Can the Right to Personal Liberty be Interpreted in a Paternalistic Manner? : Cases on the Mental Health Act 2001

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The Mental Health Act 2001 introduced major reforms of Ireland’s civil mental health law and instigated a new era for those detained in psychiatric hospitals and units. The main focus of the Act was improvement of the legal regime concerning involuntary detention of persons with mental disorders, an area of law which concerns a number of constitutional and human rights, particularly the right to personal liberty. The content of the Act and the cases interpreting it have been the subject of extensive legal commentary.¹ One of the most surprising aspects of the case law interpreting the Act has been that the courts have referred on numerous occasions to the need to interpret the Act in a “paternalistic” manner. In this article, the meaning of paternalism and its possible application to the right to personal liberty in mental health law will be considered. The case law concerning the Mental Treatment Act 1945 will be reviewed, followed by the case law since the Mental Health Act 2001 came into force in 2006. The tension between paternalism and autonomy will be explored, and the question of whether a paternalistic interpretation of the 2001 Act is compatible with the ECHR will be considered.

The Meaning of Paternalism

The Oxford English Dictionary defines paternalism as “the policy or practice of restricting the freedoms and responsibilities of subordinates or dependants in what is considered or claimed to be their best interests.”² It also defines “paternal” as “of or relating to a father or fathers; characteristic of a father in his care for, bearing towards, or authority over offspring; fatherly; (of government) paternalistic”.³ Paternalism may therefore be used to justify restriction of another person’s

³ ibid. “Paternalistic” is defined as “of, relating to, or of the nature of paternalism; practising paternalism.”
freedoms, provided this is done in a “fatherly” manner and in that other person’s best interests. It is also notable that paternalism applies to restriction of freedom of “subordinates or dependants”.

Paternalism is frequently contrasted with autonomy, and criticised as failing to treat people as autonomous agents. Negative aspects include the implications that adults are treated as children and that “superior” people decide what “inferior” people need. However, the concept may also be used in a benign sense to justify restrictions of freedom “for one’s own good” such as a requirement to wear a life-jacket while boating.

Paternalism and beneficence are dominant themes in medical ethics although in recent years they have been challenged by newer theories such as patient autonomy, medicine-as-trade and therapeutic alliance. Paternalism is also linked with the principle that doctors must act in the best interests of patients, although the meaning of “best interests” is malleable.

Paternalism has in recent years become associated with outmoded “doctor knows best” thinking and, in general terms, it is considered incompatible with a rights-based approach to mental health law. Serious questions have been raised as to why beneficence should trump autonomy in the case

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5 Beneficence means doing good for the patient and may mean on some interpretations that the physician’s view on what is good for the patient is more important than the patient’s view. This extreme form of beneficence is now often pejoratively referred to as paternalism – M Donnelly, Healthcare Decision-Making and the Law: Autonomy, Capacity and the Limits of Liberalism (Cambridge University Press, Cambridge, 2010), p 11.
6 See generally JK Mason & GT Laurie, Mason and McCall Smith’s Law and Medical Ethics (7th ed, Oxford University Press, Oxford, 2006).
8 The Mental Health Act 2001 states that decision-makers must act in the “best interests” of a person (s 4(1)) but does not provide a definition of best interests. Some see the best interests principle as merely a restatement of the paternalism principle whereas others regard it as a new departure, emphasising the need to place the patient’s interests above all other interests. The Mental Health Commission has stated that the best interests principle needs to be clarified - Mental Health Commission, Report on the Operation of Part 2 of the Mental Health Act 2001 (2008), p 86.
of mental disabilities but not in the case of physical disabilities.\(^9\) It has also been noted that “covert paternalism” can arise, dressed up in therapeutic language.\(^10\)

The Law Reform Commission has noted that there is a move away from “benign paternalism”, stating that “the force of paternalism is undermined by a growing recognition that all adults, including those living with a disability, have a right to autonomy and self-determination”.\(^11\) The Commission also noted that the rise in importance of autonomy and self-determination is difficult to reconcile with paternalism, and that in certain circumstances the ethical principles of autonomy and beneficence may conflict.\(^12\)

The general move away from paternalism and towards autonomy is related to the move from a medical model of disability (including mental disability) to a social model. The medical model of disability focuses on remediing impairment, and views disability as abnormal and undesirable. The social model of disability holds that disability (as opposed to the actual impairment) is a social creation, barriers created by society need to be removed, discrimination remedied and independent living facilitated.\(^13\) The social model has now been embraced at United Nations level in the Convention on the Rights of Persons with Disabilities (CRPD), 2006,\(^14\) which Ireland has signed and intends to ratify.\(^15\) Paternalism does not appear as an explicit principle in the UN’s Mental Illness Principles 1991,\(^16\) or in the CRPD 2006.\(^17\)

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\(^{15}\) Minister Ahern, Written Answers, 659 \textit{Dáil Debates}, 8 July 2008.

Paternalism in Irish Mental Health Case Law Prior to 2006

The case law concerning the Mental Treatment Act 1945 may be divided into two streams – a first stream emphasising paternalism and a second stream in which the right to personal liberty trumps the paternal interpretation of the 1945 Act.

The main cases in the first stream, emphasising paternalism, are *Re Philip Clarke*, the Supreme Court in *Croke v Smith (No 2)* and *Gooden v St Otteran’s Hospital*.

The applicant in *Re Philip Clarke*\(^\text{18}\) argued that s 165 of the Mental Treatment Act 1945\(^\text{19}\) was unconstitutional due to the absence of any judicial intervention or determination between the taking into custody of a person alleged to be of unsound mind and his or her subsequent detention under a reception order. He relied on various articles of the Constitution, including the right to personal liberty.\(^\text{20}\) The Supreme Court held that s 165 was not unconstitutional as it was designed for the protection of the citizen and the promotion of the common good.\(^\text{21}\) O’Byrne J said that the legislation was “of a paternal character, clearly intended for the care and custody of persons suspected to be suffering from mental infirmity and for the safety and well-being of the public generally.”\(^\text{22}\) At a later stage, he referred to the Act’s long title as partial justification for this interpretation: “This Act, as shown in the title, was primarily intended to provide for the prevention and treatment of mental disorders and the care of persons suffering therefrom. Coming to the

\(^{17}\) However, the CRPD contains references to the “best interests” of a child at Arts 7(2), 23(2) and 23(4).

\(^{18}\) [1950] IR 235.

\(^{19}\) Section 165 of the Mental Treatment Act 1945 provided that where a Garda was of opinion that it was necessary that a person believed to be of unsound mind should, for the public safety or the safety of the person himself or herself, be placed forthwith under care and control, the Garda could take such person into custody and remove him or her to a Garda station.

\(^{20}\) The right to personal liberty in Art 40.4 was cited in legal argument in the Supreme Court (see [1950] IR 235 at 242-4.) Reference was also made to the Preamble, Art 40.3.1º (the personal rights of the citizen) and Art 40.3.2º (the life, person, good name and property rights of every citizen.)

\(^{21}\) “We do not see how the common good would be promoted or the dignity and freedom of the individual assured by allowing persons, alleged to be suffering from such infirmity, to remain at large to the possible danger of themselves and others” – [1950] IR 235 at 248.

\(^{22}\) [1950] IR 235 at 247.
particular part of the Act with which this case is concerned, it appears that it was also intended for the safety of the public generally.”

The constitutional analysis by the Supreme Court in *Re Philip Clarke* is neither thorough nor deep, but this is hardly surprising given that the decision was made in 1949. It has been noted that the judgment “is probably a creature of its time and seems to subject the appellant's arguments to a thin analysis and bland conclusion.” Ironically, in a historical context, the case actually represented an important positive step in the recognition that personal liberty could not be interfered with merely because the Oireachtas permitted it, but instead there was a requirement that deprivation of liberty be objectively justified.

The “paternal” nature of the 1945 Act was also emphasised by the Supreme Court in *Croke v Smith (No 2)*, a decision on the constitutionality of s 172 of the Act issued in 1996. Croke brought an application under Art 40.4 of the Constitution, challenging his detention and the constitutionality of s 172 of the 1945 Act on two grounds, one of which was that the detention was indefinite and there was no independent review procedure. While this argument had been accepted by Budd J in the High Court (and Budd J’s judgment will be discussed below), the Supreme Court upheld the appeal, rejecting the challenges to the Act. Hamilton CJ pointed out that s 172 of the 1945 Act enjoyed a presumption of constitutionality and that it must be presumed that people who issue decisions under the Act will act in accordance with constitutional justice. He twice reproduced the Supreme Court’s view in *Re Philip Clarke* that the 1945 Act “is of a paternal character, clearly intended for the care and custody of persons suspected of suffering from mental infirmity and for the safety and well-being of the public generally.”

The Supreme Court was obviously not impressed by Budd J’s view that “the certainties implicit in the judgment in Clarke’s case in 1949 may be diluted by now.” The court did acknowledge that the obligation which rests on the Oireachtas is to ensure that a citizen, who is of unsound mind and requiring treatment and care, is not unnecessarily...

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24 T Cooney and O O’Neill, *Psychiatric Detention: Civil Commitment in Ireland* (Baikonur, Wicklow, 1996), p 97. The authors also note that the assumption that involuntary commitment is a purely medical process appears to underpin the decision.
25 *Re Philip Clarke* stands in contrast to the positivist interpretation of “in accordance with law” in Art.40.4 in cases such as *R. (O’Connell) v Military Governor of Hare Park Camp* [1924] IR 104; *State (Ryan) v Lennon* [1935] IR 170. See G Hogan & G Whyte, *J.M. Kelly: The Irish Constitution*, 4th ed. (Butterworths, Dublin, 2003), pp 1535-1540.
27 In the Supreme Court judgment in *Croke (No 2)*, this extract appears at p 112 and p 132 of the report.
28 *Croke v Smith (No 2)*, Budd J, High Court, 27 and 31 July 1995, p 124.
deprived, even for a short period, of his or her liberty and to ensure that legislation which permits
the deprivation of such liberty contains adequate safeguards against abuse and error in the continued
detention of such citizens.\(^{29}\) While the Supreme Court quoted from Costello P’s judgment in \textit{RT v
Director of Central Mental Hospital}\(^{30}\), it did not believe that the lack of automatic review of a
patient’s detention interfered with the patient’s personal rights or right to liberty.\(^{31}\) In fact, the
Supreme Court stated that many of the sections of the 1945 Act vindicated and protected citizens’
rights.\(^{32}\)

The Supreme Court rejected the argument that periodic judicial or quasi-judicial intervention was
required after the patient’s detention, relying heavily on the judgment of O’Flaherty J in \textit{Keady v An
Garda Síochána}.\(^{33}\) Automatic review by an independent review board as provided for in the Health
(Mental Services) Act 1981\(^{34}\) “may be desirable”\(^{35}\) but the failure to provide for such review did not
render the 1945 Act constitutionally flawed. The resident medical superintendent was obliged
regularly and constantly to review a patient in order to ensure that he or she had not recovered and
was a proper person to be detained. In so doing, the resident medical superintendent must act in
accordance with the principles of constitutional justice. “There is no suggestion that such a review
is not carried out.”\(^{36}\) The Supreme Court made no reference to the European Convention on Human
Rights, the \textit{Winterwerp} case,\(^{37}\) or the Green Paper and White Paper on Mental Health.\(^{38}\)

\(^{29}\) [1998] 1 IR 101 at 118. On this point, the Supreme Court relied on \textit{O'Dowd v North Western
Health Board} [1983] ILRM 186 and \textit{RT v Director of Central Mental Hospital} [1995] 2 IR 65.
\(^{30}\) See Supreme Court at pp 117-118 and p 123 - the court “must be particularly astute when
depriving or continuing to deprive a citizen suffering from mental disorder of his/her liberty.”
\(^{31}\) The court adds: “If, however, it were to be shown in some future case, that there had been a
systematic failure in the existing safeguards, and that the absence of such a system of automatic
review was a factor in such failure, that might cause this court to hold that a person affected by such
failure was being deprived of his constitutional rights.” (p 131).
\(^{32}\) For example - [1998] 1 IR 101 at 114-5 and 119-120.
\(^{33}\) [1992] 2 IR 197
\(^{34}\) The Health (Mental Services) Act 1981 was never commenced. See Whelan, \textit{op. cit}, pp 211-
212.
\(^{37}\) \textit{Winterwerp v Netherlands} (1979-80) 2 EHRR 387.
\(^{38}\) Department of Health, \textit{Green Paper on Mental Health} (Stationery Office, Dublin, 1992);
By way of contrast, in \textit{RT v Director of Central Mental Hospital} [1995] 2 IR 65 at 79-80, Costello P
referred to criticisms of s 207 of the Mental Treatment Act 1945 which had been made in the Green
Paper.
Hamilton CJ relied on the fact that medical professionals would periodically review the detention of patients as adequate protection of their constitutional right to personal liberty, thus adopting the approach that medical decision-making would be assumed to be correct and did not require review by external bodies. He referred uncritically to other sections in the legislation which appeared to provide avenues for complaint by patients, without any regard to the possibility that these sections might be of little use in practice. The decision was a major setback for the rights of patients detained under the 1945 Act. It would be another ten years before automatic periodic review of detention was required by law, whereas if the court had decided differently the Oireachtas would have been obliged to introduce the legislation immediately. Hogan has characterised the decision as an example of “result-oriented jurisprudence”.

It was recently relied on to justify the detention without independent review of a patient with an infectious form of tuberculosis.

Mr Croke took his case to Europe and received an undisclosed sum of money in friendly settlement as compensation from the Irish government. By the time of the settlement, the government had published its new Mental Health Bill (which would later become the Mental Health Act 2001) and this was acknowledged as part of the terms of the settlement.

McGuinness J again approved of the Re Philip Clarke approach in Gooden v St Otteran’s Hospital in 2001:

This passage [in Re Philip Clarke] has been generally accepted as expressing the nature and purpose of the Act of 1945. The Act provides for the detention of persons who are mentally ill, both for their own sake and for the sake of the common good.

Hardiman J in the same case justified a purposive interpretation of the 1945 Act by reference to its “paternal” nature:

I believe however that in construing the statutory provisions applicable in this case in the way that we have, the court has gone as far as it possibly could without rewriting or supplementing the statutory provisions. The court must always be reluctant to appear to be doing either of these things having regard to the requirements of the separation of

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41 Croke v Ireland, European Court of Human Rights (Fourth Section), App No 33267/96, Admissibility Decision, 15 June 1999 and Judgment (Striking out), 21 December 2000; [1999] 1 MHLR 118.
42 (2001) [2005] 3 IR 617 at 634.
powers. I do not know that I would have been prepared to go as far as we have in this direction were it not for the essentially paternal character of the legislation in question here, as outlined in In Re Philip Clarke [1950] I.R. 235. The nature of the legislation, perhaps, renders less complicated the application of a purposive construction than would be the case with a statute affecting the right to personal freedom in another context. The overall purpose of the legislation is more easily discerned and, where the medical evidence is unchallenged, the conflicts involved are less acute than in other detention cases. I do not regard the present decision as one which would necessarily be helpful in the construction of any statutory power to detain in any other context.”

This passage explicitly recognises that the “paternal” nature of mental health legislation means that it may be interpreted differently from other statutory powers of detention. The ability to interpret the legislation differently is justified by its easily discerned overall purpose and the fact that conflicts are less acute where medical evidence is unchallenged. Given the general move towards a rights-based approach to mental health law, the validity of this reasoning may be questioned, as it suggests that deprivations of liberty for mental health reasons are less worthy of close scrutiny than other forms of detention, and that medical considerations may prevail over legal ones. Examined in light of the Convention on the Rights of Persons with Disabilities, for example, it may be argued that this paternalistic reasoning fails to recognise sufficiently the equal right to citizenship and participation in society of persons with mental disabilities.

The second stream of cases prior to 2006 took a very different line on the relevance of paternalism to deprivations of liberty on grounds of mental health. In 1995, a strong High Court decision was issued by Costello P, declaring that s 207 of the 1945 Act was unconstitutional as it interfered with a person’s constitutional right to personal liberty. Costello P made no reference to Re Philip Clarke or to paternalism as a principle. Instead, he emphasised the constitutional right to personal liberty and the failure of the 1945 Act to conform with international human rights standards. Costello P refers to the “essentially benign” objectives of the 1945 Act, and states that “the State’s duty to protect the citizen’s rights becomes more exacting in the case of weak and vulnerable citizens, such as those suffering from mental disorder.” The constitutional imperative required 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

43 [2005] 3 IR 617 at 639-640.
44 RT v Director of Central Mental Hospital [1995] 2 IR 65.
45 [1995] 2 IR 65 at 79.
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.\textsuperscript{46}

Costello P held that s 207 was defective because there were no procedures for patients to review the Inspector of Mental Hospital's opinion,\textsuperscript{47} to procure their re-transfer or liberty, or to review their continued detention. Costello P concluded that the section not only fell far short of internationally accepted standards but was unconstitutional. The State had failed adequately to protect the right to liberty of temporary patients, who had "a right to liberty, at most, eighteen months after the reception order which restricted their liberty was made."\textsuperscript{48} The President of the High Court said that the State was obviously searching for an ideal solution to the problems with mental health legislation, but this "prolonged search for excellence ... has had most serious consequences for the applicant."\textsuperscript{49} Quoting Voltaire, the President said "the best is the enemy of the good".\textsuperscript{50}

Having found that s 207 was unconstitutional, Costello P was obliged by Art 40.4.3 of the Constitution to refer the question of the validity of the section up to the Supreme Court by way of case stated. However, by the time the case reached the Supreme Court, the patient had already been transferred back from the Central Mental Hospital to St Brendan’s Hospital. The case stated lapsed, which meant that s 207 still remained on the statute books until its repeal came into effect in 2006.\textsuperscript{51} The State did not transfer back all the other patients who were detained in the Central Mental Hospital under s 207.\textsuperscript{52} By transferring one patient back to an ordinary mental hospital, the State succeeded in postponing much-needed reforms in transfer procedures.

\textsuperscript{46} [1995] 2 IR 65 at 79.
\textsuperscript{47} Under s 207(2) of the Mental Treatment Act, 1945, as amended, the Minister for Health and Children ordered the Inspector of Mental Hospitals to visit the person and report on their condition. After this, the Minister made the decision whether to make the transfer to the Central Mental Hospital.
\textsuperscript{48} [1995] 2 IR 65 at 80.
\textsuperscript{49} [1995] 2 IR 65 at 81.
\textsuperscript{50} Voltaire, “La Bégueule” in Contes en Vers et en Prose II (1772, reprinted by Classiques Garnier, Paris, 1993), p 339; based on an old Italian proverb. This quote is given in French by Budd J in Croke v Smith (No 2), High Court, 27 and 31 July 1995 at p 128.
\textsuperscript{51} Section 207 of the 1945 Act was repealed by s 6 of the Mental Health Act 2001, which came into force on 1 November 2006.
\textsuperscript{52} In November 1997, 11 patients were still being held in the Central Mental Hospital under s 207 - Department of Health, Report of the Inspector of Mental Hospitals 1997, p 18. By November 2004 the number had fallen to five: Mental Health Commission, Annual Report 2004, including the Report of the Inspector of Mental Health Services (Dublin, 2005), p 499.
The second judgment to take a different line was that of Budd J in the High Court in *Croke v Smith (No 2)*, in 1995. Budd J found that s 172 was an unconstitutional interference with the right to liberty. Budd J considered the role of the European Convention on Human Rights and the general principles of international law, concluding that while these were influential guidelines, they could not be used as a touchstone with regard to constitutionality. The judge referred to United States cases such as *Addington v Texas*, *O’Connor v Donaldson* and *Jackson v Indiana* to illustrate how seriously the courts in that jurisdiction had taken the need for a judicial process before citizens could be detained in mental hospitals.

Having been referred to *Re Philip Clarke*, he acknowledged that he was bound by the decision of the Supreme Court but said that the decision solely concerned s 165 of the 1945 Act, which was not at issue in this case. Also, there had been changes since that case:

> The certainties implicit in the judgment in Clarke’s case in 1949 may be diluted by now with increasing knowledge about the psyche, changing patterns of behaviour, conflicts between psychiatrists as to the nature of mental illness and awareness of the abuses of psychiatric treatment in other countries.

Budd J relied heavily on the judgment of Costello P in *RT v Director of Central Mental Hospital* and eventually concluded that s 172 of the 1945 Act was an unconstitutional interference with the patient’s right to liberty as there were no adequate safeguards to protect the patient against an error in the section’s operation, there was no formal review procedure in respect of the opinion of the resident medical superintendent and of the Inspector of Mental Hospitals and there was no automatic review of long-term detention of a patient such as Mr Croke. As he had decided the issue of constitutionality of s 172 on this ground, he opted to “exercise reticence” and did not express a view on the other ground put forward, namely that other sections of the Act were unconstitutional due to the lack of judicial or quasi-judicial intervention prior to the reception and detention of a patient.

This judgment treated the issue of detention of mental patients with the seriousness it deserved and Budd J’s conclusion that s 172 of the 1945 Act was unconstitutional could have had far-reaching

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53 *Croke v Smith (No 2)*, High Court, Budd J, 27 and 31 July 1995.
54 441 US 418 (1979)
55 422 US 563 (1975)
56 406 US 715 (1972)
58 *Croke v Smith (No 2)*, Budd J, High Court, 27 and 31 July 1995, p 124.
implications for mental health law. It might even have spurred the Government into enacting a new Mental Health Act. However, as was noted above, the Supreme Court upheld the appeal against Budd J’s decision and found that the 1945 Act was not an unconstitutional interference with the right to personal liberty.

Cases Since 2006

The main substantive sections of the Mental Health Act 2001 came into force on 1 November 2006\(^{59}\) and the post-2006 case law has in general imported the paternalism of *Re Philip Clarke* without question. The introduction of the statutory “best interests” principle in s 4 of the 2001 Act might have been expected to lead to a new emphasis on the rights of the patient, but instead the principle has frequently been interpreted in a manner which equates it with paternalism.\(^{60}\) The courts have also relied on the paternal nature of the Act to justify a purposive interpretation of its provisions, even when this may mean that the rights of patients are diminished.\(^{61}\)

O’Neill J said in *MR v Byrne and Flynn*\(^{62}\) that “s. 4 of the Act … in my opinion gives statutory expression to the kind of paternalistic approach mandated in the case of *Philip Clarke*\(^{63}\) and approved in the case of *Croke v. Smith*\(^{64}\) and also … *Gooden v. St Otteran’s Hospital*.”\(^{65}\) According to Peart J in *JH v Lawlor, Clinical Director of Jonathan Swift Clinic, St James’s Hospital*,\(^{66}\) s 4 introduced a “patient-centred focus” but on the other hand the Act was paternalistic:

This provision [s 4] highlights the patient centred focus of the Act's purpose. The Act proceeds to set forth a scheme whereby at all stages the constitutional rights of the patient are to be respected and protected. There are time limits and other safeguards built into the scheme, as well as requirements that the patient at all times has access to legal advice, notice and information regarding all matters pertaining to orders made to detain him/her, so that in a meaningful way his/her detention and the reasons for it must be properly, promptly and independently reviewed by a tribunal hearing at which he/she may be legally represented. The scheme in this regard has been appropriately described

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60 The approach of the courts on this issue is not consistent and they have provided mixed signals. Some judgments have emphasised how the best interests principle enhances the rights of patients under the 2001 Act. Others have interpreted the principle as merely a restatement of paternalism as expressed in case law prior to the 2001 Act. See further Whelan, *op. cit*, pp 26-31.
61 On purposive interpretation of the 2001 Act, see Whelan, *op. cit*, pp 31-35.
as paternalistic in nature. Its purpose is to protect the rights of the patient as well as to care for the patient. The paternalistic nature of the Act is clear also from the definition of "mental disorder" contained in s. 3 of the Act.

It must never be overlooked that persons detained under the provisions are detained so that they may receive care and treatment which they need and will not otherwise receive. Nevertheless the patient retains his/her constitutional rights, subject to necessary and appropriate restrictions to, inter alia, the right to liberty which are necessitated or permitted by the Act itself. 67

In *PMcG v Medical Director of the Mater Hospital*, 68 Peart J stated that the protections put in place by the 2001 Act “are detailed and specific and it is of the utmost importance that they be observed to the letter, and that no unnecessary shortcuts creep into the way in which the Act is operated.” He continued:

> It cannot have been the intention of the Oireachtas when it enacted this piece of legislation that its provisions would have to be acted upon in such a literal way that the best interests of the patient would take second place. 69

This appears to demonstrate a willingness to defer to medical evidence regarding the patient’s condition and permit this to trump some arguments about the procedural rights granted to the patient by the Act.

In the Supreme Court in *EH v Clinical Director of St Vincent's Hospital*, 70 Kearns J 71 stated that any interpretation of the term “voluntary patient” in the 2001 Act “must be informed by the overall scheme and paternalistic intent of the legislation as exemplified in particular by the provisions of sections 4 and 29 of the Act”. 72 He then approved of the judgment of McGuinness J in the *Gooden* case. He continued: “I do not see why any different approach should be adopted in relation to the Mental Health Act, 2001, nor, having regard to the Convention, do I believe that any different approach is mandated or required by Art 5 of the European Convention of Human Rights.” 73 He also stated: “There can be no doubt but that the Mental Health Act, 2001 was designed with the best interests of persons with mental disorder in mind.” 74 In his view, the fact that the 2001 Act provides for the assignment by the Mental Health Commission of a legal representative for a patient

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67 [2008] 1 IR 476 at 487.
69 [2008] 2 IR 332 at 339.
71 Murray CJ, Fennelly, Macken and Finnegan JJ concurring.
73 [2009] 3 IR 774 at 790.
74 [2009] 3 IR 774 at 781.
following the making of an admission order or a renewal order should not give rise to an assumption that a legal challenge to that patient’s detention is warranted unless the best interests of the patient so demand.\textsuperscript{75}

This judgment goes even further in its prioritisation of paternalistic “best interests” over rights. While in \textit{PMcG}, Peart J had stated that it was “appropriate” for the patient’s legal representative to bring non-compliance with a section of the Act to the court’s attention by way of an application under Art 40.4, the Supreme Court in \textit{EH} introduced a new requirement that a legal representative consider the patient’s best interests before mounting a legal challenge. Given that “best interests” in this context appear to be equated with medical best interests, this represents a remarkable prioritisation of medical considerations over legal ones. It has been commented that courts tend to be deferential to medical opinion,\textsuperscript{76} and this may be seen as a further example of this phenomenon.\textsuperscript{77}

There are, however, some indications in the case law since 2006 that a paternalistic interpretation must be tempered by a concern for patients’ rights. Peart J stated in \textit{PMcG v Medical Director of the Mater Hospital} \textsuperscript{78} that there should not be a “slack approach” to the observance of the requirements of this legislation and this would be an undesirable situation to arise in relation to legislation whose very purpose is to put in place a regime of statutory procedures for the protection of vulnerable persons against involuntary unlawful detention.\textsuperscript{79} He noted that the protections put in place by the 2001 Act “are detailed and specific and it is of the utmost importance that they be observed to the letter, and that no unnecessary shortcuts creep into the way in which the Act is operated.”\textsuperscript{80} He said that “there may be situations where some deviation from the provisions of the Act will not undermine” the protections provided for patients by the 2001 Act.\textsuperscript{81} The same judge

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{75} [2009] 3 IR 774 at 792.
\item \textsuperscript{76} See Teff, \textit{op. cit}, pp xxiii-xxiv.
\item \textsuperscript{78} [2007] IEHC 401; [2008] 2 IR 332; High Court, Peart J, 29 November 2007.
\item \textsuperscript{79} [2008] 2 IR 332 at 338.
\item \textsuperscript{80} [2008] 2 IR 332 at 338.
\item \textsuperscript{81} [2008] 2 IR 332 at 339.
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said in *AM v Kennedy* 82: “The greatest care must be taken to ensure that procedures are properly followed, and it ill-serves those whose liberty is involved to say that the formalities laid down by statute do not matter and need not be scrupulously observed.” 83  He also said that to pretend that nothing wrong occurred “is to deny the right to liberty other than in due course of law, and that is a slippery slope down which I cannot bring myself to venture.” 84  At Supreme Court level, Hardiman J said in *MD v Clinical Director of St Brendan's Hospital*: 85  “The Act … is intended to constitute a regime of protection for persons who are involuntarily detained because they are suffering from a mental disorder. That purpose will not, in my view, be achieved unless the Act is complied with.” 86

In *SM v Mental Health Commission* 87 McMahon J, referring to detention under the Mental Health Act 2001, stated that it must be remembered that what is at stake is the liberty of the individual and while it is true that no constitutional right is absolute, and a person may be deprived of his or her liberty “in accordance with the law”, such statutory provisions which attempt to detain a person or restrict his or her liberty must be narrowly construed. 88  He also stated that the approach to an interpretation of a section of the 2001 Act should be that which is most favourable to the patient while yet achieving the object of the Act. 89  McMahon J was of the view that the purposive approach “may be given greater latitude in mental health legislation because of its paternal nature, but it cannot be resorted to willy nilly by the courts to thwart the clear meaning of the legislator.” 90  He said that it was also important to recall that in *Gooden* the court was prepared to act because the matter in dispute had not been provided for in the legislation and the court was prepared to give effect to the purpose of the Act in that situation. 91  He continued:

I have little difficulty in accepting the appropriateness of using the purposive interpretive technique, perhaps more generously in the context of legislation which is paternal in nature, but where the rights and protection of the patient are specifically dealt with in the legislation itself, the occasions where this paternal approach comes into play are limited. The first obligation of the court in such a situation is to interpret the section and give effect to the plain meaning of the provision when it is clear. The

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83 [2007] 4 IR 667 at 676.
84 [2007] 4 IR 667 at 677.
86 [2008] 1 IR 632.
87 [2008] IEHC 441; [2009] 3 IR 188.
88 [2009] 3 IR 188 at 203.
89 [2009] 3 IR 188 at 204.
90 [2009] 3 IR 188 at 195.
91 [2009] 3 IR 188 at 195.
McMahon J said that he had no difficulty in accepting as a general principle that the courts in considering the Mental Health Acts should where possible adopt a purposive or teleological approach to the legislation and should in appropriate cases do so bearing in mind the paternal nature of the legislation itself. However, he said there is no room for the purposive approach to interpretation where a particular section is clear and unambiguous. The literal approach is the first and proper rule of interpretation when one has to construe the meaning of an Act. It is only when the literal rule leads to an ambiguity or an absurdity that other canons of interpretation are called in to assist.\(^{93}\)

**The Role of the European Convention on Human Rights**

Art 5 of the European Convention on Human Rights states that everyone has the right to liberty and security of the person and that no one shall be deprived of their liberty save in certain listed circumstances and in accordance with a procedure prescribed by law. The list of circumstances includes the lawful detention of “persons of unsound mind” in Art 5(1)(e). Art 5(4) provides that everyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of their detention shall be decided speedily by a court and their release ordered if the detention is not lawful. Extensive literature is available on the role of the ECHR in mental health law.\(^{94}\) The case law of the European Court of Human Rights on mental health law does not contain any reference to paternalism as a principle. The court has emphasised the importance of the right to liberty in a democratic society.\(^{95}\) It has stated that the text of Art 5(1) sets

\(^{92}\) [2009] 3 IR 188 at 196.

\(^{93}\) [2009] 3 IR 188 at 205.


\(^{95}\) Winterwerp v The Netherlands (1979-80) 2 EHRR 387, para 37, citing De Wilde, *Ooms and Versyp v Belgium* (No.1) (1971) 1 EHRR 373, para 65, and *Engel v The Netherlands* (No.1) (1976) 1 EHRR 647, para 82 in fine.
out an exhaustive list of exceptions calling for a narrow interpretation, and that the object and purpose of Art 5(1) is to ensure that no one should be dispossessed of their liberty in an arbitrary fashion.

There were three challenges to the Mental Treatment Act 1945 lodged with the European Commission of Human Rights or the European Court of Human Rights, but none of them led to a full judgment of the court.

One of the most significant mental health cases to come before the court in recent years was *HL v United Kingdom*, which concerned the application of the ECHR to a patient classified as “informal” under s 131 of England’s Mental Health Act 1983. Mr L was kept in an unlocked ward, but the staff of the hospital said that if he had tried to leave, they would have detained him under the Mental Health Act. The court recalled that the right to liberty was too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he or she might have given himself or herself up to be taken into detention, especially when it was not disputed that that person was legally incapable of consenting to, or disagreeing with, the proposed action. It agreed that any suggestion that L was free to leave was a “fairy tale.” It was not determinative whether the ward was locked or not, and the court found that L was deprived of his liberty. While L was “of unsound mind”, his detention under Art 5(1) was not lawful due to the lack of formalised admission procedures. L was detained on the basis of the common law doctrine of necessity, but there were no limits in terms of time, treatment or care. The court found that the absence of procedural safeguards failed to protect against arbitrary deprivations of liberty on

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97 *Winterwerp v The Netherlands*, para 37 citing *Lawless v Ireland (Merits)* (1961) 1 EHRR 15 at 27-28 and *Engel v The Netherlands* (1976) 1 EHRR 647, para 58.


99 (2005) 40 EHRR 32.

100 ibid., para 91.

101 In the House of Lords, Lord Steyn had stated that any suggestion that L was free to leave was a “fairy tale” - *R. v Bournewood Community and Mental Health NHS Trust, Ex p L* [1999] 1 AC 458 at 495.

102 (2005) 40 EHRR 32, para 94.

103 ibid., para 120.
grounds of necessity and therefore violated Art 5(1). As a result of the lack of procedural regulation and limits, the hospital’s health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed as and when they considered fit. The European Court said that the very purpose of procedural safeguards is to protect individuals against any misjudgements and professional lapses and concluded that it had not been demonstrated that the applicant had available to him a procedure which satisfied the requirements of Art 5(4) of the Convention. The HL case led to new legislation being passed in England and Wales, as part of the Mental Health Act 2007.

It is difficult to reconcile the ECHR case law on the right to liberty in mental health law with the paternalistic application of the right to personal liberty expressed by the Irish courts in cases such as Gooden and EH. The stark contrast in the approaches is particularly evident in the EH case, as the Supreme Court was specifically asked to consider the application of HL v United Kingdom to the facts before it. Kearns J had “great difficulty in understanding” how the decision availed the patient’s counsel to any degree. The case in question could not possibly bear on the applicant’s detention subsequent to 22 December 2008. All of the statutory protections and procedures which counsel contended were absent from 10 December 2008 to 22 December, 2008 were fully restored from that time onwards and there was no want of any procedure whereby the rights of the applicant could be asserted. This reasoning glosses over the fact that from 10 to 22 December, protections against arbitrary deprivations of liberty were not available.

The contrast in approaches is also evident in MMcN v Health Service Executive, where Peart J considered the case of two patients with severe dementia who had initially been admitted on an involuntary basis to an approved centre. Their involuntary admission orders were then revoked and their status was changed to voluntary, but they remained in the centre. He distinguished the HL case on its facts, stating that the point at issue in HL was really whether s 131 of the Mental Health

\[\text{ibid.}, \text{para 121.}\]
\[\text{ibid.}, \text{para 124.}\]
\[\text{[2009] 3 IR 774 at 790.}\]
\[\text{[2009] 3 IR 774 at 790.}\]
\[\text{[2009] 3 IR 774 at 790.}\]
\[\text{[2009] 3 IR 774 at 790.}\]
\[\text{[2009] IEHC 236; High Court, Peart J, 15 May 2009.}\]
Act 1983 (England and Wales) empowered the hospital to admit L as a voluntary patient who could not so consent, or whether by doing so he was “detained” and unlawfully detained. That was a different situation to the present applicants as s 29 of the Mental Health Act 2001 was not the basis of their admission, as s 131 of the English Act had been the case in respect of L. However, Peart J went on to note that HL v United Kingdom was “of interest” and as he was obliged to have regard to the case he had regard to it, although it was of limited value.

Peart J’s treatment of the HL case may be questioned. He distinguishes HL from the current case on rather thin grounds. In HL, the patient was admitted as a voluntary patient. In MMcN, the patients were initially admitted on an involuntary basis, their orders were revoked and they then remained on a voluntary basis. Either way, the patients in both cases were classified as voluntary or informal and in HL the European Court of Human Rights held that such de facto detention breached the Convention.

The Human Rights Commission has recently considered the Supreme Court’s interpretation of the meaning of “voluntary” patients in the EH case. The Commission stated that the Supreme Court’s approach to the 2001 Act, where neither capacity nor consent are relevant factors to determining the status of a patient, with the result that patients without capacity to consent are not subject to the safeguards of the 2001 Act (in the form of independent periodic reviews of admission orders), was of concern to the Commission insofar as it had implications for the State's compliance with its international human rights obligations. The Commission recommended that the definition of a voluntary patient in the Mental Health Act 2001 be amended to include only those persons who have the capacity to make such a decision and who have genuinely consented to their admission to a psychiatric institution and continue to consent to same.

Conclusion

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112 Section 29 of the Mental Health Act 2001 states: "Nothing in this Act shall be construed as preventing a person from being admitted voluntarily to an approved centre for treatment without any application, recommendation or admission order rendering him or her liable to be detained under this Act, or from remaining in an approved centre after he or she has ceased to be so liable to be detained”.
114 (2005) 40 EHRR 32.
116 See note 112 above.
The Mental Health Act 2001 was intended to herald a new era in Irish mental health law, with an emphasis on civil liberties and human rights. While in general this change has occurred, the continued references by the courts to the need for a paternalistic interpretation of the Act appear to be a step backwards rather than forwards, more suited to interpretation of the 1945 Act than the 2001 Act. As Eldergill has commented, “the main purpose of the 2001 legislation was patently not just to repeat the paternal character of the Act of 1945.”\textsuperscript{117} Craven has expressed surprise that the paternalistic interpretation in \textit{Re Philip Clarke} has survived the cultural and medical shifts away from paternalism since 1949.\textsuperscript{118}

Contrasting approaches have been taken in different cases to the key question of how mental health legislation should be interpreted. In the \textit{Gooden} case, for example, Hardiman J appeared to suggest that deprivations of liberty for mental health reasons are less worth of close scrutiny then other forms of detention, and that medical considerations may prevail over legal ones. The judgment of Peart J in \textit{PMcG} suggests a willingness to defer to medical evidence regarding the patient’s condition and permit this to trump some arguments about procedural rights. The Supreme Court in \textit{EH} went even further, introducing a new requirement that a legal representative consider the patient’s best interests before mounting a legal challenge. It is difficult to reconcile the \textit{EH} decision with the ECHR, especially \textit{HL v United Kingdom}.

An alternative approach is found in cases such as \textit{RT v Director of Central Mental Hospital} and Budd J’s High Court judgment in \textit{Croke v Smith (No 2)}. It has most recently been articulated by McMahon J in \textit{SM v Mental Health Commission}, when he stated that statutory provisions which attempt to detain a person or restrict his or her liberty must be narrowly construed, the approach to an interpretation of the 2001 Act should be that which is most favourable to the patient while yet achieving the object of the Act, and the paternalistic approach is not intended to rewrite the legislation.

For the present, the Supreme Court’s decision in \textit{EH} is the dominant precedent and this means that the emphasis on paternalism seems set to continue. There remains room for reconciliation of paternalism with rights, however. It is possible to acknowledge the need for a paternal approach on some occasions, and yet hold in individual circumstances that the patient’s rights have been


infringed to such a significant degree that the court must find in favour of the patient. The courts may choose to emphasise the benign aspects of paternalism as a concept, modernise the interpretation of the principle,¹¹⁹ and steer away from negative “doctor knows best” connotations. They may also stress the autonomy of the patient in appropriate cases.

There is significant concern in legal circles that the paternalistic interpretation of the Mental Health Act 2001 is undermining the significant advances in mental health law which the Act was intended to bring about. The paternalistic interpretation seems to place medical concerns above the patient’s human rights and is inconsistent with the ECHR. In due course, the courts may take the opportunity to reconsider the principle of paternalism and its application to the right to personal liberty and either reinterpret it in a rights-based manner, or alternatively abandon the principle altogether.

¹¹⁹ “The difficulty is not with paternalism as such but with paternalism operated in an inappropriate way which fails to protect the rights of the person lacking capacity. As the [Mental Capacity Act 2005, England and Wales] shows, it is possible to adapt the best interests standard to reflect modern understandings regarding participation and to include an appropriate role for the right of autonomy of the previously capable person who now lacks capacity.” – Mary Donnelly, “Legislating for Incapacity: Developing a Rights-Based Framework” (2008) 30 DULJ 395 at 424.