

**WHEN IS A VOLUNTARY PATIENT NOT A VOLUNTARY PATIENT?
AN EXAMINATION OF THE DEGREE TO WHICH THE IRISH COURTS HAVE
SOUGHT TO ENGAGE WITH THE JURISPRUDENCE OF THE EUROPEAN
COURT OF HUMAN RIGHTS, IN RELATION TO THE TREATMENT AND
DETENTION OF VOLUNTARY OR 'INFORMAL' PATIENTS¹**

HOPE DAVIDSON*

I. INTRODUCTION

Faced with the difficulty of reconciling the tensions between the need for treatment, and respecting patients' rights, case law suggests that the courts in Ireland have tended to maintain a deferential approach to the medical profession and not to give voice to the significant rights protections set out in the jurisprudence of the European Court of Human Rights ('ECtHR') and instead view the legislation in this area, the *Mental Health Act 2001* through a paternalistic prism.² This has given rise to what seems at first glance to be the extraordinary logic in what is now the leading, and only, Irish Supreme Court case in the area, *E.H. v Clinical Director St Vincent's Hospital*.³ This case states that a voluntary patient is not a voluntary patient in so far as one ordinarily understands the word. In the Supreme Court, Kearns J, said:

'The terminology adopted in s.2 of the Act ascribes a very particular meaning to the term 'voluntary patient'. It does not describe such a person as one who freely and voluntarily gives consent to an admission order.'⁴

This suggests an interpretation of the 2001 Act which is not immediately reconcilable with the considerable body of jurisprudence of the European Court of Human Rights.

II. THE EUROPEAN CONVENTION AND WINTERWERP⁵

Mindful of illegal incarcerations that took place in the Second World War, the European Convention on Human Rights 1950 ('ECHR') states, and echoes the Irish Constitution in this regard, that no one shall be deprived of their liberty save in accordance with law,⁶ and that anybody so deprived has the right to have that detention reviewed.⁷ Article 5(4) of the Convention states that: 'Everyone who is

*PhD candidate in Law at the University of Limerick

¹ The term 'voluntary' is used in the Irish Mental Health Act 2001 whilst the term 'informal' is used in the Mental Health Act 1983 in England and Wales. As Eldergill observes, the wording in s2 and s 29 of the Mental Health Act 2001 suggests that what is meant by voluntary admission in an Irish context is in fact informal admission as there is no requirement under the Irish legislation to have capacity to 'volunteer' for admission, as would be the case in most jurisdictions. A. Eldergill, 'The Best is the Enemy of The Good: The Mental Health Act 2001' (2008) *J. Mental Health L.* 21, p26.

² The Department of Health Expert Group reports growing concern at the 'paternalistic approach that has been adopted by the judiciary in the interpretation of the Act'. Department of Health *Report of the Expert Group on the Review of the Mental Health Act 2001*, (2015), p12.

³ [2009] ILRM 149

⁴ *EH v Clinical Director St Vincent's Hospital* [2009] 2 ILRM 149, at 161

⁵ *Winterwerp v The Netherlands* (1979) 2 EHRR 387

⁶ ECHR 1950, Art 5 (1) and Article 40.4 1 *Bunreacht na hEireann* 1937

⁷ Article 5(4) ECHR. However, as Richardson observes, 'Certain groups of unsightly people can simply be detained'. G. Richardson, 'The European Convention and Mental Health Law in England

deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.⁸

The seminal case of *Winterwerp v The Netherlands*⁹ in 1979 sets out how these provisions are to be applied *viz-à-viz* the detention of mental health patients, namely: (1) the person must be shown to be of unsound mind;¹⁰ (2) the mental disorder must be of a degree or kind warranting involuntary confinement; and (3) the detention remains compatible with Article 5 only so long as the disorder persists.¹¹ How the review of detention procedures were to be interpreted was not, however, set out in the case.

III. CROKE V SMITH (NO 2)¹²

In the Irish case of *Croke v Smith (No 2)*,¹³ a challenge was brought to the provisions of the *Mental Treatment Act 1945*, the precursor to the *Mental Health Act 2001*, which allowed for indefinite and unchecked detention. While Budd J in the High Court¹⁴ acknowledged the ECHR's 'persuasive influence',¹⁵ he found that a chargeable patient reception order 'which allows for detention until removal or discharge by proper authority or death, without any automatic independent review, falls below the norms required by the constitutional guarantee of personal liberty'.¹⁶ The Supreme Court subsequently¹⁷ failed to acknowledge the ECHR or the principles set out in *Winterwerp*.¹⁸ It was satisfied that an ordinary review during the course of medical care would constitute a sufficient guarantee of personal liberty.

and Wales: Moving Beyond Process?' (2005) 28 *International Journal of Law and Psychiatry*, 127, 130.

⁸ In *X v United Kingdom* (1981), (*Application no. 7215/75*) at para 33, the ECtHR found 'that Article 5 par. 4 (art. 5-4) had been violated, since X had not been entitled to take proceedings by which the lawfulness of his detention consequent upon his recall to hospital could be decided speedily by a court.'

⁹ *Winterwerp v The Netherlands* (1979) 2 EHRR 387

¹⁰ 'The Convention does not state what is to be understood by the words "persons of unsound mind". This term is not one that can be given definitive interpretation..., it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes....' *Ibid.*, para 37.

¹¹ *Winterwerp v The Netherlands* (1979) 2 EHRR 387, para 402

¹² Budd J. July 27 and 31, 1995; Supreme Court, July 31, 1996: [1998] 1 IR 101

¹³ Budd J. July 27 and 31, 1995; Supreme Court, July 31, 1996: [1998] 1 IR 101

¹⁴ *Croke v Smith (No 2)* [1995] IEHC 6 (31st July 1995)

¹⁵ *Ibid.* While we remain an ultra-dualist State constitutionally, the challenges of giving further effect to international human rights law in domestic courts are significant' D. O'Connell, 'Time to start taking European Convention on Human Rights more seriously' <http://www.irishtimes.com/news> 2nd September 2013 (date accessed 12th of September 2016)

¹⁶ *Croke v Smith (No 2)* [1995] IEHC 6 (31st July 1995) See also Costello P in *R.T. v. The Director of the Central Mental Hospital* [1995] 2 IR 65, at 79 'So, it seems to me that the constitutional imperative to which I have referred requires the Oireachtas to be particularly astute when depriving persons suffering from mental disorder of their liberty and that it should ensure that such legislation should contain adequate safeguards against abuse and error in the interests of those whose welfare the legislation is designed to support. And in considering such safeguards regard should be had to the standards set by the Recommendations and Conventions of International Organisations of which this country is a member.'

¹⁷ *Croke v Smith (No 2)* [1998] 1 IR 101

¹⁸ *Winterwerp v Netherlands* (1979) 2 EHRR 387

Mr Croke took his case to the European Court of Human Rights and while the Irish government then sought to rely on the remedy of *habeas corpus*¹⁹ to satisfy the 'detention shall be decided speedily by a court' requirement, as set out in Article 5(4),²⁰ a 'friendly settlement' was ultimately agreed between the parties. The ensuing legislation, the *Mental Health Act*, was enacted in 2001. The key features of it were that it enabled independent review tribunals²¹ for those *formally detained* and second-opinion safeguards for certain treatments in the absence of consent.²²

IV. DE FACTO DETENTION

A. *H.L. v U.K.*²³

The problem persisted, however, for those psychiatric patients who were *not formally detained*, classed as 'informal' in England and 'voluntary' in Ireland.²⁴ These patients appeared to be going under the radar, and in the case of *H.L. v United Kingdom* in 2005 the ECHR found:

'striking the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated persons²⁵ is conducted. The contrast between this dearth of regulation and extensive network of safeguards applicable to psychiatric committals covered by the [Mental Health Act] 1983 is, in the Court's view, significant.'²⁶

Further, it found that the absence of any procedural safeguards failed to protect against arbitrary deprivations of liberty and therefore violated Article 5(1) of the ECHR.²⁷ This has led to the Deprivation of Liberty Safeguards²⁸ in England and Wales which extend the provisions of the Mental Capacity Act 2005 to cover the deprivation of liberty of, amongst others, (compliant) incapacitated mental health patients. In Ireland, the Assisted Decision-Making (Capacity) Act 2015 has recently been enacted, although is not yet operative, and safeguards in relation to deprivation of liberty are to be dealt with in the Disability Equality (Miscellaneous Provisions) Bill which is currently being drafted.

¹⁹ Article 40.4.2 *Bunreacht na hEireann 1937*. Roundly criticised by commentators as an ineffective remedy, see M.Keys 'Challenging the lawfulness of psychiatric detention under habeas corpus in Ireland' (2002) 24 *D.U.L.J.* 26 and C.Murray, 'Safeguarding the Right to Liberty of Incapable Compliant Patients with a Mental Disorder in Ireland' (2007) 1 *Dublin University Law Journal* 279 and ruled on by the ECHR in *X v United Kingdom* (7215/750) [1981] ECHR 6

²⁰ Article 5(4) ECHR

²¹ s 17 *Mental Health Act 2001*

²² s 60 *Mental Health Act 2001*

²³ *H.L. v United Kingdom* (2005) 40 EHRR 32

²⁴ See n1 above.

²⁵ Though whether HL was compliant is questionable. As Lady Hale has observed, 'L would clearly have objected to his admission to hospital had he not been sedated in order to get him there' B. Hale 'Taking Stock', (2009) *J Mental Health L.* 111, p113.

²⁶ *H.L. v United Kingdom* (2005) 40 EHRR 32, para 120

²⁷ *Ibid.*, para 124

²⁸ Introduced into Mental Capacity Act 2005 via s 50 of the Mental Health Act 2007. It must be noted that these safeguards are not without their critics. See P. Fennell, 'The Deprivation of Liberty Safeguards in England: The Case for Abolition' (2012), *Centre for Disability Law and Policy, NUIG*; L. Series, 'Case Study: the Limits of the Functional Approach in the English Mental Capacity Act 2005', (2013), *Centre for Disability Law and Policy, NUIG*; and *House of Lords, Select Committee on the Mental Capacity Act 2005*, 'Mental Capacity Act 2005: post-legislative scrutiny', March 2014.

On the facts of the case in *H.L. v United Kingdom*, *H.L.* did not attempt to leave the institution in which he was detained, but in *Storck v Germany*²⁹ the Court found that a person who attempts to leave an institution and is prevented from doing so cannot be regarded as someone who validly consents to admission, irrespective of status or capacity³⁰. What is interesting about the ruling in *Storck*, is that it 'provides the basis for an approach to decision-making that looks beyond questions of capacity and incapacity and addresses issues of willingness, restraint and force.'³¹ In the 2008 case of *Shtukurov v. Russia*³² the ECtHR found, effectively reinforcing *Storck*:

that while the applicant lacked de jure legal capacity to decide for himself' that this did not 'necessarily mean that the applicant was de facto unable to understand his situation.'³³

This is very pertinent to the Irish case which is next discussed.

B. *E.H. v Clinical Director of St Vincent's Hospital*³⁴

In *E.H. v Clinical Director of St Vincent's Hospital* the applicant sought a declaration that the definition of a voluntary patient under the 2001 Act was incompatible with Article 5 of the ECHR. This was on the basis that it was recorded on the applicant's form that she did not have the capacity to consent to admission on a voluntary basis (upon revocation of her involuntary detention order) and yet she was admitted as a voluntary patient notwithstanding. This has led to the by now well-known dictum in Ireland:

'The terminology adopted in s.2 of the Act ascribes a very particular meaning to the term 'voluntary patient'. It does not describe such a person as one who freely and voluntarily gives consent to an admission order.'³⁵ Instead the express statutory language defines a "voluntary patient" as a person receiving care and treatment in an approved centre who is not the subject of

²⁹ *Storck v Germany* (61603/00) [2005] ECHR 406

³⁰ '... assuming that the applicant was no longer capable of consenting following her treatment with strong medication, she cannot in any event be considered to have validly agreed', *ibid.*, para 76.

³¹ M. Donnelly *Healthcare Decision Making and the Law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010), p220.

³² *Shtukurov v. Russia* (44009/05) [2008] ECHR 223

³³ *Ibid.*, para 108. 'Capacity and incapacity are not concepts with clear a priori boundaries. They appear on a continuum....There are, therefore, degrees of capacity'. M. Gunn, 'The Meaning of Incapacity' (1994) 2 *Medical Law Review* 8, at p9, as quoted in J. Herring, "Losing it, Losing What? The Law on Dementia" (2009) 21 *Child and Family Law Quarterly* 3, p 4.

³⁴ *E.H. v Clinical Director of St Vincent's Hospital* [2009] I.E.H.C.69, *E.H. v Clinical Director of St Vincent's Hospital* [2009] IESC 46

³⁵ It is worth recalling at this point the words of Denham J in *In Re a Ward of Court* [1996] 2 IR 79, at 156, in relation to consent: 'If medical treatment is given without consent it may be trespass against the person in civil law, a battery in criminal law, and a breach of the individual's constitutional rights' or indeed as Patricia Rickard-Clarke, of the Law Reform Commission, observes, voluntary 'has to mean consent to something, it can't mean anything else', 'Mental Capacity in the context of the Mental Health Act 2001', (2010) *Mental Health Law Conference, Faculty of Law, U.C.C.* 'It had been submitted by the applicant's legal team in the High Court and in the Supreme Court that the word "voluntary" must be given its ordinary meaning, "a meaning which respects the provisions of the Constitution and a meaning which, having regard to the State's obligations pursuant to s. 2(1) of the Human Rights Act 2003, respects the necessity for a freely given consent to detention by a person who has capacity to give it.' A. Hynes, 'The Mental Health Act 2001 in Practice' (Mental Health Law Conference, U.C.C., 2010).

an admission order or a renewal order. This definition cannot be given an interpretation which is *contra legem*.³⁶

But probably more worrying is when Kearns J goes on to say: 'Any interpretation of the term in the Act must be informed by the overall scheme and paternalistic intent of the legislation as exemplified by the provisions of sections 4 and 29 of the Act.'³⁷ In so doing he fails to recognise that the 2001 Act was not intended to be a reiteration of the 1945 Act³⁸ and that the 'best interests'³⁹ standard as set out in s4 is not merely medical best interests but that the need to respect 'the right of the person to dignity, bodily integrity, privacy and autonomy' is clearly stated.⁴⁰ Indeed, as the Irish Human Rights Commission went on to observe, in its submission as *amicus curiae*⁴¹, in the later case of *P.L. v Clinical Director of St Patrick's University Hospital (No 2)*⁴² 'paternalism cannot be given such a broad application as to defeat the significant recognition given to the patient's human rights, accorded by the *Mental Health Act, 2001*'.⁴³ If the friendly settlement agreed in *Croke*⁴⁴ was the impetus behind the new legislation then surely it follows that the legislation was to bring Ireland in to line with the ECHR and the *Winterwerp* principles?⁴⁵ Kearns J was clearly satisfied that the fact that the medical professionals were 'poised to reinstate' the involuntary order (and thereby the specific statutory protections) was sufficient to guard against

³⁶ Per Kearns J, *EH v Clinical Director St Vincent's Hospital* [2009]2 I.L.R.M., 149, at 161. Donnelly calls it 'a departure from common sense' (M. Donnelly, ' "Voluntary" psychiatric patients need protection' *Irish Times*, 9th of February 2012)., Additionally, as Craven observes, 'Quite apart from any question of statutory interpretation, if the *lex* referred to includes, as it reasonably might, the general law on consent, the interpretation contended for cannot, as a result be considered to be *contra legem*. Such a restrictive approach might be considered *contra corpus iuris*' (C. Craven, 'Issues of Consent –Detention & Treatment' November 2010, *The Law Society of Ireland* p 11).

³⁷ Per Kearns J, *EH v Clinical Director St Vincent's Hospital* [2009]2 I.L.R.M.,149, at 161.

³⁸ The new Act is different. Eldergill, among others, observes: '[I]t must be emphasised that the main purpose of the 2001 legislation was patently not just to repeat the paternal character of the Act of 1945. Nor was it intended simply to ensure the care and custody of people suffering from mental disorder. The 1945 Act promoted and secured those objectives' (A. Eldergill, 'The Best is the Enemy of The Good: The Mental Health Act 2001' (2008) *J. Mental Health L.* 21, p23).

³⁹ 'The inclusion of best interests in s.4 has provided a justification for the continuing reliance on paternalism as the guiding principle in Irish mental health law' cautions Murray. C. Murray, 'Moving Towards Rights-based Mental Health Law: The Limits of Legislative Reform' (2013) 1 *The Irish Jurist* 161, p175).

⁴⁰ S 4 (3) *Mental Health Act 2001*

⁴¹ *P.L. v Clinical Director of St Patrick's University Hospital, Outline Submissions of the Human Rights Commission*, (19th June, 2012).

⁴² [2012] IEHC 547

⁴³ *P.L. v Clinical Director of St Patrick's University Hospital, Outline Submissions of the Human Rights Commission*, 19th June, 2012, p20. 'The MHA 2001 does contain a number of important safeguards and rights which had not previously existed in Ireland, such as automatic periodic review of detention by tribunals and second-opinion safeguards for certain invasive medical treatments'. C. Murray, 'Moving Towards Rights-based Mental Health Law: The Limits of Legislative Reform', (2013) 1 *The Irish Jurist* 161, p166.

⁴⁴ *Croke v Ireland* (33267/96) [2000] ECHR 680

⁴⁵ 'It is noted however, that in *Croke v Smith (No 2)* [1998] 1 IR 101 the Supreme Court held that, on the facts of that particular case, the Constitution did not require automatic review by an independent tribunal of the patient's detention. However, it is submitted that the Oireachtas has now expressed a clear intention, that this would not be the case by enacting the Mental Health Act 2001.' *P.L. v Clinical Director of St Patrick's University Hospital, Outline Submissions of the Human Rights Commission*, 19th June, 2012, para 50, p24.

arbitrary detention.⁴⁶ This sounds like a reasoning similarly deferential to the medical profession to that given by the Supreme Court in *Croke*⁴⁷ on the 1945 Act. It also 'glosses over the fact that from December 10 to 22, the protections were not available'⁴⁸ and this is not as Craven observes 'apparently reconcilable with the due process requirements of the Convention'.⁴⁹

In many ways *E.H.* was not an ideal test case to advance the rights of the voluntary patient. In *E.H.* it is fair to say that on the facts the patient may not have been 'arbitrarily' deprived of her liberty, and since the purpose of the safeguards as set out in *Winterwerp* was to guard against 'arbitrary' detention there may have been less sympathy for the situation the applicant found herself in. Kearns J had a difficulty with her having capacity to instruct counsel and yet not to consent to admission. In addition, by the time the *habeas corpus* application came around the fact that the applicant was lawfully detained on an involuntary order 'led the court to question whether the arguments before it were moot'.⁵⁰ However since the applicant in *E.H.* was in a very similar position to *H.L.*, being an informal patient without capacity, it seems odd not to consider *H.L.* as of precedential value.⁵¹ A fundamental difficulty in the *E.H.* case, in common with the case we now move on to consider, *P.L.*,⁵² is that in neither case was there a suggestion that the applicant was well enough to be discharged and for that reason the Court may have been looking in a paternalistic way to find that the detention was lawful so that treatment might be continued.⁵³

C. *P.L. v Clinical Director of St Patrick's University Hospital*.⁵⁴

In *P.L.* the applicant sought declarations that 'the respondents were not entitled to prevent him from leaving the hospital without involuntarily admitting him in accordance with the MHA 2001'.⁵⁵

⁴⁶ Any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. See *Herczegfalvy v Austria* (1992) 15 EHRR.

⁴⁷ When it extinguished the trail blazed by Budd J in the High Court. D. Whelan, *Mental Health Law and Practice: Civil and Criminal Aspects* (Dublin: Round Hall 2009), p7.

⁴⁸ 'This reasoning glosses over the fact that from 10 to 22 December, protections against arbitrary deprivations of liberty were not available' D. Whelan, 'Can the Right to Personal Liberty be Interpreted in a Paternalistic Manner?: Cases on the Mental Health Act 2001', forthcoming, (2012-2013) *Irish Human Rights Law Review*, p17 of 20.

⁴⁹ C. Craven, 'Issues of Consent –Detention & Treatment' November 2010, *The Law Society of Ireland*, p 13 of 31.

⁵⁰ C. Murray, 'Moving Towards Rights-based Mental Health Law: The Limits of Legislative Reform' (2013) 1 *The Irish Jurist* 161, p 173

⁵¹ D. Whelan, *Mental Health Law and Practice: Civil and Criminal Aspects* (Dublin: Round Hall 2009) p167, M. Donnelly, Falling between the gaps: Formulating reform in a dual-model system. 23 June 2012, *Mental Health Law Reform: New Perspectives and Challenges* (Amnesty International Ireland and the Centre for Disability Law and Policy, NUIG, and C. Murray, 'Moving Towards Rights-based Mental Health Law: The Limits of Legislative Reform' (2013) 1 *The Irish Jurist* 161, p 171.

⁵² *P.L. v Clinical Director of St Patrick's University Hospital* [2012] IEHC 15

⁵³ As Murray observes: 'The practical effectiveness of the rights protections contained in the MHA 2001 depends to a significant extent on the judicial approach taken to their implementation.' C Murray 'Reinforcing Paternalism within Irish Mental Health Law - Contrasting the Decisions in *EH v St. Vincent's Hospital and Others* and *SM v The Mental Health Commission and Others*' (2010) 17 *Dublin University Law Journal* 273, p273.

⁵⁴ [2012] IEHC 15

The case is as complete an illustration of the myriad difficulties encountered in attempting to treat a voluntary patient while staying on the right side of the legal regime as we are likely to get:

'Mr McDonagh for the applicant does not dispute that the applicant is suffering from a mental illness for which he needs care and treatment. At issue, rather, is whether there is any lawful basis for the applicant's de facto detention in the hospital, in circumstances where on the 12th October 2011 the Renewal Order was revoked and the applicant was "discharged" though not permitted to leave, where he initially thereafter agreed to remain and be treated as a voluntary patient, but has on several occasions thereafter expressed a wish, and has in fact attempted, to leave the hospital, has verbally indicated a withdrawal of his consent to remain as a voluntary patient, has been physically restrained from attempting to leave and forcibly sedated, but has not been detained pursuant to the provisions of Sections 23 and 24 of the Act because he was not considered by Dr. Power to be a person who fulfilled the criteria for admission under those sections.'⁵⁶

Proceeding to analyse that argument piece by piece we might comment as follows: If the applicant needs treatment then that is arguably in his 'best interests' pursuant to s4 of the Act and so he could have been formally detained under the legislation. He expressed a wish to stay on without formal detention, which was acceded to and this acknowledges his 'will and preference'.⁵⁷ He then expressed a wish to leave. This wish is inconsistent with his earlier wish⁵⁸ and could call in to question his capacity⁵⁹, though no finding of incapacity could or would be made under the Act, such as would have had any impact on his status as a voluntary patient. He was forcibly restrained⁶⁰ and sedated, which the Committee on the Prevention on Torture (CPT) have previously commented on,⁶¹ and ultimately the second opinion doctor

⁵⁵ C. Murray, 'Moving Towards Rights-based Mental Health Law: The Limits of Legislative Reform', (2013) 1 *The Irish Jurist* 161, p173. The recent case of *Atudorei v. Romania* suggests 'that the failure of the authorities to initiate the involuntary procedure for hospitalisation in the applicant's case underlines the uncertainty and ambiguity of the applicant's deprivation of liberty' and as being capable of engaging Article 5(1) of the ECHR. *Atudorei v. Romania* (50131/08) (2014) ECHR 947, para 147.

⁵⁶ *P.L. v Clinical Director of St Patrick's University Hospital* [2012] IEHC 15, at 30.

⁵⁷ This is the language of Article 12 UN Convention on the Rights of Persons with Disabilities (Equal recognition before the law).

⁵⁸ 'Psychotic patients may often have no unitary "will" as the law conceives it, but rather fluctuate back and forth between mutually exclusive desires, unable to resolve conflicting wishes'. P.Appelbaum and G.Gutheil "Rotting With Their Rights On": Constitutional Theory and Clinical Reality in Drug Refusal by Psychiatric Patients. *Bulletin of the AAPL* Vol. VII, No.3, p313.

⁵⁹ As Dworkin argues '[I]f [a person's] choices and demands, no matter how firmly expressed, systematically or randomly contradict one another, reflecting no coherent sense of self and no discernible even short-term aims, then he has presumably lost that capacity that is the point of autonomy to protect.' R.Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A. Knopf, 1993) p 224

⁶⁰ Although this is expressly permitted for voluntary patients under s 69 (4)(b) of the 2001 Act provided that the *Rules Governing the Use of Seclusion and Mechanical Means of Bodily Restraint* (The Mental Health Commission, October 2009) have been complied with.

⁶¹ The administration of medication 'for behaviour control rather than for decreasing symptoms of their disease' has been criticised by the CPT: 'At present, such use of "chemical restraint" does not qualify as a means of restraint under Irish law and is therefore not subjected to oversight. The CPT recommends that use of "chemical restraint" be governed by clear rules and subjected to the same oversight as regards other means of restraint.' *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*(CPT) from 25 January to 5 February 2010, Strasbourg, 10 February 2011, para 132, p65.

disagreed with his treating psychiatrist as to the necessity of formal detention. Arguably therefore he had an 'independent review' of his detention. It appears as Murray has noted 'that the reason the renewal order was revoked was that the treating consultant psychiatrist was of the opinion that the applicant was improving'⁶² and this is part of what moving from involuntary to voluntary status is about.

Peart J, in *P.L.*, highlights, while ultimately determining that the applicant's detention was lawful in the particular case, that the danger is that:

'[F]or all practical purposes the applicant in the present case is in precisely the same locked ward and under precisely the same care and treatment plan'⁶³ which he was under while the subject of the Renewal Order prior to its revocation. He is not permitted to leave the hospital when he expresses a wish to do so, yet he has none of the protections and safeguards of an involuntary patient. His status as a voluntary patient appears to disadvantage him in this way and arguably gives rise to the mischief that he could remain indefinitely in this locked ward as a "voluntary patient" with no recourse to review or even access to a legal representative to assist him...'⁶⁴

Peart J effectively acknowledges the rights issues but finds, indeed as he did in *M.McN. v HSE*⁶⁵ that he cannot bring himself to have a vulnerable person potentially released unprotected,⁶⁶ finding instead that:

'a wide margin of appreciation'⁶⁷ ought to be allowed to clinicians when faced with a patient who expresses a wish to leave, to not immediately permit him to do so, in order to provide an opportunity to discuss matters with him with a view to persuading him to once again co-operate as a voluntary patient in his own best interests, rather than simply accepting the expressed wish at face value immediately, and discharging him there and then.'⁶⁸

However, as the 2008 Annual Report of the Mental Health Commission pointedly identifies:

⁶² C. Murray, 'Moving Towards Rights-based Mental Health Law: The Limits of Legislative Reform', (2013) 1 *The Irish Jurist* 161, p174.

⁶³ 'In reality, the difference between her position and that of a hypothetical detained psychiatric patient...would have been one of form, not substance.' As Lord Dyson JSC observed in *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2 at paragraph 34.

⁶⁴ *P.L. v Clinical Director of St Patrick's University Hospital (No.1)* [2012] IEHC 15, at 48 .He does however say that the regulation of treatment for voluntary patients might benefit from being addressed by the Supreme Court. See M. Carolan, 'Voluntary mental patient not being held unlawfully' *Irish Times*, 25th January, 2012.

⁶⁵ *M. McN v Health Service Executive* [2009] IEHC 236, High Court, Peart J, May 15, 2009.

⁶⁶ ' [I]t would be grossly negligent for the hospital, following the required revocation of the admission/renewal order, to immediately bring these vulnerable patients to the front door of the hospital, lead them down the steps and to pavement and say to them 'we no longer have any legal basis for keeping you in hospital, so off you go – home or wherever you can'....' *M.McN v Health Service Executive* [2009] IEHC 236, High Court, Peart J, May 15, 2009, p 37. Contrast this however with Clarke J in *JH v Russell* [2007] IEHC 7, at 6.5: 'While I fully understand the pressures which may have led those in charge of Mr H to attempt to devise means of ensuring his continued treatment, (which they clearly considered desirable) notwithstanding the defective legislation within which they were operating, I was nonetheless satisfied that the detention was unlawful'

⁶⁷ The Court recalls that in deciding whether an individual should be detained as a "person of unsound mind", the national authorities are to be recognised as having a *certain* margin of appreciation. *Shtukaturov v Russia* (44009/05) ECHR 223, para 67

⁶⁸ *P.L. v Clinical Director of St Patrick's University Hospital* [2012] IEHC 15, at 50.

'It is a fact of life that when individuals, especially vulnerable individuals, are detained, an imbalance of power exists between those detained and those holding the keys. Without rigorous human rights standards and frequent inspections, this is fertile ground for abuse or neglect'.⁶⁹

In *S.M. v the Mental Health Commission and Ors*,⁷⁰ McMahon J while observing that 'such statutory provisions which attempt to detain a person or restrict his or her liberty must be narrowly construed', ordered a stay of four weeks to allow the "relevant authorities" to determine what the appropriate order was in the circumstances.⁷¹ Whelan notes that this appears to be 'an unjustifiably lengthy period of time to postpone the release of a patient in unlawful custody'.⁷² The problem, as Lady Hale, or Hoggett (as she then was), has observed is that you can only secure your release in to the community if appropriate supports are there.⁷³ There has not been the progress in setting up community support that would have been envisaged by, *inter alia*, *A Vision for Change*⁷⁴ with the result that 'patients continue to be readmitted on an inpatient basis when they could be more appropriately treated in the community'.⁷⁵ This may in part be influencing the judiciary's cautious attitude or continuing paternalism in respect of a patient's detention. However, it is hard to disagree with Murray's conclusion in *P.L.*, that it is 'an extraordinary interpretation of the MHA 2001' to find that a 'capable, unwilling "voluntary" patient who was refused permission to leave the hospital, with no possibility of an independent procedure to review the ongoing need for him to remain in the hospital' was 'not unlawfully detained or deprived of his liberty'.⁷⁶

The fact that fewer people are now being treated on an involuntary basis is suggestive of co-operation in treatment⁷⁷ rather than compulsion but if it is unregulated it may be voluntary in name only. One cannot help but feel that voluntary patients now are in an eerily similar position to involuntary patients under the 1945 Act where '[t]here was no mechanism for an automatic review of the decision to admit, for example, and once admitted, a patient's stay could be renewed indefinitely at the discretion of the person in charge of the institution, without the need for any kind of formal review'.⁷⁸

⁶⁹ *Mental Health Commission Annual Report 2008* (Mental Health Commission, 2009) p57.

⁷⁰ *S.M. v The Mental Health Commission, the Mental Health Tribunal and the Clinical Director of St. Patrick's Hospital* [2009] 3 IR 188

⁷¹ *Ibid.*, at 203

⁷² D.Whelan, *Mental Health Law and Practice: Civil and Criminal Aspects* (Dublin: Round Hall 2009), p 40.

⁷³ B.Hoggett, *Mental Health Law* (London 1976).

⁷⁴ Expert Group on Mental Health Policy, *A Vision for Change* (Dublin, 2006).

⁷⁵ Mental Health Research Unit of Health Research Board, *Selected Findings and Policy Implications from 10 Years of HRB Mental Health Research*, 2009, p8.

⁷⁶ C. Murray, 'Moving Towards Rights-based Mental Health Law: The Limits of Legislative Reform', (2013) 1 *The Irish Jurist* 161, p174

⁷⁷ Though it looks like, to borrow an expression from the medical world this might be a false positive.

⁷⁸ P. Casey, P. Brady, C. Craven and A. Dillon, *Psychiatry and the Law*, 2nd ed. (Dublin: Blackhall Publishing, 2010), p437.

V. CASE LAW IN RELATION TO CONSENT TO TREATMENT

There is as yet little Irish case law in relation to consent to treatment.⁷⁹ As Lady Hale, of the UK Supreme Court, observed previously '[t]he Bournemouth amendments⁸⁰ deal only with safeguards against arbitrary deprivation of liberty. They do not introduce safeguards against unjustified medical treatment.'⁸¹ Consent can be complicated in a physical health scenario⁸² but the case of *M v Ukraine*⁸³ suggests that *E.H.* for instance would certainly fall foul of what the ECtHR would expect in terms of a valid consent to treatment for a mental health patient:

'[T]he Court takes the view that a person's consent to admission to a mental health facility for in-patient treatment can be regarded as valid for the purpose of the Convention only where there is sufficient and reliable evidence suggesting that the person's mental ability to consent and comprehend the consequences thereof has been objectively established in the course of a fair and proper procedure and that all the necessary information concerning placement and intended treatment has been adequately provided to him'.⁸⁴

This issue has been addressed by the Expert Group on the Review of the Mental Health Act 2001 in their Report in which they recommend that:

'[a]ll voluntary patients on admission to an approved centre should be fully informed of their rights, including information relating to their proposed treatment as well as their rights regarding consent or refusal of treatment and their right to leave the approved centre at any time.'⁸⁵

It was held in *Storck v Germany*⁸⁶ that 'even a minor interference with the physical integrity of an individual must be regarded as an interference with the right to respect for private life under Article 8 if it is carried out against the individual's will.'⁸⁷ Indeed as the Committee on the Prevention of Torture observed:

The CPT's mandate relates to persons deprived of their liberty, and not to voluntary patients. However, in the course of the visit, the CPT's delegation observed that many so-called "voluntary" patients were in reality deprived of their liberty; they were accommodated in closed units from which they were not allowed to leave and, in at least certain cases, were returned to the hospital if they left without permission. *Further, if staff considered it necessary, these patients could also be subjected to seclusion and could be administered medication for prolonged periods against their wish.*⁸⁸

⁷⁹ *K.C. v Clinical Director of St Loman's Hospital* [2013] IEHC 310, High Court, Hogan J., July 4, 2013; *Health Service Executive v M.X.* [2011] I.E.H.C. 326, High Court, MacMenamin J., July 29, 2011; *M.X. v Health Service Executive* [2012] I.E.H.C. 491 High Court, MacMenamin J., November 23, 2012 (Source: *Mental Health Commission Case Law Summary October 2013*). It is worth noting that this also a problem for involuntary patients.

⁸⁰ *Deprivation of Liberty Regulations*, Introduced in to Mental Capacity Act 2005 via s 50 of the Mental Health Act 2007

⁸¹ B. Hale, 'The Human Rights Act and Mental Health Law: Has it Helped?' (2007) *J. Mental Health L.* 7, p 11

⁸² See D. Madden, *Medicine Ethics and the Law*, 2nd Ed (Bloomsbury, 2011)

⁸³ *M v. Ukraine*, (2452/04) 19th April, 2012

⁸⁴ *M v. Ukraine* (2452/04) 19th April, 2012, para 77

⁸⁵ Department of Health, *Report of the Steering Group on the Review of the Mental Health Act 2001*, 5th of March 2015, Recommendation 25, p 90.

⁸⁶ *Storck v Germany* (61603/00) [2005] ECHR 406

⁸⁷ *Ibid.*, para 143.

⁸⁸ *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 January to 5 February 2010, Strasbourg, 10 February 2011 para 117, p65.*

A. *MX v HSE*⁸⁹

In the 2012 case of *M.X*, MacMenamin J stated: 'By virtue of ss. 2-5 of the European Convention on Human Rights Act 2003, this court is required to interpret laws of this State in compliance with the State's obligation under the ECHR provisions'.⁹⁰ He had noted that '[t]he incursion into the plaintiff's constitutional rights is very significant. It involves medical treatment against her will.'⁹¹ While he acknowledged that the paternalistic nature of Act had been emphasised in cases such as *E.H*, he considered that this case was different as it was about treatment rather than liberty.⁹² If the reasons for drawing a distinction between liberty and consent to treatment were not entirely clear, the case itself was a welcome acknowledgment of the relevance of international human rights principles. In the Grand Chamber judgment *Stanev v. Bulgaria*⁹³ judgment the ECtHR stated that it felt 'obliged to note the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible.'⁹⁴ MacMenamin J found in *M.X*⁹⁵ that there was no space on the relevant form, Form 17,⁹⁶ to record the patient's view on medication and his ruling in this regard has led to Form 17 being changed. It may seem a small change but it is very important as an example of the recognition of the right of a patient to be heard. As Bartlett asks: '[C]an we afford to have the process independent of the voices of the very people the service affects?'⁹⁷ and, as Murray observes, '[a]t the heart of the CRPD is a commitment to positive rights, and this introduces a new perspective on discussions of rights-based mental health law.'⁹⁸

B. *K.C. v Clinical Director of St Loman's Hospital*⁹⁹

The recent case of *K.C.* continues the paternalistic vein. In that case Hogan J ruled that the provisions of s. 23 (and, by extension, s. 24) which enable a holding power to prevent a voluntary patient from attempting to leave, pending examination by an independent Consultant Psychiatrist, do not 'impliedly prevent the making of an admission order'¹⁰⁰ when they do not attempt to leave.

K.C. is a very important case in terms of treatment as it reveals the practical difficulties when a voluntary patient does not attempt to leave but does not consent

⁸⁹ *M.X. v Health Service Executive* [2012] IEHC 491

⁹⁰ *Ibid.*, para 61

⁹¹ *Ibid.*, para 5

⁹² *Ibid.*, para 59

⁹³ *Stanev v. Bulgaria* (36760/06) [2012] ECHR 46

⁹⁴ *Ibid.*, at para 244

⁹⁵ *M.X. v Health Service Executive* [2012] IEHC 491, at para 28

⁹⁶ *Form 17, Mental Health Act 2001 s 60*. Treatment without consent, administration of medicine for more than 3 months, involuntary patient.

⁹⁷ P. Bartlett and R. Sandland, *Mental Health Law: Policy and Practice*, 4th Ed., (Oxford: Oxford University Press, 2014), p 2.

⁹⁸ C. Murray, 'Moving Towards Rights-based Mental Health Law: The Limits of Legislative Reform', (2013) 1 *The Irish Jurist* 161, p 161.

⁹⁹ *K.C. v Clinical Director of St Loman's Hospital* [2013] IEHC 310

¹⁰⁰ *Ibid.*, para 21. Anecdotally there was some disquiet among tribunal members as to whether that was the intended interpretation of the section.

to any treatment. This is why the Expert Group on the review of the Mental Health Act believe that consent to admission should include some understanding that you are consenting to being admitted for treatment¹⁰¹ and that if that acceptance were not forthcoming that the admission would not proceed.¹⁰² The Canadian case of *Starson v Swayze*,¹⁰³ although it concerns an involuntary patient is a salutary lesson. In that case, Professor Starson refused medication and his health eventually declined to a point where he lost capacity, was eventually treated and improved, but not before he had spent nine years in hospital.

VI. CONCLUSION

Case law in relation to the voluntary patient is only in its infancy in Ireland. The cases have only begun to come before the courts since about 2008, two years after the operative date of the Mental Health Act 2001. Prior to that, a great deal of the case law in relation to detention came from cases against the Central Mental Hospital ('CMH'), which is the national forensic psychiatric unit.¹⁰⁴ The reason for this was that patients in the CMH would already have had legal representation from their legal cases and there is a well-established 'rights culture' in prison¹⁰⁵ and by extension in the CMH. While the rights protections may be slow in filtering through for the wider community of detained patients it is immensely welcome that an avenue has been presented, via the introduction of automatic legal representation for involuntary patients in the 2001 Act.¹⁰⁶ While the overriding approach of the judiciary is undoubtedly paternalistic it is very welcome that the rights issues are beginning to be aired before the courts and that a greater awareness is being created of the issues involved. With the advocacy brought about by the 2001 Act we have found that very many people were unlawfully detained under the 1945 Act.¹⁰⁷ Unfortunately as legal representation is only available to involuntary patients the cases that come before the courts tend to be people who are essentially very unwell and while judges, such as Peart J and MacMenamin J, recognise the existence of their rights they tend ultimately to fall back on a paternalistic default setting. Perhaps if representation or

¹⁰¹ 'It was submitted that a voluntary patient who might meet the 23 criteria for a mental disorder could withhold consent to treatment and consequently their condition might deteriorate yet their status cannot be changed unless they indicate a wish to leave the approved centre'. Department of Health, *Interim Report of the Steering Group on the Review of the Mental Health Act 2001*, 27th of April 2012, p23. In their Final Report, the Expert Group recommend 'that it should no longer be a requirement that a patient must first indicate a wish to leave the approved centre before the involuntary admission process is initiated.' *Report of the Expert Group on the Review of the Mental Health Act 2001*, (2015), p56.

¹⁰² Which is more like the 1945 Act.

¹⁰³ *Starson v Swayze* [2003] SCC 32

¹⁰⁴ *Re Philip Clarke* [1950] IR 235, *R.T. v. The Director of the Central Mental Hospital* [1995] 2 IR 65, *Croke v Smith (No 2)*[1998] 1 IR 101.

¹⁰⁵ Many factors might be at play in the apparent low rate of use of the habeas corpus procedure, including the lack of information about rights, or the lack of a "rights culture" in psychiatric hospitals. Keys, M 'Challenging the lawfulness of psychiatric detention under habeas corpus in Ireland' (2002) 24 *D.U.L.J.* 26.

¹⁰⁶ S 16(2) (b)

¹⁰⁷ A. Hynes, 'The Mental Health Act 2001 in Practice' Mental Health Law Conference February 26 2010. U.C.C.

advocacy were available to voluntary patients¹⁰⁸ it might be easier to establish a more general application of rights protection.¹⁰⁹ This could be singularly useful in relation to consent to treatment which has not as yet been considered by the Irish courts to any substantial degree.

¹⁰⁸ The case law concerning voluntary patients tends - *E.H.* and *P.L.* being examples - to concern patients who had been involuntary and had therefore been assigned a legal representative who continued to act for them notwithstanding that they had become voluntary patients.

¹⁰⁹ 'This can be contrasted with the approach in the context of challenges to detention in excess of time limits contained in criminal justice legislation. In these circumstances the courts are more disposed to find that there has been a breach of the fundamental rights of the party detained.' C. Murray, "Reinforcing Paternalism within Irish Mental Health Law - Contrasting the Decisions in *EH v St. Vincent's Hospital and Others* and *SM v The Mental Health Commission and Others*" (2010) 17 *Dublin University Law Journal* 273, p273.