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## **Appellate Court Discusses Impact of Mental Health on Sentencing in Overturning Jail Term for Possession of Gun**

**By:** Meryl Friedland

**Case Commented On:** *R v Fabbro*, [2021 ONCA 494 \(CanLII\)](#)

The Ontario Court of Appeal recently released *R v Fabbro*, [2021 ONCA 494 \(CanLII\)](#), which addresses the sanction for a criminal offence committed during a mental health crisis. The facts of the case and grounds of appeal relate to a suicide attempt and suicidal ideation, which are discussed throughout this post. Mr. Fabbro’s charges related to possession of a firearm that he was using in an attempt to end his life. The sentencing judge decided that Mr. Fabbro should go to jail for two years for this. The Court of Appeal overturned the decision and substituted a conditional sentence order – colloquially, ‘house arrest’ or jail in the community.

Justice Eileen E. Gillese, writing for the Court in *Fabbro*, introduced the case by stating that the “appeal exposes the ongoing challenges for sentencing judges arising from the opiate scourge in [Ontario]” (para 1), but it is also about judicial treatment of mental health issues. Successful sentence appeals remedy legal errors and provide specific relief to appellants. In cases such as this one, however, they can also contribute to larger public challenges, such as reducing the overincarceration of an often vulnerable and marginalized group of society. *Fabbro* is an example of a case where a sentencing judge did not adequately consider an offender’s mental health in sentencing and ordered a custodial sentence unnecessarily. The appellate decision adds to growing authority for non-custodial sentences where mental health issues contribute to the commission of criminal acts. *Fabbro* also underscores the need for rehabilitation over denunciation and deterrence, and over prison in such cases. Moreover, the facts show, once again, that the criminal justice system is not, and should not be, the answer to underfunded and overwhelmed mental health services. Mr. Fabbro had sought assistance for suicidal ideation several times in the month prior to this incident and was turned away from hospital each time.

Before getting into the details, I will address the language that I employ in this post. The term “mental health” is used in *Fabbro*, and so that is what I use here. “Mental health issues” are frequently referred to in the sentencing case law to describe a wide range of conditions including cognitive and intellectual disabilities (each case would of course get into the specific person’s experience/diagnosis as well). “Mental illness” is also frequently employed in the sentencing jurisprudence, as is “mental disorder”. “Mental disorder” is a legal term and part of the *Criminal Code*, [RSC 1985, c C-46](#) (Part XX.1) relating to findings of not criminally responsible on account of mental disorder and fitness, but it does not appear in the sentencing sections. The term “mental disability” is already included in the sentencing provisions ([s 718.2\(a\)\(i\)](#)) and aligns with human rights legislation (*Canadian Human Rights Act*, [RSC 1985, c H-6](#), s 25. Though out of scope of

this post, several aspects of the treatment of offenders' mental health on sentencing could use clarification, including establishing consistent and respectful terminology.

The post begins with a review of the facts in *Fabbro*. The next two sections review and discuss two errors found by the Court of Appeal: first, the sentencing judge overemphasized denunciation and deterrence and omitted rehabilitation as a primary sentencing principle; second, the sentencing judge erred by not considering whether there was a causal link between the appellant's mental health issues and the offences. After outlining these errors and discussing jurisprudence related to rehabilitation and causal links, the post concludes with a brief discussion of how *Fabbro* demonstrates the pressing need to meaningfully address the overcriminalization of persons with mental health issues.

## Facts

The facts are outlined at paragraphs 2-13 of the Court of Appeal's decision, which are summarized here. Mr. Fabbro pleaded guilty to criminal offences regarding possession of a sawed-off shotgun. Police were advised that Mr. Fabbro was seen with a gun and there was a concern that he might harm himself. He was also on bail for other charges at the time and prohibited from possessing weapons. Police quickly initiated a traffic stop on a vehicle driven by Mr. Fabbro. He pulled over and parked in the driveway of a random residence. At the time that the police approached the vehicle, Mr. Fabbro had the shotgun in his mouth.

Police spoke with Mr. Fabbro for several hours. He told them that he only wanted to hurt himself. He also told them of his struggles and that he wanted to make changes in his life. He eventually tossed the gun out of the vehicle. He was then apprehended by police and admitted to the hospital under Ontario's *Mental Health Act*, [RSO 1990, c M.7](#).

Mr. Fabbro had undiagnosed and untreated mental health issues at the time of his suicide attempt, as well as an addiction to heroin. Like many others, his addiction started after years of taking prescription opioids following an injury. When Mr. Fabbro could no longer receive prescriptions for these opioids, he turned to other drugs. Further, in the year before his injury, he had "found the body of a neighbor who had committed suicide by hanging; he saw a friend decapitated in front of him; and, he saw a snowmobiler go over a cliff" (para 4). These experiences caused grief and trauma. Paragraph 5 sets out what I believe to be one of the most important facts in this case:

In the month leading up to the incident, the appellant went to the Sault Area Hospital on three occasions to get medical help for suicidal ideation but was sent away each time. Two earlier visits to the hospital had also been unsuccessful.

After Mr. Fabbro was released on bail, he took several steps to address his addiction and mental health challenges. These included attending residential treatment and seeing a psychiatrist. The sentencing judge accepted that the incident had acted as a "catalyst" and that the appellant had made significant life change since (para 14). It was also accepted that he had only ever threatened to harm himself during this incident. Nevertheless, the judge sentenced Mr. Fabbro to two years less a day of jail to be followed by three years of probation. On appeal, the Court substituted a conditional sentence order (CSO) for the custodial portion of the sentence and did not disturb the

probation order. A CSO is a term of imprisonment served in the community under conditions ordered by the court (s 742 of the *Criminal Code*; notably, if CSO conditions are violated a judge can order that the remaining sentence be served in jail (s 742.6(9)). The result of the appeal is that Mr. Fabbro must serve a five-year sentence in the community during which his liberty will be restricted insofar as the conditions of the CSO and probation permit.

## **Sentencing Principles**

### ***Review of Error Found by the Court of Appeal***

According to the Court of Appeal, the first error in *Fabbro* was the sentencing judge's overemphasis on the principles of denunciation and deterrence, and omission of rehabilitation as a primary sentencing principle. The sentencing judge identified the primary sentencing principles as denunciation and deterrence because the charges involved a firearm, but failed to consider that the possession of the firearm in this case was driven by a suicide attempt. Justice Gillese notes on appeal that attempted suicide does not "cry out for a denunciatory sentence" (para 23) and that rehabilitation is also a primary sentencing principle here. A Pre-Sentence Report highlighted the steps that Mr. Fabbro already took towards rehabilitation, observing that he had "proven for the past 10 months that with community and family supports he is capable of being a productive member of the community" (para 23).

### ***Commentary***

*Fabbro* demonstrates another related key point: how the beginning of an accused's criminal justice journey can influence the result. Mr. Fabbro was released on bail. While on bail, he was able to access support and resources in the community, from his treatment team and his family. The track record that he developed was relied on to support the elevation of rehabilitation to a primary sentencing principle. Had Mr. Fabbro not been released on bail and remained in custody without these opportunities, he may not have been in the same position on sentencing.

Given the evidentiary record in *Fabbro*, it is not surprising that the Ontario Court of Appeal found that rehabilitation should be prioritized. Sentencing judges and appellate courts have tended to emphasize rehabilitation for offenders with mental health issues who were responsive to treatment. However, it has also been previously recognized that "even if there is little prospective of complete cure and rehabilitation", deterrence and denunciation should play less of a role in sentencing an offender with a mental health issue (*R v Ayorech*, [2012 ABCA 82 \(CanLII\)](#) at para 11; *R v Shevchenko*, [2018 ABCA 31 \(CanLII\)](#) at para 26). The Alberta Court of Appeal has explained the rationale for this: "little would be achieved by making an example of an offender whose acts are committed at the time of mental illness, and specific deterrence has little impact on the mentally ill" (*R v Resler*, [2011 ABCA 167 \(CanLII\)](#) at para 14, referencing *R v Tremblay*, [2006 ABCA 252 \(CanLII\)](#)).

The concept of rehabilitation was recently reconsidered by appellate courts in Saskatchewan (*R v JP*, [2020 SKCA 52 \(CanLII\)](#) at paras 58-62, see also [case commentary](#) by Glen Luther and Hilary Peterson), the Yukon (*R v Charlie*, [2015 YKCA 3 \(CanLII\)](#) at para 22), and Manitoba (*R v Friesen*, [2016 MBCA 50 \(CanLII\)](#) at paras 36-37) in relation to offenders with cognitive disabilities. These

courts emphasized that rehabilitating a person with a mental health issue is not limited to finding a medication or “cure” that could prevent further misconduct. Rather, assisting in behaviour modification or management can promote rehabilitation and prevent recidivism, as there is not always a medication or other traditional “treatment” that can assist with the management of some mental health issues. For a case in which this view of rehabilitation may have assisted, see *R v Maier*, [2015 ABCA 59 \(CanLII\)](#), along with this [ABlawg post](#) by Glen Luther, Q.C. and Dr. Mansfield Mela on *Maier* and discussion of when mental health has been treated as aggravating on sentence.

The promotion of rehabilitation as a primary sentencing principle in *Fabbro*, combined with other recent appellate authorities on when rehabilitation should take priority, should assist sentencing judges in appropriately weighing the codified sentencing principles for offenders with mental health issues.

### **When to Consider Mental Health – Causal Link**

The Court of Appeal held that the sentencing judge also failed to consider whether there was a causal connection between Mr. Fabbro’s mental health and criminal act.

Though not mentioned in *Fabbro*, it is relevant for the purpose of this post to note that the sentencing provisions of the *Criminal Code* are silent on offenders’ mental health. While s 718.2(a)(i) provides that where an offence is motivated by prejudice or hate based on mental disability, this may be aggravating, there is no mention of the impact of an *offender’s* mental disability on sentence. Where mental health is an issue, courts must determine if it is relevant and if so, how so. Mental health has been treated by sentencing judges and appellate courts as diminishing an offender’s level of responsibility and as mitigating where certain conditions are met. One of those conditions is a connection between the mental health issue and the commission of the offence.

The Crown in *Fabbro* argued that there was “no evidence the appellant was experiencing a delusion or in a mental state that rendered him incapable of appreciating the consequences of his actions [and that he] did not challenge his criminal responsibility or mental capacity at sentencing” (para 24). Based on this language, the Crown seems to have suggested that the criteria for a finding of not criminally responsible (NCR) on account of mental disorder must be met for a causal link to be established. For an accused to be found NCR, they must have acted “while suffering from a mental disorder that rendered [them] incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong” (*Criminal Code*, s 16). This is not an easy threshold to meet. Moreover, it is often an undesirable path for an accused person. An NCR verdict is not an acquittal, nor a conviction, but rather results in an accused’s transfer into the forensic mental health system where they will remain unless or until they are found to not be a significant threat to the safety of the public (*Winko v British Columbia (Forensic Psychiatric Institute)*, [1999 CanLII 694 \(SCC\)](#), [1999] 2 SCR 625). There are several reasons that accused persons may choose not to advance an NCR argument even where it might be successful, including that it could lead to more serious deprivations on their liberty than would follow a finding of guilt and sentence (*R v Kankis*, [2012 ONSC 378 \(CanLII\)](#) at paras 20-22).

Regardless, an accused does not need to meet NCR criteria for their mental health to be considered on sentencing. As noted by the Court of Appeal in *Fabbro*, “the Crown’s argument misses the point” (para 25). The Court reiterated previously established law: for mental health to be mitigating, there must be a causal link between the offender’s mental health issue and the criminal act. That causal link may be direct or indirect. For example, in *R v Elliott*, [2017 ABCA 395 \(CanLII\)](#), the majority of the Court of Appeal explained that “[i]t is sufficient that the mental illness contributed to the commission of the offence” and that it need not be the direct cause to significantly mitigate sentence (para 12; see also *R v Resler*, [2011 ABCA 167 \(CanLII\)](#)). The question then becomes what extent the criminal act related to the mental health issue, and correspondingly what extent it should impact the sentence.

In *Fabbro*, a causal link was “virtually inescapable on the evidence: the appellant wanted to commit suicide (using the shotgun) because of his addictions, his unresolved mental health issues, and the ensuing breakdown of his life” (para 26). *Fabbro* is not the first case in which a suicide attempt during or around the time of an offence has provided what courts of appeal considered to be an obvious connection between a mental health issue and criminal offence – see e.g. *R v Dedeckere*, [2017 ONCA 799 \(CanLII\)](#) and *R v Adam*, [2019 ABCA 225 \(CanLII\)](#).

*Fabbro* is also not the first case where the connection between a mental health issue and criminal act involved substance use. The British Columbia Court of Appeal in *R v Badhesa*, [2019 BCCA 70 \(CanLII\)](#) recently considered this connection where the appellant’s mental health and substance use had both contributed to manslaughter. The Court held that self-induced intoxication may reduce culpability if the intoxication was related to mental illness. In *Badhesa*, the appellant’s depressive psychosis had contributed to his alcohol use. A similar conclusion was reached in *R v Ayorech*, [2012 ABCA 82 \(CanLII\)](#), where the accused was caught in a “vicious cycle of psychosis and substance abuse” (at para 10). *Fabbro* doesn’t create new precedent on the causal connection point, but it reiterates that the causal connection required for sentence mitigation is different than what is required for an NCR verdict. In *Fabbro*, that causal connection was clear. On facts where the connection is less obvious, courts have still found that an indirect connection can suffice.

## Discussion

There was no dispute in this case that Mr. Fabbro had the gun for the purpose of committing suicide, which Justice Gillese noted was “the ultimate plea for help” (para 23). Mr. Fabbro did seek help before, though, at least three times within the month leading up to the incident when he was turned away from hospital, and twice before that. He could not get medical attention during this month of distress, yet when he had the gun he got attention from several police officers, the Emergency Service Unit, and a negotiator. He then received medical attention that he previously sought. It should not take a suicide attempt and police involvement to get help. The criminal justice system should not be relied on as the net that catches people who need assistance and can’t get it from medical or social services.

The overincarceration of persons with mental disabilities is theorized to be caused by various systemic problems, including lack of access to mental health care and supports, which appears to be part of the issue in *Fabbro*. While mental health facilities have capacity limits, remand centres do not turn away people charged with crimes (Michael Davies et al, *A Guide to Mental Disorder*

*Law in Canadian Criminal Justice* (Toronto: LexisNexis, 2020)). Other causes of this overcriminalization may include structural poverty, racism, and trauma (Centre for Addiction and Mental Health, “[Mental Health and Criminal Justice Policy Framework](#)”; Mental Health Commission of Canada, “[The Mental Health Needs of Justice-Involved Persons, A Rapid Scoping Review of the Literature](#)”). Some hypothesize that persons with mental health issues are more likely to come into contact with and be detected by police, more likely to be arrested and charged, more likely to be denied bail, and more likely to plead guilty than others.

There are several routes that may reduce the overcriminalization of persons with mental health issues, including properly resourced community services, reducing police involvement by utilizing adequately trained non-police first responders (see for example a recent pilot project [here](#)), and enhanced diversion measures. Police have discretion to determine whether charges need to be laid, and crown prosecutors have discretion to determine whether charges need to proceed. If charges are laid and lead to findings of guilt, more robust approaches to mental health issues in sentencing proceedings may also contribute to reducing the overincarceration of persons with mental health challenges. Noncustodial sentences are not necessarily “lenient”, given that terms of a CSO or probation can significantly restrict liberty, but they at least avoid hazards that can come with a jail term, including disconnect from supports, exacerbation of symptoms and lack of appropriate treatment. Rehabilitation should be prioritized on sentencing, and not only in cases where the offender already has access to resources, treatment, and/or community that are working well for them post-arrest.

Mr. Fabbro was able to avoid jail with his successful appeal. However, he had to go through an appeal to get there, and the appellate process involves resources that are not available to everyone. It is also not clear how restrictive the terms of his CSO and probation are. He will still have an entry on his criminal record for weapons offences and have to carry this with him as a reminder of a traumatic period in his life. Further, Mr. Fabbro had access to support and treatment following his arrest, and his mental health seemingly responded well to this. Without minimizing the sustained and significant steps that Mr. Fabbro took to achieve this result (as well as the fact that he was unable to access supports prior to his arrest), many others do not have access to these supports or have a mental health issue that is not well treated through traditional psychiatry or psychology.

More resources need to go into mental health care and non-police first responders, and the criminal justice system must stop picking up the pieces of under-resourced community care. If criminal charges must be laid, diversion should be more accessible. If these cases get to a sentencing judge, up to date case law on sentencing persons with mental health issues should be considered. There is a significant, recent body of case law from provincial appellate courts to be drawn on. *Fabbro* adds one more to the pile.

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***Links to 24/7 mental health support:***

<https://www.ucalgary.ca/wellness-services/contact/after-hours> - call, text, and online chat options

<https://cmha.bc.ca/crisis-lines/>

<https://findahelpline.com/ca>

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