effectiveness thereof.

The role and responsibility of these professionals during the fitness assessment were set out. The personal and procedural consequences of a finding of fitness versus a finding of unfitness were discussed in detail.

The chapter showed that detailed provision has been made for persons found unfit to stand trial and that the position of the unfit accused has recently even been considered by the Constitutional court. The position of the fit accused is less complicated but not without problems in that no further consideration is given to an accused with a mental illness who is nonetheless found fit to stand trial. A third category on the fitness continuum was thus identified, namely the fit but mentally ill accused whose position is not regulated by South African law. The cases of this category of accused persons should ideally not be processed through the traditional criminal justice system. Alternatives to traditional prosecution should be explored.

The concept of diversion in South Africa was briefly explored with a focus on rehabilitation as the desired outcome of diversion. This discussion elucidated the fact that there is currently no diversion option for the mentally ill accused in South Africa. A case was made out that Mental Health Courts can provide a viable alternative to traditional prosecution for a fit but mentally ill accused. The proposal is supported by the fact that the South African Department of Correctional Services has not only identified mentally ill accused persons as a special group of persons requiring specialised care but have shifted their focus to rehabilitation. Specialised care for the mentally ill accused with a view on rehabilitation is what the Mental Health Court has to offer.

Chapter 3 highlighted the current challenges in the South African criminal justice system ranging from lack of space in prison for accused persons awaiting assessment to lack of space in psychiatric facilities to accommodate inpatient assessment and delays caused by these resource shortages. Various suggestions were made to remedy these challenges in the current system, with the optimal solution being the implementation of a Mental Health Court.

2.5 Chapter 4

The Mental Health Court model employed in Canada formed the focus of this chapter.

The chapter set out the legislative framework as it affects the mentally ill accused person in the Canadian criminal justice system with a specific focus on the Canadian Constitution, Criminal Code and Mental Health Legislation. The Canadian system makes provision for a presumption of fitness and has clear provisions regarding fitness procedures.

The criminal court structure in Canada was set out to ascertain the place of the Mental Health Court in the court system. Mental Health Courts were acknowledged as lower criminal courts that may consider less serious offences. Review Boards as an important role player for mentally ill accused persons in the criminal justice system were explained, and their function highlighted. These Review Boards are particularly relevant to those accused persons found unfit to stand trial.

Procedural aspects pertaining to the mentally ill accused person in the Canadian criminal justice system were explored with a specific focus on the content of the order for assessment, the test employed to determine fitness to stand trial and the consequences of a finding of fitness versus unfitness. Of significance is that the period for fitness assessment is set at 5-days, and a presumption exists that such assessment is conducted out of custody.

The test for fitness to stand trial as it is understood in Canada and as it emerged through case law and legislation were explored, and criticism levelled against it discussed. Concern has been raised about the low threshold that applies when assessing fitness to stand trial in accordance with this test. Because of this low threshold, the majority of those sent for fitness assessments are found fit to stand trial and many persons who are potentially not fit to stand trial face the full force of the law and a criminal trial as a result.

Consideration was given to alternatives in the criminal justice system for mentally ill accused persons. Different types of diversion were considered, including Mental Health

Courts as a post-booking or post-charge diversion option. The particular model of the Canadian Mental Health Court, and in particular the Mental Health Court in Toronto, formed the focus of the remainder of the chapter.

The goal of the Canadian Mental Health Court is to speed up pre-trial issues such as fitness assessments and to reduce recidivism. Its underlying principles are voluntary participation, therapeutic jurisprudence and the involvement of a multi-disciplinary court team. The procedural dynamics of the court was explored by considering how the accused is referred to the Mental Health Court, and the two main phases in the court process, namely, the admission phase and the programme phase, were explained. Each phase has various stages, and these were discussed. The Canadian Mental Health Court model is easy to understand, and the processes seem crystallised. The eligibility criterion is clear, and the options for the accused once at the Mental Health Court are clear.

The Canadian Mental Health Court is not a diversion programme *per se* but has a diversion component attached to it. The diversion component of the Toronto Mental Health Court is reserved for those accused of minor offences. The Mental Health Court, however, offers assistance to those accused persons who do not qualify for diversion but who require the assistance of the Mental Health Court in which specialised skills are housed. The Mental Health Court can be of assistance to these accused persons by assisting them with a bail application where the conditions of bail will have a treatment component built into it or can assist the accused person to resolve his case with a guilty plea in the Mental Health Court. On agreement between the parties, the Mental Health Court may also assist in cases where the accused enters the insanity defence.

The successes of the Canadian Mental Health Court model were identified as cost-saving, lower recidivism and reduced delays in fitness assessments. Challenges were, however, also identified. Specific challenges included concerns about the true voluntariness of participation in the Mental Health Court programme, and the concern that accused persons in the criminal justice system will receive preferential treatment in terms of mental health services at the disadvantage of those in the community that are in need thereof. A limited pool of resources may have this result. It was suggested that resources be allocated specifically for the Mental Health Court and that the Mental Health Court model be improved by supplementing it with an active pre-booking diversion programme.

The chapter concluded with a brief comparison of some main aspects of the South African criminal justice system as it pertains to the mentally ill and that of Canada with due consideration to the fact that Canada makes use of a Mental Health Court as diversion for

the mentally ill but fit accused person.

The Canadian Mental Health Court model succeeds in making its specialised skills available to mentally ill accused persons regardless of the seriousness of the offence because of the fact that it provides services to those who do not qualify for diversion due to the fact that they, for instance, committed a serious offence which does not qualify for diversion according to the Canadian Criminal Code.

2.6 Chapter 5

The Mental Health Court model employed in the United States of America was explored in this chapter. The structure of this chapter was similar to that of chapter 4, in which the Canadian Mental Health Court model was discussed. The similarity in structure was aimed at assisting with the comparison between the two very different Mental Health Court models employed in these two jurisdictions.

The legislative framework as it pertains to the mentally ill accused in the United States was discussed with specific reference to the American Constitution, the Criminal Code and mental health legislation. The fact that a presumption of fitness applies was highlighted. Legislation, as it applies in New York, was singled out since the Mental Health Court model discussed in this chapter was mainly based on the model used in Brooklyn, New York. The legislative framework and regulation of criminal law and procedure in America are much more complex than that of Canada because every state in America has its own constitution and its own legislation pertaining to the enforcement of criminal law and procedure.

The dual court structure was explained, illustrating the place of Mental Health Courts in the hierarchy of courts. The criminal court system in the United States does not incorporate Review Boards, as is the case in Canada.

The concept of fitness as it applies in the United States was explored, followed by the order for fitness to stand trial and the test employed to establish it. The test has crystallised through case law and is accepted as clear, although the threshold for being found fit to stand trial is very low, resulting in the majority of those sent for assessment being found fit to stand trial.

The actual assessment was discussed by looking at who should conduct it, where it takes place, and how long it lasts. Fitness assessments are ordered for 30-days at a time and may be conducted on either an inpatient or an outpatient basis depending on if hospitalisation is required for the assessment or not.

The personal and procedural consequences of finding of fitness were contrasted with a finding of unfitness. Potential indefinite detention of those found unfit to stand trial has been resolved through case law and detailed measures put in place to ensure that detention is never indefinite for unfit accused persons.

Diversion options in the United States were discussed with a particular focus on Mental Health Courts as a form of diversion. The particular model of Mental Health Court employed in the United States formed the focus of the remainder of the chapter.

The goals of the American Mental Health Court are diversion and rehabilitation. The underlying principles were explored and established as similar to those of Canada, although the underlying principle of voluntary participation receives much criticism in the United States model. The reason for this is that the Mental Health Court requires a guilty plea as a condition for participation in the court programme. This requirement presupposes fitness and criminal capacity, which may very well be a misconception in some cases.

The procedural dynamics of the Mental Health Court were discussed, and the phases are aligned with those in the Canadian model for ease of comparison. The stages within these phases, however, differ and were discussed accordingly. The court process in the American Mental Health Court seems less defined as compared to the Canadian processes. This might be because this Mental Health Court considers serious offences as well, which require a different approach depending on the particular case. The use of the term "assessment" potentially creates confusion as it is used for fitness assessments and eligibility assessments at the Mental Health Court.

The eligibility criterion was discussed in detail since the American model is a diversion programme *per se,* and admission criteria are very particular. The Brooklyn Mental Health Court allows accused persons charged with violent crimes into their diversion programme. Treatability of mental illness is one of the primary considerations for admission into the Mental Health Court programme.

The successes and criticism of the model as it is employed in the United States were discussed. The model attracts more criticism than the Canadian model, especially because of the fact that it requires the accused to enter a guilty plea before he is admitted to the Mental Health Court. Other concerns include the stigmatisation of the accused and the sanctions employed for non-compliance. The latter criticism is mostly against the use of jail time as a sanction.

The chapter included a brief comparison between the South African criminal justice system pertaining to the mentally ill accused and the American system with due consideration to the fact that the latter system makes use of a Mental Health Court for their mentally ill but fit accused person.

A brief comparison of the main differences between the Mental Health Court model employed in Canada and in the United States of America concluded the chapter.

3 ADDRESSING THE RESEARCH QUESTIONS

The main hypothesis of this research was that the current South African criminal justice system does not constitute the ideal structure within which to process cases of persons with mental illness. This applies in particular to accused persons found fit to stand trial but who nonetheless suffers from a mental illness, which may have contributed to the criminal behaviour from the outset. Currently, the cases of these accused persons are processed through the traditional criminal justice system without any further consideration given to the existing mental illness.

This research suggests that the current system could be supplemented with a Mental Health Court that functions within the current legislative and logistical framework but allows for persons with specialised knowledge and experience in mental health care to give their input in the processing of cases of mentally ill persons accused of crimes. The Mental Health Court, as a speciality court, diverts the mentally ill accused away from the criminal justice system into court-monitored treatment programmes where mental health skills are applied.

Mental Health Courts as a specialised solution will allow an alternative to prosecution for those who are found fit to stand trial after assessment but who are still mentally ill. No such alternative currently exists for this category of accused persons in South Africa. The need to divert mentally ill persons away from the criminal justice system is acknowledged by the Department of Corrections in its white paper where it states that:

> *It is the ideal that correctional centres should not accommodate mentally-ill offenders and that they should rather be diverted to institutions with the necessary knowledge to deal with them.*[1]

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[1] Department of Correctional Services "White paper on Corrections in South Africa" www.dcs.gov.za/AboutUs/COE/Documents/**WhitePaper**/**WHITE**%20**PAPER**%208.doc (Date of use: 22 August 2016) at 80.

These courts could further assist in cases where mental illness possibly affects the accused's criminal capacity.

In exploring the hypothesis, various research questions were posed to ascertain the possible benefits of such an alternative to traditional prosecution. The main research questions are clarified below.

3.1 Why should a specialised solution be explored for mentally ill accused persons in the criminal justice system?

Mentally ill persons in the criminal justice system have been identified by the Department of Correctional Services as a group that requires specific attention.[2] Options have to be considered to better address the needs of mentally ill accused persons for the benefit of the criminal justice system and the public at large.[3] Some specific reasons for considering such a specialised solution in the South African context are highlighted below.

3.1.1 Overrepresentation of mentally ill persons in the criminal justice system

The previous chapters illustrate that persons with mental illnesses are overrepresented in the criminal justice system. This is a consequence of various factors, *inter alia,* the deinstitutionalisation movement where many psychiatric hospitals were closed down, and psychiatric patients were released into the community for care, but often without the required support systems being put in place. The lack of community support leads to the increased contact of mentally ill persons with the criminal justice system. Other factors that contributed to the increase of mentally ill persons in the criminal justice system are changes in legislation pertaining to involuntary admission to mental health care institutions that made dangerousness a primary requirement for admission, lack of training of police officers pertaining to mental health issues and non-compliance with medication.

Accused persons awaiting psychiatric observation in court contribute to overcrowding in prison as these accused persons are most often detained in correctional facilities awaiting assessment. Mental health treatment is generally not available to accused persons

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2 Department of Correctional Services "White paper on Corrections in South Africa"www.dcs.gov.za/AboutUs/COE/Documents/**WhitePaper**/**WHITE**%20**PAPER**%208.doc (Date of use: 22 August 2016) at 11, 80.

3 The benefit to the public lies therein that recidivism of those who committed offences because of their mental illness, will most probably be reduced as shown by studies conducted in other jurisdictions. As a result, the public will be less at risk of falling victim to a crime committed by a person who suffers from a mental illness and who has been in conflict with the law on a previous occasion.

awaiting psychiatric observation in prison and the position intensifies as the number of persons in need of mental health care increases.

Mentally ill persons encounter the criminal justice system more often than non-mentally ill citizens and often cycle in and out of the criminal justice system, known as the revolving door phenomenon. Reducing re-offending by persons with mental illnesses should be a priority and is in the interest of the accused and society as it translates into a safer society with less crime.

Mentally ill persons housed in the criminal justice system, rather than in the mental health care system, amounts to criminalisation of mental illness. This phenomenon should not be perpetuated and could be addressed by placing the responsibility for mental health care back with the health care system where the specialised mental health care skills are housed rather than with the criminal justice system. Mere rerouting of the pathway of a mentally ill accused person from one system to the other will soon merely cause problems such as overcrowding and delays in the processing of cases. For this reason, a unique diversion programme is needed that will keep mentally ill accused persons out of the criminal justice system and ensure that they get much-needed treatment without placing an undue burden on the mental health care system.

3.1.2 Long delays in finalising fitness assessments

What contributes further to a large number of mentally ill persons in the criminal justice system is the fact that those awaiting assessment for fitness to stand trial and criminal responsibility often have to wait in correctional facilities for the availability of a bed in a psychiatric facility where the assessment can be conducted. In South Africa, these waiting periods range from anything between three months to up to 2 years in some cases.

The fact that fitness assessments are routinely conducted on an inpatient basis for a 30-day period creates long waiting periods for those awaiting assessments. The fact that there are only ten psychiatric facilities in South Africa where these assessments can be done contributes to the delays in the assessment process.

Research shows that incarceration has a detrimental effect on a person with a mental illness and will, in all likelihood, causes a deterioration of the mental condition of such person. The incarceration of mentally ill accused persons is therefore counter-therapeutic. In addition, appropriate treatment for mental illnesses is not always available in correctional facilities. Delays in providing appropriate treatment as soon as possible have a negative

effect on the eventual treatability of the accused.

Currently, long delays are caused in the processing of cases of persons with mental illness due to challenges pertaining to resources in the current forensic system. This process must be expedited to protect the accused's right to a speedy trial and the accused's right to dignity.

3.1.3 Fit but mentally ill accused not acknowledged

The current criminal justice system acknowledges that an accused can be either fit to stand trial or unfit to stand trial. No consideration is given to the situation of a person who is fit to stand trial yet who suffers from a mental illness, either a type of mental illness (in different ranges of seriousness) that does not affect his ability to follow proceedings, or a mental illness that does affect this ability but does not affect it enough in order for him to be found unfit to stand trial according to the test for fitness.

This category arguably forms the largest part of the group on the fitness continuum. If the fact that the reason for requesting a fitness assessment in the first place is a suspicion that a mental illness is present is considered, with the fact that the majority of persons sent for fitness assessments are found fit to stand trial, it cannot be denied that a large portion of those found fit to stand trial may suffer from a mental illness.

It is, in particular, this category of persons for whom an alternative to traditional prosecution should be found.

3.2 What is needed to address the unique challenges that mentally ill accused persons bring to the criminal justice system?

The answer to this question is not one-dimensional and requires consideration of various aspects that could assist in paving the way for the implementation of a specialised solution for mentally ill accused persons. Various considerations in this regard are highlighted below.

3.2.1 Acknowledgement of the category of fit but mentally ill accused persons

As stated above, the majority of persons sent for fitness assessments are found fit to stand trial. It appears from the research that the threshold to be found fit to stand trial is generally not very high. The finding of fitness does not imply that a mental illness is absent. Many accused persons found fit might, therefore, very well suffer from a mental illness. These

cases will be processed through the traditional criminal justice system under the current procedural framework with no further consideration to the existing mental illness.

If this third category of accused persons is acknowledged, specialised solutions can be considered and implemented for them. Such specialised solutions can hold various potential benefits similar to the benefits that alternatives to traditional prosecution have had for other jurisdictions such as Canada and the United States of America. Among these are reduced recidivism by this group of accused persons, relief of court caseload, and some relief from the overcrowding problem in correctional facilities.

3.2.2 Alternatives to traditional prosecution for fit but mentally ill accused persons

A fresh approach to dealing with cases of accused persons suffering from a mental illness should be explored and, more in particular, the implementation of therapeutic jurisprudence. Therapeutic jurisprudence places the focus on the underlying cause of the "criminal" behaviour and focuses on treatment rather than punishment.

Specialised skills in mental health care are essential to deal effectively with cases of accused persons with mental illness. This may entail special training for all those involved in dealing with cases of mentally ill persons, including the judge, prosecutor, and police officers.

As part of a new approach, fitness assessments must be streamlined so that it takes up the least amount of time and allows for a fitness determination to be made as soon as possible so that the proceedings may continue and treatment of the accused may commence.

Consideration should be given to the incorporation of diversion options into the existing criminal justice legislation to allow for persons who are fit to stand trial but who suffer from a mental illness to be diverted away from the criminal justice system with the assistance of officials with special training in mental health care matters. Court-monitored diversion programmes should be developed and implemented using existing resources and supplementing them where necessary. Such alternative measures could further provide specialised assistance to accused persons with mental illnesses who do not qualify for diversion for whatever reason but wish to make use of the specialised skills housed in this alternative measure to prosecution. The proposed alternative is a Mental Health Court.

3.2.3 Implement Mental Health Courts as alternatives to prosecution

An alternative to traditional prosecution that this research focussed on is the Mental Health

Court initiative. This is a specialised court within the criminal court structure that diverts the fit but mentally ill accused away from the criminal justice system into court-monitored treatment.

These courts can assist in dealing with all cases involving mental illness and thereby lightening the load of the criminal courts that are currently overburdened with especially cases involving petty crimes.

Mental Health Courts can take on various forms depending on the needs of the specific community that it aims to serve. The underlying principle employed in a Mental Health Court, regardless of the form it takes on, is therapeutic jurisprudence. Therapeutic jurisprudence aims to address the underlying cause of criminal behaviour, namely, mental illness. Many crimes are committed due to mental illnesses going untreated or not treated properly. These crimes could have been prevented had proper treatment been administered and support services been in place to ensure that necessary treatment is continued.

These courts as alternatives to traditional prosecution can only be implemented if the benefits to the community at large are clear. Benefits of these courts include reduced recidivism, which in turns means a safer community with less crime. Therapeutic jurisprudence as a vehicle for restorative justice assists in restoring relationships in the community that have been tainted by the actions of the mentally ill accused. These courts have further reduced the caseload of criminal courts and result in a cost-saving to the system as fewer accused persons are admitted to psychiatric institutions for forensic assessments, which are a costly exercise. The delivery of justice to victims of crime is expedited in the process.

It is proposed that a Mental Health Court will provide an opportunity to implement all that is needed to address the current major challenges that the criminal justice system is experiencing when processing cases of persons with mental illness. It will allow for the application of therapeutic jurisprudence by specially trained staff with a view of diverting the mentally ill accused away from the criminal justice system into the mental health care system. Delays in finalising cases of mentally ill accused persons will further be reduced significantly through the implementation of Mental Health Courts.

4 UNIQUELY SOUTH AFRICAN ASPECTS TO CONSIDER WHEN DEVELOPING A MENTAL HEALTH COURT MODEL FOR SOUTH AFRICA

4.1 Introduction

As stated during the Mental Health Court discussion, a Mental Health Court model is tailored to address the needs of the particular jurisdiction in which it is established. In order for the Mental Health Court to be effective in the South African context, uniquely South African considerations have to be taken into account when considering the model. The process of implementing a Mental Health Court can start with a white paper documenting all the problems that the criminal justice system currently has in dealing with persons with mental illness.[4]

Some issues or challenges that have been identified in the South African criminal justice and forensic setting are indicative of the fact that alternatives to traditional prosecution for mentally ill accused persons are needed. Such a need has been expressed as discussed below. These challenges and current suggestions on how to address them can be aligned with the suggestion of a Mental Health Court for South Africa.

Some of the challenges that create an opportunity for a Mental Health Court to be established in South Africa are discussed below.

4.2 Mentally ill persons in the criminal justice system acknowledged as a special group requiring special solutions

The South African Department of Correctional Services identified remand detainees awaiting assessments and those with diagnosed mental illnesses as a special group in the system that requires specialised solutions. The Department has also acknowledged that it is ideal for these persons not to be detained in a correctional facility.[5]

Through implementing specialised solutions, the aim is to provide much-needed treatment to the accused and simultaneously reduce the number of remand detainees in correctional

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[4] This was the process followed before establishing the Brooklyn Mental Health Court. See O'Keefie K *The Brooklyn Mental Health Court Evaluation: Planning, Implementation, Courtroom Dynamics, and Participant Outcomes* (Centre for Court Innovation New York 2006) at 6. The Department of Correctional Services issued a white paper on remand detainees where the position of the mentally ill accused in the criminal justice setting is touched upon. No separate document highlighting particular challenges regarding mentally ill accused persons in the criminal justice system exists at date of completion of this research.

[5] Department of Correctional Services "White paper on Corrections in South Africa" www.dcs.gov.za/AboutUs/COE/Documents/**WhitePaper**/**WHITE**%20**PAPER**%208.doc (Date of use: 22 August 2016) at 80 where it is stated "It is the ideal that correctional centres should not accommodate mentally-ill offenders and that they should rather be diverted to institutions with the necessary knowledge to deal with them."

facilities. This, in turn, will reduce the overall number of persons detained in prisons and thus reduce the serious problem of overcrowding in South African prisons.

As pointed out earlier in this research, mental health treatment is not always available to all in need thereof in correctional facilities. Providing such much-needed treatment to the mentally ill accused will contribute to rehabilitation, which will, in turn, reduce recidivism.

4.3 Section 77 and 78 processes in terms of the Criminal Procedure Act is causing confusion

A number of cases discussed throughout the research show that many South African presiding officers are not always sure of the correct procedure in terms of assessment orders and orders to be made after the assessment. The line between the impact of a mental illness on the fitness of the accused versus the impact of the mental illness on the criminal capacity of the accused become blurred. This might be an indication that the referral process needs to be streamlined to avoid confusion. It might also emphasise the need for the involvement of mental health professionals at an earlier stage in the proceedings than at the assessment stage.

As alluded to earlier, a Mental Health Court necessarily incorporates input from the mental health care profession. Such input is sought throughout the Mental Health Court process. The involvement of mental health professionals as is provided for in the Mental Health Court will ensure that the best possible solution is sought in each particular case involving an accused person with a mental illness.

4.4 The need for diversion of mentally ill accused in the South African criminal justice system identified

Cassim suggests that the mentally ill accused in South Africa should be treated in the mental health care system rather than the criminal justice system.[6] She points out that diverting the mentally ill accused away from the criminal justice system will relieve the burden of backlogs on the criminal courts with cost- and time-saving in the long run.[7]

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6 Cassim F "The accused person's competency to stand trial – a comparative perspective" 2004 (45) *Codicillus* 17-27 at 27. She suggested that South Africa should follow the British model where those that are unfit to plead, are dealt with by the mental health care system rather than the criminal justice system. (See this source at 24-25).

7 Cassim 2004 *Codicillus* 17 at 27.

Gagiano, Van Rensburg and Van Schoor [8] suggest that those with known psychiatric disorders, as well as those who clearly exhibit signs of mental illness, should not be referred for observation in terms of the Criminal Procedure Act. They submit that the state should, in these instances and in particular where they are accused of minor offences, withdraw the charges and refer the accused for psychiatric treatment in terms of the Mental Health Act.[9] In this way, these individuals are removed from the criminal justice system. This is what the Mental Health Court sets out to achieve, to remove, especially those who committed petty crimes, from the criminal justice system and divert them into some sort of therapeutic programme to enhance their chances at rehabilitation which might, in certain instances, merely entail placing the patient on proper and effective medication.

There is currently no formal diversion programme in place for mentally ill accused persons in South Africa. Formal diversion is, however, not a foreign concept in the South African Criminal justice system, as is evident from the diversion built into the Child Justice Act.

Informal diversion away from the South African criminal justice system is, however, applied in the case of petty crimes [10], although such informal diversion is not specifically aimed at accused persons with mental illness. Where informal diversion is considered, the accused is required to acknowledge liability for the offence that he is charged with.[11] Participation in such informal diversion programmes is completely voluntary.[12] Compliance with the diversion programme will lead to a withdrawal of the charge(s) against the accused.[13] Once the prosecutor decides to divert the accused, a note to this effect must be made in the

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8 Gagiano CA, Van Rensburg PHJ and Verschoor T "Unnecessary committals for forensic observation: Section 77 and 78 of the Criminal Procedure Act 51 of 1977" 1991 (108) *SALJ* 714-718 at 715.

9 Gagiano, Van Rensburg & Verschoor 1991 *SALJ* 714 at 715. Also see Kruger A *Mental Health Law in South Africa* (Butter This initiative was probably also motivated by the fact that mental illness is the leading cause of disability in these two jurisdictions.[9]worths 1980) at 159 who points out that it was common when the Criminal Procedure Act just came into operation, that charges against mentally ill accused persons charged with minor offences such as minor assault, was withdrawn.

10 National Prosecuting Authority of South Africa *Awaiting Trial Detainee Guidelines.* *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use 17 August 2016) at 29.

11 National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016) at 29.

12 National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016) at 29.

13 National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016) at 29. The accused will have to submit a certificate of completion or some sort of proof of completion of the diversion programme.

docket of the accused, and the investigation diary must be endorsed with the outcome.[14]

The need for a diversion programme that is specifically aimed at mentally ill accused persons is identified as a gap in the current criminal justice system.

4.5 Lack of resources in the South African forensic setting acknowledged

The current system where accused persons are routinely admitted to psychiatric facilities for fitness assessments creates huge problems in terms of resource availability in the forensic setting.[15] In addition, mental health care services in correctional facilities where accused persons await assessment are inadequate.[16]

Pillay [17] points out that there is no reason why forensic assessments only have to take place on an inpatient basis, which entails admitting a patient to a psychiatric facility for a 30-day observation period. Assessment on an outpatient basis has very recently been ordered by South African courts [18] and is supported by the view that *all of the relevant aspects of the required examinations can be achieved during the day-visits.*[19] This applies to assessments for fitness to stand trial as well as criminal capacity and is promoted by South African psychologists.[20] This view provides support for the notion of a Mental Health Court in South Africa as the Mental Health Court's *inter alia* aim to expedite the assessment process by conducting assessments on site.[21] Pillay further advocates for the inclusion of psychologists in the assessment process to alleviate some of the resource constraints caused by a shortage of psychiatrists in South Africa.

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14 National Prosecuting Authority of South Africa *http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf* (Date of use: 17 August 2016) at 30.

15 See the discussion of the South African forensic setting in chapter 3 of this research where it is pointed out that there are only 10 facilities nationwide where forensic assessments can be one with some, such as Valkenberg hospital, only having capacity for 15 observation patients at a time – these include assessments for fitness and criminal capacity. Such shortages obviously creates backlogs in the system in that accused persons awaiting fitness assessments wait in correctional facilities for a bed to become available for unduly long periods of time.

16 The inadequacy of the mental health care services available in prisons was alluded to by the court in *De Vos* v *Minister of Justice and Constitutional Development* CC case at [43].

17 Pillay AL "Could S v *Pistorius* influence reform in the traditional forensic mental health evaluation format?" 2014 (44) *South African Journal of Psychology* 377-380 at 378.

18 S v *Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014). Pillay 2014 *South African Journal of Psychology* 377 at 378 point out that forensic assessment on an outpatient basis has been employed in the Limpopo province of South Africa for some time. It is however not a popular or generally accepted practice.

19 Pillay 2014 South African Journal of Psychology 377 at 378.

20 Pillay AL "Competency to stand trial and criminal responsibility examinations: are there solutions to the extensive waiting list?" 2014 (44) *South African Journal of Psychology* 48-59.

21 See the discussion of the various Mental Health Court models discussed in chapters 4 and 5 earlier in this research.

Having regard to the current resource challenges of the South African forensic system,[22] alternatives have to be sought to alleviate the situation. Mental Health Courts employ mental health professionals on-site who can conduct fitness assessments. Only those cases that require detailed observations are referred for off-site observation. This will have a direct impact on the resources in psychiatric facilities and will free those resources up for persons in serious need of mental health care treatment. Mentally ill accused persons referred for observation to psychiatric facilities are not necessarily in need of serious or urgent mental health care treatment, although they may be diagnosed with a mental illness.

4.6 Speciality courts in South Africa are not a new invention

The implementation of Mental Health Courts in other jurisdictions such as the United Kingdom,[23] which does not yet have Mental Health Courts, is currently under consideration. The reason why authors such as Frailing [24] promote the introduction of Mental Health Courts in the United Kingdom is that problem-solving courts are not a foreign concept to the United Kingdom. The United Kingdom has drug courts, community courts and domestic violence courts. Frailing, therefore, suggests that the framework is in place to introduce Mental Health Courts as well.[25]

The above argument applies to the South African context as well. Speciality courts such as domestic violence courts, children courts, commercial crimes courts, and equality courts have been part of the South African justice system for some time. The concept of a speciality court is therefore not strange to the South African justice system. Recently, child justice courts were introduced by the Child Justice Act, which creates a separate criminal process for children charged with criminal offences. Children have diverted away from the traditional criminal justice system into the specially created one having regard to the unique characteristics of child offenders.

The fact that there are various specialised courts in operation in the South Africa justice system confirms that South Africa is amenable to speciality courts. Speciality courts are typically established to address the needs of a particular group of people, whom the justice system has identified as a group of people in need of a tailor-made solution that the traditional criminal justice system is not currently offering. Alternatively, the introduction of

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22 See chapter 3 of this research where some of these challenges have been identified.

23 Frailing K "The genesis of mental health courts in the United States and their possible applicability for the United Kingdom" 2008 *C.S.L.R* 63-73 at 71.

24 Frailing 2008 *C.S.L.R* 63 at 71, 72.

25 Frailing 2008 *C.S.L.R* 63 at 72.

speciality courts can be an acknowledgement of the fact that specialised skills are needed to adjudicate cases that fall in a particular field of the law, for example, sexual offences, equality, and commercial crimes. Either reason can be employed in favour of establishing Mental Health Courts in South Africa.

Having regard to the above, Mental Health Courts will merely build forth on principles and concepts already introduced into the South African criminal justice system. It will merely focus on a different part of the population who, due to their mental illness, deserves both compassion and intervention.

The remainder of this chapter deals with the proposed Mental Health Court model for South Africa. The proposal is on a conceptual level, and only selected aspects of the suggested inner workings of the court are singled out.

5 PROPOSED MENTAL HEALTH COURT MODEL FOR SOUTH AFRICA

5.1 Introduction

Mental Health Courts can serve as a therapeutic response to accused persons with mental illnesses in the South African criminal justice system.

One of the reasons behind establishing Mental Health Courts in other jurisdictions is the view held by most advocates of the Mental Health Court movement that most mental illnesses are treatable conditions.[26] If mental illness were not viewed as treatable, alternatives to incarceration for the mentally ill accused would serve no therapeutic purpose.[27] Care should, however, be taken not to place too much emphasis on the treatability of a condition when considering the eligibility criteria of a Mental Health Court as this might exclude a large number of persons from the Mental Health Court treatment programme. Persons with intellectual disabilities are by necessary implication excluded from Mental Health Court treatment programmes, as these conditions are not treatable. This should, however, not necessarily exclude persons with intellectual disabilities from benefiting from the specialised knowledge available at Mental Health Courts.

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26 Heerema M "An introduction to the mental health court movement and its status in Canada" 2005 (50) C*rim.L.Q* 255-282 at 262. This view is supported by the expectation that the state should assume responsibility of providing treatment and facilities for such treatment.

27 Closely related to the belief that mental illnesses are treatable conditions, is the provision for hospital orders in the initial provisions of Bill C-30. These provisions never made it into the promulgated version of the legislation, mainly because of concerns regarding logistics of executing the orders. See Barrett J and Shandler R *Mental Disorder in Canadian Criminal Law* (Carswell Toronto 2006) at 1-13. See the discussion of the proposals for this Bill in chapter 5 of this research.

There is no "set" or "ideal" model of a Mental Health Court as each model is a response to the particular deficiencies in the particular mental health and criminal justice system.[28] Developing the ideal court for a particular jurisdiction should be a continuous evolutionary process as it becomes apparent which features of a particular model are efficient and which are less efficient and should be altered or replaced.[29] What a Mental Health Court is or what it should be is determined within the framework of the particular jurisdiction, based on the prioritisation of the particular inefficiencies of the relevant systems and the available resources that can be employed to address these inefficiencies.[30] South Africa can look to other jurisdictions for guidance on Mental Health Court models or aspects of various models that may work for the South African context.

This research considered the Canadian and the American Mental Health Court models. The researcher opines that selected features from both models can be borrowed to compile a Mental Health Court model for the South African context. This model should be informed by, *inter alia,* what would best serve justice, both for the victim(s) of the crime, the mentally ill accused and society.

5.2 Comments on implementing a court model from another jurisdiction

Nolan [31] stresses that when one jurisdiction looks at another to "borrow" laws and practices, it should always be born in mind that law is shaped by the particular culture and history of the people in the society to which this particular law is applied. It is therefore not always desirable to transfer laws directly from one jurisdiction to the next. Whenever laws from another jurisdiction are transferred, it should be done gradually.[32]

Borrowing a system from one jurisdiction to transplant to another should be approached with caution. Heeding this warning, the following goals for the South African Mental Health Court are proposed.

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[28] Schneider RD, Bloom H and Heerema M *Mental Health Courts – Decriminalizing the Mentally Ill* (Irwin Law Canada 2007) at 6, 102

[29] Schneider, Bloom and Heerema *Mental Health Courts* at 6, 103.

[30] Schneider, Bloom and Heerema Mental Health Courts at 85.

[31] Nolan JL "The international problem solving court movement: A comparative perspective" 2011 (37) *Monash University Law Review* 259-279 at 260. Solutions for a particular jurisdiction's problems are informed by cultural and historical factors that will shape the form of a particular problem solving court in a particular jurisdiction.

[32] See in general Nolan 2011 *Monash University Law Review* 259. The author gained this knowledge by visiting over 50 problem-solving courts in 6 jurisdictions. For more detail on his work, see Nolan JL *Legal Accents, Legal Borrowing: The International Problem Solving Court Movement* (Princeton University Press 2009).

5.3 *Goals of the South African Mental Health Court*

Three proposed goals of the South African Mental Health Court are set out below with the envisaged consequence of achieving each goal.

The first proposed goal is to divert mentally ill persons accused of minor offences away from the traditional criminal justice system towards treatment and rehabilitation.[33] Should this goal be achieved, the unique treatment needs of the mentally ill accused will have been addressed, the caseload in criminal courts would be less and overcrowding in prisons would be relieved because persons with mental illness will no longer be part of the statistics of backlogs and overcrowding.

The second proposed goal is to reduce recidivism by mentally ill accused persons through providing court-monitored treatment options to these accused persons aimed at rehabilitation. Achieving this goal will result in a cost-saving for the criminal justice system as mentally ill persons will not encounter the criminal justice system repeatedly. The caseload of criminal courts will be lightened, as there will be fewer cases due to reduced recidivism. The most prominent benefit of succeeding in this goal will be the fact that society will be safer due to less recidivism.

The third proposed goal of the South African Mental Health Court should be to significantly reduce pre-trial delays with regard to fitness issues in particular. Should the Mental Health Court succeed in speeding up the assessment process, justice for all will be delivered sooner, and resource-strapped psychiatric and correctional facilities will be relieved from at least some of the load since persons will no longer wait as long for assessments and assessments need not necessarily be conducted at psychiatric institutions for lengthy periods of time. Criminal courts will benefit from an even lighter caseload since cases involving mental illness and pre-trial issues associated with it will no longer be on the criminal court roll but referred to the Mental Health Court.

In addition to the three main goals, South African Mental Health Courts should make its specialised skills available to those accused persons who, for whatever reason, may not qualify to participate in the diversion component of the Mental Health Court but may still

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[33] The Mental Health Court in the United States of America is a diversion programme as such whereas the Mental Health Court in Canada has a diversion component attached to it but also assists accused persons who do not qualify for the diversion component. This is suggested for the South African model as well. This entails that, after assessment and determination of eligibility, a treatment programme is drafted for the accused to which he consents and subsequently participates in as an alternative to the traditional prosecution through the criminal court.

require the specialised skill of the court for purposes of a bail application for instance or to conduct a trial in the criminal court with the specialised assistance of the Mental Health Court in a case where lack of criminal capacity is raised as a defence.

South African Mental Health Courts should strive to ensure that persons with mental health skills are involved in the criminal process for persons with mental illness. Mental health professionals are involved on a full-time basis at the Mental Health Court for these purposes, and all the legal personnel must undergo special mental health training.

5.4 Underlying principles of the South African Mental Health Court

Therapeutic jurisprudence, voluntary participation and the use of a multi-disciplinary team should form the principles of the South African Mental Health Court. These three underlying principles form the basis of the Mental Health Court models in Canada and the United States of America. Each of these with specific reference to the South African context is discussed below.

5.4.1 Therapeutic jurisprudence

Therapeutic jurisprudence enables problem-solving courts such as Mental Health Courts to address the underlying cause of the offending behaviour. Mental illness as the reason behind the criminal act is targeted. This is done through treatment programmes aimed at rehabilitation and integration.

Therapeutic jurisprudence also monitors the impact of the law and its processes on a mentally ill accused and is aimed at ensuring that such impact is not anti-therapeutic. This underlying principle is the basis of the unique functionality of all Mental Health Courts and will inform its processes and rules. Therapeutic jurisprudence also impacts the manner in which cases are conducted in that cases in the Mental Health Court are generally conducted in a more relaxed atmosphere where the accused is addressed directly rather than through his legal representative.

Therapeutic jurisprudence uses the law as an agent to achieve therapeutic outcomes for those involved in the criminal justice process.

5.4.2 Voluntary participation

Voluntary participation can refer to two aspects of the accused's involvement in the Mental Health Court. Firstly, it can refer to the initial referral from the criminal court to the Mental

Health Court and secondly, it can refer to the accused's participation in the Mental Health Court treatment programme.

Initial referral to the Mental Health Court from the criminal court is not necessarily compulsory depending on the model that is followed. In the Canadian model, the criminal court has an option to refer the matter to the Mental Health Court. This model further allows an accused to remain in the criminal court and refuse initial referral to the Mental Health Court altogether. Where there is such refusal, the criminal court will make the necessary arrangements for a fitness assessment.

In the American model in the Brooklyn Mental Health Court, in particular, it is compulsory for the criminal court to refer all matters that involve mental illness to the Brooklyn Mental Health Court. Since this is a compulsory process for the court, the accused has no option to refuse initial referral to the Mental Health Court.

It is suggested that South African criminal courts must be under an obligation to refer any case involving mental illness to the Mental Health Court, regardless if it pertains to suspicion of lack of fitness or lack of criminal capacity. The motivation behind such an obligation is to ensure that the case is considered by persons with specialised skill in mental health.

Once at the Mental Health Court, the accused must undergo a fitness assessment, which is not optional, and the accused does not have a choice in this instance. The position is thus similar to the current position in the South African criminal justice system in that an accused may not refuse to undergo a fitness assessment. It should be permitted for the court to draw a negative inference from the fact that the accused refuses to co-operate with a mental health professional for the purpose of assessment for either fitness to stand trial or criminal capacity. Once these obligatory parts of the process are completed, the process becomes voluntary for the accused in the sense that he can opt for his case to revert to the criminal court at any point in time after the assessment.

Participation in the Mental Health Court treatment programme must, however, always be voluntary regardless of the model that is followed. The Brooklyn Mental Health Court that follows the American model requires prospective participants to enter a guilty plea as a prerequisite for admission into the treatment program.[34] This requirement contradicts the

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34 See the discussion of the model in chapter 5 of this research where the reasons for requiring a guilty plea are explained. It is, *inter alia,* requested to speed up prosecution in the event that the accused

voluntariness requirement and faces serious criticism.[35] The South African model of the Mental Health Court must not require a guilty plea as a prerequisite for participation in the treatment phase of the Mental Health Court. It is submitted that the South African model could employ "acknowledgement of responsibility" as a standard for admission as opposed to requiring the accused to plead guilty. This is currently the requirement for informal diversion in South Africa, as mentioned earlier.

The Canadian model requires the accused to accept responsibility for the crime that he is charged with, which is just short of a guilty plea, but this practice is motivated by the fact that diversion is only possible in Canada if there is a strong case against the accused in the first place. This is proposed for the South African model as well.

Accused persons in the Mental Health Court in Canada and the United States of America are required to consent to the unique treatment programme drafted for them (once they have been found eligible for the treatment programme) and consent to the possible sanctions that can be employed for non-compliance of the treatment programme. Once an accused signed up for the treatment programme, non-compliance therewith will attract sanctions since the accused voluntarily signed up for the programme and agreed to submit himself to the treatment conditions and sanctions for non-compliance. This is the case in both the Canadian and the American model.

The choice to participate in the programme should be exercised without coercion. Participation in the programme phase should therefore be completely voluntary. Where doubt exists about the accused's capacity to consent/agree to treatment, further investigation into his capacity should be undertaken before he is accepted into the treatment programme. There are ways to ensure that participation is voluntary by, *inter alia,* ensuring that the accused is well informed of the content of the programme and the sanctions that can be employed for non-compliance. The accused can further be requested to sign a consent form in which he agrees to participate in the programme drafted by the multi-disciplinary team.

5.4.3 Multi-disciplinary team

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does not complete the Mental Health Court program. Proponents of this requirement explain that If this is not a requirement, then anyone in need of mental health care can simply hand themselves over the police on a charge of theft for example and qualify for the Mental Health Court diversion component. It has to be limited to those whose mental illness causes them or is at the very least a contributing factor to their criminal behaviour as the aim is to reduce recidivism.

35 See chapter 5 for the criticism levied against this practice.

The Mental Health Court requires a specially selected and trained Mental Health Court team [36] consisting of professionals from both the mental health and legal fields. Working with mentally disordered persons within the criminal justice system requires a greater measure of tolerance and dedication and, most importantly, creative thinking.[37] Stefan and Winick [38] opine that those working in the Mental Health Court, in particular the judges and lawyers, must have well developed interpersonal skills, must eschew paternalism and must treat the individual in the court with respect and dignity. They must also have an understanding of the psychological dimensions of the interventions that the court aims to advance.

Problem-solving court judges are activist judges who are very aware of the discretion that they have in the problem-solving court and who are not afraid to use it.[39] Some speciality court judges, however, caution against giving speciality court judges too much discretion and emphasise that the judge should still maintain some distance from the case and the people involved therein in order to fairly and impartially dispense justice.[40]

A mental health practitioner working in the Mental Health Court must have knowledge and experience of working with the mentally ill accused.[41] These mental health practitioners must be particularly familiar with the community resources available in respect of particular diagnostic categories within which the participants mostly fall, including schizophrenia[42] and substance abuse disorders. The court support workers [43] in the Mental Health Court are mainly responsible for establishing essential links with community resources where

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36 Schneider, Bloom and Heerema *Mental Health Courts* at 114.

37 Schneider, Bloom and Heerema *Mental Health Courts* at 114.

38 Stephan S and Winick BJ "A dialogue on mental health courts" 2005 (11) *Psychology, Public Policy and Law* 507-526 at 508.

39 Nolan 2011 Monash University Law Review 259 at 263.

40 Nolan 2011 Monash University Law Review 259 at 264.

41 Schneider, Bloom and Heerema *Mental Health Courts* at 115 and 116. Mental Health practitioners with a lack of training or experience in forensic mental health issues would naturally shy away from treating mentally ill offenders. The issue of mental health practitioners having to wait in court to testify and having to explain or substantiate their treatment of the mentally ill accused, serves as deterrents for mental health practitioners to work with mentally ill accused.

42 Schizophrenia is the most common mental illness with which mentally ill accused present in the criminal justice system. See Schneider, Bloom and Heerema *Mental Health Courts* at 115. Also see Torrey EF, Stieber J, Ezekiel J, Wolfe SM, Sharfstein J, Noble JH and Flynn LM *Criminalizing the Seriously Mentally Ill. The Abuse of Jails as Mental Hospitals* (Public Citizen's Health Research Group and the National Alliance for the Mentally ill 1992) at 46 where it is indicated that individuals with paranoid schizophrenia are more likely to face charges of assault as they may feel the need to "protect" themselves from someone who they believe is either following them or trying to hurt them.

43 See Schneider, Bloom and Heerema *Mental Health Courts* at 120,121 for details on what the other functions of Mental Health Court support workers are.

treatment can be provided to the Mental Health Court participants.[44]

Further to the essential knowledge required by these mental health practitioners, they must be comfortable working with lawyers, judges, law enforcement, and corrections.[45] They should further be familiar with the relevant psycho-legal issues pertaining to mentally ill accused, including fitness to stand trial, criminal responsibility and bail applications, [46] as these are all functions envisaged for the South African Mental Health Court as well.

Since those in the legal profession have a punitive orientation towards violations, they are bound to disagree with mental health care workers, whose focus is more on rehabilitation and therapy than on punishment.[47] For this reason, the cooperation between the mental health care workers and the legal personnel in the Mental Health Court should be monitored.[48] Not following this approach could forecast failure for the particular Mental Health Court.[49] Working in the Mental Health Court can be draining, and care must be taken and measures put in place for Mental Health Court staff to preserve their own mental health.[50]

The above approach by the presiding officer in a problem-solving court and, in particular, the Mental Health Court, which is under consideration here, most, certainly suggests at the very least the introduction of some elements of an inquisitorial judicial system within the South African adversarial criminal justice system. This is due to the practice of therapeutic jurisprudence, which, by its very nature, requires inquisitorial elements in a justice system.

6 PROCEDURAL DYNAMICS OF SOUTH AFRICAN MENTAL HEALTH COURT

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44 Schneider, Bloom and Heerema *Mental Health Courts* at 119.

45 Schneider, Bloom and Heerema *Mental Health Courts* at 115, 116.

46 Schneider, Bloom and Heerema *Mental Health Courts* at 116. The legal profession relies heavily on the advice of mental health care professionals in these matters and it has even been suggested that defense attorneys should have a team of clinicians to their disposal who only does assessments for the defense during bail hearings to determine if they should be considered for the Mental Health Court programme or not. See Seltzer T ""Mental health courts: A misguided attempt to address the criminal justice system's unfair treatment of people with mental illnesses" 2005 (11) *Psychology, Public Policy and Law* 570-586 at 576.

47 Schneider, Bloom and Heerema *Mental Health Courts* at 119.

48 Schneider, Bloom and Heerema *Mental Health Courts* at 118 where it is suggested that period meetings be held with the Mental Health Court staff as a monitoring tool. Also see Slate RN "From the jailhouse to Capitol Hill: Impacting mental health court legislation and defining what constitutes a mental health court" 2003 (49) *Crime and Delinquency* 6-29 at 7. And further see Watson A, Hanrahan P, Luchins D and Lurigio A "Mental health courts and the complex issue of mentally ill offenders" April 2001 (52) 4 *Psych Serv* 477-481 at 478.

49 Watson *et al 2001 Psych Serv* 477 at 479. Also see Schneider, Bloom and Heerema *Mental Health Courts* at 118.

50 Schneider, Bloom and Heerema *Mental Health Courts* at 119.

6.1 Introduction

For Mental Health Courts to function effectively, a careful balancing exercise between the rights of the mentally ill, society and the victim of the crime is required. Procedural fairness has to play a fundamental part in the process, and justice has to prevail. Furthermore, for these courts to operate effectively, therapeutic jurisprudence has to be practiced in these Courts, as these are problem-solving Courts aimed at ensuring that the deed is punished, the condition is treated, and the person rehabilitated.

Practical considerations should play an important role in shaping a model for South Africa, such as available resources, logistics, and procedures. Since each Court determines its own procedures in rules of court, this research does not attempt to suggest the operation of a Mental Health Court in the finest detail. Suggestions are made in broad terms to give effect to the suggested goals of the South African Mental Health Court and its underlying principles as discussed above.

The discussion of the proposed procedural framework of the South African Mental Health Court is divided into 3 phases. Phase 1 comprises the initial referral to the Mental Health Court by the criminal court and the assessment of fitness to stand trial. Phase 2 comprises the assessment of the accused's eligibility to enter Phase 3, the diversion component of the Mental Health Court. [51] Each phase has various stages that are discussed below. In addition to the three-phased approach, some miscellaneous functions proposed for the South African Mental Health Court are discussed. These miscellaneous functions are aimed at the mentally ill accused who does not qualify for the diversion component of the Mental Health Court.

Before the three-phased process is discussed, consideration is given to the status of the proposed Mental Health Court within the South African legal and legislative framework.

The proposed model is illustrated by a diagram attached to this research as Annexure F that explains the flow of proceedings in the South African criminal justice system where Mental Health Courts are acknowledged as an alternative to traditional criminal justice proceedings for those accused in respect of whom mental illness is an issue.

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[51] The discussion of the two Mental Health Court models in chapter 4 and 5 of the research had only two phases, the admission phase and the programme phase. Since many aspects are included under the admission phase, the first phase is effectively broken down into two parts, the first dealing with the first appearance and presentation of the accused to the Mental Health Court as well as assessment for fitness and the second phase dealing mainly with the eligibility criteria for, and the acceptance of, the treatment plan designed for the diversion component of the Mental Health Court.

6.2 Status of the South African Mental Health Court

Since the crime level in South Africa is very high, and courts are generally overburdened with caseloads, the Mental Health Court model for South Africa should be a comprehensive one and should aim to accommodate assessments for fitness to stand trial for all accused persons with a mental illness regardless of the seriousness of the crime. Only such a model will achieve a reduction in the caseloads of the criminal court and a reduction of delays with regard to finalising pre-trial issues such as fitness assessments. This South African Mental Health Court should thus be established on a regional magistrate court level.[52] A regional magistrate court has jurisdiction over all offences except treason.[53] It is, however, suggested that the diversion component of the Mental Health Court be served for those accused of minor crimes.

Any criminal court should be able to refer the accused to the Mental Health Court. It is proposed earlier that such referral to the Mental Health Court should be compulsory in any criminal matter involving mental health issues. Referral to the Mental Health Court forms part of the first phase of the proposed Mental Health Court model, as discussed below.

6.3 Phase 1: Referral and assessment phase

This phase consists of the initial referral of the accused by the criminal court to the Mental Health Court and the assessment for fitness to stand trial.

6.3.1 Referral to the Mental Health Court by the criminal court

It is suggested that referral to the Mental Health Court in the South African context should be compulsory, as is the case in the Brooklyn Mental Health Court in the United States of America.[54] This is the only way to ensure that the caseload in criminal courts will indeed be

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[52] Regional Magistrates courts are established in terms of the Magistrate Courts Act 32 of 1944. (as amended). The jurisdiction of Regional Magistrates Courts in respect of offences are set out in section 89 which reads as follows: "Jurisdiction in respect of offences (1) The magistrate's court shall have jurisdiction over all offences except treason, murder and rape. (2) The regional court shall have jurisdiction over all offences except treason." If the Mental Health Court is established on a regional level, the only offence that will thus be excluded from the Mental Health Court, is treason.

[53] Regional Magistrates courts are established in terms of the Magistrate Courts Act 32 of 1944. (as amended). Section 89(2). Establishing the Mental Health Court on a regional level, will eliminate concerns regarding whether the authority for referral to fitness is reserved for courts with jurisdiction over the trial of the offence. See in particular the concerns raised with regard to the provisions of section 77(6) read with section 77(5) of the Criminal Procedure Act as discussed in chapter 3 of this research.

[54] Steadman HJ, Redlich AD, Griffin P, Petrila J and Monahan J "From referral to disposition: Case processing in seven mental health courts" 2005 (23) *Behavioural Science and Law* 215-226 at 219.

lightened as judges and magistrates might be hesitant to make referrals to these courts initially since its exact functioning might be uncertain. As with any new initiative, it will take time to settle, and it will take time for the criminal justice community to gain confidence in referring cases to these courts. The duty to refer an accused for assessment, especially for fitness, is in line with the current legislative obligation in terms of section 77(1), which does not leave the presiding officer with the discretion of referral for a fitness assessment.[55] The only difference would be that, instead of the court ordering assessment at a specific psychiatric institution, the court refers the matter to the Mental Health Court who will take care of the assessment in terms of its rules and procedures.

Another motivation for making referrals to the Mental Health Court compulsory is to ensure that persons with mental health expertise handle cases involving mental illness. If referral to the Mental Health Court is optional, there will still be cases where the position of the mentally ill accused persons are considered by persons with no specialised skill, or interest, in mental health matters.

In order to achieve the goal of reducing caseloads, expediting pre-trial issues and ensuring that persons with specialised skill are involved, referral to the Mental Health Court must be compulsory. This rule applies in all cases where mental illness is at issue, regardless of if it pertains to fitness or criminal capacity, even though not all these persons may qualify for the diversion component of the Mental Health Court.

It is suggested that the criminal court still makes the order for psychiatric observation in terms of section 77 or 78, or both as the case is currently since the issue may be raised by any party to the proceedings before the criminal court. It is suggested, however, that the format of the order should change. Currently, the order is very specific, stating that the accused's fitness must be investigated at a specific psychiatric institution by specific mental health practitioners (mostly psychiatrists). The new model would function optimally if the order simply reads that the issue of fitness or criminal capacity should be enquired into in accordance with section 79 of the Criminal Procedure Act. As soon as the general order for assessment in terms of section 77 or 78 or both is made, the matter is referred to the Mental Health Court to deal with in terms of its own rules and procedures.

In Brooklyn, all individuals referred for competency evaluations to determine fitness to stand trial or criminal capacity, must be referred to the Mental Health Court. Also see the discussion of the Brooklyn Mental Health Court model as discussed chapter 5 of this research.

55 Section 77(1) states that the court shall cause the matter to be enquired into. This implies a lack of discretion. Also see the discussion of the grounds for ordering a fitness assessment as discussed in chapter 3 of this research where the South African criminal justice system is discussed.

The eligibility criterion for referral to the Mental Health Court in the first place is simply that a mental health issue must be involved. All accused persons with mental health issues are accommodated in the first phase of the Mental Health Court regardless of the type of mental illness. Since a comprehensive Mental Health Court model is proposed for South Africa, this Mental Health Court should assist all mentally ill accused persons in this initial phase of the process regardless of the charge.[56] The diversion phase of the Mental Health Court should, however, be reserved for accused persons charged with non-violent crimes.

The question may arise if it is truly appropriate to refer an accused who is charged with a violent offence to the Mental Health Court during this initial phase. There should be no objection to this, since the Mental Health Court will, in such a case, only assist with the assessment of fitness to stand trial or assist in making arrangements for assessment for criminal capacity, and such an accused will not qualify for the diversion component of the court if the eligibility criteria for that component is set up to determine that diversion is reserved for those accused of non-violent offences. The manner in which the Mental Health Court can assist those who committed violent offences which may not qualify for the diversion component of the court is discussed under miscellaneous issues below. Not allowing accused persons charged with violent crimes into the diversion component of the Mental Health Court ensures that the public's sense of justice is not offended. It is submitted, however, that this will form a smaller portion of the group of accused persons referred to the Mental Health Court since the majority of persons with mental illness, as explained in previous chapters, commit petty crimes.

The first phase of the Mental Health Court should take in all accused persons with suspected mental illness or intellectual disability. Since the therapeutic pathways of persons with mental illness differ from those with intellectual disability, the eligibility of the accused for purposes of the diversion component of the court will be decided later in the process. At these first stages of the court process, it should not matter since the assessment will also confirm the suspected diagnosis and determine the desired way forward to best serve the treatment needs of the accused and the therapeutic objective of the Mental Health Court. The diagnosis is arrived at during the psychiatric inquiry to determine fitness to stand trial, which is the second stage in this first phase of the proposed Mental Health Court model for South Africa.

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56 Schneider, Bloom and Heerema *Mental Health Courts* at 6 and further at 100 states that a comprehensive Mental Health Court model should assist all mentally ill accused persons regardless of the charges against him.

6.3.2 Assessment of fitness to stand trial and arrangements for criminal capacity assessments

It is proposed that the Mental Health Court should assist with the assessment of fitness to stand trial for all accused, regardless of the seriousness of the offence.[57] The first phase should further entail assistance to arrange assessments for criminal capacity.

Fitness assessments are clinically less complex than assessments for criminal capacity,[58] and for this reason; Mental Health Courts can conduct fitness assessments on-site and within very short periods.[59] The same is not necessarily true for assessments for criminal capacity; hence this should not be a primary focus of the court, although its expertise could be available for such assessments and to assist those who intend to raise the lack of criminal capacity as a defence during the trial.[60]

Where an assessment for criminal capacity is required, the Mental Health Court can assist with arrangements for the assessment to be conducted at an appropriate mental health facility. Mental Health Court will be more likely to have contact with psychiatric facilities where these assessments can be conducted than the traditional criminal courts. To make the process even more effective and expedient, more psychiatric facilities should be licenced to conduct psychiatric observations. Currently, there are only ten such facilities in South Africa nationwide.

Since space in the dedicated facilities may not be available immediately, the Mental Health Court may consider and grant bail to an accused awaiting assessment for criminal capacity. Where an assessment of the criminal capacity as well as the accused's fitness was ordered by the criminal court (it seems to be practice to order that both assessments be done simultaneously) the Mental Health Court process in terms of fitness assessment and considering the accused's eligibility for diversion may continue pending the accused's referral to the relevant facility for assessment of criminal capacity. Once a space is

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57 Schneider, Bloom and Heerema *Mental Health Courts* at 6, 88. This is also the case with the Nova Scotia Mental Health Court. See Rieksts M "Mental health courts in Canada" *LawNow* 2008 (33) 31-34 at 33.

58 Pillay 2014 South African Journal of Psychology 48 at 50.

59 See chapter 4 for the discussion of the Canadian model and chapter 5 for the model in the United States of America.

60 This is one of the services that the Toronto Mental Health Court offers to participants who are fit to stand trial but who do not qualify for the diversion component of the court. See the discussion of the Canadian Mental Health Court model as discussed in chapter 4 of this research.

available for such an assessment, the accused should be referred to the relevant psychiatric facility and return to the Mental Health Court for the fitness process to continue upon his return.

It would have been ideal to postpone the assessment for criminal capacity until the accused completes the Mental Health Court programme or until the accused regains fitness in the event that he is unfit to stand trial. This is, however, not advisable since it is essential that the assessment for criminal capacity takes place as soon as possible as it relates to the alleged offence committed, and passage of time may hamper a fruitful investigation into the true state of mind of the accused at the time of the commission of the offence.

The alternative would be to finalise the assessment for criminal capacity first and then commence with the fitness proceedings. This will, however, result in mentally ill but fit accused persons not receiving mental health treatment through the Mental Health Court since they are first awaiting assessment for criminal capacity. It can also be argued that where an accused is diverted into the treatment programme of the Mental Health Court, there will most likely not be a trial at all, provided the accused completes the treatment programme, in which case criminal capacity becomes irrelevant as charges are often dropped after completion of the programme. An assessment for criminal capacity might, in the end, turn out to have been completely unnecessary. Where an accused, however, does not complete the treatment programme and his case reverts to the criminal court for a trial, criminal capacity will be relevant. The assessment cannot be postponed until the time that it is clear whether the accused will face the traditional criminal court or not due to the urgency of conducting a criminal capacity assessment as soon as possible, as pointed out earlier. The best working solution, therefore, seems to be to address the fitness issue immediately and refer the accused for the criminal capacity assessment as and when the facilities become available, wherever in the Mental Health Court process this might happen.

Fitness assessments can be conducted on-site by the mental health care professionals at the court, as is the case in, especially, Canada. If, after the on-site assessment, the court is of the view that a more in-depth assessment is required, the accused may be assessed at an alternative facility but not necessarily as an inpatient. Assessments for fitness to stand trial should be limited to 5-days, as is the case in Canada, and only when a more in-depth review is required should it be extended by a period not exceeding 30-days. The Mental Health Court, through its court workers, can make the necessary arrangements for such an assessment.

It is stated earlier that the inquiry into fitness to stand trial is distinctly different to that into

criminal capacity and that the fitness assessment considers the current state of mind of the accused and that the investigation into fitness is not retrospective in that the state of mind at the time of the offence is considered. Hence, the offence is not of central importance during this inquiry. The question arises then why the South African Criminal Procedure Act has specific provisions for fitness assessments, in terms of the number of professionals that have to assess the accused, depending on the seriousness of the offence? If the inquiry is truly not retrospective, then the type of crime should not matter. Bear in mind further, as pointed out in the *De Vos* matter, that an assessment for dangerousness is not done during the fitness assessment, which makes the seriousness of the offence even less relevant. Is a distinction possibly drawn between the fitness assessment for accused persons who are charged with serious versus less serious crimes because a different level of fitness is required from the one group versus the other?

Of course, a finding of unfit to stand trial has the consequence that the trial against the accused does not continue (but only for as long as he is unfit). The community may feel offended if a mentally ill person who committed murder and rape, for example, is found unfit and then not prosecuted. It is submitted, however, that subjecting such an accused to assessments by more than one mental health professional will not make the prospect less likely. Perhaps a more effective process would be to subject the initial finding of fitness or unfitness to a review by a panel of specially skilled persons, such as the Mental Health Review Board. This proposal is fleshed out later in this chapter.

In Canada, only one mental health professional assesses an accused for fitness at the Mental Health Court. In the Brooklyn Mental Health Court, one psychiatrist, appointed on contract, conducts a psychiatric evaluation within approximately one hour, during which a diagnosis is made and appropriate treatment identified. The Brooklyn Mental Health Court specifically includes assessment of persons charged with serious offences meaning that these persons are assessed for fitness by a single psychiatrist. Other members of the multi-disciplinary team, such as the psychologist and/or social worker, conduct various types of assessments on the accused to determine his suitability for diversion.

Considering the shortage of psychiatrists in South Africa, it is recommended that the fitness assessment is conducted on-site and need only be conducted by a single psychiatrist regardless of the seriousness of the offence.[61] The services of clinical psychologists should

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[61] Under the current Criminal procedure Act an accused charged with a non-violent crime need only be assessed by one psychiatrist. An accused charged with violent crime, must be assessed by more

also be considered to fulfil this role.[62]

The mental health professional that conducted the fitness assessment drafts a report to submit to the Mental Health Court. This report would usually be submitted to the criminal court in terms of the Criminal Procedure Act but is now submitted to the Mental Health Court for consideration by the multi-disciplinary team and forms part of the court record.

If the multidisciplinary team's finding is that the accused is unfit to stand trial, the accused should not revert to the criminal court for an order in terms of section 77(6). It is submitted that the accused must be referred to the Mental Health Review Board to decide on an appropriate disposition for the accused. If the purpose of the Mental Health Court is truly to divert all persons with mental illness away from the criminal justice system, persons found unfit to stand trial should also not have to face a criminal court at various junctures. The trial on the facts, as currently provided for in section 77(6) of the Criminal Procedure Act, could perhaps be held by the Mental Health Court before the accused is referred to the Review Board for the disposition. The Mental Health Court should have jurisdiction to make a "get fit" order, as is the case in Canada, where the accused can be treated in a psychiatric facility for a 60-day period in order for him to recover to the extent where he is fit to stand trial. If an accused is still unfit after this time, he is referred to the Review Board for an appropriate disposition. The accused will then remain under the jurisdiction of the Review Board for as long as his unfitness persists. If the accused regains fitness, the accused can again be referred back to the Mental Health Court, where the process will run from phase 1 again.

If the accused is found fit to stand trial, he may proceed to the next phase in the Mental Health Court proceedings. Since the process after the establishment of fitness is voluntary, the accused may opt-out of the Mental Health Court at this point and choose for his case to be heard by the traditional criminal court.

An accused referred to the Mental Health Court for a criminal capacity assessment only cannot progress past the first phase since criminal capacity has an impact on the accused

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than one. See section 79 of the Criminal Procedure Act where the composition of the panel for assessment is set out.

62 See the discussion of the position of clinical psychologists in South Africa with regard to assessments for fitness to stand trial as discussed in chapter 3 of this research. Also see Pillay 2014 *South African Journal of Psychology* 48 at 50. Pillay points out that there are four times as many clinical psychologists in South Africa than psychiatrists and those they are properly trained in conducting forensic assessments. He advocates for the more frequent appointment of clinical psychologists to panels for purposes of psychiatric assessments.

sentencing in the criminal court and will be reverted to that court upon completion of the criminal capacity assessment. The Mental Health Court may, however, be requested to assist the criminal court at the stage when the criminal capacity of the accused is considered.

If an accused is fit to stand trial and does not opt-out of the Mental Health Court at this juncture, he may continue to the next phase where his legal and psychiatric eligibility for the diversion component of the Mental Health Court is assessed.

6.4 Phase II: Assessment of Eligibility criteria for Mental Health Court diversion component

As discussed in the previous chapters, there are generally legal eligibility criteria and psychiatric eligibility criteria for entrance into a Mental Health Court diversion programme. Based on the proposal that the South African Mental Health Court should be a comprehensive Mental Health Court with a diversion component attached to it, the following eligibility criteria are proposed for the diversion component.

The criteria that span across both legal and psychiatric criteria is that the accused must be fit to stand trial. This was established during the first phase and an accused only proceeds to the second phase if fitness has been established.

6.4.1 Legal eligibility

The legal criteria entail that the accused must be fit to stand trial and must be charged with a crime.

The American model allows accused persons charged with violent crimes into the Mental Health Court treatment programme if the prosecuting authority agrees to such diversion. Persons accused of rape and murder are, however, not eligible regardless of the accused's circumstances. In the Canadian model, only minor crimes are allowed into the diversion component of the Mental Health Court.

Considering the high crime rate in South Africa and the threat that this brings about to the daily safety of society, it is suggested that the South African Mental Health Court should initially only allow persons accused of minor and/or non-violent crimes into the diversion component of the Mental Health Court. This would be in line with the current diversion practices in South Africa, where only non-violent crimes qualify for diversion. This practice

will also serve the community's sense of justice. The Court could, perhaps, at a later stage, consider diversion of more serious offences on a case-by-case basis (perhaps with the consent of the prosecution and the victim) once the initial diversion process has been streamlined. This was the case in the Brooklyn Mental Health Court where only non-violent crimes were initially considered for diversion, but felonies were later included on a case by case basis, provided that the prosecuting authority had the right to veto any such diversion.

The South African Mental Health Court should, however, assist those accused persons who do not qualify for diversion because of the seriousness of the alleged offence by assisting such an accused with a bail application, for instance.

6.4.2 Psychiatric eligibility

Some American Mental Health Courts set treatability of the mental illness as a requirement for admission into the diversion component of the Mental Health Court. This is not as explicitly stated in the Canadian context but is illustrated by the fact that neither the Canadian Mental Health Court nor the American Mental Health Court allows persons with personality disorders as their only diagnosis into the Mental Health Court treatment programme. If they have a co-existing mental illness, they are, however, accepted, and treatment is focussed on the co-existing mental illness.

The same applies to persons with mental retardation. As stated earlier, mental retardation cannot be "treated"; hence diverting such an accused into a treatment programme will serve no therapeutic purpose. The risk of enrolling such a person into a treatment programme is that, because the condition is not curable, the chances of this person ever completing the treatment programme is slim if the measurable outcome is that such person must be "cured". Such a person will not complete the programme and will encounter sanctions for non-compliance which may, depending on the sanction, be even further counter therapeutic.

Having these cases revert to the criminal court would, however, be unjust as these persons still suffer from a mental illness and should not face the traditional criminal justice system. It is suggested that the Mental Health Court should have jurisdiction to make a suitable order with regard to such a person who does not qualify on psychiatric grounds. These may include assistance from organisations providing special care for persons with mental retardation, for example, or an order entrusting him to the care of his family under some sort of probation. The determination of such alternatives for persons who do not qualify for diversion due to their mental illness is best determined by mental health practitioners.

Once the accused meets the legal and psychiatric eligibility criteria, he moves on to phase three of the Mental Health Court process.

6.5 Phase III: Diversion component (treatment)

6.5.1 Development and acceptance of treatment programme

Once the eligibility of the accused is established, the multidisciplinary team can draft a treatment plan for the accused that uniquely caters for his needs. The actual treatment that the accused should undergo is determined by the mental health care professionals and social workers that form part of the Mental Health Court team. The treatment programme can consist of various aspects, including taking medication and attending therapy or vocational training, for instance.

Once the treatment programme is designed, the court workers contact their community network and find a space for the accused in the appropriate institution that will be willing and able to provide the required assistance to the accused.

Legal representation must be provided to an accused in the Mental Health Court. This is in line with the current obligation in the Criminal Procedure Act that a legal representative must be appointed for an accused whose mental state is at issue if it will be a travesty of justice not to do so. It is the duty of the legal representative to explain the implications of choice to participate in the diversion programme to the accused.

The accused has to accept the programme and agree to comply with it. Such consent also includes acknowledgement of the sanctions that can be employed in the event of non-compliance. A consent form setting out the treatment plan and the sanctions for non-compliance should be signed by the accused. Issues of information sharing with regard to the medical information of the accused for treatment purposes have to be included in such consent form. This should also be signed by the Mental Health Court judge and made an order of the Mental Health Court.

Should the accused choose not to accept the treatment programme, his case reverts to the criminal court unless he decides to resolve his case with a guilty plea in the Mental Health Court.

This is an important step in the process because it confirms that the treatment is voluntary. The choice to participate in the treatment programme is completely up to the accused. It is important to remember that, even though someone may have a mental illness, it does not

necessarily mean that the person is incompetent to take any decision whatsoever. Evidence of this is the categories of mental health care users described in mental health care legislation.[63]

6.5.1.1 Duration of treatment

Some Mental Health Courts employ the principle that the treatment should not exceed the maximum time that the person would have spent in jail had he pleaded guilty to the charges against him.

From a treatment perspective, placing a time limitation on treatment could be anti-therapeutic. It is suggested that, in principle, treatment programmes should not exceed the time that the accused would have spent in jail had he pleaded guilty but, the treatment can exceed this time if the accused agrees thereto or if good clinical reasons exist. It is suggested that this should be included in the consent form that the accused is required to sign before entering the Mental Health Court treatment programme. Strict time limits on treatment programmes may be counter-therapeutic.

6.5.1.2 Availability of treatment options

In order for a Mental Health Court to function efficiently, law enforcement, correction and probation services, psychiatric hospitals, psychiatric wards in general hospitals, community mental health care clinics, and social services [64] will have to declare their willingness to and actively participate in achieving the goals of the Mental Health Court.[65]

Where a treatment programme has been designed for the accused and a service provider for the mental health treatment identified, such service provider should ideally consent to the provision of the service in terms of the treatment programme that has been made an order of the court as explained above. This ensures that services are indeed provided and

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63 See for example the description of voluntary mental health care user in the Mental Health Care Act 17 of 2002 in South Africa, which user is capable of consenting and willing to receive treatment. What is more is that the regulations to the Act provide for a mental health care user to give consent to a medical intervention if a need would arise for such an intervention to be performed on him. This illustrates that, even though a person may suffer from a mental illness, it is not assumed that s/he has lost the ability to take decisions regarding other aspects of his/her life or treatment.

64 This may include programmes in the community aimed at providing housing, marriage counselling, substance abuse or domestic violence programmes, community recreational programmes, food banks, special programmes aimed at the elderly, formal education and support groups. See Schneider, Bloom and Heerema *Mental Health Courts* at 122.

65 Schneider, Bloom and Heerema *Mental Health Courts* at 121, 122. Also see David L *Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform* (Bazelon Centre for Mental Health Law Washington D.C 2003) at 17.

that an undue load is not placed on mental health care providers since they will have the option of declining to provide such services if they do not have the capacity to do so.

6.5.2 Sanctions for non-compliance

Relapses and setbacks are often part of the recovery process in the mental health care treatment context.[66] Sanctions for non-compliance should be imposed with this in mind.

Some sanctions used in Canada for non-compliance include more frequent appearances in front of the Mental Health Court judge. The treatment plan is also adjusted in an attempt to avoid future non-compliance. The American model employs similar sanctions and other creative sanctions, such as requiring the accused to write an essay on the reason for non-compliance.

Some American Mental Health Courts, including the Brooklyn Mental Health Court, use jail time as a sanction for non-compliance.[67] Faraci [68] points out further that if one of the main objectives of a Mental Health Court is to intervene as soon as possible in the criminal justice process to avoid the negative effects that detainment can have on a mentally ill individual, incarceration as a sanction cannot be used without this objective of the Mental Health Court being compromised.[69] This practice contributes to the criminalisation of mental illness as the participant is "punished" for relapsing or having a setback. This is something that is often not within his control, as it happens in the process of establishing the best treatment method for the individual.[70] Before imposing punitive sanctions for non-compliance, the court should conclude that the defendant was capable of complying but

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66 Council of State Government's Criminal Justice/ Mental Health Consensus Project: Survey of Mental Health Courts (2003) http://consensusproject.org/topics/news/mhcsurvey(Date of use: 28 March 2014).at 89. Also see the discussion of sanctions for non-compliance in chapter 4 of this research.

67 Schneider, Bloom and Heerema *Mental Health Courts* at 90. Also see Griffin PA, Steadman HJ and Petrila J "The use of criminal charges and sanctions in mental health courts" 2002 (53) *Psych Serv* 1285-1289 at 1285. Also see Seltzer 2005 *Psychology, Public Policy and Law* 570 at 579. Also see in general Redlich AD, Steadman HJ, Petrila J, Monahan J and Griffin PA "The second generation of mental health courts" 2005 (11) *Psychology, Public Policy and Law* 527-538.

68 Faraci SM "Slip Slidin' away? Will our Nation's Mental Health Court Experiment Diminish the Rights of the Mentally Ill?" 2004 (22) *Quinnipiac Law Review* 811-848 at 837.

69 Setlzer shares this view. See Seltzer T ""Mental Health Courts: A misguided attempt to Address the Criminal Justice System's Unfair Treatment of People with Mental Illnesses" (2005) 11(4) *Psychology, Public Policy and Law* 570-586 at 579.

70 Setlzer shares this view. See Seltzer 2005 *Psychology, Public Policy and Law* 570 at 580. An example is where an individual's medication is changed and he simply does not respond positively to the particular type of medication. This is not due to the unwillingness of the participant or his stubbornness and he should not be punished for this.

chose not to.[71]

Jail time as a sanction for non-compliance to the Mental Health Court programme is not recommended for the South African context. The criticism against this type of sanction for non-compliance is valid, in particular, the concern that such sanction is particularly counter-therapeutic for the mentally ill accused.[72]

Imposing jail time as a sanction for non-compliance with the treatment programme also has the potential to defy the very goal of a Mental Health Court, which is to reduce the number of mentally ill offenders in prison through diversion.[73] In the South African context, in particular, overcrowded prisons will not be able to accommodate those who are sent to prison to serve out their sanction time. Treatment programmes should rather be adjusted if non-compliance with the initial programme is detected.[74]

6.5.3 Procedure upon completion of the treatment programme

Where the treatment programme is successfully completed, the charges against the accused should be dropped. The accused will not have a criminal record after successfully completing the treatment programme.

The accused should, after completion, be put into contact with community services where he can get future assistance if he is in need thereof. This will ensure that the progress that has been made with the treatment during the programme is sustained and that future relapses could possibly be avoided or at least detected at an early stage to avoid possible future contact with the criminal justice system.

Those accused persons who do not complete the programme due to reasons other than ones related to the treatment (such as a change in medication etc.) will revert to the

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71 Council of State Government's Criminal Justice/ Mental Health Consensus Project: http://consensusproject.org/topics/news/mhcsurvey(Date of use: 28 March 2014) at 100.

72 Arrest and incarceration *per se* can be debilitating to a mentally ill accused. See Schneider, Bloom and Heerema *Mental Health Courts* at 116. Also see Seltzer 2005 *Psychology, Public Policy and Law* 570 at 572 who confirms that contact with the criminal justice system has negative consequences for anyone who is arrested and/or incarcerated and even more so for those who suffer from mental illnesses. Mentally ill offenders generally do not cope well in the criminal justice system. (See Seltzer at 573).

73 See 2005 *Psychology, Public Policy and Law* 570 at 579. Also see Faraci 2004 *Quinnipiac Law Review* 811 at 837. See further the discussion of sanctions for non-compliance in chapter 4 of this research.

74 Schneider, Bloom and Heerema Mental Health Courts at 90. Also see chapter 4 of this research for a discussion of sanctions for non-compliance and the criticism levied against the practice of using jail-time as a sanction.

criminal court and their cases will be dealt with in the conventional way. Consideration can be given to the possibility for the criminal court to consider as mitigating the fact that the accused participated in the treatment programme during the sentencing phase, as is the practice in both Canada and the United States of America.

6.6 *Miscellaneous functions of the proposed South African Mental Health Court*

It will defeat the purpose of a Mental Health Court if access to the expertise of the Mental Health Court is restricted to accused persons charged with non-violent crimes as the skills of the Mental Health Court will not reach the entire group of mentally ill accused persons.[75]

Miscellaneous matters that the court will address include trials of accused persons who are fit to stand trial but who intend to file the insanity plea. They may also consider bail applications by persons found fit to stand trial that chose to have their cases processed through the Mental Health Court. Persons who do not qualify for diversion can have their cases resolved in the Mental Health Court by filing a guilty plea. In these cases, mental illness will not arise again, for instance, in the form of the insanity plea, as the insanity plea amounts to a plea of not guilty. These are secondary functions of the Mental Health Court.

It is a secondary objective of the Toronto Mental Health Court to assist in cases of those in respect of whom fitness to stand trial is not at issue but who wish to enter a plea of not criminally responsible.[76] These hearings do not take place in the Mental Health Court, but the Mental Health Court can offer its skills to assist in whichever way possible.

The Mental Health Court can assist with bail hearings of accused persons referred to it for assessments. The bail conditions could possibly include some treatment at a psychiatric or community facility.

Accused persons who are fit to stand trial and who do not qualify for the diversion component can opt to remain within the Mental Health Court should they wish to enter a guilty plea and end the matter. The Mental Health Court will then hand down a sentence with a therapeutic element attached to it where appropriate.

The American Mental Health Court model does not provide such assistance to persons who

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75 Lurigio RJ and Snowden J "Putting therapeutic jurisprudence into practice: The growth, operations, and effectiveness of mental health courts" 2009 (2) *The Justice System Journal* 196-218 at 213 where it is pointed out that, only addressing minor crimes excludes persons with serious mental illness accused of violent crimes from the opportunity to receive court monitored treatment.

76 Schneider, Bloom and Heerema Mental Health Courts at 98.

do not qualify for diversion to the Mental Health Court. This practice arguably excludes a large portion of mentally ill accused persons from the specialised skills that the Mental Health Court team has to offer.

Since the model proposed for SA is a comprehensive one, assistance in the form of bail applications and ending a matter by entering a guilty plea in the Mental Health Court should be provided to those who do not qualify for the diversion component of the Mental Health Court. Assistance in trials for those who intend to enter a plea of not criminally responsible could be provided on a case-by-case basis initially until it is clear in which way the court can assist in such matters.

7 ADDITIONAL SUGGESTIONS FOR THE OPTIMAL TREATMENT OF PERSONS WITH MENTAL ILLNESS IN THE CRIMINAL JUSTICE SYSTEM

7.1 Early intervention by police

As suggested in chapters 4 and 5 of this research, the Canadian and American Mental Health Court models could benefit from supplementing the Mental Health Court services by implementing pre-booking interventions. This requires the cooperation of the police service to a large extent. Training of the police on mental health issues will go a long way to sensitise the police to the unique challenges that mentally ill persons bring to the criminal justice system. The same applies to the South African context.

Police should, in particular, be made aware and trained on the use of the provision in the Mental Health Care Act that provides for the police to take a person that appears to suffer from a mental illness to a treatment facility for observation, rather than arresting the person for a crime that might very well be the result of an untreated but treatable mental illness.

Pre-booking diversion programmes are the only way to avoid contact with the criminal justice system for the accused altogether and should receive serious attention.

7.2 Unfit accused persons

Even though the position of the unfit accused was not the primary focus of this research, it formed a necessary part of the discussion since the position of the accused found fit to stand trial had to be contrasted with the position of the accused found unfit to stand trial. Even though the position of the unfit accused is regulated in the South African criminal justice system, some suggestions could be made to improve the regulatory framework in this regard.

The manner of detention of a person found unfit to stand trial differs depending on whether he is found to have committed an offence or not. An accused charged with a violent crime but found not to have committed it is detained as a state patient, whereas an unfit accused charged with a non-violent crime and found to have committed it is detained as an involuntary mental health care user. Discharge from detention as a state patient is much harder than discharge from detention as an involuntary mental health care user. The reason for this distinction is unclear. If fitness is truly distinctly different from the inquiry into criminal capacity and concerned with the present state of mind, surely the order as to the manner of detention should be dictated by the mental health care needs of the accused rather than the type of charges against him? This is especially so considering that no provision for the assessment of the dangerousness of the accused is made during the fitness assessment.

It is suggested that the Canadian model could be looked at to supplement the current system. In Canada, findings by courts that an accused is unfit to stand trial are sent for review to the Mental Health Review Board, and the latter usually decides on an appropriate disposition for the relevant accused, taking into account the safety of the community and the position of the accused. The Review Board can also make a "get fit" order that subjects the accused to treatment with the view of making him fit to stand trial. The accused remains under the jurisdiction of the Review Board for as long as he is unfit. This includes periodic reviews of the mental state of the accused by the Review Board.

In Canada, the Criminal Code provides for the examination of the evidence against an unfit accused bi-annually.[77] Where a *prima facie* case against the accused cannot be proven, or where the court is of the view that evidence is no longer sufficient, the accused may be acquitted.[78]

South Africa has Review Boards in place, but they are not tasked with the review of findings of unfitness or the periodic reviews of such persons. They are tasked with reviewing the

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77 Section 672.33 of the Criminal Code provides for these inquiries into the evidence against the accused every two years until the accused is tried or acquitted. Also see Barret and Shandler *Mental Disorder in Canadian Criminal Law* at 1-12. Section 672.33(1.1) provides that the period for the review of the evidence may be extended if it is in the interest of the proper administration of justice.

78 As provided for in section 672.33(6) of the Criminal Code. *Coughlan Criminal Procedure* at 292 who points out that the procedure for these hearings, to determine if there is still sufficient evidence, is not set out in the Criminal Code and can be conducted by way of affidavit. See further Van der Wolf *et al* 2010 *International Journal of Forensic Mental Health* 245 at 250. Also see Byrick K and Walker-Renshaw B *A Practical Guide to Mental Health and the Law in Ontario* (Ontario Hospital Association Toronto 2012) at 91.

mental state of mentally ill prisoners, assisted and involuntary mental health care users. The suggestion is that their powers should be extended to review findings of unfitness made by courts, to make "get fit" orders and assist the court in arriving at appropriate dispositions for accused persons found unfit to stand trial or not criminally responsible and, finally, to conduct period reviews of such persons. Review Boards should further be empowered to make assessment orders where further information may be required to make an appropriate disposition.

8 PROPOSED LEGISLATIVE AMENDMENTS IN SUPPORT OF THE PROPOSED MENTAL HEALTH COURT MODEL FOR SOUTH AFRICA

8.1 Introduction

In order to give effect to the initiative of a South African Mental Health Court, legislative amendments are required.

These amendments could be incorporated into existing legislation, more particularly the Criminal Procedure Act and the Mental Health Care Act and possibly the Correctional Services Act. Alternatively, a separate piece of legislation could be drafted to provide for the incorporation of the Mental Health Court into the existing criminal justice system.

Since this research intimates that the Mental Health Court can be incorporated into the existing logistical and procedural framework of the criminal justice system, the approach followed here is to propose amendments to the current legislation.

The proposed amendments are set out below in general terms. These proposals focus on the Criminal Procedure Act and the Mental Health Care Act. The exact wording thereof is best left to the legislature.

8.2 Criminal Procedure Act

The proposed amendments to sections 77 to 79 of the Criminal Procedure Act are discussed below. The main objective of these amendments is to incorporate the Mental Health Court into the existing system to be of assistance to accused persons with mental health issues and, in particular, those accused persons who are fit but mentally ill.

8.2.1 Proposed amendments regarding fitness to stand trial generally

– Insert a presumption of fitness to stand trial;

- All assessments for fitness to stand trial shall be the responsibility of the Mental Health Court to deal with in terms of its specific rules and procedures.[79]

- The period for fitness assessment should not exceed 5-days [80] with the provision that it can be extended by 30-days in the event that an in-depth assessment is required.

- Only one mental health professional is required to conduct the fitness assessment.[81] Such mental health professional may either be a psychiatrist or a clinical psychologist with the appropriate forensic training.[82]

- Insert presumption that fitness assessment will take place out of custody.[83] This

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79 Fitness assessments could be conducted on site as is the case with the Canadian and the American Mental Health Courts. Only more complex matters that require intense assessment will be done over a longer period of time. The minimum prescribed time for fitness assessments should apply.

80 This is the position in the Canadian system as provided for in the Criminal Code.

81 Since the type of crime that the accused is charged with is strictly irrelevant for purposes of fitness to stand trial, there is no need to draw a distinction between the number of mental health professionals that must assess an accused charged with a minor crime versus an accused charged with a serious one. South Africa currently allows for one psychiatrist to assess an accused charged with a minor crime. For serious offences, the South African system currently requires an accused to be assessed by at least 2 psychiatrists and possibly a third and /or a clinical psychologist. South Africa is experiencing a severe shortage of psychiatrists and it is causing delays in the system to require up to three psychiatrists to assess an accused for fitness. The Canadian system only requires one psychiatrist to assess an accused for fitness regardless of the seriousness of the offence. In the American system, two mental health professionals must assess an accused for fitness. Should the proposal of one mental health practitioner to conduct an assessment be implemented, the rules in the Criminal Procedure Act pertaining to hearing evidence from those who conducted the assessment need to be amended as well. If the suggestion that findings of unfitness should routinely be reviewed by a Review Board is implemented, this will provide a safety net for accused persons found unfit to stand trial regardless of if they are assessed for fitness by one or multiple mental health professionals.

82 Since a fitness assessment may require a diagnosis of a physical condition, the accused may, after the assessment by the psychologist (if the initial assessment is done by a psychologist) be referred to a psychiatrist or physician for such diagnosis. This will assist in alleviating the skills shortage that is currently experienced in South Africa with regard to psychiatrists. The suggestion has been made that South African courts should rely more on psychologist to fulfil the assessment function as their training includes training on forensic issues. In the American system where assessments must be done by two mental health professionals, it is specifically stated that these professionals may be two psychiatrists, two psychologists or one from each profession.

83 A statutory presumption exists in the Canadian Criminal Code that the assessment for fitness to stand trial, will take place out of custody. This presumption applies to assessment orders made by courts as well as Review Boards. Section 672.16 of the Criminal Code reads as follows:
"672.16 (1) Subject to subsection (3), an accused shall not be detained in custody under an assessment order of a court unless the court is satisfied that on the evidence custody is necessary to assess the accused, or that on the evidence of a medical practitioner custody is desirable to assess the accused and the accused consents to custody;
(*b*) custody of the accused is required in respect of any other matter or by virtue of any other provision of this Act; or
(c) the prosecutor, having been given a reasonable opportunity to do so, shows that detention of the accused in custody is justified on either of the grounds set out in subsection 515(10)."

presumption applies to assessment orders made by Mental Health Courts as well as Review Boards.[84]

- Provide for compulsory referral of a matter to Mental Health Court at any time during the court proceedings and as soon as the criminal court or either party identifies the issue of mental illness.

– Mental Health Court may find, after fitness assessment, that an accused:

  ∗ is fit to stand trial with no mental illness present;

  ∗ is fit to stand trial but mentally ill; or

  ∗ is unfit to stand trial.

8.2.2 Proposed amendments in respect of an accused found fit to stand trial

- An accused found fit to stand trial with no mental illness present shall proceed to the criminal trial in the criminal court. The Mental Health Court has no jurisdiction over such an accused.[85]

– An accused found fit to stand trial but who is mentally ill remains under the jurisdiction of the Mental Health Court provided that:

Also see Schneider RD *Annotated Ontario Mental Health Statutes* 4th ed (Irwin Law Toronto 2007 at xv. See further Barret and Shandler *Mental Disorder in Canadian Criminal Law* at 2-21. The New York CPL also makes provision for fitness assessments to take place out of custody where the accused is not detained in a correctional facility at the time when the assessment is ordered. See the New York CPL 730.40.

84 See section 672.16 of the Canadian Criminal Code for the presumption where an assessment order was made by a court. See section 672.121 of the Canadian Criminal Code for the presumption where an assessment is ordered by a Review Board. In the latter case, assessments shall take place out of custody unless
(a) the accused is currently subject to a disposition made under paragraph 672.54(c);
(b) the Review Board is satisfied on the evidence that custody is necessary to assess the accused, or that on the evidence of a medical practitioner custody is desirable to assess the accused and the accused consents to custody; or
(c) custody of the accused is required in respect of any other matter or by virtue of any other provision of this Act.

85 Where no mental illness is present, the expertise of the Mental Health Court is not essential and such an accused reverts to the traditional criminal justice system. The Mental Health Court is reserved for cases involving mental illness only. Even though the accused may have had mental health issues at the time of referral, this is no longer the case if he is found fit with no mental illness and he has nothing to gain from the Mental Health Court. The option of applying for bail in the Mental Health Court does not apply to this persons since bail conditions set by the Mental Health Court has a treatment element attached to it and an accused found fit with no mental illness has no need for such treatment.

a) the accused must be assessed for eligibility for the diversion component of the Mental Health Court

b) the accused may opt-out of the Mental Health Court process at this juncture prior to assessment for diversion since the diversion component of the Mental Health Court is voluntary

c) only non-violent offences shall qualify for Mental Health Court diversion

d) If the accused does not qualify for diversion due to the serious nature of charges against him, he may:

   i) Choose for his case to revert to the criminal court

   ii) Choose for his case to remain within the Mental Health Court for a bail application. Bail conditions will incorporate a treatment element

   iii) Choose to resolve his case with a guilty plea in the Mental Health Court

e) Mental Health Courts may determine their own psychiatric eligibility criteria guided by available treatment programmes provided that:

   i) The Mental Health Court shall have the discretion to make any appropriate order in respect of an accused with an intellectual disability

– Charges against accused found fit and eligible to participate in Mental Health Court diversion programmes are suspended pending completion of treatment programme

– Charges against an accused who completes Mental Health Court treatment programme are to be dropped

– The case against an accused who does not complete the Mental Health Court treatment programme should revert to criminal court for trial. Accused's participation in the treatment programme may be taken into consideration during sentencing

8.2.3 Proposed amendments in respect of an accused found unfit to stand trial

– Insert provisions to the effect that any finding of unfitness to stand trial must be

reviewed by the Review Board immediately after order is made and thereafter periodically

– Insert provision that empowers Review Boards to make assessment orders to determine fitness to stand trial

– Review Board may make a "get fit to stand trial" order not exceeding 60-days after the finding of unfitness by the Mental Health Court or Review Board (where the Review Board ordered assessment to determine fitness)

- Allow orders to "keep fit to stand trial" where fitness is regained, but concern exists that the accused may become unfit if kept in a facility other than a psychiatric facility. Such an order can be made by the Review Board or Mental Health Court

– The Review Board must decide on an appropriate disposition for an accused found unfit to stand trial

– An unfit accused remains under the jurisdiction of the Review Board for as long as he is unfit to stand trial.

8.2.4 Proposed amendments in respect of an accused in respect of whom criminal capacity is at issue

– Provide for compulsory referral to Mental Health Court at any time during the court proceedings and as soon as the criminal court or either party identifies the issue of mental illness

– All arrangements for criminal capacity assessments to be made by Mental Health Court [86]

– Inset provision that specifically allows for criminal capacity assessments to take place out of custody

– Allow for the criminal court to call on Mental Health Court expertise during a trial in which lack of criminal capacity is at issue

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[86] Even though the trial of an accused found to lack criminal responsibility will not take place in the Mental Health Court, provision is made for the Mental Health Court to make arrangements for assessment of criminal capacity to lighten the administrative load of criminal courts in this regard. The suggestion that assessments for criminal capacity could take place out of custody could assist in expediting this process as well.

- Insert provision to the effect that any finding of not criminally responsible must be reviewed by the Review Board

Relevant forms will either have to be amended or designed to provide for the proposed referral to the Mental Health Court, as discussed earlier in this chapter.

8.3 Mental Health Care Act

The proposed amendments to the Mental Health Act are mainly in support of those suggested in respect of the Criminal Procedure Act. It mainly pertains to the powers of the Review Board.

The proposed amendments to the Mental Health Care Act will aim to achieve the following:

- Extend the powers of the Review Board in line with the suggested functions as set out under the proposed amendments to the Criminal Procedure Act

- Provide for a category of mental health care, treatment and rehabilitation that will accommodate accused persons under "get fit" or "keep fit" order made by the Review Board and as suggested under the proposed amendments to the Criminal Procedure Act

It is reiterated that this research mainly concerned itself with pre-trial issues pertaining to fitness to stand trial. Issues surrounding criminal capacity and the assessment thereof are incidental to this research, and the suggestions above are included for the sake of completeness and to encourage further research and investigation into the possibility that criminal capacity assessments should not be administered by traditional criminal courts.

9 CONCLUSION

This research was aimed at suggesting an alternative to traditional prosecution for the mentally ill but fit accused. The focus of the research was to investigate the functionality of well-established and successful Mental Health Courts within two different jurisdictions. The successes and challenges of each model were pointed out.

The research proposes an alternative to traditional prosecution for the mentally ill accused in the form of a Mental Health Court in South Africa. Drawing from the Mental Health Court models in Canada and the United States of America, the best attributes of these two models were combined into the proposed functioning of a South African Mental Health Court. Such court will house specialised mental health care skills and will make use of

legal professionals with special training in mental health matters.

A South African Mental Health Court can reduce the caseload on criminal courts by referring all matters involving mental illness to the Mental Health Court. Referring all matters to the Mental Health Court can assist in reducing the number of awaiting trial prisoners, especially those awaiting psychiatric assessments in prison, since fitness assessments can be conducted on-site at these courts. Mental Health Courts can divert mentally ill persons accused of minor crimes into a treatment programme and can provide specialised assistance to accused persons with mental illness who do not qualify for such diversion.

Mental Health courts will significantly reduce delays in the finalisation of pre-trial issues of mentally ill accused persons and will lighten the load on the resource-strapped forensic mental health care system since they will no longer have to admit accused persons for 30-day fitness assessments. Increasing the involvement of clinical psychologists in fitness assessments may further assist in lightening the load.

The mentally ill accused is rehabilitated through the appropriate and timeous treatment of his mental illness that in turn improves the likelihood of reduced recidivism by such an accused. Diversion of the mentally ill accused has proved to reduce recidivism, which in turn results in a safer society.

Mentally ill accused persons, as a group of accused persons in respect of whom specialised solutions should be sought, will benefit greatly from a Mental Health Court. So will the criminal justice system, the forensic mental health care system, and society at large.

The research also proposed some changes to the legislative framework that currently regulates the criminal justice system to improve the manner in which those found unfit to stand trial or not criminally responsible are treated. These suggestions pertained mostly to the powers of the Review Board and entailed that their powers be extended to include the review of a finding of unfitness and/or lack of criminal responsibility by a criminal court and further that these Review Boards should be approached for input on what the best possible disposition for a particular accused would be.

The implementation of Mental Health Courts as a specialised court, which is not a new phenomenon in South Africa, could be the first step towards a complete overhaul of the criminal justice system's approach to mentally ill accused persons, as alluded to in the *De Vos* matter. In support of such a first step, current structures, such as Review Boards, can

be redefined and aligned to optimise the manner in which criminal cases involving mental illness are dealt with in the South African criminal justice system.

Therapeutic jurisprudence should be used as an agent within the criminal justice system to ensure that the law has a constructive effect on a mentally ill accused person. Therapeutic jurisprudence is one of the underlying principles of any Mental Health Court and is proposed as an appropriate therapeutic response to accused persons with mental illness in the South African criminal justice system.

ANNEXURE A – SOUTH AFRICAN ASSESSMENT ORDER

(FORM J138A)

1204 "B"

G.P.-S. 003-0319 J 138A

LASBRIEF TOT OORPLASING VAN 'N PERSOON WAT AANGEHOU WORD, NA 'N INRIGTING, VIR ONDERSOEK KRAGTENS DIE BEPALINGS VAN HOOFSTUK 13

[Strafproseswet, 1977 (Wet 51 van 1977), artikels 77, 78 en 79]

Vingerafdruk No.	Polisiekantoor	M.R. No.	Saak No.
NB	George	500-6-2002	C 572/02

Aan die (¹) SAPD George / Hoof van die Gevangenis

en aan die † *Geneeskundige Superintendent* Lentegeur hospitaal/~~psigiaters~~:

(1) Dr. ——— van ———

(2) Dr. (⁶) ——— van ———

AANGESIEN dit † *blyk/beweer word* dat (²) Lara Johnston

'n (³) blanke persoon aangekla van die misdaad van bendresigment

en deur u, genoemde (¹) hoof aangehou by die SAPD selle

kragtens 'n lasbrief uitgereik deur die † ~~Streeklanddros~~/*Landdros vir die distrik*/~~streekafdeling~~

George /

~~Regter van die~~ ——— † ~~Provinsiale/Plaaslike Afdeling van die Hooggeregshof van Suid-Afrika~~ op 18-6-2002 †aan 'n geestesongesteldheid of geestesgebrek ~~hy~~/*gely het tydens die pleging van die misdaad* en dit wenslik is dat ~~hy~~/sy ingevolge artikel (⁴) 78(2) en 79

van die Strafproseswet, 1977, na Lentegeur hospitaal vir sielsiekes vir ondersoek vir 30 dae verwyder word.

So word u, genoemde (¹) hoof en u, genoemde † *Geneeskundige Superintendent* ~~Psigiaters~~ hierby gelas om aan die Hofbevel soos hieronder uiteengesit te voldoen:

†1. Ooreenkomstig die bepalings van artikel (⁴) 78(2) en 79 van die Strafproseswet, 1977, gelas ek dat (²) Lara Johnston na Lentegeur hospitaal verwyder word en dat ~~hy~~/sy daar ondersoek word.

2. Ek gelas ook dat bogenoemde ~~psigiaters~~/superintendent ondersoek instel of die beskuldigde vanweë geestesongesteldheid of geestesgebrek—
   (a) oor die vermoë beskik om die hofverrigtinge dermate te begryp dat hy sy verdediging na behore kan voer;
   en/of
   (b) ten tye van die pleging van die misdryf vir die ten laste gelegde misdryf strafregtelik toerekenbaar is, d.i. of hy bevoeg was om—
      (i) die ongeoorloofdheid van die handeling te besef;
      of
      (ii) ooreenkomstig 'n besef van die ongeoorloofdheid van sy handeling op te tree.

3. Ek gelas ook dat die † *Geneeskundige Superintendent*/~~*Psigiaters*~~ sy/~~hulle~~ verslag(~~e~~), ingevolge artikel (⁴) 78(2) en 79 van die Strafproseswet, 1977, in viervoud opstel, en in drievoud aan die Landdros te George en een afskrif aan die (⁵) DOJ te Kaapstad voor of op 26-6-2002 voorlê.

4. Ek gelas ook dat, indien dit nodig is dat genoemde (²) Lara Johnston by die verstryking van die tydperk waarin ~~hy~~/sy ondersoek is ~~hy~~/sy na die gevangenis op George teruggestuur word om tot tyd en wyl 'n verdere bevel uitgereik word, daar aangehou te word.

5. Ek gelas ook dat 'n transkripsie van die ~~getuienis wat by † *die voorlopige ondersoek en/of die verhoor* afgeneem is, gemaak en aan die † *Geneeskundige Superintendent/Psigiaters*~~ verskaf word.

ANNEXURE B – CANADIAN ASSESSMENT ORDER

(FORM 48)

FORM 48

(*Section 672.13*)

ASSESSMENT ORDER

Canada,

Province of

(*territorial division*)

Whereas I have reasonable grounds to believe that evidence of the mental condition of (*name of accused*), who has been charged with ...., may be necessary to determine*

☐ whether the accused is unfit to stand trial

☐ whether the accused suffered from a mental disorder so as to exempt the accused from criminal responsibility by virtue of subsection 16(1) of the *Criminal Code* at the time of the act or omission charged against the accused

☐ whether the accused is a dangerous mentally disordered accused under section 672.65 of the *Criminal Code*

☐ whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child

☐ where a verdict of unfit to stand trial or a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused, the appropriate disposition to be made in respect of the accused pursuant to section 672.54 or 672.58 of the *Criminal Code*

☐ where the accused has been convicted of the offence, whether an order under subsection 747.1(1) of the *Criminal Code* should be made in respect of the accused

I hereby order an assessment of the mental condition of (*name of accused*) to be conducted by/at (*name of person or service by whom or place where assessment is to be made*) for a period of .... days.

This order is to be in force for a total of .... days, including travelling time, during which time the accused is to remain*

☐ in custody at (*place where accused is to be detained*)

☐ out of custody, on the following conditions:

(*set out conditions, where applicable*)

* Check applicable option.

Dated this .... day of .... A.D. ......, at ....

....

(Signature of justice or judge or clerk of the court, as the case may be)

ANNEXURE C – AMERICAN ASSESSMENT ORDER

(FORM 16(a))

C.P.L. Article 730 FORM 16-a 3/90

ORDER FOR PSYCHIATRIC EXAMINATION

_________ COURT OF _________ COUNTY OF _________ ____________x

PEOPLE OF THE STATE OF NEW YORK, ORDER FOR PSYCHIATRIC EXAMINATION – against – Docket No. Indictment No.______ Defendant.____________ x……………………………………………

The above named defendant having been charged with __, in violation of __, and the court being of the opinion that the defendant may be an incapacitated person,

NOW, THEREFORE, it is

ORDERED that, pursuant to Article 730 of the Criminal Procedure Law, the Director of Community Mental Health Services or the Director of __Hospital for the (County) (City) of __ shall cause an examination to be made of said defendant to determine whether said defendant, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or her or to assist in his or her defense, and it is further

ORDERED that such examination be conducted in the manner specified in the paragraph checked below (check only one):
1. said defendant, having heretofore been released on bail or on (his) (her) own recognizance and not being in custody, such examination shall be conducted on an outpatient basis, and said defendant is hereby ordered to report for examination at a time and place to be designated by the said Director
2. said defendant, being now in custody, such examination shall be conducted at the place where (he) (she) is being held, unless the Director shall determine that hospital confinement of the defendant is necessary for an effective examination, in which event the (Sheriff) (Commissioner of Correction of the City of New York) is hereby directed to deliver the defendant to a hospital designated by the Director and to hold the defendant in custody therein, under sufficient guard, until the examination is completed, for a period not exceeding thirty (30) days (if the defendant subsequently has been released on bail, the foregoing paragraph (1) shall apply)
and it is further

ORDERED that upon the completion of said examination, reports thereof be submitted by the Director to this Court pursuant to section 730.20, subdivision 5, of the Criminal Procedure Law, and that the Clerk of the Court furnish a copy of said reports to the attorney for the defendant and to the District Attorney.
Dated: ______ Judge or Justice………………………………………………………………………………………………

Please indicate relevant reason(s) for referral for:	Art. 730 Eval.	Probation Referral
Disruptive, confused or bizarre behavior		
Threatening or violent behavior		
Suicidal behavior		
Uncooperative with defense counsel		
Appears dishevelled; not taking care of self		
Appears not to understand charges or court processes		
History of past psychiatric problems		
History of drug or alcohol abuse		
History of suicidal behavior		
Extreme or bizarre type of offense		
Other:		
Persons who may be contacted for more information, if needed:		
Judge:	Phone:	
Defense Counsel:	Phone:	
District Attorney:	Phone:	
Probation Officer:	Phone:	

COMMENTS OF THE COURT (if any) …………
BAIL CONDITIONS: ____

RETURN DATE, IF BAILED: ____

ENDORSEMENTS

Hospitalization of Defendant not in Custody

TO: The above named court

This Court, having directed that the defendant be examined on an out-patient basis by reason of the defendant's being released on bail or on (his) (her) own recognizance, the Director now informs the Court that hospital confinement of the defendant is necessary for an effective examination, for the following reasons:

and designates the following hospital

____

for such an examination.

Dated:

____

Signature of Director

The Court having directed that the defendant be examined on an out-patient basis by reason of the defendant's being released on bail or on (his) (her) own recognizance, and the Court having been informed by the Director that hospital confinement is necessary for an effective examination, the Court hereby directs the (Sheriff) (Commissioner of Correction of the City of New York) to take custody of the said defendant and to transfer (him) (her) to __ Hospital, for such examination, for a period not exceeding thirty (30) days.

Dated: ______ Judge or Justice…………………………………………………………………………………………

Additional Hospital Confinement To: The above-named court

The Director hereby applies for additional hospital confinement of the defendant for a period not to exceed thirty (30) days, for the following reasons:

Dated:

____

Signature of Director

The Court being satisfied that a longer period is necessary to complete the examination of the defendant, the Court does hereby authorize hospital confinement of the said defendant for an additional period, not to exceed thirty (30) days, for such examination.

Dated:______ Judge or Justice………………………………………………………………………………………

Hospitalization of Defendant in Custody To: The (Sheriff) (Commissioner of Correction of the City of New York)

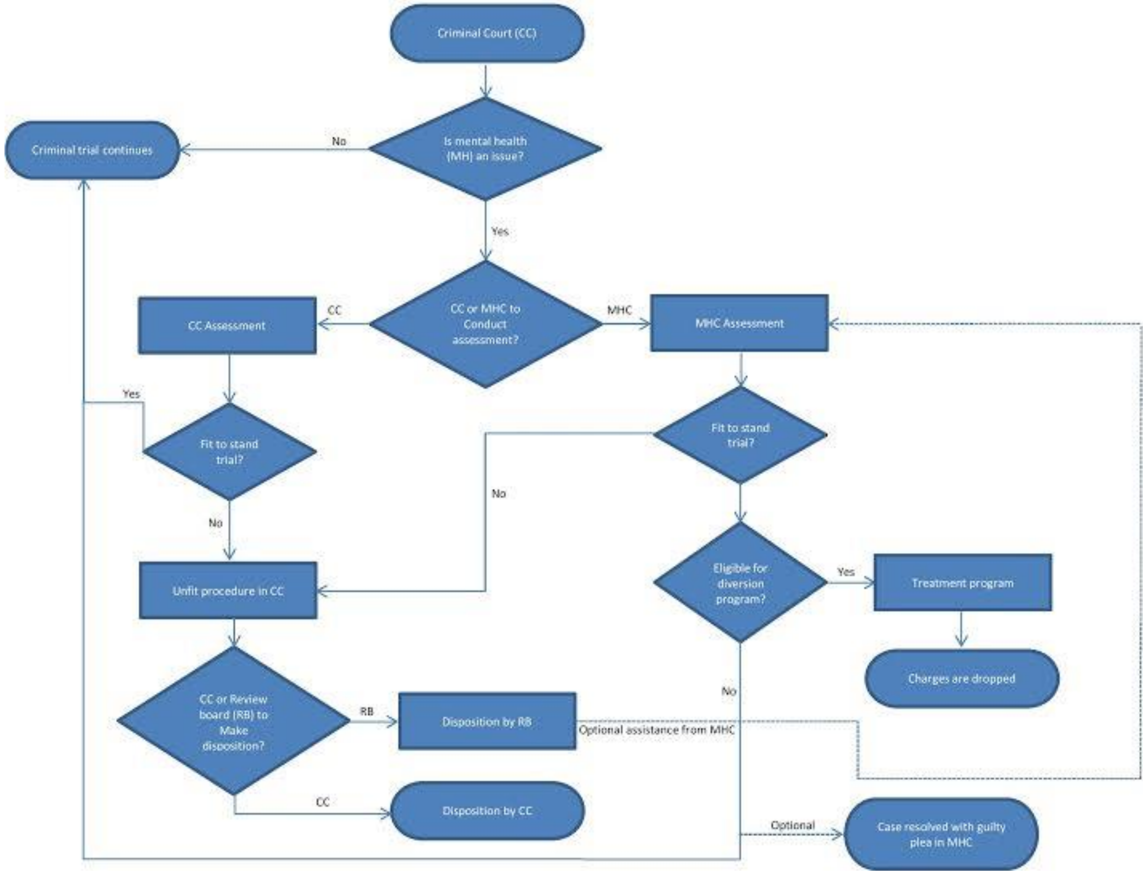
The Director hereby determines that hospital confinement of the defendant is necessary for an effective examination and, pursuant to order of the Court herein, directs that you deliver the defendant to __ Hospital and hold the defendant in custody therein, under sufficient guard, until the examination is completed, but not to exceed the period authorized by the Court.

Dated:

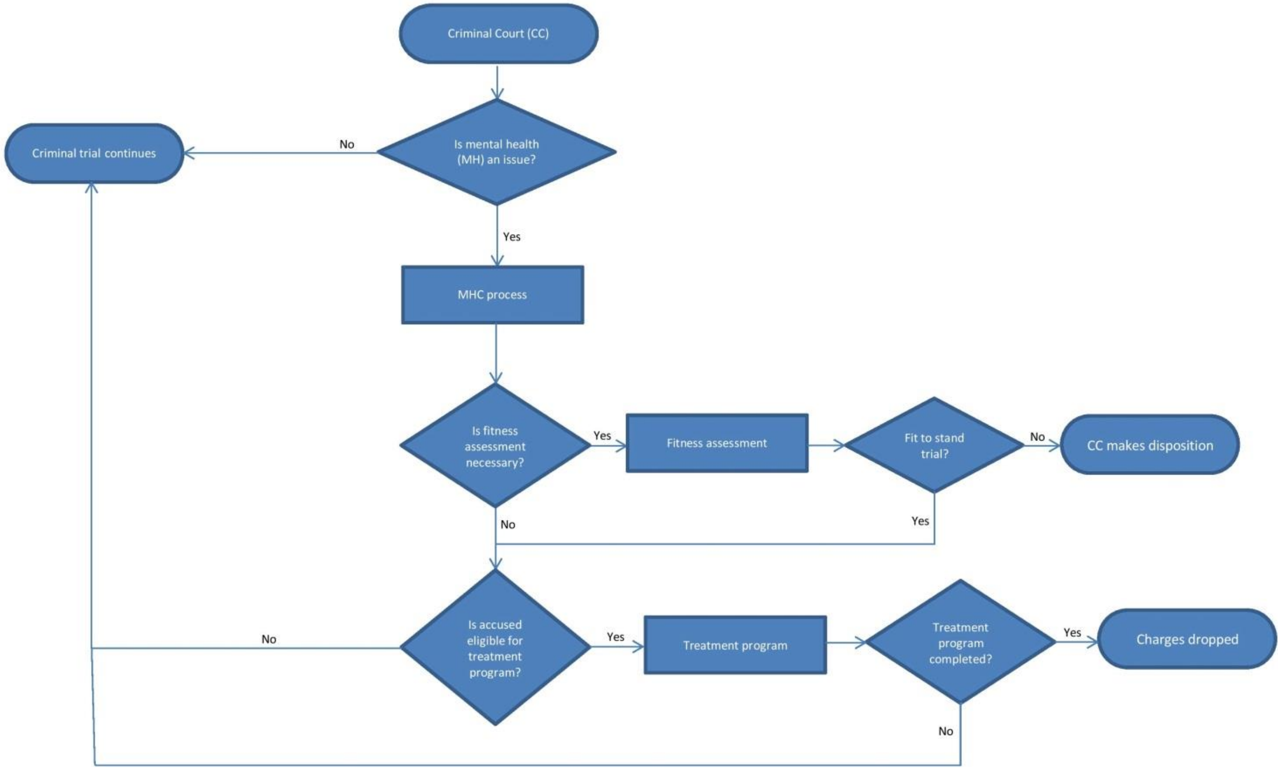
____

Signature of Director

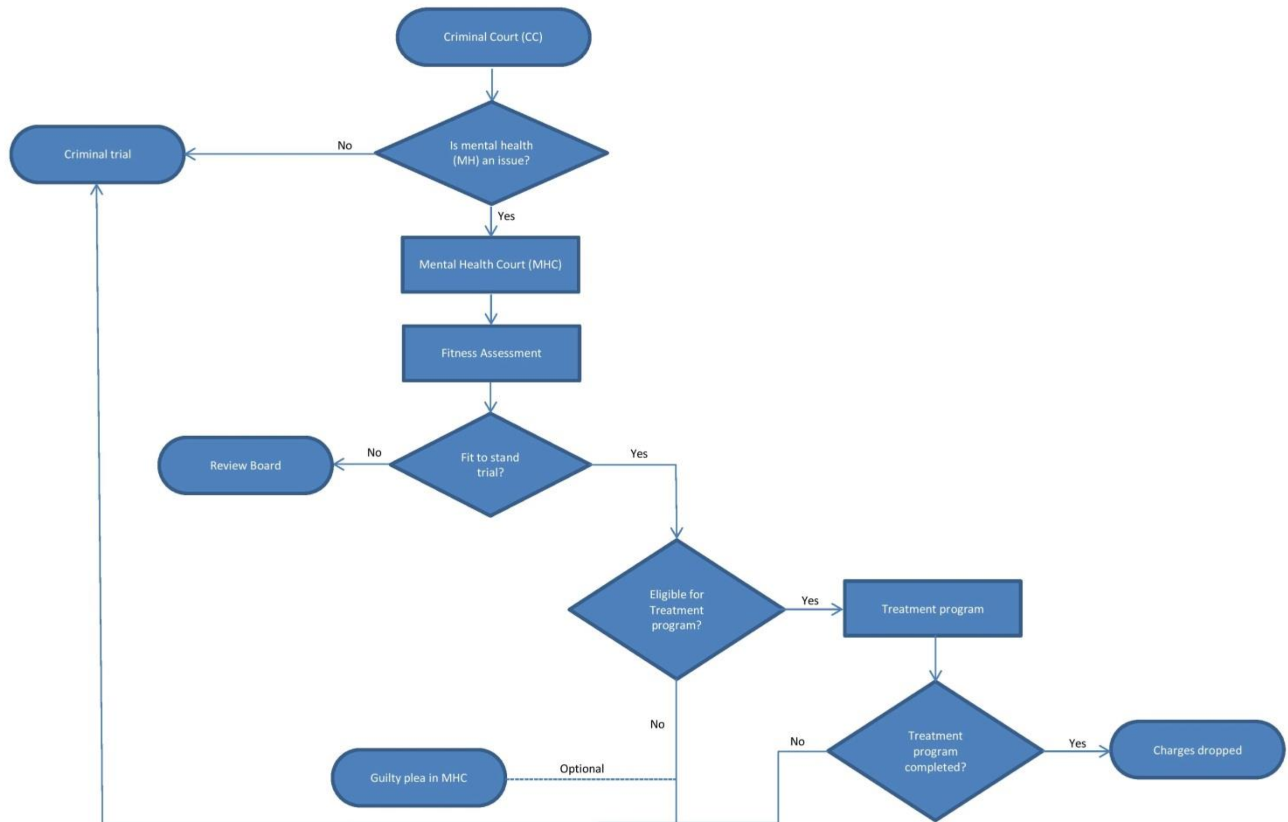
ANNEXURE D – CANADIAN MENTAL HEALTH COURT PROCESS



ANNEXURE E – AMERICAN MENTAL HEALTH COURT PROCESS



ANNEXURE F – PROPOSED SOUTH AFRICAN MENTAL HEALTH COURT PROCESS



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Speedy Trial Act 1974 18. U.S.C

United States Code

Canadian Legislation

Constitution Act of 1982

Criminal Code RSC1985 c, C-46

Health Care Consent Act S.O 1996 C.2

The Interpretation Act R.S.C 1985 C 1-21

Not Criminally Responsible Reform Act S.C 2014. C.6

Ontario Mental Health Act R.S.O 1990

Provincial Offences Act R.S.O 1990

English Legislation

Constitution At 1867 (U.K)

Criminal Lunatics Act 1800

International treaties and agreements

United Nations *Principles for the Protection of Persons with Mental Illness*

United Nations General Assembly resolution 46/119, *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* A/RES/46/119 (17 December 1991) http://www.un.org/documents/ga/res/46/a46r119.htm (Date of use: 13 August 2016)

United Nations Convention on the Rights of Persons with Disabilities.

United Nations General Assembly resolution number 61/106 *Convention on the Rights of Persons with Disabilities A/RES/61/106 (13 December 2006*) http://www.refworld.org/docid/45f973632.html (Date of use: 13 August 2016)