COURT OF APPEAL FOR ONTARIO

CITATION: Pellett (Re), 2017 ONCA 753
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Laskin, Pepall and Trotter JJ.A

IN THE MATTER OF: Rosemary Pellett

AN APPEAL UNDER PART XX.1 OF THE *CODE*

Ken J. Berger, for the appellant Rosemary Pellet

Erica Whitford, for the respondent Attorney General of Ontario

Gavin S. MacKenzie, for the respondent Centre for Addition and Mental Health

Heard: September 15, 2017

On appeal from the disposition of the Ontario Review Board dated December 12 and December 29, 2016.

REASONS FOR DECISION

(1) Introduction

[1] The appellant, Rosemary Pellet, appeals from the November 28, 2016 disposition of the Ontario Review Board ("the Board"), ordering that she remain subject to a conditional discharge, albeit with more relaxed conditions.

[2] The appellant argues that the Board erred in finding that she remains a significant threat to the safety of the public, and claims she is entitled to an absolute discharge. We agree. The Board's decision that the appellant continues to pose a significant threat to the safety of the public is unreasonable.

(2) Background

[3] The appellant is 62 years old. She has two sons – both are in their 30's, and both are supportive of their mother.

[4] The appellant was diagnosed with schizophrenia many years ago, shortly after the birth of her second son. She has a history of hospitalization dating back to 1986. Between 1997 and 2010, she was admitted over a dozen times. The appellant's hospital records show a pattern of hospitalization, treatment, release, de-compensation, relapse, and re-admission. The appellant has often been non-compliant with Community Treatment Orders under the *Mental Health Act*, R.S.O. 1990, c. M.7.

[5] When psychotic, the appellant has engaged in troubling behaviour, but these incidents are quite dated. The incidents include: attempting to divert traffic

on a busy street (August 2000); pushing her car into her landlord's car (March 2001); and throwing objects out of a window, crashing her car and smashing cars with brooms (November 2001).

(3) The Index Offence

[6] On May 23, 2011, the appellant assaulted a five-year-old child. The child was walking along a public sidewalk with her mother. The appellant believed the child was sending her telepathic messages. She pushed the child to the ground and walked away. No physical or psychological pain to the child was reported. The appellant was arrested shortly afterwards.

[7] On October 26, 2011, the appellant was found not criminally responsible for this assault. She was ordered detained at the Centre for Addiction and Mental Health (CAMH).

(4) Previous Board Dispositions

[8] Despite showing poor insight into her illness, the appellant has done well under the Board's jurisdiction. Although initially ordered detained, she soon gained privileges to live in the community under supervision. The Board granted her a conditional discharge in 2015. Since May 15, 2015, the appellant has lived in a house with six other people, subject to only minimal supervision. At her most recent hearing, the one that is the subject of this appeal, the Board continued her conditional discharge, but loosened her conditions. The appellant is currently

required to report to CAMH every four weeks. She has been compliant and reliable in picking up her injectable medication from a pharmacy and bringing it to her family doctor to be administered every two weeks.

(5) Is the Appellant a Significant Threat to the Safety of the Public?

[9] The Board was required to address two interrelated issues: (1) whether the appellant would stop taking her medication if released from the Board's supervisory jurisdiction; and (2) if the appellant stopped taking her medication, whether she would become a significant risk to the safety of the public.

(a) Evidence before the Board

[10] On the first issue, there was a credible evidentiary basis for the Board to conclude that the appellant will become non-compliant with her medication. The appellant has poor insight into her illness; she is wary of her medication. She has been deemed incapable of consenting or refusing to consent to treatment. Until recently, the appellant had a poor track record of compliance. She has explained her recent willingness to take her medication as a means of obtaining an absolute discharge. She had told members of her clinical team, close in time to the hearing, that she would discontinue her medication.

[11] The appellant testified before the Board and acknowledged that she would have to take medication for the rest of her life. However, she qualified her

evidence by saying she would continue to take her medication as long as there were no side effects.

[12] On the issue of whether the appellant is a significant risk to the safety of the public, the Board had the benefit of the comprehensive Hospital Report prepared by the appellant's clinical team. Addressing the question of risk to the safety of the public, the authors of the report write:

> [A]bsent medication monitoring, Ms. Pellett is at high risk for medication noncompliance. An exacerbation of her psychosis will most likely lead to aggressive behaviours.
>
> . . .
>
> [I]t is the opinion of the clinical team that Ms. Pellett continues to represent a significant threat to the safety of the public as defined in section 672.5401.

[13] Dr. R. McMaster, one of the appellant's psychiatrists, testified before the Board. He was asked questions about what would happen if the appellant stopped taking her medication. He gave the following evidence:

> If she were to stop taking her medication, she would likely have remission of her symptoms, exacerbation and this would lead to multiple difficulties. This would lead to psychosis, and flowing from her psychotic symptoms would be aggressive – a change in her behaviour.
>
> While being treated, to her credit, she's been a very pro-social individual. She's a very pleasant individual and she's done very well. We – the team and her children have concerns that if not for [her] medication or [were she] to stop medication, it would lead to very serious

> consequences for her, including readmissions and possibly homelessness.
>
> . . .
>
> So when she has been ill in the past – she has been more aggressive – quite aggressive and – which has led, led to the index offence. And also later in hospital that was aggressive. So that we see a direct link between her major mental illness and aggressive behaviour.
>
> . . .
>
> In the event of an absolute discharge, it is very likely that she would stop medication, [and] become psychotic and then act out aggressively. [Emphasis added.]

[14] Dr. McMaster described the index offence as "serious aggression." He also referred to an incident at CAMH in August of 2012 when the appellant pushed and threatened a nurse who was injecting her with medication.

[15] In follow up questions by a Board member, Dr. McMaster confirmed that the appellant's only criminal charge was the index offence. He was unable to indicate whether this assault resulted in any injury. Indeed, there was a paucity of evidence before the Board about this offence. Dr. McMaster acknowledged that the appellant does not have a history of serious violence, but relied upon some of her dated, erratic behaviour referred to in para. 5, above.

(b) The Board's Decision and Reasons

[16] On November 28, 2016, the Board made its disposition, continuing the appellant's conditional discharge. However, it removed some of the previous

conditions and reduced the reporting requirement from once every two weeks, to once every four weeks.

[17] The Board issued two sets of reasons. In its first set, dated December 12, 2016, the Board indicated, at para. 21:

> This conclusion by the Board is not unanimous. A member of the Board was not able to make the positive finding that Ms. Pellett continues to represent a significant threat. The member chose not to write a formal dissent.

[18] On December 29, 2016, the Board released "Fresh Reasons for Disposition." These reasons contained the following amendment to para. 21:

> One member of the panel thought this case was close to the line, but ultimately agreed with the positive finding that Ms. Pellett continues to represent a significant threat, despite the fact that the offence was isolated and there was little other evidence of violent or threatening behaviour over the years. [Emphasis omitted.]

[19] On the issue of whether the appellant will continue to be medication-compliant, the Board preferred the evidence of Dr. McMaster to that of the appellant.

[20] On the issue of the appellant's risk to others, the Board referred to the index offence and stated the following, at para. 21:

> Although the details of the index offence available to the Board do not disclose any physical or psychological harm, the Board finds that the described behaviour of pushing a young child on the sidewalk close to a roadway meets this threshold of significant risk. Keeping

> in mind that this came at a time when Ms. Pellett was not optimally, if at all, medicated, then her lack of insight into her need for medication and her stated intention prior to the hearing to stop taking medication becomes an important factor. Non-compliance with medication has been a profound difficult for Ms. Pellett over the past 30 years. The Board accepts the evidence of Dr. McMaster that in the event of an absolute discharge and a failure to take anti-psychotic medication, the residual symptoms which Ms. Pellett continues to experience would exacerbate with a return to her paranoia and a real risk of serious injury to members of the public. [Emphasis added.]

(6) Analysis

[21] The scheme under Part XX.1 – Mental Disorder is driven by public safety. When this element is absent, the *Criminal Code* ceases to have a role. In *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, McLachlin J. (as she then was) said the following, at para. 57:

> To engage these provisions of the *Criminal Code*, the threat posed must be more than speculative in nature; it must be supported by evidence. The threat must also be "significant", both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious. A minuscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold. Finally, the conduct or activity creating the harm must be criminal in nature. In short, Part XX.1 can only maintain its authority over an NCR accused where the court or Review Board concludes that the individual poses a significant risk of committing a serious criminal offence. If that finding of significant risk cannot be made, there is no power in Part XX.1 to maintain restraints on the NCR accused's liberty. [Citations omitted.] [Emphasis added.]

[22] The Board's mandate is set out in s. 672.54 of the *Criminal Code*, which identifies the safety of the public as the "paramount consideration." If the individual is "not a significant threat to the safety of the public", the Board *shall* order that the person be discharged absolutely. Parliament recently (2014, c. 6, s. 10) refined the definition of "safety of the public" in s. 672.5401, which provides:

> For the purposes of section 672.54, a significant threat to the safety of the public means a risk of serious physical or psychological harm to members of the public – including any victim of or witness to the offence, or any person under the age of 18 years – resulting from conduct that is criminal in nature but not necessarily violent.

[23] Dangerousness is not presumed in this context; it is the other way around: see *Winko*, para. 46. As Huscroft J.A. said in *Re Carrick*, 2015 ONCA 866, 128 O.R. (3d) 209, at para. 17:

> In short, the "significant threat" standard is an onerous one. An NCR accused is not to be detained on the basis of mere speculation. The Board must be satisfied as to both the existence and gravity of the risk of physical or psychological harm posed by the appellant in order to deny him an absolute discharge. [Emphasis added.]

See also *Re Wall*, 2017 ONCA 713, at para. 26.

[24] The jurisdiction of an appellate court in reviewing decisions of the Board is contained in s. 672.78(1) of the *Criminal Code*, which provides:

> The court of appeal may allow an appeal against a disposition or placement decision and set aside an order made by the court or Review Board, where the court of appeal is of the opinion that
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> (a) it is unreasonable or cannot be supported by the evidence;
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> (b) it is based on a wrong decision on a question of law; or
>
> (c) there was a miscarriage of justice.

[25] In considering whether the decision of the Board is reasonable, deference is required, given the expertise of its members: see *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 29-30; and *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528, at para. 22.

[26] The Board's conclusion that the appellant will likely discontinue her medication was a finding that it was entitled to make on the evidence before it. However, in our view, the evidence does not support the Board's conclusion that the appellant is a significant threat to the safety of the public.

[27] At its highest, all Dr. McMaster could say was that, if the appellant stops taking her medication, it will result in de-compensation, and *could* lead to "aggressive behaviour" or cause the appellant to "act out aggressively." He placed the index offence, as well as the pushing incident with the CAMH nurse, in this category of behaviour. However, he failed to measure these incidents,

along with his conception of “aggressive behaviour”, against the standard of a “risk of serious physical or psychological harm.”

[28] The Board improperly extrapolated from Dr. McMaster’s evidence to conclude that the standard had been met. I repeat part of the statement from the Board’s Reasons, contained in para. 20, above: “Although the details of the index offence available to the Board do not disclose any physical or psychological harm, the Board finds that the described behaviour of pushing a young child on the sidewalk close to a roadway meets this threshold of significant risk.”

[29] The question of what happened to the child does not engage the question of risk; it is a historical fact. The question the Board seemed focused on was whether the index offence involved “serious physical or psychological harm.” This was an issue that arose in submissions. Counsel for the Attorney General (through no fault of her own) was unable to provide information on this issue. There was no evidence before the Board that would allow it to determine whether the index offence caused *serious* physical or psychological harm. It is always a matter of concern when a child is assaulted. However, this does not automatically translate into a finding of serious physical or psychological harm.

[30] Assuming that the index offence met this threshold, the question the Board had to face was whether the appellant posed a significant *risk* of repeating conduct of a similar nature. The Board did not address the fact that the index

offence appears to have been a one-off incident. There is nothing in the appellant's records, either before or after the index offence, which would suggest she is pre-occupied with children, let alone at any real risk of harming them, or anyone else for that matter. It is completely speculative.

[31] The Board speculated when it concluded that the appellant poses a significant threat of serious harm to others. The appellant is now 62 years old. She has no criminal record. The Board's conclusion is based on the index offence and dated incidents during which the appellant engaged in behaviour that resulted in damage to property, and placed her in harm's way.

(7) Conclusion

[32] The appellant has benefitted from her time under the Board's supervision. We acknowledge that imposing an absolute discharge may not be in the appellant's best interests. However, this is not relevant to the determination under s. 672.54 of the *Code*: see *R. v. Ferguson*, 2010 ONCA 810, 271 O.A.C. 104, para. 45; and *Re Wall*, para. 30. There is a risk that the appellant will cease taking her medication, and that her condition will worsen, perhaps quite quickly. However, the appellant is entitled to be discharged unless she constitutes a significant threat to the safety of the public.

[33] The evidence failed to meet the “onerous” standard under s. 672.54. The appeal is allowed. The decision of the Board is set aside. In its place, and pursuant to s. 672.78(3)(a), we order an absolute discharge.

“John Laskin J.A.”
“S.E. Pepall J.A.”
“G.T. Trotter J.A.”