Australian
Health Law
Bulletin

This article was first published in *Australian Health Law Bulletin* Volume 24 No. 4 (HLB 24.4)

WCH v Mental Health Tribunal — a consideration of the treatment criteria for community treatment orders under the Mental Health Act 2014 (Vic)

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Summary

In *WCH v Mental Health Tribunal*,[1] the Victorian Civil and Administrative Tribunal (VCAT) was asked to consider whether a community treatment order of the Mental Health Tribunal should be revoked because the mandatory treatment criteria set out in the Mental Health Act 2014 (Vic) (MH Act) were not satisfied. Relevantly, WCH submitted that the community treatment order had taken away his rights as a citizen and infringed his human rights under the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter of Human Rights). WCH had been diagnosed in 1993 with schizophrenia and treated in the community for the past 16 years on community treatment orders made by the Mental Health Review Board and its successor, the Mental Health Tribunal. Relevantly, WCH did not believe he had schizophrenia. The Tribunal found that evidence before the Tribunal did not demonstrate that WCH had a mental illness as defined in the MH Act[2] and therefore ordered that the community treatment order should be revoked, noting that this was consistent with WCH's rights under the Charter of Human Rights.

Background

WCH had a history of mental illness and was diagnosed with schizophrenia in 1993. Over the years WCH's mental illness had caused him to be hospitalised, however, for the past 16 years his mental illness was effectively managed in the community by way of community treatment orders made by the Mental Health Review Board and its successor, the Mental Health Tribunal under the MH Act. Relevant to this proceeding, on 7 August 2015, the Mental Health Tribunal made a community treatment order lasting for 52 weeks.

WCH did not believe he had schizophrenia and made an application for review by VCAT of the Mental Health Tribunal's decision on 7 August 2015.

Criteria for community treatment orders

For the Mental Health Tribunal to make a mandatory community treatment order, four mandatory criterion (the treatment criteria) must be met. The criterions are set out in s 5 of the MH Act and are as follows:

> (a) the person has mental illness; and
> (b) because the person has mental illness, the person needs immediate treatment to prevent—
> (i) serious deterioration in the person's mental or physical health; or
> (ii) serious harm to the person or to another person; and
> (c) the immediate treatment will be provided to the person if the person is subject to a Temporary Treatment Order or Treatment Order; and
> (d) there is no less restrictive means reasonably available to enable the person to receive the immediate treatment.

"Mental illness" is defined in s 4 of the MH Act to mean a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory. However, a person is not to be considered to have mental illness by reason only of any one or more of the factors set out in s 4(2) of the MH Act, including that the person has previously been treated for mental illness or the person expresses or refuses to express a particular religious opinion or belief.

In this case, WCH's treating team made an application to the Mental Health Tribunal for a community treatment order, and the Mental Health Tribunal made the order, on the basis that the treatment criteria applied to WCH.

VCAT's review

VCAT was required to hear the matter afresh and make a decision as to whether the treatment criteria for making a community treatment order set out in s 5 of the Act applied to WCH at the time of the VCAT hearing.

Specifically, VCAT was required to determine whether WCH had mental illness (s 5(a) of the MH Act) and whether, because WHC had mental illness, he needed immediate treatment to prevent serious deterioration in his mental or physical health or serious harm to him or to another person (s 5(b) of the MH Act).

Counsel for WCH submitted that the test to be applied in determining the elements of the treatment criteria, given that a community treatment order "impinges on a person's liberty",[3] was the standard described in *Briginshaw v Briginshaw*.[4] This standard "requires a tribunal to actually be persuaded that a fact in issue exists".[5] Further, the standard requires a tribunal to:[6]

> … consider the seriousness of the matter at hand and the gravity of the consequences flowing from a particular finding and determine whether the matters in issue have been proven to its reasonable satisfaction.

This submission was accepted by the Tribunal Member.

As a statutory authority, VCAT was also bound by the Charter of Human Rights in conducting the review.[7] VCAT was therefore required to interpret the treatment criteria in s 5 of the MH Act and the MH Act in general in such a way (as far as possible) that it was "consistent with their purpose and in a way that is compatible with human rights".[8]

Evidence

At the hearing, evidence was heard from the medical professionals who were involved in WCH's care by way of oral evidence and reports provided to VCAT. An expert report from Dr Walton (a psychiatrist) was also available to VCAT. In addition, at the VCAT hearing, WCH was legally represented.

WCH's view

To treat WCH's schizophrenia, the community treatment order required WCH to take depot anti-psychotic medication together with mood stablishing medication and other medication to address side effects of these. However, WCH did not believe he was schizophrenic and therefore submitted that the treatment criteria in s 5(a) of the MH Act was not satisfied.

WCH proposed to slowly cease his medication over a period of time and be monitored by his community treating team for a further 12 months. WCH submitted that the current evidence did not "establish that there was a need for immediate treatment in order to prevent such a deterioration",[9] that deterioration being a result of him ceasing his medication.

Treating team

The treating team comprised of Dr A (WCH's treating psychiatrist) and Ms B (WCH's case manager). In giving evidence, the treating team relied on WCH's history as found in his medical records and their individual expert experience. In Dr A's evidence, she said that "the diagnosis of chronic schizophrenia was 'certain'"[10] and noted that "WCH has a 'history of significant bizarre delusions, depression and at times elevated mood'"[11] which supported this diagnosis.

The treating team were also of the view that WCH's mental illness persisted, but there were no signs or symptoms because WCH's mental illness was treated effectively by anti-psychotic medication. The treating team also gave evidence that there was an immediate need for treatment, with that treatment being depot anti-psychotic medication. This was what they submitted because without the treatment, there would be a serious deterioration in WCH's mental health. In supporting these submissions, Dr A referred to events in the 1990s.

Dr Walton (independent expert)

Dr Walton stated that in his opinion, the diagnosis of schizophrenia in 1993 was valid. However, when Dr Walton examined WCH in 2015, Dr Walton found no symptoms of schizophrenia and relevantly found "no evidence of a significant disturbance of thought, memory, mood or perception".[12]

When questioned about how one would know whether WCH was symptom free, given that he was currently treated with medication, Dr Walton noted that "there is a concept that the diagnosis would continue to apply thereafter even in the absence of obvious significant further symptoms"[13] given that "symptoms may not occur because of the effectiveness of treatment or because there is no need for any treatment".[14] However, Dr Walton expressed the opinion that it was "unusual for there to have been no symptoms or episodes of illness for such a lengthy period"[15] and noted the "possibility that the previous illness has resolved or subsided".[16]

In considering whether the treatment criterion in s 5(b) of the MH Act was satisfied, Dr Walton opined that there was a risk that WCH's health could deteriorate upon cessation of his medication; however, the deterioration to his health could not be "meaningfully quantified".[17] Dr Walton gave evidence that it may take months or years for deterioration to be evident. Accordingly, in Dr Walton's opinion, the risk of relapse was low, which meant that the risk of harm to WCH and to others was also low (as required by s 5(b) of the MH Act). Dr Walton also made the point that if WCH's health was deteriorating, then another community treatment order could be made.

Findings

Mental illness

The first question for the Tribunal Member to consider was whether at the time of the hearing, WCH had mental illness as required by s 5(b) of MH Act. On the basis of the expert evidence, the Tribunal Member accepted that the diagnosis of chronic schizophrenia in 1993 was valid.

The Tribunal Member was also prepared to accept that the diagnosis could continue in someone who did not show symptoms because they were effectively treated with medication. However, the Tribunal Member found that there was no evidence before her to suggest that "WCH recently had or currently has a significant disturbance of thought",[18] especially in light of Dr Walton's opinion that it was unusual for symptoms of mental illness to be silent for so long even with treatment.

Turning to consider the question as to whether WCH's medication was "masking" symptoms of schizophrenia, the Tribunal Member noted the differing views of Dr Walton and Dr A and decided to resolve the question by having regard to s 4(2)(o) of the MH Act "which makes plain that previous mental illness is not a basis on which to find current mental illness".[19] On this basis, the Tribunal Member was unable to find that past instances of events "demonstrate that WCH has chronic schizophrenia or a mental illness as defined by the MH Act".[20] Accordingly, having regard to Dr Walton's evidence that it is unusual for there to have been no symptoms or episodes of illness for such a lengthy period and the possibility that the previous illness had resolved or subsided, the Tribunal Member was not "satisfied to the requisite standard"[21] that the treatment criterion in s 5(a) of the MH Act was met.

Having made that finding, the Tribunal Member was not required to consider the other criteria in s 5 of the MH Act. However, in an abundance of caution, the Tribunal Member made findings in respect of the treatment criteria in s 5(b) and 5(d) of the MH Act.

Immediate treatment

While the Tribunal Member was prepared to accept that there was a risk that WCH would become unwell if he ceased his medication, the Tribunal Member, was not prepared to accept, on the evidence, that it could be described as "serious" as required by s 5(b) of the MH Act.[22] The Tribunal Member was satisfied that this conclusion was "consistent with … a Charter consistent interpretation of s 5(b)"[23] of the MH Act. In reaching this conclusion, the Tribunal Member took into account Dr Walton's evidence that WCH had sought help from health professionals in the past when he was experiencing difficulties, which the Tribunal Member commented was relevant to the "likelihood of a serious deterioration if immediate treatment is not provided".[24] Accordingly, the Tribunal Member was not "persuaded that without treatment there would be a deterioration in WCH's mental health which would be serious or a risk that there would be serious harm to WCH or others".[25]

Less restrictive treatment

In considering the treatment criterion in s 5(d) of the MH Act, the Tribunal Member was satisfied that there were less restrictive treatment means reasonably available to enable WCH to receive the immediate treatment. The medical service where WCH had been receiving health services confirmed at the hearing that "it would be able to manage that process with WCH and so he could continue to be treated by practitioners who know him in a familiar environment".[26] Further, the Tribunal Member was satisfied that, based on the evidence of WCH seeking support and assistance when needed, there will be "many opportunities for any adverse consequences of medication reduction to be identified and, ideally, addressed with WCH's consent and co-operation".[27]

Finally, the Tribunal Member noted that allowing WCH to reduce his medication and be treated as a voluntary patient was "consistent with his dignity as a person"[28] and would enable him to make decisions about himself and his treatment which was consistent with WCH's rights under the Charter of Human Rights.

Orders

Applying the standard of proof required by *Briginshaw v Briginshaw* and interpreting provisions of the MH Act consistently with their purpose and in a way that is compatible with human rights (as set out in the Charter of Human Rights), the Tribunal Member found on the evidence that three of the treatment criteria did not apply to WCH.[29] Accordingly, the Tribunal Member ordered that the community treatment order be revoked. Relevantly, while the Tribunal Member noted that she could not make an order in relation to WCH's reduction of medication under the supervision of a psychiatrist, the Tribunal Member encouraged WCH to "exercise his rights with prudence and in accordance with medical advice".[30]

Comment

This decision is noteworthy as it provides guidance as to the interpretation of the MH Act compulsory treatment provisions in light of the Charter of Human Rights, following the authority established in *Kracke v Mental Health Review Board*[31] and *Antunovic v Dawson*.[32] In this case, three factors crucially influenced the decision:

- the Mental Health Tribunal must consider the Charter of Human Rights in interpreting the MH Act and, as a public authority, is bound by the Charter;
- the *Briginshaw* standard should be applied in determining whether the test for compulsory treatment has been satisfied. That is, the gravity of the consequences require the matters be proven to the Tribunal's reasonable satisfaction; and
- the MH Act itself precludes previous mental illness alone as supporting a finding of current mental illness.

Importantly, in this case the medical evidence was divided as to the presence of a current mental illness and the seriousness of any potential deterioration. On the one hand, the treating team considered that symptoms were managed (and therefore masked) by the longstanding treatment, while on the other hand, the expert evidence was that it was unusual, even with ongoing medication, for symptoms to remain silent for such a long period. Further, the expert took the view, which the Mental Health Tribunal favoured as consistent with a "Charter friendly" interpretation, that even if the symptoms were masked, the risk of harm from deterioration and subsequent recommencement of the treatment was not serious.

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Footnotes

1. *WCH v Mental Health Tribunal (Human Rights) (Amended)* [2016] VCAT 199.
2. Above n 1, at [60].
3. Above n 1, at [19].
4. In *Briginshaw v Briginshaw* (1938) 60 CLR 336; BC3800027, the High Court stated that the balance of probabilities tests requires a tribunal to: "feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of mere mechanical comparison of probabilities independently of any belief in its reality… at common law … it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal" (per Dixon J).
5. Above n 1, at [19].
6. Above n 1, at [19].
7. See s 38(1) of the Charter of Human Rights and *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646.
8. Above n 1, at [20].
9. Above n 1, at [77].
10. Above n 1, at [34].
11. Above n 1, at [29].
12. Above n 1, at [38].
13. Above n 1, at [37].
14. Above n 1, at [37].
15. Above n 1, at [61].
16. Above n 1, at [61].
17. Above n 1, at [73].
18. Above n 1, at [52].
19. Above n 1, at [59].
20. Above n 1, at [60].
21. Above n 1, at [61].
22. Above n 1, at [95].
23. Above n 1, at [95].
24. Above n 1, at [92].
25. Above n 1, at [95].
26. Above n 1, at [100].
27. Above n 1, at [103].
28. Above n 1, at [106].
29. Above n 1, at [22].
30. Above n 1, at [112].
31. *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646.
32. *Antunovic v Dawson* (2010) 30 VR 355; [2010] VSC 377; BC201006085.