

OVERPROTECTING PROFESSIONALS FROM 'VEXATIOUS' CLAIMS UNDER THE HONG KONG MENTAL HEALTH ORDINANCE: THE QUESTION OF ACCESS TO JUSTICE FOR PERSONS WITH MENTAL ILLNESS

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ABSTRACT

Using Hong Kong's mental health legislation as a case study, this article asks whether provisions in domestic mental health legal frameworks which seek to restrict the institution of legal proceedings against those working under such legislation may be justified, given the implications they have on the fundamental right to access to justice. Under section 69 of the Hong Kong Mental Health Ordinance, legal proceedings cannot be brought against anyone acting in pursuance of the Ordinance unless leave has been given by a court, and such leave shall not be given unless the court is satisfied there is a 'reasonably arguable' case of bad faith or negligence. Limited case law on section 69 and Hong Kong mental health jurisprudence in general indicate that this test is likely to be applied by judges stringently, with the result that mental health patients face a virtually insurmountable hurdle should they wish to bring actions against professionals for wrongful or negligent treatment under the Ordinance. The author argues that provisions such as section 69 are rooted in discriminatory stereotypes of persons with mental illness as particularly 'vexatious' litigants and constitute unjustified barriers to their right to equal access to the courts. In Hong Kong's case, in particular, section 69 operates within and reinforces a broader legislative framework that is systemically discriminatory against those who fall under the compulsory mental health regime. As such, such provisions must be seriously reconsidered and reformed.

I. INTRODUCTION

Since the UN Convention on the Rights of Persons with Disabilities ('CRPD') was opened for signature in 2007, there has been much academic commentary on what this 'paradigm-shifting' treaty means for the conceptualisation of equality and justice for persons with disabilities, given its specific focus on the 're-articulation of rights found in other treaties in ways that will make those rights meaningful to people with disabilities'.¹ Articles 12 and 13 in particular go to the heart of this aspiration, requiring states to ensure persons with disabilities enjoy legal capacity *and* effective access to justice on an equal basis with others, as they have historically and routinely been excluded from making decisions for themselves in relation to their person and property and from participating in legal proceedings, usually by the law's denial of their legal capacity or the lack of reasonable accommodation for them to meaningfully participate in the courtroom.

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¹ Peter Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75 *Modern Law Review* 752.

Much of the literature² and a considerable number of individual communications filed with the Committee on the Rights of Persons with Disabilities³ have focused on these two particular aspects of domestic legal systems' treatment of persons with disabilities. However, short of being deprived of their legal capacity and apart from the issue of whether they are provided with the accommodation they need to participate in legal proceedings, there exists a different kind of barrier which certain persons with mental disabilities face in accessing the courts which has not been much explored in relation to the right to access to justice, especially in view of the CRPD: in many jurisdictions, mental health legislation contains provisions which expressly limit the liability of those working under the legislation to situations where they have acted in negligence and/or bad faith;⁴ in other jurisdictions, there are further provisions which restrict or even prohibit the commencement of legal proceedings against such personnel.⁵

Hong Kong is one of the jurisdictions which restrict *both* professional liability and the institution of legal proceedings under its mental health legislation. Under section 69(2) of the Hong Kong Mental Health Ordinance ('MHO'), legal proceedings cannot be brought against anyone acting in pursuance of the Ordinance, for example in making an application to compulsorily detain a patient with mental disorder, unless leave has been given by a court; such leave is not to be given unless the court is satisfied there is a 'reasonably arguable' case of bad faith or negligence.⁶ A recent decision by the Court of First Instance, *Bhatti Bhupinder Singh v Hospital Authority* ('*Singh v HA*'),⁷ is one of the first reported cases which shed light on a judge's application of the test in detail, and it seems to suggest that the threshold is, in practice, applied in such a way as to be virtually insurmountable. The effect of this legally instituted hurdle, which is clearly intended to discourage individuals from initiating proceedings against medical professionals for their conduct under the MHO, in turn raises the question of whether patients' right to access to justice has been unjustifiably restricted by this rule. This

² See eg Eilionóir Flynn and Anna Lawson, 'Disability and Access to Justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities' (2013) 4 European Yearbook of Disability Law 7, 9; Lucy Series, 'Legal capacity and participation in litigation: Recent development in the European Court of Human Rights' (2015) 5 European Yearbook of Disability Law 103; Anna Lawson, 'Disabled People and Access to Justice: From disablement to enablement?' in Peter Blanck and Eilionóir Flynn, *Routledge Handbook of Disability Law and Human Rights* (Routledge 2017) 91, 95; Penelope Weller, 'Legal Capacity and Access to Justice: The Right to Participation in the CRPD' (2016) 5 Laws 13. Flynn and Lawson (2013) and Lawson (2017) give comprehensive accounts of different types of barriers faced by persons with disabilities in accessing justice, but the denial of legal capacity and lack of reasonable accommodation remain the two main strands discussed in detail.

³ See eg a series of individual communications submitted by deaf individuals against Australia for failing to fulfil its obligations under, *inter alia*, article 13, by not providing reasonable accommodation for them to perform their jury duties: UN Committee on the Rights of Persons with Disabilities, 'Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 11/2013' (25 May 2016) UN Doc CRPD/C/15/D/11/2013, 'Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 13/2013' (30 May 2016) UN Doc CRPD/C/15/D/13/2013, and 'Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 35/2016 (20 December 2018) UN Doc CRPD/C/20/D/35/2016.

⁴ See eg s 231 of the Victorian Mental Health Act 2014, s 797 of the Queensland Mental Health Act 2016, s 218 of the Tasmanian Mental Health Act 2013, and s 33.6 of the Ontario Mental Health Act 1990.

⁵ See eg s 119 of the Indian Mental Healthcare Act 2017: 'No suit, prosecution or other legal proceeding shall lie against the appropriate Government or against the chairperson or any other member of the Authority or the Board, as the case may be, for anything which is in good faith done or intended to be done in pursuance of this Act or any rule or regulation made thereunder in the discharge of official duties.' See also s 139 of the English Mental Health Act 1983, which will be further discussed below.

⁶ *Chan Shek Him v Hospital Authority* [2014] CHKEC 980.

⁷ [2020] HKCFI 530.

issue, however, has not been examined in the literature, despite renewed academic interest in the need to reform the MHO.⁸

Given this gap, this article therefore sets out to explore the implications of legal rules which impose restrictions upon the commencement of legal proceedings against those working under mental health legislation on the right of persons with mental illness to access to justice, using section 69 of Hong Kong's MHO as a case study. It argues that such restrictions are rooted in discriminatory stereotypes of persons with mental illness as particularly 'vexatious' litigants and, even where it may otherwise be said to pursue a legitimate aim, the threshold, as applied, represents a disproportionate interference with their right to equal access to the courts. The next section gives a brief overview and history of section 69 and its counterparts in English mental health legislation, while section III examines how the law has been applied in practice. Section IV explores the content and limits of the right to access to justice in relation to the issue of gatekeeping litigation against professionals working under legislation such as the MHO, especially in light of the CRPD and in the context of broader mental health jurisprudence in Hong Kong. Finally, section V concludes with suggestions for reconsidering and reforming the provision so that those with mental illness or who are otherwise subject to the MHO may truly be able to access justice on an equal basis with others.

II. A BRIEF OVERVIEW OF SECTION 69: 'PROTECTION OF PERSONS CARRYING OUT THE PROVISIONS OF THIS ORDINANCE'

A. The English Mental Treatment Act 1930 and Mental Health Acts 1959 and 1983

Hong Kong mental health law today, as with other legislation in the land, has historically been developed from English law because of the city's history as a British colony.⁹ While Hong Kong courts are no longer bound by English statutory and case law after the handover in 1997, they nevertheless refer to English jurisprudence for guidance at times as the common law system has remained in place,¹⁰ and especially when it comes to provisions that have roots in English law.¹¹ It is therefore useful to examine the historical origins of section 69 and how Hong Kong and English courts have interpreted and applied this section and its English counterparts over the years.

⁸ See eg The Law Reform Commission of Hong Kong, *Substitute Decision-Making and Advance Directives in Relation to Medical Treatment* (LRC, August 2006) <<https://www.hkreform.gov.hk/en/publications/rdecision.htm>> accessed 17 August 2021; HK Cheung, 'What We Should Consider When We Next Amend the Mental Health Ordinance of Hong Kong' (2009) 19 *Hong Kong Journal of Psychiatry* 53; Sherlynn G Chan, 'The Way Forward' in *A Practical Guide to Mental Health Law in Hong Kong* (HKU Press 2019) 138; Daisy Cheung and others, 'Articulating future directions of law reform for compulsory mental health admission and treatment in Hong Kong' (2020) 68 *International Journal of Law and Psychiatry* 101513; 'Workshop: "Living Will, Living Well? Advance Directives Across Asia" by the Centre for Medical Ethics and Law' (*Hong Kong Lawyer*, November 2020) <<http://hk-lawyer.org/content/workshop-%E2%80%98living-will-living-well-advance-directives-across-asia%E2%80%99-centre-medical-ethics-and>> accessed 17 August 2021.

⁹ See Daisy Cheung, 'Mental Health Law in Hong Kong: The Civil Context' (2018) 48 *Hong Kong Law Journal* 461 for an overview of the historical development of civil mental health law in Hong Kong.

¹⁰ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, art 8.

¹¹ Anthony Mason, 'The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong' (2007) 37 *Hong Kong Law Journal* 299, 307.

The statutory text of section 69 has remained unchanged since the original MHO was enacted in 1960. It was directly modelled upon section 16 of the English Mental Treatment Act 1930, which provided that:

(1) Where a person has presented a petition for a reception order, or signed or carried out, or done any act with a view to signing or carrying out, an order purporting to be a reception order or any report, application, recommendation, or certificate purporting to be a report, application, recommendation, or certificate under this Act, or any Act amending this Act, or has done anything in pursuance of this Act, or any Act amending this Act, he shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground unless he has acted in bad faith or without reasonable care.

(2) No proceedings, civil or criminal, shall be brought against any person in any court in respect of any such matter as is mentioned in the last preceding subsection, without the leave of the High Court, and leave shall not be given unless the court is satisfied that there is substantial ground for the contention that the person, against whom it is sought to bring the proceedings, has acted in bad faith or without reasonable care.

This section was largely preserved in section 141 of the Mental Health Act ('MHA') 1959, albeit in less cumbersome language. The protection afforded by the 'substantial ground' requirement to professionals and public authorities acting under the 1930 and 1959 Acts was intended to be construed broadly, covering cases where these actors 'may have misconstrued the Act' and 'may have done things which there was no jurisdiction to do', as long as 'they acted in good faith and in a reasonable manner'.¹² It was also meant to provide greater protection than its predecessor in the Lunacy Act 1890 and Mental Deficiency Act 1913, as Denning LJ explained in *Richard v London City Council* in relation to section 16 of the 1930 Act:

[Section 16 of the 1930 Act] puts the burden of proof the other way round. It puts the burden of proof on the man who seeks to bring such an action. It goes further. It says that not only must there be reasonable grounds [as in the Mental Deficiency Act 1913], but there must be substantial grounds for the contention.¹³

Case law indicates that the 'substantial ground' threshold was, if a little ambiguous, certainly an onerous one. In the same case, it was held that, while it was not possible to define 'substantial grounds', it sufficed to say that 'there must be solid grounds for thinking that there was want of reasonable care or bad faith'.¹⁴ In *Carter v Commissioner of Police of the Metropolis*,¹⁵ this standard was confirmed by the Court of Appeal to be applicable to section 141 of the MHA 1959.

However, in section 139 of the MHA 1983, while the civil and criminal liability for individuals acting in pursuance of the Act continues to be limited to cases of bad faith or negligence, some notable changes were made to the rule regarding the commencement of proceedings. Under subsection (2), criminal proceedings may only be brought in respect of such acts by or with the consent of the Director of Public Prosecutions; civil proceedings remain subject to the requirement of leave of the High Court, but the threshold for granting such leave is no longer specified in the text.

¹² *Richardson v London City Council and Others* [1957] 1 WLR 751, 760 (Denning LJ).

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ [1975] 1 WLR 507.

Subsection (3) states that the section no longer applies to the Secretary of State or public authorities, such as the National Health Service Commissioning Board or Local Health Boards.

The question of which test to be applied under section 139(2), since the 'substantial ground' threshold had been scrapped from the statute, was considered in the case of *Winch v Jones*,¹⁶ an appeal against a High Court decision to not grant such leave. Sir John Donaldson first acknowledged that the change in law was one 'of substance and not merely an improvement in the drafting', before considering a few possible approaches the court might take: whether the plaintiff has established a 'prima facie case' of negligence or bad faith, as the High Court judge had asked; whether there is a 'serious issue to be tried' or a 'real prospect of succeeding', as submitted by the plaintiff and taken from a line of cases on granting interlocutory injunctions; and whether there is an 'arguable case', as used in granting leave in the context of judicial review.¹⁷ Sir John Donaldson concluded that 'none of these approaches is directly applicable to the jurisdiction under section 139' and decided to opt for an approach that was analogous to the one adopted in the context of judicial review but also *sui generis*:

The issue is whether, on the materials immediately available to the court [...], the applicant's complaint appears to be such that it deserves the fuller investigation which will be possible if the intended applicant is allowed to proceed.¹⁸

Parker LJ concurred in the same case, framing the threshold as 'there is a reasonable suspicion that [the potential defendant] has committed some wrong'.¹⁹ Section 139(2) of the MHA 1983 thus represents a considerable departure from the 'substantial ground' approach taken under section 16 of the Mental Treatment Act 1930 and section 141 of the MHA 1959, providing claimants with 'increased access to the courts'.²⁰ Later judgments on section 139(2) remain faithful to the approach adopted in *Winch v Jones*. For example, in *David Johnson v The Chief Constable of Merseyside Police*, the claimant's application for leave was granted, with Coulson J concluding that the claim was 'not frivolous, vexatious, or an abuse of process' and 'although far from straightforward, has a real prospect of success'.²¹ In *DD v Durham County Council*, the Court of Appeal overturned a High Court decision to refuse leave, as the claimant's case was 'at least arguable' and had met 'the very low threshold' under section 139.²²

B. Section 69 of the Mental Health Ordinance

As mentioned above, the text of section 69 of the MHO was modelled upon the 1930 English legislation and has not been amended since, even whilst other parts of the Ordinance were updated, often taking reference from developments in other

¹⁶ [1986] 1 QB 296.

¹⁷ *ibid* 303–304 (Sir John Donaldson MR).

¹⁸ *ibid* 304–305 (Sir John Donaldson MR).

¹⁹ *ibid* 306 (Parker LJ).

²⁰ Peter Bartlett and Ralph Sandland, *Mental Health Law: Policy and Practice* (4th edn, OUP 2013) 577.

²¹ *David Johnson v The Chief Constable of Merseyside* [2009] EWHC 2969 (QB) [24].

²² *DD v Durham County Council and Another* [2013] EWHC Civ 96 [24].

commonwealth jurisdictions, especially England and Wales.²³ Section 69(2) uses the exact same threshold as provided for in pre-MHO 1983 English law, that 'leave shall not be given unless the Court is satisfied that there is substantial ground for the contention that the person [...] has acted in bad faith or without reasonable care'.

In 2014, however, the requirement of 'substantial ground' was read down in a remedial interpretation in *Chan Shek Him v Hospital Authority*.²⁴ *Chan Shek Him* concerned a challenge of the constitutionality of section 69 by the applicant, whose earlier claim for damages against a psychiatric hospital for wrongful detention in the High Court was struck out as he had not obtained leave under section 69(2) before initiating the proceedings.

In considering whether section 69 was unconstitutional, the Court of Appeal began from the position that the section 69(2) requirement of leave presented a prima facie limitation on 'the right to litigate' under article 35 of the Basic Law, which states that Hong Kong residents shall have the right to, *inter alia*, access to the courts and to judicial remedies, and article 10 of the Hong Kong Bill of Rights, which guarantees equality before the courts and tribunals. It then referred to English jurisprudence on the issue over the years, deciding that, first of all, the limitation pursued and was rationally connected to a legitimate aim. The Court cited Lord Simon's judgment in *Pountney v Griffiths*, a 1976 case on section 141 of the MHA 1959, that the justification for the provision was that 'unless such classes of potential litigant enjoy something less than ready and unconditional access to the courts, there is a real risk that their fellow-citizens would be, on substantial balance, unfairly harassed by litigation'.²⁵ This was supported by the Secretary for Justice's submission to the Court, whose position was that

In Hong Kong, the most common form of severe mental illness is schizophrenia and such patients tend to be unaware of their illness. There is also a tendency for such patients to develop persecutory delusion and distorted appreciation of personal experience which make some of them litigious, particularly when they are subject to detention against their will [...]

It is in the public interest that people involved in the process of involuntary removal or detention under the MHO should not be deterred by the cost and annoyance of unmeritorious potential court actions because otherwise those suffering from mental illness may not receive the necessary treatment which may require custody and detention.²⁶

Having established that section 69(2) was able to meet the requirements of the first two stages of the proportionality test, the Court went on to consider whether it was proportionate, meaning that it did not impose a restriction which was more than necessary for the pursuit of the purported legitimate aim,²⁷ specifically in terms of the 'substantial ground' threshold and the fact that the onus of meeting it rested entirely on the claimant. In doing so, the Court turned to *Winch v Jones* and a subsequent

²³ See Cheung (n 9). Despite these reforms, other parts of the MHO have often been criticised as lagging behind other jurisdictions in terms of compliance with international human rights standards as well: see section IV(C) below.

²⁴ *Chan Shek Him v HA* (n 6).

²⁵ *Pountney v Griffiths* [1975] 3 AC 314, 329 (Lord Simon).

²⁶ *Chan Shek Him v HA* (n 6) [53].

²⁷ Note that the test applied here was the three-stage test as set out in *Leung Kwok Hung v Secretary for Justice* (2005) 8 HKCFAR 229, which has since been replaced by the four-stage test in *Hysan Development Co Ltd v Town Planning Board* [2016] HKCFA 66.

House of Lords judgment on section 139 of the MHA 1983, *Seal v Chief Constable of South Wales Police*,²⁸ noting that section 69(2)'s English counterpart has been revised since the 1930 and 1959 Acts to require claimants to meet only a very low threshold.²⁹

Acknowledging that the 'substantial ground' threshold was 'a high threshold' which could 'be a hurdle which a claimant cannot meet when he has not even had the chance to get discovery and the other side has put forward contradictory evidence from professional personnel treating him', the Court ultimately found that the current threshold of 'substantial ground' constituted a disproportionate interference with the fundamental right of access to the courts.³⁰ In a remedial interpretation, the Court decided to adopt the standard 'reasonably arguable ground' currently used in the context of granting leave for judicial review, as set out in *Po Fun Chan v Winnie Cheung*,³¹ which means that section 69(2) should now read:

No proceedings, civil or criminal, shall be brought against any person in any Court in respect of any such matter as is mentioned in subsection (1), without the leave of the Court, and leave shall not be given unless the Court is satisfied that there is *reasonably arguable ground* for the contention that the person, against whom it is sought to bring the proceedings, has acted in bad faith or without reasonable care.

This was notably contrary to Sir John Donaldson's decision in *Winch v Jones* to *not* directly adopt the threshold used in the context of judicial review, his reasoning being that those subject to section 139 were not necessarily 'vexatious litigants' by nature, as those whom the leave requirement for judicial review was meant to deter were, and therefore required a different, presumably less demanding test.³² The Court of Appeal in *Chan Shek Him*, however, held that the judicial review standard was directly applicable, as 'the purpose for having a leave requirement for judicial review is similar [to section 69(2)]: to filter out unmeritorious claims and to protect public process and public officers or authorities against disruption and harassment occasioned by such claims'.³³

A 'reasonably arguable case', according to *Po Fun Chan*, is one which 'enjoys realistic prospects of success'.³⁴ How this threshold is applied in practice and its effects on potential claimants is discussed in the following section.

III. THE 'REASONABLY ARGUABLE GROUND' THRESHOLD IN ACTION: MEDICAL NEGLIGENCE AND 'PROFESSIONAL JUDGMENT'

Applications made under section 69(2) of the MHO since *Chan Shek Him* have been few and far between, but the very limited case law available, when seen in the broader context of general mental health jurisprudence in Hong Kong, raises serious concerns about the likely impact it has on the right to access to the courts of those subject to the MHO, namely individuals who have, or are perceived to have, a (history of) mental

²⁸ [2007] UKHL 31.

²⁹ *Chan Shek Him v HA* (n 6) [60].

³⁰ *Chan Shek Him v HA* (n 6) [63].

³¹ (2007) 10 HKCFAR 676.

³² *Winch v Jones* (n 16) 304 (Sir John Donaldson MR).

³³ *Chan Shek Him v HA* (n 6) [62].

³⁴ *Po Fun Chan* (n 31) [15].

illness and who thereby find themselves caught up in the compulsory mental health regime.

Bhatti Bhupinder Singh v Hospital Authority is a recently decided case on an application for leave to bring an action against the Hospital Authority for wrongful detention. Singh was a man who, in the midst of a two-year ordeal with his estate management over his complaints about a noise problem that had been consistently ignored, was escorted to an Accident and Emergency department by the police after he had thrown a stapler onto the floor and a letter at a member of staff at the management office on two separate occasions. After being assessed by a nurse and a doctor, he was admitted to and detained in a psychiatric hospital for observation for seven days under section 31 of the MHO based on his suspected psychotic symptoms (as evidenced by his complaints about apparently non-existent noises) and also his 'uncontrollable violent behaviour with potential to cause bodily harm to others when he felt that he had not been fairly treated'.³⁵ Although during Singh's seven-day detention, the hospital was able to obtain confirmation from his family that the noises did in fact exist, his detention was extended for 21 days under section 32 of the MHO on the basis of a delusional disorder diagnosis. He was discharged after this period, with a principal diagnosis of paranoid personality disorder. Singh sought to commence a case against the medical professionals responsible for his diagnosis and detention, but leave was refused.

As the author and Daisy Cheung have argued elsewhere, the Judge's reasoning in the judgment appears to be highly flawed in many respects.³⁶ The main case to be considered here was the contention that the professionals had acted without reasonable care, which meant that the *Bolam* test was to be applied:

[a doctor] is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art [...] a man is not negligent, if he is acting in accordance with such practice, merely because there is a body of opinion that takes a contrary view.³⁷

The question the Judge had to decide, therefore, was whether Singh was able to present a reasonably arguable case that the professionals had acted in a way that would not be accepted as proper by any responsible body of medical personnel skilled in psychiatry. Despite the fact that the nurse and doctors involved in Singh's admission to and detention in hospital seemed to have based their decisions on less than solid grounds — relying only on Singh's estate management, a party with its own clear interests in the case and no expertise in the medical matters at hand, for reports of his supposed auditory hallucinations and violent behaviour in admitting him and extending his stay even after having confirmed that his 'hallucinations' were in fact real — the Judge did not scrutinise these decisions at all, instead starting and stopping at the point of acknowledging that the nurse and doctors had exercised their 'professional judgment'.³⁸ The *Bolitho* principle that 'if, in a rare case, it can be

³⁵ *Singh v HA* (n 7) [22].

³⁶ Urania Chiu and Daisy Cheung, 'Claiming wrongful diagnosis under the Mental Health Ordinance: The impossibility of building a reasonably arguable case' (2020) 50 Hong Kong Law Journal 837.

³⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, 587.

³⁸ *Singh v HA* (n 7), [30]–[32]. See also Chiu and Cheung (n 36).

demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that body of opinion is not reasonable or responsible³⁹ was not mentioned at all, and there was no evidence that the Judge had put each of these decisions to logical analysis in relation to the requirements under the MHO. For example, under section 31(1), an application may only be made for the detention of a patient if the patient is suffering from a mental disorder of a nature or degree which warrants such detention *and* if they ought to be so detained for their own health or safety or for the protection of others. Without referring to these criteria, the Judge seemed to have simply accepted that the diagnosis and reported incidents were a reasonable basis on which the medical professionals could come to the decision of applying for Singh's detention.

As advised by a lawyer at the time he intended to bring his case to court (which was more than two years after his detention), Singh obtained and submitted a report on his mental condition. The report stated that, at the time of the assessment, the psychiatrist was unable to find any evidence of mental disorder or substantive ground to support a diagnosis of paranoid personality or delusional disorder.⁴⁰ This was rejected outright by the Judge as irrelevant.⁴¹ However, although this psychiatric assessment made more than two years after the detention could not, indeed, have been used as a retrospective evaluation of Singh's state of mind at the relevant time, it should have been considered in assessing the reasonableness of the original diagnoses and in light of the possibility that Singh's 'hallucinations', as observed by the nurse and doctors at his admission, were 'putative' and a result of the conflicting versions of events with which they were confronted.⁴² The reasonableness of the professionals' decision to act, to make use of the compulsory provisions under the MHO in such difficult circumstances, was precisely what the question of whether there is a reasonably arguable case hinged on, but the Judge stopped short of examining it. While the Judge could not (and should not) have gone into such an examination in detail at this stage, it would be impossible for him to assess whether the case enjoyed any 'realistic prospects of success' if he simply deemed the professionals' actions 'reasonable' or accepted them as having a logical basis as long as they were 'professional' in the sense of being within the ambit of their job descriptions.

Having acknowledged the facts, the Judge came to the conclusion that he was not satisfied that 'the applicant manages to establish that he has reasonably arguable grounds for saying that the nurse or any of the doctors, and thus HA, had acted in bad faith or without reasonable care'.⁴³ *Singh v HA* is one of the very few available judgments concerning an application under section 69(2), and by far the most detailed one — although as a standalone Court of First Instance judgment it has no binding force on other applications, it still raises serious concerns about the effect of section 69 on the ability of those subject to the MHO to bring cases against professional

³⁹ *Bolitho v City and Hackney Health Authority* [1998] AC 232, 243 (Lord Browne-Wilkinson). The *Bolitho* principle is widely accepted in Hong Kong medical negligence jurisprudence to have qualified the original *Bolam* test. See *Kong Wai Tsang v Hospital Authority* [2004] HKEC 1333 [10] (Rogers VP) and *Dr Chan Po Sum v Medical Council of Hong Kong* [2015] 1 HKLRD 330 [43]–[45] (Kwan JA).

⁴⁰ *Singh v HA* (n 7) [38]–[39].

⁴¹ *Singh v HA* (n 7) [42].

⁴² *Singh v HA* (n 7) [40].

⁴³ *Singh v HA* (n 7) [47].

misconduct. Given the troubling trend towards excessive deference to medical professionals in mental health jurisprudence in general in Hong Kong, it is very likely that the tone set in *Singh* will be one followed by future section 69(2) cases. As the author and Cheung note, the refusal of the Judge in *Singh v HA* to go into the substance of the medical reasoning echoes Hartmann J's judgment in *The Hospital Authority v A District Judge (HA v A District Judge)*, a case in relation to judges' power to scrutinise applications under the MHO:⁴⁴

The judge or magistrate is, of course, much more than a rubber stamp. But that does not mean that he is entitled to question the medical validity of opinions expressed if those opinions comply, on their face, with the relevant section of the Ordinance.⁴⁵

In that case, the original District Court judge's refusal to countersign an application for detaining a patient under section 36 of the MHO, as he was not satisfied that the doctors' opinion that it was necessary for the patient to be detained was based upon sound evidence,⁴⁶ was sternly criticised and eventually set aside by Hartmann J. However, if judges are not allowed to ask whether the criteria set out under the section have truly been met in ascertaining that the application certificate is 'in order and there are no grounds for rejecting it',⁴⁷ they are essentially performing only the function of a rubber stamp to confer legitimacy upon unchallengeable medical decisions. Although medical professionals are often protected by law from becoming liable for every decision that happens to result in a negative outcome (as under the *Bolam* test for medical negligence), they are still required to have made these decisions with reasonable care, as judges are tasked with ascertaining under the *Bolitho* principle. Hartmann J's statement therefore has troubling implications for the role of the judiciary in safeguarding individuals from arbitrary compulsory detention or treatment under the MHO.⁴⁸

The Judge in *Singh v HA* has, in effect, applied the section 69(2) test in a way that makes it extremely difficult for a case to be considered 'reasonably arguable'. This is because the Judge, by refusing to question the doctors' and nurse's actions beyond whether they have acted within the bounds of their official duties, has essentially failed to consider the question of whether there are *reasonably arguable grounds* for the contention that they have acted without reasonable care or in bad faith. If a case like *Singh's*, which evidently exhibited many points of doubt about the reasonableness of the professionals' decision-making, is not granted leave, it is difficult to imagine what kind of cases may pass the section 69 hurdle to be heard in full.

⁴⁴ Chiu and Cheung (n 36).

⁴⁵ *The Hospital Authority v A District Judge* [2001] HKEC 1657 [27].

⁴⁶ *Re Patient O* [2001] HKEC 509.

⁴⁷ Mental Health Ordinance Cap 136, s 36(2).

⁴⁸ Daisy Cheung, 'The compulsory psychiatric regime in Hong Kong: Constitutional and ethical perspectives' (2017) 50 International Journal of Law and Psychiatry 24.

IV. OVERPROTECTING PROFESSIONALS FROM 'VEXATIOUS' CLAIMS: WHAT ABOUT ACCESS TO JUSTICE FOR PERSONS WITH MENTAL ILLNESS?

A. The rights to access to justice and equality before the courts

The introduction of the CRPD, by framing injustices historically faced by persons with disabilities in terms of universal rights, brought international attention to previously underexplored ways that human rights instruments and discourse may be utilised to achieve equality and justice for all. As noted in section I, the deprivation of legal capacity and lack of reasonable accommodation have been the main focal points around which academic discussions about the exclusion of persons with disabilities from meaningful participation in legal proceedings have revolved in recent years.⁴⁹

Under article 12 of the CRPD, states are asked to recognise that persons with disabilities 'enjoy legal capacity on an equal basis with others in all aspects of life'; under article 13, states are tasked with ensuring 'effective access to justice for persons with disabilities on an equal basis with others'. These provisions correspond to article 14 of the International Covenant on Civil and Political Rights, which guarantees that all persons shall be equal before the courts and tribunals. In the Hong Kong local human rights framework, the same is guaranteed under articles 25 (equality before the law) and 35 (the right to confidential legal advice and access to the courts) of the Basic Law. Although case law on the MHA and MHO provisions has in the past alluded to the right to access to the courts and evaluated the relevant threshold for granting leave to bring cases against medical professionals in relation to its interference with such a right,⁵⁰ what the right means, especially to those with mental disabilities, is never explicated in detail.

The term 'access to justice', in academic literature, has been used generally to refer to the legal system's two basic purposes of 'be[ing] equally accessible to all' and 'lead[ing] to results that are individually and socially just'.⁵¹ It has also been used in a more aspirational sense, 'as a focus of campaigns and other calls for justice to be made available to all', a 'political claim for an inclusive, affordable and impartial justice system' fundamental to a functioning and fair democracy and the rule of law.⁵² In law specifically, 'access to justice' is used to describe 'the bundle of rights relating to the justice system which are recognised in human rights law'.⁵³ The right to access to justice, as set out under article 13 of the CRPD, falls within this latter usage of the term and may be viewed, at a basic level, as simply 'an extension of the existing universal rights to an effective remedy and to a fair hearing'.⁵⁴ At the same time, given the CRPD's overall focus on the effective enjoyment and exercise of universal rights by persons with disabilities 'on an equal basis with others', it may be understood to mean, more specifically, that 'disabled people should have the same opportunities as

⁴⁹ See nn 2, 3 above.

⁵⁰ See, most notably, *Pountney v Griffiths* (n 25), *Winch v Jones* (n 16), and *Chan Shek Him v HA* (n 6).

⁵¹ Mauro Cappalletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181.

⁵² Lawson (n 2) 89, 90.

⁵³ Lawson (n 2) 90.

⁵⁴ Eilíonóir Flynn, 'Access to Justice' in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou, *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (OUP 2018) 384.

non-disabled people to access justice'; Eilionóir Flynn therefore suggests that the relevant test for discrimination should be 'whether a non-disabled person would have been able to access justice in the same circumstances where a disabled person has been prevented from accessing justice'.⁵⁵ This is supported by the view of the Committee on the Rights of Persons with Disabilities that legal regimes which separate patients with mental illness from other patients and allow them to be subject to compulsory treatment are non-compliant with CRPD norms:

Persons with disabilities are frequently denied equal protection under these laws by being diverted to a separate track of law, including through mental health laws. These laws and procedures commonly have a lower standard when it comes to human rights protection, particularly the right to due process and fair trial, and are incompatible with article 13 in conjunction with article 14 of the Convention.⁵⁶

Access to justice may be further conceptualised in terms of four elements: substantive, procedural, symbolic, and participatory.⁵⁷ The substantive focuses on 'the content of the legal rules and principles which shape the decisions made about those who make a "justice claim"',⁵⁸ while the procedural involves the familiar requirement of removing barriers and providing support for individuals to be able to effectively participate in legal proceedings.⁵⁹ The symbolic element expands the current understanding of access to justice to express an aspiration towards 'a society in which, due in part at least to its laws and justice system, individuals from marginalised communities are fully included and empowered to participate as equal citizens'.⁶⁰ The participatory element focuses on the overall attainment of equal citizenship for persons with disabilities in all aspects of life.⁶¹ Given these different dimensions to the right to access to justice and the crucial fact that individuals' ability to exercise or otherwise assert other relevant rights under compulsory mental health regimes such as the right to liberty and security of the person (article 14 of the CRPD), equality and non-discrimination (article 5), and the right to protection of the integrity of the person (article 17) hinges on this very right, access to justice is clearly a fundamental issue that needs to be critically examined in detail by courts and academic literature in this area.

Section 69 of the MHO, in restricting the type of proceedings (conduct involving negligence or bad faith) that those subject to the compulsory mental health regime—who would, except in the rare case of *Singh v HA*, most likely be people with mental illness and/or other disabilities—can institute against professionals and putting in place an extra obstacle of having 'a reasonably arguable case' which they need to overcome in order to bring a case, clearly contravenes the substantive element of access to justice, as those in other medical settings do not have to face the same barriers in making a justice claim. It is moreover argued here that, in evaluating the rights-

⁵⁵ *ibid* 392.

⁵⁶ UN Committee on the Rights of Persons with Disabilities, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities' (September 2015) [14].

⁵⁷ Eilionóir Flynn, 'Access to Justice and its Relevance for People with Disabilities' in *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge 2016).

⁵⁸ *ibid* 13.

⁵⁹ *ibid* 15.

⁶⁰ *ibid* 16.

⁶¹ *ibid* 18.

compliance of a rule which seeks to exclude a minority group from accessing systems of law and justice, it is necessary to look to broader conceptions of equality and justice as set out above, given the rule not only affects potential claimants who have already brought their application for leave to court but also those who intend or would have intended to do so. The symbolic element of access to justice must therefore also be considered here: the legal rule and how courts interpret it send a powerful message to this group as a whole and the community at large about who are and are not deserving of having their cases heard fully in a court of law without additional barriers. By setting down a rule that explicitly excludes a group which overwhelmingly consists of people with mental disabilities from unhindered access to justice, the current law not only falls foul of the substantive dimension of the right to access to justice but also the symbolic—those subject to the MHO are, undoubtedly, not being included or empowered to participate in the justice system on an equal basis with others by the current law.

B. Persons with mental illness as 'vexatious' litigants

The justification for provisions which limit not only the liability of those working under mental health legislation, but also the possibility of having cases brought against them at all, is essentially based on a view that those who find themselves subject to such legislation, i.e., people who have or appear to have a mental illness, are particularly 'vexatious' litigants. Lord Simon in *Pountney v Griffiths*, for example, wrote,

Patients under the Mental Health Act may generally be inherently likely to harass those concerned with them by groundless charges and litigation, and may therefore have to suffer modification of the general right of free access to the courts.⁶²

In *Winch v Jones*, although a relatively low threshold was set down for section 139 of the MHA 1983 and the judicial language used was seemingly more sympathetic, the justification for the continued existence of the threshold remained the same: 'mental patients are liable, through no fault of their own, to have a distorted recollection of facts which can, on occasion, become pure fantasy',⁶³ which meant that it was necessary to protect those working under the MHA from being 'harassed by clearly hopeless actions'.⁶⁴ It is notable that, despite these strongly worded proclamations to the effect that those subject to the compulsory mental health regime are somehow inherently prone to initiating undesirable (characterised as 'groundless' 'clearly hopeless', 'frivolous', or 'vexatious') litigation, none of these judgments relied on actual empirical evidence, whether psychiatric or statistical, to support these claims.⁶⁵

The concept of 'vexatious litigants' has long been used in general civil procedural law: under Rule 3.4 of the English Civil Procedural Rules 1998, a court may strike out the statement of a case if it appears to the court that it discloses 'no reasonable grounds for bringing or defending the claim' or that it is 'an abuse of the court's process' or

⁶² *Pountney v Griffiths* (n 25) 329 (Lord Simon).

⁶³ *Winch v Jones* (n 16) 302 (Sir John Donaldson MR).

⁶⁴ *Winch v Jones* (n 16) 305 (Parker LJ).

⁶⁵ Baroness Hale specifically criticised section 139(2) of the MHA for making the 'empirically unproven' assumption that 'everyone who has ever been subject to Mental Health Act compulsion is automatically suspect': *Seal v Chief Constable of South Wales Police* (n 28) [57].

otherwise 'likely to obstruct the just disposal of the proceedings'. Despite the existence of Rule 3.4, those who carry out their duties under the MHA are seen as needing additional protection, in the form of section 139, from vexatious litigation.

Similarly, in Hong Kong's case, the judiciary readily accepts the argument that instituting a legal hurdle to dissuade potential claimants from pursuing cases under the MHO is necessary and in the public interest, endorsing the government's submission in *Chan Shek Him* that there is a tendency for patients with mental illness, especially those with schizophrenia, to be particularly 'litigious'.⁶⁶ The Court further cited statistics in relation to involuntary removal and detention in Hong Kong which showed that there was a 'not insignificant' number of cases where such compulsory powers had to be exercised by frontline officers, which supposedly implied that they could be exposed to much unwarranted litigation if the section 69(2) hurdle was removed.⁶⁷

The Court never made clear why, given the low count of applications under section 69(2) that make it to the courts, the fact that there is a significant number of individuals subject to compulsory powers under the MHO should indicate a tendency to initiate unnecessary litigation rather than the opposite, that this group of individuals are in fact disinclined to bring lawsuits against those involved in their care or treatment. To demand them to satisfy the onerous test under section 69(2) before they could have their case fully heard would be to further discourage them from making claims for their rights, when they should instead be provided with more information on and assistance in exercising them, given that their present disinclination to do so likely stems from their vulnerable and disempowered position in clinical settings and in broader society.⁶⁸ Ultimately, it seems that these assumptions are reflective of the age-old stereotype that those with mental illness are troublesome, difficult, and simply 'crazy', someone from whom 'normal' people, especially those whose jobs involve caring for (or rather, 'dealing with') them, have to be protected. Although the concept of 'querulous behaviour' has been raised in some psychiatric literature before (and not without controversy) as a syndrome which 'may occur as part of other psychiatric illnesses such as paranoid personality disorder, organic and schizophrenic psychoses' and which entails 'an overvalued idea of having been wronged' that 'results in behaviour directed to the attainment of justice',⁶⁹ there is no evidence that this is the case with most people who have a mental illness or who are otherwise subject to the MHO,⁷⁰ especially in light of cases such as *Singh v HA*, where the very claim put forward is that the individual in question did *not* have a mental illness and had been negligently or wrongfully detained. In such cases, the professed rationale for putting an extra barrier in place to deter those under the compulsory mental health regime from bringing legal actions against professionals—to counteract the 'litigious'

⁶⁶ *Chan Shek Him v HA* (n 6) [53].

⁶⁷ *Chan Shek Him v HA* (n 6) [54].

⁶⁸ See text accompanying n 72 below.

⁶⁹ GS Ungvari, AHT Pang and CK Wong, 'Querulous Behaviour' (1997) 37 *Medical, Science and the Law* 265, 266.

⁷⁰ See eg Alfred H T Pang and others, 'Querulous Paranoia in Chinese Patients: A Cultural Paradox' (1996) 30 *Australian & New Zealand Journal of Psychiatry* 463. Pang and others found that, out of more than 1,500 new referrals to a psychiatric outpatient clinic in Hong Kong in one year, only three were diagnosed with querulous paranoia. There has been little to no research on this in more recent years, for better or worse, mainly because the very question of 'vexatious litigants' is prone to being misused to stigmatise those with mental illness.

tendencies that are assumed to be inherent to people with mental illness—completely disappears. Again, what the evidence shows is that patients are in fact very much disinclined to initiate legal proceedings in relation to their detention or treatment under the MHO, contrary to what is usually alleged; this is certainly the case in Hong Kong, as may be gleaned from the fact that there have only been three reported cases on section 69(2) to date, all of which have been dismissed.⁷¹ Literature on professional-patient relationships in the mental health context shows that patients occupy a systemically disadvantaged position in relation to psychiatrists, due to their passive role in the therapeutic encounter, the stigma attached to mental illness, and psychological distress stemming from their conditions and treatment.⁷² Moreover, individuals who (are perceived to) have a mental illness often feel, and are, discredited and disbelieved in clinical settings,⁷³ and it is likely that these issues of power disparity and epistemic injustice⁷⁴ spill over into a feeling of powerlessness in general which makes them hesitant to bring complaints for perceived negligent or wrongful treatment; further barriers to their access to court such as section 69(2) only exacerbate this.⁷⁵

At any rate, it is impossible to tell how many 'clearly hopeless', 'vexatious', or 'frivolous' cases there would be without the 'reasonably arguable' threshold, if individuals are deterred from making applications at all by the current rule. This was rightly recognised by Baroness Hale in her dissenting judgment in *Seal*, where she suggested 'the best solution would be to remove the procedural requirement [under section 139 of the MHA] altogether'.⁷⁶ With such a dearth of evidence on what exactly professionals are supposed to be protected from, it is indeed disconcerting that the threshold exists at all. On the substantive level of equality and access to justice, section 69 is clearly discriminatory, imposing an almost impassable obstacle for persons with mental disabilities to overcome which those without such disabilities, who may well make claims that are deemed vexatious, are not subject to. On the symbolic level of equality and justice, this is even more alarming. The main reason used by courts to justify the rule, which is simply taken for granted in all the aforementioned cases and never corroborated by any empirical evidence, perpetuates the stereotype of persons with mental illness as inherently untrustworthy and unreliable, which in turn contributes to the stigma they face both in the community

⁷¹ *Chan Shek Him v Hospital Authority* CAMP 61/2017; *Jacqueline Francis v Chan Yi San* [2020] HKCFI 238; *Singh v HA* (n 7).

⁷² Michael McCubbin and David Cohen, 'Extremely Unbalanced: Interest Divergence and Power Diversities Between Clients and Psychiatry' (1996) 19 *International Journal of Law and Psychiatry* 1, 12–15.

⁷³ Rena Kurs and Alexander Grinshpoon, 'Vulnerability of Individuals with Mental Disorders to Epistemic Injustice in both Clinical and Social Domains' (2018) 28 *Ethics & Behavior* 336.

⁷⁴ Epistemic injustice is a kind of injustice that consists 'in a wrong done to someone specifically in their capacity as a knower'. Those diagnosed with or perceived to have a mental illness or other mental health problems often face *testimonial* injustice in particular, which is when 'prejudice causes a hearer to give a deflated level of credibility to a speaker's word': Miranda Fricker, *Epistemic Injustice: Power & the Ethics of Knowing* (OUP 2007) 1. See also Paul Crichton, Havi Carel and Ian James Kidd, 'Epistemic injustice in psychiatry' (2017) 41 *BJPsych Bulletin* 65.

⁷⁵ In the case of *Singh v HA*, although Singh himself did not raise this issue, it is possible that his minority ethnic background also played a part in his complaints being disbelieved and his actions construed as unduly aggressive by his estate management, the police, the medical professionals, and ultimately the Court. The vulnerability of those who (are perceived to) have a mental illness may thus intersect with other vulnerable characteristics to further marginalise certain groups in clinical and judicial settings.

⁷⁶ *Seal v Chief Constable of South Wales Police* (n 28) [57], [61]. Baroness Hale was referring to clause 298 of the Draft Mental Health Bill proposed in 2004 (Cm 6305-1), which never came to fruition.

and in clinical settings.⁷⁷ *Singh v HA* demonstrates this perfectly: after having his noise complaints discounted by his estate management for two years, Singh continued to be disbelieved by medical professionals when he was presented at the hospital, with his expressions of frustration and agitation readily construed as the basis for a delusional disorder diagnosis despite him not even having a psychiatric history. When the Judge relied upon the discharge summary which recorded his 'improvement' as evidence that the doctors had exercised reasonable care in relation to his detention, one cannot help but think that, had Singh instead shown signs of growing distress, which would have been quite understandable in the circumstances, they would probably have been equally construed as evidence that he was severely ill and therefore in need of treatment.

C. Compulsory powers, vulnerability, and the lack of protection for the rights of mental health patients in Hong Kong

One might argue that, the 'vexatious litigant' argument aside, section 69 may still be justified by the fact that psychiatric diagnostic processes are largely dependent upon professionals' evaluation of symptoms, which is inherently prone to controversy and often has to be done under huge time pressure.⁷⁸ However, professionals must also understand that they are wielding extremely broad powers, notably to impose compulsory detention and/or treatment, over those who come into contact with the mental health system, who are vulnerable both because of their mental state and because of the fact that they have essentially no power to object to these compulsory measures once they are deemed to have a mental illness that places them within the MHO's remit. Here, the effects of section 69 need to be examined in the broader context of the compulsory mental health regime in Hong Kong. First of all, according to current mental health jurisprudence, it is very unlikely for judges to question medical professional opinion at the stage of the compulsory order being made: the effect of *HA v A District Judge* is such that doctors' medical opinions are essentially not subject to any real scrutiny beyond having to conform to the required legal form when applying to detain a patient under sections 31, 32, or 36 of the MHO.⁷⁹ Technically, once compulsorily detained, individuals may apply to the Mental Health Review Tribunal ('MHRT') to have their cases reviewed—but for those detained under sections 31 (seven days) and 32 (21 days), launching such an application will inevitably take more time than the detention period, and limited research shows that the success rate for such applications is extremely low.⁸⁰ In an application for leave to commence judicial review concerning a conditional discharge order made under section 42B of the MHO, the judge, with some irony, suggested that the applicant

⁷⁷ See, for the Hong Kong context, Sing Lee and others, 'Stigmatizing experience and structural discrimination associated with the treatment of schizophrenia in Hong Kong' (2006) 62 *Social Science & Medicine* 1685 and K F Chung and M C Wong, 'Experience of stigma among Chinese mental health patients in Hong Kong' (2004) 28 *Psychiatric Bulletin* 451.

⁷⁸ *Chan Shek Him v HA* (n 6) [53].

⁷⁹ *HA v A District Judge* (n 45); Cheung (n 48).

⁸⁰ According to limited information obtained by an Access to Information request to the Food and Health Bureau by Daisy Cheung, the average wait time between the date of application to the MHRT and the date of hearing, in the period from July 2017 to January 2020, was more than 120 days. 33 applications related to section 36 were recorded in this period, only three of which were successful. There was no record of how many section 31 or 32 applications were made, since the patients concerned had all been discharged before the MHRT even started to properly categorise them in their case files.

resort to section 69(2) of the MHO or bring his case to the MHRT.⁸¹ Again, the prospects of success at the MHRT for these cases are dishearteningly low, to say the least.⁸² Given this lack of an effective review mechanism during the period of the individual's compulsory detention and/or treatment, professionals cannot expect to be immune from being called upon to answer cases where their exercise of these extensive compulsory powers are in doubt after the event.⁸³ Indeed, given the existing power disparity between professionals and patients and the immense difficulty at every stage of their compulsory detention and/or treatment for individuals to have their cases reviewed, it is arguable that *more* protection and avenues for effective remedy for patients need to be put in place to ensure professionals are held accountable for their decisions under the MHO.

Taking a step back from section 69(2) of the MHO, one can see that medical professionals are, in fact, already very much protected by the current law from unmeritorious claims. On top of section 69(1), which limits the liability of professionals acting in pursuance of the MHO to cases of negligence or bad faith, medical negligence law also presents a more onerous test for claimants to meet than in general negligence cases, which has the explicit purpose of protecting doctors from liability from any unintended consequences of decisions that may otherwise be deemed reasonable by standards of accepted practice. Under more general civil procedural law, cases which are clearly unmeritorious, i.e., which disclose 'no reasonable cause of action or defence', are 'frivolous or vexatious', or are 'otherwise an abuse of the process of the court', may also be struck out by the High Court under Order 18, Rule 19 of the Rules of the High Court. In more extreme cases, the Court of First Instance may even make an order that a person who has 'habitually and persistently and without any reasonable ground instituted vexatious legal proceedings' may not institute any legal proceedings without leave.⁸⁴

Despite these laws that are already in place to protect medical professionals from various unwanted claims and the fact that those subject to the MHO have hardly any effective avenue in earlier stages of their compulsory detention and/or treatment to raise objections, section 69(2) continues to operate as an additional barrier to bringing cases against professionals under the MHO. The 'reasonably arguable' threshold, as set out in the statute and applied in the stringent manner seen in *Singh v HA*, thus effectively seals the final gateway that those subject to the MHO have to any access to the courts, to have their cases heard in full, and ultimately to the opportunity of attaining justice and asserting their fundamental rights in a court of law. As discussed above, it is in fact very unlikely for those subject to the MHO to be inclined or able to initiate proceedings against those involved in their care and treatment. Even if they do make an application for leave under section 69(2), they are confronted with a test

⁸¹ *Ho Man Kon Natalis v Pamela Youde Nethersole Eastern Hospital* [2013] HKEC 1069 [6].

⁸² Information obtained by Daisy Cheung shows that, in the period from July 2017 to January 2020, 51 such applications were made; only one succeeded. See also Urania Chiu, 'Compulsory treatment in the community in Hong Kong: Implications of the current law and practice on the rights of persons with mental illnesses' (2019) 20 *Asia-Pacific Journal on Human Rights and the Law* 60.

⁸³ See Baroness Hale's judgment in *Seal v Chief Constable of South Wales Police* (n 28) [49]: 'The purpose [of section 139 of the Mental Health Act 1983] was and remains the protection of staff. But protection from what? It cannot have been intended or expected that staff would be protected from all knowledge of possible claims [...] What staff are protected from is having to defend a baseless action.'

⁸⁴ High Court Ordinance Cap 4, s 27.

that seems practically impossible to satisfy and a constant sense that because they had, for whatever reason, found themselves caught up in the mental health system, they had to jump through extra hoops in order to make justice claims that those in other medical settings do not have to—a result of the existing inequality in accessing justice, in both the substantive and symbolic senses. It is lamentable that the Court of Appeal in *Chan Shek Him* has chosen to retain such a high threshold on paper and that lower court judges, guided and perhaps even constrained by the general judicial deference to medical judgment, will likely apply it in a way that will allow only the most egregious cases through the gap. The rule therefore has deeply discriminatory effects on those who have or are seen to have a mental illness and sends a dangerous message to this community, frontline workers, and society at large that persons with mental illness are not to be trusted and are only seeking to make trouble when they make claims for their rights. Given the deep-seated prejudice and stigma those who regularly come into contact with the mental health system already face in society, this is a state of affairs that needs to be addressed as a matter of priority.

V. CONCLUDING REMARKS

This article, by highlighting the statutory provision preventing individuals from initiating proceedings under the main piece of mental health legislation in Hong Kong and how it is applied in practice in the context of broader mental health jurisprudence, hopes to bring the discussion about this discriminatory and very real obstacle to access to justice for persons with mental illness to the fore, especially in light of the CRPD's focus on achieving substantive equality for persons with disabilities.

Given section 69(2)'s discriminatory roots, the need for it and its content must be seriously reconsidered. This is so for similar rules in other jurisdictions as well, such as section 139 of the English MHA 1983: regardless of the threshold set by judges, the justification for the rule itself ought to be re-evaluated in view of renewed international standards for the rights of persons with disabilities. In Hong Kong's case, since it will probably require a legislative overhaul and overcoming considerable resistance from the social work and medical sectors in order to even come close to abolishing the threshold altogether, the best courts can do for now may be to reconsider the content of the threshold and, instead of merely applying the proportionality test at the point of access, take into account the fundamental importance of equality before the courts and access to justice and keep in mind the wider impact such a rule would have on a community that is vulnerable and much maligned by society. The current adoption of the threshold originally used in leave applications for judicial review is plainly untenable. In the case referred to by the Court of Appeal in *Chan Shek Him*, Bokhary PJ explained the rationale behind adopting a relatively high threshold in deciding whether to grant leave for judicial review:

Rarely and exceptionally, the public interest in having a particular point of law decided can be so great as to warrant leave to pursue an application or appeal even though the case has become academic as between the immediate parties save perhaps as to costs [...] This broad approach avoids further costs. It represents practical justice.⁸⁵

⁸⁵ *Po Fun Chan* (n 31) [18] (Bokhary PJ).

This rationale clearly does not apply to the case of a potential claimant under the MHO, whose rights to liberty and security, to equality and non-discrimination, to dignity, and to remedy for negligent or wrongful treatment are neither academic nor a mere matter of cost-effective 'practical justice'. They concern a historically marginalised group who have long struggled to have their voices heard in the community, in their own care and treatment decisions, and in the legal system and who deserve an equal opportunity to have their claims considered carefully and thoroughly in a court of law as those without mental disabilities currently do. Section 69(2) as it currently stands exacerbates the discriminatory treatment persons with mental disabilities already experience in the Hong Kong mental health legal system, which are in many ways unsatisfactory by international human rights standards.⁸⁶

In the longer term, a fundamental cultural change in courts' approach to mental health law, in particular to the judiciary's role in scrutinising medical decisions and guarding against unjustified interferences with patients' rights, is needed for any legislative reform to be effective. As observed in the previous sections, mental health law in Hong Kong gives far-reaching compulsory powers to frontline professionals without any equivalent safeguards that can be deemed adequate in protecting individuals from unwarranted detention or treatment at the time of its occurrence or providing them with effective remedy or redress after it has occurred. A large part of it is due to how legal rules are applied in practice by judges, whose views inevitably reflect, to some extent at least, prevalent societal attitudes toward mental illness and those associated with it. At the same time, any progressive development in upholding rights in the court will also hopefully trickle down to public attitudes and discourses. To achieve true access to justice, including the symbolic and participatory elements of inclusion, empowerment, and ultimately overall attainment of equal citizenship for persons with disabilities in all aspects of life,⁸⁷ much more has to be done in terms of destigmatising mental illness both in the community and in the courtroom. Abandoning outmoded legal rules and recognising the important role judges themselves have to play in redressing the power imbalance between professionals and those subject to the compulsory mental health regime are the first steps courts can take in addressing the historical exclusion of persons with mental disabilities from accessing justice, and they must be taken promptly to prevent further harm to this community.

⁸⁶ See Cheung and others (n 8).

⁸⁷ Flynn (n 57).