BRITISH COLUMBIA COURTHOUSE LIBRARY WEBINAR SERIES

Assessing Fitness to Stand Trial and Not Criminally Responsible on Account of Mental Disorder: Methods, Qualifications, Controversies, and Future Directions

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Canadian Psychological Association Task Force
Fitness to Stand Trial and
Criminal Responsibility Assessments

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Case Study – Fitness to Stand Trial

- Elderly client charged - breach of conditions
- Claimed amnesia for alleged offence
- Issue of fitness was raised
- Assessed in hospital
  - ‘Ganser syndrome’ (other: ‘Capgras syndrome’)
  - TOMM results and history
    - Korsakoff’s syndrome
- Ultimately found Unit to Stand Trial
  - Charges eventually stayed by the Court

Case Study - NCRMD

- **Murdered children**
- **Issue of mental health was raised**
- **Assessed in hospital**
  - Diagnosed with psychotic disorder
  - Unable to appreciate wrongfulness
    - Claimed altruistic acts
- **Found NCRMD**
  - BCRB
- **Backlash**
  - Contrast with recent US case (UI, JY e.g.)

Brief History

Torah (1313 BC)

Shoteh (‘insane’ person) - lacks the capacity for reason, cannot understand a charge, cannot cross examine witnesses, cannot appoint counsel, cannot form criminal intent – they lack da’at (legal capacity)

New Testament (1st century AD)

Diminished culpability for ignorance

‘Father, forgive them, for they do not know what they are doing’

1313 BC — 1st century AD — Ancient Greece — Ancient Rome

Brief History

Ancient Greece (e.g., Aristotle; 384-323 BC)

People driven by ‘madness’ – lacked moral agency

Required special consideration, not standard culpability

Ancient Rome (2nd century BC to 6th century AD)

Furiosus nullus voluntas est - an ‘insane’ person has no will

Satis furore ipso punitur - he is sufficiently punished by his ‘madness’

‘madness’ or fate - fati infelicitas - excused a person from criminal liability.

Brief History

1836

Early common law

Canadian Courts relied on R v. Pritchard (1836), an English case

Non-verbal deaf man charged with bestiality, a capital offence

Questions for the jury

Is the prisoner ‘mute of malice’ or by the ‘visitation of God?’

Can the prisoner plead to the indictment?

Is the prisoner of ‘sufficient intellect’ to comprehend the course of proceedings?

Seeds of current fitness test

1836 — 1892 — 1992 — 2025

Brief History

1892

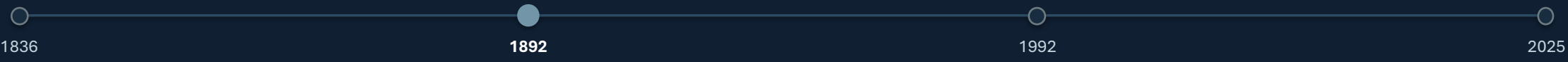
Criminal code

1892 (s. 737)

No definition of unfit

If accused appeared insane, Court could launch inquiry re:

‘on account of insanity unfit to take his trial’



Brief History

Criminal code

1892 (s. 737)

No definition of unfit

If accused appeared insane, Court could launch inquiry re:

‘on account of insanity unfit to take his trial’

1992 (Bill C-30)

Section 672.11(a) – assessment order ‘whether an accused is unfit’

understand the nature or object of the proceedings

understand the possible consequences of the proceedings

communicate with counsel

1836 — 1892 — **1992** — 2025

Brief History

Case law re Fitness

1992

R. v. Taylor (1992 ONCA)

‘Limited Cognitive Capacity’ test

2025

R. v. Bharwani (2025 SCC 26)

Reality-based decision making

1836 1892 1992 **2025**

Brief History

1800

Early common law

Rex v. Hadfield (1800)

‘Regicide in Drury Lane’

Influenced how law defined ‘insanity’, later adopted in Canada

‘Wild beast test’

Defence of ‘irresistible impulse’

If delusional, could not possess criminal intent – mens rea

Not guilty ‘being under influence of insanity’

Brief History

1892

1892 – First Criminal Code

Canada adopted ‘The M'Naghten Rules’ (1843; British House of Lords)

The accused was suffering from a ‘disease of the mind’ (or ‘natural imbecility’)

‘This mental defect rendered them incapable of understanding the nature and quality of the physical act, or incapable of knowing that the act was wrong’

1800 — **1843 / 1892** — 1992 — 1999

Brief History

Criminal code	1992 (Bill C-30)	NCRMD replaced NGRI

Section 16

> ‘No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong’

1800 — 1843 / 1892 — **1992** — 1999

Brief History

Section 672.54

‘Governs the dispositions a Court or a Review Board must make when an accused person is found not criminally responsible (NCR) on account of mental disorder or unfit to stand trial’

1999 Winko v British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625

1800 — 1843 / 1892 — 1992 — **1999**

Common Disorders

- **Fitness to Stand Trial assessments**
  - Neurodevelopmental
    - Intellectual disability
  - Neurocognitive
  - Psychotic

- **NCR assessments**
  - Psychotic
  - Mood
    - BiPolar
    - Depression with psychotic features
  - Occasionally: substance induced, BPD

If Found Unfit

01 **By Court**

- Based on assessment evidence

03 **Charges could be stayed**

04 **Review Board jurisdiction**

- Tx to increase fitness
  - Medication
  - Education

If Found NCRMD

01 **By Court**

- Based on assessment evidence

03 **Review Board jurisdiction**

- Tx to stabilize MH / reduce risk
  - CD
  - AD

(D) Fitness – Evaluator Competencies

01 Diagnose / assess mental disorders, substance use, & cognitive functioning

02 Examine present capacity to understand proceedings and communicate with counsel

03 Assess malingering

04 Identify interventions to restore fitness

05 Forensic Psychologists have all of these skills

(D) Case Study – Mr. J

- Age 72, male, former lawyer
- Theft, Fraud, Criminal breach of trust
- Fitness assessment (court ordered)
- Forensic Psychologist & Psychiatrist completed a report – team approach
- 2nd report from a private psychiatrist, completed for defense counsel

(D) Case study – Mr. J

- Numerous medical problems
- Parkinson's disease & dementia
- No history of psychosis
- Recent cognitive decline – documented in medical records & confirmed by family collateral

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(D) Assessment – Mr. J

- 2 key questions – testing required
- Cognitive functioning – current status?
- Memory, attention, language, etc.
- Malingering – any evidence?
- Lawyer for many years – should know legal concepts . . .

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(D) Psychological Testing – Mr. J

- Neuropsychological screening (RBANS)
- Immediate memory (1st percentile)
- Delayed verbal memory – significant trouble recalling information
- Decline in performance from previous testing
- Significantly lower than what would be expected from a lawyer

(D) Response style – Mr. J

- Effort testing (TOMM)
- No concerns about feigning or poor effort
- Memory problems – consistent finding across multiple data sources
- No recall of the charges on two separate meetings with police
- Poor memory for other historical events

(D) Fitness hearing – Mr. J

- 3 experts testified – one Psychologist and two Psychiatrists
- All 3 concluded that Mr. J was Unfit to stand trial
- 2 experts opined that Mr. J was not malingering; 3rd expert provided mixed evidence
- Crown contested the issue of fitness, claiming Mr. J was malingering

(D) Court decision – Mr. J

- https://www.canlii.org/en/mb/mbpc/doc/2020/2020mbpc21/2020mbpc21.pdf
- Unfit to stand trial
- Dementia impairs his ability to understand and meaningfully participate in criminal proceedings
- Judge examines expert evidence and accused's testimony

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(D) Key points – Mr. J

- Fitness assessment – focus on accused's present capacity (not the past)
- Examine multiple data sources
- Testing - Cognitive functioning & effort / malingering
- Unique contribution of forensic psychological expertise

NCRMD Assessments - How

01 Referral

02 Multi-method, multi trait

03 File

04 Clinical Interviewing

- Engagement challenges
  - Due to psychosis or other factors
  - Interviewing
    - Chicken example

NCRMD Assessments - How

01 Collateral interviewing

02 Assessment of malingering (general and specific)

- Faking deafness example

04 Testing – general and specific

05 Hypotheses testing

06 Diagnosis

NCRMD Assessments - How

> Clinical – not legal analysis – of NCRMD criteria
>
> Appreciate the nature and quality of the act / know it was wrong

Report – Don’t answer ultimate question

Testimony – ditto

NCRMD Assessments - How

- **Assessing mental state**
  - Clinically re motivation
    - Emotionally
    - Cognitively
    - Behaviourally
  - Not legally
    - Mens rea – guilty mind
  - File
    - Hx records, RCC, witness statements, CCTV
  - Testing
  - Clinical interviews
    - Interviewing strategies to increase engagement
    - Symptoms
    - Symptom suggestion
  - Collateral interviews

NCRMD Assessments - How

- Eliciting and assessing memory for alleged offence
  - Narrative memory
  - Funnel approach
  - Consistent vs. inconsistent
  - Addressing claims of amnesia
    - Dissociative vs. organic
  - State dependent memory
    - Red out

- **Does memory conform to known processes?**
- Do not directly address credibility of memory

Case Study – NCR Assessment

- Young Indigenous male
- Crim history, MH history
- Index: stabbed two adult men
- Found guilty of second-degree murder
- Issue of mental health was raised
- Multi-method multi trait assessment

Case Study – NCR Assessment

- File, interviews, collateral interviews, testing (PAI, SIRS-2)
- Symptom suggestion; PCL-R
- Diagnoses: schizophrenia, APD, SUDs
- Inconsistencies in reports of psychosis
- Mental state / hypothesis testing
- All experts diagnosed him with schizophrenia
  - Issue was when symptoms started

- **Not found NCRMD**

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(D) NCR – evaluator competencies

01 Diagnose and assess mental disorders, including serious mental illnesses

02 Assess mental condition of accused at the time of the offence

03 Examine alternative causes or explanations for the offence (e.g., substance use, personality)

04 Assess malingering and other response styles

05 Forensic Psychologists possess all of these skills

(A) Automatism

In Canadian criminal law, automatism is:

a state of impaired consciousness in which a person, though capable of physical action, has no voluntary control over their conduct—such as during sleepwalking, a severe concussion, or an acute dissociative episode

(A) Automatism

Because a voluntary physical act (actus reus) is a foundational requirement for criminal guilt, genuine automatism negates criminal liability

Under the Supreme Court of Canada's framework in R. v. Stone (1999), there are two categories based on its underlying cause:

non-mental disorder automatism and mental disorder automatism

(A) NCR Example

- **David Moss**
  - David Michael Moss was charged with second-degree murder
  - On May 18, 2020, Mr. Moss killed 7-year-old Bella Rose Desrosiers (Bella) while Bella's mother, Melissa Desrosiers was present. Bella's 4-year-old sister, Lily Desrosiers (Lily), was in the home as well

(A) NCR Example

> Mr. Moss argued that he was not criminally responsible for Bella's death because he was suffering from a mental disorder that rendered him, at the time of the alleged offence, incapable of appreciating the nature and quality of the act or of knowing that it was wrong

(A) NCR Example cont.

> Defence submitted that, at the time of the attack on Bella, Mr. Moss believed the physical world was an illusion which did not have real people in it, and therefore Bella's killing was not real and part of the illusion

(A) NCR Example cont.

- **Mr. Moss did not want to kill Bella**
- Rather, he did so as a selfless act, which means that, due to his mental disorder, Mr. Moss believed that what he was doing was morally right

(A) Four Properly Qualified Experts

- **Court Ordered Assessment**
- Dr. Maryana Kravtsenyuk, forensic psychiatrist: Dr. Kravtsenyuk treated Mr. Moss while he was at Alberta Hospital
  - Ordered neurological consultation
  - Reviewed the post-injury brain scans, medical records, and treatment notes from 2004. Dr. Kravtsenyuk's review was extensive and detailed

(A) Four Properly Qualified Experts

- Dr. Andrew Haag, forensic psychologist: Dr. Haag prepared an independent court-ordered assessment of Mr. Moss
  - M-FAST and SIRS-2
- Dr. Thérèse Chevalier, neuropsychologist: Dr. Chevalier conducted a neuropsychological assessment of Mr. Moss at the request of Drs. Haag and Kravtsenyuk

- All of the above relied on Mr. Moss's entire medical history, Alberta Hospital records, written and verbal reports from Mr. Moss' assessment and treatment team, social work reports, the complete police file, and audio and transcripts from an interview with Mr. Moss, witness statements, and other legal documentation

(A) Four Properly Qualified Experts

- **Defence Assessment**
- Dr. Marc Nesca, clinical and forensic psychologist: Dr. Nesca was retained by Mr. Moss to provide an opinion on the cause of Mr. Moss's psychosis. Dr. Nesca was called by the Defence
  - Dr. Nesca conducted a Personality Assessment Inventory (PAI) with Mr. Moss

(A) NCR Example cont.

- The written decision involved the judge weighing a great deal of expert evidence
- After weighing the evidence of all four experts, the judge concluded:

(A) NCR Example cont.

> “Even if Mr. Moss suffered from a disease of the mind, the evidence does not establish that he was incapable of appreciating the nature and quality of the act or of knowing that it was morally wrong”

(A) NCR Example cont.

> “The actus reus is not in dispute. The evidence establishes beyond a reasonable doubt that Mr Moss had the requisite mens rea to commit second-degree murder”

(A) Appeal 2025/07/04

01 On appeal, the appellant raised the following issues:

- reviewable errors in defining and applying the test for criminal responsibility, specifically
  - errors in assessing the impact of drug toxicity
  - overreliance on expert evidence
- reviewable error in determining that the appellant had the requisite intent for murder

(A) Appeal

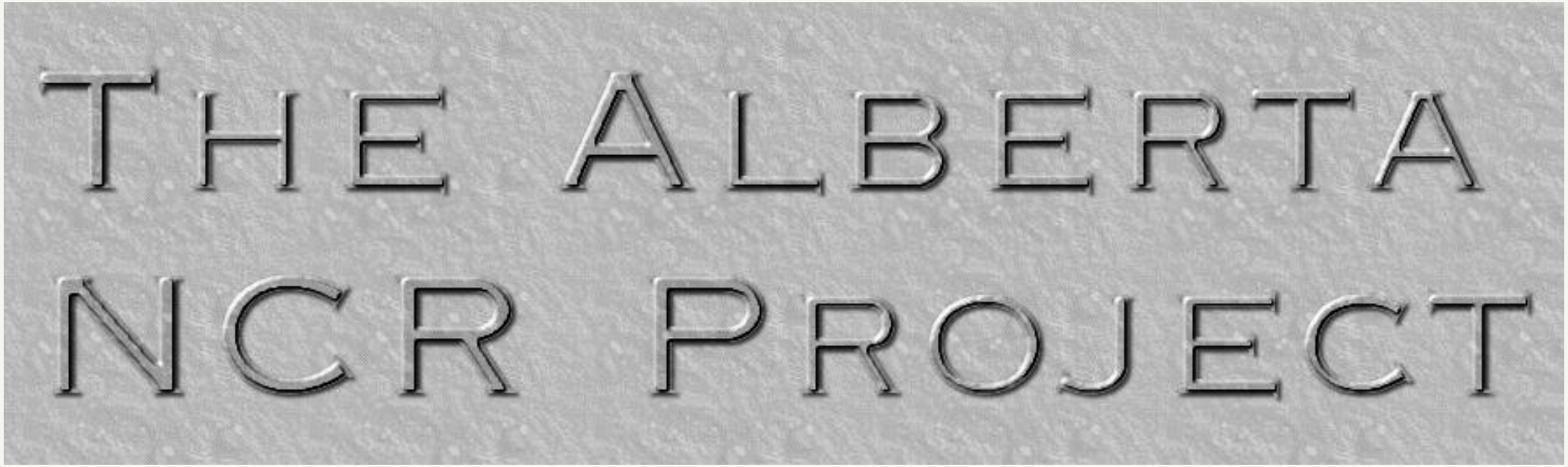
> [51] The appellant argues that the trial judge over-relied on the expert evidence and erred by allowing them to give evidence on “the ultimate issue”. The appellant is correct that the definition of a disease of the mind is a legal concept, not a medical concept: Bouchard-Lebrun at paras. 61-62. It would be an error of law for the trial judge to abdicate the responsibility for this key finding of fact to the experts: R. v Williams, 2023 MBCA 11 at para. 33, 423 CCC (3d) 99. However, it would also be an error of law for the trial judge to ignore the expert evidence without good reason

(A) Appeal

> [52] In this case the trial judge heard evidence from four qualified experts. No objection was made at trial to either their expert qualifications or the scope of their opinions. He accepted the opinion of Dr. Haag and Dr. Kravtsenyuk that the appellant's psychosis was cannabis induced. That finding of the medical cause of the appellant's psychosis at the time of the homicide formed the factual platform for the trial judge's legal conclusion that the appellant had not met the burden of proof on him to show that he was suffering from a disease of the mind. The appellant has not shown a reviewable error in this assessment of the expert evidence, or its use in deciding the legal question of whether the appellant was suffering from a disease of the mind at the time of the homicide. The trial judge did not simply adopt any opinion of the experts on the legal issue

The Appeal was dismissed

(A) NCR Research



(A) NCR Research cont.

01 Chart information was gathered on all persons found NCR and / or ‘insane’ in Alberta’s history (i.e., the entire population)

02 The project involved multiple students from the U of A, Ph.D. Residents, Medical Residents, etc.

03 Resulted in many publications and four completed dissertations to date

- One dissertation is still underway

(A) The National Trajectory Project

- The National Trajectory Project (NTP) was / is a multi-province Canadian research study examining individuals found Not Criminally Responsible on Account of Mental Disorder (NCRMD)
- Current researchers include Drs. Anne G. Crocker, Tonia L. Nicholls, Michael C. Seto, Gilles Côté, Yanick Charette, Andrew Haag, Mark Olver, Andrew Grey, and Malijai Caulet
- The first studies were published primarily as a five-part series in The Canadian Journal of Psychiatry (2015)

(A) The National Trajectory Project

- The study analyzed the legal and clinical files of 1,800 adults entering provincial Review Board (RB) systems between May 2000 and April 2005 across Canada's three most populous provinces - Quebec, Ontario, and British Columbia
  - Tracked outcomes through December 2008
- Further research is expected soon and will cover most of Canada

Who Completes These Assessments (In Canada)?

- **Mostly psychiatrists**

- **Why?**
  - Criminal Code of Canada (1992)
    - Section 672: Mental Disorder
      - Outlines process for Court-ordered fitness and criminal responsibility assessments
    - Describes who can conduct assessments:

Who Completes These Assessments (In Canada)?

> ‘assessment means an assessment by a medical practitioner or any other person who has been designated by the Attorney General as being qualified to conduct an assessment of the mental condition of the accused’

Who Completes These Assessments (In Canada)?

> ‘medical practitioner means a person who is entitled to practice medicine by the laws of a province’

(D) What about Psychologists?

01 “any other person who has been designated by the Attorney General” (2005)

02 Psychologists mentioned in the reasoning for adding this clause to the legislation (CCC)

03 Attorney general of any province has power to make it happen

04 Psychologists in forensic mental health systems regularly provide expert opinion in these cases (e.g., AB, ON, MB)

The CPA is Advocating for Change

- **CPA task force**

The CPA is Advocating for Change

> Hessen Kayfitz, J., Cooper, B., Guy, L., Haag, A., Hill, D., Kolton, D., Pomichalek, M., Roesch, R. & Watt, M. C. (2017). Fitness to stand trial and criminal responsibility assessments in Canada: Improving access to qualified mental health professionals. A Position Paper of the Canadian Psychological Association., Ottawa, ON.

The CPA is Advocating for Change

> Roesch, R., Kayfitz, J.H., Watt, M.C., Cooper, B., Guy, L.S., Hill, D., Haag, A.M., Pomichalek, M., & Kolton, D. (2019). Fitness to stand trial and criminal responsibility assessments: Advocating for changes to the Canadian Criminal Code. Canadian Psychology, 60, 148-154.

The CPA is Advocating for Change

> In section 672.1 of the Criminal Code, we propose a change to the definition of ‘assessment’ to say, ‘assessment means an assessment by a qualified mental health professional, and any incidental observation or examination of the accused’

The CPA is Advocating for Change

> Similarly, to the Youth Criminal Justice Act, we propose that ‘qualified mental health professional’ is defined as: ‘a person duly qualified by provincial law to practice psychiatry or a person duly qualified by provincial law to practice psychology’

Why Qualified Forensic Psychologists?

01 **We have the good stuff**

- Education
- Training
- Experience

Why Qualified Forensic Psychologists?

01 **One stop shop**

- No need to refer out
  - IQ / neuropsychological, adaptive functioning
  - Psychopathy
  - Diagnostic clarification
  - Malingering

07 **Improve access / minimize delays**

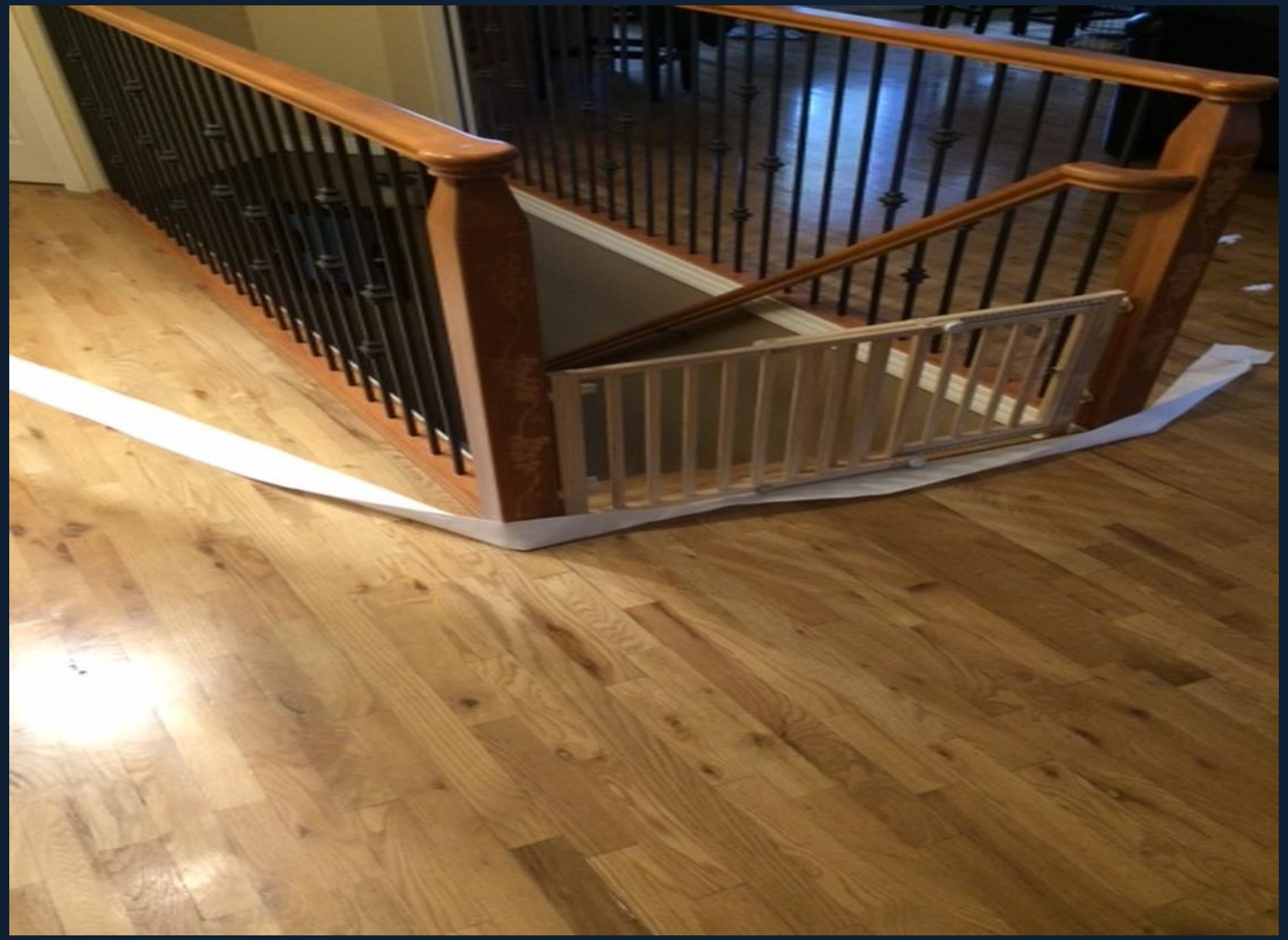
08 **Economical**

Recommendation:

- ‘allow forensic psychologists to perform fitness to stand trial (FST) and not criminally responsible (NCR) assessments’
  - E.g., to reduce delays

TP MASSACRE

FIRST CRIME



SECOND CRIME



ACCUSED REQUIRING ASSESSMENT



CO-ACCUSED



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