Neutral Citation Number: [2010] IEHC 161

THE HIGH COURT

2009 3538 P

AND

2009 69 IA

BETWEEN

M. P.

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE, THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM AND SHEILA CASEY

DEFENDANTS

JUDGMENT of Mr. Justice John MacMenamin delivered the 27th day of April, 2010

1. Sections 73 of the Mental Health Act, 2001 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 reasonable grounds for contending that the person against whom the proceedings are brought acted in bad faith or without reasonable care.
>
> (2) Notice of an application for leave of the High Court under subs. (1) shall be given to the person against whom it is proposed to institute the proceedings and such person shall be entitled to be heard against the application.
>
> (3) Where proceedings are, by leave granted in pursuance of subs. (1) of this section, instituted in respect of an act purporting to have been in pursuance of this Act, the Court shall not determine the proceedings in favour of the applicant unless it is satisfied that the defendant acted in bad faith or without reasonable care".

The applicant's motion

2. Ms. P. (whom I will refer to also as "the applicant") was born in Sierra Leone. By way of notice of motion dated 6th January 2010, she seeks leave to initiate proceedings against the defendants ("the respondents") in accordance with s. 73 of the Act of 2001. She and members of her family experienced considerable misfortune and tragedy there. She came to this country in or about the year 2000. She is described in the proceedings as being a media-psychologist. While she presented her case without the assistance of a solicitor or counsel, she is a highly intelligent and fluent person, very well capable of presenting an account of events, as she perceived them.

3. The applicant in fact commenced one set of proceedings against the defendants on the 14th April, 2009. As these were issued without leave, they were struck out by order of this Court on 9th November 2009. She now seeks again to initiate these issues in a second set of pleadings. In both applications she made a wide variety of very unusual and far ranging claims arising from her interaction with the defendants, or their servants or agents. A number, if not all of the allegations, are phrased in very broad and extreme terms. She makes assertions against a number of public officials including those involved in her treatment pursuant to the Act of 2001. She was diagnosed as having a psychiatric paranoid condition and received involuntary treatment in Cavan General Hospital Psychiatric In-Patients Unit between the 3rd February and the 13th March, 2009 during which time her detention was monitored by the Mental Health Tribunal. She seeks to initiate claims *inter alia* in regard to the treatment she received then, and with regard to other matters.

4. During much of the material time to the questions here the applicant lived in County Cavan. She has now returned to live in Dublin.

The defendants' motions

5. As well as being respondents to the applicant's notice of motion, the defendants bring application to have the intended proceedings dismissed as being frivolous and vexatious and or an abuse of process. The matters raised by the defendants in those motions are also relied on by the respondents in resisting the applicant's application for liberty to issue her proceedings pursuant to s. 73 of the Act of 2001.

The applicant's affidavit

6. The applicant's affidavit consists to a large degree of a reiteration of her complaints. It is valuable in that way. For a description of the sequence of events the main focus should in the first instance be on what is deposed to by or on behalf of the defendant. This is not to make any value judgment. It is simply that the chronology is set out more fully there.

The affidavit of Dr. Sheila Casey
7. The first affidavit in time is that of Dr. Sheila Casey, a general practitioner. Dr. Casey describes first coming into contact with the applicant at her walk-in clinic on 3rd November 2008 in Kingscourt, County Cavan. She said she was informed by the applicant that her young child was in voluntary care. She needed to attend a general practitioner so as to provide voluntary weekly urine tests to exclude the possibility of cocaine and cannabis use. She was also required to have her drug regime supervised by a home based team so as to obtain access to her daughter. Such conditions had been imposed by the District Court in proceedings relating to her child. Dr. Casey said that the applicant informed her that whilst she was living with friends in Cavan town, she had been a patient of Dr. Darragh Hume, a general practitioner, and had also attended a Dr. E. Moloney, consultant psychiatrist.

8. The applicant attended Dr. Casey on a number of occasions. The doctor said she made efforts to ensure she would have supervision for her mental health condition through the home base team in Kingscourt. This was led by the psychiatric services and Dr. Vincent Russell, consultant psychiatrist. At the applicant's request, she also endeavoured to refer her to another psychiatrist of her choice based in Dublin. Dr. Casey states that these efforts did not prove successful as her patient would not respond to telephone calls left by the community psychiatric nurse.

9. Until November 2008, the applicant's urine tests were negative. Dr. Casey says she always passed this information on to social workers. A number of claims were made by Ms. P. that she did not pass on these tests results. These the doctor denies entirely.

The applicant's complaints regarding text messages
10. In an affidavit actually sworn on 23rd September 2009, three months prior to the date of her motion, the applicant complained that she brought her mobile phone to Dr. Casey, that it contained text messages concerning her private life which were of a "life threatening" nature but the doctor ignored those messages. She alleges that Dr. Casey asked her intrusively each week about her new neighbours; was aware of the involvement of neighbours misconduct or harassment towards the applicant and did nothing to stop this or other interventions of the defendants so as to enable her to nurture her daughter who is in care with foster parents. The applicant claims that social workers, who are not identified, later said that Dr. Casey did not tell them about the negative urine tests. There is no corroboration of this. The applicant claims Dr. Casey prescribed psycho-active drugs which were detrimental to the care of her child.

Dr. Casey's responses
11. In response, Dr. Casey points out that the medication which she prescribed for the applicant was a continuation of that prescribed by her previous general practitioner, a Dr. Hume, and her previous consultant psychiatrist, Dr. Maloney. She also denies that she ever had any discussion with social workers about the applicant's interaction with her neighbours.

12. The general practitioner says that on 27th November 2008, she rang the applicant and offered to organise referral to the psychiatrist, Dr. Vincent Russell and a community psychiatric nurse. The applicant was not willing to attend. Later, in December 2008, she told Dr. Casey that she was willing to attend for a psychiatric assessment. By then the District Court which had charge of the child care proceedings had indicated that her daughter would remain in care until she did so.

13. Dr. Casey states that for a one month period, between 18th December, 2008 to 12th January, 2009 the applicant did not attend her at all. In the meantime social workers had arranged for her to have an independent assessment by another consultant psychiatrist, Dr. O'Domhnaill. Dr. Casey asked the applicant to produce urine sample at the time. She refused and indicated that she would only furnish one if there was a written request by District Court Judge McBride who was dealing with the care proceedings.

14. Dr. Casey states that on 20th January 2009, the applicant attended her surgery in an upset agitated condition. Her account is that her patient claimed that she had received a series of text messages threatening both her and her child and that she had shown these to a Sergeant David Burke in Kingscourt Garda station who she said did not them seriously. The doctor deposes that Ms. P. *purported* to show her the text messages but scrolled down through them so quickly that she could not read any of them, and therefore could not vouch as to their contents. In the applicant's presence, Dr. Casey rang Sergeant David Burke. He indicated that the matter was under investigation, and that he was dealing with the complaint. The doctor did not form any impression that the sergeant had brushed the applicant off. On the same day Dr. Casey telephoned the applicant's daughter's foster mother and gave the applicant the telephone so that she could speak with the foster mother. This conversation calmed her down. At this stage, the doctor felt that the applicant looked unwell and underweight.

15. On 22nd January 2009, the applicant attended the doctor and stated that she had reported the texts to the *guardian ad litem* appointed by the District Court to represent the interests of her daughter.

16. The applicant attended the doctor again on 29th January 2009, and stated that two days previously, she had been arrested by the gardaí under s.12 of the Mental Health Act, taken to Bailieborough Garda station, whereupon the gardaí called a doctor from the out of hours service who had assessed her. This doctor had refused to certify her and she was released. The applicant indicated to Dr. Casey that she had traced the abusive threats and (she claimed) they were actually coming from the gardaí. She told Dr. Casey that she was taking her medication.

17. On the 3rd February, the applicant attended again. It was obvious to the doctor that her mental condition had deteriorated considerably. The applicant informed the doctor she had received further threatening texts. She told the doctor she did not own a gun but had a knife which she was prepared to use, and she had brandished the knife to show people that she had one. She also informed the doctor that people were throwing stones at her house at night and making noise and that she was sleeping by day and waiting at night to catch them. On this occasion she was agitated and speaking very quickly.

18. On the basis of her own observations and confirmed by social workers, Dr. Casey formed the view there was a significant risk of the applicant either harming herself or another person. By this stage the doctor says she had made every effort to have the applicant supervised by mental health care professionals. She telephoned Dr. Russell, Consultant Psychiatrist, after the applicant left and explained the situation. Dr. Russell agreed that there appeared there was a threat to life and that Dr. Casey should make an application to have her admitted under the Mental Health Act.

19. Dr. Casey wrote a referral letter to Dr. Russell indicating that the applicant had been diagnosed as having a paranoid illness

related to cannabis abuse by Dr. Ian Moloney, Psychiatrist, in the summer of 2008. She outlined to Dr. Russell the complaints that the applicant had made to her. She indicated that she had left a message with a Melinda Cooper, Social Worker, as the applicant's child A. was in care. It appeared that the social worker who brought A. to Kingscourt for supervised visits on each Wednesday was nervous of the applicant because of allegations she was making about her neighbours.

20. Dr. Casey then telephoned Sergeant Burke at Bailieborough Garda Station and requested that the applicant be detained under the Mental Health Act. She saw the applicant at the garda station subsequently at which time she was very upset. Dr. Casey explained to the applicant in simple terms why she had been arrested and why she was concerned and felt that she needed help. She informed her patient that there would be a thorough psychiatric assessment and that if the outcome of this was that it was appropriate to admit her, she would be released home the same evening. By contrast the applicant contends that she was not suffering any psychiatric complaint. However the applicant faces the issue that what she says is based on bare assertion. This is important in light of the legal tests applicable, which are outlined later. There is no independent evidence before the Court which bears out any part of the applicant's case against these defendants. On a detached assessment of the doctor's evidence there is no indication she acted other than *bona fide* in the interests of her patient.

21. It is then necessary to take up the narrative as to the medical care which was given to the applicant by the HSE.

Dr. Russell's affidavit

22. Dr. Vincent Russell, Consultant Psychiatrist, deposes that on the 21st August, 2008, the applicant had been diagnosed by Dr. Ian Moloney, Consultant Psychiatrist, as suffering from a paranoid psychotic illness. She initially accepted home base treatment, but subsequently rejected nursing visits. At the time of this initial assessment she had been living in Cavan where Dr. Daragh Hume was her general practitioner. Thereafter, when she moved to Kingscourt she came to Dr. Casey.

23. On the 1st December, 2008, Dr. Russell received a letter from the applicant informing him that she would be naming him "for examination" in a "law suit against the HSE for discriminatory, biased and unethical practices" and alleging that she had been denied "public services". In the letter, the applicant claimed that her daughter had not visited her for five weeks because he (Dr. Russell) had denied her "public services", *i.e*. psychiatric assessment. It appears from the letter that the applicant resented being treated at home by community nurses. She wrote:-

> "Your refusal to accept me as a patient is a continuance of the maltreatment of mental health patients and I await your defence of such in court."

24. In the course of this letter, Ms. P. made a number of allegations against Dr. Russell's colleague, Dr. Moloney. The applicant suggested that this continued maltreatment was because of her racial background. There is no corroboration of this contention. The applicant also complained about the standard of care which she was given. She wrote that she had made formal complaints to the Mental Health Commission and to the Board of Cavan General Hospital, as well as informing the Minister for Health and the Chief Executive of the HSE.

25. Dr. Russell deposes that he arranged for Dr. Moloney to contact the applicant's general practitioner in relation to these complaints. He says that in the third week of January, 2009 he was contacted by Dr. Casey to discuss recent deterioration in the applicant's behaviour. He arranged an appointment to carry out an assessment of the applicant on the 23rd January, 2009, at Dr. Casey's rooms. However, on the day before, the 22nd January, the applicant telephoned to say that she refused to see Dr. Russell but that she had agreed to commence taking anti-psychotic medication. Dr. Russell made notes of this conversation with Dr. Casey.

26. Dr. Russell states that on 3rd February 2009, the applicant was admitted to Cavan General Hospital Psychiatric In-Patient Unit under his care as an involuntary patient under the Mental Health Act 2001. This was following an application made by An Garda Síochána and Dr. Casey. The documentation exhibited in Dr. Russell's affidavit includes:-

> A. An application form made pursuant to s. 12 of the Mental Health Act 2001, by Sergeant David Burke who applied for a recommendation for the involuntary admission of the applicant.
>
> B. A recommendation by Dr. Casey pursuant to s. 10 of the Mental Health Act 2001, for such involuntary admission.
>
> C. An involuntary admission order dated the 3rd February, 2009, pursuant to ss. 14 and 15 of the Act of 2001, completed by him.

27. The reason for the applicant's admission to hospital was by reason of her expression of paranoid ideation with particular concerns expressed by Dr. Casey that the applicant threatened to use a knife in defending herself against what she perceived as threats conveyed to her, as well as the general practitioner's concerns regarding her weight loss and agitation.

28. When the applicant was assessed on admission on the 3rd February, 2009, she appeared as affectively controlled and articulate. Her attitude was guarded. Her mood was felt to be stable. The applicant stated that she felt that two members of An Garda Síochána had deliberately shone their car lights into her bedroom, as a result of which she had retaliated by parking her car in front of their houses and playing her car radio to the maximum. She claimed neighbours had harassed her both in Dublin and in Cavan town before she moved to Kingscourt. She claimed that the she was a victim of a conspiracy on the part of the HSE and social workers who had recruited a variety of neighbours and third parties in several different locations to observe and harass her. She did not give a reason for this conspiracy. With regard to reported threats of using a knife the applicant described that this was in response to harassment by text messages which she had received threatening to kill her, and she was merely responding with similar threats.

29. Based on this overall assessment, it was considered that the applicant presented with a paranoid psychotic illness. Dr. Russell states that the immediate events prior to her admission, her current mental state on examination, and the fact that she was refusing voluntary treatment, justified detention as an involuntary patient under the Mental Health Act 2001.

30. There is no contention in this case that there was a specific breach of legal procedures. (See *A.L. v. Clinical Director of St. Patrick's Hospital & The Mental Health Commission* [2010] IEHC 62, Clarke J., a decision which became available after this case was heard.) In accordance with s. 16(2) of the Mental Health Act 2001 the applicant's admission to Cavan General Hospital was notified to the Mental Health Commission on the 3rd February, 2009. In the early period following her admission the applicant's behaviour was pleasant and stable, although sometimes irritable with staff and co-patients. She occupied herself primarily in assembling evidence of what she saw as her unlawful detention which she planned to present to the High Court. On the 8th February, 2009, the applicant's

tablets, or some of them, were found in her locker. When asked about this the applicant claimed that she had been spitting out some of her medication because she had brought in medication of her own to help her sleep, which she was taking instead. The applicant continued to have supervised access with her daughter in hospital, and no inappropriate behaviour occurred at this time.

The Mental Health Tribunal procedure

31. The Mental Health Tribunal was created under the Act of 2001. Its function is to monitor and supervise the detention of patients in psychiatric wards. Pursuant to s. 18 of the Act of 2001, a Tribunal review of the applicant's admission order was to take place on the 19th February, 2009. The applicant was interviewed by her solicitor and an independent consultant psychiatrist, Dr. Bernadette McCabe, who in accordance with the Act provided a report to the Tribunal for the purpose of the statutory review. The applicant attended the Mental Health Tribunal review on the 19th February, 2009, and a report was made available to the Tribunal by Dr. Russell.

32. Pursuant to s. 18 of the Act, the Tribunal reviewed the applicant's admission order on the 19th February, 2009, in accordance with s. 49(6)(j) of the statute. Having considered the evidence, the Tribunal found that the applicant was suffering from a mental disorder within the meaning of that term in s. 3 of the Mental Health Act 2001. The Tribunal was further satisfied that the various statutory provisions had been complied with and accordingly, it affirmed the order. I attach considerable importance to this determination.

33. On the 23rd February, 2009, Dr. Russell completed parts 1 and 2 of a "Certificate and Renewal Order by responsible consultant psychiatrist" (Form 7 pursuant to s. 15 of the Act of 2001). This was notified to the Mental Health Commission on the 23rd February, 2009. The applicant was also notified in writing of the extension of her detention.

34. During the period of her detention the applicant had regular supervised access with her daughter. She also had escorted visits to her home for the purpose of collecting some personal belongings and arranging the payment of her rent.

35. On the 3rd March, 2009, the applicant's solicitors wrote to the Clinical Director of the psychiatric unit of Cavan General Hospital giving notice of an appeal to the Circuit Court of the decision of the Mental Health Tribunal dated 19th February, 2009.

36. It is said that despite being maintained on anti-psychotic medication, the applicant remained fixed in her beliefs that she was the victim of conspiracy on the part of the Health Service Executive and others. She believed a male co-patient had been a Health Service Executive 'plant' after she observed him disposing of medication administered to him on the ward.

37. The Mental Health Tribunal's second review of the applicant's detention took place on the 13th March, 2009. The applicant was also reviewed by an independent consultant psychiatrist in preparation for the Mental Health Tribunal hearing. On this occasion, the Tribunal received evidence for the applicant as well as medical evidence from Dr. Russell. Having considered this evidence, the applicant's detention was revoked by the Mental Health Tribunal on the 13th March, 2009.

38. As appears from the decision, the basis of the revocation was that the Tribunal was not satisfied that the provisions of s. 3(b) (ii) of the 2001 Act any longer applied. In essence, the effect of this determination was that it had not demonstrated that the applicant's continued detention was likely to be of benefit to her or to alleviate her condition to any material extent. The Tribunal made no criticism of the fact that the applicant had originally been detained, however.

Contact after detention ended

39. Dr. Russell interviewed the applicant immediately after the Tribunal hearing. She was offered the option of remaining in hospital on a voluntary basis. This she declined. She refused any further out-patient follow up, either with Dr. Russell or others members of the Cavan Adult Mental Health team. She did, however, state that she intended remaining on her current prescribed medication and accepted three days supply of this medication and agreed to attend Dr. Casey, her general practitioner, on the following Monday to obtain a follow up of this medication. The applicant did not do so.

40. The applicant claims now that she was "subjected to torture at the hands of Dr. Russell and ward nurses". No details are outlined on this allegation. No complaint of this nature was made to the Tribunal. Any such allegation is totally denied by Dr. Russell. He was not made aware of any complaint or allegation of mistreatment at the time of her detention other than the fact of her actual detention itself. Other than providing a psychiatric report to Judge McBride of the Cavan District Court in February, 2009 in the context of the childcare proceedings, Dr. Russell has had not further contact with the applicant.

The joinder of the Minister for Justice, Equality and Law Reform as a defendant

41. The Minister for Justice, Equality and Law Reform is joined in these proceedings as a defendant. Here the one clear uncontested fact is that Sergeant Burke arrested the applicant for the purposes of her detention. This was in pursuance to s. 12 of the Mental Health Act 2001, which empowers a member of An Garda Síochána to take a person believed to be suffering from mental disorder into custody and having done so, make application in a form specified by the Mental Health Commission to a registered medical practitioner for a recommendation. This fact alone does not bear out any evidence of want of compliance with s. 12 on the part of the detaining officers.

Consideration of the affidavits as to the defendants conduct

42. Other than assertion, there is no evidence that the medical professionals or the gardaí acted other than with the patient's interest at heart. The detention was monitored by the Mental Health Tribunal. There is no independent evidence of want of skill or diligence on the part of the doctors or social workers. There are no reasonable grounds established in evidence for finding the doctors or members of the gardaí acted in bad faith or with want of reasonable care.

The progress of the applicant's proceedings against each of the respondents

43. The applicant caused her summons to be issued on the 14th April, 2009. This was served on Dr. Casey, the third defendant personally on the 22nd April, 2009. It appears that the fundamental basis for her joinder in the proceeding was because she had applied under s. 9(1) of the Mental Health Act 2001, for a recommendation that the applicant be involuntarily admitted to an approved centre, in the circumstances outlined. When the applicant issued the summons, Dr. Casey was advised by her solicitor that there was no legal entitlement to issue the summons unless leave was first obtained pursuant to s. 73 of the Mental Health Act 2001.

44. On the 24th July, 2009, therefore, the third named defendant's solicitors caused a notice of motion to be issued returnable for the 12th October, 2009, seeking to strike out the applicant's proceedings pursuant to O. 137, r. 4(b) of the Rules of the Superior Courts 1986 as amended, for failure to obtain leave of the High Court under s. 73 of the Mental Health Act 2001. This application was grounded upon an affidavit of Kate McMahon solicitor, sworn on the 24th July, 2009.

The High Court hearings on 12th October, 2009 and thereafter

45. The third defendant's motion first came before this Court in the Chancery List on the 12th October, 2009. On that date the applicant did not appear in court. The Court was informed by counsel that the applicant had telephoned the third named defendant's office to say she had appeared in court earlier that morning, but that she had chosen not to stay in the court as, she claimed, the court had no jurisdiction to make any order, and any such order it might make would be null and void. I directed an adjournment of the motion for three weeks peremptorily against the applicant and directed that any replying affidavit of the applicant was to be delivered within ten days.

46. On the next return date, the 2nd November, 2009, the applicant again did not appear. No replying affidavit had been filed. At this point the third named defendant's solicitors had become aware that the applicant had, separately, issued a motion in a different set of proceedings against the same defendants. These proceedings bore the record no. 2009/69I.A and the motion was returnable for the 9th November, 2009. It was appropriate that the two matters be heard together and the court so directed. The applicant was informed of a direction to this effect.

47. On the 9th November, 2009 all aspects of the case were listed before this Court. Having heard counsel for the third and first named defendants, as well as the applicant who appeared in person, and as there had been no compliance with s. 73 of the Act of 2001, the Court ordered that the motion and proceedings bearing record no. [2009 No. 3538P] and the intended application of the applicant bearing record no. [2009 No. 691A] be struck out and made no order as to cost. What occurred in court is now described in more detail.

The decision of the Court on the 9th November, 2009

48. Counsel for the third defendant explained that the applicant had issued the second proceedings record no. [2009 No. 69A], subsequently to the issuance by the doctor's solicitor of the notice of motion striking out the first plenary, proceedings [2009 No. 3538P]. Counsel indicated she had not had sight of the motion or any grounding affidavit in the new proceedings. They had not been served upon her client. She believed that if there was to be a motion seeking leave to proceed under s. 73 she was entitled to be served with motion papers pursuant to O. 137 of the Rules of the Superior Courts. Counsel explained that the applicant's motion seeking leave under s. 73 had been returnable that day in the non-jury list where Hedigan J. transferred the motion to be heard before me.

49. Counsel for the first defendant, the HSE, indicated to the Court that her client had not been a party to Dr. Casey's motion, but that her instructions were similarly to apply to strike out the proceedings record no. [2009 No. 3538P] against her client, both on the basis that it was brought in contravention of s. 73 of the 2001 Act, and that the claim was frivolous and vexatious.

50. Counsel for the HSE indicated that it appeared that her client had been named as a party to the applicant's motion seeking leave under s. 73 in the new, second proceedings record no. [2009/69IA], but that these had never been served on her client. They had only come to notice via the third named defendant's solicitors. Counsel stated that she was primarily seeking an order that the applicant serve her motion and affidavit seeking leave under s. 73 upon the HSE, so that the first defendant could ascertain the nature of the applicant's complaint and respond to it pursuant to its entitlement under O. 137.

51. Counsel pointed out that the applicant's originating motion seeking leave to issue proceedings in the second set of proceedings had (a) been issued after the proceedings bearing record no. [2009 No. 3538P] had been issued; (b) been issued after the third named defendant's motion to strike out the first proceedings (record no. [2009 No. 3538P]) had been issued; and (c) that neither the applicant's originating notice of motion seeking leave under s. 73 nor had any grounding affidavit been served on her client. The Court explained the provisions of s. 73 of the Act of 2001 to the applicant.

52. Counsel's note records the applicant at that stage responding by saying that she had never issued her summons under the Mental Health Act 2001, and querying an averment in the third named defendant's grounding affidavit to this effect. She advised the court on that occasion that she had recently changed address and that letters sent to her had not been received until a short time before the motion.

53. The Act prohibits 'the institution' of proceedings without leave of the courts. There is no variation or waiver provision. Having heard submissions from the applicant, and counsel for the defendants, the court ruled then that it did not have power to waive the leave requirement under s. 73 in either the original, or the intended action, and consequently that it would strike out (but not dismiss) both actions against the defendants. It indicated to the applicant that if she wished lawfully to issue proceedings, she must first bring an application under s. 73 to obtain the requisite leave. The applicant was told that were she to bring any such application she must set out in an affidavit the acts complained of which were purported to have been done pursuant to the Act of 2001, and to specify any wrong which she had believed had been done to her. The Court further indicated that such affidavit should be served upon each defendant allowing them time to reply in respect of each such allegation. Unfortunately, matters did not turn out as hoped for.

54. Subsequent to the order of the 9th November, 2009, the applicant, regrettably, simply served an additional document on the third named defendant entitled "Statement of Claim (continuation)". This document purported to be served pursuant to the first plenary proceedings (record no. [2009 No. 3538P]) which had been struck out on the 9th November, 2009. In this document the applicant made further rather unusual allegations against various parties, claiming that the Department of Justice had contacted her landlord, estate agents, and neighbours with the intention of turning them against her; that she had been arrested on the 3rd November, 2009, as a result of making allegations in relation to bugging devices placed in her home.

55. The applicant had apparently been arrested on the 7th November, 2009, following a distress call she made on an emergency line. She claimed a neighbour, who she claimed, the defendants had set against her, allegedly threatened her with a gun. This was at the instigation of the Department of Justice. The applicant now claimed that the Department of Justice in an effort to intimidate her had removed her Jeep from her residence on the 7th November, 2009. She claimed that the Department of Justice was acting in collusion with national broadcasters. She stated that an RTE radio host had been used to taunt her on the radio and that on following days both FM104 and TV3 had aired selected programmes to "stitch up" a diagnosis of schizophrenia by the HSE. There were many other allegations. On foot of these she now claims damages of €20 million.

The applicant's motion before the Court

56. On the 6th January, 2010, the applicant issued a notice of motion under s. 73 of the 2001 Act seeking leave of the court to issue a summons instituting civil proceedings against the defendants. She sought further orders compelling the defendants to produce medical documents so far withheld relating to acts committed under the Mental Health Act 2001; for telephone service providers to produce records of phone tapping and communication relating to acts committed under the Mental Health Act 2001; and for "worldwide web service provider" to produce records of cyber and internet communications and interference relating to acts committed under the Mental Health Act 2001. This notice of motion was grounded on an affidavit dated the 23rd September, 2009.

57. In documents submitted to the Court, the applicant identified the contents of a series of text messages and telephone numbers. These text messages are indeed of an extremely unpleasant nature containing racist remarks and threats. A number of persons are identified as having particular phone numbers. The applicant says she had reported an African gentleman to gardaí for dealing in drugs. She swears that gardaí went to him and told him that she had 'ratted' on him and that the gardaí asked him to "take her out". His telephone numbers are supplied. She identifies persons who she claims were paid to inform against her. She identifies a number of 'chat room' participants sent to inquire of her work plans.

58. Beyond mere assertion there is no evidence to suggest that any of these other persons have links with any of the defendants. To justify the retention of the named defendants in these proceedings it would be necessary to demonstrate clear causal links between the defendants and persons making threatening phone calls, text messages or emails. No sufficient evidential link is established which would justify the court in proceeding upon this basis.

59. Unfortunately yet again the applicant also failed to comply with Court procedures. An affidavit sworn on behalf of the HSE's solicitors indicated that as of the 10th February, 2010, they had not been served with any copy of the affidavit of the 23rd September, 2009. When the matter again came before me on the 29th January, 2009, I again directed that the applicant serve *all* parties with all documentation.

60. Ultimately, the first named defendant's solicitors had to obtain a copy of the applicant's affidavit of 23rd September, 2009, from Dr. Casey's solicitors.

61. By letter of 25th January, 2010, the applicant had informed the solicitors acting for the HSE that they should access affidavits "1 and 2 from the Central Office of the High Court". Despite this reference to *two* affidavits, it appears that the only single affidavit which has been filed by the applicant for her motion is that of the 23rd September, 2009. A previous affidavit sworn on the 22nd April, 2009, for proceedings bearing record no. [2009 No. 3538P] has not been exhibited or referred to. No affidavit filed by the applicant demonstrates any want of good faith by the respondents named herein.

Matters outside the parameters of the motion before the Court

62. The applicant's affidavit of the 23rd September, 2009, was by no means confined to alleged acts or omissions done in pursuance of the Mental Health Act 2001. As explained, it also referred: (1) to acts purportedly done by various persons not defendants in these proceedings, and (2) to acts done by the HSE pursuant to its statutory duty under the Childcare Act 1991, that is to say, care proceedings in respect of the applicant's daughter. These items fall outside the terms of this motion.

63. When the matter next came before me on 22nd February, 2010, I specifically indicated to the applicant that this Court would make no order restraining the conduct of the Childcare Proceedings which were to be resumed by Judge McBride, apparently, on the next day.

The defendant's case that the claims are frivolous and vexatious

64. The defendants contend that the applicant's proceedings are frivolous and vexatious. As well as resisting the application for leave, they seek to invoke the inherent jurisdiction of the Court to restrain the institution of proceedings by the applicant and to restrain her from making scandalous allegations, not merely against the defendants but as against other persons not joined in the proceedings. It is contended that the defendants (and other persons named by the applicant) have a right to be protected from unnecessary harassment and expense, and that the applicant has evinced a determination repeatedly to invoke the court's processes in order to pursue groundless and vexatious litigation. The question arises as to whether an order in such wide ranging terms would be disproportionate.

Legal authorities

65. In the course of submissions I was not referred to any authority directly touching on s. 73 of the Act of 2001. Since the hearing, Clarke J. delivered judgment in the *A.L.* case cited earlier. The facts of the two cases are very distinct. Two authorities under its predecessor provisions in s. 260 of the Mental Treatment Act 1945 are, however, helpful.

66. In *Murphy v. Greene* [1990] 2 I.R. 566, the Supreme Court held that s. 260 of the Act of 1945 in requiring the leave of the High Court as a precondition to the institution of proceedings was a curtailment of the constitutional right of access to the courts and thus, should be strictly construed. Finlay C.J. stated:-

> "Section 260 of the Mental Treatment Act 1945, is *prima facie* a curtailment of the constitutional right of every individual of access to the courts to the extent that it requires a precondition of leave of the court for the bringing

> by him of a claim for damages for an asserted wrong. It seems reasonable as was stated by O'Higgins C.J. in *O'Dowd v. North Western Health Board* [1983] ILRM. 186, that one of the reasons for this curtailment is to prevent a person who is or has been thought to be mentally ill from mounting a vexatious action, or one based on imagined complaints."

67. In *Blehein v. Minister for Health and Children* [2008] IESC 40, Denham J. pointed out that the purpose of s. 260 was to give a limited protection to persons acting under the Act of 1945. She observed that this was a legitimate purpose for such legislation. However, she observed that the section was a restriction of a constitutional right of access to the courts in a context where the fundamental constitutional right of liberty has itself been restricted.

68. Thus, Denham J. found the section should be applied in a proportionate manner. She observed that the Supreme Court has itself restricted access in ordinary litigation (*Wunder v. Hospitals Trust (1940) Limited*, Supreme Court, 24th January, 1967, and 22nd February, 1972). She observed that while the aim of the Act of 1945 was legitimate, the limitation on the right of the applicant should not be overbroad, should be proportionate and should be necessary to secure the legitimate aim of the legislation. In this connection she cited the well known observations of Costello P. in *Heaney v. Ireland* [1994] 3 I.R. 593, at p. 607.

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 s. 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, that is whether under s. 73(1) (a):

> (a) "…the proceeding 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."

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 paragraph (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. These authorities are, of course, equally applicable to the defendants' motions to strike out the applicant proceedings on the same grounds.

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. This has not been raised here.

73. In *Faye v. Tegral Pipes Limited* [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 caused 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."

74. Further factors were identified in *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463; *Riordan v. Hamilton* (Unreported, Supreme Court, 9th October, 2002); and *Riordan v. Government of Ireland* (Unreported, High Court, 6th October, 2006).

75. Ó Caoimh J. in *Riordan (No.5)* identified a number of matters which are relevant here. These included:

> a) The entitlement of the court to look at the whole history of the matter and not confine itself to a consideration of whether the pleadings disclose a cause of action. One indicator is whether the proceedings have been brought habitually and persistently without reasonable ground;
>
> b) where it is obvious that an action cannot succeed or if the action would lead to no possible good, or if no reasonable person could reasonably expect to obtain relief, and
>
> c) where the action was brought for an improper purpose including the harassment and oppression of other parties by multifarious proceedings brought by purposes other than the assertion of legitimate rights.

76. Against these, this Court must, of course, have regard to the point, as identified by the Supreme Court in *Riordan* that one other of the indicia is whether the issues have already been litigated elsewhere. This is not so in the present case.

77. However, this point must be seen in the light of Costello J's observation in *McSorley v. O'Mahoney* (Unreported, High Court, 6th November, 1996) that it is an abuse of process of the court to permit the courts' time to be taken up with litigation which can confer no benefit on an applicant. It is also an abuse to permit litigation to proceed which will undoubtedly cause detriment to a defendant and which can confer no gain on an applicant. I must apply these principles and observations to this case.

Section 73 and Proportionality

78. What should be a proportionate application of s. 73 of the Act of 2001 in the leave application? One must have regard to the fact that the matters outlined by the applicant have not been previously fully litigated. But that is in the nature of a leave application. However the other tests outlined earlier are of particular relevance. To reiterate, the affidavits sworn by the medical practitioners involved indicate that they acted *bona fide* and reasonably. There is *no* evidence to the contrary, save assertion.

79. For the purposes of these applications there is inter-relationship between the applicant and the defendants' motions. In the absence of *any* evidence of want of *bona fides*, the applicant's proceedings as against the identified defendants in these motions become, *ipso facto*, "frivolous and vexatious" and could confer no benefit on the applicant. At no stage during the course of the submissions has she identified any material evidence relating to *these defendants* which might bear out her case as to her treatment. This observation applied from August, 2008 until the determination by the Mental Health Tribunal that the applicant should be released on the 13th March, 2009. The Tribunal held on the first hearing that the applicants detention was lawful – on the second, it concluded that her detentions was serving no further purpose. It made no finding which could be interpreted as being adverse to the defendants' treatment of the applicant. The existence of the Tribunal is in itself a protection against any such abuse. No case is established in relation to actions of members of An Garda Síochána in the performance of their duties pursuant to s. 12 of the Act of 2001.

80. There is no evidence sufficient to cross the thresholds that any of the defendants or their servants or agents acted in such a manner as would warrant leave being granted for proceedings relating to what I will identify as the "relevant period" identified in this application brought by the applicant. For the section to be applied in a proportionate manner in the case of the defendants here an order should start as and from the date of the first contact of Dr. Casey with the applicant (3rd November, 2008), and end at the last contact of Dr. Russell with her, that is to say, the 13th March, 2009. This order also must include the other servants or agents of the H.S.E. who interacted with the applicant during this same identified period in relation to acts done in pursuance of the Act of 2001.

81. It would not be proportionate however to make an order as against the applicant in relation to any other persons she identifies in the proceedings who do not come within the heading of persons identified by virtue of s. 73 of the Act of 2001. The restraint on the right of access to the courts must be proportionate to the objectives of the Act of 2001, and relate to those persons intended to be protected by it, but no further.

82. Whether the applicant has a cause of action against other persons does not fall to be considered in this application. One relevant consideration in the event of any further application being necessary regarding these defendants, would be if the applicant, in some form of collateral proceeding again sought to re-litigate the same grievances or concerns against these same defendants under another guise, or in the form of other proceedings. Such an action could very well give rise to a finding of abuse of the court process and might (unless justified) bring into consideration broader remedies relating to a constitutional right of access to the courts generally.

83. In accordance with the terms outlined above I will dismiss the application for leave to proceed under section 73. I find that the proceedings as framed against these defendants are frivolous and vexatious. There is no evidence of bad faith or want of reasonable care. Thus the two statutory tests are satisfied. For the same reasons I will dismiss the proceedings in reliance on the inherent jurisdiction of the Court.