

LETTER TO THE EDITOR

Criminal court ordered assessments in France and Canada: a comparison

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Dear Editor,

France is one of the European countries at the genesis of Forensic Psychiatry, whereas Canada is viewed as the country where modern, scientific-based, Forensic Psychiatry was developed. The French legal system is civil law based whereas the Canadian legal system, including the federal Criminal Code, is common law basedⁱ [1]. Therefore, there are fundamental differences between France and Canada in terms of the legal process which also impacts the way Forensic Psychiatry assessments are conducted. Other major differences reside in the inquisitorial aspect of the French system as opposed to the accusatorial nature of proceedings in Canada. The Prosecutor in Canada is a lawyer who sits beside the Defense Lawyer against whom he/she argues the case. In France, the Prosecutor is at the level of Judge, which could be perceived as an imbalance in the legal system. In both countries, the role of the Forensic Psychiatrist is to highlight the relevant issues pertaining to the legal case of an individual; and the Judge remains free to follow the opinion of the experts, after carefully weighing the evidence. Despite the similarity of the role the forensic psychiatrist plays in both countries, we would like to highlight the major differences in the Legal Background, the Legal Proceedings and the Forensic Psychiatry Processes. Indeed, comparing both systems is a way to help each professional to reflect on their own practice in their jurisdiction. This may also provide some understanding of the context of medico-legal studies when performed in Canada or France. The figure

below provides an overview of the legal pathways involving criminal court order assessment in Canada and France.

Legal Background

In the introduction, we specified some obvious differences of the legal framework between the two countries. It appears relevant to focus on some specific aspects pertaining to forensic psychiatry, from an assessment perspective. The role of the Judge, the legal concept of criminal responsibility, and its possible legal outcomes are outlined below.

In Canada, the Judge is a person who makes a final decision in a case and who chooses the appropriate sentence. In France, there are multiple possible roles for a Judge, and often the Judge does not cumulate these roles (ex. Judge who sentences, Judge who controls the custodial situation of patients and inmates, Judge who ensures an impartial process during the criminal investigation, Judge who ensures that the convicted may have some adaptation in sentencing) [2].

The Canadian legal definition of criminal responsibility is detailed in the Criminal Code, by implementing the concept of legal or moral wrongfulness of the action (section 16) [3]. An individual who may have been suffering from a mental disorder at the time of the offence can be found responsible as the mental state may not have been sufficient to explain that he could not control his action. The French definition of criminal responsibility is broader and somewhat left to the discretionary decision of the expert (article 122-1 of the French Penal Code; capacity of consenting, discerning and controlling his/her actions were abolished or altered) [4]. This does not necessarily help to form a cohesive opinion.

There are only two options in terms of criminal responsibility in Canada, either the individual is criminally responsible or not criminally responsible on account of mental disorder (NCR) [3]. The French model developed three options in terms of criminal responsibility: an individual can be found responsible, not criminally responsible, or partially responsible [4]. This third option is often used when someone presents with severe psychiatric symptoms of a personality disorder with impulse control issues. It is commonly reported that in this third situation, although an individual is supposed to receive a lower sentence (because of partial responsibility as opposed to full), he/she is often given a more severe sentence with the notion that the personality disorder may be difficult to treat and the risk of re-offending remains high [5].

Legal Proceeding

Some relevant points of the legal proceeding in comparing both countries can be highlighted in describing how the Court exercises the law, orders assessments, and makes its final decision. The nature of the questions asked to the expert, the timeline when an assessment can be ordered, and the legal consequences for individuals found not criminally responsible or unfit to stand trial are salient points that should be addressed.

In Canada, a court ordered assessment has one specific question, which can be one of the following: criminal responsibility, fitness to stand trial, risk, or dangerous offender status. The assessment is requested at the pre-trial or trial phase (once a Judge is notified about the case). Only pre-sentencing assessments are ordered. Once the sentence is given, no other assessment can be ordered unless there are new charges. Once the accused is found NCR or Unfit to Stand Trial, the Judge orders the transfer into the forensic system, where the Review Board will take over the role of custodial control [3].

In France, one court ordered assessment may have many questions, including criminal responsibility, fitness to stand trial, risk, opportunity of treatment, etc. They

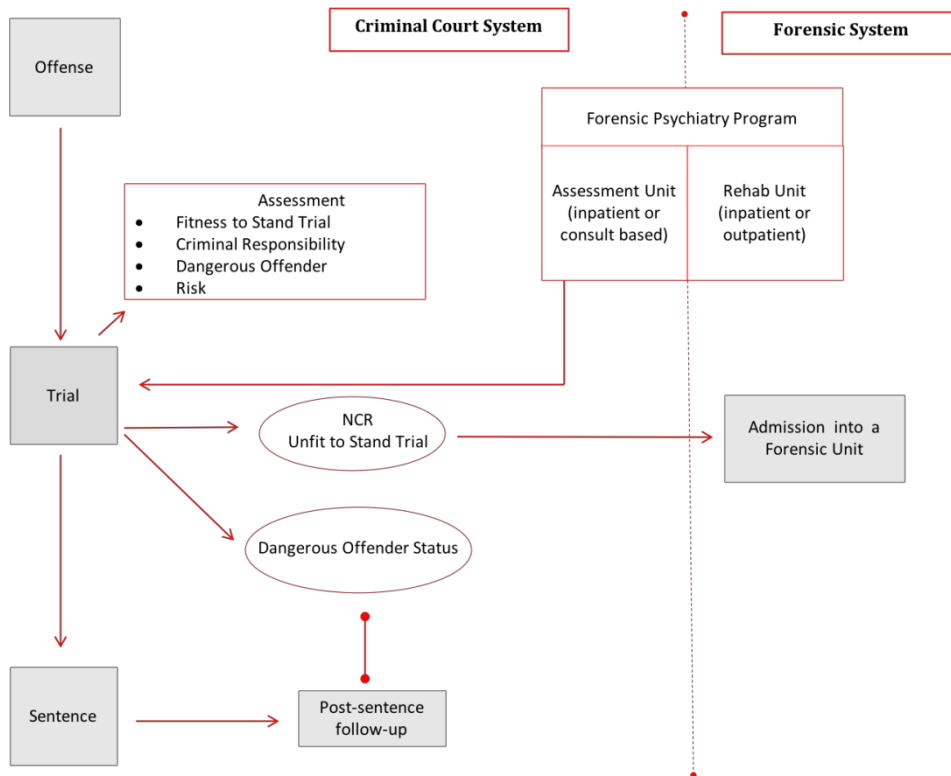
can also be created by the Judge. The clinician is requested to answer all the questions in the report. A court ordered assessment can be requested during the investigation phase, either by the Prosecutor or the Judge who overviews the legal proceeding (this Judge's role is not to adjudicate) while gathering the evidence. Pre and post-sentencing assessments can be ordered. The pre-sentencing assessment will guide the Judge in his final decision. The post sentencing assessment will help orientate the rehabilitation process of the inmate, or will indicate if a lower level of custody could apply in managing the risk (article 712-21 of the Penal Procedural Code) [4]. After being found NCR, the Judge may order the patient's transfer into a psychiatric unit (if found to be dangerous) which could be a general psychiatry inpatient unit - with no Forensic background (article 706-136 of the Penal Procedural Code [6]. Decisions regarding custodial control will be made by another Judge of the civil system who also controls any involuntary admissions (Judge of the Liberties and Detention) [7].

Forensic Psychiatry Process

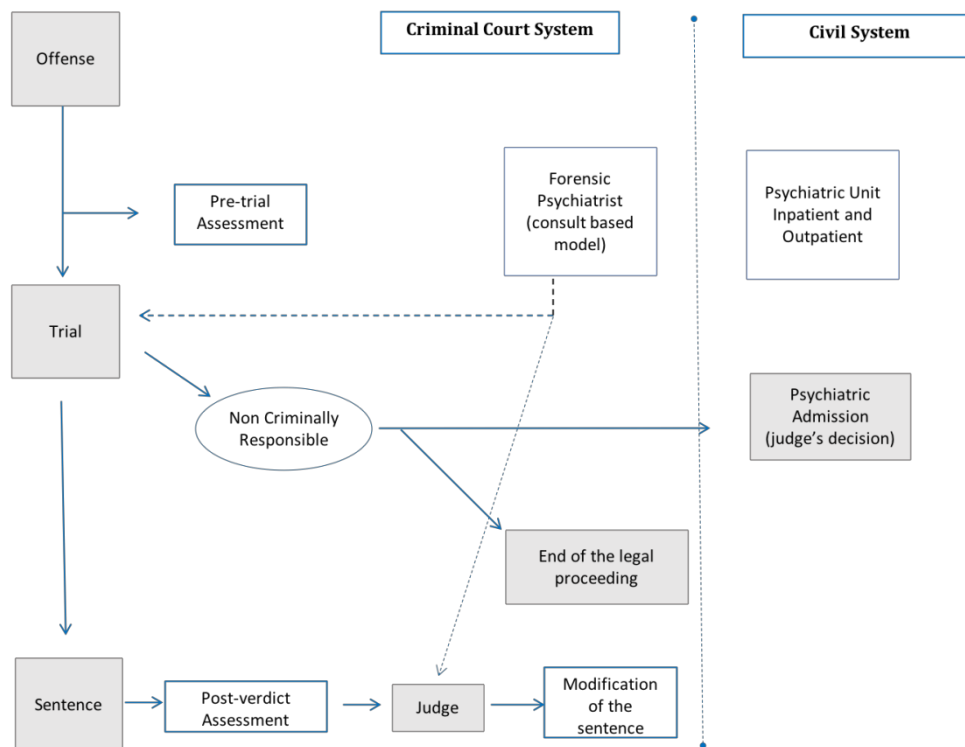
The legal background and legal proceedings are the basis of the forensic practice. This has permitted to develop the way the forensic disciplines have been exercised; and how, to some extent, political decisions have helped allocate funds for this medico-legal field. There are differences in terms of location, staff involvement, method used and time spent on a forensic psychiatric assessment, in each country.

In Canada, the assessment can be conducted in a forensic psychiatry program, where all staff members have developed a specific expertise in forensic mental health. Particularly, the assessments can be conducted in a dedicated inpatient unit, where the accused remains in custody. Information is gathered by several team members such as psychologist, social worker, nurse, occupational therapist, etc. In addition, the structured risk assessment tools are widely used during the assessment. The assessment is often the result of multiple consults compiled to corroborate the information given by the accused.

Canadian System



French System



In France, the lack of a dedicated program for Forensic Psychiatry does not permit an extensive collaboration and often results in assessments conducted by one individual with no discussion about the case. The assessments are done according to a consult-based model. All the information has to be gathered by the psychiatrist. Although some psychiatrists use risk assessment tools, they are typically not widely used. Psychiatrists rely mostly on their professional judgment, which can be dangerous as it has been published that not using structured professional judgment tools in predicting risk equates to giving a random opinion [8]. The report often follows a one-time interview with the accused.

Conclusion

These characteristics relate to the criminal court processes and the steps that an accused will undergo. We have not detailed what happens to individuals who enter the forensic system in Canada or the civil psychiatric system in France. Assessments will take place at this stage but will not be

ordered by the criminal court in either country. There are many differences in terms of the theoretical and practical aspects of Forensic Psychiatry. If one aspect can be summarized, we can say that in France, the process seems more beneficial to the rehabilitation of the individual, as it permits an assessment at any time to evaluate the risk and the benefit of a release from custody; in Canada, the practice of Forensic Psychiatry is based on a scientific model which strengthens the level of evidence provided to the court.

Conflict of interest: none

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Note

ⁱ Quebec is the only province in Canada which is civil law based, having been colonized by the French. The Criminal Code of Canada (R.S.C., 1985, c. C-46), which contains provisions relating to Forensic Mental Health under Part XX.1, is federal legislation and it is rooted in the common law.