Mental illness and the law

A recent New South Wales Supreme Court case explored some interesting and novel concepts with respect to the law and mental illness.[1] This article outlines the case and summarises the legislation in each Australian state and territory which regulates the care and treatment of patients who have a mental illness.

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Case history

On 3 July 1995, the 36 year old patient, Mr Kevin Presland, was brought to the emergency department by police following an episode of bizarre and violent behaviour. After medical assessment, the patient was transferred to a psychiatric hospital at around midnight. He was initially assessed by the night duty psychiatry registrar who admitted him as a voluntary patient with a provisional diagnosis of 'drug induced psychosis'. Following review by another psychiatry registrar on the morning of 4 July 1995, the patient was discharged in the company of his brother at about 11 am. About 6 hours after his discharge from hospital, Mr Presland killed his brother's fiancée with a kitchen knife.

On 7 May 1996, Mr Presland was acquitted of the murder of the fiancée upon the ground that when he attacked and killed her he was in a psychotic state which so affected his capacity to reason that he did not know that what he was doing was wrong and, accordingly, he was not guilty on the grounds of mental illness. Mr Presland subsequently commenced proceedings against the hospital and the psychiatry registrar.

The patient's case was that it was negligent of the hospital and the psychiatry registrar not to have detained him as an involuntary patient under the New South Wales *Mental Health Act* 1990. According to the patient/plaintiff, this action would have averted the tragic death at his hand of his brother's fiancée and his subsequent trial and incarceration in a psychiatric hospital. The plaintiff claimed compensation for his distress and the economic loss that resulted from these events.

The claim proceeded to trial in the Supreme Court of NSW and judgment was handed down on 19 August 2003. At trial, the plaintiff argued that when he was seen on the morning of 4 July 1995, the psychiatry registrar should have concluded that he was mentally ill and that he needed to be detained for his own safety or the safety of others. It was asserted that had the patient been detained, it was unlikely that he would have killed his brother's fiancé. The trial judge found that the psychiatry registrar's assessment of the patient was inadequate and that the patient's care had been negligent. The judge stated that it was foreseeable that without appropriate treatment and detention as an involuntary patient, Mr Presland might suffer harm by seriously injuring himself or others. The patient was awarded $225 000 in damages for pain and suffering and approximately $100 000 for loss of income.

The Hunter Area Health Service, on behalf of the hospital and the registrar, appealed the decision. The substantive issues for determination by the NSW Court of Appeal included:

- the nature and content of the duty of care owed to patients presented for psychiatric assessment both at common law and under the *Mental Health Act* 1990 and whether there was a breach of that duty of care
- whether the killing of the fiancée disentitled the plaintiff to recover damages under the principle of *ex turpi causa non action* (plaintiff seeking to profit from his illegal conduct) or on the basis of a break in the chain of causation or on public policy grounds, and
- whether the award for pain and suffering was manifestly excessive.

On 21 April 2005, by majority judgment, the Court of Appeal set aside the judgment in favour of Mr Presland and entered a verdict in favour of the Hunter Area Health Service on behalf of the hospital and the psychiatry registrar. One of the judges, Sheller JA, found that the

compensation sought by the plaintiff was for the consequences of acts of killing. He concluded that: 'Public policy must loom large in a court's consideration of whether the plaintiff should be compensated for the harm so suffered'. Further, he found that the *Mental Health Act* 1990 was directed to enabling detention only as a last resort: 'It is doubtful that the policy behind the statutory provisions contemplates or permits a party to recover damages because a medical superintendent has refused to admit the claimant to a hospital as an informal patient, albeit that the decision to refuse was a negligent decision. This would have the tendency to discourage the due performance by the statutory authority and medical superintendents of their statutory duties. The nature of the harm suffered by the plaintiff points as a matter of commonsense against the existence of a legal responsibility in the defendants for that harm'.

Discussion and risk management strategies

Unlike most areas of medical practice, the care and treatment of patients who have a mental illness is subject to detailed legislative

Table 1. State and territory legislation for 'involuntary' patients

ACT – *Mental Health (Treatment and Care) Act* 1994

Where a doctor or mental health officer believes on reasonable grounds that:

(a) a person is mentally dysfunctional or mentally ill and
(i) as a consequence, requires immediate treatment or care, or
(ii) in the opinion of the doctor or mental health officer, the person's condition will deteriorate within 3 days to such an extent that the person would require immediate treatment or care
(b) the person has refused to receive that treatment or care, and
(c) detention is necessary for the person's own health or safety, social or financial wellbeing, or for the protection of members of the public, and
(d) adequate treatment or care cannot be provided in a less restrictive environment, the doctor or mental health officer may apprehend the person and take him or her to an approved health facility

New South Wales – *Mental Health Act* 1990

A person may be taken to and detained in a hospital on the certificate of a medical practitioner or an accredited person:

(a) who has personally examined or personally observed the person immediately before or shortly before completing the certificate, and
(b) who is of the opinion that the person is a mentally ill person or a mentally disordered person, and
(c) who is satisfied that no other appropriate means for dealing with the person are reasonably available, and that involuntary admission and detention are necessary, and
(d) is not a near relative of the person

The certificate is to be in the form set out in Part 1 of Schedule 2 of the Act.

NorthernTerritory – *Mental Health and Related Services Act*

The criteria for the involuntary admission of a person on the grounds of mental illness are that:

(a) the person has a mental illness
(b) as a result of the mental illness
(i) the person requires treatment that is available at an approved treatment facility
(ii) the person
(A) is likely to cause imminent harm to himself or herself, a particular person or any other person, or
(B) is likely to suffer serious mental or physical deterioration, unless he or she receives the treatment, and
(iii) the person is not capable of giving informed consent to the treatment or has unreasonably refused to consent to the treatment, and
(c) there is no less restrictive means of ensuring that the person receives the treatment

The criteria for the involuntary admission of a person on the grounds of mental disturbance are that:

(a) the person does not fulfil the criteria for involuntary admission on the grounds of mental illness
(b) the person's behaviour is, or within the immediately preceding 48 hours has been, so irrational as to lead to the conclusion that:
(i) the person is experiencing or exhibiting a severe impairment of or deviation from his or her customary or everyday ability to reason and function in a socially acceptable and culturally appropriate manner, and
(ii) the person is behaving in an abnormally aggressive manner or is engaging in seriously irresponsible conduct that justify a determination that the person requires psychiatric assessment, treatment or therapeutic care that is available at an approved treatment facility
(c) unless the person receives treatment or care at an approved treatment facility, he or she:
(i) is likely to cause imminent harm to himself or herself, to a particular person or to any other person
(ii) will represent a substantial danger to the general community, or
(iii) is likely to suffer serious mental or physical deterioration
(d) the person is not capable of giving informed consent to the treatment or care or has unreasonably refused to consent to the treatment or care, and
(e) there is no less restrictive means of ensuring that the person receives the treatment or care

Queensland – *Mental Health Act* 2000

A recommendation for medical assessment of a mentally ill person can only be made by a medical practitioner or an authorised mental health practitioner. A recommendation must be in the approved form, state the facts upon which it is based,

provisions. Patients with psychiatric disorders may be treated against their will as so-called 'involuntary' patients. This factor alone has necessitated legislation to define the conditions under which involuntary detention may occur. In general terms, the law is aimed at ensuring that patients are treated with care and compassion and not detained unnecessarily. Involuntary detention is only applicable to those who may injure themselves or others, and/or those who refuse to or are unable to consent to treatment, due to mental illness, who could improve by having treatment.

The legislation in each Australian state and territory differs in the way it regulates the care of involuntary patients (*Table 1*).

Conflict of interest: none.

Reference

1. Presland v Hunter Area Health Service & Anor [2003] NSWSC 754; Hunter Area Health Service & Anor v Presland [2005] NSWCA 33. Accessed at www.austlii.edu.au/au/cases/nsw.

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and not be in respect of one of his or her relatives

South Australia – *Mental Health Act* 1993

If, after examining a person, a medical practitioner is satisfied:

(a) that the person has a mental illness that requires immediate treatment, and

(b) that such treatment is available in an approved treatment centre, and

(c) that the person should be admitted as a patient and detained in an approved treatment centre in the interests of his or her own health and safety or for the protection of other persons, the medical practitioner may make an order for the immediate admission and detention of the person in an approved treatment centre. The order expires 3 days after the day on which it is made

Tasmania – *Mental Health Act* 1996

A person may be detained as an involuntary patient in an approved hospital if:

(a) the person appears to have a mental illness, and

(b) there is, in consequence, a significant risk of harm to the person or others, and

(c) the detention of the person as an involuntary patient is necessary to protect the person or others, and

(d) the approved hospital is properly equipped and staffed for the care and treatment of the person

If a medical practitioner is satisfied, on application for admission of a person as an involuntary patient, that the criteria for his/her detention as an involuntary patient in an approved hospital are met, the medical practitioner may make an order for the admission and detention of that person as an involuntary patient

Victoria – *Mental Health Act* 1986

The documents required to initiate the involuntary treatment of a person are:

(a) a request in the prescribed form and containing the prescribed particulars, and

(b) a recommendation in the prescribed form by a registered medical practitioner following a personal examination of the person (not more than 72 hours before the patient's admission to hospital)

A registered medical practitioner must not make a recommendation unless he considers that:

(a) the person appears to be mentally ill

(b) the person's mental illness requires immediate treatment and that treatment can be obtained by the person being subject to an involuntary treatment order, and

(c) because of the person's mental illness, involuntary treatment of the person is necessary for his/her health or safety (whether to prevent a deterioration in the person's physical or mental condition or otherwise) or for the protection of members of the public, and

(d) the person has refused or is unable to consent to the necessary treatment for the mental illness, and

(e) the person cannot receive adequate treatment for the mental illness in a manner less restrictive of his/her freedom of decision and action

Western Australia – *Mental Health Act* 1996

A person should be an involuntary patient only if:

(a) the person has a mental illness requiring treatment

(b) the treatment can be provided through detention in an authorized hospital or through a community treatment order and is required to be so provided in order:

(i) to protect the health or safety of that person or any other person

(ii) to protect the person from self inflicted harm (serious financial harm, lasting or irreparable harm to any important personal relationship resulting from damage to the reputation of the person among those with whom the person has such relationships and serious damage to the reputation of the person)

(iii) to prevent the person doing serious damage to any property

(c) the person has refused or, due to the nature of the mental illness, is unable to consent to the treatment, and

(d) the treatment cannot be adequately provided in a way that would involve less restriction of the freedom of choice and movement of the person than would result from the person being an involuntary patient