

Mainstreaming Mental Health Courts: Consent and Coercion



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OUTLINE



- WHAT IS MENTAL HEALTH COURT?
- WHY DO WE HAVE MENTAL HEALTH COURT?
- WHAT ARE THE FORMS OF MHC?
- WHAT ARE THE STAGES THAT REQUIRE CONSENT?
- WHAT IS THE PROBLEM WITH THAT CONSENT?
- WHAT IS THE ALTERNATIVE FOR CONSENT?
- HOW SHOULD SECTION 720 READ?

Basics of the Mental health Courts

- TJ - the extent to which a legal rule or practice promotes the psychological and physical well-being of a person subject to legal proceedings

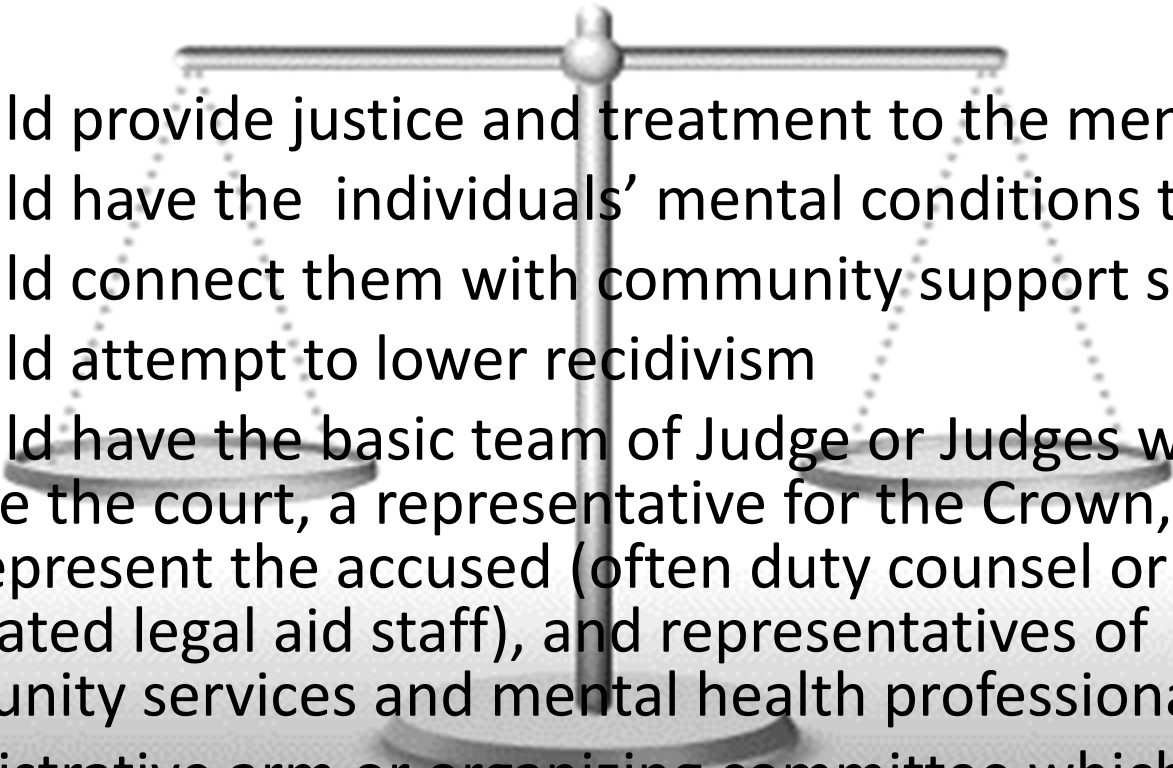
-Rottman & Casey '99

- TJ - exploration of ways mental health and related disciplines can help shape the law – Hora et. al, '99

Guiding principles for the change

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- Diversion
 - Fairness
 - Treatment not punishment
 - Prevention
 - Emphasis on community treatment
 - Rehabilitation
 - Schneider, Bloom & Heerema 2007

Functioning of the MHC

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- It should provide justice and treatment to the mentally ill
 - It should have the individuals' mental conditions treated
 - It should connect them with community support services
 - It should attempt to lower recidivism
 - It should have the basic team of Judge or Judges who oversee the court, a representative for the Crown, lawyers who represent the accused (often duty counsel or designated legal aid staff), and representatives of community services and mental health professionals
 - Administrative arm or organizing committee which makes decisions

For the Person with a mental health condition

- Reverse the revolving door phenomenon
- Improve functioning
- Reduce psychopathology
- Restore integration and help to become law abiding
- Restore self esteem

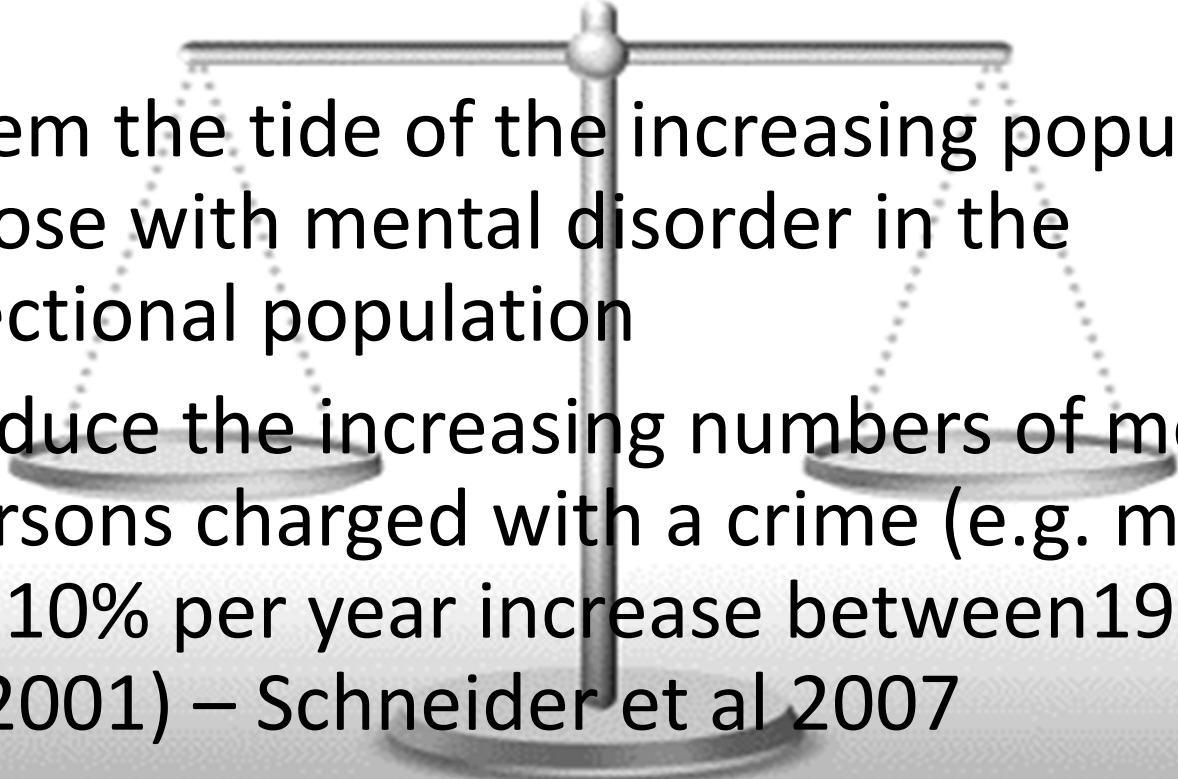
For Society

- Makes society safer by focusing on treatment of the accused person with a mental health condition.
- Stops the expense of the revolving door phenomenon.

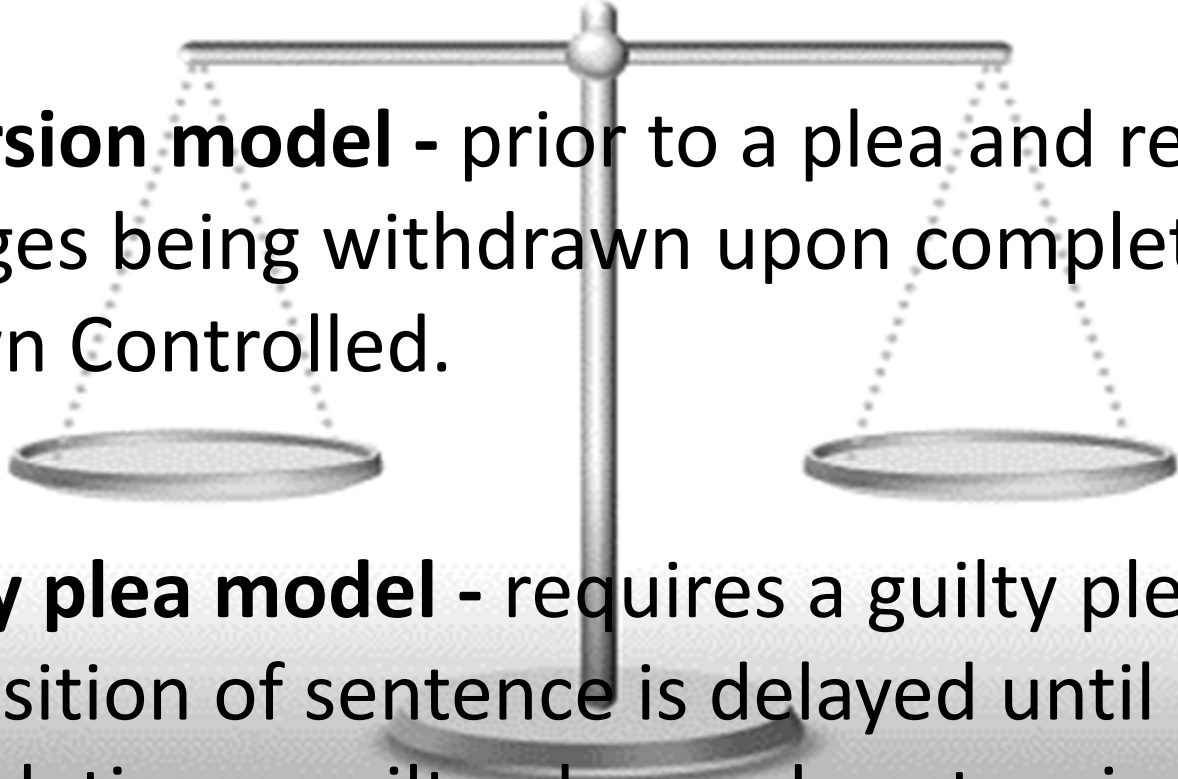
Mental disorder and criminal acts

- this increases one's chance of inadvertent violation of the law especially non premeditated and non-deliberate offence
- decreased capacity of the mental health system to care for all forms of mental illness including the more malodorous
- concur because they share many of the same predispositions.
- Medicalization of offending behavior
- deliberate so as to return to where they are accustomed to – institutionalization
- lack of accommodation of the needs of mentally ill offenders
- stigma leading to likely reporting and arrest

CJS's role as defacto MH System

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- To stem the tide of the increasing population of those with mental disorder in the correctional population
 - To reduce the increasing numbers of mentally ill persons charged with a crime (e.g. more than 10% per year increase between 1990s and 2001) – Schneider et al 2007
 - Distantly prevent contact with police by those with mental disorder

Models and phases of MHC

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- **diversion model** - prior to a plea and results in charges being withdrawn upon completion - Crown Controlled.
 - **guilty plea model** - requires a guilty plea but imposition of sentence is delayed until completion – guilty plea and sentencing - Judge Controlled.

Guilty Plea Model:

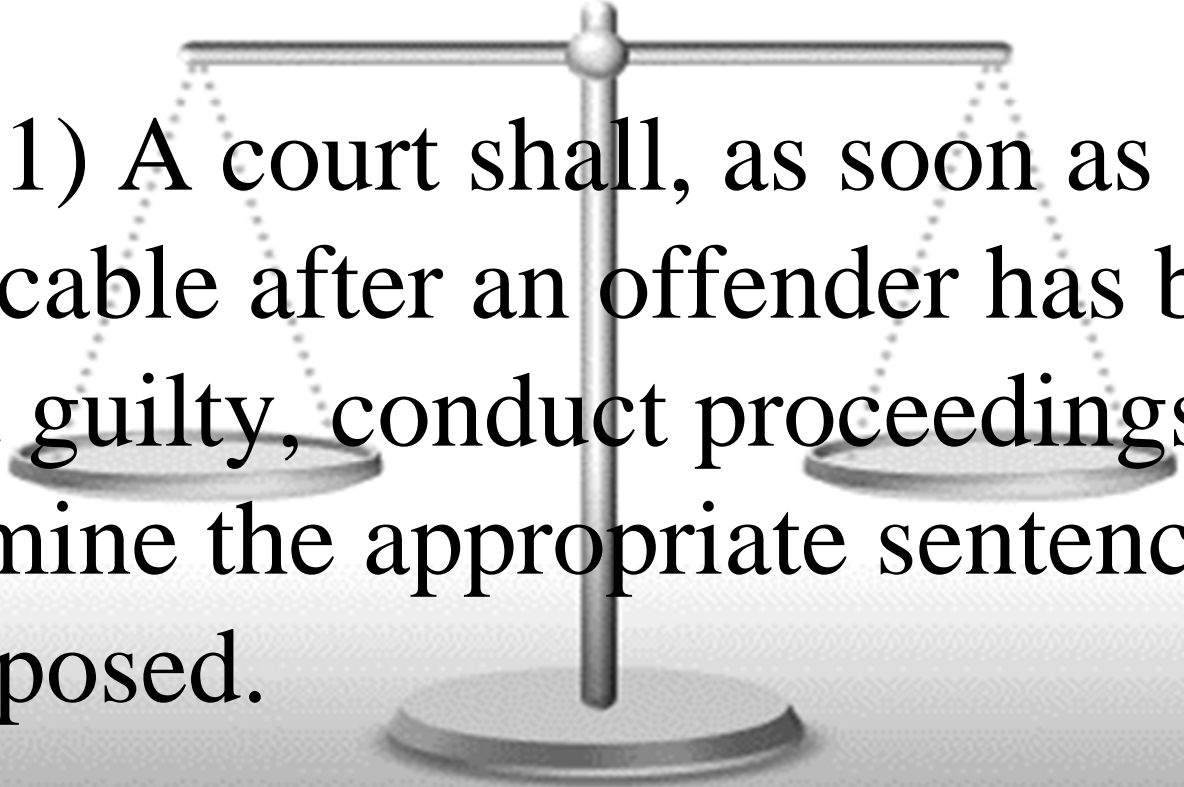
Fundamental Principle of Sentencing

Currently the practical application of therapeutic jurisprudence in Canadian Courtrooms is *primarily* in the area of sentencing.

Section 718.1 Criminal Code:

718.1 A sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender.*

Section 720(1), *Criminal Code*



720. (1) A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed.

Traditional Criminal law practice required a Court to sentence an accused “expeditiously”

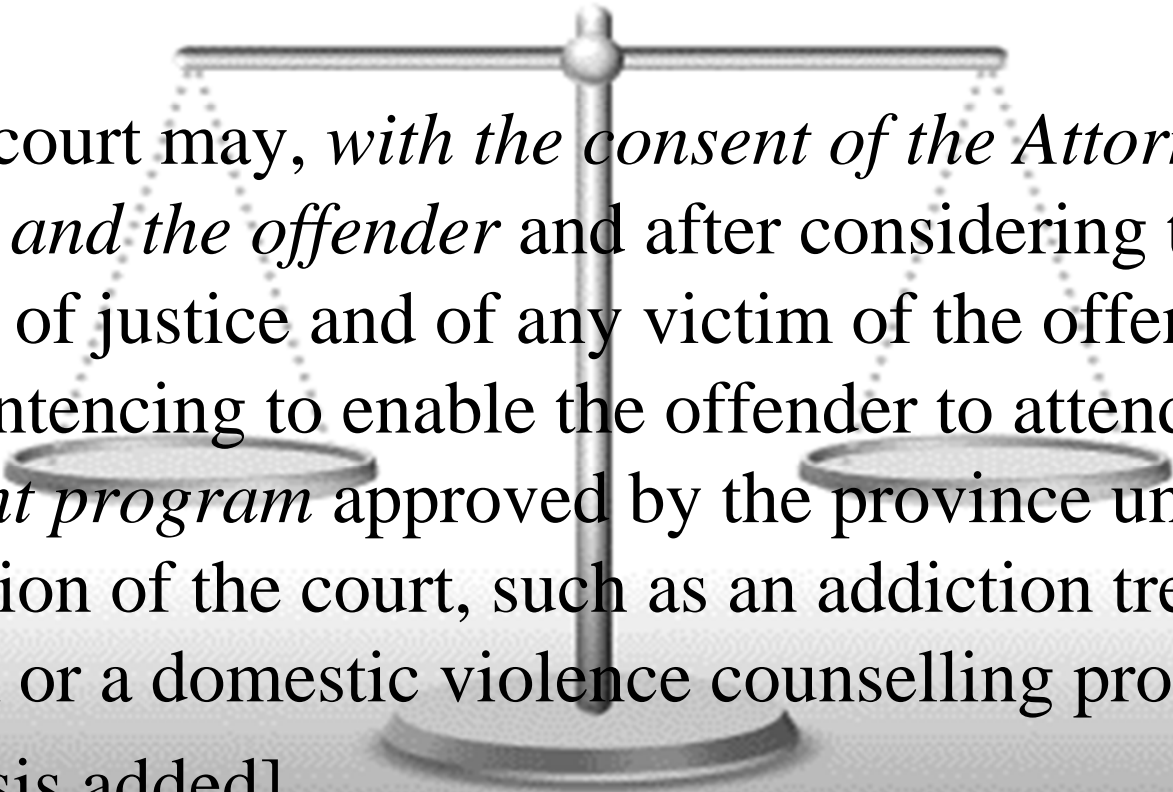
For example, in *R. v. Urton* [1974] 5 W.W.R. 476 (C.A.), Culliton CJS said:

To take into consideration the subsequent conduct of the convicted person, particularly over a long span of time, would be to consider matters not in existence at the time the offence was committed and this should not be done.

Moreover, an unjustifiable delay in imposing sentence is unfair to the convicted person. He should not be kept in a state of suspense and uncertainty.

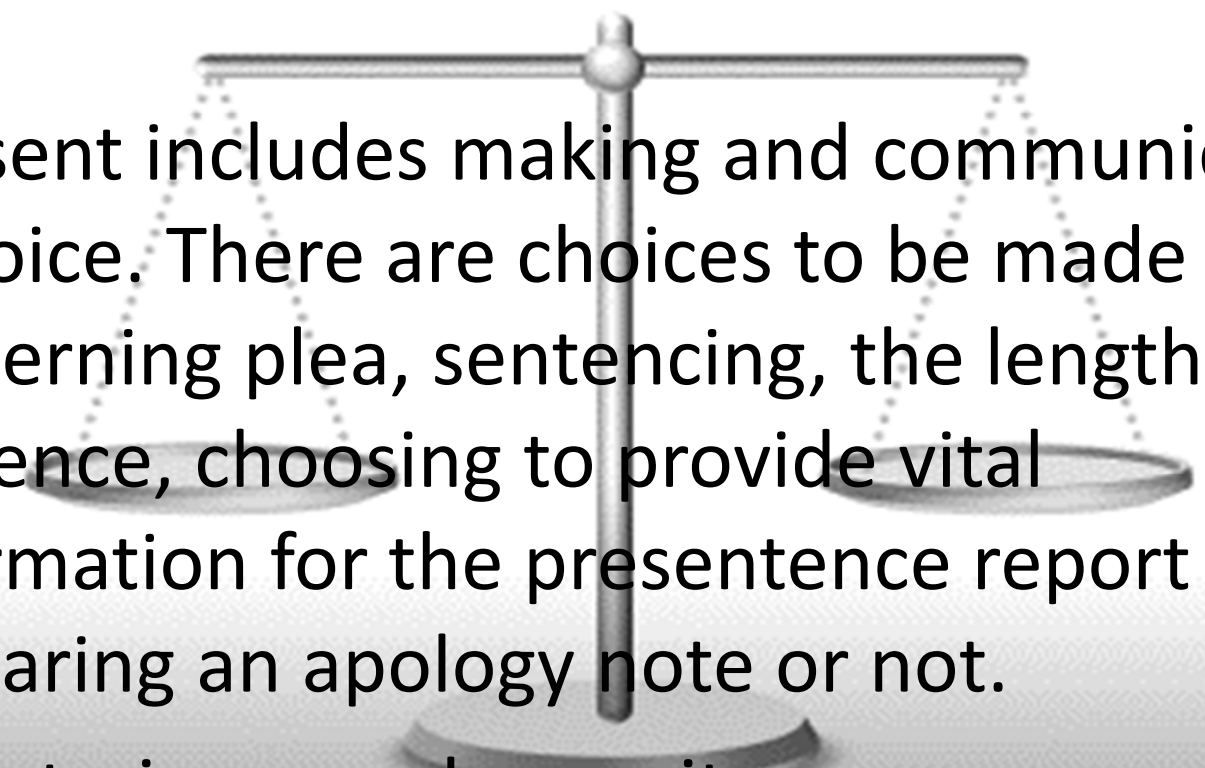
The decision whether or not to impose a sentence of imprisonment ... should be made as expeditiously as the circumstances will permit.

Section 720(2)

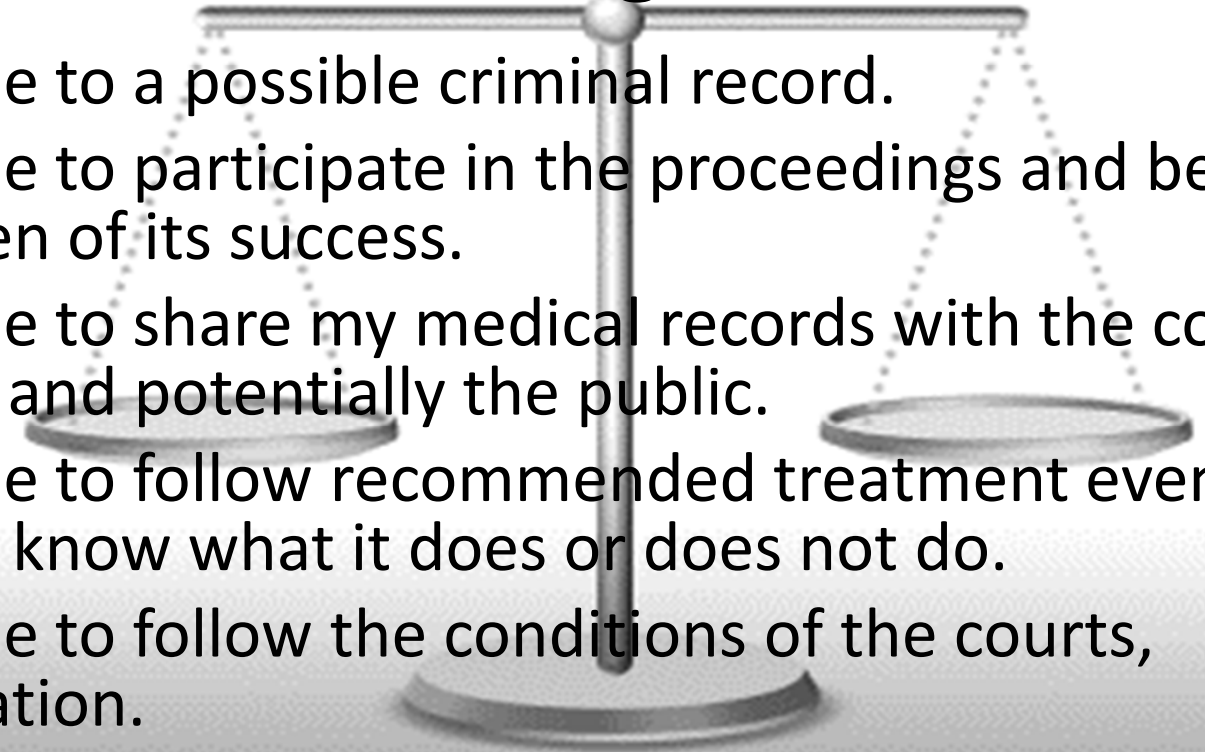


(2) The court may, *with the consent of the Attorney General and the offender* and after considering the interests of justice and of any victim of the offence, delay sentencing to enable the offender to attend a *treatment program* approved by the province under the supervision of the court, such as an addiction treatment program or a domestic violence counselling program.
[Emphasis added].

What consent implies

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- Consent includes making and communicating a choice. There are choices to be made concerning plea, sentencing, the length of sentence, choosing to provide vital information for the presentence report or not, preparing an apology note or not.
 - Voluntariness and capacity

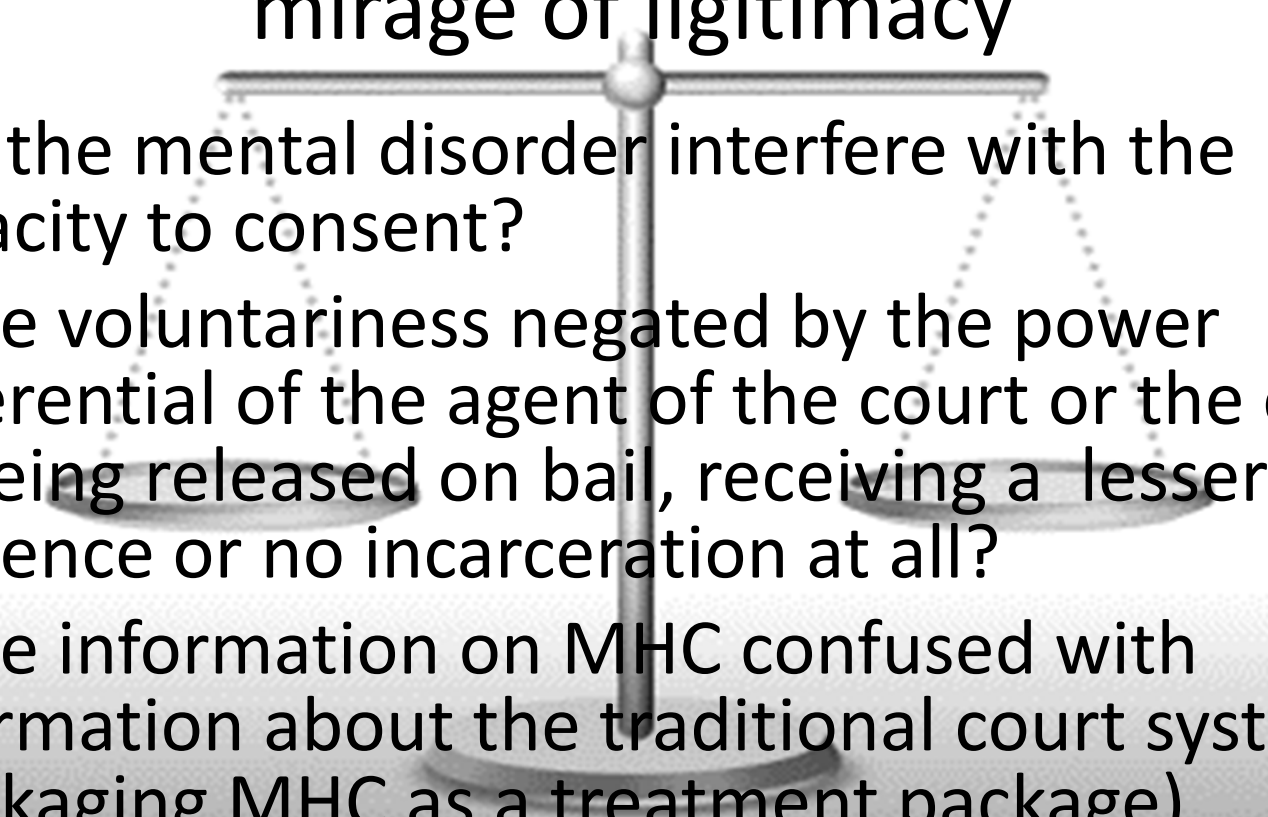
Voluntary, But Knowing and Intelligent?

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- I agree to a possible criminal record.
 - I agree to participate in the proceedings and bear the burden of its success.
 - I agree to share my medical records with the court team and potentially the public.
 - I agree to follow recommended treatment even if I don't know what it does or does not do.
 - I agree to follow the conditions of the courts, probation.
 - I agree to be sent back to traditional court if I am not compliant.

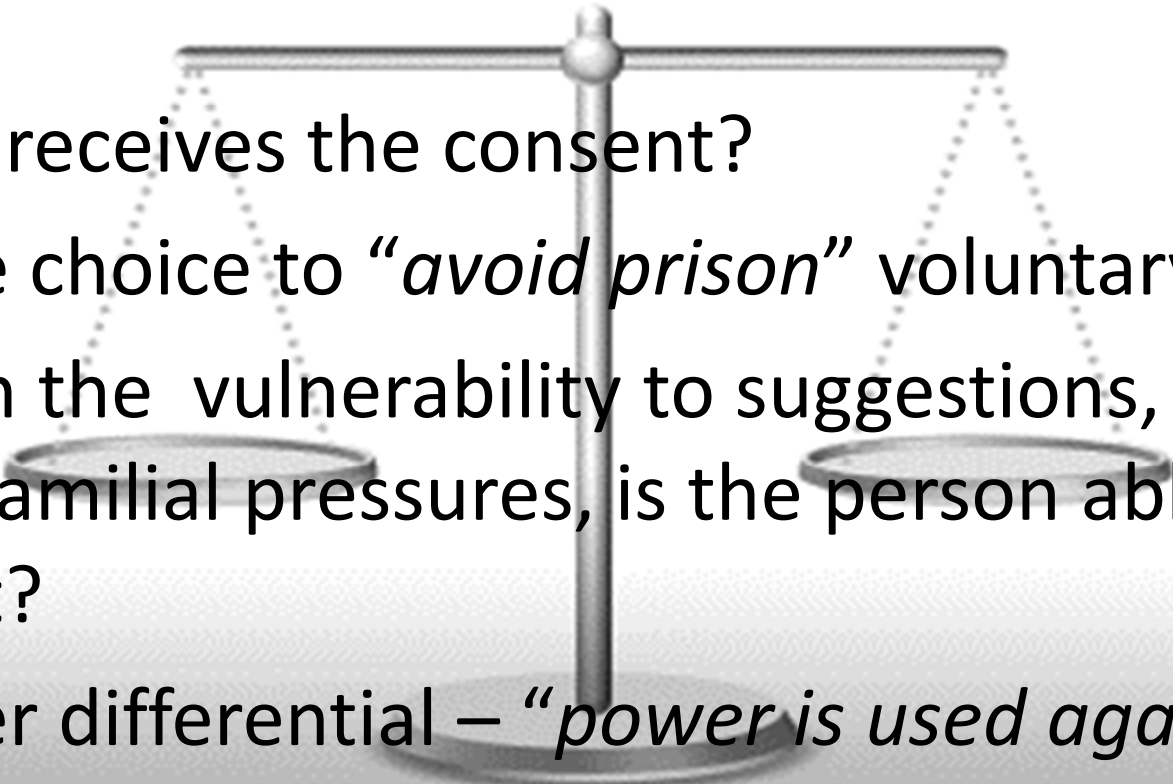
– Redlich 2005

Problematic MHC consent

“mirage of legitimacy”

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- Will the mental disorder interfere with the capacity to consent?
 - Is the voluntariness negated by the power differential of the agent of the court or the offer of being released on bail, receiving a lesser sentence or no incarceration at all?
 - Is the information on MHC confused with information about the traditional court system (packaging MHC as a treatment package)
 - Are we missing important accused in need of treatment and support?

Problematic MHC consent

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- Who receives the consent?
 - Is the choice to “*avoid prison*” voluntary?
 - Given the vulnerability to suggestions, official and familial pressures, is the person able to resist?
 - Power differential – “*power is used against the most feeble of possible parties*” – Case ‘04

Criteria for referral

- Determine that suspicion of mental illness reaches a threshold for referral
- Decide the types of offences
- Divert to mental health court and mental health system

Contrasting with MHA committal criteria

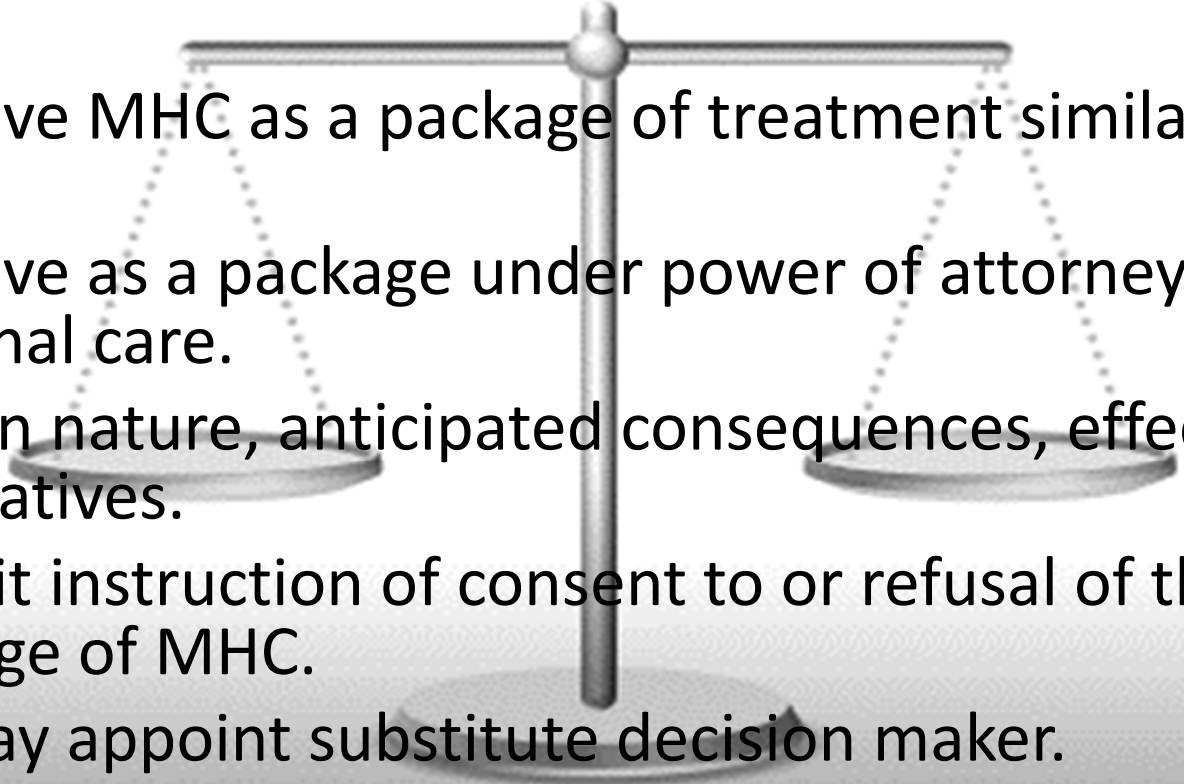
MHA

- Mental disorder
- Dangerous or harmful to self or others
- Risk of deterioration and instability
- Lack of informed consent

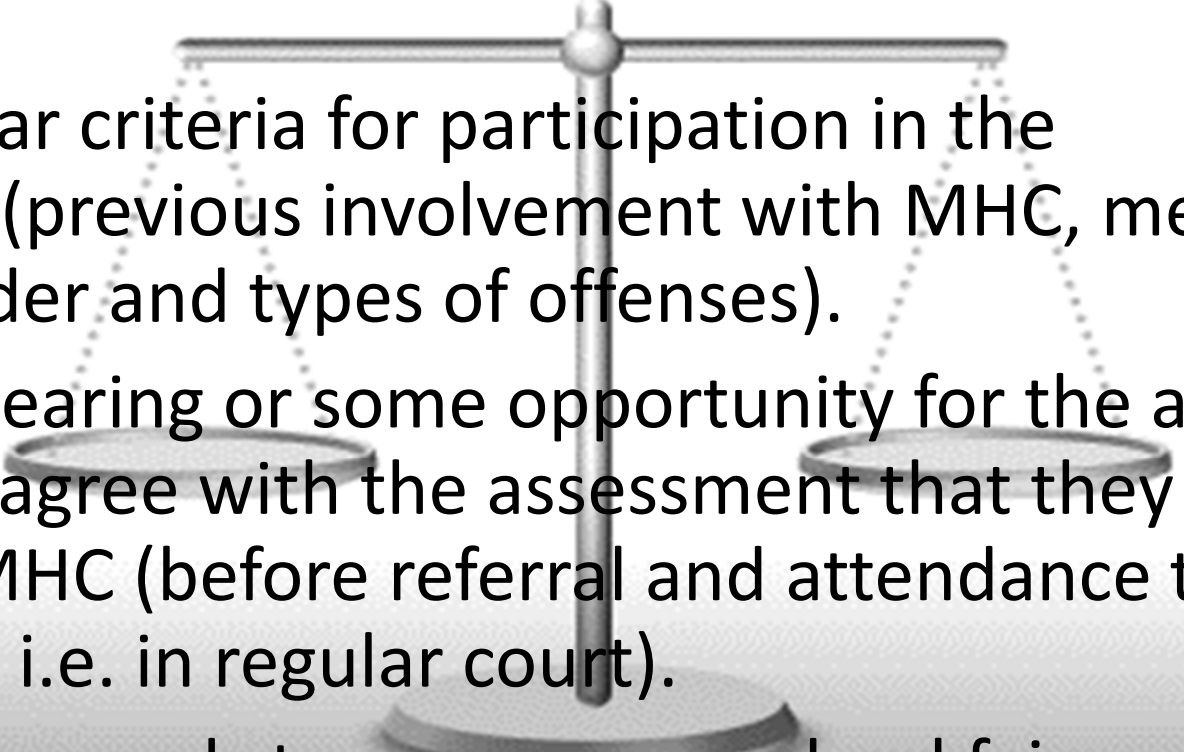
MHC

- Mental disorder
- Offence committed and is before the court
- Revolving door or potential to revolve?
- Other Criteria?

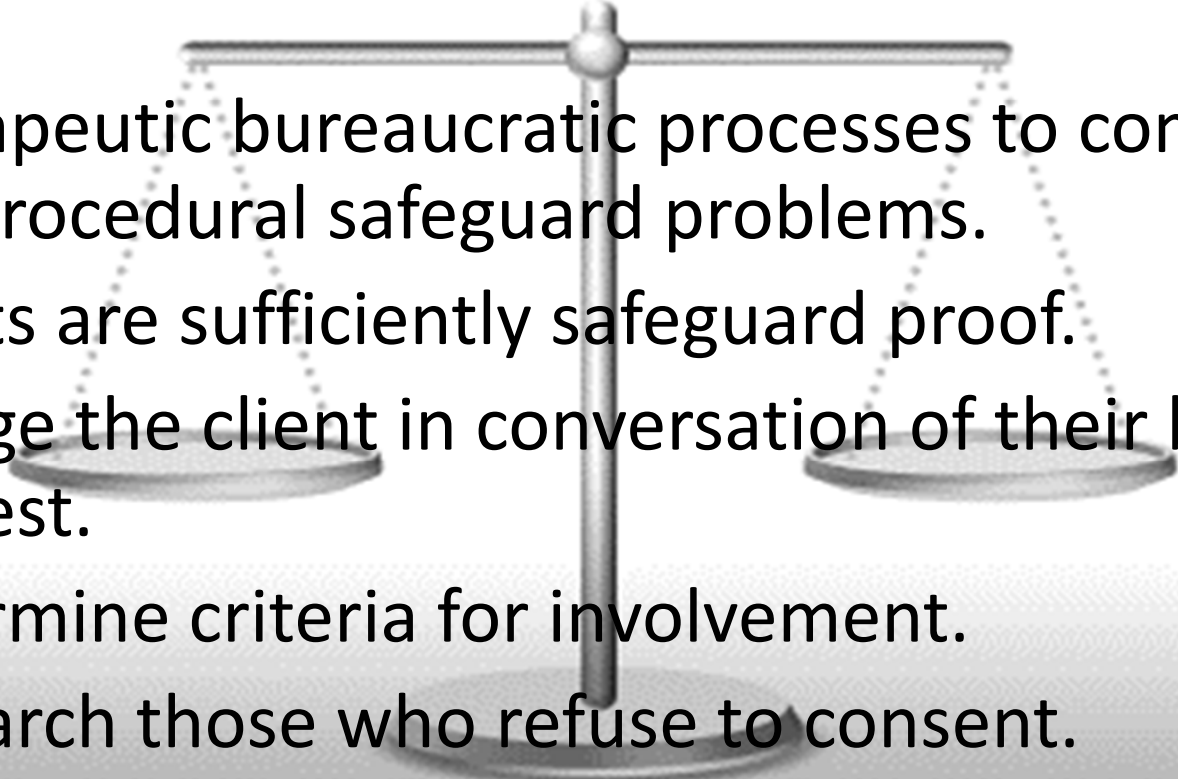
Advance directives

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- Perceive MHC as a package of treatment similar to CTO.
 - Perceive as a package under power of attorney for personal care.
 - Explain nature, anticipated consequences, effects and alternatives.
 - Explicit instruction of consent to or refusal of the package of MHC.
 - AD may appoint substitute decision maker.
 - Triggered by being incapacitated or coming before the court.

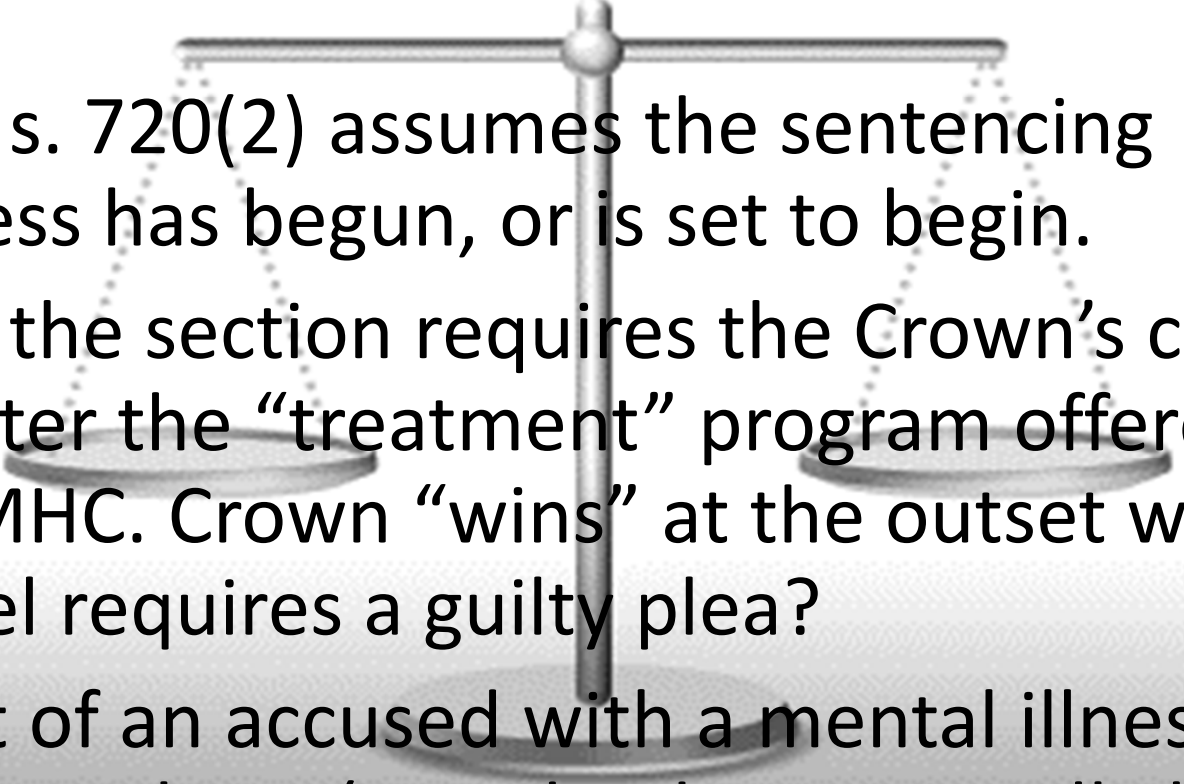
Keith's suggestion

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- 1) clear criteria for participation in the MHC,(previous involvement with MHC, mental disorder and types of offenses).
 - 2) a hearing or some opportunity for the accused to disagree with the assessment that they belong in a MHC (before referral and attendance to the MHC, i.e. in regular court).
 - 3) safeguards to ensure procedural fairness (periodic reviews similar to monthly appeals and six monthly reviews).

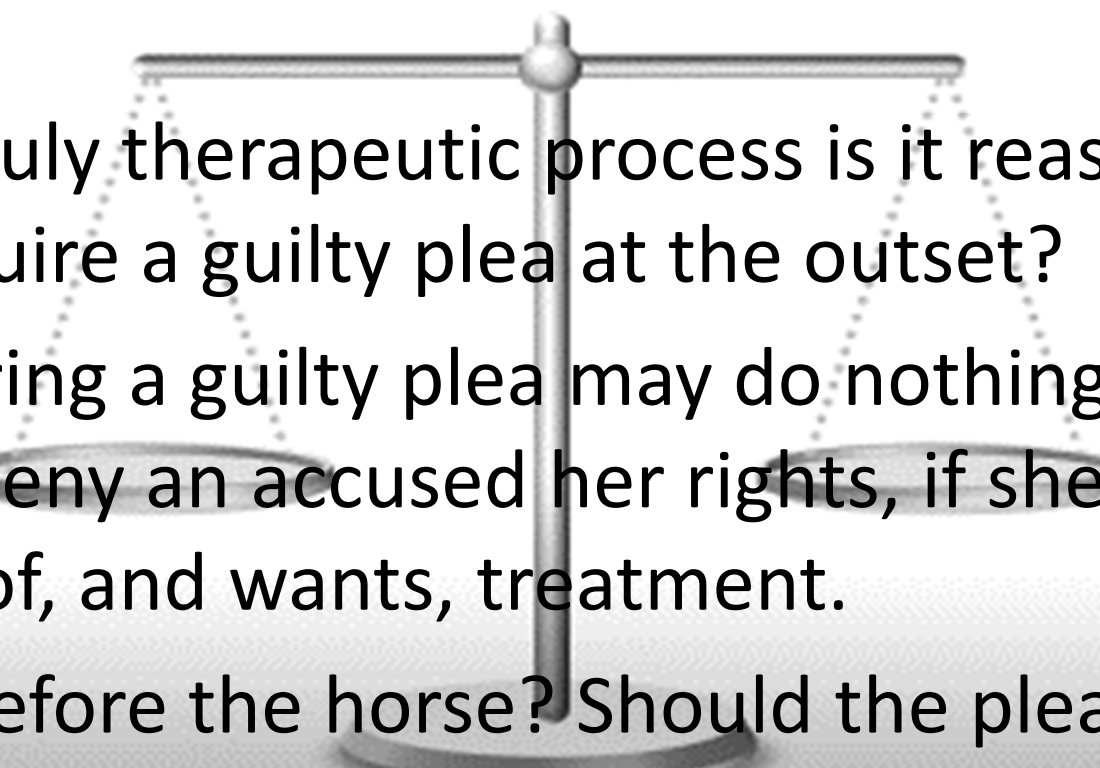
Keith's suggestion II

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- Therapeutic bureaucratic processes to combat any procedural safeguard problems.
 - Courts are sufficiently safeguard proof.
 - Engage the client in conversation of their best interest.
 - Determine criteria for involvement.
 - Research those who refuse to consent.
 - Assessment and/or treatment before deciding to plead guilty.

The guilty plea dilemma

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- Note s. 720(2) assumes the sentencing process has begun, or is set to begin.
 - Note the section requires the Crown's consent to enter the "treatment" program offered by the MHC. Crown "wins" at the outset where model requires a guilty plea?
 - What of an accused with a mental illness who believes she is (or indeed may actually be) not guilty?

Mandatory MHC?

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- As a truly therapeutic process is it reasonable to require a guilty plea at the outset?
 - Requiring a guilty plea may do nothing more than deny an accused her rights, if she is in need of, and wants, treatment.
 - Cart before the horse? Should the plea demand not be delayed until after assessment is completed and treatment is implemented?

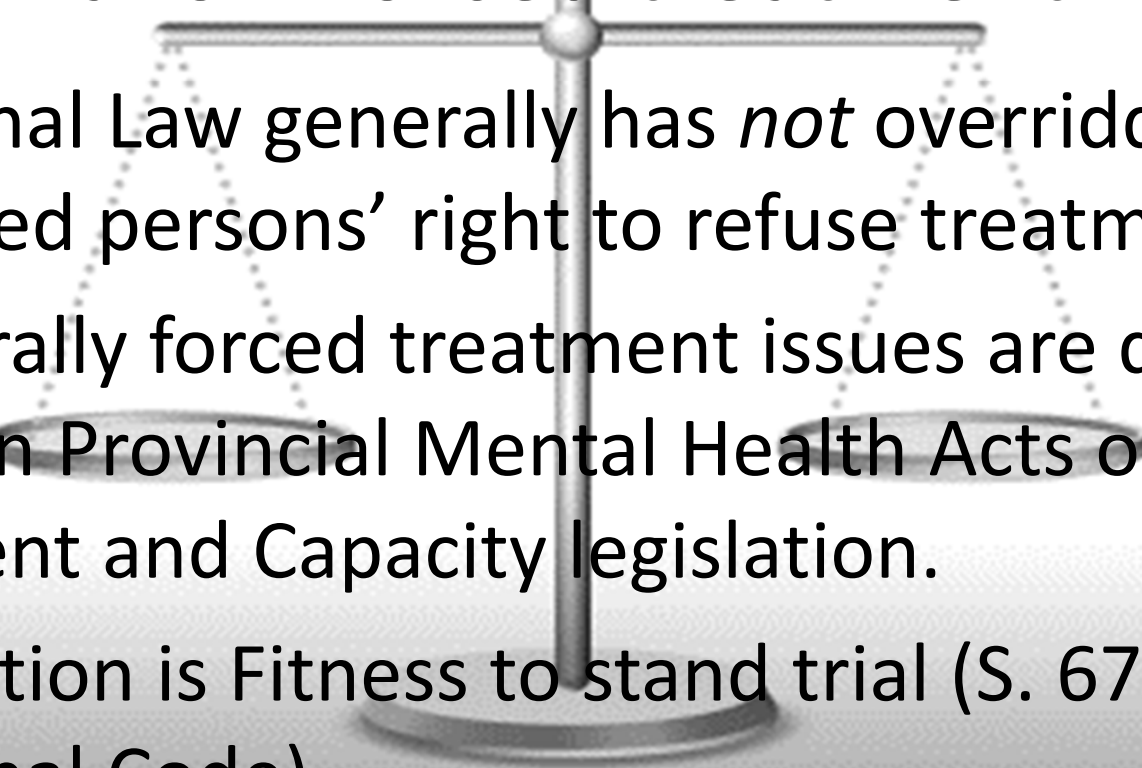
If the Plea demand is delayed, “consent” may not be the best criteria

- The mainstreaming of mental health courts.
- See them as an integral part of the CJS.
- See them as controlled by the (inquisitorial) court and not the parties.
- Creation of agreed upon criteria for entry to a MHC process applied by and controlled by the court after hearing from the parties.

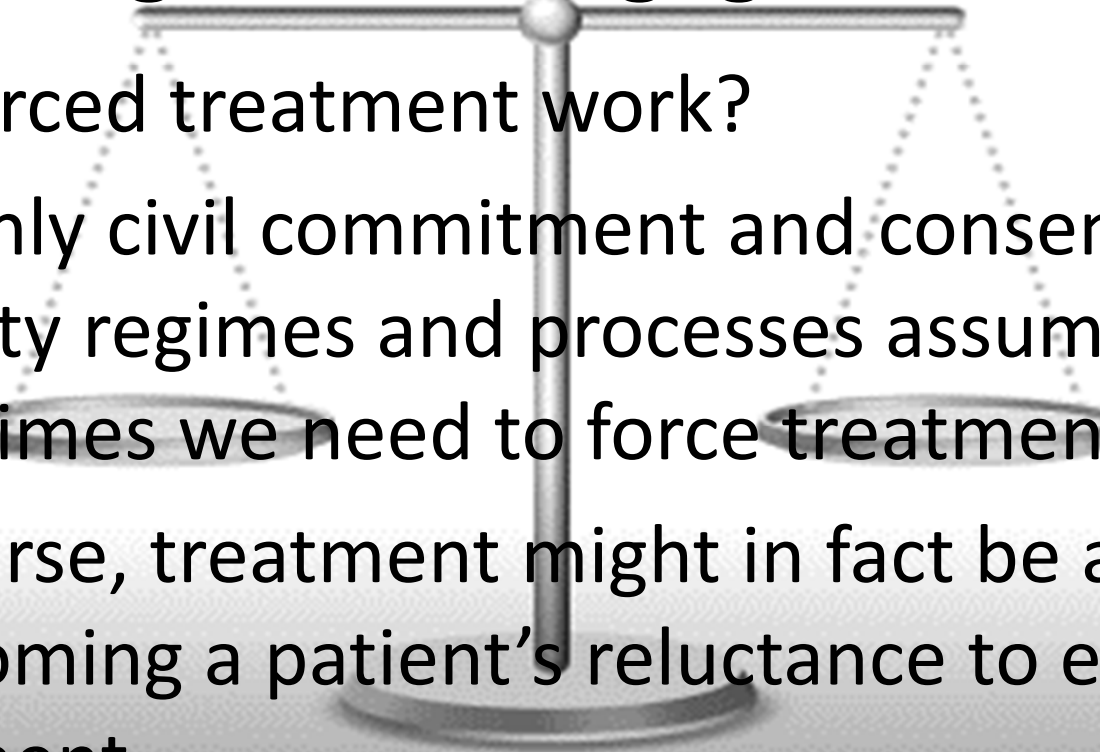
See: Barron et al, “Process Evaluation of the Saskatoon Mental Health Strategy”,

http://www.usask.ca/cfbsjs/research/pdf/research_reports/MHSCourt.pdf

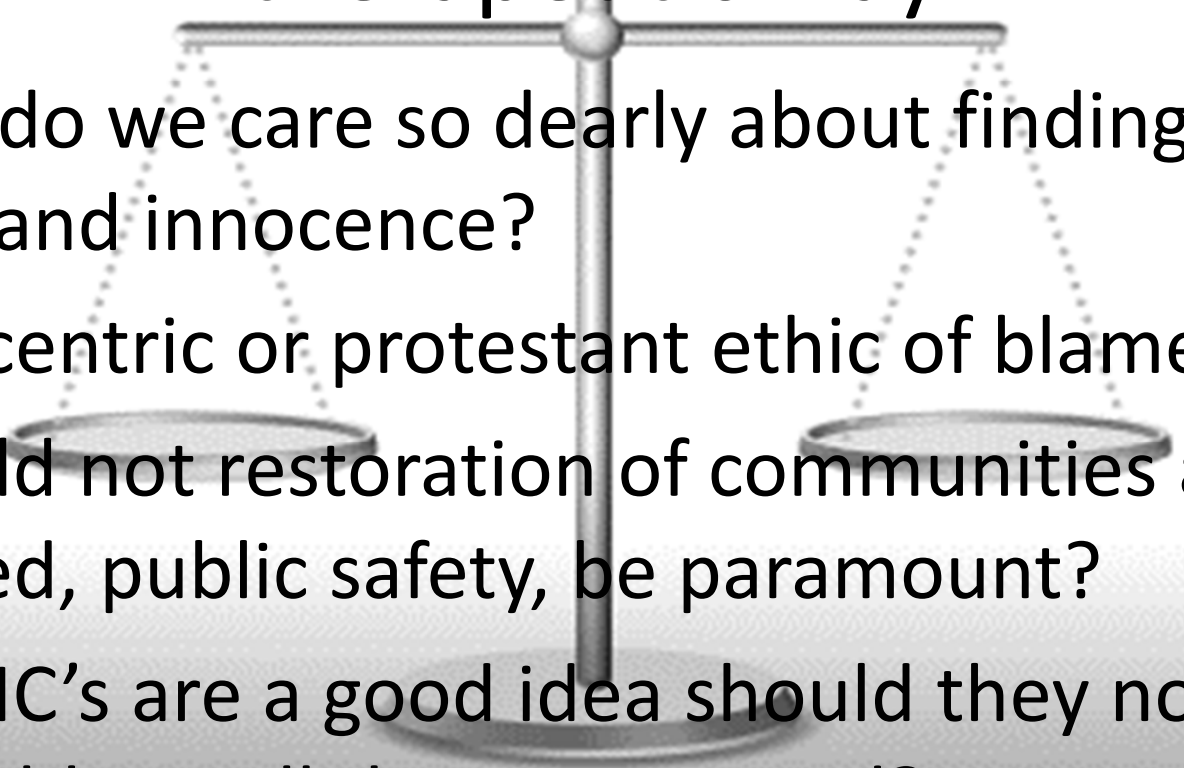
Entry to MHC does not necessarily allow forced treatment

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- Criminal Law generally has *not* overridden accused persons' right to refuse treatment.
 - Generally forced treatment issues are dealt with in Provincial Mental Health Acts or Consent and Capacity legislation.
 - Exception is Fitness to stand trial (S. 672.58 Criminal Code)

Is treatment success based on willingness to engage therein?

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- Can forced treatment work?
 - Certainly civil commitment and consent and capacity regimes and processes assume that sometimes we need to force treatment.
 - Of course, treatment might in fact be aimed at overcoming a patient's reluctance to engage in treatment.
 - “Treatment” is often too narrowly defined.

Seeing the court process in a therapeutic way

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- Why do we care so dearly about findings of guilt and innocence?
 - Eurocentric or protestant ethic of blame?
 - Should not restoration of communities and indeed, public safety, be paramount?
 - If MHC's are a good idea should they not be available to all that are in need?

Thankyou!



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