Supreme Court

New South Wales

Medium Neutral Citation:	**Re J (No. 2) [2011] NSWSC 1224**
Hearing dates:	14 and 15 September 2011
Decision date:	15 September 2011
Jurisdiction:	Equity Division - Protective List
Before:	White J
Decision:	Refer to paras [115], [123] and [124] of judgment.
Catchwords:	MENTAL HEALTH - involuntary detention at mental health facility - appeal from Mental Health Review Tribunal - where plaintiff suffers from mental illness - whether plaintiff by reason of mental illness needs protection from "serious harm" - whether involuntary detention least restrictive care - where continued involuntary detention of the plaintiff is sought to be justified on ground that he might suffer financial harm as a result of his mental illness - involuntary detention is to be a measure of last resort to protect from harm - protection from financial harm could have been provided by a financial management order - plaintiff not found to be incapable of managing his affairs - necessary to consider the extent to which mental illness was a harm for plaintiff and assess its seriousness - appeal allowed - order that plaintiff be discharged from mental health facility
Legislation Cited:	Mental Health Act 2007 NSW Trustee and Guardian Act 2009 Guardianship Act 1937 Guardianship Act 1987 Mental Health Act 1990 Mental Health Amendment Act 1997 Mental Health Legislative Amendment Act 1997
Cases Cited:	M v K (Supreme Court of New South Wales, Powell J, 24 April 1989, unreported) Application of O'Hara; Re M [1999] NSWSC 209 FA v the Protective Commissioner [2009] NSWSC

	415
Category:	Principal judgment
Parties:	J (Plaintiff) South Eastern Sydney Local Area Health Service (1st Defendant) Mental Health Review Tribunal (2nd Defendant)
Representation:	J Bartos (Plaintiff) J McDonnell, solicitor (Defendant) David Begg & Associates (Plaintiff) Crown Solicitor's Office (Defendant)
File Number(s):	2011/291580

JUDGMENT

1 **HIS HONOUR** : This morning I ordered that the Medical Superintendent of the Kiloh facility at the Prince of Wales Hospital at which the plaintiff is detained, or someone on behalf of Medical Superintendent, bring the plaintiff to court this afternoon for examination by me. I did so to ascertain whether or not the plaintiff wished these proceedings to be brought, as they have been, by the lawyers retained by him.

2 As I said in my reasons this morning, the plaintiff had signed a document advising that he did not wish to engage the solicitor, Ms Berntsen, to act in reference to matters pertaining to his hospitalisation. But there was evidence from the plaintiff's solicitor that notwithstanding what the plaintiff wrote, he did wish his lawyers to bring this proceeding.

3 This afternoon the plaintiff has confirmed to me that he understands that the proceeding is one brought to seek an order for him to be released from the facility. He has confirmed that he had instructed the lawyers who appear for him to act on his behalf, and that the application that has been made is in accordance with his wishes.

4 I asked him why he signed the document withdrawing his instructions. His explanation was substantially in accordance with Ms Berntsen's evidence.

5 Therefore, I was satisfied that I should proceed to deal with the application.

6 In my reasons this morning, I said that the plaintiff suffers from a mental illness, being mania. The plaintiff in his statement to me this afternoon disputes the evidence from the treating doctors that he does suffer a mental illness but there is clear evidence he does, and, as I said this morning, there is evidence that the illness affects his ability to make decisions about his money.

7 As I have said, the plaintiff has recently received a $700,000 payout for his life insurance and superannuation and his wife and doctors consider he is at risk of dissipating this money unwisely. There is evidence that his mental illness affects his ability to make judgments about expenditure of money.

8 When the matter was before me yesterday there was debate about the grounds upon which the defendant (being the South Eastern Sydney Local Area Health Service, in which the Prince of Wales Hospital is situated) contended that the plaintiff's continued detention in the mental health facility was justified.

9 A report had mentioned the existence of serious concerns arising from what was said to be a threat made by the plaintiff to harm his mother and wife with a hammer.

10 I was concerned to ascertain whether the defendant contended that a threat of physical harm to others was raised as a ground justifying the plaintiff's continued detention.

11 The solicitor appearing for the defendant made it clear that that was not contended. The evidence subsequently admitted in the hearing shows that the concerns which are said to justify the plaintiff's continued detention do not include that matter.

12 The plaintiff's counsel had initially sought interim orders to permit the plaintiff to be examined by an independent psychiatrist. The defendant indicated that that course would not be opposed.

13 It emerged from the discussion with the parties' legal representatives that the ground on which the defendant said that the plaintiff's continued detention was justified was that he needed protection from unwise expenditure of his money by reason of mental illness. That was confirmed by Professor Parker's evidence given yesterday afternoon.

14 The matter having proceeded on the basis that this was the issue, I considered that the application ought to be decided accordingly.

15 The central issue is whether the plaintiff's involuntary detention can be justified on the ground that he is at risk of serious financial harm, when a financial management order could be made if the plaintiff were incapable of managing his affairs.

16 It is important to understand the legislative context in which the question arises. The authority to detain a patient who suffers from a mental illness against the person's will is laid down in Chapter 3 of the *Mental Health Act* 2007. Part 1 of Chapter 3 contains general restrictions on the detention of persons. Sections 12 and 14 provide:

" 12 General restrictions on detention of persons

(1) A patient or other person must not be involuntarily admitted to, or detained in or continue to be detained in, a mental health facility unless an authorised medical officer is of the opinion that:

(a) the person is a mentally ill person or a mentally disordered person, and

(b) no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the person.

(2) If an authorised medical officer is not of that opinion about a patient or other person at a mental health facility, the officer must refuse to detain, and must not continue to detain, the person.

(3) An authorised medical officer may, immediately on discharging a patient or person who has been detained in a mental health facility, admit that person as a voluntary patient.

...

14 Mentally ill persons

(cf 1990 Act, s 9)

(1) A person is a mentally ill person if the person is suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary:

(a) for the person's own protection from serious harm, or

(b) for the protection of others from serious harm.

(2) In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration in the person's condition and the likely effects of any such deterioration, are to be taken into account. "

Those sections do not confer the authority for detention. Rather, they place a restriction on the power of detention. Section 14 refers to the need for protection of a person suffering mental illness from " *serious harm* ". " *Serious harm* " is not defined. That provision is to be contrasted with s 15 which concerns mentally disordered persons. Section 15 provides:

" 15 Mentally disordered persons

(cf 1990 Act, s 10)

A person (whether or not the person is suffering from mental illness) is a mentally disordered person if the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary:

(a) for the person's own protection from serious physical harm, or

(b) for the protection of others from serious physical harm."

Clearly the expression " *serious harm* " is wider than " *serious physical harm* ". I will return to this question later in these reasons.

17 Part 2 of Chapter 3 sets out the circumstances in which a person may be involuntarily admitted and detained in a declared mental health facility. In the present case the relevant section is s 19. It relevantly provides:

> *" 19 Detention on certificate of medical practitioner or accredited person*
>
> *(cf 1990 Act, s 21)*
>
> *(1) A person may be taken to and detained in a declared mental health facility on the basis of a certificate about the person's condition issued by a medical practitioner or accredited person. The certificate is to be in the form set out in Part 1 of Schedule 1.*
>
> *(2) A mental health certificate may be given about a person only if the medical practitioner or accredited person:*
>
> *(a) has personally examined or observed the person's condition immediately before or shortly before completing the certificate, and*
>
> *(b) is of the opinion that the person is a mentally ill person or a mentally disordered person, and*
>
> *(c) is satisfied that no other appropriate means for dealing with the person is reasonably available, and that involuntary admission and detention are necessary, and*
>
> *(d) is not the primary carer or a near relative of the person."*

18 Before involuntary detention can continue, there must be at least two further medical examinations. Section 27 provides:

> *" 27 Steps for medical examination requirements for ongoing detention in mental health facility*
>
> *The following steps must be taken in relation to a person who is detained in a mental health facility under this Division:*
>
> *(a) Step 1 Initial examination by authorised medical officer*
> *An authorised medical officer must examine the person as soon as practicable (but not later than 12 hours) after the person arrives at the facility or after the person is detained after being a voluntary patient.*
>
> *The person must not be detained after the examination unless the officer certifies that, in the officer's opinion, the person is a mentally ill person or a mentally disordered person.*
>
> *(b) Step 2 Examination by second medical practitioner*
> *The authorised medical officer must cause the person to be examined by another medical practitioner as soon as possible after giving the certificate in step 1. The second examiner must be a psychiatrist if the authorised medical officer is not a psychiatrist.*

The second examiner must notify the authorised medical officer in the form prescribed by the regulations if of the opinion that the person is a mentally ill person or a mentally disordered person or if not able to form such an opinion.

(c) Step 3 Examination by third medical practitioner if second examiner does not find person to be mentally ill or mentally disordered

If the second examiner is not of the opinion that the person is a mentally ill person or a mentally disordered person, the authorised medical officer must cause the person to be examined by a medical practitioner who is a psychiatrist, as soon as practicable after being notified of that opinion.

The third examiner must notify the authorised medical officer in the form prescribed by the regulations if of the opinion that the person is a mentally ill person or a mentally disordered person.

(d) Step 4 Mental health inquiry or discharge

An authorised medical officer must notify the Tribunal and bring the person before the Tribunal for a mental health inquiry if:

(i) the person is found to be a mentally ill person by an authorised medical officer on initial examination in step 1, and to be a mentally ill person or a mentally disordered person on examination in step 2 or step 3, or

(ii) the person is found to be a mentally disordered person by an authorised medical officer on initial examination in step 1, and to be a mentally ill person on examination in step 2 or step 3.

The person must be brought before the Tribunal as soon as practicable after admission (subject to meeting the requirements set out above).

If the third examiner does not find that the person is a mentally ill person or a mentally disordered person, the person must not be detained after the third examination.

(e) Step 5 Mentally disordered persons

If a person is found to be a mentally disordered person by an authorised medical officer on initial examination in step 1, and is found to be a mentally disordered person on examination in step 2 or step 3, the person may be detained in the mental health facility as a mentally disordered person."

19 In the present case a mental health certificate in respect of the plaintiff was given on 17 August 2011. Certificates under s 27(a) and 27(b) were given on 17 August and 19 August 2011.

20 At least at the time of the first certificate there were concerns not only about the plaintiff's need for protection against financial harm, but about the alleged threat of physical harm to the plaintiff's mother or wife.

21 Section 27(d) required the authorised medical officer of the facility to bring the plaintiff before the Mental Health Review Tribunal as soon as practicable after 19 August 2011.

22 The evidence does not show what was done to comply with this requirement. That is, the evidence does not show when steps were taken to bring the plaintiff before the Tribunal following 19 August 2011.

23 The inquiry which s 27(d) provides for is held under s 34. Section 34 relevantly provides:

> *" 34 Mental health inquiries to be held*
>
> *...*
>
> *(2) An authorised medical officer of the mental health facility in which an assessable person is detained:*
>
> *...*
>
> *(b) must make all necessary arrangements to ensure that all appropriate medical witnesses appear before the Tribunal and other relevant medical evidence concerning the person is placed before the Tribunal at or before the inquiry, and*
>
> *(c) as soon as practicable after notifying the Tribunal under section 27 (d), and at or before the inquiry, must provide the Tribunal with all relevant medical reports of the examinations in step 1 or step 2, as referred to in section 27 (d), and any additional information required by the Tribunal for the purposes of the inquiry.*
>
> *..."*

24 Section 35 provides:

> *" 35 Purpose and findings of mental health inquiries*
>
> *(cf 1990 Act, ss 50-52)*
>
> *(1) The Tribunal when holding a mental health inquiry is to determine whether or not, on the balance of probabilities, the assessable person is a mentally ill person.*
>
> *(2) For that purpose, the Tribunal is to do the following:*
>
> *(a) consider the reports and recommendations of the authorised medical officer and other medical practitioners who examined the person under section 27 after the person's detention,*
>
> *(b) consider any other information before the Tribunal,*
>
> *(c) inquire about the administration of any medication to the person and take account of its effect on the person's ability to communicate,*
>
> *(d) have due regard to any cultural factors relating to the person that may be relevant to the determination,*
>
> *(e) have due regard to any evidence given at the inquiry by an expert witness concerning the person's cultural background and its relevance to any question of mental illness.*
>
> *(2A) As soon as practicable after the beginning of a mental health inquiry, the Tribunal must ask the assessable person whether the person:*

(a) has been given a written statement, in the prescribed form, of the person's legal rights and other entitlements, as required by section 74, and

(b) has been informed of the duty imposed under section 76 on the authorised medical officer relating to the giving of the notice specified in that section.

(2B) As soon as practicable after the beginning of a mental health inquiry, the Tribunal must ascertain from the authorised medical officer whether the written statement and notice referred to in subsection (2A) have been given or all such things as are reasonably practicable have been done to give that statement or notice, as the case requires.

(3) If the Tribunal is not satisfied, on the balance of probabilities, that an assessable person is a mentally ill person, the Tribunal must order that the person be discharged from the mental health facility.

(4) The Tribunal may defer the operation of an order for the discharge of a person for a period of up to 14 days, if the Tribunal thinks it is in the best interests of the person to do so.

(5) If the Tribunal is satisfied, on the balance of probabilities, that an assessable person is a mentally ill person, the Tribunal may make any of the following orders:

(a) an order that the person be discharged into the care of the person's primary carer,

(b) a community treatment order,

(c) an order that the person be detained in or admitted to and detained in a specified mental health facility for further observation or treatment, or both, as an involuntary patient, for a specified period of up to 3 months, if the Tribunal is of the opinion that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available or that for any other reason it is not appropriate to make any other order under this subsection."

25 In the mental health inquiry the Tribunal was required to assess whether the plaintiff was a mentally ill person as defined in s 14, not merely whether the plaintiff suffered a mental illness. " *Mental illness* " is defined in s 4. It is unnecessary to set out that definition because I do not think there is any question on this application that the plaintiff suffers a mental illness.

26 As well as determining whether the plaintiff was a mentally ill person as defined in s 14, the Tribunal was required to consider the matters in s 35(5)(c).

27 An involuntary patient can apply to the authorised medical officer of the mental health facility to be discharged. If the application is refused he or she can appeal to the Mental Health Review Tribunal. Sections 43 and 44 relevantly provide:

" 43 Discharge of involuntary patients on application of primary carer

(cf 1990 Act, s 68)

(1) The primary carer of an involuntary patient or another person detained in a mental health facility may, at any time, apply to an authorised medical officer of the mental health facility for the discharge of the patient or person.

(2) The authorised medical officer may discharge the patient or person if:

(a) the applicant gives the authorised medical officer a written undertaking that the patient or person will be properly taken care of, and

(b) the authorised medical officer is satisfied that adequate measures will, so far as is reasonably practicable, be taken to prevent the patient or person from causing harm to himself or herself or others.

44 Appeals against discharge refusals

(cf 1990 Act, ss 69, 70)

(1) An involuntary patient or person detained at a mental health facility (the applicant) who applies to be discharged, or a person who applies for the discharge of the applicant, or a person appointed by the applicant, may appeal to the Tribunal if:

(a) the authorised medical officer refuses the application, or

(b) the authorised medical officer fails to determine the application within 3 working days after it is made.

(2) An appeal may be made orally or in writing and is to be made in accordance with the regulations.

(3) The authorised medical officer must provide the Tribunal with a report about the applicant, including the officer's reasons for refusing to discharge the applicant or failing to determine the application.

(4) For the purpose of determining an appeal, the Tribunal has and may exercise the functions of the authorised medical officer with respect to the discharge application and may make an order accordingly.

(5) In addition, the Tribunal may determine that no further right of appeal may be exercised under this section before the date on which the person is next reviewed by the Tribunal under this Act, if it thinks it appropriate to do so, having regard to the following:

(a) the interval between the last determination under this Act that the applicant was a mentally ill person and the date of the appeal,

(b) the frequency of appeals under this section made by or on behalf of the applicant,

(c) the last report about the applicant by the authorised medical officer under this section,

(d) any other matter the Tribunal considers relevant. "

28 It seems that the plaintiff applied for his discharge, although the date on which he did so is not clear. Whenever it was, the application was refused. On 30 August 2011 the plaintiff signed the prescribed form to appeal against the

refusal of his application for discharge.

29 Other relevant provisions of the *Mental Health Act* contained in Pt 3, deal with the involuntary treatment of mentally ill patients in the community. The Tribunal can make a community treatment order where a treatment plan has been proposed by the declared mental health facility that is to implement the order.

30 Sections 51 and 53(3) provide:

> *" 51 Community treatment orders*
>
> *(1) A community treatment order authorising the compulsory treatment in the community of a person may be made by the Tribunal.*
>
> *Note . Section 56 sets out the matters to be included in community treatment orders.*
>
> *(2) The following persons may apply for a community treatment order for the treatment of a person:*
>
> *(a) the authorised medical officer of a mental health facility in which the affected person is detained or is a patient under this Act,*
>
> *(b) a medical practitioner who is familiar with the clinical history of the affected person,*
>
> *(c) any other person prescribed by the regulations.*
>
> *(3) An application may be made about a person who is detained in or a patient in a mental health facility or a person who is not in a mental health facility.*
>
> *(4) An application may be made about a person who is subject to a current community treatment order.*
>
> *(5) A community treatment order may be made in the following circumstances and may replace an existing order:*
>
> *(a) following a mental health inquiry,*
>
> *(b) on a review of a patient by the Tribunal,*
>
> *(c) on an application otherwise being made to the Tribunal.*
>
> *...*
>
> *53 Determination of applications for community treatment orders*
>
> *...*
>
> *(3) The Tribunal may make a community treatment order for an affected person if the Tribunal determines that:*

(a) no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the person and that the affected person would benefit from the order as the least restrictive alternative consistent with safe and effective care, and

(b) a declared mental health facility has an appropriate treatment plan for the affected person and is capable of implementing it, and

(c) if the affected person has been previously diagnosed as suffering from a mental illness, the affected person has a previous history of refusing to accept appropriate treatment."

31 A community treatment order can require a person to attend to receive medication or services to be provided in accordance with a treatment plan (s 56(1)).

32 Section 46 of the *NSW Trustee and Guardian Act* 2009 gives the Mental Health Review Tribunal power to make financial management orders in respect of persons who have been admitted to a mental health facility in accordance with the *Mental Health Act.* Such an order may be made if the Tribunal is satisfied that the patient is not capable of managing his or her affairs.

33 If the Tribunal is so satisfied, it must make an order that the person's estate be subject to management under the *NSW Trustee and Guardian Act* (s 46). An application for a financial management order can be made by anyone who the Tribunal considers to have a sufficient interest in the matter.

34 Under s 47 of that Act the Mental Health Review Tribunal can make an interim financial management order, if a person is incapable of managing his or her affairs.

35 This Court can also make a declaration to that effect and order that the person's estate be subject to management under the *NSW Trustee and Guardian Act* . This Court also can appoint a suitable person as manager of the estate (*NSW Trustee and Guardian Act* , s 41).

36 An application for a financial management order in respect of the plaintiff's estate was made to the Mental Health Review Tribunal by Ms S Joy, a social worker at the Kiloh Centre at the Prince of Wales Hospital, the mental health facility at which the plaintiff was detained. The application was made by no later than 31 August 2011.

37 The Tribunal conducted a single hearing on 1 September 2011. There were three matters before it, namely the mental health inquiry under s 34 of the *Mental Health Act* required by s 27(d), the plaintiff's appeal under s 44 of that Act against the refusal of the authorised medical officer to discharge him, and the application of Ms Joy under s 46 of the *NSW Trustee and Guardian Act* for a financial management order in respect of the plaintiff's estate.

38 Section 44 of the *NSW Trustee and Guardian Act* provides:

> *" 44 Consideration of capability to manage affairs at mental health inquiries*
>
> *If the MHRT after conducting a mental health inquiry orders that the person subject to the inquiry be detained in a mental health facility, it must:*
>
> *(a) consider whether the person is capable of managing his or her own affairs, and*
>
> *(b) if satisfied that the person is not capable of managing his or her own affairs, order that the estate of the person be subject to management under this Act."*

39 On 1 September 2011, the Tribunal determined under s 34 of the *Mental Health Act* that the plaintiff be detained as an involuntary patient up to 30 September 2011. It dismissed the appeal under s 44 of that Act. It adjourned the application under s 46 of the *NSW Trustee and Guardian Act* to a date to be fixed by the Registrar of the Tribunal. The Tribunal made no finding under s 44 of the *NSW Trustee and Guardian Act* .

40 The Tribunal expressed a number of conclusions in relation to those orders that I will describe shortly.

41 The plaintiff appeals from the decision of the Tribunal pursuant to ss 163 and 164 of the *Mental Health Act* . The appeal is by way of a new hearing. For the purposes of the appeal the Court has all the functions and discretion of the Tribunal.

42 This is the legislative context in which the application arises.

43 I turn to the facts. I said in my reasons this morning that in May of this year the plaintiff was diagnosed with terminal pancreatic cancer. The prognosis was that he had six month to live. The plaintiff's treating oncologist was concerned about the plaintiff's mental state and requested a psychiatric review. A mental health assessment was conducted on 17 August 2011.

44 On that day a certificate was given under s 19 of the *Mental Health Act* (a Schedule 1 certificate) by Dr Chaudhuri. He or she recorded symptoms of mania and a previous history of depression. The doctor also noted "... *threatens to harm others* ".

45 The report of the initial examination under s 27(a) of the *Mental Health Act* by an authorised medical officer noted a " *recent history of aggression and irritability, increased spending and irrational behaviour* " as well as symptoms of mental illness. The doctor concluded " *Mentally ill. Serious risk of harm by self (reputation, misadventure). Needs hospitalisation* ".

46 The report of the examination by the second medical practitioner under s 27(b) on 19 August 2011 also testified to the plaintiff's being mentally ill. The basis for the opinion was noted as being " *Out of character behaviour last month - giving away money; planning to set up a business and a charity; less need for sleep; irritable* ". The doctor made other observations and concluded " *Appears to be manic - never like this previously. Requires involuntary care as is a risk to himself financially and to his reputation.* "

47 It may be observed that the reports under s 27(a) and 27(b) refer to the plaintiff being of risk of harm to himself, rather than his being a risk of causing harm to others.

48 The observations in these reports were elucidated in a report provided to the Mental Health Review Tribunal by Dr Djurovic, a psychiatric Registrar at the Prince of Wales Hospital.

49 The report appears to have been prepared pursuant to s 34(2)(c) of the *Mental Health Act* . Dr Djurovic noted that the plaintiff had a past history of depression with psychotic features. She made observations about mood disturbance and how the administration of medication in hospital had improved some aspects of his mental state and the quality of his sleep.

50 Dr Djurovic described the plaintiff's symptoms, but it is unnecessary to refer to the details of these. Dr Djurovic reported " *Serious concerns were also raised that he had threatened to harm his mother and wife with a hammer.* " She noted that the plaintiff had not consistently taken his medication and expressed the view that he was demonstrating poor judgment.

51 In this respect Dr Djurovic said:

> *"The* [plaintiff] *has demonstrated poor judgment at present. He has been offering money to staff (offering to employ them on his discharge from hospital ...). He has offered me the details of his bank account with PIN and has by his account, given these details to other people.*
>
> *He states that this allows them to monitor his account but there is documented evidence that he has allowed them to withdraw money from his account. He has recently engaged a solicitor and then has nominated her a his primary carer (until 30 Aug he had nominated his wife as primary carer).*
>
> ...
>
> *Conclusion*

> [The plaintiff] *requires continued treatment in hospital as the least constrictive conditions. He has little or no insight into his mental illness. He believes that he does not have an illness. He can't commit or agree to taking medication if not in hospital. '* [The plaintiff] *has improved marginally in mental state ... but he remains elevated of mood, irritable and grandiose; he has not yet returned to his 'baseline' as observed by people who know him. It is my opinion that* [the plaintiff] *continues to experience a disturbance to his mood which is affecting his judgment and that treatment with medication should return him to his usual level of functioning. The treating team request permission to treat* [the plaintiff] *for a period up to one month. In that time we wish to optimise treatment which will best be able to facilitate a return to community and continuation of his medical treatment.* "

52 The three principal matters arising from this report relevant to the Tribunal's decision under s 35 were first, the reported threat of violence to the plaintiff's mother and wife; secondly, whether the plaintiff would take medication for the diagnosed condition of mania if he were not hospitalised; and thirdly, that the plaintiff, due to mental illness, was using poor judgment in relation to his money.

53 I think it is fair to say that Dr Djurovic's report placed the greatest emphasis on the second matter.

54 A report was also prepared by Ms Joy, the social worker with the facility. I gather from the evidence of Ms Berntsen that that report was before the Tribunal.

55 Ms Joy's report is undated. It makes no reference to any threatened violence by the plaintiff. Ms Joy described her concerns that the plaintiff, who had been a very frugal man, had (according to his family and friends) been acting out of character in relation to his finances. He had increased his spending. Ms Joy referred to reports of his having made efforts to buy property; to him having made " *multiple donations to charity* "; to his having given money to women in Thailand; to his having purchased international air tickets for individuals to attend his mother's ninetieth birthday party; to his having made gifts to different individuals; to his having made a spur-of-the-moment trip back to his country of origin; and to his having given bank details and PIN numbers to friends to set up an international charity.

56 Ms Joy said that the plaintiff denied difficulties in managing his finances and had offered to supply recent bank statements. She recommended that the plaintiff be placed under an interim financial management order which she described as being the least restrictive means possible to deal with those concerns.

57 Although Dr Djurovic's report to the Tribunal outlined three areas of concern, at the hearing of the appeal before me the issue of concern had become narrowed to the issue whether due to the plaintiff's manic state, he might spend a lot of money to his financial detriment, and whether this was a matter which justified his continued detention.

58 The Tribunal determined under s 35 that the plaintiff was a mentally ill person.

In saying that, I mean that it ticked a box on a standard form to that effect.

59 The Tribunal said that the plaintiff should be detained until 30 September 2011. The reasons for orders were:

> " [The plaintiff] *suffers from a mental illness and requires further treatment in hospital. There would be a risk to his personal safety and welfare if discharged from hospital."*

60 This conclusion would appear to be based on the second limb of Dr Djurovic's report, namely that the plaintiff needed to be hospitalised to ensure that he took the appropriate medication to treat his mental illness. No reasons were given as to why that was so, or whether a less restricted regime could be implemented.

61 If this was the ground of decision, as I think it was, the Tribunal had to consider whether there were other avenues of care, including a community treatment order that would provide safe and effective care to the plaintiff. Such an order could require the plaintiff to attend at the mental health facility to receive medication. Dr Djurovic's report did not address this question and did not indicate grounds for thinking that such an order would not be complied with.

62 The only reasons given by the Tribunal for its dismissal of the plaintiff's appeal under s 44 were that "[The plaintiff] *continues to suffer from a mental illness requiring further treatment in hospital* ." There were no reasons for this conclusion. The conclusion is manifestly inadequate. The question for the Tribunal was not whether the plaintiff required hospitalisation for his mental illness, but whether that was necessary to protect him from serious harm.

63 It is clear from s 14 of the Act that these two matters are not necessarily synonymous. It may be taken that the reasons given by the Tribunal on the mental health inquiry under s 35 applied also to the appeal under s 44. The reasons do not address the possibility of a community treatment order.

64 The further matter before the Tribunal was the application of Ms Joy under ss 46 and 47 of the *NSW Trustee and Guardian Act* for a financial management order. As previously noted, s 44 of that Act required the Tribunal to consider whether the plaintiff was capable of managing his affairs. That section required the Tribunal, if satisfied that the plaintiff was not capable of managing his affairs, to order that his estate be subject to management under that Act.

65 The Tribunal was required to consider these questions because it had ordered the plaintiff to be detained after conducting the mental health inquiry.

66 The Tribunal made no such finding or order. Instead it adjourned the application to a date to be fixed. The reason for the adjournment was stated as follows:

> *"Matter possibly better dealt with by Guardianship Tribunal due to complexity of information and numbers of witnesses interstate."*

67 The Tribunal was in error in finding that the application could be dealt with by the Guardianship Tribunal. There was no application before the Guardianship Tribunal under Pt 3 of the *Guardianship Act* 1937 for a guardianship order, and none was contemplated. Further, the adjournment order itself was an order " *in respect of* " the plaintiff's estate and accordingly the Guardianship Tribunal would have no jurisdiction to make a financial management order (*Guardianship Act* 1987, s 25K(2)).

68 It should be concluded that the Tribunal did not find that the plaintiff was not capable of managing his affairs. That is consistent with the Tribunal's having reached its conclusion that the plaintiff's continued detention was justified on the ground that he would otherwise not take the necessary treatment for his mental illness.

69 However, it might have been expected that if this was the Tribunal's view, it would have said why the plaintiff's continued detention to deal with his mania was necessary to protect him from serious harm, given the prognosis that he had only a couple of months to live in any event.

70 Yesterday evidence was called by telephone link from the consultant psychiatrist at the facility who is currently treating the plaintiff, Professor Parker. Professor Parker confirms that the essential reason for the continued detention of the plaintiff was that he not squander his money by reason of his mental illness. He was asked to indicate what concerns there would be if the plaintiff were to be discharged. He said there were several. First, Professor Parker stated that while the plaintiff's condition is terminal, he was not talking about any " *departure* " and was showing no interest in interaction with the oncology staff. Professor Parker said that he was concerned that the plaintiff had no interest in that issue, and that if he were to leave hospital in his present mood, he was unlikely to make any contact with the oncology department to receive treatment.

71 On being brought before me today for examination, the plaintiff expressed quite a different view. He said that he wished to examine alternative treatments for his cancer, and (as I understood what he said) he had taken what might be called an alternative health treatment that he implied showed some improvement, in that he said his cancer had not progressed from the last scan.

72 I do not know what weight I can put upon that matter, and there is no corroboration of it. But it is clear from the hospital notes that prior to his admission the plaintiff had expressed interest and had in fact pursued a course of chemotherapy in his country of origin in Europe, being a course of

medication which he said was available to him without substantial cost in that country, whereas it was only available with a high cost in this country.

73 The plaintiff has not received treatment for his condition to date whilst he has been detained in the Kiloh Centre. I am not suggesting that there is an available treatment that ought to have been administered. But given that, and given the interest the plaintiff had shown prior to his involuntary detention in pursuing possible treatments, as well as statements he made on examination before me, I do not consider that there is a basis for saying that the plaintiff would be less able, or less likely, to take up any available therapy, if he were discharged, than if he remained in involuntary detention.

74 In this respect it is relevant that if the plaintiff remains in involuntary detention, the present plan for his treatment is that on the current rate of improvement it is expected his mood should be stabilised within a week or two, and that prior to then he would be allowed to leave the facility for initially short periods into the care of his wife whilst he adjusts to living again in the community.

75 The second concern expressed by Professor Parker and the principal matter of concern was described by him as follows:

> *"... my more specific concern is his capacity for spending a lot of money, and after coming down from the manic episode, which he will undoubtedly do, he will then revert absolutely. As recently as this last ward round, meaning Tuesday, he was unable to provide any answer as to how much his lawyer had cost or the lawyers and barristers that he might engage might cost.*
>
> *He had asked for an independent medical review and I have said that could be provided on a previous occasion. I then asked him how much would it cost and he seemed to be quite disinterested in the cost. So that is at variance with the interaction he had with my secretary a couple of months."*

Professor Parker also said that:

> *"Yesterday at the ward rounds he was very cavalier in regard to costs associated with the medical side and with the legal side. Further, when he was asked leaving hospital, and as you know he has already been given leave from the ward in controlled circumstances, when asked about that he said he would not get into any difficulty at all. But when we turned to his wife she reflected a level of apprehension, and when we pursued that to some degree she expressed concern that he may go on the internet and spend significant amounts of money, and that she had no way of controlling that, and that would be the concern that I have as well."*

76 As I have said, this is the only issue in the case; whether continued involuntary detention can be justified on the ground that the plaintiff might suffer financial harm by spending money when he was not capable of making a proper judgment about the wisdom of the expenditure due to his mental illness.

77 The examples Professor Parker gave of the plaintiff's present proclivity in this regard were not happy ones. Professor Parker had described the plaintiff's previous frugality, including his unwillingness to spend money on a medical consultation. But that previous experience was before the plaintiff had been diagnosed with a terminal illness and before he received a substantial payout.

78 But dealing with the two examples that Professor Parker raised of potential expenditure, namely expenditure on lawyers and an independent medical opinion, it would not be unreasonable for the plaintiff to intend to spend money on those matters to seek to obtain his release from a secure facility in the last few months of his life.

79 Whilst dealing with the issue of the plaintiff's retention of his lawyers, I must express concern about one particular matter. When the plaintiff's solicitor sought to interview the plaintiff in the company of one his friends, she was not permitted to take pen nor paper, nor to see the plaintiff in private.

80 The clinical notes of the hospital for 1 September 2011 under the heading " *Visitor Access* " referred to concerns having been raised that the plaintiff's lawyer had had difficulties accessing him and that another friend had also been turned away. It was reported that:

> " *Understandably, this had been done due to overall concerns that* [the plaintiff] *had previously* ".

There is then a statement of instructions to follow. The instructions included:

> " *Ascertain the identity of visitors. ...*
>
> *They are to keep personal belongings - bags etc. off the ward.*
>
> *No documents to be brought on to the ward or signed.*
>
> *[The plaintiff] is vulnerable and there are many conflicting parties who will possibly disadvantage him* ."

81 The direction was not given by Professor Parker. When asked about the justification for not permitting the lawyer retained by the plaintiff to visit the plaintiff in private and with documents he proffered a suggestion that if that course were permitted the plaintiff might have committed himself to an expenditure on lawyers' fees that he would later regret. But no finding had been made that the plaintiff was unable to manage his affairs.

82 It is untenable that a doctor should seek to prevent an involuntary patient from communicating effectively with a lawyer with a view to the lawyer's providing legal advice and assistance as to the legality of the detention, on the ground that this would not be in the patient's interest. Such an approach might be well meaning, but if carried into effect so as to prevent the provision of legal

assistance to the patient, it would negate the rule of law. I trust that is not what has occurred in the present case.

83 Returning to the concerns identified by Professor Parker, there is some material in the hospital notes which suggests that the opposition to the expenditure of the plaintiff's money comes from the plaintiff's wife who might be expected to inherit. A note of 9 September 2011 records:

> " *Wife requested not allow* [the plaintiff] *to have contact with solicitor as her* [sic] *just waste money on them.* "

84 The plaintiff's statement and examination before me today confirms the evidence given by his solicitor that he signed the letter purportedly withdrawing his instructions to his solicitor because he was acting in compliance with his wife's wishes. The plaintiff's evidence corroborated his solicitor's evidence to the effect that he told her that he considered that acting in compliance with the wishes of his wife and the doctors of the facility was his best chance of obtaining his release. The clinical notes corroborate it. There are repeated observations that the plaintiff said that he would co-operate in every way so as to be able to leave the hospital.

85 Professor Parker said that the plaintiff's attitude to expenditure was quite different from the frugal attitude he had expressed in 2007. This is consistent with other medical records. This is not itself indicative of the change in attitude being due to mental illness. It is entirely consistent with the plaintiff's now having only a short time to live, as well as his having received a very substantial cash payment, that he should prefer to spend money on himself and his friends rather than to lay it by.

86 Nonetheless, there is medical evidence that his ability to make such judgment is impaired by his mental illness. As I have said, there has been no finding that the plaintiff is incapable of managing his financial affairs. The plaintiff produced his bank statements to the hospital. Although I have not seen them, I infer from other evidence that they show the receipt of the cash payment and subsequent expenditure.

87 On 8 September 2011 Ms Joy advised Dr Walsh, a psychiatric registrar who also has responsibility for the plaintiff's care, that she would be applying to " *revoke* " the financial management order application that she had submitted to the Mental Health Review Tribunal. She said:

> *"I have ongoing concerns regarding* [the plaintiff], *however upon reviewing his bank statements, I am not in good faith able to proceed for lack of evidence.* [The plaintiff's] *mental state has improved and I believe he has the financial management skills to have the capacity to manage his finances."*

88 The principal issue is whether the unresolved concerns about the plaintiff's ability to manage his financial affairs provide a lawful basis for his continued

detention.

89 There is no definition of the expression " *serious harm* " in s 14. Section 14 is in the same terms as s 9 of the now repealed *Mental Health Act* 1990 following amendment of that Act by the *Mental Health Amendment Act* 1997.

90 Prior to 1997, s 9 of the *Mental Health Act* 1990 dealt separately with the necessity to protect a person suffering from mental illness from serious physical harm and from serious financial harm and from serious damage to the person's reputation.

91 That section was repealed and replaced by the *Mental Health Legislative Amendment Act* 1997 in the form which was repeated in s 14 of the 2007 Act.

92 The explanatory note to the amendment in 1997 stated:

> " *The amendment asserts a new definition of mentally ill person that removes the existing requirement that a person suffering from a mental illness is such a person if the person requires care, treatment or control for the protection of the person or others from serious physical harm and replaces it with a requirement that such a person requires the care, treatment or control for protection of the person or others from serious harm. The effect of this is to enable other kinds of harm, such as financial harm or harm to reputation, to be considered when determining whether a person can be detained as a mentally ill person.* "

93 There may be a question as to whether this prior legislative history can be considered in construing s 14 of the present Act. If it can be taken into account, then it would be clear that serious harm under s 14 can include harm to a person's finances. Without recourse to the legislative history, I doubt that the expression would be so construed, although " *serious harm* " would have to be wider than " *serious physical harm* ". I think there would be much to be said for the submission of counsel for the plaintiff that serious harm under s 14 refers to what counsel calls either physical harm or psychological harm.

94 In the context of this Act there could be a real question as to the validity of such a distinction, but it is a distinction often drawn in other areas of the law. Such a construction would be consistent with other provisions, such as ss 12 and 35(5)(c) which contemplate that there will be protection provided against the harm by provision of care.

95 In the absence of argument on the question and in the time available I have not come to a conclusion as to whether it is legitimate to construe s 14 by reference to the prior legislative history. I will assume without deciding that it is, and that therefore a person can be a mentally ill person if he or she suffers from mental illness, and owing to that illness there are reasonable grounds to believe that care, treatment or control of the person is necessary to protect the person or otherwise from serious financial harm.

96 Assuming that to be so, then ss 12(1)(b) and 35(5)(c) which refer to provision of care must be given an ample operation. Those provisions must be read as referring to care that might be available of a less restrictive kind than involuntary detention that protects against serious financial harm. A financial management order that protects a person against harm to his or her finances would provide care against harm to those finances.

97 Read as a whole, the scheme of Chapter 3 is that involuntary detention is to be a measure of last resort to protect against harm. In the present case, that protection could have been provided by a financial management order if the Tribunal or this Court, if an application were made to this Court, were satisfied that the plaintiff was not capable of managing his affairs.

98 Given that available remedy, I do not consider that the plaintiff's involuntary detention can be justified on the basis that it was necessary to prevent his spending his money unwisely. Of course, if it were found that the plaintiff was capable of managing his affairs, then there would be even less justification for his involuntary detention on that ground.

99 The Tribunal's orders proceeded on a different basis than that on which the plaintiff's continuing detention was now sought to be justified.

100 Yesterday, the defendant's solicitor did not submit, and Professor Parker did not say, that the plaintiff's continued involuntary detention could be justified by the need to continue his medication until mood stability was achieved.

101 I would accept that s 14 would permit the continued involuntary detention of a person suffering from mental illness if that were necessary to protect the person from serious harm, being the harm associated with the illness itself. But it would be necessary to consider the extent to which the illness was a harm for the person and to assess its seriousness.

102 I asked Professor Parker whether in his view the plaintiff's continued involuntary detention was necessary in order for him to achieve a stable mood state. He said " *absolutely* ". When asked why, Professor Parker said that the plaintiff was not showing insight into his condition, but was denying reality. In that respect he instanced the plaintiff's not having even raised the topic of his cancer.

103 Professor Parker also said:

> " *As of yesterday when I did the last assessment, I did not think he showed an appropriate level of insight, and if he were to be made voluntary he would leave the hospital immediately, because that would be his right, and then he would be back fairly quickly in the same domain, or at risk of being in the same domain, and spending a lot of money, which would not be in his best interests.* "

104 I asked whether it was feared that the plaintiff would not continue the medication that would be necessary to achieve the stable mood state. Professor Parker said that when people lacked insight and denied that they had a distinct problem, then there was a whole series of risks. One is that the person might say, " *I don't need the medication.* " However, he also said that he believed the patient trusted him to a reasonable degree and if he were to say, " *You really must take the medication, and we will probably give it to your wife for her to administer,* " he suspected that the plaintiff would probably go along with that.

105 Professor Parker then said that it was his financial concerns that drove his concerns about the management plan.

106 Professor Parker also gave evidence that if the plaintiff continued to take his medication then there should be continued improvement in the plaintiff's mental state as " *being in the hospital or out of hospital is largely irrelevant* ."

107 Before me today the plaintiff made it clear that if discharged, he would continue to attend the hospital and to take the medication and treatment. Again, I do not know that I should place particular weight on that assurance. I do not say that I in any way disbelieve the plaintiff. But, I have to take into account that I am dealing with a person who has been diagnosed as suffering a mental illness.

108 During the course of final submissions, Ms Shirm, for the defendant, submitted that if I were to order the plaintiff's discharge, I might make a community treatment order to minimise the risk that the plaintiff would discontinue his medication. I was receptive to that proposal.

109 However, I was later informed by the defendant that having taken further instructions from Professor Parker, that submission was not pressed. I was told in substance that the Professor's view was that the plaintiff did not have the insight, nor the ability, to make a judgment about his own condition. I confess that I do not understand that suggested reason as a reason for not making a community treatment order if it were otherwise possible to do so. Professor Parker has given evidence that the plaintiff was likely to continue to take the medication if he urged him to do so. I assume that Professor Parker would do just that. It would only be an added spur to the plaintiff's continuing his medication to make a community treatment order. Whether so intended or not, I regret to say that I perceive that response to be an attempt to raise the bar to my decision-making.

110 However, a community treatment order cannot be made unless there is a treatment plan. The hospital would have to prepare the treatment plan. I cannot compel it to do so. Accordingly, I cannot make such an order.

111 The defendant also submitted that if I were minded to allow the appeal, then a staged order should be made to reflect the hospital's present plan for the plaintiff's treatment. That is, to stage the order so that the plaintiff would not be moved from the status of an involuntary patient to a voluntary patient until after a few days had elapsed, so that thereafter, within perhaps a week or so, he could be discharged into the care of his wife.

112 But the question for me is not what is the best treatment for the plaintiff's mental illness. The question is whether his continued detention is lawful. If it is not lawful, he must be discharged. His continued detention is not lawful unless there is no other care that can provide means for protection from serious harm, being serious financial harm. That is not made out.

113 Accordingly, on the basis on which the application was heard and determined the plaintiff must be discharged.

114 I should add one final observation and that is that in the course of his evidence Professor Parker referred to a previous incident in which he said an in-care patient spent $30,000 on legal fees while in the hospital and was discharged as a consequence of very strong legal advocacy, but then killed himself a week later. I am conscious of judicial fallibility, but in the present case there is no suggestion that such an outcome would be a likely, or even an unlikely consequence, of the order for discharge. If there were a risk of serious harm of that kind, then I would expect to be told of it if it were something the plaintiff's treating doctors had been able to assess.

115 For these reasons I make the following orders:

1. Allow appeal from the orders of the Mental Health Review Tribunal on 1 September 2011 made by the Tribunal pursuant to ss 35 and 44 of the *Mental Health Act* 2007.

2. Order that the plaintiff be discharged from the mental health facility of the Prince of Wales Hospital.

116 I will hear the parties on costs.

[Parties address on costs.]

117 Pursuant to r 49.1 of the Uniform Civil Procedure Rules 2005, costs *prima facie* follow the event. That is to say, costs follow the event unless it appears to the Court that some other order should be made.

118 In this case, the plaintiff has been successful and seeks costs. This matter is heard in the Protective List. Different principles apply in relation to protective matters. This has been recognised in authorities (see, for example, *M v K*

(Supreme Court of New South Wales, Powell J, 24 April 1989, unreported); *Application of O'Hara; Re M* [1999] NSWSC 209; and *FA v the Protective Commissioner* [2009] NSWSC 415).

119 It would be disturbing if persons were dissuaded from applying for relief under protective legislation for fear of incurring an adverse costs order. It would also be against the public interest if the defendant to an application were dissuaded from providing a proper response to what it genuinely considered to be the best interests of the plaintiff for fear of an adverse costs order. The bodies charged with responsibility for making what are very often difficult decisions that impact severely on people's lives have no option but to decide how they will exercise their statutory powers.

120 In this case it is, I think, clear that the hospital has acted in what it regards as the best interests of the plaintiff. The fact that the Tribunal's orders have been reversed does not reflect adversely on the hospital.

121 Particular issues have been raised in the course of litigation in relation to the timeliness of steps taken, but I do not think they should affect the decision as to costs.

122 In my view, notwithstanding that the plaintiff has been successful, there should be no order as to costs.

123 I make no order as to costs with the intention that each party bears his and its own costs.

124 The exhibits may be returned after 28 days. I thank counsel and the legal representatives of the parties for their assistance in this matter.

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Decision last updated: 17 October 2011