Adjudicating the Risks of Confinement: Bail and Sentencing During COVID-19

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The pandemic has drastically altered our world, but many of the issues it has highlighted in respect of punishment and detention are not new. We have long been concerned with conditions of confinement, extensive lockdowns and the health effects of incarceration in both pretrial and post-conviction settings. We have long worried about how we hold large numbers of innocent people in pretrial custody notwithstanding delays in the courts. We know that these features of our system can reflect and reproduce various forms of inequality, betraying the ideals and eroding the legitimacy of criminal law.

In the realm of bail and sentencing during COVID-19, judges have struggled to uphold the criteria for detention and punishment while responding to an altered world that has exacerbated many of these longstanding concerns. This article tracks how courts have responded in distinct ways to the question of inmate vulnerability to COVID-19.

In the context of interim release, a divide has emerged as to whether COVID-19 is a factor that presses generally in the direction of release or if an accused must claim that he is subjectively at higher risk.[1] This article tracks two major positions in the cases. One position recognizes the heightened risks and severity of confinement for all inmates at this time

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[1] There is a distinction — the significance of which is not always carefully observed in the cases — between the risk of contracting COVID-19 and the risk of becoming seriously ill or dying from it. *R. v. Nelson*, 2020 ONSC 1728 (Ont. S.C.J.), discussed below at note 35, observes that all incarcerated people are in a class of people at heightened risk of contracting the virus (at para. 41). A separate issue is the likely effects of contracting the virus, which may interact with and flow from individual health status.

and permits consideration of COVID-19 with no further evidence. A second, different position requires that an individual defendant point to an underlying or pre-existing health condition that makes him particularly vulnerable before COVID-19 can weigh heavily upon a decision.

Ostensibly, the cases often appear as a debate about the proper scope of judicial notice — a doctrine already well-known for uneven application — or as a technical discussion about the secondary or tertiary grounds for ordering detention. Beneath the surface of those debates, however, there is also a meaningful divide as to the kind of plea for protection that judges are requiring applicants to advance during this extraordinary time.

This article cautions against some of the approaches that have been used to address the COVID-19 factor. A decision to detain may be warranted notwithstanding the pandemic, but that should be done without minimizing or dismissing the risks and effects of COVID-19, and without purporting to assign responsibility for its management entirely to corrections.

Some judges have denied release by trying to draw a neat line between those who are vulnerable or not due to a specific health condition — a line between those inmates we must protect and those we need not. These approaches often fail to respond to the full range of concerns that the pandemic raises: the prospect of further court delays in a system that is already backlogged, the extensive use of solitary confinement as an infection control measure in a system that already abuses it, the impact that a prison outbreak will have on collective health resources, and the vulnerability that incarcerated populations already have in terms of health and safety.[2]

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[2] On the response of the Correctional Service of Canada to COVID-19 and these underlying issues in the federal prison system, see Adelina Iftene, "COVID-19 in Canadian Prisons: Policies, Practices and Concerns", in Coleen M. Flood, Vanessa MacDonnell, Jane Philpott, Sophie Thériault, Sridhar Venkatapuram, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19*, (Ottawa: University of Ottawa Press, 2020), 367. On the response of provincial systems to COVID-19, which have been far more focused on reducing the custody population, see Howard Sapers, "The case for prison depopulation: Prison health, public safety and the pandemic" *Journal of Community Safety and Well-Being*, 5(2), 79-81 (July 2020).

Add to this that harsh conditions of pretrial confinement were a serious concern even before the pandemic arrived. Ontario courts have repeatedly condemned these conditions,[3] and the Ontario Court of Appeal has developed a methodology for awarding enhanced sentencing credit for the many cases that involve serious institutional failures and negative impacts on a remand inmate.[4] Ideally, the pandemic should be an occasion to deepen our recognition of the risks of detention, many of which are greater and graver than that posed by COVID-19. Requiring evidence of an underlying health vulnerability to COVID-19 is, in many cases, an inadequate response to the pandemic and its impacts. It is also an approach that risks normalizing the unacceptable conditions and risks of pretrial confinement present well before the arrival of the novel coronavirus to Canada.

The Search for an "Underlying Condition"

The prominence of discourse around individual vulnerability during this pandemic — often put in terms of "underlying" or "pre-existing" conditions — has been the subject of important critique that is relevant here. From the fields of disability studies and public policy, Thomas Abrams and David Abbott observe the constant emphasis in media that serious illness and death only happen to people with underlying health conditions.[5] When the first death of a child, aged five, was reported in the UK, there was "a clamour to establish whether they had an underlying health condition. Parts of the nation breathed easier when this was confirmed, much like when natural disaster is announced: 'But wait, it's not here,

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[3] See e.g. *R. v. Tyrell*, 2013 ONSC 6555 (Ont. S.C.J.); *R. v. Grizzle*, 2013 ONSC 6523 (Ont. S.C.J.); *R. v. Douale*, 2018 ONSC 3658 (Ont. S.C.J.).

[4] *R. v. Duncan*, 2016 ONCA 754 (Ont. C.A.). In *R. v. Inniss*, 2017 ONSC 2779 (Ont. S.C.J.), the court awards enhanced credit where a defendant is locked in his cell for extended periods and denied fresh air for over one year. In *R. v. Persad*, [2020] O.J. No. 95, 2020 CarswellOnt 95 (Ont. S.C.J.), at para. 34, Justice Schreck concludes that "inhumane conditions" at Toronto South Detention Centre have risen to the level of "deliberate state conduct." Mental and physical hardship arising from the COVID-19 crisis has also already formed the basis for enhanced credit for pretrial custody: *R. v. Abdella*, 2020 ONCJ 245 (Ont. C.J.).

[5] Thomas Abrams and David Abbott, "Disability, Deadly Discourse, and Collectivity amid Coronavirus (COVID-19)" *Scandinavian Journal of Disability Research*, 22(1): 168–174.

it's somewhere else, somewhere foreign.'"[6] Death announcements have often been accompanied by "reassurance" that most, if not all, of those lost were vulnerable due to either age or individual health factors.[7]

Part of what Abrams and Abbott are identifying is that, in responding to the profound anxieties of this pandemic, we seem to be keen to draw lines between those who will be affected and those who will not. The lines drawn are themselves a troubling reflection of a pre-pandemic reality as to whose lives are "expendable and not to be counted."[8] There is an "underlying casual brutality" to this discourse which partly serves to comfort the majority: we can all breathe a sigh of relief to know that only those who are *already* sick or vulnerable, living in long-term care or approaching the end of life, will really be affected.

In the bail cases, there is a similar attempt to draw lines around the vulnerable, but to a different end. It seems that judges look for an underlying vulnerability as a way to decide when pretrial detention is risky or not. What gets obscured in this approach are three things: the risks that all inmates face in detention generally, the fact that COVID-19 can deliver lasting harm to individuals who have no other health conditions, and the systemic impacts of pandemic management beyond individual illness and death. Rather than recognizing how the pandemic *adds* to a system of pretrial detention that was already unacceptable in many respects, judges who seek — and fail to find — evidence of a serious underlying condition are able to breathe a sigh of relief about their decision to detain.

The fact that some individuals are more vulnerable to either contracting or becoming seriously ill from COVID-19 is clear. Still, the lens of individual vulnerability should not be the central or sole focus in the adjustments that must be made to the law of bail and sentencing. The final section of this article compares the bail cases to one striking example from the sentencing context that usefully describes how COVID-19 is relevant to the fitness of a sentence generally. In *R. v. Hearns*, Justice Pomerance declines to individualize the risks and effects of COVID-19, attending instead to the changes in routine and conditions that apply

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6 *Ibid* at p. 168.

7 *Ibid*.

8 *Ibid*.

across our institutions of punishment.[9] Largely by way of judicial notice, Justice Pomerance brings these insights to bear when analyzing how a "government-enforced congregation of people" relates to concerns with proportionality and parity in the administration of detention.

Bail in a Pandemic

In terms of bail procedure, several cases decided early in the pandemic established that the pandemic was a "material change in circumstances" sufficient to trigger a bail review.[10] Fewer cases, mostly outside of Ontario, have taken a case-by-case approach, occasionally finding that the pandemic is not, absent a serious underlying health condition, sufficient to trigger review.[11]

Regarding the grounds of a decision to detain, the relevance of the pandemic has received varied treatment. On the secondary ground of "public safety" under s. 515(10)(b), *R. v. T.K.* held that the jeopardy and risk posed to inmates is a valid factor, "in particular for non-violent offenders on a bail review."[12] Other courts have denied bail review under the sec-

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[9] *R. v. Hearns*, 2020 CarswellOnt 5089, 2020 ONSC 2365 (Ont. S.C.J.).

[10] In *R. v. J.S.*, 2020 ONSC 1710 (Ont. S.C.J.) the court treats the pandemic as a standalone material change on the secondary and tertiary ground, though there was also a new proposed release plan.

[11] See *R. v. Jeyakanthan*, 2020 CarswellOnt 4587, [2020] O.J. No. 1409 (Ont. S.C.J.), which seems to hold that COVID-19 is a material change in circumstances only where evidence indicates that the accused has a "real, significant" underlying health condition that would increase their risk of COVID-19. See also *R. v. Brown*, 2020 ONSC 2626 (Ont. S.C.J.) in which a material change was denied on the secondary ground for lack of evidence of the accused's fear of infection, which weakened the argument that this would deter him from re-offending. In *R. v. CKT*, 2020 ABQB 261 (Alta. Q.B.), the court denied a "material change" on the secondary ground on the basis that the accused failed to present sufficient evidence as to the "differential risk" to them, requiring the accused to distinguish himself from the general population (paras. 6-9). In *R v. DH*, 2020 ABQB 358 (Alta. Q.B.) the accused was successful in establishing a material change on the basis of very serious underlying health issues, with the court relying on the same reasoning as in *CKT*. See also *R. v. Alexander*, 2020 CarswellNfld 78, [2020] N.J. No. 69 (N.L. Prov. Ct.) (para. 7) and *R v. PO*, 2020 CarswellAlta 1152, 2020 ABQB 355 (Alta. Q.B.) (para. 40).

[12] *R. v. T.K.*, 2020 ONSC 1935 (Ont. S.C.J.), at para. 60.

ondary ground stating that it strictly concerns the "protection of the public" and *not* the protection of the accused themselves.[13] Some have held that the secondary ground can cut in favour of release only if the accused has a particular fear of infection such that re-incarceration may serve as a deterrent for re-offending.[14]

More commonly, courts have held that the pandemic is relevant to the tertiary ground of public confidence in the administration of justice under s. 515(10)(c).[15] The analysis on the tertiary ground considers whether a reasonable member of the community, aware of the imminent threat that COVID-19 poses to the health of inmates and staff in our detention centres, would lose confidence in the administration of justice if the accused was detained, even where the other factors favour detention. As Justice Harris put it in *R. v. Rajan*, the public understands the "momentous nature of this crisis" and threat of COVID-19 "goes a long way to cancelling out the traditional basis for tertiary ground detention."[16] However, some courts have required medical evidence of individual vulnerability — as if public confidence would *only* be undermined by detention during COVID-19 where an accused is likely to become gravely ill or die of the virus.

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[13] *CKT*, *supra*, note 11 at para. 17. See also *R v. SAH*, 2020 ABQB 264 (Alta. Q.B.), at para. 6.

[14] See e.g. *CKT*, *supra*, note 11, requiring evidence of how the pandemic may increase the "compliance attitude" of an accused in a way that would impact public safety concerns before COVID-19 can impact the secondary ground (para. 7). See also *R. v. Dawson*, 2020 ONSC 2481 (Ont. S.C.J.), another secondary ground case that considers whether the accused is likely to comply with social distancing and the question of relative risk inside or outside of a custodial facility.

[15] For the definitive interpretation of the tertiary ground and the non-exhaustive factors sets out in s. 515(10)(c), see *R. v. St-Cloud*, 2015 SCC 27, 19 C.R. (7th) 223 (S.C.C.). Among other things, *St-Cloud* makes clear that the personal circumstances of the defendant, including physical or mental condition, are factors that a court may consider as part of its assessment of all of the circumstances. (para. 71). See also *R v. Antic*, 2017 SCC 27, 37 C.R. (7th) 237 (S.C.C.), emphasizing that s. 11(e) of the *Charter of Rights and Freedoms* protects the right not to be denied reasonable bail without just cause and sets a standard of least onerous conditions for release.

[16] *R. v. Rajan*, 2020 ONSC 2118 (Ont. S.C.J.), at para. 69..

No Individual Vulnerability Required: COVID-19 Elevates Risk and Severity of Confinement Generally

On March 20, 2020, Justice Copeland set the stage with her reasoning in *R. v. J.S.*[17] The accused applied for a review of a detention order under the tertiary ground on firearms and trafficking charges. Justice Copeland concludes that "the greatly elevated risk posed to detained inmates from the coronavirus, as compared to being at home on house arrest is a factor that must be considered in assessing the tertiary ground."[18]

Justice Copeland is clear that, in order for COVID-19 to be considered, there is no requirement for an applicant to show any failure of the correctional authorities to take appropriate steps to attempt to limit the spread of the virus. She takes judicial notice of the risks stating that "[t]he virus is clearly easily transmitted, absent strong social distancing or self-isolation, and it is clearly deadly to a significant number of people who it infects. The practical reality is that the ability to practice social distancing and self-isolation is limited, if not impossible, in an institution where inmates do not have single cells."[19]

Justice Copeland observes further that the health of an individual accused is only one aspect of a decision to detain — also at issue is the "preservation of scarce hospital resources to treat patients."[20] Finally, the pandemic factor must be "balanced with the other tertiary ground factors." In this case, the new proposed release plan also presses in the direction of release. While the applicant in *J.S.* made no suggestion that he was particularly vulnerable to either contracting or becoming seriously ill from COVID-19, release was granted.

Many decisions have taken the same approach. In *R. v. C.J.*, the accused applied for release dealing with the tertiary ground alone. In his review, Justice Conlan considers the impact of COVID-19 on the institutions, stating that they have "curtailed or eliminated altogether the few niceties that prisoners had available to them previously, such as family visits and

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[17] *R. v. J.S.*, *supra*, note 10, at para. 18.

[18] *Ibid*, at para. 19.

[19] *Ibid*.

[20] *Ibid*.

religious services."[21] Mitigation measures clearly make life in correctional institutions more difficult than pre-pandemic detention.

On March 30 2020, Justice Molloy in *R. v. T.L.* considered the impact of COVID-19 on both the state of the institutions and the community at large. After finding that the accused had satisfied his onus on the secondary ground, Justice Molloy observes in her tertiary ground analysis the "realities of detention and release" in the midst of a global pandemic. She notes that courts are closed except for emergency orders, all matters scheduled for trial have been adjourned, a significant backlog will accompany any re-opening, and the pandemic has made living conditions in pretrial facilities more onerous than it was prior to the pandemic.[22]

Justice Molloy observes that protective measures being undertaken by the rest of the community (such as not congregating in groups, self-isolation, social distancing, maintaining a six-foot distance between people) are not as easily achieved in an institutional prison environment. She describes, further, how every individual decision to detain affects the prospect of mitigation and engages the interests of the wider community:

> . . . the more people that are housed in the institutions, the harder it will become to achieve any distancing to prevent infection or to contain or treat any infections that do occur. It is in the interests of society as a whole, as well as the inmate population, to release people who can be properly supervised outside the institutions. It better protects those who *must* be housed in the institutions (because there are no other reasonable options), those who work in the institutions (because they perform an essential service), and our whole community (because we can ill-afford to have breakouts of infection in institutions, requiring increased correctional staffing, increased medical staffing, and increased demand on other scarce resources).[23]

In many cases, the Crown has introduced material suggesting that COVID-19 is being properly managed in the jails. In *R. v. Cain*, the Crown offered that prisoners are being queried upon admission for signs of the virus.[24] In response, in a decision handed down on April 1 2020, London-Weinstein J. takes judicial notice that the virus is contagious in

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[21] *R. v. C.J.*, 2020 ONSC 1933 (Ont. S.C.J.) at para. 9.

[22] *R. v. T.L.*, 2020 ONSC 1885 (Ont. S.C.J.) at para. 36.

[23] *Ibid*.

[24] *R. v. Cain*, 2020 ONSC 2018 (Ont. S.C.J.).

both pre-symptomatic and asymptomatic people. She notes that things can change quickly in terms of an outbreak, and that prisoners cannot adequately socially isolate, nor wash their hands frequently. *Cain* was a bail review in a case involving a violent attack following a dispute over crack cocaine. Like Justice Copeland in *J.S.*, Justice London-Weinstein is clear that there is no need to find fault on the part of the facility. She notes the applicant's evidence that he is prone to infections due to a liver injury, but she is clear that there is no requirement to allege a "subjective personal characteristic" of vulnerability to the coronavirus.[25] Release is granted.

These decisions do not mean that the pandemic is determinative. In cases like *J.S.* and *C.J.*, each accused presented with a new and satisfactory release plan. Moreover, it's clear that even where an accused has pointed to an underlying health condition, they may still be denied release.[26] At the same time, it is clear that some accused are released when they would not normally be, owing to the pandemic factor. In *T.K.*, the accused was released on various drug charges with the court stating that in "normal times" the court would have detained the accused on the secondary ground for repeated failures to comply with court order.[27] The court granted release on the basis that these are *not* "normal times", citing reports from the World Health Organization explaining the challenges of keeping inmates safe at this time.[28]

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[25] *Cain* at para. 11.

[26] *R. v. Phuntsok*, 2020 ONSC 2158 (Ont. S.C.J.) the accused had asthma supported by medical evidence but was still denied release owing to the accused's history of non-compliance and a weak proposed release plan that did not mitigate the court's concerns (paras. 35 and 37). In *R. v. Benson*, 2020 ONSC 3568 (Ont. S.C.J.), the accused presented evidence of "pulmonary issues" and fibromyalgia but was subsequently denied release on the basis of flight risk, a weak proposed release plan, and the loss of public confidence related to releasing a person with a "track record for violence, drug dealing" and non-compliance (para. 80).

[27] *T.K.*, *supra*, note 12 at para. 70.

[28] *Ibid*, at para. 71. World Health Organization (Europe), "Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance", (2020) (https://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf).

On April 20 2020, Justice Schreck concludes in *R. v. J.R.* that detention on the tertiary ground alone will "rarely be justified" during the pandemic.[29] Reasonable members of the public would "expect the courts to give significant weight to the public health implications of incarcerating individuals." As it has done in many other cases, the Crown filed a Briefing Note which assured the court that the Ministry of the Solicitor General is "confident in the care we are providing our inmate population." Justice Schreck details the shortcomings of the Briefing Note and accords it little weight.[30] Here, there also happened to be strong evidence of individual vulnerability: the applicant deposed that he suffered from severe asthma, which his physician confirmed in a letter.[31] However, the court is clear that there is no burden on the accused to "adduce evidence that he is somehow more susceptible." In a case involving an "extremely grave" firearms offence and drug offences, plus a lengthy criminal record, release is granted.[32]

It is clear that even where a judge is attentive to the systemic issues raised by detention during the pandemic, that need not function as a trump card mandating release. In *R. v. Williams*, Justice Stribopoulos observes that "unnecessary admissions to correctional facilities are a health hazard for *everyone* in the context of the COVID-19 pandemic."[33] While the virus presses strongly in the direction of release, detention is ordered in this first degree murder case given the compelling circumstantial evidence as well as a confession. Justice Stribopoulos does take care to mention that there is no evidence that the defendant is especially vulnerable to a life threatening outcome should he contract the COVID-19 virus.[34] But the case does not minimize the significance of the pandemic and stops well short of naming a rule that release is only called for where detainees have serious underlying health conditions. Individual vulnerability can be a factor, but the absence of such vulnerability does not end the analysis.

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[29] *R. v. J.R.*, 2020 ONSC 1938, 62 C.R. (7th) 143 (Ont. S.C.J.), at para. 47.

[30] *Ibid* at paras. 38–43.

[31] *Ibid* at para. 7.

[32] *Ibid* at para. 50

[33] *R. v. Williams*, 2020 ONSC 2237 (Ont. S.C.J.), at para. 87.

[34] *Ibid* at para. 97.

Evidence of Individual Vulnerability Required: Judicial Notice of the Pandemic Not Enough

Other cases have required at least a claim from the accused, if not medical evidence, that they are particularly vulnerable to COVID-19 before allowing the pandemic to weigh heavily as a factor. In *R v. Nelson*, Justice Edwards voices his agreement with Justice Copeland in *J.S.* that judicial notice could be taken of "the public health emergency that we are all presently living under."[35] Justice Edwards endorses the view from *J.S.* that "the greatly elevated risk posed to detained inmates from the coronavirus" is a factor to be considered in assessing the tertiary ground.[36] But he then seems to step back from that general recognition, noting the prospect of floodgates: "I suspect that as this virus worsens, we may see many more applications for bail."[37]

Justice Edwards observes that although there is this general risk, there is no medical evidence from the accused that he suffers from "any medical condition that may render him more susceptible to the virus."[38] Justice Edwards departs from the reasoning in *J.S.* by requiring some evidence that an accused is individually vulnerable before COVID-19 can bear strongly upon the decision to detain.

Justice Edwards does take judicial notice of a significant amount of material as to who is vulnerable to the novel coronavirus. Citing "media and the internet", he observes that "younger persons are said to be much less likely to experience the virus in its most severe form. I also take judicial notice that there are some media reports that even younger persons may become ill with the virus. On balance, the information that is available to everyone would suggest older members of society are the ones most susceptible to the virus in its most serious form."[39] He observes that only an incarcerated person who is advancing in age and who has underlying health issues will be at greater risk, such that detention could affect confidence in the administration of justice under the tertiary ground.

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[35] *R. v. Nelson*, 2020 ONSC 1728 (Ont. S.C.J.), at para. 34.

[36] *Ibid* at para. 35.

[37] *Ibid*.

[38] *Ibid* at para. 9.

[39] *Ibid*.

Justice Edwards is clear that the "prevailing health crisis" requires the court to review the question of release due to the "heightened risk of contracting the virus."[40] He is also clear that all inmates fall within this category of heightened risk, given the realities of confinement. But *Nelson* departs from *J.S.* by requiring an applicant to show they are also at risk of "severe health issues or even death."[41]

Justice Edwards could have based his decision to detain on the strength of the other relevant factors in the case: the seriousness of the charges, prior criminal record, and the weakness of the proposed plan of release. It was open to him to simply say that these factors could not overcome concerns about the impact of the pandemic on correctional environments. For example, in *R. v. J.F.*, COVID-19 is considered as a factor in a secondary ground case. London-Weinstein J. accepts that the defendant was terrified of contracting the virus (though there is no evidence filed as to whether he was, as a leukemia survivor, at an increased risk). Rather than requiring better evidence of an individual vulnerability, London-Weinstein J. simply describes how other important factors mean that the accused did not meet his onus on the secondary ground.[42]

The issue is often presented as one about the sufficiency of evidence. *R. v. Budlakoti* acknowledges the difficulty of obtaining medical evidence to support claims of vulnerability to COVID-19, and also acknowledges the many unknowns of COVID-19.[43] In rejecting that celiac and gastroesophageal reflux disease are sufficiently risky underlying conditions, the court notes that the accused had filed only "internet information."[44] The court appears to simply require "more cogent evidence."[45] But it is clear that what is really missing is a sufficiently strong claim of individual vulnerability — or, as Laliberte J. puts it: "increased risk to the accused."[46] Other decisions accept evidence from an accused about an un-

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[40] *Ibid* at para. 40.

[41] *Ibid* at para. 41.

[42] *R. v. J.F.* (April 3, 2020), 2020 ONSC 2045 (Ont. S.C.J.).

[43] *R. v. Budlakoti*, [2020] O.J. No. 1352 (Ont. S.C.J.) at para. 14.

[44] *Ibid*.

[45] *Ibid*.

[46] *Ibid*.

derlying condition, but point to the need for additional evidence about how that condition translates into vulnerability to the virus.[47]

Several cases have opined that public health in the jails is solely the responsibility of correctional services.[48] Others have required inmates to point to outbreaks in specific institutions. In *R. v. Sappleton*, the court held that the accused did not present sufficient evidence as to the risk of infection because there were no cases in the institution and thus no evidence of the institution failing to manage the risk.[49] In *R. v. GTB*, the court noted that a "systemic failure to adequately care for and protect people in custody should not be assumed."[50] These courts appear to require the accused to show evidence of a current institutional outbreak for COVID-19 to be taken seriously, though other judges have pointed out the shortcomings of that approach.[51]

Unlike *J.S*, the *Nelson* approach acknowledges the general risk to inmates but requires them to point to how they are uniquely likely to become seriously ill or die of COVID-19. Requiring that kind of individual vulnerability might make sense in certain scenarios — such as secondary

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[47] In *R. v. Ellis*, [2020] O.J. No. 1636 (Ont. S.C.J.), at paras. 18 and 19, R.K. Levita J.P. accepts that the accused has asthma and suffers from pneumonia, but needs more evidence as to how this enhances vulnerability to COVID-19. This decision also seems to articulate a presumption that jails are taking all possible measures to respond to the pandemic: "I have heard no evidence that the facility is not doing everything they can to protect themselves and the inmates from the virus."

[48] *R. v. Alexander*, *supra*, note 11, at para. 7; *R. v. Phuntsok*, *supra*, note 26, at para. 48.

[49] *R. v. Sappleton*, 2020 ONSC 1871 (Ont. S.C.J.), at para. 22.

[50] *R. v. GTB*, 2020 ABQB 228 (Alta. Q.B.), at paras. 42–44.

[51] A major issue with this approach is simply that, at that point, it may be too late. As London-Weinstein J. states in *Cain*, "Given that matters at the jail may become rapidly worse, if present events occurring elsewhere are any indication, the time to determine whether Mr. Cain can be released and the public adequately protected, is now, before matters have worsened." (*Cain*, *supra*, note 24 at para. 9.) In *R. v. Duncan*, 2020 BCSC 590 (B.C. S.C.), Justice Kent points to an April 2020 outbreak at a B.C. institution in which 42 prisoners and six staff were infected, with seven hospitalizations. Justice Kent cites this outbreak as establishing that notwithstanding mitigating measures, outbreaks are still possible and can spread quickly. *Duncan*, at para. 41.

ground cases where the accused argues that fear of exposure to COVID-19 in custody makes them far less likely to reoffend.[52] In *R. v. CKT*, for example, the accused was charged with firearms offences and had a record for violence, weapons and breaching court orders.[53] He was detained on the secondary ground, with the court noting the need for evidence of "differential risk" in jail rather than the community, and "medical evidence of extra susceptibility."[54] Courts should be clear that such individualized evidence of differential risk is not required in all cases, and that several COVID-19 factors, apart from the question of individual risk, press in favor of release.

Bail Pending Appeal: Individual Vulnerability Plus?

In the context of applications for bail pending appeal, a number of appellate courts have stated a requirement that an applicant be particularly vulnerable to COVID-19 before this factor can support release.[55] Given the obvious difference from bail applications decided by trial courts — where the presumption of innocence is still in play — a more onerous approach might make sense.[56]

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[52] See e.g. *R. v. Hastings*, 2020 ONSC 2083, 2020 CarswellOnt 4679 (Ont. S.C.J.), holding that COVID-19 cannot operate as a deterrent where an accused is young and in good health and has no particular fear of contracting the virus. Also see *Cain*, *supra* note 24 at para. 17, a secondary ground factor is how fear of COVID-19 may have "salutary effect on Mr. Cain's willingness to follow court orders . . .". Also see *R. v. Brown*, 2020 ONSC 2626, 2020 CarswellOnt 6290 (Ont. S.C.J.), holding that there was no material change in a case of detention on the secondary ground, because the defendant had no "identified health concerns" — he was not a "fragile and vulnerable inmate." (para. 41). But also see *R v. DH*, *supra* note 11, which makes clear how difficult it will be to justify detention on *either* the secondary or tertiary ground when an accused does have serious health issues. The accused, facing sexual assault charges, had COPD, chronic and recurrent pneumonia, and HIV. Interim release was granted in the face of a past conviction for aggravated sexual assault and several failures to comply with conditions of statutory parole and probation orders.

[53] *R. v. CKT*, *supra*, note 11 at paras. 6-9.

[54] *Ibid* at paras. 25–29.

[55] See e.g. *R v. Shingoose*, 2020 SKCA 45 (Sask. C.A.); *R v. Bear*, 2020 SKCA 47 (Sask. C.A.); *R v. Ledesma*, 2020 ABCA 194 (Alta. C.A.).

[56] As noted by *Ledesma*, *ibid* at para. 24.

A number of Ontario appellate decisions have noted the absence of an underlying health condition, but without going so far as to state that the pandemic is irrelevant absent that individual feature.[57]

It is clear that the presence of serious health conditions will press in favor of release in the bail pending appeal context. In *R. v. Kazman*, decided on April 8 2020, the applicant was 64 years old with asthma and a heart condition. Harvison-Young J.A. concludes that the "particular circumstances of this case justify release" owing to the "well documented" health conditions that put the applicant in a "vulnerable group more likely to suffer complications and require hospitalization" from the virus.[58] Harvison Young J.A. emphasizes that bail will not be granted in every case where COVID-19 is raised, but she also does not say that it will only be a factor in cases where there was evidence that an appellant was in a vulnerable group. In another decision, Harvison Young J.A. refers with approval to the description of Justice Copeland in *J.S.*, describing the systemic impacts of the pandemic that press in the direction of interim release.[59]

But compare the recent decision in *R. v. Stone*, which seems to go even further than requiring an underlying health condition — it also seems to require that an applicant show a sort of *blameless* form of vulnerability.[60] The applicant was sentenced to six years' imprisonment for trafficking methamphetamine and sexual abuse of children. Juriansz J.A. identified little merit in the sentence appeal but proceeded to consider whether release should be granted based on the pandemic.

The defence filed evidence from epidemiologist Dr. Aaron Orkin outlining the risks for the spread of COVID-19 in congregate facilities and the far greater prevalence of the disease in Ontario correctional institutes versus the general population. Dr. Orkin opined that "every admission

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[57] See e.g. *R. v. Jesso*, 2020 ONCA 280 (Ont. C.A.); *R. v. Stojanovski* (2020), 2020 ONCA 285 (Ont. C.A.).

[58] *R v. Kazman*, 2020 ONCA 251 (Ont. C.A.), at paras. 16 and 21.

[59] *R. v. Omitiran*, 2020 ONCA 261 (Ont. C.A.) at para. 26, referring to paras. 18-19 of the decision of Copeland J. in *R. v. J.S.*, *supra*, note 10. In *R. v. S.A.*, 2020 ONSC 2946 at para. 63, Spies J. notes that "it is clear that Copeland J.'s remarks that were approved of by Harvison Young J.A. were not limited to those inmates who provided evidence that they were in a vulnerable group."

[60] *R. v. Stone*, 2020 ONCA 448 (Ont. C.A.).

prevented, and every resident discharged or released, is an opportunity to flatten the curve and improve health for the individual involved, other inmates in the facility in questions, staff at the facility in question, and the public."[61] Dr. Orkin also spoke to the likelihood of a second wave of outbreaks should mitigation measures be relaxed without reducing populations.
[62]

While Juriansz J.A. states that the pandemic is relevant, it is hard to square that recognition with his view that "primary responsibility" for the safety of federal inmates lies with the federal government and Corrections Canada and that it is "up to the prison authorities to take appropriate measures to ensure the health and safety of those who are incarcerated or work in the institution, as well as of the general public."[63] It is difficult to see how the pandemic is relevant if responsibility for it lay entirely elsewhere.

And while the applicant does allege that he is particularly vulnerable to COVID-19 due to diabetes, Juriansz J.A. seems to deny the relevance of that evidence by suggesting that he has contributed to his poor health:

> [18] . . . The applicant is diabetic and a former smoker and says he is especially vulnerable to the virus. He attributes his high sugar levels to being incarcerated. The Crown has introduced evidence that he has consistently been purchasing from the canteen a high number of

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[61] *Ibid* at para. 7.

[62] Dr. Aaron Orkin has provided similar expert evidence in a number of cases, and we note that some judges have been critical of aspects of his evidence. In *R. v. Paramsothy*, 2020 ONSC 2314 (Ont. S.C.J.), the court notes that Dr. Orkin was too speculative when he suggested that depopulation was the best method of reducing the risk in correctional settings, and held that the institutions themselves are in the "best position" to speak to the risks of infection in their facilities. In *R. v. Osman*, 2020 ONSC 2490 (Ont. S.C.J.), the court notes that Dr. Orkin did not visited the facility at issue, and that his opinion was not "grounded in experience" (para. 97). Both *Paramsothy* and *Osman* accept Dr. Orkin's evidence on the risks posed by the virus, but note that Dr. Orkin is not generally aware of the realities of jail administration. Compare *R. v. J.R.*, where the court found Dr. Orkin's credentials to be impressive and relied heavily on his evidence. (*supra* note 29, at paras. 28–31). Also see *Williams, supra* note 33, in which Dr. Orkin's evidence is relied upon extensively, at paras. 65–94.

[63] *Stone*, *supra*, note 60 at para. 19.

> products high in carbohydrates such as pop, cookies, swiss rolls, and Fudgee-O cookies. The evidence does not satisfy me the applicant's high sugar levels are attributable to his incarceration.

There is no further discussion of this material, so it is difficult to unpack exactly what the court draws from it (or why the Crown opted to file it). The court seems to accept that the applicant has diabetes — a disease in which the body either cannot produce insulin or cannot properly use insulin, which can result in difficulties regulating blood sugar levels. But the court also seems to suggest that his high blood sugar is the result of his diet. The suggestion, it seems, is that the applicant has contributed to poor management of his condition, and that this is somehow relevant to whether the risks he faces from COVID-19 should favor release.

Of course, inmates are not required to prove that health conditions are attributable to incarceration before those conditions might be relevant to either bail, sentencing, or release. And Canadians in the community are not required to prove their virtuous lifestyle before accessing healthcare. Add to this that many inmates are unable to access adequate nutrition while incarcerated, and the fact that prison canteens often sell *only* the junk food that it seems the applicant is blamed for consuming.[64]

Stone may have been rightly decided, but the discussion of his canteen habits was unnecessary. The applicant had previously breached recognizances by using drugs and accessing child pornography on the internet. He had little insight into his offences, a weak release plan, and he stood convicted of serious crimes against children for which he had received a long sentence. Given the strength of the factors that favored detention pending his sentence appeal, there was no need for the court to relegate responsibility for COVID-19 entirely to corrections, nor to minimize or assign blame to the applicant for his underlying health conditions. Courts

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[64] A federal audit in January 2019 identified inadequate nutrition and other problems associated with food delivery in federal prisons: Correctional Service Canada, *Audit of Food Services*, January 14, 2019. In response, Correctional Investigator Ivan Zinger wrote to CSC Commissioner Anne Kelly to raise concerns about both the scope of the audit and the persistent problems with prison food quality, warning of health and security concerns associated with small portions and bad food. "Food has gradually become another highly valued and dangerous commodity in the parallel or underground inmate economies. Muscling, bullying and extortion for food is a common and pervasive problem, especially at higher security institutions."

can simply state that the pandemic, while particularly relevant in the case of a serious underlying health condition, is not determinative of a decision to detain.

Sentencing: COVID-19 Relevant to Fitness

Sentencing cases have followed the *J.S.* approach by holding that it is not necessary for a defendant who has been impacted by pandemic management measures to also provide medical evidence that demonstrates they are at higher risk for contracting COVID-19 or suffering serious consequences.[65]

In one case, a court opted to impose a conditional sentence in a case that would have attracted jail time absent the pandemic.[66] The defendant was not required to file evidence of outbreaks in provincial reformatories, nor evidence of the defendant's overall health or risk of infection. Where a defendant sentenced to custody during COVID-19 does have significant underlying health vulnerabilities, that is a "significant consideration" in sentencing and justifies a sentence at the very low end or below the range.[67]

Several features of an April 17, 2020 sentencing decision stand out and provide guidance for sentencing generally and the pandemic-related bail debates. *R. v. Hearns* involved a serious offence of aggravated assault. The accused, having consumed crystal methamphetamine, struck the victim in the head with a bat, fracturing her skull and lacerating her scalp. She required surgery and remained unconscious for several weeks. He had a substantial criminal record, including property offences, assaults and uttering threats, with many offences related to drug use. While the gravity of the crime and the defendant's record called for a "substantial term of incarceration", the joint submission of time served plus probation was deemed appropriate largely due to the "current social and medical context."[68] Justice Pomerance imposed a sentence of one day in custody

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[65] *R. v. Dakin*, 2020 ONCJ 202 (Ont. C.J.) at para. 32.

[66] *R. v. D.D.*, 2020 ONCJ 218 (Ont. C.J.).

[67] *R. v. Bell*, 2020 ONSC 2632 (Ont. S.C.J.) at paras. 43–49: health risks are a relevant collateral consequence, properly considered as part of the "personal circumstances of the offender."

[68] *R. v. Hearns*, *supra* note 9, at para. 9.

to be followed by three years' probation. The defendant had spent 667 "real" days in jail, which she credited at 1.5:1 or 1,001 days.

First, Pomerance J. took judicial notice of the pandemic and particularly how the risk of infection is affected by standard and necessary features of carceral living such as being forced into "cramped quarters, shared sleeping and dining facilities, [and] lack of hygiene products" which "as a matter of logic and common sense" make the risk of contracting COVID-19 higher in jail.[69]

Pomerance J. clearly rejects the notion that defendants must be particularly vulnerable. There was "no suggestion" that the defendant had "any enhanced vulnerability flowing from age or underlying medical conditions."[70] She notes reports of "otherwise healthy individuals" succumbing to severe illness and, in some cases, death: "We must assume that no one is immune from the disease or the full range of potential consequences."[71] She specifies that she is taking judicial notice of the following points, none of which arise from the individual circumstances of the defendant: "we are experiencing a worldwide pandemic; that control of the pandemic requires that individuals practice social distancing; that social distancing is very difficult to maintain in custodial settings; that inmates are consequently at a greater risk of infection; and that the risk of COVID-19 in prison settings translates into an increased risk for the community at large."[72]

There is a sense in which the defendant's individual experience bears upon the analysis, but it is not simply the issue of whether they will become seriously ill. A final section of the *Hearns* judgment connects the pandemic and its impact on correctional facilities to established sentencing principles that recognize hardship in the serving of a custodial sentence.[73] Pomerance J. reasons that the question of fitness looks not only

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[69] *Ibid* at para. 11.

[70] *Ibid* at para. 12.

[71] *Ibid* at para. 1.

[72] *Ibid* at para. 14.

[73] See also, *R. v. Kandhai*, 2020 ONSC 1611 (Ont. S.C.J.) at para. 7: "Hardship in serving a jail sentence has always been a proper consideration in crafting an appropriate sentence . . . The entire country is being told to avoid congregations of people. A jail is exactly that, a state mandated congregation of people, excluded from the rest of the population by reason of their crimes or alleged

at the length of a sentence but the conditions under which it is served. As a result of the current health crisis, she reasons: "jails have become harsher environments, either because of the risk of infection, or, because of restrictive lockdown conditions aimed at preventing infection. Punishment is increased, not only by the physical risk of contracting the virus, but by the psychological effects of being in a high-risk environment with little ability to control exposure."

These concerns about the likely effects and consequences of a sentence of imprisonment are well-supported in the jurisprudence. Drawing from extensive Supreme Court of Canada jurisprudence, Pomerance J. notes her authority to sentence outside a particular common law range and to allow extraneous circumstances and collateral consequences to impact the analysis of a fit sentence.[74]

Like Justice Copeland in *J.S.*, Justice Pomerance is clear that there is no requirement to find fault on the part of correctional authorities:

> No one is to blame for the pandemic. I accept that those in charge of jails are doing their best to control the spread of infection. Nor does the issue fall neatly into the category of collateral consequences. There is nothing collateral about the conditions of imprisonment — they are as direct a consequence as one can imagine. Yet, the impact of the pandemic is a matter that is extraneous to the pillars of proportionality — the gravity of the offence and the moral blameworthiness of the offender.[75]

She is careful to note that the impact of the pandemic is not attributable to the "characteristics of the offender, though in some cases there may be

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crimes. The situation, which has led to drastic measures in society at large, is bound to increase day to day hardship in prison and the general risk to the welfare of prison inmates."

[74] As *R. v. Lacasse*, 2015 SCC 64, 24 C.R. (7th) 225 (S.C.C.) observes: "everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case." *R. v. Nasagaluak*, 2010 SCC 6, 72 C.R. (6th) 1 (S.C.C.) confirms that the court can use "extraneous circumstances" to reduce a sentence, including state misconduct that may fall short of a *Charter* violation. Finally, *R. v. Suter*, 2018 SCC 34, 47 C.R. (7th) 1 (S.C.C.) makes clear that a collateral consequence can include any consequence that impacts the offender arising from the sentence, with no requirement that it emanate from state misconduct.

[75] *Hearns*, *supra*, note 9 at para. 20.

heightened vulnerability." The impact is attributable to the "social conditions of the time." COVID-19 is not a mitigating factor in the classic sense. However, it adversely affects conditions of imprisonment, and increases health risks for those in jail. On that basis, it is an "important part of the sentencing equation."[76]

Justice Pomerance is careful to note that there will be cases where release from custody is not a viable option, and that the pandemic cannot justify a sentence that is "disproportionately lenient, or drastically outside of the sentencing range."[77] But where a period of incarceration has served to address sentencing principles, however imperfectly, release may be called for. The *Hearns* approach has been taken in many subsequent decisions.[78]

Conclusion

While individual vulnerability is a tempting device to try to resolve the extraordinary concerns of this moment, it is a device that may lend false comfort. The management of COVID-19 in prisons and jails affects every aspect of daily routines and conditions, regardless of whether a particular institution has seen an outbreak or whether a particular individual becomes sick from the virus.

Canadian jails and prisons have been able to limit the spread of COVID-19 by cancelling visits and programs and by locking inmates in cells for much of the day and night. Conditions of confinement are extremely difficult and there is no end in sight. In addition, there is a growing body of evidence on the long-term serious effects of COVID-19 on people who had no underlying health conditions. Add to this that the healthcare needs of detained people were profound and often unmet before the pandemic, and the risks and deprivations of pretrial custody already unacceptable in jurisdictions like Ontario. A test of individual vulnerability to COVID-19 is a woefully inadequate response to the challenges and unknowns brought by the pandemic.

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[76] *Ibid* at para. 20.

[77] *Ibid* at para. 23.

[78] *Bell*, *supra* note 67 at para. 48.; *R. v. Abdella*, 2020 ONCJ 245 (Ont. C.J.), at para. 108.; *R. v. Dakin*, *supra* note 65 at para. 32.; *R. v. D.D.*, *supra* note 66 at paras. 53–57.; *R. v. O.K.*, 2020 ONCJ 189 (Ont. C.J.), at para. 41.

Justice Pomerance's approach in the sentencing context reflects what we now know to be true in the community: while the worst effects of the pandemic are being felt along standard fault lines of social and economic disadvantage, there are also universal transformations in how we are all living, the risks we all face, and the ways that our own actions can imperil others. The *Hearns* approach underscores how *every* decision to detain may impact the course of this pandemic in our prisons and jails — a perspective that Justice Stribopoulos and others in the bail review context have also taken.[79]

The claim here is not that COVID-19 should be determinative in either a bail decision or sentencing. Other factors may properly overwhelm or weigh against it, particularly in cases that rely on the secondary ground of public safety to deny release. It may be appropriate to look for heightened vulnerability in a case where an accused is arguing that they are less likely to reoffend given their heightened fear of incarceration. But as Justice Schreck observes in *R. v. J.R.*, detention on the tertiary ground alone will "rarely be justified" during the pandemic.[80] And in cases where interim release is properly denied, judges need not opine that the management of COVID-19 is entirely the business of the correctional apparatus apparatus or that the topic only matters if a detainee is headed to an institution with an active outbreak.

Finally, recall what Abrams and Abbott observe about public discourse during the pandemic. There has been a great deal of focus on underlying and pre-existing conditions, which they read partly as a desire to locate risk "elsewhere."[81] Abrams and Abbott point to how this "ableist discourse of preexisting conditions" obscures the flourishing lives of disabled persons and devalues the care that goes into sustaining *all life*.[82]

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[79] *Williams*, *supra* note 33 at para. 87: "unnecessary admissions to correctional facilities are a health hazard for *everyone* in the context of the COVID-19 pandemic."

[80] *R. v. J.R.*, *supra*, note 29 at para. 47. See also *R. v. J.S.*, *supra*, note 10; *R. v. T.K.*, *supra*, note 12; *R. v. Cain*, *supra*, note 24; *R. v. Rajan*, *supra*, note 16; *R. v. C.J.*, *supra*, note 21.

[81] *Supra*, note 5.

[82] Discussions of vulnerability also fed into worries about a potential scarcity of ventilators early in the pandemic. As Abrams and Abbott write, not only did disabled people have "a lot to fear from catching the virus" — they also faced

There might be a similar urge to locate risk "elsewhere" in the pandemic bail cases. Cases that require individual vulnerability attempt to provide a sigh of relief: that only those who are *already* sick or vulnerable face an unacceptable level of risk to COVID-19 in our institutions of detention and punishment. The implication is that — outside of this extraordinary pandemic moment which will hopefully soon pass — the lived realities inside of our institutions of detention and punishment are acceptable and fair. But rather than using COVID-19 to condone the problematic system we already had, we might use it to press in the direction of greater sensitivity to the many non-pandemic issues that bear upon all life in our institutions of detention and punishment.

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the "possible denial of the full range of medical treatments" in the event of rationing. *Ibid* at 169. They write: "In this paper, and in our personal and professional lives, we find a heartbreaking trend, whereby those who have long required ventilators to live are seen as a misallocation of resources, taking up machines best put to use elsewhere." (170) The question of equitable access to medical treatment, particularly during times of crisis, is a potent one in the prison context as well.