

THE HIGH COURT

[2017 No. 145 MCA]

IN THE MATTER OF SECTION 73 OF THE MENTAL HEALTH ACT 2001

AND IN THE MATTER OF INTENDED PROCEEDINGS

BETWEEN

J. O'T.

INTENDED PLAINTIFF

AND

**NEIL HEALY, ANGELO GRAZIOLI, COMMISSIONER OF AN GARDA SÍOCHÁNA, MINISTER FOR JUSTICE AND EQUALITY, IRELAND
AND THE ATTORNEY GENERAL**

INTENDED DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 9th day of October, 2018

1. This is an application for an order pursuant to s. 73 of the Mental Health Act 2001 (the 2001 Act) whereby the intended plaintiff seeks leave to issue proceedings against the intended defendants named above.

The First Proceedings

2. This application was preceded by the issuing of proceedings without the leave required under s.73. It is instructive because the applicant did not exhibit any draft proceedings in the course of this application to set out what is essentially the same claim made by him in the statement of claim delivered in the earlier proceedings. The intended plaintiff initiated proceedings by way of plenary summons on 16th February, 2016 (Record No. 2016/1438 P) in which he sought damages for negligence and breach of duty (including statutory duty), breach of contract, unlawful deprivation of liberty, false imprisonment and breach of and failure to vindicate the plaintiff's constitutional rights and rights pursuant to the European Convention on Human Rights. A statement of claim was delivered on 20th September. The first proceedings were initiated against Neil Healy and Davina Hoban practicing under the style and title of Bellview Clinic, Angelo Grazioli, the Commissioner of An Garda Síochána, the Minister for Justice and Equality, Ireland and the Attorney General.

3. The plaintiff claimed that on or about the 14th March, 2014 the first defendant, in breach of the provisions of s. 10 of the 2001 Act, purportedly caused a recommendation via a Mental Health Commission Form 5 to be completed for the involuntary admission of the plaintiff to an approved centre. It was alleged that the purported recommendation was completed even though no written application in the appropriate form Form 1, for a recommendation for involuntary admission pursuant to s. 9 of the Act had been made or was received by the first defendant and without the first defendant conducting an examination of the plaintiff within 24 hours of its receipt contrary to s. 10 of the Act. It was alleged that the first defendant wrongfully caused or permitted the original purported recommendation to be provided to An Garda Síochána in Mullingar, Co. Westmeath where it was mislaid by members of An Garda Síochána.

4. The statement of claim also alleges that on 26th March, 2014 the third defendant Angelo Grazioli caused a further Form 5 recommendation to be completed for the involuntary admission of the plaintiff at the behest of a member of An Garda Síochána to an approved centre. It is alleged that this recommendation was also completed without an application being made to or received by him pursuant to s.9 of the Act and without an examination of the plaintiff prior to the making of the recommendation.

5. It was further alleged that neither the first or third defendants took any steps to notify the plaintiff of the proposal to make the recommendation for his involuntary detention nor did they afford the plaintiff the opportunity to make any representations in respect of the making of the recommendation contrary to s. 4(2) of the 2001 Act.

6. It is also alleged that notwithstanding the invalidity of the recommendation purportedly made by Angelo Grazioli and his failure to notify the approved centre that it had been made, he caused this notification to be given to the plaintiff's estranged wife and a copy to be faxed to Pearse Street Garda Station without the plaintiff's consent when he knew or ought to have known that the invalid recommendation was likely to be relied upon by members of An Garda Síochána in dealing with the plaintiff. This invalid recommendation was then allegedly used by the plaintiff's estranged wife during the course of legal proceedings in support of her application for a barring order against the plaintiff which was granted and subsisted at the time of the drafting of the statement of claim.

7. The statement of claim also alleges that on 26th March, 2014 the plaintiff, while attending the St. Stephen's Green Hibernian Club at 9 St. Stephen's Green, Dublin 2 of which he was a member, was approached by a member of An Garda Síochána who arrested and detained him and conveyed him in custody to Pearse Street Garda Station in purported reliance on the Form 5 recommendation completed by the third named defendant as a result of which he was deprived of his liberty and falsely imprisoned. He was detained for a period of in excess of two hours and was only released following examination by another doctor who determined that he ought not to be detained under the Mental Health Act 2001.

8. It is also alleged in the statement of claim that An Garda Síochána sought to rely on their powers of detention pursuant to s. 12 of the 2001 Act as the basis for detaining the plaintiff notwithstanding the fact that he was never advised that he was being detained pursuant to that provision while at Pearse Street Garda Station and in the absence of any reasonable grounds for a belief that he was suffering from a mental disorder or that because of that mental disorder there was a serious likelihood of the plaintiff causing immediate and serious harm to himself or to others.

9. These proceedings were struck out by an order made on 16th February, 2016 (Reynolds J.) as the plaintiff had failed to obtain the leave of the court to issue the proceedings in accordance with s. 73 of the 2001 Act. The intended plaintiff now seeks leave to issue proceedings against the second, third, fourth, fifth, and sixth intended defendants based on the same alleged causes of action and facts as set out in the statement of claim delivered in the first proceedings. The first intended defendant was initially included in the relief sought. However, the motion insofar as it sought leave to initiate proceedings against him was struck out by consent on 21st June 2018.

Section 73

10. Section 73 of the 2001 Act provides:-

"73(1) No civil proceedings shall be instituted in respect of an act purporting to have been done in pursuance of this Act save by leave of the High Court and such leave shall not be refused unless the High Court is satisfied:

(a) that the proceedings are frivolous or vexatious, or

(b) that there are no reasonable grounds for contending that the person against whom the proceedings are brought acted in bad faith or without reasonable care.

...

(3) Where proceedings are, by leave granted in pursuance of subsection (1) of this section, instituted in respect of an act purporting to have been done in pursuance of this Act, the Court shall not determine the proceedings in favour of the plaintiff unless it is satisfied that the defendant acted in bad faith or without reasonable care."

11. Section 73 was enacted following the decision in *Blehein v. Minister for Health and Children* [2008] 2 ILRM 401 in which s. 260 of the Mental Treatment Act 1945 as amended by s. 2(3) of the Public Authorities Judicial Proceedings Act 1954 was found to be invalid having regard to the provisions of the Constitution having failed a test of proportionality. Section 260 of the 1945 Act as amended provided:-

"(1) No civil proceedings shall be instituted in respect of an act purporting to have been done in pursuance of this Act save by leave of the High Court and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the person against whom the proceedings are to be brought acted in bad faith or without reasonable care."

Subsection 260(2) and (3) are in the same terms as s. 73(2) and (3) of the 2001 Act.

12. Under s. 260(1) an applicant had to establish that there were substantial grounds for contending that the person against whom the proceedings were to be initiated acted in bad faith or without reasonable care. This no longer the case.

13. The Supreme Court upheld the High Court declaration of invalidity on the basis that the limitation of access to the courts on the two specified grounds constituted an impermissible interference by the legislature in the judicial sphere contrary to Articles 6 and 34 of the Constitution. It was accepted that the legislature was permitted to fix the grounds to be considered by the High Court in deciding whether to grant leave to make an application or initiate proceedings and to provide that such grounds should be "substantial". However, the legislature was not entitled to limit access on specific grounds requiring the applicant to establish and make out a case of "bad faith or absence of reasonable care". The threshold set by s.260 was disproportionate.

14. The effect of s. 73 was considered by Clarke J. in *A.L. v. the Clinical Director of St. Patrick's Hospital* [2010] 3 I.R. 537. Having recited the provisions of s. 73 the learned judge stated:-

"5. It will immediately be seen that there are two significant differences between s. 73(1) of the Act of 2001 and s. 260(1) of the Act of 1945. Firstly, s. 73 of the Act of 2001 reverses the onus of proof. Under s. 260 it was necessary for the person wishing to initiate proceedings to establish that there were substantial grounds for contending bad faith or lack of reasonable care. Under s. 73 the court is required to give leave unless the court is satisfied that the proceedings are frivolous, vexatious or that there are no reasonable grounds for asserting bad faith or lack of reasonable care.

6. Secondly, it is to be noted that while s. 260 required the intended plaintiff to show substantial grounds for the contentions which underlie the intended proceedings, s. 73 contains no such requirement ..."

The court in addressing the term "without reasonable care" stated:-

"8. ... it seems to me to be clear that the term "without reasonable care" should be interpreted as applying not just to an absence of proper medical care, but also as applying to an obligation to use care in ensuring that persons are not in unlawful custody. For example, in *Melly v. Moran* (Unreported, Supreme Court, 28th May, 1998), the Supreme Court allowed an appeal from a decision of this Court, under s. 260 ... refusing leave to bring proceedings. It is clear from the judgment of O'Flaherty J., that the Supreme Court was of the view that the facts of the case concerned disclosed a "prima facie want of reasonable care" (at p. 9 of the judgment). The allegation in that case was described by O'Flaherty J. at p. 10 of the judgment as being to the effect "that there was a want of reasonable care in the filling out of the form by the doctor and by the hospital authorities in accepting it as sufficient". For the purposes of the current discussion, the precise nature of the alleged want of care is not particularly relevant. However, it is clear that the Supreme Court was satisfied that there was a *prima facie* basis for alleging substantial grounds of want of care in the procedures relating to the detention of the plaintiff concerned.

9. Thus, at the level of principle, it seems clear that it is open to an intended plaintiff to seek to allege that there was a breach of duty of care on the part of a doctor or hospital arising out of the procedures, followed or not followed in the course of putting in place the necessary measures required to procure the detention of a patient. Any such want of care is, it seems to me, therefore, a type of want of care which came within s. 260 of the Act of 1945 and also comes, at the level of principle, within s. 73 of the Act of 2001."

15. The court also noted that there was no suggestion made in that case that the proceedings were frivolous or vexatious or that the defendants acted in bad faith. Clarke J. continued:-

"... Shorn of those aspects of s. 73, the question which I must ask myself is whether I am satisfied that there are no reasonable grounds for contending that either or both of the intended defendants acted without reasonable care. This is, of course, something of a double negative. I should grant leave unless I am satisfied of that matter. It follows that leave should be granted, save in cases where it has been demonstrated that there is no reasonable basis for the allegation that any relevant intended defendant acted without reasonable care. Where, therefore, there is any legitimate basis on which a court might arguably conclude that a relevant intended defendant had acted without reasonable care, then it follows

that leave must be granted."

16. The proper application of s. 73 was also considered by MacMenamin J. in *M.P. v. Health Service Executive* [2010] IEHC 161:-

"69. I consider that the principles of proportionality applied in *Blehein* are as applicable here as they were to the predecessor section. The onus placed on the applicant is to establish her case having regard to *all* the terms of s. 73(1) (a) and (b) of the Act of 2001. The court should not refuse leave unless satisfied that the proceedings are either frivolous and vexatious, or that there are reasonable grounds for contending the potential defendants acted in bad faith or with want of reasonable care. But in the present case that goes beyond mere bald assertion. The "reasonable grounds" for establishing bad faith or absence of reasonable care must be clear. They are not so here. Such a test may, in appropriate cases require a degree of corroboration, something beyond mere bald assertion. Here there are strong denials by the defendants and reliance by them on the terms of section 73(1)(a) and (b).

70. Putting the matter another way, the intent of the legislation is that leave should not be granted where either of two alternative tests are satisfied ...

71. On the facts of this case, I consider that the tests can be treated together. If it is established as a matter of probability, the procedures are frivolous or vexatious it follows there can be no reasonable basis for finding bad faith or want of reasonable care. I do not say this approach is appropriate in every case, but the facts and tests are so interlinked. With regard to para. (a) I have been referred to a judgment of Edwards J. delivered on the 6th May, 2008 in *Bula Holdings & Ors v. Roche & Ors* [2008] IEHC, which helpfully contains numerous citations as to the case law on what constitutes frivolous and vexatious proceedings. I should refer to these briefly. ...

72. In *Adams v. The Minister for Justice* [2001] 2 I.L.R.M. 1452, Hardiman J. identified some of the pointers as to whether proceedings were frivolous or vexatious as being whether the claims were of 'the baldest kind, without any basis in law and fact'; or 'without any attempt to rely on proved individual circumstances'. Such facts would be indicators that the proceedings were frivolous, vexatious and 'doomed to fail'. A further balancing factor identified in *Adams* was whether the proceedings were capable of being saved by amendment. ...

73. In *Faye v. Tegral Pipes Ltd.* [2005] 2 I.R. 261, the Supreme Court identified further indicia:

"While the words frivolous and vexatious are frequently used in relation to applications such as this, the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the courts. Such abuse cannot be permitted for two reasons. Firstly, the courts are entitled to ensure the privilege of access to the courts which is of considerable constitutional importance in relation to genuine disputes between parties will only be used for the resolution of genuine disputes and not as a forum for lost causes which no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second and equally important purpose of the jurisdiction is to ensure that litigants will not be subject to the time consuming expense and worrying process of being asked to defend a claim which cannot succeed."

Involuntary admission under the 2001 Act

17. Part 2 of the 2001 Act provides the procedure for the involuntary admission and detention of a person suffering from a 'mental disorder' to an 'approved centre', in this case St. Loman's Hospital, Mullingar. Section 3 defines 'mental disorder' as inter alia a "mental illness, severe dementia or significant disability" where:-

"(a) because of the illness, disability or dementia there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons."

A 'mental illness' is defined as:-

"....a state of mind of a person which affects the person's thinking, perceiving, emotion or judgment and which seriously impairs the mental function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons..."

18. The governing ethos of the legislation under s.4(1) is that in making any decision about the care of any person including their involuntary admission to a hospital the principal consideration shall be his/her best interests with due regard to the interests of others who may be at risk of serious harm if the decision is not made. Section 4(2) provides that where it is proposed to make a recommendation for admission the person should "so far as is reasonably practicable" be notified of the proposal and "be entitled to make representations in relation to it". Before deciding the matter due consideration must be given to any representations duly made under the section. Section 4(3) provides that in making a decision under the Act due regard must be had for the person's rights to dignity, bodily integrity, privacy and autonomy.

19. The criteria for involuntary admission exclude admission of a person to an approved centre "by reason only of the fact' that he/she:-

(a) is suffering from a personality disorder,

(b) is socially deviant, or

(c) is addicted to drugs or intoxicants."

It is however clear that such factors may be and often are relevant to the consideration of whether a person is suffering from a "mental disorder".

20. Under s.9 an application for a recommendation for an involuntary admission may be made by *inter alios* the spouse, a relative of the person or a member of An Garda Síochána to a registered medical practitioner. Section 10(1) provides that the application must be made in the form specified by the Mental Health Commission (Form1). The applicant must have observed the person not more than 48 hours before the date of application. The form must state the reasons for the application, the relationship of the applicant to the person and the circumstances in which it is made.

21. Section 10 provides that an examination by the doctor of a person the subject of an application must be carried out within 24 hours of its receipt. The doctor must inform the person of the purpose of the examination unless in his/her view the provision of that information might be prejudicial to the person's mental health or well-being or emotional condition. If the doctor is satisfied after this examination that the person is suffering from a mental disorder he/she 'shall make a recommendation...in a form specified by the Commission that the person be involuntarily admitted to an approved centre...specified ...in the recommendation' (Form 5). Section 10(4) provides that the recommendation shall then be sent to the clinical director of the approved centre and a copy given to the person concerned: under s.10(5) the recommendation remains in force for a period of seven days from the date it is made and 'shall then expire'.

22. Section 12 confers a power upon members of An Garda Síochána to take a person into custody:-

"12(1) Where a member of the Garda Síochána has reasonable grounds for believing that a person is suffering from a mental disorder and that because of the mental disorder there is a serious likelihood of the person causing immediate and serious harm to himself or herself or to other persons, the member may either alone or with any other members of the Garda Síochána—

(a) take the person into custody ..."

Section 12(2) provides that the Garda must then make an application forthwith in a form specified by the Commission (Form 3) to a doctor for a recommendation following a procedure similar to that set out in s.10: under s.12(4) if the application is refused the person must be released from custody immediately.

23. Section 13 provides for the removal of a person to an approved centre when a recommendation has been made. This is to be arranged by the applicant with the assistance, if required, of the staff of the approved centre. Section 13(3) empowers the clinical director to request the assistance of An Garda Síochána in the removal of the person to the centre where he/she or the doctor who made the recommendation are of opinion that there is a serious likelihood that the person will cause immediate and serious damage to himself/herself or others.

The claim against Dr. Grazioli

24. The claim against the second named intended defendant, Dr. Grazioli, a general practitioner who was employed at the Bellview Clinic in March 2014, is based on his completion of a recommendation using a Mental Health Commission Form 5 for the involuntary detention of the intended plaintiff pursuant to s. 10 of the 2001 Act. It is claimed that the Form 5 was invalid and completed without any lawful basis because no application for a recommendation for his involuntary detention had been made to Dr. Grazioli using an appropriate Form 1 as required by s. 9(3) of the Act. It is also claimed that the recommendation was defective in that Dr. Grazioli failed to conduct an examination of the intended plaintiff within 24 hours of receipt of an application contrary to the provisions of section 10(2). The last time J.O'T had seen Dr. Grazioli was in May 2013 some 10 months earlier. In addition, it is said that no lawful basis for concluding that the intended plaintiff was suffering from a mental disorder was disclosed in paragraphs 7 and 8 of Form 5. It is stated in the form that the basis for concluding that the intended plaintiff was suffering from a mental disorder was "alcohol and benzodiazepine abuse, suicidal ideation, under a restraining order following assault of wife". It is said that this does not disclose a mental disorder such as to justify his involuntary detention. Furthermore, the Form 5 was not sent to the approved centre concerned which was St. Loman's Hospital, Mullingar contrary to s. 10(4) of the Act. It also alleged that it was never the doctor's intention that he would be involuntarily detained in reliance on the form but it was to be used for an unlawful purpose to pressurise him to submit to voluntary admission to hospital. The intended plaintiff also complains that he was never afforded an opportunity to make any representation with regard to the making of the recommendation contrary to s. 4(2) of the Act.

25. It is also said that in breach of patient confidentiality the Form 5 was furnished to J. O'T.'s wife and An Garda Síochána. It is claimed that the Form 5 was sent by fax to Pearse Street Garda Station on 26th March and was used unlawfully as the basis for detaining the intended plaintiff later that day.

26. Dr. Grazioli in his affidavit accepts that he completed a Form 5 in respect of J. O'T. on 26th March, 2014 in circumstances which are outlined and supported by the medical records exhibited. Late on the evening of the 25th March the intended plaintiff's sister telephoned the MIDOC out-of-hours general practitioners' service at Mullingar requesting J. O'T.'s involuntary admission for psychiatric treatment. She advised that Dr. Healy had signed a Form 5 ten days previously. MIDOC were informed that J. O'T. was suicidal at the time of the call and that Dr. Healy had previously signed an involuntary admission form which had been faxed to the Garda station in Mullingar. J. O'T. was then in St. James Hospital, Dublin. His sister requested that MIDOC organise "forms" to be faxed to St. James Hospital urgently as he was threatening to leave the hospital and kill himself. The outcome was recorded in an attendance note:-

"Phoned garda station and requested them to fax the forms to St. James Hospital which Dr. Healy had signed. Phoned again 01:10. Garda could not find the letter and they informed the PT's wife."

The advice given was that the patient should see his own general practitioner.

27. The following day the practice notes made by the secretary record the receipt of the MIDOC report advising about the call which they had received from J. O'T.'s sister the previous evening. They also record that the Form 5 completed by Dr. Healy that had been handed into the Gardaí in Mullingar could not be found by them. She phoned the Gardaí in Mullingar to speak with the superintendent on duty. She notes that she had personally delivered the form to them and was shocked to hear that they could not find it. She spoke to Garda Cormac O'Riordan in the superintendent's office who promised to speak to the superintendent and get back to her.

28. The secretary then records that the patient's wife arrived in reception and was very annoyed that the form could not be found at the Garda station. She complained that the form had not been faxed to the Gardaí. The secretary advised that not only had the form been faxed but she brought it personally to the Garda station. She was informed at the time that the Gardaí would place the form on the patient's original file at the station. The patient's wife then:-

"recounted the situation again and said she is only trying to help the family now and her relationship is gone – she is trying to protect herself also as patient has attacked her in the recent past. She said she would go to the Garda station now and see what they are going to do. M. took a call from Cormac in the Garda station looking for information from the MIDOC report – I advised that Dr. Angelo (Grazioli) is free if he wanted to discuss same. A call was put through to Dr. Angelo. M."

The next entry states that the Garda spoke to Dr. Grazioli. The Garda was informed that the patient's wife had been in that morning and that the patient was currently at the Hibernian Men's Club on St. Stephen's Green.

29. Dr. Grazioli states in his affidavit that Garda O'Riordan confirmed to him that he had sent the plaintiff's wife to the Bellview Clinic to obtain a copy of the Form 5 completed by Dr. Healy. A copy of the Form 5 could not be located and Garda O'Riordan asked Dr. Grazioli to prepare a new Form 5. Dr. Grazioli states:-

"I explained to Garda O'Riordan that I was not in a position to complete a valid Form 5 as I had not examined the plaintiff within [the] 24 hour time period required by the Mental Health Act 2001. However, Garda O'Riordan reassured me that there was no intention on the part of the garda to use the Form 5 to involuntarily detain the plaintiff but rather their intention was to use the Form 5 to persuade the plaintiff to voluntarily seek psychiatric assessment. I understood that the Gardaí wanted to show him a Form 5 in order to illustrate to him that a Form 5 had been completed in the past and a new one could be completed in the future if he did not voluntarily seek treatment. Having received this reassurance, I completed a Form 5 which was made purposely invalid by my leaving section 6 incomplete and indicating that the plaintiff was last examined by the first named defendant [Dr. Healy] rather than by me. I was absolutely clear that there was no question of the plaintiff being detained on foot of this form."

Dr. Grazioli states a copy of the Form 5 was later faxed to Pearse Street Garda Station at 10:56 and a copy was given to the intended plaintiff's wife. He states that he later received a telephone call from Dr. Kahn at Pearse Street Garda Station who queried the Form 5 which he had completed and highlighted that it was not sufficient to allow the involuntary detention of the intended plaintiff. Dr. Grazioli stated that he explained to Dr. Kahn that he was aware of this but that he had deliberately left portions of s. 6 in the form blank in order to invalidate it. He also stated that he informed Dr. Kahn that the purpose of the form was simply to convince the intended plaintiff to agree to seek psychiatric help on a voluntary basis.

30. The note on the file completed by another secretary A.D. in respect of Form 5 confirms that it was sent to Pearse Street Garda Station and that another copy was given to the patient's wife with contact telephone numbers for Pearse Street Station. The secretary informed the intended plaintiff's wife that the form "may not be enough as Dr. Angelo has not seen him today, she said that is fine she just needs to (sic) form to show patient to try to convince him to get help." The patient's wife later informed the clinic that they had finally located J. O'T. and "have him in Pearse Street Garda Station. She wanted to let us know and was very relieved that he was found."

31. Dr. Grazioli states in his affidavit that all of the steps taken by him were in the context of a crisis in that the intended plaintiff was believed to be suicidal and *bona fide* efforts were being made by his family and the Gardaí to locate him and preserve his life. He believed that he acted in the best interests of the intended plaintiff at all times in circumstances in which he was experiencing a crisis and had expressed suicidal ideation. He states that in those circumstances he believed the steps he took were reasonable and denies they were taken in bad faith. He does not accept that he was in breach of his duty of confidentiality to the intended plaintiff as a patient and/or his duties under the Data Protection Acts or his right to privacy and believes that all of the information provided in the Form 5 to the gardaí and the plaintiff's family were already within their knowledge as a result of the previous Form 5 completed on 12th March by the first defendant Dr. Healy. He states that he took steps to ensure that when the request for a Form 5 was made by the plaintiff's wife on 26th March, it had come from An Garda Síochána and was sought for a particular purpose namely to convince him to seek psychiatric assessment on a voluntary basis. Dr. Grazioli's next dealing with J. O'T. occurred on 28th March, 2014. In the meantime, the intended plaintiff was arrested later on 26th March.

Arrest and Detention

32. The intended plaintiff claims that members of An Garda Síochána in Mullingar and Pearse Street acted unlawfully in procuring and effecting his arrest and detention. Firstly, the intended plaintiff claims that Gardaí from Mullingar had no legal basis to seek or receive the original or a copy of Form 5 from Dr. Healy which contains sensitive personal and medical information concerning him and in circumstances where no member of An Garda Síochána had completed an application for his involuntary detention on the appropriate form pursuant to s. 9 or under s. 12 of the 2001 Act. The Gardaí had not been requested by pursuant to s. 13 of the Act to assist in the intended plaintiff's removal to hospital.

33. The intended plaintiff also complains that members of An Garda Síochána based in Mullingar Station subjected Dr. Grazioli to undue influence or pressure to complete a Form 5 recommendation for his involuntary admission to an approved centre under the Act notwithstanding the fact that Dr. Grazioli advised the Gardaí that he had not seen the intended plaintiff since 30th May, 2013. He had also advised that a completed Form 5 was unlikely to be sufficient for his involuntary detention. He states that the medical records indicate that the Gardaí sought a completed Form 5 to use as leverage to convince him to get voluntary help which is not a lawful basis for the completion of a recommendation under the Act. Therefore, he claims that the actions of the Gardaí in Mullingar in procuring an invalid Form 5 from Dr. Grazioli were not in accordance with law. He alleges that Gardaí at Mullingar sought to have the invalid Form 5 faxed to Pearse Street Station, Dublin when they knew or ought to have known that it was likely to be relied upon by Gardaí at Pearse Street to apprehend and detain the intended plaintiff.

34. The final element of the intended plaintiff's claim relates to his arrest by Garda Michael Hannon and his subsequent detention at Pearse Street Garda Station. The intended plaintiff states in his affidavit:-

"42. ... I was lawfully present at the St. Stephen's Green Hibernian Club, 9 Stephen's Green, Dublin 2, a private members club of which I was a member at the time on the afternoon of 26th day of March 2014 when I was approached by a member of An Garda Síochána (who I believed to have been Garda Michael Hannan), who in full view of my fellow members and guests at the said club sat me down in the lobby of the said club, to which I protested advising that I was mortified. The said Garda asked me to accompany him to Pearse Street Garda Station saying that people were concerned about me, in circumstances where due to the manner of such request I did not feel it open to me to refuse."

He complains that he was removed to Pearse Street Garda Station where he was detained for a period in excess of two hours. He was then brought to an interview room and examined by Dr. Kahn, a medical practitioner who advised that he was not detainable under the 2001 Act and was subsequently released. He complains that at no time did Garda Hannon or any other member of An Garda Síochána ever advise him that he was being detained pursuant to s. 12 of the 2001 Act. He also complains that proper procedures were not followed in relation to his detention and notification to the Mental Health Commission under s. 12(2) of the Act. He claims that there was no basis for his detention under s. 12 and no reasonable grounds for Garda Hannon to believe that he was suffering from a mental disorder to the extent that there was a serious likelihood of causing immediate and serious harm to himself or others. He denies that he was causing a disturbance or spectacle of any kind at the club when arrested and was not posing any risk to anybody including himself.

35. The original grounding affidavit does not contain any reference to the fact that members of his family accompanied Garda Hannon at the time of the arrest. Garda Hannon describes his involvement in the case as follows:-

"5. On the 26th of March 2014, I was on duty attached to Pearse Street Garda Station. In or about 3:00pm, I received a call from the Station Command and Control Desk seeking assistance for a member of the public. The plaintiff's mother, Mrs. R. O'T. had contacted the garda station expressing concerns for her son whom she described as being in a highly agitated state. She advised that the plaintiff had a previous history of mental health issues and requested immediate garda assistance at Neary's public house. Accordingly, I attended Neary's public house but on arrival could not locate the caller or anyone matching her son's description. Contact was re-established with Mrs. O'T. who confirmed that both herself and her husband as well as the plaintiff had now moved to Hickey's pharmacy on Grafton Street to get medication for the plaintiff. I proceeded on foot to Hickey's pharmacy where the plaintiff's father Mr. G. O'T. was waiting for me. Mr. O'T. informed me that the plaintiff had left for the Hibernian Club on St. Stephen's Green and that Mrs. O'T. had gone with him. Both Mr. O'T. and this deponent proceeded to the Hibernian Club where we located the plaintiff and Mrs. O'T. without difficulty.

6. Upon arrival, I approached the plaintiff and inquired if he was okay. The plaintiff was indeed in an agitated state and repeated the same conversation over and over to me. I noted that the plaintiff appeared visibly troubled and was becoming increasingly (*sic*) distressed. The plaintiff advised me that he had a history of mental health related issues, that he had been hospitalised on a number of occasions including a recent stay as an in-patient. The plaintiff had not been taking his prescribed medication and was now very anxious to get his medication. The plaintiff's parents repeatedly expressed their concerns to me for their son's safety and wellbeing. They said he needed medication urgently and that he had recently been discharged from a period as an in-patient in a mental health facility. I did not detect any element of malice in their urgings, rather that they were highly concerned about the plaintiff's agitated state and they were seeking my assistance.

7. Following my observations of the plaintiff, I formed the opinion that he was a cause of concern and that there was a serious likelihood of him causing immediate and serious harm to himself or to other persons. I say and believe that this opinion was entirely reasonable in all of the circumstances. Accordingly, this deponent made the decision to arrest the plaintiff pursuant to the provisions of s. 12 of the Mental Health Act 2001. The plaintiff was then removed to Pearse Street Garda Station for medical examination.

8. For the avoidance of doubt, I was not aware nor was I advised by any of my colleagues either at Pearse Street Garda Station or in Mullingar, that a Form 5 Recommendation of Involuntary Admission (hereinafter, a "Form 5 Recommendation") had issued in relation to the plaintiff. In fact, it was only after I responded to the call for garda assistance that the plaintiff's mother handed me a faded photocopy of what appeared to be a Form 5 Recommendation for my attention. I did not request the form from her or from the first or second named defendants. The form presented to me was merely a photocopy and it had not issued to me for the purpose of seeking the plaintiff's arrest.

9. Accordingly, the Form 5 Recommendation did not at any time form the basis of my decision to take the plaintiff into custody. The plaintiff was not taken into custody pursuant to s. 10 of the Mental Health Act 2001 following a recommendation of a recommended medical practitioner for his involuntary admission to an improved centre. Instead, the plaintiff was taken into custody pursuant to s. 12 of the Mental Health Act 2001 ...

12. Contrary to the assertions of the plaintiff I did inform the plaintiff that he was being detained under s. 12 of the Mental Health Act 2001. In my 20 years service as a member of An Garda Síochána I am aware of the need to clearly state the purpose and basis of any arrest I seek to make and I am satisfied that the correct procedure was followed in this regard."

Garda Hannon has deposed that the sole basis for the arrest of the intended plaintiff was the exercise of the power vested in him under s. 12 of the Mental Health Act 2001.

36. Garda Hannon also deposed that he then conveyed the intended plaintiff to Pearse Street Garda Station without difficulty arriving at 15:39 to await a medical review by one of the appointed doctors on call. This occurred at 17:45 when the plaintiff was taken to the doctor's room where he was reviewed by Dr. Kahn. Dr. Kahn having determined that the plaintiff was not suitable for involuntary detention, he was immediately released from custody in accordance with s. 12(4) of the Act. Although the intended plaintiff complains that s. 12(2) which requires the Garda who is taking a person into custody under subs. 1 to make an application forthwith in a form specified by the Commission to a registered medical practitioner for a recommendation was not followed, nevertheless it does appear that Dr. Kahn was contacted for the purpose of examining the intended plaintiff in respect of the recommendation which is the subject of the section and having concluded that there was no basis to make such a recommendation, the intended plaintiff was then released immediately.

37. Two documents were exhibited by Garda Hannon. The first is the note made by him in respect of the arrest which occurred at 3:15pm on 26th March. Garda Hannon noted the parents' names and their respective telephone numbers. The note also contains a reference to s. 12 of the Mental Treatment Act and Dr. Kahn's telephone number. The contemporaneous entries in the custody record in Pearse Street Station also record the time of arrest and that the intended plaintiff was detained pursuant to s. 12 of the Mental Health Act 2001. J.O'T informed the member in charge that he was suffering from blood pressure and that he was on blood pressure tablets. He was given information which is required to be furnished in accordance with Regulation 8(1) of the Treatment of Persons in Custody Regulations 1984. These entries also indicate that he was visited by Dr. Kahn at 16:18 following which Dr Kahn deemed him fit to be released. It also records that he had consumed alcohol earlier in the day.

38. On his release the intended plaintiff states that he was handed a copy of the invalid Form 5 completed by Dr. Grazioli and that Garda Hannon told him there was something peculiar with it and that he should investigate it further. He states that it is clear that since Dr. Kahn discussed the Form 5 with Dr. Grazioli he must have had sight of it and therefore the Gardaí in Pearse Street had possession of Form 5. For his part Garda Hannon states that a copy of Form 5 was handed to him by the intended plaintiff's mother after he responded to the call for assistance. However, Garda Hannon states that he did not rely upon the form at the time he made the arrest and does not accept that he made the comment suggested by J.O'T.

39. Garda William Geraghty of Pearse Street Garda Station states that a call was recorded by the DMR South Central CAD Web Status Monitor at Garda Command Centre on 26th March, 2014 at 14:58. The matter is stated to be "health related". The relevant note also states "mother concerned for her son J. O'T. Currently in Neary's pub, require gardaí". Subsequently the intended plaintiff's solicitors were informed by letter dated 23rd April that their client had been arrested by Garda Hannon pursuant to s. 12 of the Act. The invalid Form 5 prepared by Dr. Grazioli was also sent by fax to Pearse Street station earlier on the morning of 26th March. However, there is no record of its receipt at the station and Garda Hannon states that he was not made aware of that form's existence prior to the arrest, though he acknowledges J.O'T's mother handed him a copy of a Form 5 when he responded to the call for assistance

40. The intended plaintiff denies that Garda Hannon was advised by him and by his parents that he had a history of mental health related issues or had a recent in-patient stay at a mental health facility. This was untrue. Though he had attended a number of doctors in relation to his addiction, he had never been admitted to hospital for residential care for any mental disorder.

41. Following his release from custody, the intended plaintiff attended Bellview Clinic on 28th March, 2014. Dr. Grazioli states that this visit was preceded by a telephone call from Dr. El Taweel consultant psychiatrist at St. Loman's Hospital who informed him that the plaintiff was on his way to the clinic to obtain a summary of his current medications and medical conditions and was expected to return to St. Loman's Hospital for voluntary admission and treatment. Dr. Grazioli states that the plaintiff attended at the clinic and explained that he and his wife were working towards reconciliation and had agreed that the best course was now to pursue treatment through St. Loman's Hospital and the Community, Alcohol and Drug Service. The plaintiff thanked the doctor for his assistance then and at the time of his prior crisis. Dr. Grazioli asked the intended plaintiff whether he understood why he had issued the incomplete Form 5 and that it was nothing to do with him being in St. Loman's. He said that the intended plaintiff said he understood this and that he was in St. Loman's voluntarily. Dr. Grazioli was not informed that the plaintiff had been arrested on foot of Form 5 though he had the impression that he was fully aware of it. He believed he was then to return to Dr. El Taweel upon leaving the clinic. He later received a telephone call from the intended plaintiff's sister informing him that the plaintiff had failed to return to St. Loman's Hospital. It appears that the plaintiff indicated to his sister that Dr. Grazioli had refused to provide him with the information requested by Dr. El Taweel as he was of the opinion that he did not require admission. The intended plaintiff also misrepresented the nature of his attendance with Dr. Grazioli on 28th of March to his wife. This is also recorded in the clinic's records. A letter of the same date sent by fax immediately to Dr. El Taweel indicates that Dr. Grazioli had forwarded the relevant information requested. He was releasing the relevant records to the intended plaintiff and "he will bring it straight back to you now".

Conclusion

42. I am satisfied of the following in respect of the intended plaintiff's claim applying the legal principles set out above

43. Dr. Grazioli, the second intended defendant, was placed in a very difficult position not least by the highly irregular behaviour and actions of the intended plaintiff who clearly became a source of alarm and distress to his relatives at this time which led ultimately to his detention on 26th March. The main complaint against Dr. Grazioli is that he completed a Form 5 without receiving a proper application on Form 1. He did not have the opportunity at any stage to examine J.O'T before completing a Form 5. He acknowledged that the Form 5 was completed at the behest of others to be presented to J.O'T and used to coax him into submitting to a voluntary admission. For that purpose it was sent to Pearse Street Garda Station. However, Dr Grazioli points out that the recipients of this Form 5 knew from its terms that it could not be used as a recommendation for J.O'T's involuntary admission because of a number of obvious flaws. Thus the first element of the claim against the second intended defendant is based on his misuse of the statutory power vested in him under s.10 of the Act.

44. Though the intended plaintiff claims that the Form 5 was intended to be used and relied upon by Gardaí in securing his involuntary detention this is strongly rejected by the doctor. J.O'T relies upon the fact that Form 5 was faxed to Pearse Street Station on the morning of 26th March and that Garda Hannon accepts that he had a copy of Form 5 later that day: indeed Dr. Kahn discussed the terms of the Form 5 with Dr. Grazioli while J.O'T was detained at the station. I am not satisfied on the evidence adduced that the intended plaintiff's claim in this regard may be dismissed as frivolous or vexatious. It is alleged also that Dr. Grazioli was involved in a process which led to J.O'T's detention under s.10 using a Form 5 which was unlawfully completed and furnished to the Garda Síochána. It appears that a copy of Form 5 was sent to Pearse Street station on the morning of 26th March and Garda Hannon avers that a copy of a Form 5 was given to him later that day by J.O'T's mother. It is therefore said that the doctor is liable in damages for false imprisonment and breach of the intended plaintiff's constitutional right to be detained only in accordance with law because he wrongfully provided a completed Form 5 to be used to that end. I am satisfied that the second intended defendant has not established that there are no reasonable grounds to conclude that his actions were carried out in bad faith or without reasonable care: it has not been demonstrated that there is no reasonable basis for making the claim sought to be advanced. Indeed the doctor accepts that an invalid Form 5 was furnished by him but for a different purpose. Accordingly, I will grant leave to issue proceedings against the second intended defendant seeking damages for negligence, breach of statutory duty, false imprisonment and breach of his constitutional right to privacy in supplying his medical details to the Gardaí. This does not in any way suggest that I am satisfied that this claim should succeed: that is a matter for the trial of the action and subject to a different standard of proof.

45. The case against the other intended defendants is one of damages for false imprisonment. They are said to be vicariously liable for the actions of Dr. Grazioli and/or the Gardaí who dealt with the case. It is claimed that the intended plaintiff was detained under s.10 by Garda Hannon who knowingly adopted a procedure that was illegal for the numerous reasons already stated as part of some form of conspiracy to misuse the provisions of Part 2 of the 2001 Act to procure his involuntary admission to hospital. Alternatively, if the intended plaintiff was detained under s.12, it is claimed that this detention was unlawful because Garda Hannon acted in bad faith in detaining J.O'T using material set out in the Form 5 which he knew to be incorrect and unlawfully completed and/or because he had no reasonable grounds for believing that the intended plaintiff was suffering from a mental disorder because of which he was a danger to himself or others. Garda Hannon claims that he exercised his powers under s.12 not s.10: however, as already noted the chronology of the events of 26th March indicates the existence of some evidence in support of the intended plaintiff's claim based on the communication of the Form 5 to the Gardaí and an alleged failure to comply with ss. 9 and 10 of the Act. The court is not here determining the issues between the parties to the standard applicable at the trial of the action. The events concerning the relevance, importance and use made by Garda Hannon, if any, of Form 5 in detaining J.O'T, and whether the power exercised was under s.10 as claimed by J.O'T or s.12 as claimed by Garda Hannon and recorded in the custody record, are matters that fall to be determined at the trial. The exigencies of the events faced by the intended defendants and the actions of the defendant may also prove to be relevant to the determination of these issues and the determination of liability and the level of damages, if any, to be awarded. However, I am satisfied that the issues raised go beyond a claim that might be regarded as frivolous or vexatious. There are clearly issues of fact between Dr. Grazioli, Garda Hannon and J.O'T as to how and why the detention was effected: the lawfulness of the detention is also in issue between them. It is appropriate therefore to grant leave to issue proceedings against the third, fourth, fifth, and sixth intended defendants for the same reasons as leave was granted in respect of the second intended defendant since they are said to be liable in their various capacities for the actions of Garda Hannon and Dr. Grazioli.

46. I wish to emphasise that the leave threshold is very low and the claims made will be determined at the trial of action which will require a much higher standard of proof based on oral evidence.