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A Mentally Ill Judge, Involuntary Detention and an Application for Tutelage: Messages for Today from the Notorious Schreber Case

A Review of "Memoirs of My Nervous Illness"
by Daniel Schreber¹

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Schreber's *Memoirs* have been analysed from the time of Freud for many purposes. However, the primary reason for their being written between 1900 and 1902 was to advance the former judge's contention that the Royal Superior Court of Saxony should reverse a first instance decision and release him from "tutelage" in spite of his continuing experience of florid symptoms of psychosis. The Court released him. The reports of the principal expert in the case, Schreber's psychiatrist, constitute an inadequately recognised piece of fine forensic writing. In addition, the Court's judgment is worthy of close analysis as it constitutes a sensitive and informed examination of the ramifications and, sometimes, the limitations in impact of encapsulated delusions. The judgment has important messages a century later for courts and tribunals called upon to evaluate the risk to safety posed by persons with active symptoms of schizophrenia and only a modest degree of insight into the nature of their illness.

Dinnage's new edition of Schreber's *Memoirs* and associated documents offers the opportunity for an important historical perspective upon the treatment of serious mental illness before the era of modern anti-psychotics. It also affords access to a liberal and psychiatrically informed appellate court decision in relation to the need for involuntary detention and appointment

a century ago in Saxony of what we would today call a guardian and administrator. Dinnage's edition incorporates the *Memoirs* themselves, an essay by Schreber on involuntary detention of those with mental illnesses; forensic reports in 1899, 1900 and 1902 by Dr Weber, Schreber's psychiatrist; the patient's closely argued grounds for appeal against the first

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instance decision of the Dresden court which acceded to his involuntary detention; and the 1902 decision of the Royal Superior Court of Saxony sitting at Dresden into Schreber's appeal against his detention.

This article reviews the extraordinary character of Schreber's *Memoirs* but concentrates upon their forensic component and repercussions, leading up to the important decision of the Saxony Court which determined that it was safe both for Schreber and the general community that he be released from involuntary detention and liberated from the fetters of tutelage. The article explores the reasoning process of the court and argues that it has a continuing relevance in cases where patients have encapsulated delusions and limited insight into their illness but do not pose a significant risk of harm to themselves or to other members of the public².

Daniel Paul Schreber

Daniel Paul Schreber was born in 1842, practised as a lawyer and was appointed Chairman of the County Court of Chemnitz, and then later the Chairman of the County Court at Leipzig, and finally the President of the Senate of the Court of Appeal in Dresden. His legal career was glittering.

Schreber's first psychiatric breakdown took place while he was a judge in 1884 but it was of relatively short duration. According to him, it was principally characterised by hypochondriasis and did not contain the "supernatural" components that came later to dominate his delusional thinking. He recovered by 1885 and returned to his judicial office, albeit transferred to Leipzig. However, in 1893 he fell very seriously ill and was admitted, voluntarily at first, for nine years to various institutions, including the Sonnenstein Public Asylum. The *Memoirs* were written during this period and were at the one time an account of what he perceived to be his unique experiences and a plea for release.

After two years of legal disputation, including success at appellate level before the Royal Superior Court of Saxony in respect of an application for tutelage over him, Schreber was released to his house and spent a period of apparently peaceful time with his wife and adopted daughter. However, after his wife

was incapacitated by a stroke he fell ill again and spent the remainder of his life in an asylum, dying in 1911. His earnest wish was to be freed from confinement and to be surrounded by his relatives.

The illness of Schreber needs to be seen viewed within familial, environmental, pathological and temporal contexts. The Schreber family was something of a German institution, Daniel's father being the pre-eminent nineteenth century German medical authority on child-rearing³. The nature of the young Schreber's upbringing and the quirks of his psychiatric illness have prompted argument that Schreber's was a case where the causes of the patient's illness were at least in part environmental rather than organic. The circumstances of Schreber's illness, writings about his delusions and appeals against his involuntary detention remain controversial and are of considerable historical significance. They have been fuelled by the fact that Schreber succeeded in having published an extensive record of his disordered beliefs and perceptions in the form of his *Memoirs*, thereby allowing a range of psychiatrists and psychologists to analyse his state of mind without ever having met him. Freud is the most prominent example, in 1911 publishing about the Schreber case his *Psycho-analytic Notes on an Autobiographical Account of a Paranoia (Dementia Paranoide)*⁴.

Little, of course, could be done to address Schreber's symptomatology, in the absence of antipsychotic medications. One of the most interesting aspects of the illness in fact is that Schreber apparently had periods of relative remission between 1885 and 1893 and then between 1902 and 1907. However, he was unable to return to his judicial duties after release from the Sonnenstein asylum in 1902 and we are largely dependent upon his own accounts of his freedom from symptoms during the period after his first discharge. What can be said with some confidence is that stress in the form of his candidacy for the Reichstag in 1883, the burdens of office after appointment to the Appeal Court in 1893 and the death of his mother and the illness of his wife in 1907 all coincided with periods of psychotic illness.

All manner of interpretations have been advanced for the nature of Schreber's psychiatric condition, as many in fact as there were different schools of thought in twentieth century psychiatry.

Many have focussed upon the harshness and rigour of Schreber's upbringing. Dinnage, interestingly, comments that the *Memoirs* are an account of what it is to be forsaken by everything familiar and real, and of the delusionary world that gets invented in its place:

The complicated, mythic universe that Schreber in his captivity created — an affair of rays and miracles, upper and lower gods, souls and soul murder, voices of nerve language, struggling against the 'Order of the World' — concerned itself with issues of realness and unreality, identity and fusion, power and passivity. His own identity having been invaded, fragmented and distorted, and annihilated, a story had to be found that had more sense of it. The more massive the violations, the more grandiose the explanations. (p. xviii)

Freud's interpretation of Schreber's case was that the patient's fantasy of being turned into a woman (one of his psychotic symptoms) indicated repressed homosexual love for his father in the shape of the asylum director, Dr Flechsig of Leipsig.

The Memoirs

Daniel Schreber's *Memoirs* may well be the most written-about document in psychiatric literature. Even in 2001 Melbourne writer, Gosden, analysed Schreber's case in arguing the case for psychiatrists continuing to misunderstand schizophrenia⁵. As already noted, the *Memoirs* were the subject in 1911 of a celebrated paper by Freud⁶, who never met Schreber. They were also written about by luminaries such as Jung⁷, Canetti⁸ and Deleuze⁹. The life and circumstances of Schreber continued to excite psychological, sociological and psychiatric interest throughout the twentieth century. Niederland¹⁰ and Lothane¹¹, for instance, chronicled almost every detail of Schreber's life. Sass used Schreber's case to attempt to understand schizophrenia from within¹². Santner¹³ purported to locate within Schreber's delusions the start of the modern world and the seeds of the Nazi regime. Little has been written, by contrast, about the forensic processes that formed the rationale for and the first forum for analysis of *the Memoirs*. This short note attempts to commence that process.

The *Memoirs* were written, according to Schreber, in the context of his application for release from the Sonnenstein Asylum: "It is therefore necessary to give those persons who will then constitute the circle of my acquaintances, an approximate idea at least of my religious conceptions, so that they may have some understanding of the necessity which forces me to various oddities of behaviour, even if they do not fully understand these oddities." (p. 15)

The *Memoirs* concentrate upon Schreber's supernatural experiences — "how, owing to my illness, I entered into peculiar relations with God" (p. 17). They also detail Schreber's perception that he had acquired female genitalia and that within his body there was a quickening of human life. Some of the writing is significantly thought disordered, all of it pervaded by bizarre cosmogonies, hallucinations, and obsessive religious themes. Some of the more accessible and touching accounts relate to the author's accounts of the onsets of his "nervous illnesses", first in the 1880s and then again in the 1890s. At times, Schreber displays considerable insight into his "hypochondriacal ideas" and preoccupations but the consistent thread throughout is a set of bizarre delusions with a grandiose religious flavour. He never abandons his perception that the supernatural interaction which he enjoyed with the godhead was real.

In chapter 4, Schreber describes his early appointment as *Senatspräsident* to the Superior Court, the stresses of the new job, and the commencement of his experience of hallucinations. He recounts returning in 1893 for help to the man who, he believed, had previously cured him — the psychiatrist, Professor Flechsig. He was prescribed morphine, chloral hydrate, camphor, none of them to much effect. Schreber's descriptions of overpowering depression and a suicide attempt in a "cell fitted out for demented" are very moving.

Schreber describes at length and without any apparent censorship his experience of multiple voices, his obsessions with bizarre sexual, religious and morbid themes and many different delusions and hallucinations¹⁴. The voices that he heard were incessant, often babbling meaningless phrases, at other times being derogatory and very distressing. He is eloquent about his torment

[F]or almost seven years — except during sleep — I have never had a single moment in which I did not hear voices. They accompany me to every place and at all times; they continue to sound even when I am in conversation with other people, they persist undeterred even when I concentrate on other things, for instance read a book or a newspaper, play the piano, etc; only when I am talking aloud to other people or to myself are they of course drowned by the stronger sound and therefore inaudible to me. (p. 271).

His perceptions of centrality in a religious revolution were overwhelming and wildly grandiose, as well as disordered.

Schreber continued to read during his confinement, including the works of the psychiatrist, Kraepelin, with which he expressed disagreement in respect of matters such as hallucinations. The vivid descriptions of his own hallucinations and delusions are remarkably graphic accounts of the sensations and perceptions which he experienced over the lengthy period of his second confinement.

Tutelage under Saxony Law

Schreber was placed under tutelage as an insane person at the instance of the prosecuting authority by an order of the District Court of Dresden in 1900. It was against this order that Schreber appealed to the Royal Superior Country Court of Saxony, sitting at Dresden.

Under the Civil Code of Saxony people could be placed under tutelage if by reason of mental illness, they were incapable of managing their affairs. Tutelage allowed decision-making in respect of personal and financial affairs by a "tutor". It enabled the tutor to consent to the involuntary detention of the person within an asylum for the insane. From the perspective of Anglo-Australian law, the concept of tutelage at the turn of the century in Saxony combined the notions of guardianship and administration and allowed for civil commitment. The burden for proof of need for tutelage lay upon the party contending for it.

Schreber's Treatise on Tutelage

Schreber's essay, *In What Circumstances Can a Person Considered Insane be Detained in an Asylum against his Declared Will* was penned

in 1900. It afforded him an opportunity to marshal his energies toward legal argument, a task which he undertook with precision and rationality. The essay is framed in general terms, not addressing the author's personal circumstances. It can only be classified as a lucid, thoughtful piece of legal analysis.

Schreber accepted that "the accommodation and maintenance of insane persons in institutions established for that purpose is part of the State's task of general care for the well-being and safety of its subjects." (p. 316) He advanced the need for a distinction to be drawn, though, between insane persons whose detention is in the public interest and insane persons whose detention is not in the public interest. To the first class he assigned all those insane persons "who through their illness could become dangerous to themselves or others, particularly cases of raving madness or melancholia, the latter particularly through the possibility of suicide." (p. 317). To the second category he assigned other cases of mental illness — "of a severe or lighter character, showing perhaps only a few delusions of whom it cannot be said that being at liberty would be dangerous either to themselves or others" (pp. 317–318). He classified such mental illnesses as cases of "harmless insanity" and contended that there is no public interest in their being involuntarily detained. No doubt he classified himself as falling into the latter category.

The Medico-Legal Reports of Dr Weber

The medical reports authored by Dr Weber, Superintendent of the Sonnenstein Asylum, constitute fascinating historical records in relation to the way in which Schreber's illness was viewed at the end of the nineteenth century and the commencement of the twentieth century. They are graphic, well constructed and considered expert reports, concentrating on close recording of the symptoms and behaviours of Schreber. They also exhibit an evolution in attitude toward the patient, said to be consistent with his improving mental state. As examples of turn of the century, detailed forensic reports, they have few peers in terms of their thoroughness, their quality and their humanity.

In the 1899 report, Weber commented that he had observed in his patient a progression from an acute psychosis to an hallucinatory insanity in which paranoid symptomatology had become increasingly prominent: "This kind of illness is, as is well known, characterized by the fact that next to a more or less fixed elaborate delusional system there is complete possession of mental faculties and orientation, formal logic is retained, marked affective reactions are missing, neither intelligence nor memory are particularly affected and the conception and judgment of indifferent matters, that is to say matters far removed from the delusional ideas, appear not to be particularly affected, although naturally because of the unity of all psychic events, they are not untouched by them." (pp. 332-333) He described Schreber by 1899 as appearing neither confused nor psychically inhibited, not markedly affected in his intelligence — "he is circumspect, his memory excellent, he commands a great deal of knowledge, not only in matters of law but in many other fields, and is able to reproduce it in an orderly manner ..." (p. 333). Schreber's 1900 essay on involuntary detention is an example of this phenomenon. However, Weber described Schreber as of 1899 as still being absorbed by pathological ideas woven into a largely fixed system not amenable to correction by objective evidence:

If, however, what has been said gives the impression, far removed from medical opinion, that the patient is prevented by mental illness from understanding all events objectively and correctly, from judging them by circumstances as they really are, and from taking his decisions after unimpaired sensible consideration and with free will, then clearly in this case the existing hallucinations, the delusions connected with them and built up into a system, and the irresistible impulses which rule the patient, amount to a considerable degree of impairment and continue to do so. (p. 336)

Thus, at this stage Dr Weber's view was that the delusions reached out beyond their direct subject matter and affected Schreber's functioning at a broad level.

In a second report, Dr Weber described concerns that he harboured about the capacity of his patient to reintegrate into the general

community after his lengthy period of institutionalisation. His greater concern though was in relation to Schreber's insightlessness into the pathological nature of his hallucinations and delusions. In support of his views, he relied in part upon the content of Schreber's *Memoirs*.

Schreber's Grounds of Appeal

In his closely argued grounds for appeal against the decision of the first instance court which placed him under tutelage, Schreber drew attention to what he contended to have been the improvements in his condition over the preceding 12 months. He argued that no-one need fear his behaving unreasonably if freedom of decision were restored to him in respect of his personal circumstances and his finances:

I have since then shared hundred of meals at the Director of the Asylum's family table, have gone on smaller and greater excursions on foot, by steamship or railway, to public places of entertainment, to shops, to Church, theatre and concerts, not infrequently without being accompanied by an attendant from the Asylum, and have been in possession of a certain, if limited, amount of money. Nobody will have noticed on these occasions the slightest sign of unreasonable action on my part. It never occurred to me to molest other people by telling them of my delusions or hallucinations (p. 369).

He did concede, though, that he had been seen standing before a mirror for significant periods of time with the upper half of his body exposed and bedecking himself with "female adornments". He argued that his involuntary bellowing had significantly diminished and that he could safely be released from the strictures of tutelage without risk to himself or others.

Dr Weber's Report to the Appellate Court

Dr Weber's 1902 report to the Superior Country Court of Saxony at Dresden also contains many interesting elements which will resonate with mental health professionals, lawyers and patients at the start of the twenty first century. He bemoaned the difficult role of the psychiatrist who must report about the condition of a patient with whom the psychiatrist has striven to build up a therapeutic rapport: "However objective

the medical expert attempts to be in his statements, he will never be able to make the mentally ill patient share his opinion in the objectivity of his findings, unless the patient himself were able to judge his condition correctly, whereby he would in fact show that he was not ill." (p. 389)

Weber addressed Schreber's contention that he had conducted himself impeccably and with diminishing supervision in public over the preceding year. He accepted that in Schreber's behaviour on all occasions in public there had been nothing unreasonable or unfitting: "He always discussed frankly and openly his plans, if they were outside his routine, always made certain that the authorities were in agreement before he carried them out, and having obtained permission went ahead after careful planning and consideration of all circumstances, and always returned home from his excursions at the right time." (p. 399) In short, therefore, he had been tested within the general community¹⁵

However, he pointed out that Schreber's reports of how he fared outside the confines of the asylum could not be completely accepted "although he would never knowingly tell an untruth, but it has often been noticed that he understandably lacks objective judgment of the repercussions and effects of his behavior." (p. 399). He instanced Schreber's nightly noisy outbursts which had prompted many complaints, as well as Schreber's conduct during his daily meals "which any layman would consider pathological: not only the grimacing, screwing up of his eyes, clearing of his throat, the extraordinary position of his head, etc. but still more his occasional almost total distraction and absent-mindedness, so that he does not notice what is going on around him." (p. 400)

Weber conceded that Schreber had not squandered any of the monies permitted to him on his outings, nor been unduly parsimonious with them. He agreed too that Schreber had been attentive to his personal hygiene, had been moderate in his consumption of alcohol and had made concerted efforts to maintain his fitness and mobility by means of regular physical exercise. However, he drew the court's attention to the fact that Schreber's drawn appearance was testimony to the frequent, marked sleep disturbances, for which he was given medication, as well as his continuing restlessness and agitation during the day. He instanced Schreber's irrational

behaviour in consequence of having experienced diarrhoea and his proclamation that the ailment was a "divine miracle".

Weber also argued that Schreber's oft-expressed determination to publish his *Memoirs* was "pathologically determined and lacking sensible consideration." (p. 402) Ultimately, he expressed the view that in spite of Schreber's assurances that he did not let his delusions influence his behaviour, two points needed to be made:

Firstly, it is doubtful whether mere apprehension for the future, the possibility of endangering himself severely, is sufficient grounds to the assumption that he is incapable of looking after his affairs. Secondly, the danger for the future is now not great, because the sphere of the appellant's delusional ideas has gradually become more sharply demarcated from the rest of his ideas, and has for some time led a relatively separate existence. (p. 404)

Dr Weber accepted that Schreber's judgment and treatment of a number of his important life interests were not significantly influenced by his delusional ideas and had been carried out faultlessly. In short, therefore, Schreber's delusions had grown increasingly (though not wholly) encapsulated. Dr Weber opined that there was no reason to expect any significant deterioration in Schreber's mental state in the foreseeable future. That led him to conclude the last of his three reports by accepting that "Apprehension for the future, therefore, need not weight as heavily to-day as previously in judging the over-all situation." (p. 404)

The Decision of the Royal Superior Country Court at Dresden

The last component in Dinnage's fascinating collection is the judgment of the Royal Superior Country Court of Saxony sitting at Dresden on appeal from the District Court of Saxony. In a lengthy judgment, incorporating a high level of cross-disciplinary analysis on the need of a psychiatrically ill patient for protection, the appellate court allowed Schreber's appeal and overturned the order for tutelage made by the court below.

The Superior Court found that for Schreber to be placed under tutelage it had to be proved

that by reason of mental illness he was incapable of managing his affairs. It declined to separate out financial affairs from affairs personal to other circumstances of a patient, such as residence at an asylum. It was significantly influenced by the fact that Dr Weber in his 1902 report had not expressed a definite opinion to the effect that Schreber was in need of ongoing inpatient treatment for his illness.

The Court declined to take into account to any major degree the risk that removal of the tutelage order would have upon Schreber's relationship with his wife. It found that the matrimonial bond between Schreber and his wife had been close to non-existent for a considerable time. Evaluating the nature of tutelage and the circumstances in which so important an encroachment upon civil liberties should be made, it stressed that a "person can be placed under tutelage only in his own interests, in order to safeguard him from the threatening dangers of his own unreasonable actions, but never to protect other persons, however closely related, from unpleasantness." (p. 414). Thus, the Court drew a distinction between the posing of significant risk, such as of physical harm, and the causing of annoyance, irritation and even unpleasantness¹⁶.

In addressing the significance of Schreber's determination to publish his *Memoirs*, an issue that troubled Dr Weber, who had expressed concerns about the broader ramifications for the patient and his family by the publicising of Schreber's delusions, the Court noted that the worst consequence that could follow from publication would be that readers might consider him to be "mentally deranged." (p. 416) It noted that the document was not written for "flappers or High School girls" — although the *Memoirs* used strong language at times and made criticisms of the superintendent of the Asylum, that did not mean that adverse inferences should be drawn from his wish to publish the *Memoirs*. It observed that the *Memoirs* were "the product of a morbid imagination and nobody reading it would for a moment lose the feeling that its author is mentally deranged. But this could not possibly lower the patient in the respect of his fellow men, particularly as no one can miss the seriousness of purpose and striving after truth which fill every chapter" (pp. 438–439).

The Court found that Schreber had "no real insight into his illness and that he will not listen to advice." It had no doubt that Schreber was insane and that he lacked insight into the pathological nature of the inspirations and ideas that absorbed him: "What to objective observation is hallucination and delusion is for him irrefutable certainty." (p. 422). It accepted that it was not a sufficient ground for placing him under tutelage that his mental processes were pathologically disturbed¹⁷. It found that what was also necessary for imposition of tutelage was that his illness be so severe that it prevented him from managing all affairs like a child under the age of seven. This required a high level of impairment:

If the patient is not completely deprived of the capacity of acting sensibly and reasonably, but is only restricted through mental illness in appreciating special matters of a certain range of his affairs, this can in certain circumstances cause him to be made a ward of the Court ... but never to be placed under tutelage. (p. 423)

It held that tutelage was a protective measure designed to assist a person who by reason of lack of insight was incapable of protecting him or herself, from being taken advantage of and against exploitation by others: "The State's duty to the patient extends as far as the patient's need of protection." (p. 423)

However, it declined to make a tutelage order where to do so would serve little purpose. It held that the precautionary measure of tutelage offered by the law to the patient "must in fact be adequate and effective. Placing under tutelage is only permissible if such dangers to the person concerned are present which can be successfully countered by adjudication of his legal capacity and by appointing a guardian for the care of his pecuniary affairs." (p. 423)

The Court paid particular attention to the potential for encapsulated aspects of mental illness to pose a risk to a patient or to others. This is one of the aspects of the decision which should resonate for many courts and tribunals internationally to this day. It held that the fact that a person suffers from paranoia is not of itself sufficient proof that the person is incapable of weighing reasonably the consequences of his or her actions:

There are numerous paranoiacs who, despite severe mental derangement and although their

thinking sometimes moves in the confines of the most absurd delusional ideas are hardly recognized as sick by their environment, carry on their daily business correctly and in general fulfill the duties of their profession adequately. One might consider them whimsical and think that they have fixed ideas, but as a rule one does not think of placing them under tutelage. (pp. 424-425)

Taking account of the work of Krafft-Ebing and of the terms of the Civil Code, it commented that progress had been made precisely in the fact that it had become possible to leave such "more or less harmless persons" in possession of their legal capacity of free disposition necessary to their progress in life, despite their illness — "Even though such persons are influenced by compulsive ideas which make them appear irresponsible in those fields of mental life directly affected they have not altogether lost the faculty of acting reasonably. In those fields of mental activity removed from their delusional ideas or less exposed to them, they are mostly capable of carrying out their professional duties in a manner which gives rise to no objection." (p. 425)

The Court found that Schreber's way of looking at the world had been "falsified" by the idea ruling him about his extraordinary relationship to God, but found that only one, single, field of his mental life was affected — the field of religion. In doing so, it appeared to accept Dr Weber's view that the impact and perhaps the intensity of Schreber's experience of delusions had diminished. It held that it would be unreasonable to deprive Schreber of his legal capacity on the mere suspicion that his delusional ideas might lead him to unreasonable action. It noted that the burden of proof for placing a person under tutelage lies with the party asserting its necessity. It found that if a person was to be placed under tutelage on the basis of being unable to manage their affairs of life, it could only be done on the basis of their experience, the patient having been exposed to such affairs and being found wanting¹⁸. It placed particular emphasis on the evidence from Dr Weber that Schreber had managed well in his dealings outside the confines of the Asylum during the preceding year. It was also impressed by his intellectual powers and clarity of thinking, finding that they

had in no way suffered by his illness. The way he personally took up the fight against the tutelage under which he was placed and how he carried it through according to plan, the acuity of the logical and juristical operation developed by him, the reasonableness with which he conducted himself, and last but not least the refined measured attitude he showed when in opposition to the medical expert and the Prosecutor — all this affords indisputable proof that in this field plaintiff has no need of protection by a guardian; rather in conducting his case he was able to preserve his interests to the full and independently, better indeed than anybody else could have done it in his place. (p. 429)

The Court found that Schreber's behaviour during his contact with the world outside the asylum gave no well-founded grounds for anxiety that he would allow himself to be led astray under the compulsion of his delusional system or impair his legal interests through wrong actions if freedom were restored to him — "Practical experience has shown that the plaintiff's insane belief in miracles although forming the basis of his mental life does not so dominate him so exclusively that he is deprived of the capacity of quiet and sensible consideration of other affairs of life" (p. 432). It noted that Schreber still suffered from bellowing attacks but found that by reason of them no immediate danger would arise for him.

The Court noted that Dr Weber by implication agreed to Schreber's discharge from the asylum, subject to certain precautions, not finding him to pose a risk to himself or others. It held that there was no need to fear that he might endanger his monetary affairs through wrong and unreasonable actions — at least that there was a real prospect of his acting seriously imprudently with his finances.

The Court concluded therefore that Schreber was capable of dealing with the demands of life in spite of his paranoid illness and his continuing experience of delusions and hallucinations. Thus, it rescinded the order that he be subject to tutelage.

Ramifications of the Decision

Many aspects of the judgment of the Royal Superior Country Court of Saxony are modern, psychiatrically insightful and liberal. What it was

that generated the liberalism is not altogether clear, in particular, whether a degree of sympathy for a former fellow member of the judiciary influenced its reasoning.

Were Schreber to have come to the attention of the mental health authorities in the modern era, a diagnosis of paranoid schizophrenia might well have been made readily enough. If he was cooperative with the new oral anti-psychotics, his symptoms may well have dissipated considerably and involuntary detention may never have been necessary. However, if he were hospitalised for a time, the focus in terms of determining the legitimacy of coerced treatment would most likely have been upon his preparedness to comply with medication and thereby to render relatively unlikely the recurrence of extreme symptomatology. However, a mental health review board or other reviewing body would also be required to determine whether at the relevant time a Schreber appeared to be mentally ill — whether he had exhibited reasonably recent symptoms which significantly disrupted phenomena such as his mood, thinking or perceptions. Similarly, the question would overtly arise of whether he needed to be coerced into treatment in a hospital or in the community by reference to the risk that he posed to his own health or the safety of members of the community. These forms of consideration would be contrasted with his exhibition of eccentricities, the potential for him to embarrass or alienate his spouse or create a minor disturbance in public. Considerations related to reducing the incidence and severity of relapse often loom large in such evaluations, overtly or covertly.

The issue would also fall for consideration of whether a Schreber would consent or be able to consent to treatment. This issue differentiates the situation somewhat from that which obtained a century earlier because of the efficacy attaching for most (but not all) patients to many of the available pharmacological interventions. However, the circumstances in which autonomy should be overridden to achieve clinically desirable outcomes remain as significant an issue in 2001 as it did in 1902. There are many situations in which it may be adjudged undesirable on balance for marginally efficacious treatment to be compelled at a cost to a Schreber's independence of decision-making. It may be better to allow the patient to drift away from treatment

and become unwell again than to force them into treatment which they passionately repudiate. In short therefore most of the issues generating the decision of the Superior Court of Saxony are regularly revisited with variations upon the 1902 judgment by review bodies of both a tribunal and curial character.

Particularly interesting in the Superior Court's judgment from the modern perspective is its clear adoption of the principle that is now called "the least restrictive option". The Court was emphatic not just that the onus lay upon the party contending that a tutelage order was necessary to prove its case, but that proof had to be founded in evidence of demonstrable incapacity to manage affairs.

The Court accepted that mental illnesses may involve encapsulated delusions and hallucinations which did not necessarily contaminate all aspects of a mentally ill person's life. In Dr Schreber it was faced with an extraordinary example of such a phenomenon. The patient was highly intelligent and capable of mustering his focus to mount, entirely socially and legally appropriately, sophisticated arguments about complex concepts. Yet he was clearly still seriously ill, being afflicted by bizarre delusions. The question that it focussed upon was whether his illness in practice meant that he was a danger to himself in a broad sense or to others. It found that he was not, accepting that while his illness might irritate others, his *Memoirs* might offend and startle some, and his conduct might be odd and socially problematic, still he posed no significant risk to himself or anyone else. The decision was robust and insightful. Most particularly, it was characterised by considerable tolerance and humanity, preferring to extend autonomy to a man highly desirous of it and who, although still delusional and hallucinatory, was not an imminent threat to his interests or those of others.

Notably, the judgment is quite clear about the fact that in its words Schreber continued to be "insane". Moreover, it remarked that the patient had minimal insight into his illness, still fervently adhering to his deviant cosmologies and religious fantasies. However, the focus of the Court remained unwaveringly upon the risk that up-to-date evidence established Schreber posed to himself and others. It found that he posed no significant risk and reversed the decision

at first instance to place him under tutelage. The consequence of its decision was that Schreber went free from involuntary detention in the Sonnenstein Asylum.

The mechanism by which the Court found reassurance was by reference to the step-by-step approach of reintegration permitted Schreber successfully by the Asylum. In short, he had been tested in a way identified as important by Gillard J in *In the Matter of RDM*⁹ in 1998 in Victoria — by reference to practical opportunities in which he had coped with the demands of life in the community that he was likely to encounter upon release. The Court declined to speculate about Schreber's future, albeit being aware that he had already suffered a serious recurrence of his illness, preferring to have recourse to the evidence before it of his coping adequately when allowed on temporary leave within the community, and bearing in mind the importance of Schreber's rights and liberties²⁰. It started avowedly from the proposition that the burden of proof rested squarely upon the party that proposed interference with such entitlements. It found that burden not to have been discharged.

The Court too was steadfast in differentiating between imprudent decisions liable to be made by the patient upon release and ones that would imperil him in a serious way. It distinguished between his being an annoyance by reason of his eccentricities²¹, mannerisms and even his bellowing, and his being a risk to himself and others. It did not account the difficulty that he might cause to his matrimonial relationship by reason of being freed from the Sonnenstein Asylum as a telling factor in its balancing exercise. Nor did it weigh heavily the notoriety that was liable to attach to the publication of Schreber's *Memoirs*, a document that would graphically portray the nature and extent of his illness. Interestingly, therefore, the judgment is almost wholly without the paternalism that characterised comparable English, United States and Australian decisions of the comparable period.

The absence of insight on the part of Schreber into his illness²², which he persisted in classifying as "nervous", into the delusional nature of his symptoms, and into his need for treatment were not considered determinative by the Court²³. Its focus was upon the risk posed by Schreber to himself and others. Ironically, the absence of effective pharmacological intervention

meant that the Court did not need to canvass the potential for short or medium-term deterioration in the mental condition of the patient, if he no longer received medication which had stabilised his condition. Schreber's improvement in mental health had not been occasioned by medication.

It is for the tolerance and insight of the Royal Superior Country Court of Saxony that the decision in relation to former judge Daniel Schreber deserves best to be remembered. Dinnage's collection of the documentation relating to Schreber's release from the Sonnenstein Asylum is a remarkable case study, as significant today as it was when Schreber walked free after the decision in 1902. If its lucidity, humanity and focus upon risk were emulated by courts and tribunals dealing with involuntary detention of people with mental illnesses, decision-making a century later would have a fine model upon which to build.

Endnotes

- 1 Daniel Schreber, *Memoirs of My Nervous Illness*, New York Review Books, New York, 2000, Introduction by R Dinnage, Trans I Macalpine and RA Hunter, pb 455pp., \$A24.95.
- 2 In many jurisdiction, for instance, in Australia, New Zealand and England, this is a criterion for involuntary detention of persons with mental illnesses.
- 3 See further LA Sass, *The Paradoxes of Delusion: Wittgenstein, Schreber and the Schizophrenic Mind*, Cornell University Press, London, 1994.
- 4 Vol 12 Complete Works, found in J Strachey (ed), *Penguin Freud Library*, vol 9, Penguin, London, 1979.
- 5 R Gosden, *Punishing the Patient*, Scribe Publications, Melbourne, 2001.
- 6 S Freud, "Psycho-analytic Notes on an Autobiographical Account of a Case of Paranoia (Dementia Paranoides)" in *Standard Edition*, vol 12, 1911.
- 7 See eg C Jung, The Problem of Libido in Dementia Praecox" in *The Theory of Psychoanalysis*, reproduced in A Storr (ed), *The Essential Jung*, Fontana, 1983.
- 8 E Canetti, *Crowds and Power*, trans C Stewart, Gollancz, London, 1962.
- 9 G Deleuze and F Guattari, *Anti-Oedipus, Capitalism and Schizophrenia*, trans R Hurley, M Seem and HR Lane, University of Minnesota Press, Minneapolis, 1983.

- 10 WG Niederland, *The Schreber Case: A Psychoanalytic Profile of a Paranoid Personality*, Quadrangle/New York Times Books, New York, 1974.
- 11 Z Lothane, *In Defense of Schreber: Soul Murder and Psychiatry*, Analytic Press, Hillsdale, New Jersey, 1992.
- 12 LA Sass, *The Paradoxes of Delusion: Wittgenstein, Schreber and the Schizophrenic Mind*, Cornell University Press, London, 1994.
- 13 EL Santner, *My Own Private Germany: Daniel Paul Schreber's Secret History of Modernity*, Princeton University Press, Princeton, New Jersey, 1996.
- 14 For a complex cosmology bearing some characteristics in common with that of Schreber, see *Re the Appeal of JS* (1998) 3 MHRBD (Vic) (forthcoming).
- 15 Compare the approach of Gillard J in *In the Matter of RDM* [1998] VSC 73; and of Chernov JA in *In the Matter of RDM* [1999] VSCA 86 at [79].
- 16 Compare *Re the Appeal and Review of NG* (1995) 2 MHRBD (Vic) 276 at 280; *Re the Appeal of RH* (1991) 1 MHRBD (Vic) 363 at 367-368.
- 17 Compare *In the Review of NI* [2000] 3 MHRBD (Vic) (forthcoming).
- 18 See Gillard J in *In the Matter of RDM* [1998] VSC 73; and of Chernov JA in *In the Matter of RDM* [1999] VSCA 86 at [79].
- 19 *In the Matter of RDM* [1998] VSC 73.
- 20 Compare *EO v Mental Health Review Board* [2000] WASC 203; *RW v Mental Health Review Board* [2000] VSC 404.
- 21 See D Weeks and J James, *Eccentrics*, Kodansha International, New York, 1996.
- 22 Compare *Re the Review of NI* [2000] 3 MHRBD (Vic) (forthcoming); *Re the Review of AWY* (1995) 2 MHRBD (Vic) 250 at 254; *Re the Review of RD* (1997) 2 MHRBD (Vic) 425 at 432; *Re the Appeal of EOB* (1995) 2 MHRBD (Vic) 245.
- 23 Compare McDonald J in *Re An Application by DC*, unreported Victorian Supreme Court, 9 December 1998 at pp. 24-25 who held that "... in the circumstances of this case, that which motivates the applicant to be compliant with medical treatment prescribed by (sic) him is that it is necessary for him to do so if he wishes to enjoy the freedom of movement that he presently enjoys. It is in consequence of this that he accepts the prescribed treatment and by accepting the same the treatment has the effect as sought by his treating psychiatrist. This demonstrates that the applicant has in this respect insight. He appreciates that it is necessary to be compliant with treatment to be able to live in the circumstances that he currently enjoy.