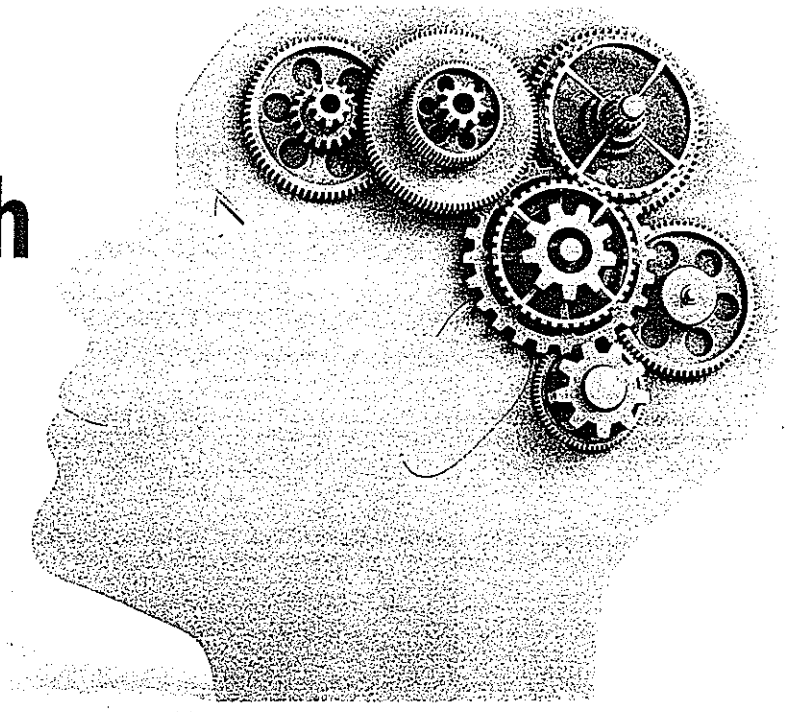
Mental health law update

By Maria Kazmierow, barrister and mediator



Mental illness is a major health concern in New Zealand and internationally. Statistically, mental disorder is common in New Zealand: 46.6 per cent of the population is predicted to meet the criteria for a disorder at some time in their lives, with 39.5 per cent having already done so and 20.7 per cent having a disorder in the past 12 months (Ministry of Health website).

Those who experience mental illness are vulnerable at a number of levels. Despite campaigns such as *Like Minds, Like Mine* and celebrities such as former All Black John Kirwan publicising their own issues, mental illness still has considerable stigma and prejudice associated with it. At the more severe and disordered part of the mental illness spectrum, the unwell person can have his or her civil liberty and medical treatment choice statutorily limited, impacting on the usual human rights in this area.

Major mental illnesses – mental disorders – are currently still part of the Family Court's jurisdiction, pursuant to the *Mental Health (Compulsory Assessment and Treatment) Act* 1992 (Act). (This article will focus solely on family law (not criminal), and will not cover the *Intellectual Disability (Compulsory Care and Rehabilitation) Act* 2003 or the *Protection of Personal and Property Rights Act* 1988.)

This is a significant responsibility for judges as decision makers over the circumstances of particularly vulnerable individuals, and counsel representing and advising those individuals or their families: particularly with regard to the weighing of therapeutic and human rights considerations that judges are required to navigate in reaching decisions about the making of orders under the Act. Orders will have significant consequences for the lives of those diagnosed disordered and in need of assessment and treatment, given the considerations of patient liberty (if an inpatient order in a Mental Health Unit is made) and patient choice as to treatment (or not) for a qualifying disorder under the Act.

Litigants who are diagnosed with mental disorders can pose particular problems for the Court and those who are sued by the disordered person, unrelated to human rights or patient choice of treatment.

Given this, it is timely that Family Files reviews the most recent case law in this area, as an update to the profession. I thank the practitioners who work in the area, District Inspectors, the Auckland District Law Society Mental Health Committee, and others for their collegiality in sharing cases of note.

Judicial review – invalid and ultra vires compulsory treatment order?

In *PS v North Shore Family Court* [2011] 2 NZLR 781, Justice Asher heard an application for judicial review of a decision of a Family Court judge, made after a hearing at Taharoto Unit, North Shore Hospital, Auckland.

The ground for judicial review was that the compulsory treatment order made was ultra vires, as the Family Court Judge dispensed entirely with the section 18 examination of the patient. The patient concerned refused to attend the hearing in the designated hearing room, but was prepared to remain where she was in a small room adjacent to the reception area, and to be seen by the Judge. The Judge declined to do so, and gave an oral judgment making a compulsory treatment order, in the presence of her counsel, and both first and second health professionals. The reason his Honour gave for declining to meet the patient, was that, in his view, it was "an unsafe and inappropriate part of the hospital to examine the patient... I think it is unwise that Court takers and members of the Judiciary depart from safe and proper process in order to endeavour to comply with [section] 18" (noted at [7] of the High Court judgment).

Counsel argued that the compulsory treatment order should be quashed and the patient released, as section 18 of the Act made personal examination of the patient a mandatory requirement and could not be dispensed with. Justice Asher agreed.

Justice Asher closely examined section 18. He noted that a plain English reading of the section made it apparent that the presence of the patient was mandatory for the examination to occur.

Justice Asher found that the language in section 18 (Judge to examine patient) was mandatory (emphasis added):

- "[A] District Court Judge *shall* examine the patient" (section 18(1));
- "The examination *shall* be conducted at the patient's place of residence, the hospital, or the other place where the patient is undergoing assessment or treatment; or where that is not practicable, at the nearest practicable place" (section 18(2));
- "*The Judge must* ... identify him or herself to patient; and explain to the patient the purpose for the visit; and discuss the patient's situation ... and the patient's views" (section 18(3)).

As his Honour noted, "there is nothing in these words which indicates that the Judge has any discretion to dispense with a personal examination" (at [19]). Section 18(2) expressly contemplates a hearing in a place other than the designated courtroom.

His Honour then went on to consider section 18 in its broader context, and decided that this "reinforces the plain meaning of [section] 18, that there must be an examination no later than 14 days after an application is made for a compulsory treatment order" (at [28]).

Justice Asher also examined practical considerations, specifically security issues, and referred to Judge Boshier's "Security protocol for mental health hearings and examinations", dated 29 October 2009. It was clear that a number of hearings occurred, with the presence of a security officer and mental health nurses, outside of the appointed hearing room – both around New Zealand and at Taharoto. Practical considerations favoured the plain language of section 18 of the Act and an examination outside of the hearing room (which was contrary to the protocol).

Finally, his Honour observed, in looking at section 27 of the *New Zealand Bill of Rights Act* 1990, an interpretation of section 18 that implies a discretion to dispense with a section 18 examination would be inconsistent with the right of a patient to observance of the principles of natural justice, to be examined by an independent judicial officer.

Writ of habeas corpus prior to section 18 examination?

In *B v Auckland District Health Board* (High Court, Auckland CIV-2010-404-7978, 15 December 2010), Justice Ellis determined an application for habeas corpus, filed a week prior to the patient attending a section 18 examination for a compulsory treatment order. The ground for the habeas corpus application was that the patient's initial detention was unlawful because there was no factual basis upon which the relevant clinician could have had reasonable grounds to believe that she was mentally disordered.

This was opposed by the Auckland District Health Board (ADHB), on the grounds:

- The Act provides a detailed statutory scheme, with numerous avenues for both internal and external review, and reconsideration of the status of the patient. This militates against the uses of habeas corpus.
- Habeas corpus is the wrong remedy, as the challenge is to the factual basis on which the patient was detained. This involves questions of medical expertise unsuitable for determination in a summary way.
- It is incorrect to focus on the legality of the patient's initial detention. Rather, the focus should be on the statutory basis on which the patient is currently detained.

Her Honour largely agreed with the ADHB's submissions. She noted that the absence of appeal rights from the writ of habeas corpus also militates against an examination of the facts. She also agreed she was bound by authorities which supported the submission, that the present basis for detention was what must be scrutinised for any earlier detention.

Justice Ellis also noted in the High Court that the Court's jurisdiction under section 84 of the Act was better suited to the types of factual issues raised by the patient's application (at [40]).

Her Honour opined that "it would need ... to be a very clear cut case (akin perhaps to a case involving Wednesbury Unreasonableness) before the habeas corpus jurisdiction could properly be utilised where the existence of mental disorder is in dispute, even in cases brought at an early stage in the MHA process... [arising] only where fundamental issues are taken with the basis upon which the compulsory assessment and treatment process has been initiated and where it is alleged that the *undisputed* facts do not on their face disclose any reasonable grounds for concluding that the patient may be mentally disordered" (at [41]).

In *B v Auckland District Health Board* [2010] NZCA 632, the Court of Appeal supported the decision of Justice Ellis. Justices Randerson, Harrison, and Stevens declined the appeal which was filed on the ground that the Judge erred in failing to determine whether the section 10 certificate was unlawful or invalid – it did not form the foundation for the process under the Act.

The Court relied on *Misiuk v Chief Executive of the Department of Corrections* [2010] NZCA 480, which is authority for the proposition that, irrespective of whether there may have been some prior deficiency in the lawfulness of the applicant's detention, if lawfully detained at the date of the hearing, then there is no basis upon which the application may be granted (at [18]).

The Court further endorsed *Sestan v Director of Area Mental Health Services, Waitemata District Health Board* [2007] 1 NZLR 767, where the Court of Appeal earlier determined that "the mechanisms contained within the [Act] will, in the normal circumstance, be much more efficacious and appropriate" (at [20]).

Quelling vexatious (incapacitated) litigants in person?

In *Corbett v Western & Patterson* (High Court, Auckland CIV-2010-404-1495, 18 April 2011), Justice Priestley addressed the problematic circumstances of "obsessed and/or querulous litigants". His Honour noted this was an area that "the legislative and judicial arms of government have failed to answer satisfactorily ... a pressing issue which needs to be addressed" (at [6]).

In this instance, the trustees of a family trust were being serially sued by Mr Corbett, an aggrieved beneficiary. Corbett had been litigating various trust matters since 2005. He had appealed matters to the Court of Appeal, and had been denied leave to appeal to the Supreme Court.

Since 2005, Corbett had been involved in six proceedings, including one appeal from the District Court and two judicial review applications against the Legal Complaints Review Officer. Clearly, the appellant was a focused and repeat litigant.

Justice Priestley was obviously gravely concerned about the self-represented litigant's conduct of litigation. He described the appellants 87 pages of pleadings as "badly organised, incoherent, fails to satisfy the basic requirements of pleadings ... incomprehensible" (at [24]).

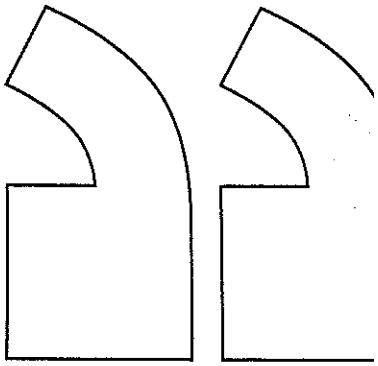
His Honour examined section 88B of the *Judicature Act* 1908, which empowers the High Court to order that no civil proceedings can be made without leave – a rarely exercised power. The condition precedent to this is that the Court must be satisfied that a litigant has issued proceedings which are vexatious, without reasonable grounds, and has done so persistently (at [13]). Justice Priestley commented that such a power should not be exercised lightly, and only in extraordinary circumstances and on a proper evidential basis.

The trustees, properly being concerned that "kernels of a possible cause of action may be buried amongst the undisciplined welter of factual assertions", sought the appointment of a senior family barrister as litigation guardian for the appellant.

Justice Priestley noted rules 4.29 and 4.35 of the *High Court Rules* and section 100 of the *Judicature Act*. The appointment would be warranted if Corbett was incapacitated. On the basis that incapacity was evidenced, a litigation guardian could conserve the Court's scarce resources and protect the respondents from ongoing, unnecessary, and expensive litigation if a psychiatric report indicated incapacity. This balanced the concern that the Courts not deny access to justice of litigants who have "genuine and meritorious claims" (at [10]).

Justice Priestley notes, "sometimes, but not always, the querulous or persistent litigant will have a diagnosable mental illness" (at [9]). In this case, the defendant trustees believed this to be the case. An assessment of Corbett's mental health was conducted. Corbett was diagnosed (after a distant history of involvement with mental health institutions), with abnormal mood, which was best characterised as cyclothymic disorder, being a recognised DSM-IV disorder – it being a less severe part of the bipolar disorder spectrum. His Honour "unhesitatingly" concluded that "the plaintiff is an incapacitated person in the narrow and specific area of conducting this proceeding" and that a litigation guardian be appointed (at [93]-[94]).

The real need for law reform was illustrated by this mentally disordered vexatious litigant. Justice Priestley recommended that law reform was required to deal with the issue (at [17]):



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"I see considerable merit in a structure whereby the High Court has power, on the application of a party, an official, or law officer, to prevent a specified litigant from commencing new proceedings in the High Court or lower courts without leave. Appointment of an amicus on such applications would be essential to ensure that the partisan interests of the applicant do not dominate. Essential too would be provision for a tight limit on subsequent leave application documents (say a one and a half page applicatic and a four-page affidavit) with limited exhibits, to avoid the risk of past grievances being regurgitated."

And at [102]:

"A better procedural remedy is required, for the reasons set out... Not all obsessive, querulous or vexatious litigants can be described as incapacitated, although doubtless most will lab under some form of mild or moderate personali disorder."

L v RIDCA Central (Regional Intellectual Disability Care Agency) (High Court, Wellington CIV-2010-485 1279, 21 December 2010), a decision of Justice Mal under the *Intellectual Disability (Compulsory Care ar Rehabilitation) Act*, was an appeal from the Family Court. While strictly outside the "family law" focus c this article, I recommend this case to practitioners whose practice covers both Acts' jurisdictions.