Neutral Citation [2013] IEHC 55

THE HIGH COURT

2012 97 IA

2013 1370 P

IN THE MATTER OF SECTION 73 OF THE MENTAL HEALTH ACT, 2001 AND IN THE MATTER OF AN INTENDED ACTION

Between:

A.M.

Intended Plaintiff

-and-

HARRY KENNEDY

(In his role as Clinical Director of the Central Mental Hospital)

Intended First Named Defendant

-and-

THE MENTAL HEALTH COMMISSION

Intended Second Named Defendant

-and

THE HEALTH SERVICE EXECUTIVE

Intended Third Named Defendant

Judgment of Ms. Justice Iseult O'Malley delivered on the 8th February, 2013

Introduction

1. In this application leave is sought, as required by the provisions of s.73 of the Mental Health Act, 2001 to institute civil proceedings against the intended defendants in relation to certain acts done in purported pursuance of that Act. Section 73(1) provides that such leave is not to be refused unless the 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.

The respondents to the application are the proposed defendants, all of whom base their opposition to the granting of leave on sub-paragraph (b). They do not contend that the proceedings are frivolous or vexatious. The applicant does not make any allegation of bad faith and the only issue to be determined therefore is whether the respondents can at this stage discharge the onus of establishing that there are no reasonable grounds for contending that they acted without reasonable care.

2. The draft plenary summons and statement of claim proposed to be issued claim damages (including, if the court sees fit, aggravated and/or exemplary damages) for false imprisonment, trespass to the person, breach of statutory duty, breach of constitutional rights and negligence with respect to his detention from the 18th of February, 2007 until the 24th of April, 2007. In proceedings brought by the applicant under Article 40.4 of the Constitution, the High Court (Peart J) has already found that his detention during that period was unlawful- see *A.M v. Kennedy* [2007] 4 IR 667.

3. The particulars in the draft statement of claim allege, inter alia, that the intended defendants negligently failed to carry out their statutory functions in a competent manner and negligently failed to release the plaintiff when required by law at the expiration of his treatment order. In so doing, it is pleaded, they breached his rights under the Constitution and the European Convention on Human Rights.

4. There is a separate claim against the third named intended defendant for damages for negligence and breach of statutory duty in respect of the transfer of the plaintiff to the Central Mental Hospital. It is pleaded that the transfer was not necessary, caused him distress and stigmatised him in his locality. However, at the hearing of this application it was indicated to the court that this aspect of the applicant's claim was not being pursued with any great vigour.

Background

5. The applicant was originally detained in Our Lady's Hospital, Navan on the 24th August, 2005 on foot of a Temporary Admission Order made pursuant to the provisions of the Mental Treatment Act, 1945. He was subsequently transferred to the Central Mental Hospital on the 20th October, 2005. The reasons for the transfer was that he had absconded from Our Lady's twice, once by breaking a window, and had seriously injured another man while at large. The hospital records show a real concern that Our Lady's was not an appropriate place within which to detain and treat him.

6. The applicant's detention in the Central Mental Hospital was renewed under s.189 of the same Act, as amended by the provisions of the Mental Treatment Act, 1961, for a further six months on the 24th February, 2006. Section 189 permitted a renewal for a period not exceeding six months. The renewal was directed by Dr. Anne Jackson, the Clinical Director of Our Lady's Hospital, who continued to be the "responsible consultant psychiatrist" in the applicant's case. As was the practice at the time, Dr. Jackson endorsed her

decision in handwriting on the original order for detention by the words "extended for a further period of six months from the 24/02/06". No criticism is made of this renewal in the current application.

7. It is deposed by Dr. Kennedy that the applicant continued to make some progress over the next few months but that in late June it was decided at a case conference that it would be in his best interests to remain in the Central Mental Hospital for a further period oftime. Subsequently, on the 18th August, 2006 Dr. Jackson again endorsed the form, this time writing the words "extended for a further period of six months from the 18/8/06".

8. It is important to note that all of the orders made in relation to the applicant up to this point were governed by the provisions of the Mental Treatment Act, 1945 pending the full coming into force of the Mental Health Act, 2001. Preparations for that event required the notification to the Mental Health Commission, by the 2nd November, 2006, of the particulars of all persons such as the applicant on the 31st October. The objective was to ensure that arrangements could be made for consideration of their detention before Mental Health Tribunals within the relevant time limits. The relevant provision here is s.72 (5) of the Act of 2001, which stipulated that the clinical director of the institution concerned was to provide the required particulars to the Commission. Notification was by means of a prescribed form called Form 24, which was to be completed by the clinical director of the relevant establishment.

9. Dr. Jackson sent a copy of Form 24 to the Commission in relation to the applicant, presumably because she was the clinical director of Our Lady's and was still the responsible consultant for him. Amongst other particulars she gave the date of expiry of the then current detention order as being the 18th February, 2007. It will be noted that this date gave a correct limit of six months from the date endorsed by her on the original order.

10. This copy of Form 24 was not accepted by the Commission because Dr. Jackson was not the clinical director of the Central Mental Hospital, where the applicant was actually detained. Dr. Kennedy then issued a second Form 24. He amended the expiry date to the 24th August, 2007. That, in turn, was obviously a mistake, since no detention order in being on the 31st October, 2006 could have had an expiry date later than the 30th April, 2007.

11. This error having been brought to his attention, Dr. Kennedy sent in a third Form 24. This time he entered the expiry date as the 24th February, 2007.The Commission then set about organising a Mental Health Tribunal to consider the applicant's case. The 20th February was set for the hearing.

12. On the 19th February Dr. Jackson examined the applicant. On the same day she gave a direction which purported to extend the detention of the applicant for a period of three months pursuant to s.15 (2) of the 2001 Act.

13. The tribunal duly met on the 20th February. By reference to Dr. Jackson's endorsement in relation to the renewal in August, 2006 it was submitted on behalf of the applicant that his lawful detention had expired on the 18th February, two days earlier. It appears from the record of the tribunal's decision that the tribunal concluded that the latest renewal had to have commenced on the expiry of the previous one, i.e. on the 24th August, and accordingly the applicant was lawfully detained on foot of it until the 24th February, 2007. Having reached that conclusion, the tribunal went on to review the basis for the applicant's detention and affirmed the renewal order made on the 19th.

14. It appears that the tribunal sat again on the 9th March to consider the issue further. However, at that stage the applicant's solicitor indicated that he believed that it was now necessary to bring the matter to the High Court.

Inquiry pursuant to Article 40.4 of the Constitution
15. On the 12th March, 2007 the applicant applied to the High Court for an inquiry into the lawfulness of his detention. The inquiry was conducted by Peart J on the 16th March, and a written judgment was delivered on the 24th April, 2007. In finding that the detention of the applicant was unlawful during the period in question, Peart J held that the endorsement by Dr. Jackson "extended for a further period of six months from the 18/8/06" had to be taken as meaning what it said and that therefore the purported extension made on the 19th February, 2007 and its purported affirmation by the tribunal were invalid and of no lawful effect.

Submissions on this application
16. Counsel for the first and third respondents submits that they took all reasonable care at all times. In keeping with their attitude in the Article 40.4 inquiry, they have averred that they believed at the time that two periods of detention could not overlap. Dr. Kennedy therefore believed that the order made on the 18th August could not take effect until the 24th and would then last for six months. It is averred that the judgment of Peart J was the first in which judicial guidance had been given as to the meaning of s.189 of the Act of 1945. Reliance is placed on observations made by Peart J to the effect that there was no suggestion that what had happened was other than a genuine error, such as can happen with busy people in any circumstances.

17. In their written submissions it is specifically argued that a mistake on the part of Dr. Kennedy as to the true interpretation of s.189 cannot on its own constitute a failure on his part to act with reasonable care. This, it is said, is a case where a party acted deliberately in accordance with a mistaken but *bona fide* view of his legal obligations. The mistake resulted in a judicial declaration of the legal invalidity of his action but there should be no other legal consequence. The contention is that s. 73 protects such a party, who did not intentionally or negligently fail to comply with legal obligations and was not reckless or indifferent as to what those obligations were.

18. The court is also urged to put the matter in context- the applicant was undoubtedly ill and it was not a case where Peart J held that he should not have been detained. His rights under the Constitution and the Convention are said to have been fully respected and there was no lack of legal procedures to challenge the legality of his detention. It is also submitted that the court should take a *de minimis* view- the illegality, it is argued, lasted only until the making of the fresh order on the 19th or its affirmation by the tribunal on the 20th.

19. Counsel for the Commission argues that it is blameless in relation to the matter. It relied on the clinical director to provide the relevant information and it was not the practice to require sight of the actual detention order. The Commission, it is asserted, is not responsible for ascertaining the correct expiry date- that is for the clinical director in the first instance. It was then for the tribunal to decide whether the detention had expired. Nor can the Commission be held responsible for the findings of the tribunal, since its only role is to establish and facilitate the tribunal.

The Law
20. Section 73 replaced the equivalent provisions in s.260 of the Mental Treatment Act, 1945. To obtain leave pursuant to s. 260(1), the would-be plaintiff had to establish to the satisfaction of the High Court that there were substantial grounds for contending that the person against whom the proceedings were to be brought acted in bad faith or without reasonable care. Should leave be granted

and the case proceed to full hearing, the court, again, was constrained to find in favour of the defendant unless satisfied that he or she had acted in bad faith or without reasonable care. Section 260 was found by the Supreme Court to be unconstitutional in *Blehein v The Minister for Health and Children* [2008] IESC 40 (*Blehein*), a case brought by an unsuccessful applicant for leave. In affirming the decision of the High Court, the Supreme Court noted that the objective of the provision - to provide some protection to persons acting under the Act against vexatious actions, or ones based on imagined complaints, instituted by plaintiffs who were or had been thought to be mentally ill- was legitimate. However, in restricting a plaintiff to allegations of bad faith or want of care; in placing the burden on the plaintiff at that stage and in curtailing the discretion of the court in a situation where the important constitutional right to liberty was concerned, the section amounted to a limitation on access to the court and a restriction on the administration of justice. The judgment of the Court singles out the restriction of the possible grounds of application as failing the proportionality test for being arbitrary and hence unfair. The effect on rights was not proportionate to the object to be achieved.

21. It must be noted that s. 73 was drafted before either the High Court or the Supreme Court proceedings in *Blehein* and indeed was in force before the latter.

22. Section 73 has been the subject of three written judgments to date. Two- *M.P. v HSE* [2010] IEHC 161 and *M.P. v Attorney General* [2010] IEHC 473- concern the same plaintiff and might fairly be categorised as cases where a person sought to bring proceedings that were vexatious (in the sense of having no chance of success) or based on imagined complaints. The issues arising in that context are not a feature of the instant case.

23. The case of *A.L. v Clinical Director of St. Patrick's Hospital and the Mental Health Commission* [2010] 3 I.R. 537 is more pertinent. There, details of a renewal order had been sent to and received by the Commission, which failed, by reason of some internal mishap, to act upon it and in particular to arrange a tribunal to review the plaintiffs case in the manner required by the Act. At the hearing of the application for leave, the Commission consented to leave being granted but the Clinical Director objected. The case made against him and his staff was, in effect, that they were put on enquiry by the complete absence of communication from the Commission and that they breached their duty of care to the plaintiff by failing to take any action.

24. Clarke J, in granting leave, noted that the new section was potentially subject to some of the same criticism as s.260 of the Act of 1945, albeit the burden of proof at the leave stage had been reversed. However, on the facts of the case before him he did not feel it necessary to explore that aspect.

25. He held that the term "without reasonable care" should be interpreted as applying not just to an absence of proper medical care but also to an obligation to use care in ensuring that persons are not in unlawful custody, following *Melly v Moran* (Unreported, Supreme Court, 28th May, 1998). It was therefore open to the intended plaintiff to seek to allege that there was a breach of duty of care on the part of the 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 her detention. The existence and extent of such a duty of care was, he considered, a matter for the trial - what mattered at the leave stage was that it could not be said that there were no reasonable grounds for asserting that a duty of care along the lines submitted did exist.

Conclusions

26. The arguments advanced on behalf of the first and third named respondents to this application rest in part, it seems to me, on a misreading of the judgment of Peart J. The decision expressly does not relate to statutory interpretation or to a misunderstanding of the statute by Dr. Kennedy but rather to the legal effect of the direction given by Dr. Jackson. There was nothing wrong with that direction- it was a valid renewal of the detention order for the period specified in her endorsement on the document. The problem arose because Dr. Kennedy believed that it was wrong and decided to give a different date to the Commission. I have no reason at all not to accept that this was done in good faith, but it is not clear to me why he thought he had the authority to amend her decision .

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 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.

36. I am therefore granting leave to the applicant to issue proceedings against the three respondents.

37. It may be worth stressing the difference between the procedure being dealt with under s.73 and, for example, an application for leave to bring judicial review proceedings. The reversed burden of proof is one obvious distinction. It is also important to note that no party, let alone a trial judge, is in any way bound by the views expressed in this judgment. The normal course of litigation, including discovery and oral evidence, may well bring other considerations to the fore.

38. There remains the separate claim, referred to in paragraph 4 above, in relation to the transfer of the applicant from Our Lady's Hospital in Navan to the Central Mental Hospital. As already mentioned, it was indicated that this was not going to be strongly urged. In fact, no argument was put forward in relation to it by any party. Quite apart from the detailed evidence exhibited in the respondents' affidavits justifying the transfer, the claim would seem to be statute barred. I am not sure whether it is possible under the section to refuse to permit a plaintiff to pursue a particular aspect of a claim where leave to institute proceedings is being granted and I will hear the parties in relation to this.