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Précis Paper

The Extension of Forensic Patient Status

A discussion about the recent decision of *Attorney General for New South Wales v Peterson (bht Rodrigues)* [2020] NSWSC 651.

Discussion Includes

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The Extension of Forensic Patient Status

In this edition of BenchTV, Corrie Goodhand (Barrister, Black Chambers, Sydney) and Felicity Graham (Barrister Black Chambers, Sydney) discuss the recent decision of *Attorney General for New South Wales v Peterson (bht Rodrigues)* [2020] NSWSC 651.

Background

1. The case of *Attorney General for New South Wales v Peterson* (bht Rodrigues) [2020] NSWSC 651 involved a preliminary application in the Supreme Court which was brought by the Attorney General of NSW seeking an extension of Mr Peterson's status as a forensic patient.
2. Mr Peterson was a forensic patient and he was subject to a limiting term imposed by His Honour Justice Campbell as a result of him being accused of murdering his friend. He was found unfit as he had an intellectual disability and he had a special hearing of which at the end of the hearing he was found not guilty of murder. However, he was found guilty on the limited evidence available of manslaughter and he was given a limiting term of 8 years. He spent approximately 5 years of that in custody and then was released on conditional release under the supervision of the Mental Health Review Tribunal.

How is an extension decided?

3. The Attorney General brings the application to the Supreme Court under Schedule 1 of the *Mental Health (Forensic Provisions)* Act 1990 (NSW) and requests an extension of time for a person to remain as a forensic patient.
4. This happens in two stages:
    a. First is the preliminary application. If an interim extension order is made it will go to the final hearing where an order can be made for up to 5 years. At the preliminary stage, an order can be made for an extension for a period of 3 months only.
    b. The second stage is a final hearing.

Evidence

5. One of the purposes of having an interim hearing is to get further assessments done of the person with the view for those expert opinions to be taken into account at the final hearing.
6. At the preliminary phase there is usually just a risk assessment report which is obtained by the Attorney General in anticipation of the application.
7. In this case, there was a risk assessment report by a forensic psychiatrist. Other evidence was also included which included information from mental health review tribunal hearings,

Mr Peterson's prison performance and other information that related to his conduct in custody as well as his behaviour in the community when he was on conditional release.

Risk

8. The test for risk is the same for both the preliminary application and the final application; the main difference being at the preliminary stage, the court has to look at the evidence at a threshold level. This involves taking the evidence at its highest without any debate as to its reliability.
9. The first limb for the test for risk is to ascertain whether there is an unacceptable risk that if the defendant ceases to be a forensic patient, that he will pose a risk of serious harm to others. If that test is made out, the second limb of the test is to look at whether that risk of serious harm to others can be more adequately managed by less restrictive means.

Regulation of involuntary detention

10. Mr Peterson was originally held in a prison setting. He was bail refused and remained in custody pending the special hearing and then he was subject to his limiting term which he served wholly in prison. In this case, Mr Peterson's status as a forensic patient arose, not out of a mental health diagnosis, but rather because of his cognitive impairment.
11. NSW is one of the only states in Australia and one of the very few places in the world that allows for the involuntary detention of a person whilst they are in custody.

The reliance on risk assessment

12. Research demonstrates that risk assessment tools appear to identify low risk individuals with high levels of accuracy with high negative predictive value but low to moderate positive predictive value. Thus, the use of risk assessment as the sole determinant of detention, sentencing and release is not supported by the existing evidence base.
13. In the mental health context and in the context of the high risk offenders regime, there is often a high degree of reliance by the State on risk assessment tools that purport to come to a conclusion of moderate or high risk in relation to someone committing a further offence of violence or causing serious harm.
14. It is important for practitioners to familiarise themselves with the tools that are being used in any particular case and to take the time to speak to the expert prior to the hearing to clarify any questions that may or may not be asked during the hearing.
15. The other issue is the uncertainty in using terms such as 'harm.' For psychologists and psychiatrists using 'harm' can encapsulate everything, whereas under the high-risk offender's legislation, being the *Crimes (High Risk Offenders) Act* 2006 (NSW), the risk of harm refers to the risk of committing a further serious violent offence as defined in the Act.

16. Unlike the high-risk offender's legislation where serious violent offence is defined, the *Mental Health (Forensic Provisions) Act* 1990 (NSW) contains no definition as to what is meant by serious harm.

Decision

17. In most situations, with preliminary applications in practice, the vast majority end up at a final hearing and often the approach taken by the defendant is to consent to the interim extension or to neither oppose or consent to the interim extension.
18. It is not common on the facts alone that a defendant is successful at the preliminary stage. The reality is that they are often not contested at preliminary stage as the Court is to assume that the matter that is asserted by the Attorney General will be proved.
19. In this case His Honour was not satisfied of limb one; that is he was not satisfied that the defendant posed an unacceptable risk of serious harm to others.

Other less restrictive means

20. The term 'less restrictive means' is not defined in the legislation. Honour Justice Adamson in the decision *Attorney General of NSW v Doolan by his tutor Jennifer Thompson (No. 2)* [2016] NSWSC 107 set out what may 'other less restrictive means' can mean.
21. We understand 'least restrictive means' to mean by way of a coercive order or some legal mechanism to control the behaviour, residence, treatment of a person.
22. The evidence in this case was that Mr Peterson had been monitored by the Tribunal for the period of time including the three years that he had been released to the community and the Tribunal was satisfied with the way he was progressing with there being no incidents of aggression. He had also made good progress in terms of his skills developing in all aspects of his life including his ability to control emotions and deal with interpersonal conflicts.
23. In this case, Dr Singh who was the expert that the State relied upon gave her opinion that she did not consider that he posed a risk of serious harm to others if he ceased having that status as a forensic patient.
24. The State's argument included his tendency to respond aggressively, even though there had been no recent evidence in the three years whilst under a conditional release order that he had acted aggressively. They also relied upon the incapacity to exercise self-control when there was a perceived threat and the fact that when he was in custody there were a number of infractions where he was said to respond aggressively although none of those involved serious violence. They said that he needed a further extended period of supervision to manage his risk factors not withstanding that he had already been under supervision in the community and under the watch of the Mental Health Review Tribunal for three years without any incident.

25. The State also submitted that he had an over reliance on support staff. However, His Honour found that he did not pose the unacceptable risk as it was likely that his NDIS package would continue, that it was likely that he would remain in the same supported accommodation he had lived in for three years and therefore he would continue to have the same support. He also found that the risks that were referred to and relied on were more historical rather than current and continuing.

Compliance with orders

26. The evidence was that Mr Paterson was unaware that he was subject to the orders that arose out of his status as a forensic patient which required him not to drink alcohol or take drugs, to live at a certain place and for a time to remain in line-of-sight supervision of a support worker.
27. For people who know that they are subject to measures, one can draw an inference that their compliance or lack of offending is because they know that they are subject to the regime. However, in this case the evidence whilst he was under conditional release was that he was happy to be where he was, and he was enjoying the significant support he was getting. Therefore, it was impossible to draw any inference that his compliance or lack of offending, his improvement in behaviour in terms of coping skills and being able to control any aggressive outbursts had anything to do with his status as a forensic patient.

Crossover between regimes

28. The case of the *State of New South Wales v Carr* [2020] NSWSC 643 was a case where Mr Carr had been placed on an extended supervision order under the high-risk offender's legislation, having as a child committed some serious sexual offences. He served out his entire sentence not being released to the extended period of parole that the sentencing judge had intended he be released to and then was subjected to a 5-year extended supervision order which, because he was breached on multiple occasions, the five-year order effectively became a twelve-year order because of his repeated incarceration on breach. This shone light on the issue of the counterproductive impact of a supervision regime.
29. Some reports suggest that the impact of the order and the way it has been enforced may be counterproductive to the rehabilitation of Mr Carr and His Honour's comment in the decision was that he was quite sure that it has been.
30. There needs to be a policy approach and an enforcement approach that recognises the real potential for a counterproductive operation of these regimes and to really confront the way these regimes may be making our communities less safe in their operation.
31. The difference between the regimes is if the order for extended supervision for high-risk offenders is made, they are being supervised by corrections and it is a criminal offence to

breach such an order. With the extension of forensic status, it is supervised by the Mental Health Review Tribunal forensic division.

32. A person who has forensic patient status who breaches the conditions of a community release, if they are again detained civilly with a decision having been made that that is what should occur, they must meet that test again and the most likely situation is that they will end up in custody again.

Costs

33. The forensic patient is protected so there is no cost order against the defendant. This is a statutory prohibition on a costs order.
34. The *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (NSW) is due to commence until early next year and it will replace the *Mental Health (Forensic Provisions) Act* 1990 in its entirety.
35. Under the *Legal Aid Commission Act 1979* (NSW) where legal aid instructs, the grants division will liaise with the State of NSW and negotiate an uplift fee

No consideration of liberty

36. There is a line of authority in the Court of Appeal and followed in single judgements relating to the regime of forensic patients and also high-risk offenders that adopts the mode of only looking at the first limb of the test and not taking into account the person's liberty. However, when one looks at the statutory test of unacceptable risk, it requires some degree of acknowledgement and taking into consideration of a citizen or person's general right to be at liberty and not be subject to the constraints of some coercive state order. There needs to be an engagement with the idea that the type of risk that is sought to be avoided is an unacceptable one as per *Coco v The Queen* (1994) 179 CLR 427.

Duration

37. In the interim stage, an interim order can be issued for a period of up to three months. In the final hearing stage, it is up to five years and there is no limit on the number of applications that can be brought. In extension of forensic status matters as opposed to high-risk offenders, there is a caveat that the outcome of the decision has to be the least restrictive means.
38. An issue that arises in many of these cases when looking at alternative management regimes is whether the person would more appropriately be managed if they are in the forensic hospital under the civil regime rather than the *Mental Health (Forensic Provisions) Act* 1990 (NSW). The enforcement of the treatment regime is less punitive in its operation. To be released on conditional release as a forensic patient one must have the risk

assessment process which is a strict and thorough process. Whereas for involuntary patients, to be released from a mental health facility, it can be done with doctor's permission, that is that it does not require the permission of the Tribunal.

39. Under the act the Attorney General has quite coercive powers in terms of obtaining information. Unlike the *Mental Health Act* 2007 (NSW) which keeps the patients name and personal details confidential, the *Mental Health (Forensic Provisions)* Act 1990 (NSW) does not provide any protection for the defendant in terms of the publication of his or her name or their personal medical information.

BIOGRAPHY

Corrie Goodhand

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Corrie Goodhand is a Barrister practising at Black Chambers, Sydney and has many years legal experience in a variety of areas of the law. Corrie grew up in Darwin and received her Bachelor of Laws from the Northern Territory University (now known as Charles Darwin University). After completing her Graduate Diploma in Legal Practice in the ACT, she relocated to Sydney and was admitted to practice in 1999. She is also admitted in the Northern Territory, the Federal and High Courts of Australia and has obtained a Masters in Health Law from the University of Sydney and a Masters in Forensic Mental Health at the University of New South Wales.

Felicity Graham

Barrister, Black Chambers, Sydney

Felicity is an experienced lawyer with a focus on criminal, administrative and human rights law. She has a diverse national and international practice and a particular interest in legal mechanisms for achieving police accountability. Before being called to the bar in 2015, Felicity was the Principal Legal Officer and Trial Advocate of the Aboriginal Legal Service NSW/ACT (Western Region). Her legal career commenced as Tipstaff to his Honour Justice Graham Barr at the NSW Supreme Court.

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