LAW AND MENTAL DISORDER


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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—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 retainments, 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
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