

CITATION: *Schakelaar v CP* [2009] NTMC 028

PARTIES: DONNA SCHAKELAAR

v

CP

TITLE OF COURT: Mental Health Review Tribunal

JURISDICTION: Mental Health & Related Services Act 1998

FILE NO(s): 1890/09

DELIVERED ON: 3 July 2009

DELIVERED AT: Darwin

HEARING DATE(s): 1 July 2009

JUDGMENT OF: Mr V M Luppino SM, President MHRT

**CATCHWORDS:**

Non-psychiatric treatment – Inter-relationship with order for involuntary admission – Whether an order made approving non-psychiatric treatment relates to a specific period of involuntary admission.

Mental Health & Related Services Act (NT) 1998 ss 14, 15, 44, 63, 64, 118, 123, 129.

**REPRESENTATION:**

*Counsel:*

Applicant:

In person

Patient:

Ms Elliott

*Solicitors:*

Applicant:

In person

Patient:

NTLAC

Judgment category classification:

B

Judgment ID number:

[2009] NTMC 028

Number of paragraphs:

27

IN THE MENTAL HEALTH REVIEW TRIBUNAL  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 1890/09

BETWEEN:

**DONNA SCHAKELAAR**  
Applicant

AND:

**CP**  
Patient

REASONS FOR DECISION

(Delivered 3 July 2009)

Mr V M LUPPINO SM:

1. On 3 June 2009 the Mental Health Review Tribunal (“the Tribunal”) conducted a review pursuant to section 123(1) of the *Mental Health & Related Services Act* (1998) (“the Act”), of the admission of CP (“the Patient”) as an involuntary patient. At the same time the Tribunal considered an application for approval to perform a major medical procedure pursuant to section 64 of the Act. The relevant procedure for which approval was sought was the investigation for neurosyphilis and thereafter, if the condition was confirmed, for a course of antibiotic therapy dependant upon the results of the investigation.
2. The parts of section 64 of the Act relevant to the issues in this case provide as follows:

64 Major medical procedure

- (1) A person must not perform a major medical procedure on a person who is an involuntary patient or subject to a community management order other than in accordance with this section.

Penalty \$5,000.

(2) Subject to subsection (3), a major medical procedure must not be performed on a person unless:

(a) it is approved by the Tribunal; or

(b) where the person is a represented person, within the meaning of the *Adult Guardianship Act*, the consent of the Local Court under that Act is obtained to the procedure being performed.

(3)-(4) Omitted

(5) The Chief Health Officer is, from time to time, to specify those medical procedures that are major medical procedures for the purposes of this section.

(6) The purpose of this section is to protect the interests of a person by ensuring the person is not unnecessarily subjected to certain medical procedures.

3. Section 64 of the Act falls within Part 9 of the Act which is titled "Regulation of Certain Treatments and Measures". Unlike a number of other of the treatments and measures referred to therein, for example, psychosurgery, mechanical restraint, seclusion and non-psychiatric treatment, there is no definition of the term major medical procedure in the Act. In lieu, the Act empowers the Chief Health Officer to determine which procedures are to be major medical procedures for the purposes of section 64.
4. No evidence was produced to the Tribunal to establish that the treatment proposed was specified to be a major medical procedure by the Chief Health Officer pursuant to section 64(5) of the Act and hence the application was refused.
5. Thereafter the Applicant made an application for approval of the same procedure as non-psychiatric treatment pursuant to section 63 of the Act. The relevant parts of that section provide as follows:

63 Non-psychiatric treatment

- (1) In this section, *non-psychiatric treatment* means:
- (a) a surgical operation or procedure or a series of related surgical operations or procedures;
  - (b) the administration of an anaesthetic for the purposes of medical investigation; or
  - (c) the administration of a course of treatment or medication requiring a prescription or medical supervision,

the primary purpose of which is not directed at treating a mental illness or mental disturbance or the effects of a mental illness or mental disturbance.

- (2) A person must not perform non-psychiatric treatment on a person who is an involuntary patient or subject to a community management order other than in accordance with this section.

Penalty \$5,000.

- (3) Non-psychiatric treatment must not be performed unless:
- (a) the informed consent of the person is obtained;
  - (b) the treatment is approved by the Tribunal or an authorised psychiatric practitioner as determined under subsection (7); or
  - (c) where the person is a represented person, within the meaning of the *Adult Guardianship Act*, the consent of the guardian or the Local Court to the treatment is obtained under that Act.
- (4) Non-psychiatric treatment may be performed without being approved under subsection (3)(b) or the consent being obtained under subsection (3)(c) where it is immediately necessary for any of the following:
- (a) to save the life of the person or to prevent irreparable harm to the person;

(b) to remove a threat of permanent disability to the person;

(c) to remove a life threatening risk to, or to relieve acute pain of, the person.

(5)-(7) Omitted

(8) The purpose of this section is to protect the interests of a person by ensuring the person is not unnecessarily subjected to certain medical procedures.

6. The scheme of the Act in this respect appears to recognise that although an involuntary patient may not have the ability to give informed consent in relation to treatment for a mental illness, that does not necessarily equate to an inability to give informed consent for treatment for physical conditions. Hence, in the case of non-psychiatric treatment, the first enquiry is whether the patient can give informed consent to the treatment (section 63(3)(a)). If so, the treatment can be authorised in that way. Where an involuntary patient cannot give informed consent, (as opposed to having that capacity and refusing consent), the Act has two conflicting interests and principles to contend with. On the one hand, a person requiring a non-psychiatric treatment should not be deprived of that treatment simply because the person is an involuntary patient. On the other hand, as section 63(8) of the Act specifically acknowledges, the Act is concerned that an involuntary patient is not subjected to unnecessary treatment on the decision of Mental Health Services. The Act achieves this balance by empowering the Tribunal, a body independent of Mental Health Services, to authorise the treatment according to specified criteria.

7. On 3 June 2009, the Patient was represented by Ms Lohmeyer of the Northern Territory Legal Aid Commission. On that occasion, the Tribunal was satisfied that the nominated procedures, i.e., spinal tap to investigate neurosyphilis and a course of medication to treat the condition, fell within

the definition of non-psychiatric treatment, specifically sections 63(1)(a) and (c) of the Act.

8. At the same time, the Tribunal determined that the Patient fulfilled the criteria for admission on the grounds of mental disturbance pursuant to section 123(5)(b) of the Act and ordered that the Patient be detained as an involuntary patient for a period of 14 days. The Tribunal, being required by that section to fix a date for a further review of the admission, then specified 17 June 2009 as the date for that review.
9. The Patient was next before the Tribunal on 1 July 2009. Evidence presented to the Tribunal showed that the Patient had absconded from the facility before the non-psychiatric procedures were due to occur. The Patient was brought back to the facility on or about 27 June 2009. The Patient then again went through the admission process in Part 6 of the Act but this time the Patient was admitted on the grounds of mental illness.
10. The criteria for admission on the grounds of mental illness are set out in section 14 of the Act. The criteria for admission on the grounds of mental disturbance are set out in section 15 of the Act. Both sections are set out in full hereunder, namely:

14 Involuntary admission on grounds of mental illness

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

- (a) the person has a mental illness;
- (b) as a result of the mental illness:
  - (i) the person requires treatment that is available at an approved treatment facility;
  - (ii) without the treatment, the person is likely to:
    - (A) cause serious harm to himself or herself or to someone else; or

- (B) suffer serious mental or physical deterioration; and
- (iii) the person is not capable of giving informed consent to the treatment or has unreasonably refused to consent to the treatment; and
- (c) there is no less restrictive means of ensuring that the person receives the treatment.

15 Involuntary admission on grounds of mental disturbance

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

- (a) the person does not fulfil the criteria for involuntary admission on the grounds of mental illness;
- (b) the person's behaviour is, or within the immediately preceding 48 hours has been, so irrational as to lead to the conclusion that:
  - (i) the person is experiencing or exhibiting a severe impairment of or deviation from his or her customary or everyday ability to reason and function in a socially acceptable and culturally appropriate manner; and
  - (ii) the person is behaving in an abnormally aggressive manner or is engaging in seriously irresponsible conduct that justify a determination that the person requires psychiatric assessment, treatment or therapeutic care that is available at an approved treatment facility;
- (c) unless the person receives treatment or care at an approved treatment facility, he or she:
  - (i) is likely to cause serious harm to himself or herself or to someone else; or
  - (ii) will represent a substantial danger to the general community; or
  - (iii) is likely to suffer serious mental or physical deterioration;

- (d) the person is not capable of giving informed consent to the treatment or care or has unreasonably refused to consent to the treatment or care; and
  - (e) there is no less restrictive means of ensuring that the person receives the treatment or care.
- 11. On 1 July 2009 there was no further application before the Tribunal for approval of non-psychiatric treatment. The Applicant apparently took the view that the approval given on 3 June 2009 was still current and valid. Ms Elliott, who appeared for the Patient on 1 July 2009, argued at the outset that the approval for the non-psychiatric treatment given on 3 June 2009 lapsed on 17 June 2009 with the expiration of the review period specified on that occasion.
- 12. Ms Elliott also indicated that there was a challenge to the basis for the previous approval for non-psychiatric treatment and that any fresh application for similar approval would be opposed. She pointed out that the Patient was willing to consent to the course of medication for treatment of syphilis but not for the spinal tap investigation. The evidence of the Applicant was that the protocol for treatment of the condition is to investigate whether neurosyphilis exists by spinal tap. It was pointed out that the symptoms experienced by the Patient, which were consistent with the then working diagnosis of mental illness, might be due to the organic condition that could result from neurosyphilis.
- 13. The Applicant's evidence then was also that whether neurosyphilis was confirmed or not, the treatment to be given would have been the same. This evidence suggested that the investigation by spinal tap might have been primarily designed to further the diagnosis of the mental illness. When questioned about this by Ms Elliott, the Applicant then said that a different treatment may also have been indicated. She maintained this position and, in the absence of any contradictory medical evidence, the Tribunal accepted the Applicant's evidence on this point.

14. The Tribunal however noted that two matters ostensibly supported the contention that the spinal tap was more for the purposes of diagnosis of the mental illness. Firstly, the admission preceding the hearing on 3 June 2009 was based on mental disturbance whereas the more recent admission was based on mental illness. This change in basis was not explored at the hearing on 1 July 2009. Given however the new admission was on the grounds of mental illness as opposed to mental disturbance, the first review date in ordinary circumstances was not due until 8 July 2009. Although there is no impediment under the Act to an earlier review, the suggestion that the matter was advanced simply to facilitate the non-psychiatric treatment is open. Running counter to that suggestion however is that the Applicant did not make a further application for non-psychiatric treatment. The Applicant proceeded on the basis that the order made for non-psychiatric treatment on 3 June 2009 remained current. If correct, the Applicant may be entitled have that treatment conducted prior to 8 July 2009 without any further application. Accordingly, all the advancing of the review achieved was to enable all of the issues to be ventilated before the Tribunal and that is consistent with fairness to the Patient as opposed to confirming any ulterior motive on the part of the Applicant.
15. Secondly, a four week period of detention was sought in relation to the current admission yet on 3 June 2009, when the admission was on the grounds of mental disturbance, only a two week order was sought. When the Tribunal makes an order for detention based on mental disturbance the maximum period of detention is 14 days in any event (see section 123(5)(b)). In the current application the Applicant sought an order for a period of four weeks detention based on mental illness. The suggestion was made that the four week period was designed only to facilitate the non-psychiatric treatment. Although that suggestion was open, the Tribunal was satisfied from the evidence that the four week period was justified. The evidence showed that although there had been improvement in the Patient's

condition before the Patient absconded, the period away from the facility without medication resulted in a deterioration of her condition warranting the period sought. Although the Applicant conceded that the non-psychiatric treatment would occur concurrently with the period of detention, any suggestion that that was the primary purpose for seeking a four week period was refuted. There is support for the Applicant's position from the previous admission and order as there only a two week order had been made and, but for the Patient absconding, the non-psychiatric treatment would have occurred within that period. Therefore the fact that a four week order for detention was sought was inconclusive as the non-psychiatric treatment could also have been effected if a shorter period of detention had been sought.

16. It routinely occurs that in matters before the Tribunal, the only challenge to the medical evidence is in the form of questioning by Tribunal members (one of whom is a consultant psychiatrist) and by the Patient's representative. I am not aware of any occasion when the Tribunal has been in receipt of qualified contradictory medical opinion. The reasons for this are obvious given resource issues and the timeframes that the Tribunal must work with. Notwithstanding that, after due consideration the Tribunal was prepared to accept the Applicant's evidence and made an order for ongoing detention of the Patient on the grounds of mental illness for a period of four weeks.
17. Turning now to the question of the currency of the order for non-psychiatric treatment made on 3 June 2009 and the related question as to whether a fresh order was required given the readmission of the Patient. That is a question of law. Pursuant to the Act, a decision on a question of law must be made by the President (see section 129(3)) or the President's delegated legal member of the Tribunal (see section 118(8) and (9)). I ruled that the order made on 3 June 2009 remained current as at 1 July 2009 and that a further

order was unnecessary and I indicated that I would subsequently publish reasons and I now do so.

18. The matter turns on the interpretation of section 63(2) of the Act which only permits non-psychiatric treatment to be performed “...*on a person who is an involuntary patient ...*”. The heading to Division 2 of Part 9, which incorporates section 63, is largely confirmatory and does not materially affect the position.
19. In my view the scheme of the Act is to regard the termination of an admission as occurring either on the discharge of a patient administratively by Mental Health Services prior to a review, or by the Tribunal refusing to make a further order for admission on the review of a previous order.
20. The order made on 3 June 2009 was an order for involuntary admission based on mental disturbance and was made pursuant to section 123(5)(b) of the Act. That section empowers the Tribunal to order detention and states that where detention is ordered the Tribunal “... *must fix a date for the order to be again reviewed...*” (emphasis added). Therefore the Act treats a review as resulting in a continuing admission, not a fresh admission. The Act does not contemplate that a patient will necessarily be discharged at the end of the period of detention specified in an order of the Tribunal. The effect of an order for admission is simply that a patient cannot be detained any longer than the period specified in the order without a further order of the Tribunal.
21. Further support for this view is that pursuant to the Act, Mental Health Services are under a positive obligation to regularly review a patient irrespective of whether the patient is admitted on the grounds of mental illness or mental disturbance. In either case the Act stipulates that if the applicable criteria are not fulfilled at the time of any such examination then the patient must be discharged (see sections 40(3) and 44(2)(d)). Also, the Tribunal has an obligation to discharge patients on any review if the

Tribunal is not satisfied that the relevant criteria are fulfilled (see section 123(7)).

22. In the current case, the Patient absconded from the facility and was not discharged by either method referred to above. The status of the Patient as an involuntary patient therefore remains unchanged in my view. Had the Patient been discharged before any non-psychiatric treatment was undertaken and the Patient then deteriorated requiring a further admission, a new order for non-psychiatric treatment would have been required. The telling difference in that event would be that the Patient would have had an intervening period where the capacity to give informed consent may have existed. In the current case however the fact of the Patient absconding does not change the status of the Patient as an involuntary patient.
23. Section 166A of the Act, which deals with absconding patients is also relevant to this issue. The relevant parts of that section are set out hereunder:

166A            Person absent without approval

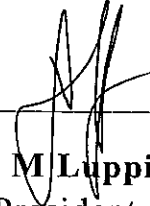
- (1) This section applies to a person who is admitted to an approved treatment facility under this Part if:
- (a) the person is absent from the facility without leave granted under section 166(1); or
  - (b) the person has been granted leave under section 166(1) and any of the following occurs:
    - (i) the person fails to return to the facility by the end of the leave;
    - (ii) the leave is cancelled;
    - (iii) the person fails to comply with a condition of the leave.
- (2) A police officer or person authorised by an authorised psychiatric practitioner may:

- (a) apprehend the person; and
  - (b) return the person to the facility.
- (3) Reasonable force and assistance may be used for subsection (2).
- (4) For subsection (2), a police officer may enter private premises or any other private place where the police officer reasonably believes the person may be found.
- (5)-(8) Omitted.

24. That section is contained in Part 19 of the Act. Part 19 does not contain any provisions dealing with the admission of persons to an approved treatment facility. That is dealt with in Part 6 of the Act. Consequently there is a drafting fault in subsection (1) given that it refers to admissions “...*under this Part...*” and that fault essentially renders the section nugatory. Notwithstanding that, the section is still indicative of Parliament’s intention as to the status of a patient who is absent without leave. Section 166A(2) confirms that when the person is located, the person is to be taken back to the facility. There is no reference to the recommencement of the same admission process that is set out in Part 6 of the Act. In my view, that is indicative that Parliament intended the involuntary status of the patient to continue. The likely reason for that is that the Parliament might consider that a patient who absconds from a facility is unlikely to receive the necessary treatment during that absence. It is unlikely therefore that the patient’s condition will have improved at best, and at worst, it is likely to have deteriorated. Parliament may have felt that in such circumstances the patient’s position was adequately safeguarded by various other provisions in the Act. For example, the obligation on Mental Health Services to regularly review the involuntary patients coupled with the obligation to discharge a patient where the relevant criteria are no longer fulfilled (sections 40(3) and 44(2)(d)). Additionally, an involuntary patient has a right to an early review by the Tribunal (see section 127(3)(a)).

25. Although Mental Health Services seem to have treated the return of the Patient to the facility as a new admission, I am of the view that it was not necessary to recommence the Part 6 admission procedure in light of my findings as to the continuing status of the patient. The Patient should be put before the Tribunal as soon as practicable unless there is a pending review date. Although the new admission has been made on the grounds of mental illness, that change does not make a difference to my view as the Act contemplates that such a change of status can occur during the course of an admission (see section 44(2)(b)).
26. In my view therefore the status of the Patient was not affected by the Patient absconding from the facility. The Patient remained an involuntary patient and accordingly the non-psychiatric treatment could still occur. An interpretation to the contrary would lead to an absurdity in my view, namely it would mean that a person could abscond from the facility while that person fulfilled the criteria for involuntary admission, (specifically lacking an ability to give informed consent to treatment), yet is thereby able to cause a change to the currency of an order and a termination of the former involuntary status if the person managed to remain away from the facility beyond the term of any then current review date.
27. Lastly I should add that had I ruled that a further application for non-psychiatric treatment was required, and had the Applicant then made an application for a new order on the day, the Tribunal would have been accepted the application and given the available evidence, a favourable decision would have been made. This is because the issue of non-psychiatric treatment was extensively considered in the course of the hearing. It was the subject of questioning by the Patient's legal representative as well as by the Tribunal. As a result, had it been necessary, the Tribunal would have made a further order approving non-psychiatric treatment in precisely the same terms as that made on 3 June 2009.

Dated this 3rd day of July 2009.

A handwritten signature in black ink, appearing to read 'V M Luppino', is written over a horizontal line.

**V M Luppino**  
President,  
Mental Health Review Tribunal