Case Law & Mental Illness:

Court of Criminal Appeal NSW

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As a psychologist I read the Case Law to get inside the heads of judges. I do this because as an occasional expert witness for the court I need to be helpful to the judge not a hindrance. To my way of thinking I need to go with the grain and not against it. So the question here is – how do Judges think about mental illness?

From numerous Case Law transcripts I discovered that there are at least four ways in which an offender's mental health problems may be relevant to sentencing. Firstly, mental illness might reduce moral culpability, thus reducing a concern for denunciation and punishment. Secondly, the mental illness might mean that the offender is not suitable for general deterrence. Thirdly, a custodial sentence might weigh more heavily on a person with a mental illness. Fourthly, a countervailing consideration is the danger the mentally ill person poses to the community whilst mentally ill.

Here I present two cases from the New South Wales Court of Criminal Appeal (CCA) to illustrate how judges think about mental illness. In these two cases there is a direct link between the mental illness and the commissioning of the crimes. In both cases there is an appeal against the original sentence.

Take the case Adzioski (ADZIOSKI v R [2013] NSWCCA 69) as an example. A 33 year old male tried to have sex with a young woman who is cognitively impaired. The incident occurred on a Sydney suburban train on a Friday night at about 7:45 PM. This all took place in the presence of her father and other train passengers. The man had removed the young woman's underpants and had pulled down his trousers to reveal his erect penis.

The offender's medical records showed a history of schizophrenia and alcohol abuse since 20 years of age. The psychiatric evidence was unanimous and it clearly established a causal link between the man's mental illness and the commissioning of the offence. At the time of the offence the man's thoughts were disordered and disintegrated. It was also agreed that the disinhibited sexual behaviour was exacerbated by his alcohol consumption. He was sentenced to six years with a non-parole period of four years.

The Case Law says that 'mental illness *might* reduce moral culpability'. The point being that each case will bring its own unique features. The sentencing judge commented that the current charges, together with the Form 1 charges, seemed to be part of a continuous sequence of events. For example, the offender had taken himself off his medication six months prior to the offence and there seemed to be a pattern of ongoing behaviour and that people were getting hurt.

The offender had told the sentencing judge that his GP and a psychologist had told him that he could go off the medication. The sentencing judge and the three appeal judges simply didn't believe him. The judges dismissed the notion that such advise was ever given. The judges were also wondering about the offender's sense of personal responsibility and they doubted his prospects for rehabilitation. The countervailing consideration of protecting the community was the main focus here. The appeal was rejected.

In the Case Law for Devaney (DEVANEY v R [2012] NSWCCA 285) we find an example where reduced moral culpability did work in favour of the offender with mental illness. In this case the offender was originally sentenced to 14 years and 11 month with a non-parole period of 11 years and seven months for the attempted murder of his ex-girlfriend.

The offender in Devaney had gone to a great deal of trouble to shoot his ex-girlfriend. He had gathered three hand guns, ammunition, a police badge, a police warrant card, a disguise, and swipe-cards to get access to the gym where the woman worked; and he had a taxi waiting outside the building that housed the gym.

The offender entered the gym, produced the gun. The woman turned and ran. Three shots were fired. The woman sustained two entry wounds and two exit wounds to her abdomen. Her colon was perforated. One bullet missed an iliac artery by two centimetres. Although she was out of hospital within a week, she had a long road to recovery with help from a physiotherapist and a psychologist.

The appeal judges focused on the "unanimous medical evidence" that the offender was psychotic at the time of the offending; and importantly there is a connection between the illness and the crime. In other words the man was acting on his paranoid psychotic delusions. Therefore, the part of the

sentence that reflected individual and general deterrence and denunciation of the crime were taken out of the overall sentence. The Court of Criminal Appeal reduced the overall sentence to 12 years and a non-parole period of 8 years.

The point of difference between Adzioski and Devaney is that Devaney didn't know that he was experiencing paranoid psychotic delusions. Adzioski had known about his illness for 13 years. Once Devaney was in custody he was soon introduced to the prison's forensic unit where he was assessed and diagnosed for the first time. Once suitable medication was found Devaney was able to admit to the wrongness of his crime. Three psychiatrists also agreed that Devaney was no longer a risk to the community now that he was no longer ill. With Adzioski there was concern about his future danger to the community.

The appeal judges still have Devaney behind bars for eight years despite the fact that the "mental illness was a consideration to permeate the whole of the sentencing task". In this case it came down to what the judges thought was a fair and just sentence when balancing the reduced moral culpability against the public perception of justice. The quote from the Case Law is, "the sentence should be sufficiently severe such that it will not undermine public confidence in the sentencing process".

How do judges think about mental illness? Now here's the thing: when a judge looks at calculating a sentence, the starting point is the objective nature of the offence, not the mental status of the offender. From what I can gather, the judge first looks at the severity of the current offence in relation to a mid-range or average example of such an offence. From that point the sentence is set with the guidance of the statistical manual. Discounts, say for an early plea of guilty could apply to reduce the sentence further.

Once the sentence is set then the judge will take into account the subjective factors to calculate the non-parole period. The judge will balance off mitigating and aggravating factors and take into account the offender's mental status, and expressions of contrition and remorse, etc.

One other interesting observation is that the judges seem to have some sense of what the public expect from them. They gauge the public for what is "sufficiently severe". Therefore there is a strong element of punishment in the sentencing. Whether you believe that 'punishment' *per se* is a sustainable measure to protect the public is up to you; but it is clear that the judges think about mental illness primarily in terms of public safety.

References:

ADZIOSKI v R [2013] NSWCCA 69, https://www.caselaw.nsw.gov.au/decision/54a639923004de94513da7bd

DEVANEY v R [2012] NSWCCA 285, https://www.caselaw.nsw.gov.au/decision/54a638f13004de94513da3a1