

Video #5 – NCR Script

It is a common portrayal in popular media to see the crafty and clever villain finally get caught, but it turns out he has one more trick up his sleeve... the insanity defense. He will pretend like he was not in his right mind to get off “easy” or avoid spending the rest of his life in prison. This narrative is far too common and couldn’t be farther from the truth. Although it is my hope that most people viewing crime dramas are doing so with a healthy amount of skepticism, I imagine most people are unaware of the history and thought process behind “the insanity defense.”

I’m John Leclair and this is “Keys to Our Past.” Please join me on this voyage of discovery as we explore the history of mental health care in Canada through the legislation and Criminal Code of Canada.

Hello, Welcome to my study. The basis for the Criminal Code of Canada extends back prior to Confederation. In the year 1800, James Hadfield shot at King George III of England and missed. At trial, it was determined that he could not be found guilty because he was under the influence of insanity at the time of his crime. In response, the British government quickly passed the Criminal Lunatics Act, allowing a court to determine that an individual was Not Guilty by Reason of Insanity. With this ruling, they would be held in custody until the King allowed for their release. The British Criminal Lunatics Act was adopted into the Criminal Code of Canada with one main difference – in Canada it was the Provincial Lieutenant Governor who would sign releases.

There was a second case in England that had a major and lasting impact on the development of the Criminal Code of Canada: the acquittal of Daniel M’Naughten in 1843. M’Naughten shot and killed the Secretary to the British Prime Minister. His trial led to a standard for determining criminal liability and formed the basis of what would come to be known as the M’Naughten Rules. These rules specified: number one, that there is a presumption of sanity; therefore it is the defense that must prove the defendant’s insanity; number two, that the defendant must be suffering from a “disease of the mind”; and number three, that the defendant must not understand the nature and quality of the act, or they must not know that it is considered wrong. For nearly a century, the Criminal Code remained unchanged and unchallenged. In practice, its application was harsh – those found Not Guilty by Reason of Insanity could only be discharged upon approval of the Lieutenant Governor, something which was exceedingly rare.

For example, in Penetanguishene - the home of Ontario’s only maximum-security forensic mental health unit since 1933 - it would take thirty years before any patients held on a Lieutenant Governor’s Warrant were considered for release. Many of these men had already served several decades in other institutions prior to their arrival in Penetanguishene. The hopelessness of this indeterminate sentence resulted in a rash of suicides in the facility’s early history. One man fought for his release for twenty years before coming across a letter confirming that although considered “cured” by hospital administrators, he would never be released. He later took his own life.

It was not until 1991 that the Not Guilty by Reason of Insanity section of the Criminal Code of Canada was significantly altered. This was the result of a landmark case, *R. v. Swain*. In 1991, the Supreme Court upheld an appeal by Owen Lloyd Swain which found that sections of the Criminal Code were unconstitutional and in violation of Canada's Charter of Rights and Freedoms. The effect of this ruling was to strike down the sections of the Criminal Code dealing with the insanity defense and Not Guilty by Reason of Insanity rulings. In its place, Bill C-30 was passed in 1992.

Bill C-30 was an amendment to include new language, limitations to the power of the court, and expectations for the care and custody of mentally disordered offenders. It ensured that while a defendant is still able to raise mental illness as an issue at trial, the court is only able to order a psychiatric assessment if they: number one, want to determine if an individual is fit to stand trial; or number two, want to determine what the appropriate disposition might be once a verdict is reached.

In addition, the Bill C-30 amendment replaced "Not Guilty by Reason of Insanity" with "Not Criminally Responsible", or more simply, NCR. This change was not only a more accurate reflection of current medical terminology, but it also allowed the courts to find an individual guilty while simultaneously ensuring they were not held responsible for their actions. In other words, an individual does not get acquitted, or "get off easy" by using the "insanity" defense – although we could argue that they never did considering the indefinite length of their confinement under the earlier law.

This leads us to another important change – the establishment of Provincial Review Boards. While it was originally only the Lieutenant Governor who judged whether an individual should be released, it is now a board made up of appointed experts and community members who review the case of an individual found unfit to stand trial or NCR on an annual basis. An additional important change was that it was no longer up to the individual to prove that they were not a risk to the public. Instead, at each hearing, it is the Board that must determine that the individual remains a significant risk to the public to continue confinement.

Finally, language was included in the Bill that care should consist of the "least restrictive and least onerous" option available. This phrasing emphasized that while community safety remains a priority, individuals are not detained in hospital for punishment; instead, the focus is on treatment and eventual community reintegration.

Despite these changes to protect the human rights of individuals found unfit or NCR, recent updates to the Criminal Code have begun to erode these protections. In response to public pressure around several high-profile cases, the government brought Bill C-14 into effect. This Bill created new definitions for risk, removing the "least restrictive and least onerous" language and replacing it with the phrase "necessary and appropriate" confinement. It also added a new "high-risk" designation. These changes were opposed by mental health professionals, community providers, and legal experts alike. These groups argued that the amendments were not evidence-based, created confusion in the law and the system, would create longer stays in hospital at greater cost to the public, and was open to constitutional challenge. Nonetheless, Bill C-14 has been in effect since 2014.

Since Confederation, Canada has, in part, defined itself in relation to how we treat our most vulnerable populations. In the case of offenders with mental illness, we have worked to maintain the delicate balance between protection of the public and protection of individual liberty, dignity, and human rights. One of the best ways we can do this is by learning from the evidence, and creating evidence-based policies. We know that individuals suffering from mental illness are less likely to commit crimes than the general population. In addition, those now deemed “high-risk” under Bill C-14 are, according to the evidence, the least likely to re-offend which actually makes them low risk. Looking towards the evidence allows us to side-step the “double stigma” faced by individuals who have a mental illness and have committed a crime.

To sum up our discussion in the study, I’d love for you to take away these three key points: number one, the Criminal Code of Canada was strongly influenced by British Common Law; number two, individuals found Not Guilty by Reason of Insanity or, today, Not Criminally Responsible, are not “getting off easy,” they are getting the treatment they need; thirdly, since Confederation, Canada has strived to maintain a delicate balance between protection of the public and protection of the rights and dignity of the mentally ill. Thanks for visiting my study, join me next time on “Keys to Our Past” as we continue our discussion of the history of mental health care in Canada.