MENTAL HEALTH LAW IN IRELAND

Where we have come from and may be heading to

1. **Fact, Fiction & Principle**

"Do I have schizophrenia? My mother and father and the dreaded psychiatrist definitely believe I am schizophrenic. They have grounds for their belief, such as my being found naked and talking to trees in woods. Yet I think I just see the world differently from other people, and maybe if psychiatrists understood this, I would not have been in the hospital. When people hear about a psychotic episode, they probably relate the word "psycho" to someone with violent tendencies. I would not describe myself as violent. I have really felt the strain of being in hospital. Being locked up for so long really damages your spirits. You feel forgotten."

- **Per Henry Cockburn ('Henry's Demons' Living with Schizophrenia, A Father and Son's Story, p.43 by Patrick & Henry Cockburn)**

"A Mental hospital is not a prison or even a police cell, but at night, when you look at the wall, they seem the same. You want to feel the night air against your lips and the streets beneath your feet. You want to run away, but you can't really escape, so you grit your teeth and consume a lot of tobacco and coffee and try to find your fellow patients interesting. But the tobacco only lasts so long and you can drink only so much coffee"

- **Per Henry Cockburn ('Henry's Demons' Living with Schizophrenia, A Father and Son's Story, p.128, by Patrick & Henry Cockburn)**

"**Compliance with a Mandatory Statutory Provision**

38....

39...

40. Viewed from that perspective, I find it hard to characterize that which has been prescribed by the Oireachtas - and, as we have noted, recently re-affirmed in 2010 - as trivial or peripheral or insubstantial. The Oireachtas clearly sought to add a further layer of protection for the benefit of an accused person found unfit to plead and to adapt my own language in *EC v. Clinical Director of the Central Mental Hospital* [2012] IEHC 214, these statutory requirements cannot be regarded as mere surplusage. Rather, they have been deemed by the Oireachtas to represent core protections for vulnerable persons. If the scope of these protections is thought to be otiose, burdensome or unnecessary, I fear that the respondents have addressed their arguments to the wrong forum.

41. Of course, I completely agree that *on the facts of this particular case* compliance with these requirements is most unlikely to have altered the actual result. But this does not mean that compliance with the requirements of the statute is not important or that in the context of an Article 40.4.2 application this Court can gloss over such non-compliance on discretionary grounds. Unlike the established discretion of the High Court and Supreme Court to withhold relief in judicial review proceedings in appropriate circumstances on established grounds- such that the granting of relief would serve no useful purpose- Article 40.4.2 is not a discretionary remedy, since as the language of Article 40.4.2 itself makes clear, the Court must order the release of the applicant unless it is established that he or she is in lawful custody.

- **Per Judge Hogan, *FX v. Clinical Director of the Central Mental Hospital & The DPP* (Notice Party) [2013] 1 ILRM 355**

"'*You know, Roseanne,' he said, 'as I have been obliged recently to look at the legal position of all our inmates, as this has been so much in the public discourse, I was looking back over your admittance papers, and I must confess-'*

He said all this in the most easy-going voice imaginable.

'Confess?' I said, prompting him. I knew his mind had a habit of drifting off silently into a private thought.

'Oh, yes – excuse me. Hmm, yes, I was wanting to ask you, Roseanne, if you remember by any chance the particulars of your admittance here, which would be most helpful – if you did. I will tell you why in a minute – if I have to.'"

(Conversation between patient Roseanne McNulty and her treating psychiatrist Dr. Grene, *The* Secret Scripture, Sebastian Barry)

2. <u>Still Forgotten?</u>

It clearly cannot be contended that things are as bad they were. The belated commencement of the Mental Health Act 2001 (as amended) ("the 2001 Act") improved the plight of those said to be suffering from mental disorder. In ***TO'D v Harry Kennedy*** **[2007] 3 IR 689** Judge Charleton stated in this context:

"*15 These provisions are exacting and complex. They were designed, however, by the Oireachtas in order to replace the situation whereby it was potentially possible for a person to be certified and detained in a mental hospital and then forgotten. The need for periodic review and renewal, and the independent examination of these conditions is not a mere bureaucratic layer grafted on to the previous law for the treatment of those who are seriously ill and a danger to themselves and others: it is an essential component of the duty of society to maintain the balance between the protection of its interests and the rights of those who are apparently mentally ill.*"

However as the facts behind the case of ***AL v St Patricks Hospital & the Mental Health Commission*** **[2010] IEHC 62** reveal, persons admitted under the Act, with all the available safeguards, can be still be forgotten about. In this case, though formally admitted pursuant to S.14 of the 2001 Act, the Plaintiff was not provided with an independent medical assessment, a legal representative or a mental health tribunal.

Moreover litigation before the Courts and decisions of mental health tribunals support the proposition that important statutory players involved in the process of involuntary detention have not applied the safeguards or discharged properly or at all their statutory functions. ***SO v Clinical Director of The Adelaide & Meath Hospital of Tallaght*** **(Unreported Hogan J., 25/3/13)** where a GP signed a recommendation for the involuntary admission of the Applicant without carrying out a prior examination is a recent example from the High Court but there have been numerous instances of mental health tribunals revoking orders because of failures to comply with the relevant provisions. But who knows of these tribunal decisions?

3. The need for consistency

We have come from an era where there was no consistency because there was simply no system of independent review at all, to a system where it is impossible to say there is consistency in tribunal decision-making because, as far as I can ascertain, there is no database available to legal representatives appointed under the Act to represent the interest of detainees before mental health tribunals, maintained by the Mental Health Commission or elsewhere to which such legal representatives can have ready access.

In **Atanasov & Ors v The Refugee Tribunal & Ors [2005] IEHC 237, [2007] 4 IR 94 (Supreme Court)** both the High and Supreme Courts found a breach of fair procedures in the unavailability of relevant tribunal decisions. *Inter alia* it is stated in the Supreme Court Judgment, *per* Geoghegan J.:

"*The second point of significance of the new subsection is something which I have already touched upon. Both of the paragraphs in the new subsection clearly imply an assumption on the part of the Oireachtas that it would be normal practice to publish decisions. Putting it another way, it would have been assumed, in my view, that fair procedures would have required access to and reference to previous decisions in an appropriate case in the interests of consistency in the treatment and application of the law. But the jurisprudential basis for the obligation to provide such reasonable access is not the new subsection but the general constitutional requirement of fair procedures. As I have already indicated, despite some ambiguity in the judgment, nevertheless that is the basis on which the learned judge decided the case. If that were not so, the judge would have had to dismiss the Atanasov case as being a pre-2003 Act case. He did not do that for the reasons he set forth in the judgment*."

The ultimate Declaration issuing from the Supreme Court was in the following terms:

"*The court doth declare that the refusal of the named respondent to make available to the applicant relevant tribunal decisions as requested by the applicant is an unlawful exercise of the discretion afforded it under the 2003 Act as well as being in breach of the applicant's rights to fair procedures and natural and constitutional justice under Article 40.3 of the Constitution."*

Also of note is **S.33 of the 2001 Act**, the first two sub-sections of which read:

"Functions of Commission

33(1) The principal functions of the Commission shall be to promote, encourage and foster the establishment and maintenance of high standards and good practises in the delivery of mental health services and to take all reasonable steps to protect the interests of persons detained in approved centres under the Act

(2) The Commission shall undertake or arrange to have undertaken such activities as it deems appropriate to foster and promote the standards and practices referred to in *sub-section (1)*

It is in my view arguable that these provisions support the view that the Mental Health Commission should maintain and make available such a database.

4. **<u>Paternalism</u>**

From the distant past through to more recent times we have moved through different views of paternalism/purposive interpretations of legislation and "best interests". Following the passing of the 2001 Act, strong judicial dicta such as the following were delivered:

"*It must be remembered here that what is at stake is the liberty of the individual and while it is true that no constitutional right is absolute, and a person may be deprived of his/her liberty "in accordance with law", such statutory provisions which attempt to detain a person or restrict his/her liberty must be narrowly construed*"

Per Mr. Justice McMahon, SM v The Mental Health Commissioner & Ors (Unreported McMahon J., 31/10/08)

"In my view the applicant was entitled to think that his detention was authorised until the 18th February 2007, and that it would expire on that date if by then it was not further renewed. That is what the endorsement says. I do not accept that this meaning is precluded by the fact that the previous order made was to expire on the 24th August 2006. No purposive statutory interpretation can alter what is stated in the endorsement. The only way in which this Court could hold that the renewal order

made on the 18th August 2006 endured until the 24th February 2007 would be to decide that it does not matter what is stated on the form of endorsement, and that the only matter to be considered is the over-riding interest of ensuring that the applicant is detained in his own and others' best interests. Such a manner of approaching the meaning of orders depriving a person of his or her liberty could not in my view be correct, as it would nullify the very purpose of inserting safeguards in the statutory procedures put in place. In matters involving the deprivation of liberty, and I place persons such as the applicant who are ill in no lesser a position than other persons whose liberty is in other circumstances curtailed or removed, the greatest care must be taken to ensure that procedures are properly followed, and it ill-serves those whose liberty is involved to say that the formalities laid down by statute do not matter and need not be scrupulously observed. That is not to say that where the meaning of a statutory provision is unclear or open to different interpretations the meaning which is consistent with a purposive interpretation of the legislature's intention is not the one which should be adopted. That is a different question altogether.

Occasionally mistakes will be made by busy personnel, and no matter how well intentioned those personnel may be, and no matter how conscientious they are in looking after and considering only the best interests of the patient, and I of course include all the personnel concerned in the present case in that category, mistakes have legal consequences, and cannot simply be erased for the sake of convenience."

Per Peart J. in AM v Kennedy [2007] 4 IR 667

"In my opinion the best interests of a person suffering from a mental disorder are secured by a faithful observance of and compliance with the statutory safeguards put into the 2001 Act, by the Oireachtas. That together with the restriction in s.18(1)(a)(ii) mean that only those failures of compliance which are of an insubstantial nature and do not cause injustice can be excused by a Mental Health

Tribunal. Therefore it necessarily follows that there must be in existence either an Admission Order or Renewal Order, where appropriate, which in substance is valid. An order which contains a flaw which undermines, or disregards the statutory basis for lawful detention as provided for in this Act, could not be excused under s. 18. Therefore the absence of the necessary valid preceding order or the making of an order by the wrong person are in my opinion defects which take the purported order outside or beyond the statutory scheme provided and cannot be cured under s. 18. It is clear that what was envisaged by the Oireachtas, was that a Mental Health Tribunal would have the power to excuse minor errors of an insubstantial nature, but no more."

***Per* O'Neill J., *WQ v Mental Health Commission* [2007] 3 IR 755**

Such dicta are still good law.

A somewhat more paternalistic tone was struck in ***EH v Clinical Director of St. Vincents Hospital* [2009] 3 IR 771** by the Supreme Court.

Commenting on this case when delivering judgment in ***MX (APUM) v HSE & Ors* [2013] 1 ILRM 322**, Mr. Justice MacMenamin stated *inter alia* as follows:

"55. Hitherto, arising from the facts in each case, decisions of the superior courts in this area have tended to lay emphasis on a paternalistic intent of legislation concerning persons with incapacity. This approach, very much in line with long-established decided authority, was most recently reiterated by the Supreme Court in EH v Clinical Director of St Vincent's Hospital [2009] 3 I.R. 774; [2009] 2 I.L.R.M. 149.

56. By way of illustration of the approach, in Gooden v St Otteran's Hospital [2005] 3 I.R. 617, McGuinness J. pointed out, at p.633, that:

"In Re Philip Clarke [1950] I.R. 235 the former Supreme Court considered the constitutionality of s. 165 of the Act of 1945. O'Byrne J. who delivered the judgment of the court described the general aim of the Act of 1945 at pp. 247–248 thus:- 'The impugned legislation is of a paternal character clearly intended for the care and custody of persons suspected to be suffering from mental infirmity and for the safety and wellbeing of the public generally. The existence of mental infirmity is too widespread to be overlooked and was, no doubt, present to the minds of the draftsmen/draughtsmen when it was proclaimed in Article 40.1 of the Constitution that though all citizens as human persons are to be held equal before the law, the

State, may, nevertheless in its enactments, have due regard to differences of capacity, physical and moral, and of social function. We do not see how the common good would be promoted or the dignity and freedom of the individual assured by allowing persons, alleged to be suffering from such infirmity to remain at large to the possible danger of themselves and others *.'" (emphasis added)*

57. In EH, Kearns J., speaking on behalf of the Supreme Court, observed that the same principle should be adopted in interpreting the provisions of the Mental Health Act 2001, again, in issues concerning personal liberty. He stated:

"I do not see why any different approach should be adopted in relation to the Mental Health Act 2001, nor, having regard to the Convention, do I believe that any different approach is mandated or required by Article 5 of the European Convention on Human Rights 1950."

58. However, it is noteworthy that these observations, very understandably on the facts, deal with the interpretation and application of the statutes predominantly in the context of the right to liberty and the right to fair trial. The position here is distinct. The case before this court does not concern the right to liberty or fair trial, but rather, the plaintiff's entitlements while *being treated in involuntary care.*

59. I do not think there is anything inconsistent with the avowedly paternalistic nature of the legislation or that jurisprudence, insofar as they concern liberty, in also ensuring that the wishes and choices of a person suffering from a disability, while under such care, should be guaranteed in a manner which, "as far as practicable" (to use the phrase adopted in art.40.3.1° of the Constitution), vindicates his or her personal capacity rights. The interpretation of the Constitution in this area of the law should be informed by, and have regard to international conventions. This principle of interpretation, of course, applies a fortiori *in relation to the regard which, as a matter of law, must be had to decisions of the European Court of Human Rights (see ss.2–5 of the European Convention on Human Rights Act 2003).*

60. That the Constitution is a living instrument which adapts to protect rights that develop over time cannot be controverted. In State (Healy) v Donoghue [1976] I.R. 325, O'Higgins C.J. observed of the values espoused in the preamble to the Constitution that:

"The judges must therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts…"

61. Should this court then have reference to the UNCRPD if not as a rule, then at least as a guiding principle? The values in question here are in no sense contrary to any provision of the Constitution. The UN Convention affirms the contemporary existence of fundamental rights for persons with a mental disorder. Although the UN Convention itself is not part of our law, it can form a helpful reference point for the identification of "prevailing ideas and concepts", which are to be assessed in

harmony with the constitutional requirements of what is "practicable" in mind. A court will, of course, (subject to the qualification pronounced in McD v L [2010] 2 I.R. 199; [2010] 1 I.L.R.M. 461) also "have regard" to the jurisprudence of the European Court of Human Rights to which Ireland also adheres on the basis of an international convention. As well as the UNCRPD itself, are there also relevant principles, ideas and concepts identified in Strasbourg case law? By virtue of ss.2–5 of the European Convention on Human Rights Act 2003, this court is required to interpret laws of this State in compliance with the State's obligation under the ECHR provisions. Judicial notice is to be taken of decisions of the ECHR and the principles contained therein. This allows a court in an appropriate case to consider whether those principles may inform present day interpretation of "prevailing ideas and concepts" provided such principles accord with the Constitution."

This need expressed by the Judge to consider paternalism in the context of international human rights conventions and agreements, most notably the European Convention on Human Rights and The United Nations Convention on the Rights of Persons with Disabilities, resonates with modern academic thinking in the area. In this regard in a recent blog on the *Assisted Decision-Making (Capacity) Bill 2013* Darius Whelan states:

"There is no explicit reference to "best interests" and this is a major advance on the 2008 Heads of the Bill. The "best interests" principle has been interpreted in such a paternalistic manner by the Irish courts that it would have been unworkable in the Capacity Bill. What's more, it's out of step with modern thinking on the Convention on the Rights of Persons with Disabilities(CRPD). "

I believe it correct to say that a view that invoking paternalism could resist all claims as to illegality emboldened Respondents, parties such as hospitals/approved centres and their staff, to resist very good causes of actions commenced by aggrieved patients. Such resistance however has not met with success on every occasion. The aforementioned S.O decision is one such case where Mr. O was successful in his Article 40 application for release from unlawful detention. This is a particularly important decision because of the fact that Judge Hogan found the failure in the case by the GP to comply with the provisions of S.10 of the 2001 Act and carry out an examination of the proposed detainee, rendered the subsequent S.14 admission order invalid and hence the detention unlawful. The failure had a knock-on effect.

Indeed there is some similarity in the thinking expressed in *SO* and that expressed by the English Court of Appeal in ***TTM v London Borough of Hackney & Ors*** **[2011] EWCA Civ 4.** In this decision *inter alia* the Court fully endorsed the following dictum of Sir Thomas Bingham delivered in *Re S-C* [1996] QB 599 (at.p612):

> *"The judge goes straight from a finding that the hospital managers were entitled to act upon an apparently valid application to the conclusion that the applicant's detention was therefore not unlawful. That is, in my judgment, a non sequitur. It is perfectly possible that the hospital managers were entitled to act on an apparently valid application, but that*

the detention was in fact unlawful. If that were not so the implications would, in my judgment, be horrifying. It would mean that an application which appeared to be in order would render the detention of a citizen lawful even though it was shown or admitted that the approved social worker purporting to make the application was not an approved social worker, that the registered medical practitioners whose recommendations founded the application were not registered medical practitioners or had not signed the recommendations, and that the approved social worker had not consulted the patient's nearest relative or had consulted the patient's nearest relative and that relative had objected. In other words, it would mean that the detention was lawful even though every statutory safeguard built into the procedure was shown to have been ignored or violated."

Commenting in TTM on the reasoning of Sir Thomas Bingham expressed in *Re SC*, Lord Toulson delivering judgment stated:

"The reasoning of Sir Thomas Bingham is, I think, clear and entirely consistent with the common law of false imprisonment. As I have said, lawfulness or unlawfulness is an attribute of the conduct which caused the loss of liberty. The tenor of Sir Thomas Bingham's judgment is that S-C's detention was unlawful, notwithstanding that the hospital had lawful authority to detain him, in as much as it was the direct consequence of an unlawful application by the AMHP, and the fact that the hospital managers, for their part, acted lawfully did not cure that underlying unlawfulness." (para.56)

It is hard in my view to reconcile such compelling common law truths and expression of principle with what our superior courts had to say in ***RL v Clinical director of St. Brendans & Ors*** **[2008] 3 IR 296 (H.Ct), (Ex temp Supreme Court, 15/2/08)**. TTM was decided *post* RL litigation and it may well be time to revisit the issues arising in RL.

In the recent decision in ***AM v Harry Kennedy*** **[2013] IEHC 55**, Judge Iseult O'Malley had the following to say in arriving at her conclusions in the case regarding how doctors and the Mental Health Commission go about their work under the 2001 Act and their duties and responsibilities:

"*27. The broader argument made by these respondents can be summarised as being a contention that a deliberate action, carried out on the basis of a bona fide but mistaken view of the law, cannot be described as having been done "without reasonable care" and is therefore immune for the purposes of s. 73.*

28. This seems to me to be a radical proposition indeed, and one not based on authority. If it is a correct interpretation of the section, it would confer on persons and bodies working in the field of mental health an immunity beyond any enjoyed

by other agents of the state. A statutory immunity for deliberate (albeit bona fide) acts would also, in my view, go far beyond the accepted, legitimate objective of the provision as endorsed by the Supreme Court in Blehein- to protect such persons from vexatious or groundless claims by those whose perceptions of their treatment may be affected by mental illness. It must be remembered that what we are dealing with in this case is an already-established breach of the constitutional right not to be deprived of liberty other than in accordance with law. If the section had to be interpreted to deprive a plaintiff of access to the courts in those circumstances, any constitutional vulnerability would be increased, having regard to the decision in Blehein and the consistent jurisprudence of the Supreme Court from the decisions in Macauley v Minister for Posts and Telegraphs [1966] I.R. 345, Byrne v Ireland [1972] I.R. 241 and Meskell v CIE [1973] I.R. 121 onwards. Furthermore, I might observe that in general it would be a strange thing if a claim in negligence could be defeated by *a plea that the allegedly negligent act was in fact committed deliberately.*

29. However, as the respondents have pointed out, the validity of the section has not been put in issue in these proceedings and it enjoys the presumption of constitutionality. I believe, moreover, that it is indeed possible to interpret it in a manner that respects the statutory intent while not depriving the person whose constitutional rights have been breached of the right to seek a remedy.

30. Having regard to the fact that this is an application for leave I think that the proper starting point is this - is it arguable that these defendants were under a duty of care when notifying the Comission of the expiry date of the applicant's detention? In the light of the established duty to use care in ensuring that correct procedures are followed in depriving a patient of his or her liberty, I think the answer must be yes. Secondly, where an act which has the consequence of violating a person's constitutional rights was carried out because of a mistaken view of the applicable law, is it arguable that it was carried out without reasonable care as to the law and the legal procedures justifying the plaintiffs detention? Again, I believe that it is. In this case, I consider that there is a sufficient factual basis to ground this argument in the errors attending the forwarding of the three Form 24s to the Commission. The respondents have not established, in relation to either of these issues, that there is no reasonable basis for the applicant's claim.

31. It is not necessary to go further than that for the purposes of this application.

32. The other matters urged on behalf of these defendants, including the strong evidence that the applicant was ill and in need of treatment at the time, seem to me to go to the question of damages rather than liability.

33. In relation to the de minimis argument, I am not satisfied that the evidence in this case is sufficiently strong from the defendants' point of view to be a factor at the leave stage.

34. The next issue is the claim against the Commission. It seems to me that it would not be appropriate to determine at this stage that there is no reasonable basis for saying that the Commission had an obligation to make inquiries in relation to the

expiry date of the applicant's detention. It is true that the statutory obligation to provide the information rested with the clinical director but it is least arguable that the fact that three separate forms were sent in respect of the applicant, all of which gave different dates and the first two of which were clearly wrong on their face, should have put the Commission on inquiry. The assertion that "it was not the practice" to seek a copy of the detention order does not suffice to ground a conclusion that it was never in any circumstances obliged to do so. ***There is an arguable case that the Commission has a duty of care in relation to ensuring that persons are not held in unlawful custody. This in turn could arguably extend to ensuring that it has the correct information before setting in train the tribunal process.*** *If it had decided to ask for the detention order in this case matters might have become clear at an earlier stage.*

35. I am also of the view that the proposition advanced by counsel for the Commission, that it has no responsibility for the actions of tribunals because it simply sets up and facilitates them, is not so obviously correct as to preclude a finding of liability at a full hearing. Under the scheme established by the Act, the Commission is responsible for the appointment of tribunal members in general and for the convening of tribunals in individual cases. It is at least arguable that it must bear some responsibility for the result, rather than leaving the individual members of the tribunals as the only potential defendants if errors are made. These are matters which require full exploration -the finding at this stage is simply that the Commission has not discharged the burden of establishing that there are no reasonable grounds upon which such a case can be made." (Bold emphasis added)

5. <u>Treatment</u>

In ***JH v Russell*** **[2007] 4 IR 242** Mr. Justice Clarke stated the following in relation to litigation that might be contemplated by patients regarding the adequacy of their treatment:

"*7.4 I am prepared to accept, for the purposes of argument in this case, that the conditions in which a person may be detained as a mental health patient might, in theory, fall so far short of acceptable conditions so as to render unlawful a detention which might otherwise be regarded as lawful. I am also prepared to accept, for the purposes of argument in this case, that amongst the relevant conditions that might, theoretically, render such detention unlawful would be the treatment (or perhaps more accurately the lack thereof) being afforded to the person concerned in all the circumstances of the case.*

7.5 However by a parity of reasoning with the jurisprudence of the courts in respect of persons who are detained within the criminal justice process, it does not seem to me that anything other than a complete failure to provide appropriate conditions or appropriate treatment could render what would otherwise be a lawful detention, unlawful. See for example State (Richardson) v. Governor of Mountjoy Prison *[1980]*

ILRM 82 . *That is not to say that a person may not have a remedy in circumstances falling short of such complete failure. If there is a legal basis for suggesting that the conditions in which a person is detained or the treatment being afforded to a person so detained are less than the law requires, then an appropriate form of proceeding (whether plenary or judicial review) may be used as a means for enforcing whatever legal entitlements may be established."*

That our Superior Courts and our legislature remain live to difficulties surrounding treatment, treatment options and involving patients in decision-making processes s made clear by the aforementioned *MX* and by the passing of the Assisted Decision-Making (Capacity) Bill 2013.

A judgment which highlights the complexity of the issues involved in the treatment context and how same may be susceptible to further challenge is the case of **DPP v B, 2011 [IECCC] 1.** On the 4th of July 2011, Mr. Justice Garret Sheehan took the somewhat unusual step of delivering a formal written judgment in the Central Criminal Court in the context of disposing of an "insanity" case which had proceeded before him. This unprecedented judgment dealt largely with the Judge's "*grave concerns about the adequacy of the treatment the defendant had received during the two and a half year period*" the accused had been in the Central Mental Hospital by the time he came to dispose of the proceedings. Venting frustration it seems at the limitations the relevant legislation, namely the Criminal Law (Insanity) Act 2006, placed on him in the context of making an Order once a jury had returned a verdict of not guilty by reason of insanity, Mr. Justice Sheehan *inter alia* was moved to say the following:

"[5.16] All the above matters give rise to a concern as to whether the Central Mental Hospital is the appropriate environment in which the defendant can achieve rehabilitation, let alone the kind of environment that will allow him to flourish as a human being. The emphasis on anti-psychotic medication, with the obvious detrimental effects to his physical health, and the failure by his psychiatrist to enter into a meaningful therapeutic relationship with him, as well as the apparent lack of real interest in the sources of the defendant's illness, are all causes for concern. Furthermore, the manner in which his initial refusal of Clozapine was dealt with is also a cause for concern. Rather than using the defendant's refusal as a platform on which to build a real relationship with the defendant, every effort was made to overcome this refusal by enlisting the support of others including family members.

[5.17] This Court notes that there is a huge discrepancy in the protection afforded to patients detained pursuant to the Criminal Law (Insanity) Act 2006 and those admitted to the Central Mental Hospital pursuant to the Mental Health Act 2001. The

purpose of both Acts must be such as to strive for the treatment or care of mentally ill persons in our society whether they are being detained in, or admitted to, the Central Mental Hospital. Yet, persons detained pursuant to the Criminal Law (Insanity) Act 2006 are not granted the same protections as those patients admitted to the Central Mental Hospital pursuant to the Mental Health Act; namely there is no requirement for the "best interests of the patient" to be at the forefront of a court's considerations in making such an order. This, therefore, appears to undermine any requirement for this Court to exercise its role as pariens patriae, pursuant to its inherent jurisdiction, at the sentencing stage. It is another cause for concern that the result of this web of legislative provisions is that once a person is found to be not guilty by reason of insanity for an offence in the criminal law sense, that person can only be detained if he or she has a mental disorder within the civil law sense. So while the person is detained using civil law criteria, he or she does not have the same rights as patients detained under the Mental Health Act 2001. For example, a person admitted as a patient pursuant to the Act of 2001 can only be detained for an initial period of 21 days within which there must be a review by a Mental Health Tribunal. In contradistinction to this, the requirement to review a person detained pursuant to the Act of 2006, on the basis that they have been found not guilty by reason of insanity, arises only every six months.

[5.18] As I mentioned earlier, under the Criminal Law (Insanity) Act 2006, the Central Mental Hospital is the designated centre. It is also noteworthy that s. 3(1) (b) (i) of the Mental Health Act 2001 refers to an "approved centre". The legislation does not refer to an appropriate or adequate/suitable centre but more precisely an "approved centre"; this further removes any possibility for this Court to consider whether the Central Mental Hospital is appropriate, adequate or suitable for this particular defendant once it is decided that he is in need of further in-patient care or treatment."

Quite often a breakdown in the therapeutic relationship between doctor and patient or other treatment issues can give rise to serious problems for those formally detained under the 2001 Act. This has been a reality encountered by many legal representatives.

That giving patients every opportunity and facility to be properly heard on such issues, to have those views respected and actioned if practicable must be considered a fundamental requirement of detention systems.

Of note in this regard are developments across the water where Deputy Prime Minister Nick Clegg announced last December that patients from 2014 will have a right to choose their provider of mental health services, a right that patients elsewhere in the NHS have had since 2008.

6. Conclusion

Undoubtedly as a society we have come a long way in terms of the respect we show to those suffering, or claimed to be suffering, from mental ill-health. However, as the controversy sparked by Asda's recent marketing for sale of a Halloween outfit as a "mental patient fancy dress costume" - with an accompanying picture showing

someone dressed in what looked like a bloodstained shirt with a bloodstained plastic meeat cleaver and what Asda described as a "gory face mask"- serves to underline laurels must not be rested on.

On the legal side much work remains to be done to ensure the fullest vindication of the rights of those coming to be detained under the Mental Health Act 2001 as well as the rights and entitlements of those kept "voluntarily" in circumstances often identical to formally sectioned patients, persons who regrettably though have none of their safeguards.

It goes without saying that those detained and their nearest and dearest, family and friends, bear the brunt of the fallout from the processes that can lead to involuntary committal. But in this context lawyers too quite often have to confront difficult situations where guidance as to the proper way forward has on occasion been less than clear. In this regard though, the following words delivered by Mr. Justice Peart in **P McG v. The Medical Director of the Mater Hospital [2008] 2 IR 332**, are of note:

"In the circumstances of this case it was in my view appropriate for the applicant's solicitor to form the view that as the provisions of s. 22 of the Act had clearly not been complied with, the High Court should be asked to enquire into the legality of the applicant's detention. It is not for the solicitor appointed to represent the interests of the patient to ignore the failure to observe the provisions of s. 22 on the basis that she may not have believed that this Court was likely to order his release. That is a matter within the jurisdiction of this Court to decide. To fail to bring the matter to Court for such an inquiry on such a basis would lead to a risk that in some case or cases a patient might remain in unlawful detention without redress, given in particular the vulnerability of many such patients who may not be in a position to themselves instruct their appointed legal representative to apply for an order releasing him or her from detention. Such a situation would tend also to encourage a slack approach to the observance of the requirements of this legislation and this would be an undesirable situation to arise in relation to legislation whose very purpose is to put in place a regime of statutory procedures for the protection of vulnerable persons against involuntary unlawful detention. The protections put in place are detailed and specific and it is of the utmost importance that they be observed to the letter, and that no unnecessary shortcuts creep into the way in which the Act is operated. That is not to say that there could never be a case which the High Court would consider ought never to have been made. The Court must always retain the discretion to consider that the defect alleged is of such a trivial and insubstantial nature as to have always been bound to fail."

Niall Nolan, Barrister

26th September 2013