> ceptionally lenient in the circumstances can be presumed to generate neither deterrence nor dununciation.[1034]

Justice Lamer also noted that the risk the offender poses of re-offending is a relevant consideration in determining whether real jail is warranted:

> In my opinion, to assess the danger to the community posed by the offender while serving his or her sentence in the community, two factors must be taken into account: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence. If the judge finds that there is a real risk of re-offence, incarceration should be imposed. Of course, there is always some risk that an offender may re-offend. If the judge thinks this risk is minimal, the gravity of the damage that could follow were the offender to re-offend should also be taken into consideration. In certain cases, the minimal risk of re-offending will be offset by the possibility of a great prejudice, thereby precluding a conditional sentence.[1035]

ISSUE 60: WHEN IS MENTAL ILLNESS A NEUTRAL, MITIGATING OR AGGRAVATING FACTOR AT SENTENCING?

There is no doubt that an offender's mental illness is a factor to be taken into account in sentencing.[1036] However, mental illness could be an aggravating factor[1037] as well as a mitigating[1038] factor.[1039] Where mental illness plays a role in the commission of the offence, the offender's culpability *may* be diminished, punishment and deterrence may be ineffective or unnecessary and treatment and rehabilitation of the offender may be paramount considerations.[1040] A review of the case law suggests that the rules are as follows for when mental illness will be a mitigating, neutral or aggravating factor:

[1034] *R. v. M. (G.)*, [1992] O.J. No. 2304 at para. 9, 11 O.R. (3d) 225 (Ont. C.A.).

[1035] *R. v. Proulx*, [2000] S.C.J. No. 6 at para. 69, [2000] 1 S.C.R. 61 (S.C.C.).

[1036] *R. v. Ellis*, [2013] O.J. No. 5583 at para. 117, 2013 ONCA 739 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 53.

[1037] Aggravating here is used in the sense of increasing the length of the sentence. See *R. v. Larche*, [2006] S.C.J. No. 56 at para. 28, 2006 SCC 56 (S.C.C.).

[1038] Mitigating here is used in the sense of decreasing the length of sentence. See *R. v. Larche*, [2006] S.C.J. No. 56 at para. 28, 2006 SCC 56 (S.C.C.).

[1039] For example, in *R. v. Killiktee*, [2011] O.J. No. 4935 at paras. 58-62, 2011 ONSC 5910 (Ont. S.C.J.), affd [2013] O.J. No. 2339, 2013 ONCA 332 (Ont. C.A.), even though substance abuse was a key contributing factor, Ratushny J. imposed a higher sentence than a similar case where substance abuse was not an issue because of the need to protect the public, specific deterrence and rehabilitation, as prior attempts by the offender to address the substance abuse outside of prison failed. In *R. v. Pitkeathly*, [1994] O.J. No. 546 at para. 13, 69 O.A.C. 352 (Ont. C.A.), the Ontario Court of Appeal said that: "We agree with the trial judge that the alcohol and substance abuse in this case was not a mitigating factor, particularly in light of the appellant's refusal to seek professional assistance to control his anger, or to address his alcohol and substance abuse problems."

[1040] *R. v. Ellis*, [2013] O.J. No. 5583 at para. 117, 2013 ONCA 739 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 53 (S.C.C.).

a. When Mental Illness May be a Mitigating Factor

In order for a **mental illness**[1041] to be considered as a mitigating **factor** in **sentencing**, the offender must show on a balance of probability[1042] a causal link between his or her illness and his criminal conduct, that is, the illness is an underlying reason for his or her aberrant conduct. Further, if it is claimed that a lengthy sentence would have a severe negative effect on the offender, there must be evidence that a lengthy sentence would have a severe negative effect on the offender such that it should be reduced on compassionate grounds.[1043] In other words, the evidence during sentencing, such as pre-setence report, must support a causal relationship between the mental illness and the aberrant behaviour.[1044]

Next, if there is a causal connection between mental illness and the crime, the sentencing judge must consider whether culpability for the offence is sufficiently attenuated by the mental illness to adjust the balance of the sentencing principles in favour of rehabilitation and away from denunciation and deterrence. It is for the trial judge to determine, having regard to all the evidence, including the circumstances of the offence and the expert evidence, the extent to which the offender's culpability may have been reduced by mental illness.[1045] For instance, in *R. v. Ellis*,[1046] the appellant was a member of the Refugee Protection Division of the Immigration and Refugee Board (IRB). In this position he was responsible for deciding refugee claims. He was convicted of breach of trust in connection with his office, contrary to section 122 of the *Criminal Code*, by suggesting to a refugee claimant that he would approve her application if she engaged in intimate relations with him. He was sentenced to 18 months' imprisonment.[1047] One of the grounds of appeal was that the trial judge minimized the scope of his bipolar disorder and the causative role it played in the commission of the offence. In the result, the appellant submitted, the trial judge gave undue emphasis to denunciation and deterrence, inadequate consideration to his rehabilitation and erred in sentencing him to a term of incarceration, rather than imposing a conditional sentence.[1048] The Court of Appeal upheld the sentence and agreed with the trial judge that the appellant's mental illness was a mitigating factor, reducing the sentence he would otherwise have received to a sentence of less

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[1041] Mental illness is meant to refer to any mental disorder recognized by the DSM-5. Therefore, substance abuse is considered a mental illness as substance abuse is a psychiatric disorder in the DSM-5 called substance use disorder.

[1042] *R. v. Pham*, [2015] O.J. No. 2360 at paras. 20-22 (Ont. S.C.J.).

[1043] *R. v. Prioriello*, [2012] O.J. No. 650, 2012 ONCA 63 at paras. 11-12 (Ont. C.A.). See also *R. v. Mercer*, [2018] O.J. No. 889 at paras. 53-73, 2018 ONSC 881 (Ont. S.C.J.).

[1044] *R. v. Hart*, [2015] O.J. No. 3396, 2015 ONCA 480 at para. 6 (Ont. C.A.).

[1045] [2013] O.J. No. 5583 at paras. 107-108, 2013 ONCA 739 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 53 (S.C.C.).

[1046] *Ibid.*

[1047] *Ibid.*, at para. 1.

[1048] *Ibid.*, at para. 54.

than two years. The issue, however, was whether his culpability for the offence was sufficiently attenuated by his mental illness to adjust the balance of the sentencing principles in favour of his rehabilitation and away from denunciation and deterrence.[1049] While the appellant's bipolar disorder may have affected his judgment at the time of the offence, it did not reduce his culpability to the point that a focus on his rehabilitation outweighed the need for a sentence consistent with denunciation and deterrence that would normally result from the abuse of his position of trust.[1050]

b. When Mental Illness May be a Neutral Factor

(i) Evidentiary and Policy Considerations: Substance Abuse and Domestic Violence

The issue of substance abuse, specifically alcohol abuse, being a cause of domestic violence, was specifically addressed by the Ontario Court of Appeal in *R. v. Pitkeathly.*[1051] The appellant was convicted of aggravated assault on his girlfriend and sentenced to eight years in jail.[1052] The appellant at the time of the offence was 29 years of age and had no prior criminal record for violence. He had a reasonably good work record.[1053] The appellant claimed that the assault was as a result of his alcohol and substance abuse, and the learned trial judge failed to take that into consideration in imposing sentence.[1054] The Ontario Court of Appeal unanimously held that with respect to the matter of alcohol and substance abuse, the trial judge had the benefit of the testimony of an expert in the field of clinical psychology, one Dr. Wolfe, who specialized in the area of violence against women and children. He testified that, while alcohol is a factor which is often associated with spousal abuse, its role is to act as a disinhibitor of the perpetrator for the violence but is not the cause of the violence. The Ontario Court of Appeal concluded that the trial judge was correct that the alcohol and substance abuse was not a mitigating factor in his or her case, particularly in light of the appellant's refusal to seek professional assistance to control his anger, or to address his alcohol and substance abuse problems.[1055]

Moreover, in some cases, such as domestic violence, in order to protect vulnerable spouses from domestic violence, even if alcohol is found to be a contributing cause, it would be contrary to public policy and the protection of the public to reduce the punishment for someone assaulting his or her partner after self-induced intoxication. This view is supported by the fact

[1049] *Ibid.*, at para. 107.
[1050] *Ibid.*, at para. 111.
[1051] [1994] O.J. No. 546, 69 O.A.C. 352 (Ont. C.A.).
[1052] *Ibid.*, at para. 1.
[1053] *Ibid.*, at para. 8.
[1054] *Ibid.*, at para. 11.
[1055] *Ibid.*, at paras. 12, 13.

that even in the context of a trial, where the constitutional considerations are more heightened than at sentencing,[1056] Moldaver J., for a unanimous Supreme Court, outlined why it would be inappropriate, for policy reasons, to allow someone to use self-induced intoxication as a defence for general intent offences:

> In the main, the policy assessment will focus on whether alcohol consumption is habitually associated with the crime in question. If it is, then allowing an accused to rely on intoxication as a defence would seem counterintuitive. For example, intoxication is often associated with the crime of sexual assault. Allowing self-induced intoxication to provide an accused with a defence would be to endorse, if not promote, the very behaviour that has historically proved to be a root cause of the problem. And while the law and common sense may not always coincide, we should not be looking for ways to send them scurrying in opposite directions.[1057]

c. When Mental Illness May be an Aggravating Factor

Just because there is a causal relationship between the mental illness and the aberrant behaviour does not end the inquiry. One outcome may be that even if substance abuse is a contributing cause to the crime, it may be an aggravating factor rather than a mitigating factor if the substance abuse and resulting crime highlights the need for protection of the public, specific deterrence or rehabilitation within a custodial setting. For example, in *R. v. Killiktee*,[1058] the offender's substance abuse was "*a key contributing cause to her violent offending. The accused has not been able to sustain the gains she temporarily achieves in dealing with her background and her addictions.*"[1059] However, Ratushny J. found that the accused's inability to abstain from substance abuse together with her pattern of aggression and violence while consuming substances which increase the risk she presents to the community required her to be in custody in the interests of public safety, specific deterrence and rehabilitation. The offender appealed the sentence on the basis that Ratushny J. did not impose a sentence within the range suggested by case law. The Ontario Court of Appeal, however, held that having regard to the appellant's inability to abstain from substance abuse and her corresponding increase in aggression, a distinguishing

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[1056] *R. v. Jones*, [1994] S.C.J. No. 42 at para. 119, [1994] 2 S.C.R. 229 (S.C.C.).

[1057] *R. v. Tatton*, [2015] S.C.J. No. 33 at para. 42, 2015 SCC 33 (S.C.C.). However, at para. 45, Moldaver J. indicated that denying the defence of self-induced intoxication for general intent offences is appropriate because "… if the judge has discretion to tailor the sentence to the facts of the case and to consider the accused's intoxication as part of that assessment, precluding the accused from advancing a defence of intoxication is less worrisome: *Daviault*, at p. 124." However, this comment was not made in regards to sentencing of domestic violence where policy factors would suggest that self-induced intoxication should not be a mitigating factor at sentencing.

[1058] [2011] O.J. No. 4935, 2011 ONSC 5910 (Ont. S.C.J.), affd [2013] O.J. No. 2339, 2013 ONCA 332 (Ont. C.A.).

[1059] *Ibid.*, at para. 58 (S.C.J.).

factor, the trial judge properly sentenced the offender.[1060] In *R. v. Robinson*,[1061] the offender was sentenced by the trial judge to 18 months in jail for sexual offences. The offender was 32 years of age at the time of these offences. He had been married, separated and had one child who lived with his wife. The offender, who had been born and raised in Trinidad, came to Canada and in the short time he was here he was quite successful as he moved from promotion to promotion in his work as an accountant and obtained a good salary. The pre-sentence report revealed his industry by reporting that while so employed he was also continuing with his education and obtained a degree from the University of Toronto. He had no criminal record prior to these offences.[1062] The court asked:

> Why does this sudden outburst of criminal conduct occur in this man who has such a good background? The Court has been given an answer and it is that as a result of the mental illness from which the respondent suffered and now suffers. Significantly, while he was not pleaded to be insane so that insanity would amount to a defence he was sufficiently mentally ill to be said to be psychotic and in the view of the psychiatrists called by the Crown certifiably so. His illness has produced this conduct, yet what he has done in the illness has been found to be crime and under our present law must be treated as such rather than merely an illness. Regrettably, each of the Doctors say that this man is a danger to the public if not treated and cured.[1063]

The Court of Appeal noted that:

> This is a case where it is not really accurate to say that the sentence should be a deterrent because others like him lose touch with reality and as such the deterrence of this sentence is of course meaningless to them. Further, the sentence should not proceed on the basis of punishment because the Court should not punish people who commit crimes because of mental illness. The important purposes of the sentence are the protection of the public so long as this man remains in this dangerous state and his early return to the community when he is cured or to put it another way, rehabilitated. The emphasis must be on the protection of the public, and of course this may be first achieved by his cure, and so the sentence must be of sufficient length to ensure full treatment but of course conversely, if that is not successful, that the public must be protected as best as can be accomplished.[1064]

The Ontario Court of Appeal, however, varied the sentence, despite mental illness, from 18 months to 8 years in custody.[1065]

[1060] *Ibid.*, at paras. 2-3 (C.A.).
[1061] [1974] O.J. No. 545, 19 C.C.C. (2d) 193 (Ont. C.A.).
[1062] *Ibid.*, at para. 7.
[1063] *Ibid.*, at para. 17.
[1064] *Ibid.*, at para. 18.
[1065] *Ibid.*, at para. 24.