

Impact of *Winko* on Absolute Discharges

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In Canada, case laws have had a significant impact on the way mentally ill offenders are managed, both in the criminal justice system and in the forensic mental health system. The Supreme Court of Canada's decision with respect to *Winko* has set a major precedent in the application of the test of significant risk to the safety of the public in making dispositions by the Ontario Review Board and granting absolute discharges to the mentally ill offenders in the forensic health system. Our study examines the impact of the Supreme Court of Canada's decision before and after *Winko*. The results show that the numbers of absolute discharges have increased post-*Winko*, which was statistically significant, but there could be other factors influencing this increase.

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Case law has had a significant role in shaping the way mentally ill offenders are treated in the criminal justice system in Canada. For nearly a hundred years, the Criminal Code of Canada had changed little in the way mentally ill offenders were managed. In the previous system, once the accused was found “not guilty by reason of insanity,” the individual could be held indefinitely “at the pleasure of the Lieutenant Governor,” the representative of Her Majesty the Queen. In Ontario, advisory boards were set up to review cases and make recommendations to the Lieutenant Governor. Theoretically, the final disposition was up to one individual. In reality, the Attorney General, Minister of Justice, and the Premier of the Province could have input. Although the Criminal Code of Canada maintains uniform jurisdiction across Canada, the mental health system is under provincial regulation. Thus, there are differences in the way mentally ill offenders are managed from province to province.

Because of these concerns, the Law Reform Commission built on earlier work to recommend changes that were overdue.^{1–4} This occurred in the 1970s. Unfortunately, the Commission's suggestions were

not enacted into law but were an important step in a series of events that led to the current changes. The Constitution Act incorporated the Charter of Rights and Freedoms in the Canadian Constitution in 1982. The charter was significant in explicitly outlining individual rights in one document and serves as the guiding law of the land for all levels of government. It was the landmark case of *Regina v. Swain* in the early 1990s that provided the impetus to create change.^{5,6}

Swain was charged with aggravated assault against his wife and children. From jail, he was transferred to a mental health facility. His psychosis was treated, and after two months he was released into the community. However, at his trial, one and a half years later, the prosecution put forth the insanity defense, and he was held at the pleasure of the Lieutenant Governor for three months until granted an absolute discharge. This was challenged in the Supreme Court of Canada, and sections of Criminal Code relating to mentally ill offenders were found to be in violation of the Charter of Rights and Freedoms (§§ 7 and 9). In 1992, this resulted in significant changes to sections of the Criminal Code relating to mentally ill offenders. These included updated definitions (changing the term not guilty by reason of insanity to not criminally responsible on account of a mental disorder (NCRMD)), elimination of the role of the Lieutenant Governor, and changing the previous advisory boards to adjudicatory boards that could determine

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disposition. Once the accused is found NCR, instead of his or her being held in strict custody, a disposition hearing is held. Possible outcomes include absolute discharge, conditional discharge, or custody. Once in the forensic system, cases are reviewed annually by the Review Board. In Ontario, the Board consists of over 120 members. The panel quorum is three members, as outlined in the Criminal Code of Canada. The chair is a current or retired judge or a lawyer qualified for judicial office. There must be at least one psychiatrist and another person with unspecified qualifications. However, the Ontario Review Board (ORB) utilizes a five-member panel.

The case of *Regina v. Winko* led to another important step in creating change.^{7,8} *Winko* was found not guilty by reason of insanity for aggravated assault and weapons-related charges when he attacked two pedestrians. He had received a diagnosis of schizophrenia and was experiencing auditory command hallucinations. After initially being held in custody and receiving treatment for his illness, he progressed to living in the community with decreased restrictions. Although he had had drug holidays and a brief readmission to a local hospital, there had been no documented evidence of physical aggression since the index offense in 1983. At a hearing in 1995, the provincial board granted a conditional discharge. The majority opinion was that *Winko* could become a significant threat under certain circumstances and thus was not suitable for an absolute discharge. This was also challenged in the Supreme Court of Canada under the Charter of Rights and Freedoms. In 1999, a subsequent ruling stated that in the absence of an affirmative finding of significant threat, the accused must be granted an absolute discharge. Significant threat was defined as “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.”⁷ This created a significant change, in that prior to *Winko*, uncertainty of threat resulted in continued jurisdiction of the Board and after *Winko*, uncertainty resulted in lapse of jurisdiction.

In our experience, the case of *Regina v. Winko* has had a major impact in the way NCR cases are managed. If a significant threat is not established, an absolute discharge must be granted. From a practical perspective, mentally ill individuals could be released prematurely with respect to their own health and/or risk to the public. In light of the *Winko* decision,

there appears to have been an increase in the number of absolute discharges.

In our study, we first sought to determine if the number of absolute discharges is in fact increasing in the province of Ontario. Second, by studying a representative sample of cases of absolute discharge before and after the *Winko* decision, we wanted to determine the factors the Board utilizes in determining significant threat. Finally, we wanted to study the representative population before and after *Winko* to determine if because of lowered threshold, individuals with more serious offenses are granted an absolute discharge.

Data

For the first objective of the study, data were obtained from the Ontario Review Board.⁹ The ORB provided the number of absolute discharges, the number of accused, and the number of hearings. Reasons for disposition were not available; however, the patient’s chart contained the written reasons for dispositions from the ORB. For the second and third objective, cases of absolute discharge before and after *Winko* were examined in a sample that consisted of all cases of absolute discharge from our facility from 1997 to 2001, inclusive. Our site, Regional Mental Health Care—St. Thomas located in southwestern Ontario, is a medium-security forensic facility with a wide variety of patients and is representative of the province of Ontario. Patients come from various geographic areas in Ontario.

Methods

The data from ORB were subjected to statistical analysis to determine if the number of absolute discharges was in fact increasing. Absolute discharges were considered in relation to the number of accused appearing before the Board. Given that there appear to be an increasing number of cases before the Board, the proportion of absolute discharges was studied. The *z* test for determining differences in proportions was used to test the first hypothesis.

For our second objective, after we obtained consent from the University of Western Ontario ethics board, we studied all cases of absolute discharge from 1997 to 2001. Cases were coded for confidentiality. Files were reviewed for age, sex, date of finding of NCR, date of absolute discharge, psychiatric history, criminal history, type of index offense, the request of

Table 1 Ontario Review Board Data

	Pre- <i>Winko</i>		Post- <i>Winko</i>	
	1997/98	1998/99	1999/00	2000/01
Absolute discharge	40	42	111	134
Number of accused	754	824	913	1055
Proportion of absolute discharges	0.053	0.051	0.122*	0.127*

* Statistically significant difference ($p \leq 0.05$).

the hospital at the ORB, the factors the Board cited in the report on granting of an absolute discharge, and factors cited in the previous year when the accused was held in custody or granted a conditional discharge. Given the date of the *Winko* decision, cases past June 1999 were considered post-*Winko*. The ages and the time until absolute discharge were compared statistically. First, the variance was considered and analyzed for equality. Then the data were pooled and the means compared. Statistical significance was set at $p \leq .05$.

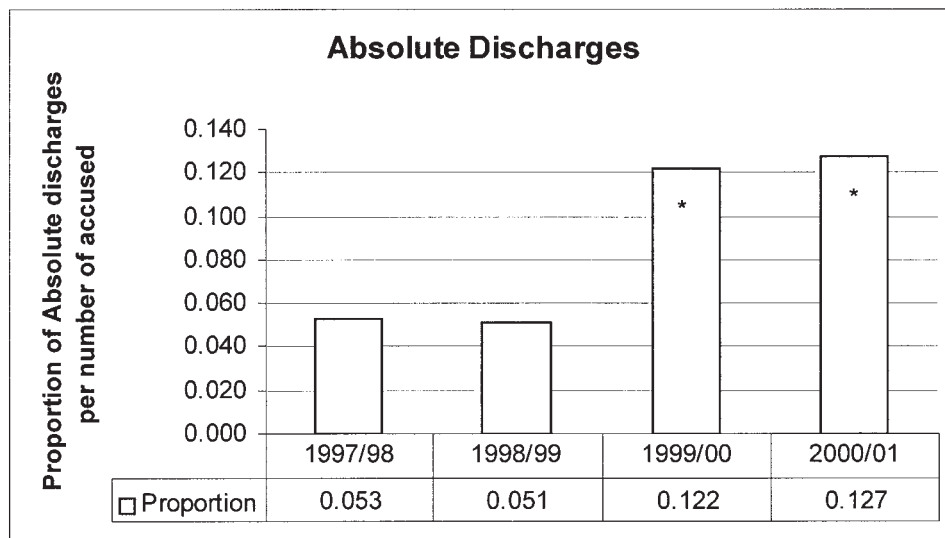
For our third objective, the index offenses were classified into three categories: murder, assault, and property offenses. The offenses were considered in relation to the total number of cases. Thus, the proportion of index offenses was compared before and after *Winko* using the z test procedure to test differ-

ence in proportions. Statistical significance was set at $p \leq .05$.

Results

The results from the Ontario Review Board are summarized in Table 1. The data show an increasing trend in the number of accused before the Board. There was also an increase in the number of absolute discharges from the two years before *Winko* (1997–1999) to the two years after *Winko* (1999–2001). The proportion of absolute discharges per the number of accused was 0.053 (5.3%) in 1997/98, 0.051 (5.1%) in 1998/99, 0.122 (12.2%) in 1999/00, and 0.127 (12.7%) in 2000/01. The difference in absolute discharges was not statistically significant between 1997/98 and 1998/99 and between 1999/00 and 2000/01. However, the increased proportion of absolute discharges was statistically significant between 1997/98 and 1999/00, 1997/98 and 2000/01, 1998/99 and 1999/00, and 1998/99 and 2000/01 ($p \leq .05$; Fig. 1).

There were a total of 26 absolute discharges from 1997 to 2001 at RMHC–St. Thomas. One file did not contain the necessary information, resulting in a sample of 25 cases. There were 8 cases before *Winko* and 17 cases after *Winko*. The results are summarized in Table 2.



*statistically significant difference $p \leq 0.05$

Figure 1. Absolute discharges granted by the ORB between 1997 and 2001, inclusive.

Impact of *Winko* on Absolute Discharges

Table 2 Regional Mental Health Care-St. Thomas Data

	Pre- <i>Winko</i>			Post- <i>Winko</i>		
<i>n</i>	8			17		
Age at absolute discharge (y)	42.9 ± 9.03			48 ± 12.05		
Time from NCR until absolute discharge (y)	9.2 ± 7.66			12.9 ± 9.29		
Sex (<i>n</i>)	Male (7)		Female (1)	Male (14)		Female (3)
Index offense* (<i>n</i>)	Murder (4)	Assault (3)	Property (1)	Murder (6)	Assault (6)	Property (5)
Hospital request (<i>n</i>)	Absolute D/C (7)		Conditional D/C (1)	Absolute D/C (14)		Conditional D/C (3)
Criminal history	Yes (5)		No (3)	Yes (10)		No (7)
Psychiatric history	Yes (8)		No (0)	Yes (14)		No (3)

* Attempted murder and murder were classified together; assault and uttering threats were classified together.

The pre-*Winko* group consisted of seven men and one woman. The average age of the group at absolute discharge was 42.9 years. They had spent an average of 9.17 years from date of finding of NCR to absolute discharge. There were often multiple charges with the index offense, and the most serious was noted. The index offenses were murder ($n = 2$), attempted murder ($n = 2$), assault ($n = 2$), theft ($n = 1$), and damaging property ($n = 1$). All patients had psychiatric histories, and five had criminal histories. In seven of eight cases, the hospital requested an absolute discharge (the other was for a conditional discharge). For six of the eight cases, the Board stated only that the patient was not a significant threat. There was no elaboration on the criteria used to reach that conclusion. For two cases, in addition to concluding the accused was not a significant threat, years of stability, and lack of substance abuse were described in the reasons. In the other, insight into illness, employment, lack of substance abuse, and lack of previous psychiatric history were described in the reasons.

The post-*Winko* group consisted of 14 men and 3 women. The average age of the group at absolute discharge was 48 years. They had spent an average of 12.86 years from date of finding of NCR to absolute discharge. The index offenses included murder ($n = 4$), attempted murder ($n = 2$), assault ($n = 3$), setting fires ($n = 2$), threats or harassment ($n = 3$), break and enter ($n = 1$), firearm ($n = 1$), and property damage.¹ Only three did not have a previous psychiatric history, and seven did not have a previous criminal history. In only three cases did the hospital seek a conditional discharge; in all other cases, the hospital requested an absolute discharge. In seven cases, the board simply reached a conclusion of no significant threat. In two cases, the board was unable to find positively that the accused was a significant threat. *Winko* was quoted in the decision in two

cases. In nine cases, factors such as living in the community, compliance with medication, insight into illness, lack of symptoms, lack of substance abuse, employment, socialization, and community integration were described in the reasons. From the data, it was not possible to identify any consistent variables that could be studied statistically. The time from a finding of NCR to absolute discharge appeared greater in the post-*Winko* group (12.9 versus 9.2 years), but the difference was not statistically significant. The difference in ages between the two groups was also not statistically significant. There was no significant difference between the proportions of murders, assaults, and property offenses before and after *Winko*.

Discussion

We studied the impact of *Winko* on absolute discharges. First, the data from the Ontario Review Board support our clinical observation that the number of cases before the Board and the number of absolute discharges has increased. Although the increase is statistically significant, we cannot conclude that the increase is solely due to *Winko*. There may be other factors involved in this increase. For example, as a result of a reduction in available beds and other systemic problems, criminalization of the mentally ill could occur.

Although the cases in the post-*Winko* group appear to have been in the system for a longer time, the difference is not statistically significant. Of interest, in the pre-*Winko* group the hospital requested an absolute discharge in 88 percent of the cases and in 82 percent in the post-*Winko* group. Although *Winko* may have been discussed in deliberations, it was only specifically mentioned in two cases. In one case, the hospital requested a conditional discharge without establishing significant threat and the Board

ruled to grant an absolute discharge. The fact that *Winko* was mentioned in only two cases may reflect the delay in increased knowledge of the particular Board members. In Crisanti's survey of both lawyers and psychiatrists to assess knowledge of the new Criminal Code provisions revealed a lack of knowledge.¹⁰ Thus, it may take a longer period, until there is universal awareness of important case law. Previous studies examining the impact of landmark cases have not shown their full impact to be immediate.^{2,11,12}

Our third hypothesis was to determine whether the lowered threshold for absolute discharges in light of *Winko* resulted in those accused with serious offenses being discharged. It is unfortunate that there was no statistically significant difference in the absolute discharges with respect to index offense. *Winko* may have some interesting implications for the future. With the lowered threshold, defense may raise the NCR plea anticipating a rapid absolute discharge. The trend from 1997 to 2001 showed an increase in the number of hearings from 920 to 1,280. If this trend continues, greater resources will be needed. An examination of the future cases of absolute discharges could answer our hypothesis with more certainty.

Our work supports previous work by Grant,¹³ with regard to absolute discharges. Often the written reasons for absolute discharges provided by the Board contain minimal information. In the reasons for disposition, the Board often stated that the accused was not a significant threat. However, there was no consistent explanation of the criteria used to reach such a conclusion. After hearing the evidence, the Board often deliberates and a decision is given. Unfortunately, the deliberation is a confidential matter, and it is impractical to extract the criteria or details considered by the Review Board during deliberation. All charts were also reviewed for the most recent reasons for disposition in the previous year before an absolute discharge. We were surprised that there was little change in the clinical record. Thus, there may be many factors that the Board must consider. Other factors, such as the members of the ORB, the forensic facility, and quality of evidence presented were not studied. Prior to establishment of which factors are significant in leading to absolute discharges, they must be explicitly stated in the reasons for disposition. Perhaps a standardized form

could be used when the reasons for disposition are made which allow for further rigorous study in the future. This could be accomplished with increased resources from the hospital.

In our opinion, *Winko* appears to be a step in a positive direction. Presentation of the psychiatric evidence will specifically address the finding of significant threat. The accused, if no longer a threat to the public, could be discharged without possibility of indefinite custody, thus bringing the system in line with the Charter. The potential risk of prematurely releasing a mentally ill offender remains. The full impact of *Winko* will be realized only in the coming years.

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