THE CIVIL COMMITTAL PROCESS

John Dawson

Commentary by Judge D D Finnigan

"Much madness is divinest sense
To a discerning eye -
Much sense the starkest madness.
'Tis the majority
In this, as all, prevail.
Assent and you are sane;
Demur, you're straightway dangerous
And handled with a chain."

Emily Dickinson

My comments on this very informative and clearly expressed paper are restricted to specific parts.

I. B. Committal's Legal Consequences Page.

Once the Judge has decided to make a reception order the effects include some that are defined but some that simply arise. Among the former, a loss of power to control money and property but a continued power to commit and be convicted of criminal offences including offences relating to property. These are legal consequences. Among the latter, non-legal consequences, is frequently the unshakeable belief that the Judge has "declared me insane"; that belief spreads to family friends and associates and may follow the patient long after the discharge of the reception order. Another such consequence is that the patient can fade from sight and from memory two years after the order is made.

Two important consequences are quite clear:

i) The function of the Judge is complete once the order is made; he has nothing more to do with the person about whom he made the decision; and

ii) the person will remain in the legal condition in which the Judge has placed him until either some person other than a Judge has decided to end it, or else a Judge, invited either by the person himself or by the Minister of Health has investigated the matter as a Judge and directed that the person's legal condition revert to what it was. Those latter applications are rather more difficult to place before a Judge than say applications under the Family Proceedings Act. The condition thus imposed upon the person may be endless.

III. A. 4. Certification (Page and following)

I would be happiest if the whole process of certification were abolished. The very word 'certified' has overtones of meaning in general use which imply that the writing of certificates is the equivalent of the making of a reception order. Yet there is a vast chasm in theory between the two.

In a nutshell, a Judge acting judicially almost invariably must justify his decisions by reference to the evidence which supports them. He is not standing on familiar ground until he sees or hears some evidence. He can then either accept or reject the evidence and thereby come to a decision. In deciding an application for a reception order he is presented with a person, an application by another person saying that he believes the first person to be mentally disordered, written statements by two other persons engaged in the practice of medicine who have written that after examining the first person they believe him to be mentally disordered and in need of detention in a hospital; he can avoid

making the order if there has been some error in the procedure adopted. Otherwise he must find some reason to doubt the evidence itself or to seek further evidence. In other words he must become an advocate for the patient as well as the patient's judge.

This situation is worsened in my view by the fact that the medical evidence may have been written by a doctor with no previous knowledge of the patient and, while doubtless conscientious in the view he has reached, he has nonetheless reached it and expressed it without looking the Judge in the eye, or having his reasons for coming to that view subjected to any test or any opportunity of second thoughts.

Bearing in mind the consequences set out in the paper and set out above, this is extremely unfair on both the person and the Judge.

III. B. 2. Committal of Informal Patients (Page and following)

Where informal patients are treated contrary to or without their consent before a hearing, a pre-judicial situation may be created in which the condition of the patient may be substantially altered before the Judge comes to assess him.

The same comment applies where there has been adjournment of an application under sections 16 or 21; if the Judge had authorised treatment without consent then it may be assumed that he or another Judge will take that into account the next time he assesses the patient. Where treatment has been administered without authority however, the Judge may be quite unaware that the person he is assessing has been subject to treatment.

It has been my experience that in at least one busy hospital if the Judge adjourns an application without giving the right to treat, the hospital is liable to discharge the patient on leave. He is legally still "detained" while on leave.

IV. The Judicial Hearing (Page and following)

The civil committal process by which mentally disordered persons who are unable or unwilling to consent to treatment may be given treatment is a formal judicial process. A Judge hears (or reads) the evidence and by judicial principles makes a decision based on that evidence. The form of hearing can be unusual in that the evidence may consist almost entirely of a reading of unchallenged, unsworn statements made in writing by an applicant and by medical practitioners, together with his inexpert interview of a person whose behaviour is said to be not normal. The Judge assesses not only the evidence, but also the complex legalities of the process by which that evidence has come before him. He then leaves the evidence aside and assesses the allegedly disordered person for himself, using whatever skills and experience he may have. He alone must decide -

i) is the process proper and complete;

ii) is the person mentally disordered (as defined in the Act); and

iii) is the person by reason of mental disorder in need of "detention" (undefined) in a hospital?

The level to which he must be satisfied is not defined but it is certainly not proof beyond reasonable doubt.

The reference in this section of the paper and later to assessment of people from other cultures under a system and set of values which may not even be European but merely British in origin, points up a very disturbing feature of the judicial hearing. I was astounded to learn that judicial officers had been observed making such assessments when they apparently were aware that the patient or subject could not understand what was being said about him.

This is not the same as excluding a patient from a hearing. After a process of trial and error it became my practice to commence hearings in the absence of the patient, despite the fact that his liberty was involved and after taking careful account of the rules of natural justice. It was brought home to me by experience that if a mental disorder did exist, there could sometimes be serious consequences from disclosing to the patient the identity of the applicant, the reasons for the application and the opinions of the doctors. In particular it struck me as being quite inappropriate for the Judge to be the vehicle by which this information came to the patient. However, it is a fundamental rule of natural justice that the patient should have the opportunity of commenting on the evidence which, if accepted, could result in deprivation of his liberty and in the absence of counsel to do the task I tried to place these matters before the patient myself in a way which was objective and did not offer the patient unnecessary clues about who thought what about him. Often with a patient who was exhibiting no overt signs of mental disorder the doctors would prime me in his absence with questions that would unlock the symptoms of disorder, or they would ask the questions themselves in my presence. After thought, I accepted that as a legitimate practice, but I still have doubts.

Almost invariably the hearings would start as a conference between the Judge and the hospital authorities. This practice used to occur also in prisons when I attended as visiting Justice to hear appeals by prisoners against disciplinary decisions of the prison authorities. I found it much more prejudicial in the prison situation and had it stopped, so far as I was concerned. In the psychiatric hospital situation however, I found it was frequently to the advantage of the patient and prepared my mind for refusal of an order or for adjournment so that the patient could be discharged without an order.

However, this aspect, as all aspects of the judicial hearing requires skill and understanding of the Judge. He has to come to know and to trust the medical personnel and more importantly, they have to learn to trust him. Between a strong minded Judge and a strong minded doctor a reception order hearing can become a tussle between the rules of evidence on the one hand and a soundly based clinical assessment on the other.

In my view there are two essentials yet to be supplied; the first is that the Judge conducting these hearings should be specially qualified by experience and preferably by additional study to do the work, and the second is that even after that he should be able to leave to others the role of patient's advocate so that he can concentrate on performing his judicial function in a judicial way.

I was very sorry to read that many doctors and Judges do not refer to the definition of "mentally disordered" in the Act: without establishment of that statutorily defined condition there can be no jurisdiction for an order. In addition that mental disorder alone is not sufficient reason for a reception order. The mental disorder must create a clearly established need for detention in a hospital.

About the meaning of "detention in a hospital". In full, the passage referred to in the paper (Page Note 15) is as follows:

> "Detention is something different from the detention normally contemplated by Judges. It is difficult to define briefly what it does mean. Broadly, it means that the person is made subject to the will of other persons in respect of where he lives and how he lives and about whether and, if so, by what means his condition will be treated."

Even detention in prison is covered by that broad definition. Many a sentenced prisoner is walking the streets. That is permitted by the legislation. It is likewise permitted by the legislation that patients subject to reception orders may live outside a hospital, because the power is given to those who have control of them to place them while still under their control outside a hospital. The Judge has no power to order that the person being detained should be kept in a hospital. That power is given to the doctors. For myself I have no doubt at all: if I had to ask myself does this person need, by reason of his mental disorder, to be kept inside the grounds of a hospital, I would be applying too far rigid a test for the purposes of the Act. I would be discharging people to their own detriment and that is also against the policy of the Act.

The Judge's role is not solely to scoop back out of the net the personal liberties of those found not to fall within the Act; that is his role in criminal proceedings. In Mental Health proceedings he becomes aware with experience that it is not from the depths of the cuckoo's nest that he is required to save individual citizens, but rather from the consequences of something that might be happening inside themselves. His role is first and only to determine on the evidence by judicial principles whether that defined condition does exist. It is a very difficult role, with very few guidelines; in it each Judge and Justice can be expected to function differently. Almost all District Court Judges in my experience, are concerned and worried about the onerous and almost unguided responsibility which falls on them in this extremely specialised field.

D D Finnigan
JUDGE