

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2006-404-6868

BETWEEN JOSKO SESTAN
 Plaintiff

AND AUCKLAND DISTRICT HEALTH
 BOARD
 Defendant

Hearing: 14 November 2006

Appearances: C Curtis for Plaintiff
 D Marshall for Defendant

Judgment: 16 November 2006 at 2:15 pm

JUDGMENT OF ASHER J

*This judgment was delivered by me on 16 November 2006 at 2:15 pm
pursuant to Rule 540(4) of the High Court Rules*

.....
Registrar/Deputy Registrar

.....
Date

Solicitors:
Marshall Bird & Curtis, PO Box 105-045 Auckland
Meredith Connell, PO Box 2213 Auckland

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Introduction

[1] The right not to be arbitrarily detained is a fundamental individual liberty, referred to in the Habeas Corpus Act 2001 and the New Zealand Bill of Rights Act 1990. Josko Sestan says he is so arbitrarily detained. He applies for a Writ of Habeas Corpus, to release him from the custody of the Auckland District Health Board (“the Board”), which presently detains him under the provisions of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (“the Act”).

[2] Mr Sestan puts forward three grounds to support his application. First, he asserts that the statutory requirements of detention under the Act, particularly his right to have explained to him the requirements of an assessment examination in the presence of a member of his family or a caregiver, or other person concerned with his welfare, were not complied with. Secondly, he asserts that he was detained unlawfully as he was not ‘mentally disordered’ as defined in the Act. Thirdly, he states that the evidence relied upon to justify his detention was irrelevant.

[3] Mr Sestan has filed only a short affidavit in support, in which he states that he did not realise at the time of assessment that he was being assessed, and that he does not consider that he is mentally unwell. He asserts that he does not pose a threat either to himself or any member of the public, and seeks his immediate release.

[4] The Board has filed two affidavits in reply. The first is by a Ms Smith, a registered health nurse employed by the Board, and a duly authorised officer under the Act. An affidavit has also been filed by William McColl, a consultant psychiatrist approved for the purpose of assessment examinations under the Act. He has been Mr Sestan’s responsible clinician as defined in the Act.

[5] The uncontested evidence in these affidavits discloses that Mr Sestan has a diagnosis of bipolar/schizoaffective disorder and becomes psychotic and manic. He is also depressive. His current admission is his fifth admission since 2002, and he has been previously admitted in Wellington and twice in Auckland. He is prescribed

medication, which is very important for his wellbeing, but has been recently refusing to take that medication. He has been the subject of one prior Compulsory Treatment Order.

[6] On 27 October 2006 Mr Sestan's mother contacted the North Shore Two Community Health Team with concerns about her son's mental state, following a traffic incident on that day. He was said to have demonstrated road rage, as well as demonstrating elevated mood, and excessive spending. She also express concerns that his mental state could be deteriorating based on his behavioural signs. The background to previous admissions included jumping from balconies, being naked in public places, experiencing hallucinations, seeing evil spirits, abandoning his car on a motorway, not sleeping, being unable to engage in conversation, and saying that God would tell people who he was.

[7] Following the call from his mother, efforts were made to speak to Mr Sestan through the next day. The plaintiff eventually arrived at the Emergency Department at 8:54 pm on 28 October 2006. On arrival the registered nurse, Ms Smith, telephoned Mr Sestan's mother to discuss the position, and whether she or another member of her family would be able to come to the hospital to be with Mr Sestan while he was assessed. Ms Smith asked Mrs Sestan whether anyone would be available to be with him, to provide him with the information that is required by s 9(d) of the Act. Mrs Sestan said that she did not wish to be present when the process took place. She said that on previous occasions the family had been present during that part of the assessment process, and Mr Sestan had become angry at them for participating. She said that at times she had been afraid of him. Ms Smith says she asked Mrs Sestan whether there was anyone else who could be a suitable support person. Mrs Sestan responded that she could not think of any other suitable person.

[8] It was decided then to continue with the assessment process. Ms Smith states that she told Mr Sestan that there was no support person available, and asked him whether he could nominate any person. He said that he understood why his family would not wish to become involved, but could not think of any other suitable person. She offered him a mobile phone to call anyone he wished to call, and he declined to use it. He advised her that he wished to get on with the assessment process.

Ms Smith says that he agreed to proceed without an independent person being present. She was aware of the obligation to explain the examination process in the presence of a member of the proposed patient's family or other suitable person, but was unsure who she could contact at that time of night. The examination process was then completed, without there being a support person with Mr Sestan.

[9] The assessment took place at 10:30 pm that night. The psychiatric registrar on duty, Doctor Stoyanoff, concluded that Mr Sestan was mentally disordered and that he should undergo further assessment and treatment under the Act. During the assessment process Mr Sestan became irritable and tried to leave. He refused to accept copies of the papers.

[10] The clinical report prepared by Doctor Stoyanoff reads:

Josko is elevated in mood with a effusive affect. His thoughts are racing. He has been making grandiose plans around work and has been overspending. His sleep is disturbed and he is overactive.

He has placed others at risk with his driving attempting today to force another driver off the road who had been 'driving too slow'. He lacks insight and exhibits poor judgment. His ability to care for himself is compromised.

A certificate of preliminary assessment was issued by Doctor Stoyanof. Mr Sestan was admitted to the Tahuratu Mental Health Unit at seven minutes past midnight on 29 October 2006.

An application for review pursuant to s 11(7) and s 16 of the Act was made and heard on 1 November 2006 before a Judge. Mr Sestan was found not to be fit to be released from his compulsory status under s 16 of the Act. There was a second review on 8 November 2006, and a second Judge refused the application.

[11] Doctor McColl, who is now Mr Sestan's Responsible Clinician as defined by s 2(1) of the Act, says that the plaintiff poses a danger to the safety of himself and others. His mental state is unstable. He lacks insight into his conditions. He has dropped his trousers in front of a female patient and was later seen to be making gestures suggestive of masturbation to her. He has kicked another patient.

[12] On 1 November 2006 Mr Sestan was further assessed, and a certificate issued stating that he was required to undergo a further 14 day period of assessment and treatment. That period expires on 15 November 2006, and he will have been further assessed under the Act on 16 November 2006. Following that assessment the options are either release, or being held to be not fit to be released from compulsory status. If he is held not fit to be released from compulsory status, the process of applying for a Compulsory Treatment Order commences under the Act.

The scheme of the Act relating to assessments

[13] There are essentially two certificates and three assessments on the path to an application for a Compulsory Treatment Order. The first step is the initial assessment under s 9, already referred to, which will result in a certificate of preliminary assessment under s 10. The second step is a further assessment and treatment for five days, following the preliminary assessment. That further assessment and treatment is referred to in s 11 of the Act, and s 12 provides that “before the expiry of the first period of assessment and treatment” the responsible clinician shall record his or her findings in a certificate of further assessment. The second certificate is issued under s 12, which Ms Curtis says here was premature. This certificate results in further assessment and treatment for a 14 day period.

[14] Before the expiry of that second period of assessment of 14 days there must be a certificate of final assessment prepared by the responsible clinician. That certificate must state whether in the responsible clinician’s opinion the patient is fit to be released from compulsory status, or whether in his or her opinion the patient is not fit to be so released. If a patient is not fit to be so released, then documents must be prepared for an application for a Compulsory Treatment Order, which will in due course be heard by the Family Court in accordance with the provisions of the Act.

Were there breaches of the Act?

[15] Section 9(2)(d) of the Act provides for the arrangements to be made prior to a preliminary assessment. It states:

9 Assessment examination to be arranged and conducted

...

(2) The arrangements required by subsection (1) of this section shall include the following:

...

(d) Ensuring that the purpose of the assessment examination and the requirements of the notice given under paragraph (c) of this subsection are explained to the proposed patient in the presence of a member of the proposed patient's family, or a caregiver in relation to the proposed patient or other person concerned with the welfare of the proposed patient:

[16] It is common ground that no such member of Mr Sestan's family or other person of the type referred to were present at the time of the explanation. It is not in dispute, therefore, that a mandatory requirement of the Act had not been met.

[17] Ms Curtis, for Mr Sestan, alleges that there was a second breach of the Act, in that the second certificate of 1 November 2006 issued under s 12 of the Act, was premature and therefore invalid. The Crown, for the Board, does not accept that there was any such breach.

[18] It is, therefore, necessary to examine the arguments for Mr Sestan in this regard. Section 12(1) of the Act states that before the expiry of the first period of assessment (which had commenced on 28 October 2006 following the initial assessment examination), the Responsible Clinician will record his or her findings in a certificate of further assessment.

[19] Dr McColl gave evidence in relation to this second certificate of assessment. He said that he calculated the initial five day period as expiring on 2 November 2006. As events unfolded, he was required to investigate Mr Sestan's position on Wednesday 1 November 2006 in preparation for the s 16 review in relation to Mr Sestan's condition, which was to be carried out by a Judge on that day. In this regard he met with Mr Sestan and his family on 1 November. He considered it appropriate at the same time to carry out an assessment in relation to the second 14 day period. Following this, on that day Dr McColl issued a s 12 certificate of further assessment stating that there remained reasonable grounds for

believing that Mr Sestan was mentally disordered, and that it was desirable he underwent further assessment and treatment.

[20] Ms Curtis submitted that the purpose of the assessment periods is to ensure that for the whole of the stated period, assessment and treatment continues. If a certificate is issued before the last day of the period, it is premature, and the patient does not get the requisite time of assessment and treatment. For this reason this certificate, prepared on the third day, 1 November rather than 3 November 2006, was invalid.

[21] The phrase in s 12 of the Act “before the expiry of the period” is used both in relation to the certificate prepared under s 12 at the end of the five day period, and a certificate prepared under s 14 at the end of the 14 day period. On the plain words, there is no requirement that the assessment be carried out on any particular day and it would be sufficient if it was carried out on any day within the period.

[22] The first period following preliminary assessment is referred to in the interpretation section, s 2(1). The period begins on the date when the patient receives a notice under s 11(1), and ends when five clear days have passed after that date. The second period following further assessment is defined in a similar way although the period is 14 clear days.

[23] Section 11(3) provides that at any time during the first period, the responsible clinician may give a variety of written notices, including a direction that a patient be admitted and detained in a specified hospital for assessment and treatment, or discharging the patient, or granting leave of absence. While there is no statement in s 11 that the certificate of further assessment can be issued before the expiry of the five day period, this would be consistent with the flexibility inherent in s 11, and the power given to the responsible clinician to take further steps within that period.

[24] It would seem highly unlikely that the legislature intended that no certificate of further assessment could issue until the last day of the five day period, but did not

say so. What it has done, to the contrary, is state that a certificate can be issued at any time “before the expiry of the first period”.

[25] It is unlikely that the legislature would have intended that no valid further certificate could issue, save for one issued on the last day of a period. Such inflexibility could obviously lead to all sorts of problems. The last day might well fall on a Sunday or be a day when the responsible clinician is just not available. It can be expected that the legislature would have allowed for flexibility.

[26] This is not to say that a responsible clinician could render the further assessment and treatment period of five days referred to in s 11 nugatory, by issuing a certificate of further assessment immediately after the certificate of preliminary assessment. The Act in providing for a staged process of assessment and treatment leading either to discharge or application for a Compulsory Treatment Order, envisages that there will be assessment and treatment within the stated periods. It would be wrong to sanction a grossly truncated assessment or treatment process. A severely shortened assessment period, could well mean that there was no assessment at all in terms of the Act.

[27] In this case I am satisfied that there was no such grossly truncated assessment, and there has been no breach of s 12. Dr McColl’s reason for preparing the certificate of further assessment effectively two days early, was reasonable. There had been a period of assessment and treatment for three full days since 28 October. He had carried out a detailed investigation and update into Mr Sestan’s position on the fourth day, 1 November. In his judgment it was appropriate to move forward on that day to the next stage. He also (erroneously) thought that the five day period expired on the following day, when he was not due to attend the hospital (it in fact finished on 3 November because of the requirement for “clear” days). It made sense to carry out the examination, and issue the certificate early in the circumstances.

[28] In *Capital and Coast District Health Board v TR* (Family Court Wellington, FAM-2006-085-000950, 25 October 2006), Judge P von Dadelszen adopted a similar approach to the five day period. He was of the view that it would not have

been proper to have truncated the five day period for administrative reasons only, but when it was done primarily for the health and wellbeing of the patient, then the shortened period was permitted.

[29] While I would not consider it appropriate for the stated periods to be truncated as a matter of course, where there is some good reason for a shortened period, and there has been a process of treatment and assessment in accordance with the spirit of the Act, a shortened period can be acceptable. In this case I do not consider that there has been a breach of the words or spirit of the Act in relation to the issue of the certificate of further assessment on 1 November 2006.

[30] This means that there is only the one identifiable breach of the section, namely the failure to explain in the presence of a third party, in breach of s 9(2)(d).

Is an application for the Writ of Habeas Corpus appropriate?

[31] In considering a habeas corpus application I am mindful of the fact that the purpose of the Habeas Corpus Act 2001, as stated in s 5, is to reaffirm the historic and constitutional purpose of the Writ as a vital means of safeguarding individual liberty. The Habeas Corpus Act specifically provides that there should be no entitlement to general or special discovery or to security for costs, to ensure that the speedy determination of the Writ is not delayed by interlocutory processes. It is a requirement for the application to be given precedence over other matters before the High Court (s 9). Crucially it is stated at s 14(1) that if the defendant fails to establish that the detention of the detained person is lawful, the High Court must grant as a matter of right the Writ ordering the release of the detained person from detention. The obligation falls on the relevant detaining person to justify the detention.

[32] The Writ of Habeas Corpus is unique and entirely different from other remedies. It arises from a detention, and there is an onus on the persons detaining to justify that detention. Procedural delay is not allowed. The concept upon which it rests is that no one should be detained against their will.

[33] It has, however, been widely recognised, that while the importance of the Writ has been reaffirmed by the enactment of the Habeas Corpus Act 2001, the Writ, is best suited to simple actions where the issue relates to the lawfulness of the actual act of detention. Cases which focus on more complex issues relating to the facts and circumstances that led up to the lawful act of detention are not so well suited to habeas corpus. There will often be disputed issues of fact and grey areas in the lead up to the issue of a detaining document, not suited to a pre-emptory hearing carried out within a few days of the issue of the application. The relationship between an application for a Writ of Habeas Corpus, and an application for judicial review, was analysed by the Court of Appeal in *Manuel v The Superintendent, Hawkes Bay Regional Prison* [2005] 1 NZLR 161, paras [30]-[51]), and the Writ was found to be not suited to an examination of administrative decisions which underpin the legality of an outwardly valid detention.

[34] Mrs Marshall, for the Board, suggested that the issues in this case would be best determined by judicial review. If it is suggested that I should not hear this application for that reason, I do not agree. The primary issue upon which this case is focused, namely the failure to carry out the s 9(2)(d) process, is factually straightforward, and indeed there is no contest about the fact of non-compliance. That issue is properly susceptible to a fair and sensible summary determination, and therefore falls within the ambit of cases appropriately addressed in habeas corpus proceedings: *Manuel v The Superintendent, Hawkes Bay Regional Prison*, para [49]. I cannot imagine the Court refusing to hear a Writ of Habeas Corpus issued in these circumstances, on the ground that an application for review would be a more appropriate proceeding. The Court would not be meeting its duty, reaffirmed in the Habeas Corpus Act 2001, if it did not do so. Nor would it be sensible to try and transform this simple proceeding into an application for a review, because of the inevitable delays that would follow. This would defeat the whole purpose of the urgent and accessible habeas corpus jurisdiction.

[35] The fact that this is an application for Writ of Habeas Corpus does not mean that principles of law different from those developed in judicial review and other areas of law apply to the assessment of unlawfulness. The habeas corpus process

requires speed, and the onus is on the person detaining to justify the detention, but the usual principles apply in assessing the lawfulness of the detention.

Effect of a breach of s 9(2)(d)

[36] There is no doubt that the requirement that the explanation is made in the presence of a third party in terms of s 9(2)(d) is mandatory. It is stated in s 9(2) that the arrangements “shall” include “ensuring” for the purpose of the assessment that the requirements are explained in the presence of such a third party.

[37] Ms Curtis argues that the consequence of a failure to observe the requirement to ensure the presence of a third party during the explanation, is that Mr Sestan’s detention, and his ongoing detention through to the second 14 day assessment and treatment stage (the last day of which is today) are unlawful, and that a Writ of Habeas Corpus should issue.

[38] However, a lack of compliance with an element of a mandatory statutory process does not necessarily mean that the subsequent steps in that process have no effect. Subject to any particular statutory provision, the correct approach in determining the consequences of such errors is that stated by Cooke J in *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1, 4:

When a decision of an administrative authority is affected by some defect or irregularity and the consequence has to be determined, the tendency now increasingly evident in administrative law is to avoid technical and apparently exact (yet deceptively so) terms such as void, voidable, nullity, ultra vires. Weight is given rather to the seriousness of the error and all the circumstances of the case. Except perhaps in comparatively rare cases of flagrant invalidity, the decision in question is recognised as operative unless set aside. The determination by the Court whether to set the decision aside or not is acknowledged to depend less on clear and absolute rules than on overall evaluation; the discretionary nature of judicial remedies is taken into account.

[39] This flexible approach to non-compliance of procedure requirements has a long and distinguished history: *New Zealand Institute of Agricultural Science Inc. v Ellesmere County* [1976] 1 NZLR 630, 636, *London & Clydeside Estates Limited v Aberdeen District Council* [1979] 3 All ER 876, *Secretary of State Home Department, ex parte Jeyeanthan* [2000] 1 WLR 354 at 360.

[40] While the statement in *AJ Burr Ltd v Blenheim Borough Council* was made in the context of judicial review and town and country planning issues, the principle has been applied in the habeas corpus jurisdiction to matters affecting the liberty of the subject. The approach referred to in *AJ Burr Ltd v Blenheim Borough Council* has been recently applied by the Court of Appeal in relation to an application for habeas corpus: *Campbell v The Superintendent, Wellington Prison* (CA 3/05, 14 February 2005, para [29]). There the applicant was being detained in prison and it was asserted that the order made by the Parole Board that he not be released was unlawful. A decision declining an application for a Writ of Habeas Corpus was upheld, despite irregularities in the processes of the Parole Board.

[41] It must be considered whether the principle elucidated in *AJ Burr Ltd v Blenheim Borough Council* should not be applied to an error affecting the liberty of the subject. Ms Curtis effectively submitted that it should not. She distinguished *Campbell v The Superintendent, Wellington Prison* on the basis that a breach of the requirements for consideration of a parole application are not as serious as non-compliance with a requirement of s 9(2)(d).

[42] I must confess I find the basis for a distinction between a procedurally incorrect new detention, and a procedurally incorrect prolonged detention, unconvincing as a reason for not applying the principle of a proportionate, rather than a technical and invariable, response. While a Judge's duty to avoid the "pernicious" doctrine (*Olmstead v United States* 277 US 438 (1928) at p 485 per Brandeis J), that in criminal law the end justifies the means must be considered in this situation, an invariable response of holding invalid all subsequent actions following an error in the assessment process, might well bring the law into disrepute. The Courts must protect citizens from breaches of their rights, but at least in the context of this part of this Act, the rigid response of all subsequent steps being a nullity is not required. The Court's response in the end must be proportionate; a balancing of the nature of the right and the severity of the breach. The Courts must be wary of inflexible and rigid responses and the need to maintain credible and effective system of justice. Equally, they must avoid letting the end justify unlawful means. As stated by Cooke J in the *New Zealand Institute of Agricultural Science Inc. v Ellesmere County*, at 630:

Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance.

[43] It is necessary, therefore, to consider the circumstances of the failure to observe the mandatory requirement of s 9(2)(d). In evaluating the failure, I propose to consider:

- a) the nature and importance of the requirement that has been not observed, in the context of the Act as a whole;
- b) the nature of and reason for the failure to observe it; and
- c) the effects of the failure to observe it.

The nature of the right in the context of the Act

[44] The purpose of having a member of the proposed patient's family, caregiver or other concerned person present can be assumed to be that such a person, normally sympathetic to the patient, will assist in ensuring that the patient fully understands the process that he or she is about to undergo. It is, of course, a process which can lead to the loss of the patient's liberty for a period of up to five days and then further assessment, so it is important that the patient does fully understand the process.

[45] The requirements relating to the conduct of the assessment examination set out in s 9 relate to the certificate of preliminary assessment which is issued under s 10 following the completion of the assessment examination. It is that certificate of preliminary assessment which is the legal basis for the detention of the patient in a specified hospital under s 11. There was in this case, therefore, a certificate issued in terms of s 10, and on the face of it a proper basis for the assessment and treatment of Mr Sestan. The alleged failure does not relate to any defect in the certificate itself, but rather to the background process of assessment, required by the Act.

[46] I am mindful of s 66 of the Act, which states that every patient is entitled to medical treatment and other health care appropriate to his or her condition. The

effect of delaying assessment because of lack of a support person, or of pre-emptory release for procedural error, could be that the patient did not receive appropriate care.

[47] Section 9 contains a number of requirements, expressed in a mandatory way. They include the need to nominate the person, and time and place of the assessment, (s 9(2)(a) and (b)), and ensuring, where necessary, appropriate arrangements to convey the proposed patient, (s 9(2)(e)). The failure to fulfill some requirements could be seen as severely impeding the reliability and integrity of the process, such as the assessment not being conducted by a properly qualified medical practitioner under s 9(3). Non-compliance with other requirements, such as a failure in the notice to state a detail, for instance the name of the place at which the assessment is to be conducted, could be seen as having very minor consequences, and not warranting a stern response from the Court.

[48] The requirement in question here, to ensure the presence of a person concerned with the welfare of the proposed patient during the explanation, is certainly not trivial. It relates to the comforting presence of a person sympathetic to the proposed patient during the process of explanation. However, it is for the explanation process only, and not the assessment itself, that the arrangement shall be made. It is not stated that any such third person need have any qualifications or objectivity, or indeed any obligation to help or advise the proposed patient. While important, this is not the articulation of a fundamental right.

The nature of and reason for the failure to observe s 9(2)(d)

[49] Ms Smith, the registered nurse involved, acknowledged throughout that a conscious decision was made by her to proceed without a third person being present under s 9(2)(d). She explained why she made this decision. She had asked Mr Sestan's mother or a member of his family to come in to the Hospital to participate. The mother refused and said that the family did not wish to be involved, as the result would be anger on the part of Mr Sestan. Mr Sestan's mother said that at times she felt afraid of him. It was after 9:00 pm on Saturday night. Mr Sestan, when asked, could not suggest any other third party. Mr Sestan was displaying

unusual behaviour, and acknowledging nudging the back of a car on the motorway at a speed of over 90 kilometres an hour, to make that car hurry up. He seemed to think this was a perfectly permissible and appropriate step for him to take. Ms Smith could not think of anyone who would be an appropriate third person. She formed the view that it was necessary for the assessment to take place with all urgency that night, rather than Mr Sestan being allowed to drive away from the hospital and hopefully return the next day. She says that she explained to Mr Sestan the process, and that Mr Sestan did not wish to have any other person present.

[50] Ms Smith made an error in reaching the decision she did. A failure to observe a mandatory statutory requirement cannot be excused. Ms Curtis made the point that it would have been open to the Board to have had a list of independent third parties who might be available to fulfil the s 9(2)(d) role, in the absence of available family members. This list could include lawyers, social workers or other professional persons.

[51] The Crown has suggested that to have a list to force a third person on a patient for the purposes of s 9(2)(d) could be a breach of the patient's right to privacy. I note, however, that s 7 of the Privacy Act 1993 states that its provisions do not derogate from the provisions of other Acts, which must include a provision such as s 9(2)(d). If there was a particular objection on the part of the patient to a third party being present, that could be dealt with on its merits. It is not a reason for there not to be such a list.

[52] However, given the unavailability of any third party at that hour of night, and any list of available persons, and given the possible consequences of allowing Mr Sestan to leave, some sympathy must be extended to Ms Smith and the dilemma she faced. If he was not assessed, there was the distinct possibility that Mr Sestan might do harm to himself or others if he was just allowed to drive away. He had a long history of mental disorder. He appeared to have no appreciation of his mental condition. He was not taking his medication. There was no one at that time of night she could call on to fulfil the s 9(2)(d) role. She could not call on another staff member, who would not meet the criteria. If she did not carry on, she would have to release Mr Sestan and hope that he would return the next day.

[53] I should also refer to Ms Smith's evidence that she explained to Mr Sestan details of the process, and that he did not wish to have any person present at the time. Mr Sestan in his brief affidavit did not appear to accept that he understood the process at all. Given the fact that he was not called upon for cross-examination, I do not feel that it would be safe to assume that he did in fact understand the full implications of the process that he was going through. I do, however, accept that Ms Smith did believe that he understood, and was told by him that he did not wish any other person to be present.

[54] Ms Smith also referred to a form which she read to Mr Sestan. I put that to one side, as the form referred to a non-existent Act, and appeared to be, in any event, out of date. The Department needs to prepare a new form.

[55] Thus, the nature of the non-compliance with s 9(2)(d) was serious, but did not in itself necessarily warrant the drastic consequence of the subsequent invalidity of the detentions that followed. While deliberate, in the sense that Ms Smith was aware that she was not complying with the Act, she had the safety of Mr Sestan and the public at stake. I do not consider that she was endeavouring to take advantage of Mr Sestan, and I consider that she thought that she was acting properly.

Effects of the failure to observe the requirement

[56] In this case it is very hard to evaluate the effect, in terms of the fairness of the process, of Mr Sestan having the process explained without there being an independent person present for the process of explanation. It is possible that the presence of such a person could have meant that he better understood the assessment that was to take place. However, this must be seen in the light of the clear evidence concerning his mental disorder on the night, and his expressed wish to have no-one present.

Recent cases

[57] Ms Curtis placed heavy reliance on two recent Judgments, where Writs of Habeas Corpus were issued to patients where there had been a failure to comply with

s 9 of the Act: *Keenan v Director of Mental Health Services* [2006] 3 NZLR 573 and *Chu v District Court of Wellington and Director of Area Mental Health Services, Wellington* (Wellington High Court, CIV 2006-485-001572, 24 July 2006, Fogarty J).

[58] In *Keenan v Director of Mental Health Services* Fogarty J emphasised the importance of a fair compulsory assessment process, and the mandatory wording of s 9(2)(d). He emphasised the importance of the presence of an independent third person. He stated at para [13]:

It is not necessary to decide whether it has been irretrievably tainted because after hearing counsel it is possible to address the situation in this way.

He proceeded to issue a Writ of Habeas Corpus, to lie in the Court until noon on Monday, by which time another s 9 process could be conducted.

[59] In *Chu v District Court of Wellington and Director of Area Mental Health Services, Wellington* he concluded that it was not the intention of Parliament that the s 9(2)(d) procedure could be disregarded (para [23]). He granted a Writ of Habeas Corpus, but ensured that the applicant was still in care by reason of an order under the Bail Act. As a consequence of that bail he was required to reside in hospital.

[60] In my view, both those two cases are distinguishable from the facts of the present case. In those cases there were aspects of the defendants' failure to have a third person present that caused the learned Judge considerable concern. In *Chu v District Court of Wellington and Director of Area Mental Health Services* he could see "no reason whatsoever" for the failure (para [8]), and considered aspects of the defendants' behaviour "extraordinary" (para [10]). There were elements of unfairness in those cases, which are not present in this case. I do not consider that the conduct of Ms Smith was reprehensible, or indeed that the requirements of s 9(2)(d) were "disregarded". An attempt was made to comply with them. Further, in both *Chu v District Court of Wellington and Director of Area Mental Health Services* and *Keenan v Director of Mental Health Services*, the issue of the Writ did not mean that the patient was released from detention. I would be reluctant to grant a Writ of Habeas Corpus, and then leave it to lie in Court for a period, so that it

ceased to have immediate effect. A person is either entitled to the issue of the Writ, or not. If the person is so entitled, the Writ should issue immediately.

[61] In the end, I am satisfied that Ms Smith, the registered nurse, gave the most anxious consideration to her obligations under s 9(2)(d). I am satisfied that she and the other persons involved acted as they thought best, and endeavoured to be as fair as they possibly could be to Mr Sestan. They had tried to get an independent person to come.

[62] I note that in two cases the Family Court has approached non-compliance with s 9(2)(d) on the basis that this did not invalidate the subsequent detention, applying the *AJ Burr Ltd v Blenheim Borough Council* approach: *Re C (Mental Health)* (1993) 10 FRNZ 545 and *Counties Manukau District Health Board v Lovatt* (Family Court Manukau, FAM 2006-092-001607, 18 August 2006, Judge DA Burns, para [32]). These were not habeas corpus cases, but are significant in that the failure to observe the requirements of s 9(2)(d) was not regarded as invalidating the later assessment process. The difficulties in finding an independent person, when no such person was available, were recognised in *Counties Manukau District Health Board v Lovatt*, para [25], where *Keenan v Director of Mental Health Services* and *Chu v District Court of Wellington and Director of Area Mental Health Services, Wellington* were distinguished.

[63] In *Re B [Mental Health]* (1994) 11 FRNZ 583, Judge PF Boshier at p 586 held that the failure to have a person present under s 9(2)(d) did not render the explanation nugatory. He accepted that there could be situations where it was not possible for a third person to be made available. He stated that he would find the procedure flawed if there was a person reasonably available and a failure to take reasonable steps to have them involved, but that it was a "... matter of balance". I have found these Family Court cases, where a proportionate rather than an inflexible response has been adopted, of assistance.

Events have moved on

[64] Mrs Marshall, for the Board, had submitted that Mr Sestan's detention is not necessarily dependent on the lawfulness of the s 10 certificate that followed the s 9 process. This is because he was subsequently assessed on 1 November 2006, and a certificate of further assessment under s 12 was issued by Dr McColl on that date.

[65] I have found earlier in this Judgment that the issue of the certificate of further assessment was not invalid on the basis of it being issued prematurely. It is undoubtedly on its face a valid certificate. Mr Sestan will now have been assessed and treated in the 14 day period that followed from the issue of that certificate of further assessment. Thus, on its face, the detention pursuant to the certificate of assessment was lawful.

[66] The Writ of Habeas Corpus is concerned with the lawfulness of detention. As indicated earlier in this Judgment, illegalities prior to the time of detention are not usually the appropriate subject of an application for a Writ of Habeas Corpus. Those upstream processes may be properly challenged by judicial review, but only in rare cases will they warrant examination of the habeas corpus procedures.

[67] Mrs Marshall for the Crown has referred to an Australian decision where the Victorian Supreme Court refused to intervene when the applicant was unlawfully transferred from his home to an institution, but the relevant forms upon which the detention was based were not themselves deficient: *Murray v Director General, Health and Community Services Victoria*, (Supreme Court of Victoria, 6060 of 1995, 23 June 1995, Eames J). The submission that a prior illegality should be treated as a continuum through to the production of the relevant forms was rejected, and it was held that the Writ of Habeas Corpus is not designed to identify illegality in procedures, but is rather directed to the lawfulness of the actual detention. It was suggested that if the forms were valid, any illegalities surrounding other aspects of the conduct would be irrelevant.

[68] I am not sure that the distinction between the legality of the detaining document, and the illegality of procedures leading up to its creation, is so clear. As I

indicated earlier, flagrant and serious upstream illegality might warrant the issue of a Writ. In *Manuel v The Superintendent, Hawkes Bay Regional Prison*, para [49], the Court of Appeal said:

A person who detains another can clearly expect to establish, effectively on demand, the legal justification for the detention ... we accept that apparently regular warrants, or other similar documents, will not always be the decisive answer to a habeas corpus application. It will be a rare case, we think, where the habeas corpus procedures will permit the Court to enquire, into challenges on administrative law grounds to decisions which lie upstream of apparently regular warrants. This is particularly likely to be the case where the decision-maker is not the detaining party.

[69] Here the decision-maker is the detaining party. I would not be prepared to go so far as to say that prior illegality could not be relevant in the issue for a Writ of Habeas Corpus, even when the actual warrant or, in this case, certificate of assessment, is valid on its face.

[70] While prior validity is highly relevant to a Court in considering the lawfulness of detention, this is not one of those rare cases where procedural defects upstream of the issue of apparently regular assessment certificates, warrant the issue of a Writ.

[71] It is also relevant in considering the Court's response to the procedural defect, as already mentioned, that the Act does provide for the urgent review of any detention of a patient, and that indeed there have already been two reviews at Mr Sestan's request, the first of which took place on 1 November 2006. Two Judges have considered his condition, and whether he should be released. These are not matters that the Court can ignore in assessing the appropriate response to Mr Sestan's application. The fact that the reviews have taken place is a further indication that there is nothing arbitrary or unfair in his ongoing detention under the Act.

Summary in relation to effects of non-compliance with s 9(2)(b)

[72] The end cannot justify the means in the area of personal liberty. The Court must condemn the failure to observe the statutory requirement of s 9(2)(d). The

Board must ensure that the statutory requirement can always be met, by ensuring that persons are always available, who meet the requirements of s 9(2)(d).

[73] However, I do not consider that the requirements of s 9(2)(d) should be seen as so integral to the fair conduct of the processes of the Act, that non-compliance will always result in the invalidity of all later actions. While that could be the result in certain circumstances, in these particular circumstances such a result is not warranted or appropriate. The non-compliance was not flagrant or reckless, and does not require such a stern response. Nor, in the circumstances, does fairness to Mr Sestan, require such a result.

[74] I do not consider in the circumstances, that Mr Sestan is subject to arbitrary detention. I consider that the Board has established that his detention is lawful.

Assertion that Mr Sestan not “mentally disordered” and that the evidence to justify detention is irrelevant

[75] This is the sort of issue which is entirely unsuited to an application for habeas corpus in that it involves an issue of fact, in this case of a person’s mental condition. It also does not involve an issue focused on the illegality of detention; rather, the issue is whether the factual justification for detention is proven. This is not a matter that is properly raised in an application for habeas corpus, and if it can be raised, will fall within the ambit of judicial review. In *Murray v Director General, Health and Community Services Victoria*, p 46, the Court declined to make an investigation into the mental state of an applicant, on the basis that the Act contained detailed provisions of the assessment of that state. It is also to be noted that a Judge of the High Court may hold a judicial review under s 84 of the Act.

[76] In any event, it is appropriate that I record that on the material before me I am satisfied that there was a proper basis for the Board to conclude that Mr Sestan was mentally disordered as defined by the Act. Dr McColl’s evidence that the plaintiff has bipolar/schizoaffective disorder and becomes psychotic when manic was not challenged. There was a challenge to the factual material provided by the mother, who had indicated on the date of the preliminary assessment that Mr Sestan had

collided with a pedestrian. However, there is no indication that Dr Stoyanof was influenced by that material. Rather, he had Mr Sestan's advice that he had deliberately driven his car so that it touched the back of the car in front in the outside lane on the motorway. He could see nothing wrong with this because that car was travelling too slow.

[77] There was also a challenge to a reference in the notes to Mr Sestan wanting to buy two houses. It was not clear in the end what the actual facts were in relation to this matter, but in the end I do not regard it as having been a highly material factor in the decision-making process.

[78] It was the driving incident, and Mr Sestan's behaviour and lack of insight that influenced Dr Stoyanof, as shown in his note made at the time. There is no basis for a challenge to his substantive assessment that Mr Sestan was mentally disordered, as there was ample evidence upon which to conclude that Mr Sestan had a mental disorder in terms of s 2. Further, the assertion in the application that the evidence relied upon to justify the detention was irrelevant, has not been supported by any of the material presented in relation to this application. This basis for challenge cannot succeed.

Result

[79] The defendant Board has established that the detention of Mr Sestan is lawful. The application for a Writ of Habeas Corpus is dismissed.

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Asher J