

LAW AND MENTAL DISORDER

Bloom, Hy, and Schneider, Richard D., Eds., *Law And Mental Disorder[:] A Comprehensive And Practical Approach* (Toronto: Irwin Law, 2013), i-xxi, 1,422 pp.

Reviewed by: DAVID C. DAY, Q.C.

(01 July 2015)

Introduction

At birth of legal memory (03 September 1189), concepts of “mental disorder” and “law” were solitudes; sharing only disregard for personal liberties, which manifested in asylums and gaols.

Law’s misunderstanding (or ignorance) of mental disorder, and medicine’s dearth of appreciation of law, were industrial strength.

Over more than nine centuries, enlightenment gradually (perhaps begrudgingly) bridged the abyss between mental disorder and law. Still, disturbingly-unhealthy suspicion lingers, even today, between psychiatrists (and psychologists) ‘following’ mentally-disordered patients and the patients’ legal advocates, and between the disciplines in which they practice.

As elucidated, in muted terms, by the Honorable Beverly McLachlin, PC, Chief Justice of Canada's Supreme Court, in her Foreword to *Law And Mental Disorder[:] A Comprehensive And Practical Approach* (p. xiii):

Our belated understanding of the interdependence of law and psychiatry and their impact on individuals has created a need to bridge these formerly separate disciplines. Lawyers must be able to access psychiatric knowledge. Psychiatrists must understand the processes of the law.

“This book,” she continues,

will help meet that need. It is broad in scope, yet detailed in clinical explanation. It is written in a style that makes it accessible to a diverse readership, from students of psychiatry to veteran psychiatrists, from board members through to lawyers to judges. It is an important work, and one that will make an important contribution to medicine and justice in Canada.

Generally

This work is a scholarly, although pragmatic—not to mention, pioneering—multidisciplinary Wikipedia of law and mental disorder, comprising 1,422 ‘Government-letter’ size (say 8 x 10.5 inch) pages, written by 69 contributors under general editorship of psychiatrist and barrister Dr. Hy Bloom (p. 1,357), and Mr. Justice Richard D. Schneider (p. 1,367). Dr. Bloom authored or co-authored 13, and Justice Schneider, six, of the book’s 60 chapters.

The chapters are, in the book’s table of contents (appended), slotted under one or another of 16 theme titles. Neither there, nor preceding the individual chapter texts—inexplicably—are there chapter content summaries. The omission (which I attribute to the publisher) detracts from the book’s utility. Nonetheless, the book is comfortably user-manageable. This, the co-editors achieve by formatting the approximately 1,015,000 words of text to include frequent sub-headings,

‘bullet’ points, tables, and diagrams. Rendering resort to the text even more beneficial is the book’s digital edition (via the Irwin Law Reader App—iOS or Android).

The volume’s bindings harbour a mobile library of chapters and groups of them which qualify to be excised and serve as stand-alone titles. Were that to occur, the resulting separate titles would join a modest number of prior books dedicated, only, to some of the topics this work embraces.

Congruent with the theme of the Foreword, the candidate’s co-editors—Dr. Bloom and Justice Schneider—preface the book with their contention (p. xvi) that

[m]uch has been said and written about the often awkward relationship between lawyers and psychiatry and psychology experts [a concern further considered at pp. 67-68]. Modern legal proceedings have thrown them together in an ever-increasing number of situations, but can they come to understand each other’s limitations, professional roles, obligations, and especially, each other’s language?

In answering their question—and, generally, expressing their aspirations for the book—the co-editors write (pp. xvi-xvii):

We hope this work will bridge the gap in knowledge and understanding between the two disciplines and, above all, that mental health practitioners, as well as members of the legal system, will find this text to be of assistance in their day-to-day practices. If that goal is met, we will have achieved our objective.

We need hope *Law And Mental Disorder* reaches its goal; considering that about 20 percent of Canadians are, in one or another respect, impaired by mental dysfunction (or addiction), and

nothing remotely comparable to the book has ever been published in Canada for ‘law and mental disorder’ practitioners. My forecast is that the book will achieve its objective.

Summary

Globally, this book is a portmanteau of law and mental disorder. Nothing more could be expected of a single-volume work about these complex subjects.

Underlying, informing, and policing practices by lawyers, psychiatrists and psychologists—the book’s principal intended audiences—of their respective professional obligations are legal (usually codified), ethical (practice) and professional (aspirational) responsibilities. Recognition and application of such are crucial to adequate discharge of duties of care owed law clients or mentally disordered (or addicted) patients. Breaches of such procedural responsibilities may generate civil liability, court sanction, professional discipline, impugned reputation or—perish the thought—criminal prosecution. Too often, law literature on particular substantive subjects inexplicably overlooks them or discounts their significance. Not so, this book.

Under the imprimatur “Professional Responsibility” (chapter 59), co-editor Bloom devotes 60 pages to thoughtful discourse on legal, ethical and professional obligations of physicians, especially psychiatrists, in the context of the book’s subject. He approaches this fundamental concern from perspectives of (i) doctor and patient relationship; (iii) ethics in forensic psychiatry, (iv) regulation of physicians and practice of medicine (citing Ontario as an example), (v) behavior subject to censure, and (vi) disruptive physicians.

Patients, and their families have, for decades, been alive to problems sometimes occasioned by disruptive physicians (and, equally, by stealthily-abusive allied support staff); but loathe to give voice to their concerns.

Disruptive physician behaviour (DPB), Dr. Bloom reports (p. 1,307), comprises “an emerging area of professional concern that is likely to rely increasingly on forensic psychiatric expertise for both assessment and treatment.” Lacking a single universally-embraced definition, he explains (p. 1,307) that “most agree, ..., ... [DPB] applies to physicians whose behaviour toward patients, colleagues, and allied health care workers is inappropriate and abusive, and by implication, injurious or potentially injurious.” After introducing the subject, he copiously and analytically pursues this professional concern from perspectives of (i) nature and scope, (ii) impact, (iii) causes, including systemic influences, (iv) assessment, and (v) management.

A discrete aspect of professional responsibility—psychiatric malpractice—is surveyed, in chapter 54, by Jenny P. Stephenson, a practising barrister (she is also a trained physician). Succinctly, though effectively, she deals with the elements of negligence, then turns to particular facets of the subject: (i) failure to prevent harm; (ii) negligent risk assessment (such as suicide, including a checklist of “Factors for Suicide”); (iii) negligent prescription of medication; (iv) negligent psychotherapy; (v) false imprisonment; (v) breach of confidentiality, and (vi) assault and battery.

Coursing through the book, under more catholic chapter titles, is commentary on myriad other professional responsibility issues. In some instances, expressly-anticipated are legal issues

which have, since the book's publication, taxed courts for adjudication. One such issue derives from communications between an expert opinion medical witness and a lawyer retaining him or her; considered in chapter 4 – Medico-legal Report Writing, by co-editor Bloom.

Dr. Bloom writes (p. 54) that “[m]aking changes to a report or draft report is subject to ethical considerations”; an issue he then examines. Months later, such considerations were front and centre in *Moore v. Getahun* in Ontario Superior Court of Justice (occasionally incendiary litigation) (2014 ONSC 237; additional reasons: 2014 ONSC 3931; affirmed on appeal: 2015 ONCA 55), and are now before Supreme Court of Canada (motion for leave to appeal to SCC filed 30 March 2015). One of the litigation issues—generated by the trial judge—derived from her criticism of counsel, for one of the parties, who had discussed with his client's expert witness (a retired orthopedic surgeon) the content of the expert's draft report which was altered to produce the final report adduced at trial.

Although confidentiality afforded by legal solicitor-client privilege does not, in general, apply to psychiatrist-patient relationships, several exceptions obtain. Co-editor Justice Schneider, and Kate Dewhirst, partner in a boutique health law firm, discuss legal, ethical and professional features of the exceptions in chapter 47 – Privacy and Privilege (pp. 1,003-1,027). Trite to state, absent consent of the assessed person, statements to a psychiatrist assessing a person at the behest of the person's solicitor (such as in a civil proceeding) are privileged by operation of agency law; and statements to a psychiatrist by an accused being assessed under *Criminal Code* s. 672.21 are, by that statutory provision, protected from disclosure. Unlike some works dedicated solely to

examining privilege, the candidate is adept at vividly despatching the fundamentals of the subject, with brevity and clarity.

Appreciation by law practitioners of medicine's responsibility issues, such as these, is essential to their providing counsel to physicians (especially psychiatrists) whose untoward behaviour triggers legal or quasi-legal proceedings.

Assessment

Arguably, *Law And Mental Disorder* may be perceived as leaning toward education of those practicing in the disciplines of psychiatry and psychology. This is particularly evident in chapters dealing exclusively with law. Some other chapters appear dedicated to addressing the sciences and practises of psychiatry (including pharmacology) and psychology, and their practitioners, in the context of mental disorder.

Whatever the leaning of the book, its content nonetheless informs, educates and counsels the legal profession, as well as teachers and researchers in law academy, on a comprehensive syllabus of psychiatry and, to lesser extent, psychology: comprising both theory and clinical applications, in a host of forensic circumstances. They need schooling, primarily, in medical science, not law.

Reinforcing this assessment is the Foreword's opinion that the book will serve as "an important contribution to medicine and justice in Canada" by helping lawyers to "access psychiatric knowledge," in addition to imbuing psychiatrists with ability to "understand the

processes of the law”. In brief, the book challenges the solitudes of these “formerly separate” disciplines by advocating “interdependence”.

This book is an entirely new work—a first edition—on law and mental disorder.

It is the only comprehensive and practical multidisciplinary work on the subject of law and mental disorder that has been published in Canada. Rather than contribute to existing literature on the subject, it expands the boundaries of subjects embraced by legal literature. Professional experience of each of its multiple authors—academics and practitioners—lends, immeasurably, to the legal and therapeutic value of the content.

This book, unmistakably, enhances the quality of legal research in Canada. It does so on three fronts. First, the candidate, in and of itself, is a testament to exhaustive, fastidious research on its broad subject.

Second, 3,252 references—evidently chosen with informed and painstaking care—have been cited after the chapters; in most instances under sub-titles of “literature” or “recommended reading”. These references will inestimably expedite research by law academy (and, of course, supplement understanding gained from the text by legal, medical, and psychology practitioners) respecting the book’s subject matter.

Third, “The Importance of Research” is especially recognized (at pp. 646-648) in chapter 29 – The Psychiatrist’s Contribution to Understanding and Preventing Acts of Terrorism” by

Wagdy Loza, a licensed psychologist and a researcher; co-editor Dr. Bloom, and Mini Mamak, a senior practising hospital forensic psychologist. “The study of extremism and terrorism,” they conclude (p. 647, by reference to Loza’s 2007 journal article in *Aggression and Violent Behaviour*),

requires a multifaceted research plan utilizing several disciplines to fully explore the various dimensions of the phenomena. The psychological part of this plan would include further exploration of important issues such as religion-based violence and the influence of religious teachings on extremists’ and terrorists’ values, beliefs, attitudes, attributions, motivations, cognitive and emotional states, ideologies, and strategies. Other equally important psychological issues are the effect of the environment and peers, the process of recruiting, the group dynamics that exist in these organizations including leader-follower relations, the organization of terrorist groups, their decision-making processes, and the personality variables involved in the functioning of these groups.

Understanding of terrorism, including all of these dimensions (some of which Dr. Bloom considers), is vital for increasing numbers of (i) counsel who prosecute or defend anti-terrorism criminal proceedings in Canada, and (ii) expert medical opinion witnesses who testify, in such proceedings, for Crown or defence.

This book is substantial in nature. It embraces all of the ‘traditional’ areas of law and mental disorder, and also addresses what—arguably—are emerging aspects of the subject; for example, (i) cross-cultural issues, (ii) sleep and violence, (iii) understanding and prevention of terrorism, (iv) risk assessment of sex offenders, and (v) law and psychiatry in the age of the *Convention on the Rights of Persons with Disabilities* [2006]. Moreover, the book is a multidisciplinary deliberation on its subject.

Maintaining qualitative consistency of writing by 69 contributors to the book, on a plateau of excellence, must have proven a considerable challenge for the co-editors. They succeeded.

First, the writing, throughout, is surgically-precise, concise, fluent, and disciplined.

Second—and much more significant—the writing achieves the most vital goal of authorship treating a technical subject (in this instance, manifold complex subjects): intelligibility for the consuming disciplines of law, and of psychiatry and psychology. Noteworthy, the book does not include a glossary; mostly unnecessary, because of the clarity of the jargon-minimized writing in expression and explanation of involved legal and psycho-medical concepts and applications.

Law And Mental Disorder is, unquestionably, of current interest in law practice. Practitioners in exceedingly few areas of law practice will not have interest. Many law practitioners will, or should, recognize a need to consult this work; if no further than psychiatrist Michel Silberfeld's chapter 49, dedicated to capacity assessment (pp. 1,079-1,090). Whether taking instructions for a last will and testament, an advance health care directive, a power of attorney, or during countless other retentions, a private law practitioner's ascertainment of a client's capacity (involving, where regarded essential, engagement of psychological or psychiatric services) is fundamental (alas, routinely overlooked in the 'crisis to crisis' of many law practices). What this chapter lacks is to be found in *When the mind fails: a guide to dealing with incompetency*, by Dr. Silberfeld and barrister Arthur Fish (Toronto: University of Toronto, 1994), cited at p. 1,077.

This book is designed to be consulted both by law practitioners and academy, and by psychiatrists, psychologists (not to mention other professional mental health carers, and medicine academy).

If not already, this book will be valued—exceptionally so—by practitioners and academics in law and in mental health. Several reasons support this conclusion. The book is a pioneer in the facet of law and of medicine promised by its title. Treatment of its subject—both theory and application—is readily intelligible to the novice; and will enrich understanding among those who regard themselves as sophisticates.

Each of the co-editors (obvious from their professional biographies) has brought to the undertaking of producing this book extensive and intimate knowledge and experience in their respective professional disciplines. They rightly identified the need for this book, and well-appreciated the nature of the work product required to satisfy that need. Their editorial partnership evidences melding of their consuming adult life commitments, respectively, to the disciplines of law and medicine (more precisely, law and medicine by Bloom, and law, by Schneider). No solitudes here.

LAW AND MENTAL DISORDER

A COMPREHENSIVE AND
PRACTICAL APPROACH



Hy Bloom
Richard D. Schneider
EDITORS



Law and Mental Disorder: A Comprehensive and Practical Approach
© Irwin Law Inc., 2013

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior written permission of the publisher or, in the case of photocopying or other reprographic copying, a licence from Access Copyright (Canadian Copyright Licensing Agency), 1 Yonge Street, Suite 800, Toronto, ON, M5E 1E5.

Published in 2013 by

Irwin Law Inc.
14 Duncan Street
Suite 206
Toronto, ON
M5H 3G8

www.irwinlaw.com

ISBN: 978-1-55221-150-2
e-book ISBN: 978-1-55221-332-2

Library and Archives Canada Cataloguing in Publication

Law and mental disorder : a comprehensive and practical approach / Hy Bloom, Richard D. Schneider, editors.

Includes bibliographical references and index.

Issued also in electronic format.

ISBN 978-1-55221-150-2

1. Mentally ill offenders — Legal status, laws, etc. — Canada.
2. Insanity (Law) — Canada. 3. Mental health laws — Canada.
4. Forensic psychiatry — Canada. 5. Criminal procedure — Canada.
I. Bloom, Hy II. Schneider, Richard D

KE514.L38 2013 344.71044 C2013-901635-X
KF9242.L38 2013

The publisher acknowledges the financial support of the Government of Canada through the Canada Book Fund for its publishing activities.

We acknowledge the assistance of the OMDC Book Fund, an initiative of Ontario Media Development Corporation.

Printed and bound in Canada.

1 2 3 4 5 17 16 15 14 13

CONTENTS

FOREWORD	xiii
PREFACE	xv
ACKNOWLEDGMENTS	xix

PART 1 BEING AN EXPERT

CHAPTER 1		
The Canadian Legal System: Introduction for Psychiatrists		1
Richard D. Schneider and Hy Bloom		
CHAPTER 2		
The Psycholegal Assessment		11
R. Ian Hector		
CHAPTER 3		
The Use of Psychologists and Psychological Testing		25
Nathan Pollock		
CHAPTER 4		
Medico-legal Report Writing		39
Hy Bloom		
CHAPTER 5		
Giving Evidence as an Expert Witness		59
Alan Gold and Hy Bloom		
CHAPTER 6		
Clinician Encounters with the Criminal Justice System		89
Howard Rubel		

vi Law and Mental Disorder: A Comprehensive and Practical Approach

CHAPTER 7 103
The Psychiatrist and Psychologist as Consultant to Law Enforcement
Alberto Choy and Mini Mamak

CHAPTER 8 119
Cross-cultural Issues in Forensic Practice
Smita Vir Tyagi

PART 2
PRE-TRIAL ISSUES

CHAPTER 9 155
Mental Health Courts and Diversion
Richard D. Schneider

CHAPTER 10 179
Mental Illness, Confessions, and Inculpatory Statements
Joseph Carl Ferencz

CHAPTER 11 201
Bail and Mentally Disordered Accused: The Expert's Role
Gary Chaimowitz

CHAPTER 12 211
Fitness to Stand Trial
Hy Bloom

PART 3
**CRIMINAL RESPONSIBILITY
AND PSYCHIATRIC DEFENCES**

CHAPTER 13 249
History of *Mens Rea* and the Evolution of the Concept of Criminal Responsibility
Richard D. Schneider

CHAPTER 14 263
Not Criminally Responsible on Account of Mental Disorder (NCRMD)
Hy Bloom

CHAPTER 15 297
Automatism
Julio E. Arboleda-Flórez and Patrick Baillie

CHAPTER 16 319
Intoxication and Capacity to Form Intent
Derek Eaves and Richard D. Schneider

CHAPTER 17		339
Sleep and Violence — Forensic Implications		
Julian Gojer		

CHAPTER 18		353
Self-Defence, Provocation, Duress, and Necessity		
Dominique Bourget		

CHAPTER 19		371
Malingered Mental Disorder in Criminal Cases		
Angus McDonald		

PART 4
**AGGRESSION, VIOLENCE,
 AND DANGEROUSNESS**

CHAPTER 20		389
Biosocial Antecedents to Violence		
Morton Menuck and Sumeeta Chatterjee		

CHAPTER 21		407
Psychopathy and Antisocial Personality Disorder		
William Komer, Hy Bloom, and Lisa Ramshaw		

CHAPTER 22		447
Neuropsychiatry and Forensics: FASD, ASD, and ADHD		
David Nussbaum, Melanie Dawn Douglass, and Stephanie Daoud		

CHAPTER 23		465
The Systematic Assessment of Risk for Aggressive and Violent Behaviour against Others		
Christopher Webster, Carla R. Dassinger, and Hy Bloom		

CHAPTER 24		485
Assessing Imminent Risks for Violence and Threats		
Hy Bloom and Christopher Webster		

CHAPTER 25		509
Stalking and Criminal Harassment		
Hy Bloom		

CHAPTER 26		547
Domestic Violence: An Overview for Mental Health Practitioners		
Sarah L. Desmarais and Donald Dutton		

CHAPTER 27		569
Homicide		
Hy Bloom		

viii	Law and Mental Disorder: A Comprehensive and Practical Approach	
CHAPTER 28		613
	Dangerous and Long-Term Offenders	
	John Bradford	
CHAPTER 29		623
	The Psychiatrist's Contribution to Understanding and Preventing Acts of Terrorism	
	Wagdy Loza, Hy Bloom, and Mini Mamak	

PART 5
DISPOSITIONS, SENTENCING,
AND CORRECTIONAL PSYCHIATRY

CHAPTER 30		657
	Forensic Mental Health Systems: Weaving the Threads Together	
	Alexander Simpson	
CHAPTER 31		673
	The Provincial and Territorial Review Boards	
	Rakesh Lamba	
CHAPTER 32		703
	Sentencing the Mentally Disordered Accused	
	Richard D. Schneider	
CHAPTER 33		713
	The Psychiatrist's Role in Correctional Facilities	
	Neil Conacher and Eric Prost	
CHAPTER 34		727
	The Psychiatrist's Role in the Management of Patients on Probation or Parole	
	Scott Theriault	

PART 6
FEMALE OFFENDERS

CHAPTER 35		739
	Female Offenders	
	Smita Vir Tyagi	

PART 7
BEHAVIOURAL SEXOLOGY AND
IMPULSE CONTROL DISORDERS

CHAPTER 36		765
	Overview of Sex Offenders and the Paraphilias	
	Howard Barbaree, David Greenberg, and Renée Fugère	

CHAPTER 37	783
Risk Assessment of Sex Offenders	
Howard Barbaree, Calvin M. Langton, Andres Gopnik-Lewinski, and Craig A. Beach	

CHAPTER 38	807
Impulse Control Disorders and Forensic Psychiatry	
R. Kunjukrishnan and A.G. Ahmed	

PART 8
**MANAGEMENT OF AGGRESSION AND
 INAPPROPRIATE SEXUAL BEHAVIOUR**

CHAPTER 39	845
Pharmacological Treatment of Violent Men	
Mansfield Mela and Robin Menzies	

CHAPTER 40	873
Psychosocial Treatment of Violent Men	
Nathan Pollock	

CHAPTER 41	887
Pharmacological Management of Problematic Sexual Behaviours	
Robert Dickey	

CHAPTER 42	903
Psychosocial Approaches to Treatment of Sex Offenders	
Howard Barbaree and Laura C. Ball	

PART 9
YOUNG OFFENDERS

CHAPTER 43	919
Sentencing the Young Person	
Louis Morissette and Miriam Bloomenfeld	

CHAPTER 44	935
Prevention and Treatment of Conduct Disordered Youth	
Normand Carrey and Jalal Shamsie	

CHAPTER 45	955
Adolescent Sex Offenders	
Howard Barbaree and R.J. O'Shaughnessy	

PART 10
VICTIMIZATION

CHAPTER 46	977
Early Victimization and its Sequelae: Issues in Clinical Practice with Offender Populations	
Smita Vir Tyagi	

PART 11
MENTAL HEALTH AND CAPACITY LAW

CHAPTER 47	1003
Privacy and Privilege	
Kate Dewhirst and Richard D. Schneider	
CHAPTER 48	1029
Civil Commitment: A Cross Canada Checkup	
Daniel L. Ambrosini and Lucie Joncas	
CHAPTER 49	1063
Capacity Assessment: Ontario	
Michel Silberfeld	
CHAPTER 50	1079
Minors and Capacity to Consent to Treatment	
Nicholas Bala, John S. Leverette, and Emily Bala	

PART 12
CIVIL LIABILITY AND LITIGATION

CHAPTER 51	1091
Personal Injury Claims — Mental Damages	
R.J. O'Shaughnessy and Anne E. Spafford	
CHAPTER 52	1107
Malingered Mental Illness in Compensation Cases	
Brian Hoffman and R.J. O'Shaughnessy	
CHAPTER 53	1137
Evaluating Sexual Harassment Claims	
Gail Erlick Robinson	
CHAPTER 54	1147
Psychiatric Malpractice	
Jenny P. Stephenson	

PART 13
FORENSIC PSYCHIATRY IN THE WORKPLACE

CHAPTER 55 Violence in the Workplace Hy Bloom	1169
CHAPTER 56 The Psychiatrist's Role in Disability Claims Stanley Yaren	1223

PART 14
CHILD AND FAMILY LAW

CHAPTER 57 The Psychiatrist's Role in Child Protection Proceedings Harriet MacMillan and R. John Harper	1237
CHAPTER 58 The Psychiatrist's Role in Custody and Access Cases George A. Awad and Peter Sutton	1247

PART 15
PROFESSIONAL BEHAVIOUR

CHAPTER 59 Professional Conduct Hy Bloom	1271
---	------

PART 16
EPILOGUE

CHAPTER 60 Law and Psychiatry in the Age of the <i>Convention on the Rights of Persons with Disabilities (CRPD)</i> H. Archibald Kaiser	1333
--	------

CONTRIBUTORS	1355
TABLE OF CASES	1371
TABLE OF LEGISLATION	1380
TABLE OF INTERNATIONAL DOCUMENTS AND INSTRUMENTS	1384
INDEX	1386