

Shifts in the Significant Risk Threshold

John Bradford,^{1,2} Gary Chaimowitz,^{1,2}

¹ McMaster University, Department of Psychiatry and Behavioural Neurosciences, Hamilton, Canada; ² St. Joseph's Healthcare Hamilton, Forensic Psychiatry Program, Hamilton, Canada;

Forensic mental health involves the assessment and treatment of mentally abnormal offenders. The treatment of these offenders, and specifically those that have been found not criminally responsible on account of a mental disorder (NCRMD), requires a balance between the clinical need for recovery and risk management strategies to reduce the chances of relapse into violent recidivism.

Forensic mental health professionals are well acquainted with the legal definition of risk in their jurisdiction, which in Canada is a “significant threat” threshold. A person who has been found NCRMD becomes an NCRMD accused under Section XX.1 of the *Criminal Code of Canada* [1]. The leading Supreme Court of Canada case defining significant threat was *R. v. Winko* 1999 [2].

In *Winko* the legal principles and definition of a significant threat with the following:

- “*Significant threat*” means the accused poses a real risk of serious physical or psychological harm to members of the public.
- The conduct giving rise to the harm must be criminal and must go beyond merely trivial or annoying conduct; and
- There must be evidence supporting the “significant threat,” as there no presumption that the NCRMD accused poses a significant threat to the safety of the public.

This gets parsed out in various subsequent cases as tribunals and courts wrestle with defining of significant risk. At times there are difficulties balancing the clinical presentation of the accused and their need for treatment and recovery with the legal definitions of “significant threat.” This becomes more complex as case law provides variations in the interpretation of the definition.

The Court of Appeal for Ontario in *R. v. Ferguson*, 2010 ONCA 810 reviewed an appeal from a disposition of the Ontario Review Board dated April 28, 2010 [3]. The facts in *Ferguson* were that he had a 10-year history of psychiatric illness, which was aggravated by substance abuse. When he was psychotic, he demonstrated bizarre behaviour that was criminal on occasion and disturbed his family and those around him. However, “with the possible exception of one event involving his father, he has never engaged in any physically assaulted behaviour.”

In the decision written Justice Doherty refers to in the Introduction,

The facts of this case raise a difficult problem familiar to those who must make disposition orders in respect of persons found not criminally responsible (N.C.R.) on account of mental disorder. The appellant is mentally ill. That illness is exacerbated by the appellant's consumption of marijuana and, to a lesser degree, his use of alcohol. The appellant's symptoms can be controlled by medication, but when left to his own devices, especially under the influence

of drugs, the appellant does not take his medication.... It is almost inevitable that if the appellant is left on his own in the community, he will abuse the consumption of marijuana and stopped taking his medication. These two events combined will lead to a significant deterioration in the appellant's mental state within a relatively short period. With that deterioration will come conduct that is anti-social and probably criminal.

While it is almost certain that the appellant will engage anti-social and criminal conduct if left on his own in the community, the crucial question is whether that conduct will pose "a significant threat to the safety of the public." Unless the Review Board could be satisfied that the appellant's conduct would pose that threat, the Review Board was obliged to absolutely discharge the appellant regardless of the negative effect that order might have on both the appellant's ability to function in society and health care professionals' ability to treat the appellant.

Other recent examples of case law are Wall (Re), 2017 ONCA 713 [4]. In Wall, the NCRMD accused had an extensive criminal record, which included convictions for robbery, assault and assault with a weapon. However, his index offence leading to the NCRMD resulted from threatening police communications staff during 911 calls he made while seeking treatment. Clinically it was noted that he had developed good insight into his mental disorder and was in the community in some capacity since 2013. In the community he did have difficulties with substance abuse that required repeated readmissions. He had had two admissions to the hospital about a year before his annual Ontario Review Board hearing.

At the hearing, the attending psychiatrist described Mr. Wall as "extremely dangerous" related to him being hypomanic, most likely related to a substance use disorder. Although the tribunal did not accept the evidence that Mr. Wall was extremely dangerous and noted

that he had not been violent for at least three years before his annual hearing, the Review Board felt that his abuse of cannabis was sufficient to support a finding of "significant threat." The Court of Appeal of Ontario disagreed and ordered an absolute discharge. In the reasons, the court said "The risk that he will abuse marijuana and commit additional offences if he is given an absolute discharge is substantial. But he cannot be detained indefinitely on this account."

Another case from the Ontario Court of Appeal was the matter of Collins (Re) 2018 ONCA 563 [5]. Mr. Collins had a long history of major psychiatric illness. In 2005, at the age of 22 years, he committed a nonviolent offence while he was psychotic. He was found NCRMD and remained under the Ontario Review Board. On October 3, 2017, he appealed the disposition of the Ontario Review Board, which followed a combined restriction of liberty hearing and his annual review hearing. The Board concluded that he continued to constitute a "significant threat" to the safety of the public and ordered that he be transferred from the Centre for Addiction and Mental Health to St Joseph's Healthcare Forensic program into a general forensic unit. The appellant raised two main issues:

1. The conclusion that he remains a "significant threat" to the safety of the public was unreasonable.
2. The Board had in failing to consider granting him a conditional discharge.

Justices Doherty, Gloria Epstein and S.E. Pepall allowed the appeal in the decision written by J.A. Epstein. The matter was referred to the Board for a new hearing under Section 672.78 of the *Criminal Code* [1]. The justices concluded that the decision that the appellant continued to pose a significant threat to public safety was reasonable; however, the Board erred in failing to consider whether a conditional discharge was the least onerous and least restrictive disposition available.

Mr. Collins's index offence occurred in May 2005 when he was observed thrusting a knife

into the front door of a neighbour's home. The index offences for which he was found NCRMD were mischief over \$5,000 and possession of a weapon for a dangerous purpose. Following this finding, he had almost continuously been detained in the Centre for Addiction and Mental Health. Before the filing of NCRMD, he had been diagnosed with a psychosis not otherwise specified, cannabis use disorder, anxiety disorder-unspecified, antisocial personality disorder and cluster C personality traits. His criminal record predating the index offence in 2005 and involved convictions for assault and assault with a weapon.

While he was under the Ontario Review Board, he continued to use cannabis, including bringing cannabis into the facility, and had regularly tested positive for cannabis and synthetic cannabinoid products. He had gone AWOL on two occasions. In 2010 while in the community, he assaulted his father, and in 2012 he assaulted a security guard. In 2014 and 2015 there were episodes of aggression that destroyed furniture and threats to staff and other patients. In 2015 he pushed another patient's head against the wall and kicked the nursing station. He threatened to hurt staff. In August of the same year, he was in a physical fight with another patient. In June of the same year, he punched himself in the face. For more than two years before the hearing under appeal, there were no incidents of violence.

The attending physician and forensic psychiatrist, Dr. Rootenberg, testified that Mr. Collins was a "significant threat" to public safety based on his "long history of violence," lack of insight and poor impulse control. Dr. Rootenberg identified Mr. Collins's use of cannabis and synthetic cannabinoid products as a "major risk management concern." Dr. Rootenberg also gave an opinion that Mr. Collins had tested positive for synthetic cannabinoid agents, which were more unpredictable than natural cannabis products and increased the likelihood of becoming violent. The hospital report also based its risk assessment on the *Violence Risk Appraisal Guide* that categorized him as having a "high risk of violent recidivism." The HCR 20 also identified him as

being a "low, moderate risk of violent reoffending" with his current supervision, and that would "greatly increase if you were to receive an absolute discharge."

The Board unanimously concluded that Mr. Collins was a "significant threat" to the safety of the public based on information that he would drop out of treatment and stop taking his medication if he received an absolute discharge. They noted his long history of substance abuse and that cannabis abuse "impacts his mental health negatively and has triggered psychosis which on occasion has led to violence."

However, when considering the "significant threat" to the safety of the public, the Court of Appeal for Ontario quoted from *Winko v. British Columbia* (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625 at para 62 [2]. The court also referred to Doherty J.A., who explained in *R. v. Ferguson* 2010 ONCA 810, 271, OAC, 1 of 4, at para, 8, [3]

[a] very small risk of even grave harm will not suffice. A high risk of relatively trivial harm will also not meet the substantial harm standard. While the conduct must be criminal in nature, not all criminal conduct will suffice to establish a substantial risk. There must be a risk that the NCR accused will commit a "serious criminal offence."

From a scientific standpoint, multiple studies dating back to the Epidemiological Catchment Area survey [6] indicate that substance abuse in its own right as well as being combined with a mental disorder significantly increases the risk of violence in psychiatric patients when compared to the general population. In the case of marijuana abuse, the risk of physical violence was nine times higher than the general population. This was at the same level as linked to the alcohol abuse. Therefore, the literal interpretation would be that risk of violence at the level of a physical assault was nine times higher for a person suffering cannabis abuse than a person in the general population. This does not take into account the cumulative risk

of a combination of a major mental disorder and cannabis abuse where the accumulated risk would be 15 times higher than a person in the general population.

Considering the growing number of cases addressing significant risk, we wonder whether in the case of Wall (Re), 2017 ONCA 713 [4], were the Justices of the Ontario Court of Appeal considering and balancing the “risk appetite” of the population of Ontario given the risk that Mr. Wall presented; or was this an “evidence-based legal decision.” Alternatively, were the justices simply balancing their experience with the criminal justice system and the Charter practices for releasing people on bail and out of custody? We suggest that the risk of violence and re-offence is not a singular formula in the eyes of the court, but affected both as the science evolves and society changes.

Conflict of interest: none

References

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Corresponding Author

John Bradford, Forensic Psychiatry Program, St. Joseph's Healthcare Hamilton, ON L9C 0E3, Canada - email: jbradford@stjosham.on.ca.