Notes on Mental Health Review Tribunal Decisions reported by the NZLII as at August 2015

(1) 09/102 - Applicant No: 09/102 [2009] NZMHRT 119 (9 October 2009)

- Section 79
- Sections 5 and 11 of NZ Bill of Rights Act
- Section 66 right to treatment
- Appropriate treatment
- Positive and negative liberty
- Professor Dawson inaugural lecture
- Applicant not fit to be released from compulsory treatment.

(2) 09/070 - E (09/070) [2009] NZMHRT 132 (27 November 2009)

- Section 75 complaint
- Complainant mother of young patient.
- Allegation that complainant and daughter left alone prior to daughter's transportation to hospital.
- Jurisdiction of Tribunal to hear complaints.
- Complaint must relate to denial or breach of a right conferred on the patient.
- Tribunal can only consider complaint if complainant not satisfied with outcome of complaint to district inspector.
- Assessment process under the Act outlined.
- Process under section 75 different to that under sections 79 to 81 as it involves an investigation.
- Complaint not found to have substance as no breach of section 66 right found.
- Tribunal only required to report and make recommendations where complaint has substance.

(3) **09/130 – Applicant 09/130 [2010] NZMHRT 35 (25 March 2010)**

- Section 79.
- Difficult challenges for clinicians to best assist applicant achieve an improved quality of life.
- Diagnosis of factitious disorder involving intentional production or feigning of signs or symptoms in order to assume sickness role.
- Harmful insertion of objects into applicant's body.
- Waitemata Health v. Attorney General and Others case discussed.
- Meaning of mental disorder.
- Whether those with personality disorders can be found to be mentally disordered.

- Steps to be followed by clinicians and Review Tribunal when determining whether or not a patient is mentally disordered.
- Four steps outlined.
- Interrelationship between delusions and disorders of mood, perception, volition and cognition on the one hand, and abnormality on the other.
- Interrelationship between abnormality on the one hand, and dangerousness or diminished capacity of self care on the other.
- Findings of steps in the determination process considered collectively to derive an appropriate conclusion.
- Mental disorder ultimately a matter of judgement, rather than a formulaic process.
- Tribunal assisted by clinical expertise of its own psychiatrist member.
- Interrelationship between disorder of volition and disorder of cognition.
- Finding that applicant is mentally disordered.

(4) **09/117 – Applicant 09/117 [2009] NZMHRT 134 (9 December 2009)**

- Section 75 complaint
- Complainant admitted for compulsory assessment following application by Police.
- Discharged after three days apparently well.
- Complainant alleged evidence justifying admission was specious.
- District inspector did not uphold the complaint distinguishing "reasonable grounds for *believing* that the proposed patient is mentally disordered" in section 10 with section 27 requirement on court to *determine* whether or not the patient is mentally disordered.
- The Tribunal held no jurisdiction to hear the complaint as complainant was not alleging any breach of a right conferred by Part 6 of the Act.
- Only conceivable breach was section 66 right to medical treatment and other health care appropriate to his or her condition.
- Tribunal held that section 66 right was a positive one about treatment and care to which complainant is entitled; by contrast complaint was that health care was *received* when it should not have been.
- Gravimen of complaint that should not have become a patient; but in that regard rights are protected by Part 1 and Part 2 procedures which do not relate to Part 6 rights.

(5) **09/103 – Applicant NO. 09/103 [2009] NZMHRT 124 (23 October 2009)**

- Section 80
- Section 77 clinical review
- Section 31 CP (MIP) Act – effect of certificate that defendant is no longer unfit to stand trial.
- Options open to the Attorney General.

- Apparent pointlessness of Tribunal certificate when clinical certificate to same effect has already issued.
- Definition of "unfit to stand trial".
- Tribunal certifies applicant is no longer unfit to stand trial.

(6) **09/032 – ABC (CTO/09/032) [2009] NZMHRT 58 (15 May 2010)**

- Section 79
- Section 76 clinical review procedure – whether deficiencies nullified order.
- Re E discussed
- Re Hutt Valley Health discussed
- Reference by Tribunal to court decisions
- Whether former responsible clinicians should provide second opinions.
- Applicant not fit to be released.

(7) **09/127 – Applicant 09/127 [2010] NZMHRT 17 (15 February 2010)**

- Section 79.
- "This case strikingly illustrates that some persons with psychiatric illness are deprived by that illness of the ability to understand the illness, how it impacts on them, and how it can be treated and contained."
- Applicant sixty-eight year old with approximately thirty year psychiatric history.
- Not fit to be released from compulsory status.

08/184 – Applicant 09/184 [2009] NZMHRT 22 (13 February 2009)

- Section 79
- KMD, PFB, JRS, and MJB referred to.
- Waitemata Health v. The Attorney General and others referred to.
- Interrelatedness of necessity for compulsory treatment and dangerousness and diminished self-care.
- Agreement to voluntary treatment may overcome dangerousness and self-care concerns.
- Considerations relevant to determination of whether a patient remains mentally disordered.
- Applicant not fit to be released.

(8) **10/073 – Applicant 10/073 [2010] NZMHRT 3 (26 August 2010)**

- Section 81 Restricted Patient Order.
- Applicant a party in Waitemata Health v. Attorney General and Others.
- Paraphilia (sadism and masochism).

- Discussion of section 81 procedures.
- Waitemata Health summarised.
- 09/130 discussed.
- Finding that applicant is mentally disordered having an abnormal state of mind characterised by disorders of volition and cognition.
- Various reports from Professor Mullen discussed.
- Finding by Tribunal personality disorders made up of antisocial, narcissistic, borderline and paranoid traits.
- Discussion of "intermittent" in mental disorder definition.
- Finding of disorder of cognition.
- IM (05/133) discussed – abnormal state of mind may comprise many aspects, not just delusions or one of the four stated disorders.
- Finding that applicant mentally disordered.
- Meaning of "appropriate" (in section 55) and "necessary" (in section 81); MAH (07/22) discussed.
- Purpose and effect of restricted patient declarations.
- Informal consequences and benefits of special patient status also applying to restricted patient status.
- Meaning of "danger" and "special difficulties" in section 55(3)(a).
- Finding that applicant should continue to be declared to be a special patient.

(10) 11/019 – Applicant 11/019 [2011] NZMHRT 19 (11 May 2011)

- Section 79.
- Question raised: "For how long should compulsory treatment orders last once patients are free from the symptoms of illness which resulted in the orders being made?"
- Balance between the rights of patients to autonomy and the rights and obligations of the community to help the sick and protect its citizens.
- Whether an implication of the Waitemata Health decision is that patients with life-long illness may never be released from compulsory status.
- Changes of fact or circumstance may mean that patients with on-going illnesses or disorders from a clinical perspective may be no longer mentally disordered and fit to be released from compulsory status.
- Possible changes of fact or circumstance are limitless in number.
- Compliance with treatment often a crucial factor as only when acutely unwell that some patients present as a serious danger or with a seriously diminished capacity of self-care.
- If due to compliance condition is unlikely to relapse then as a matter of law it may be said that serious dangerousness or seriously diminished capacity of self-care no longer apply.
- Compliance linked to insight.
- Meaning of insight.

- Changes of extrinsic circumstances can be relevant to whether patients are still mentally disordered; 08/184 referred to.
- Finding that applicant has intermittent abnormal state of mind characterised by delusions and a disorder of mood.
- Finding that applicant's abnormal state of mind still constitutes a serious danger to self and others.
- Conservative approach justified as will soon become apparent as to whether applicant still requires treatment and whether he will be compliant with that treatment; developing situation.
- Applicant not fit to be released.

(11) 11/026 – Applicant 11/026 [2011] NZMHRT 26 (31 March 2011)

- Section 80 – Unfit to stand trial.
- Application by the Attorney General.
- Consequences of a finding that patient no longer unfit to stand trial.
- Meaning of "unfit to stand trial"; court judgments referred to.
- Tests of whether or not an applicant is unfit to stand trial.
- Interrelationship between paragraphs (a) and (b) of unfit to stand trial definition.
- Finding that patient is no longer unfit to stand trial.

(12) 11/040 – Applicant 11/040 [2011] NZMHRT 40 (1 August 2011)

- Section 79.
- Meaning of "serious danger" in the mental disorder definition.
- Problematic case; usual hallmarks of dangerousness absent; no criminal record or history of physical violence.
- Applicant should not be deemed to have seriously diminished capacity of self-care only because illness affects self-care; if that was case an inordinate number of other persons who suffer from psychiatric illness would also be deemed to have seriously diminished capacity of self-care.
- Serious dangerousness ultimately a matter of judgement having regard to multiplicity of considerations and unique circumstances.
- Helpful analysis of four considerations:
    (1) magnitude and gravity;
    (2) likelihood;
    (3) proximity or imminence;
    (4) frequency.
- The four considerations not isolated one from the other; if one consideration high then dangerousness might be found; for example high gravity combined with low frequency may constitute dangerousness, and likewise low gravity but high frequency.
- Absence of one consideration does not necessarily result in no finding of dangerousness.

- Issue of relapse discussed; five considerations as mentioned in 08/184.
- Indications of dangerousness outweigh contra-indications of dangerousness.
- Finding that applicant not fit to be released from compulsory status.

(13) 11/064 – AM [2011]NZMHRT 64 (5 October 2011)

- Section 80 (acquittal on account of insanity).
- Four factors relevant to whether special patient status still required.
- Three other considerations.
- Discussion of sections 6, 11, 18 and 22 of NZ Bill of Rights Act.
- "Least restrictive intervention".
- Guidance on "exit" criteria from "entry" criteria. High Court decision R v. M B Allen discussed; five important points referred to.
- Finding that patient's condition does not require further detention as a special patient.
- Discussion of NZ Bill of Rights Act, section 11, right to refuse to undergo medical treatment.

(14) 11/118 – X [2011]NZMHRT 118 (1 December 2011)

- Implications of caring for child.
- Mother subject to indefinite community treatment order living with husband and one-year old child.
- Mother reported hearing thoughts about killing child.
- Loving and excellent mother.
- Assessment of dangerousness; likelihood of harm to child not high but seriousness of potential harm high; therefore serious dangerousness established.
- Assessment of capacity of self-care; possible social withdrawal; seriousness not high but likelihood is higher; therefore seriously diminished capacity of self-care.

(15) 11/139 – Y 11/139 [2012] NZMHRT 1 18 January 2012)

- Applicant fifty-year old living independently.
- Long history of schizophrenia; many hospitalisations, including recently; therefore first limb of mental disorder definition readily established.
- Live issue whether or not the applicant has a seriously diminished capacity of self-care.
- Meaning of seriously diminished capacity of self-care discussed. Re C 28/8/00 (Judge Thorburn) referred to.
- Applicant's level of functioning in social realm a subjective test.
- Minimum standard considered from an ordinary person's perspective an objective test.

- Those looking after themselves as best as can be expected in the circumstances may still have a seriously diminished capacity of self-care if the level of self-care is deemed unacceptable by society.
- Review Tribunal refrains from endeavouring to define capacity of self-care.
- Incapacity can take many forms.
- Incapacity unique to the individual having regard to both intrinsic and extrinsic considerations.
- A useful indicator of capacity of self-care is the extent or otherwise to which an individual relies on others for support.
- Capacity to avoid conflict is another important indicator of capacity of self-care.
- Ability to maintain accommodation another important indicator of capacity of self-care.
- Neglected attire may impact on social relationships and in turn on capacity of self-care.
- Capacity of self-care can be looked at narrowly or broadly.
- Narrow sense relates to basics of living.
- Broader sense relates to engaging harmoniously with others.
- Need for compulsory hospitalisation indicative of incapacity of self-care.

(16) 11/143 – P 11/143 [2012] NZMHRT 2 (29 February 2012)

- Timing of reviews; 21 day requirement for Tribunal reviews under section 79(6).
- Application received 14 November 2011; hearing 24 February 2012.
- Reasons for delay; implications of delay.
- Firmin v. The Attorney General of New Zealand (Department of Corrections) referred to; non-compliance with a statutory provision does not automatically render subsequent actions unlawful.
- Review Tribunal proceedings not nullified in the event of non-compliance with statutory time frame.
- Pre-hearing request that Tribunal call for report pursuant to clause 4(1) of schedule 1.
- Tribunal's usual approach to clause 4 reports.
- Dangerousness and capacity of self-care: some considerations apply equally to both.
- Intense involvement of applicant's mother both a matter of reassurance (because of support) and concern (because of lack of objectivity).

(17) 12/017 – Q 12/017 [2012] NZMHRT 12 (23 March 2012)

- Special patient on account of insanity.
- Summary of responsible clinician, Tribunal and Ministerial roles in such cases.

- Applicant not ill but personality disordered.
- Whether issue of mental disorder relevant on review of special patient (insanity) cases.
- Mental disorder not required for special patient status.
- Emphasis on patients' own interests and safety of the public, rather than on issue of mental disorder.
- Patient's condition refers to patient's mental state but Tribunal may take account of a range of considerations not necessarily mental in nature.
- Applicant regarded to have psychopathic personality traits.
- Issue of mental disorder relevant to the extent that if special patient status is removed then applicant may cease to be subject to any compulsory treatment because arguably not mentally disordered as defined.

(18) 11/126 – W 11/126 [2012] NZMHRT 3 (2 March 2012)

- Reasons why applicant fit to be released from indefinite community treatment order.
- Schizoaffective disorder; thirty-year history; vulnerable personality.
- Indecently assaulted a minor nine years ago.
- Continuing low-key grandiose and persecutory ideation and limited insight into illness.
- Applicant says welcomes treatment and will continue with it if voluntary.
- Only risk to others from further possible sexual offending, but risk low.
- Would be easy to re-engage applicant if condition relapses.
- Cases of 08/184 and 11/019 referred to.
- Not mentally disordered and fit to be released.

(19) 12/032 – Z 12/032 [2012] NZMHRT 32 (26 April 2012)

- Orders under section 25 Criminal Procedure (Mentally Impaired Persons) Act 2003.
- Criminal court can make compulsory treatment order instead of special patient order where defendant found unfit to stand trial or is acquitted on account of insanity.
- Such orders supersede existing compulsory treatment orders; reasons for that.
- Clinical review implications of fresh orders being made under section 25.
- When a tribunal is reviewing condition of an applicant for a second or more time it seeks to identify any changes of circumstance such as might lead it to a different view than previously adopted.

(20) 12/064 – R 12/064 [2012] NZMHRT 64 (20 June 2012)

- Section 79;
- Applicant has epilepsy and is also diagnosed with schizophrenia
- Inter-relationships between epilepsy and schizophrenia discussed.
- Mental disorder definition is phenomenological rather than diagnostic.
- Clarity as to diagnosis is not therefore required for a finding of mental disorder.
- Nor is certainty as to causation of abnormality required for a finding of mental disorder.
- Waitemata Health v. Attorney General and others discussed.
- Presentation of any patient is multi-factorial demanding of a holistic approach.
- 11/040 [2011] NZMHRT 40 (1 August 2011) discussed.
- Determination of serious dangerousness a matter of judgement having regard to multiplicity of considerations and unique circumstances.
- Interplay between physical and mental health.

(21) 12/020 (V)

- Section 79;
- Dilemmas facing clinicians on deciding whether or not to discharge long-term patients.
- How long a patient should be kept under the Act before being discharged on an informal basis?
- Determination of mental disorder requires a multi-factorial approach.
- Mental disorder definition is a legal construct rather than a clinical one.
- Fitness to be released inextricably linked to issue of whether or not patient mentally disordered.
- Waitemata Health v. Attorney General and others discussed.
- Patient rights are implicit in mental disorder definition.
- Although "necessity" is not a required legal test, it can be taken into account.
- Important considerations when considering "necessity".
- Meaning of "self-care".
- Helpful reasoning by which Tribunal can conclude that an applicant who still has a mental illness can be found to be no longer mentally disordered and thereby fit to be released.
- KMD 04/131 and 05/07 referred to.

(22) 12/071

- Special patient on account of insanity.
- Case illustrates whether special patient status should continue involves complex considerations and weighing of competing issues.
- Leave of special patients.
- "Hospital" refers to "premises" and excludes hospital grounds.

- Ministerial long leave.
- Short-term leave granted by Director.
- Usual step-by-step progressive basis of leave.
- Court of Appeal decision in M v. The Queen concerning special patient status discussed.
- Nature and purpose of special patient status.
- No meaningful distinction between the criterion of "necessity" to which courts and the Minister have regard in the criterion of "requirement" to which the Tribunal must have regard. Meaning of "required" explained.
- Enquiry as to special patient status a broad one.
- Inter-relationship between public and patient interest.
- System of checks and balances.
- Reasons for special patient status.
- Certain certificates sent to Minister.
- Lists of arguments for and against continuation of special patient status.
- Chronicity, periodicity, seriousness and proximity discussed.

(23) 10/070A

- Hearing held by telephone conference
- Circumstances in which Tribunal will conduct hearings by telephone conference.
- Comments also made about when Tribunal might conduct hearings by video conference.
- Applicant has had large number of Tribunal reviews.

(24) 12/075

- Safety issues arising during hearing
- Applicant's attendance excused but later seeks to return to hearing.
- Applicant's right to be present during hearing.
- Tribunal's power to excuse the attendance of the applicant.
- Tribunal's power to exclude the applicant.
- Procedural gaps in Schedule 1.
- Inherent power of courts to prevent abuses of their procedure discussed.
- Zaoui v. The Attorney General referred to.
- Tribunal decides it has implied power to control its proceedings despite gaps in Schedule 1.

(25) 08/114

- Section 79.
- Finding of serious danger to the safety of others.

- No individual behaviour amounted to serious danger but the *accumulation* of lesser dangers did.
- This is another way of expressing the criteria of gravity, likelihood, proximity and frequency.
- In this case the gravity was low but the likelihood, proximity and frequency were high, which taken together amounted to serious danger.

(26) 12/117

- Section 79
- Importance of predicted compliance with treatment when determining whether mentally disordered.
- Level of insight a means of predicting compliance.
- Meaning of insight.
- Writings of Assoc Professor Diesfeld discussed.
- Decision of Mental Health Review Board of Victoria discussed.

(27) 12/125

- Section 79
- Repeat applicant.
- Applicant has applied on 8 previous occasions in past 8 years.
- Circumstances largely unchanging; Tribunal has always decided not fit for release.
- Purpose of applications to give comfort to applicant that clinicians are making the right decisions; wish for release from compulsory status arguably of lesser importance.
- Discussion about use of telephone conferences and videoconferences in such circumstances.
- Discussion about how often applications might be justified in such circumstances.
- Unfettered right to apply affirmed.

(28) 12/148

- Section 79.
- Parents disagree about applicant's care
- Unorthodox approaches to treatment.
- Orthomolecular psychiatry
- What the Tribunal is called upon to decide.
- How the Tribunal deals with conflicting views as to treatment and care.
- How the Tribunal evaluates evidence.
- Circumstances in which a patient who has an ongoing illness can be found to be no longer mentally disordered.

(29) 12/168

- Persons permitted to be present during hearings.
- Privacy and confidentiality of hearings.
- Presence of support people.

(30) 13/012

- Issues arising when application is signed by someone other than the patient.
- Agents can sign applications on behalf of patients.
- Applicants can be other than the patients.
- Who is able to be an applicant?
- Meaning of "principle care giver"
- Purpose of section 79 applications.
- Application a nullity because it sought something outside Tribunal's jurisdiction.
- Sequence of evidence and submissions when the applicant is someone other than the patient entitled to be present.

(31) 13/047

- Section 79 application made when applicant in community under compulsory treatment order.
- Before the hearing date applicant made an inpatient under section 29(3).
- Two types of inpatient admissions under section 29.
- Reassessment procedures under paragraph (b) of section 29(3).
- If patient is being reassessed then is no longer subject to compulsory treatment order and therefore Tribunal hearing cannot proceed.
- If new order made then Tribunal review cannot occur until after clinical review.
- Five and a half month maximum period from date of order to date of entitlement to Tribunal review.

(32) 05/133

- Section 79
- Tribunal disagrees with one of its own previous decisions applying the "strands" argument.
- "Strands" argument holds that if there are no delusions or any of the 4 disorders referred to in the first limb of mental disorder definition , but there are "disturbances" in respect of a number of them, then taken in combination those disturbances can give rise to an abnormal state of mind in terms of the definition.

- Tribunal now holds that at least delusions or one of the 4 disorders must be present in order that there is a finding of an abnormal state of mind.
- It is not necessary however in order to satisfy the mental disorder definition that delusions or one of the 4 disorders of themselves (ie individually) gives rise to one of the of second limb risk phenomena. That is because it is the abnormal state of mind, not delusions or one of the 4 disorders which must give rise to at least one of those phenomena if a finding of mental disorder is to be made.
- Abnormality of mind is not limited to one or more of delusions or the 4 disorders. Many features, including intellectual incapacity and substance addiction, can go to make up an abnormal state of mind.
- If for example only a disorder of mood existed which did not itself cause seriously diminished capacity of self care, the mental disorder definition would nonetheless be satisfied if, as a result of other features comprising the abnormal state of mind, that abnormal state of mind caused a serious diminution of self care.
- If delusions or at least one of the 4 disorders exists, that does not necessarily result in an abnormal state of mind in terms of the mental disorder definition. The issue is always whether the overall presentation amounts to one which clinicians would recognise as abnormal.
- The reasons precluding the Act being invoked set out in section 4 only apply if they would be the sole reason for compulsory treatment. If there are reasons apart from the five reasons referred to in section 4 justifying the invoking of the Act, then the fact that one of those five section 4 reasons is present does not preclude the Act being invoked. If for example a person abuses substances but additionally has a disorder of mood, the latter might justify the Act being invoked, and the substance abuse does not preclude that occurring.
- If one of the five section 4 reasons causes delusions or one of the 4 disorders referred to in the mental disorder definition, then the existence of that reason does not preclude the Act being invoked. If for example substance abuse causes a disorder of cognition, the Act may be invoked despite substance abuse being a reason referred to in section 4.
- Tribunal found that the Applicant's mild intellectual disability underlay his disorder of cognition and that his serious paedophilia underlay his disorder of volition, and that taking account of personality features as well, the applicant had an abnormal state of mind, which gave rise to serious danger from sexual abuse, and hence was mentally disordered and not fit to be released.

(33) 13/068

- Section 79.

- Case raised the controversial question of whether or not persons without a recognised psychiatric illness can be deemed to be mentally disordered and made subject to compulsory treatment.
- Tribunal took the opportunity to review the law and its previous decisions.
- Applicant's diagnosis uncertain.
- Applicant not receiving any medication because unresponsive to medication
- Applicant not receiving any other therapy but was hospitalised.
- The meaning of mental disorder discussed. Other Tribunal decisions mentioned.
- The meaning of fitness to be released discussed. Other decisions mentioned.
- Tribunal found applicant mentally disordered on account of disorders of cognition and volition because of unusual and disturbed behaviour, giving rise to seriously diminished capacity of self care.

(34) 13/088

- Section 79
- When might patients with lifelong illnesses be found no longer mentally disordered and hence fit to be released?
- The relevance of "necessity" to fitness to be released.
- Fitness to be released determination equated with the issue of justification for the order
- Considerations relevant to fitness to be released
- Balancing competing rights and considerations in context of uncertainty and unique circumstances.
- Mention of earlier reported Tribunal decisions of 11/019 and 08/184.
- Waitemata Health decision referred to.
- Patient can be fit to be released even if might become unwell in the future.

(35) 13/131

- Section 79
- Bipolar affective disorder and CYFS involvement.
- Linkage between justification for order, fitness to be released, and mental disorder.
- Entry and exit criteria for compulsory status more closely aligned that the legislation implies.
- Necessity for the order discussed.
- On one view patient is still mentally disordered but on another view not; considerations relevant to each view.
- Despite not accepting of diagnosis or treatment, found fit to be released.

(36) 13/122

- Section 79
- Proper duration of orders cannot be determined with precision
- Opposing considerations and reasons to be weighed when determining fitness to be released and a judgement made.
- Dilemma posed where patient well for extended period but likely to be non-compliant with treatment if released from compulsory status.
- Mental disorder definition dynamic, not inert.
- Meaning to be read both out of and into the mental disorder definition
- Definition is purposive and so policy considerations relevant.
- Definition controls those who should and should not be subject to compulsory treatment.
- Rights based legislation requires justification for treatment.
- Considerations for and against release listed.
- Further considerations relevant to balancing the above considerations.

(37) 13/160

- Section 79
- Applicant has had schizophrenia for about 18 years.
- Violent when unwell, most recently 5 years prior to hearing.
- Been under compulsory treatment for about 15 years.
- Illness well contained on medication but applicant's understanding of illness is partial.
- Good family support deemed important.
- Compulsory treatment involves a significant infringement on usual liberties.
- Tribunal decides time has for applicant to voluntarily meet challenges of illness.
- Released from compulsory status.

(38) 14/028

- Section 80: fitness to stand trial
- Clinical and Tribunal review processes and the decision making role of the Attorney-General and Minister of Health explained
- Meaning of unfit to stand trial discussed
- Decisional competence (Dougherty case) discussed
- Additional 9 enquiries (P v Police and Ngatayi v R) referred to
- Patient found to be no longer unfit to stand trial

(39) 14/047

- Section 75 complaints
- Approach in 09/117 followed: section 66 right to treatment does not enable challenge to whether compulsory assessment and treatment should have been initiated
- Complaint that no proper consideration given to assessment and treatment in the community not upheld
- Complaint that was not kept advised of progress in hospital not upheld because the assessment involved seeing whether symptoms emerged over time and so in that respect meaningless to speak of progress
- Complaint that there was no ongoing assessment in absence of responsible clinician over 3 day weekend not upheld; assessment in terms of section 11 was longitudinal and so made no difference that responsible clinician not present; in meantime patient was being assessed by nurses in the sense of being monitored; term "assessment" has different meanings according to context.

(40) 14/008

- Section 79 application; difficult case for Tribunal to decide
- Applicant in late 60s diagnosed with late onset schizophrenia
- But psychosis might have been drug induced
- *Burden of proof* discussed i.e. who is required to prove their case; no one has overall burden of proof given inquisitorial nature of proceedings.
- Applicants or clinicians may however have an *evidential burden* on some matters ie an expectation to provide sufficient evidence to at least put matters in issue
- *Standard of proof* discussed i.e. what level or sufficiency of evidence required to deem a matter proven; appropriate standard is the balance of probabilities i.e. something is accepted if it is more likely than not; but this applies only to the factual evidence, and not to risk assessment and the ultimate evaluation of whether compulsory treatment justified; no standard of proof applies to the latter; for example applies to whether it is proven that applicant is psychotic and has exhibited dangerousness, but does not apply to whether the proven psychosis and dangerousness amounts to an abnormal state of mind giving rise to seriousness dangerousness in terms of the legal definition; the standard of proof although unchanged may call for a greater level of evidence where allegations are serious because the more serious the allegations the more improbable they are; for example it is easier to prove on balance of

probabilities that a patient shouts at people than prove on the same balance of probabilities that the patient attempted to kill someone

- *Quality of evidence* distinguished from standard of proof; quality relates to how good the evidence is; standard relates to the sufficiency of evidence to deem a matter proved; the better the quality of the evidence the greater the chance it will lead to proof on the balance of probabilities; for example first hand evidence that someone was threatened is more likely to lead to the threat being proved on the balance of probabilities than third hand evidence of the threat
- Section 4 discussed; substance abuse precludes compulsory treatment where it is the sole cause of the abnormal state of mind; does not apply where abnormality results from mixed causes; nor does section 4 apply where causation of abnormality is unknown, or substance abuse has led to new conditions themselves causing the abnormality
- Held on balance of probabilities (more likely than not) that applicant's past condition when unwell due to reasons other than substance abuse; therefore s 4 did not apply
- Held that applicant had abnormal state of mind of intermittent nature
- Issue then whether this gives rise to serious dangerousness; held that it does; concerns of those who know applicant well considered important; also of importance was applicant's forensic history-dangerousness can be assessed in the round

(41) 13/173

- Section 80 application; special patient on account of insanity
- 12/071 referred to
- M v The Queen [2012] NZCA 142 discussed
- Necessity test in section 24 CP(MIP)Act 2003 held to be same as requirement test in section 80.
- Both tests fall between what is expedient or desirable on one hand, and essential on the other
- All the circumstances of the case relevant to both the necessity test and requirement test
- 7 considerations in assessing whether special patient status required
- Public interest and the patient's interests may be aligned
- Considerations applying to applicant also often apply to ordinary patients; therefore applicant's situation not special
- Held that special patient status no longer required

- Held responsible clinician too risk averse, and was applying a test of expediency or desirability for the requirement for the special status, rather than a test between that and essential.

(42) 14/101

- Section 79
- Applicant in her 80s living on her own
- Main issue, whether has seriously diminished capacity of self care
- Tribunal's previous discussion of seriously diminished capacity of self care in 11/139 referred to and summarised
- Further discussion of meaning of seriously diminished capacity of self care
- Test is one of capacity (power and ability) and diminution (reduction)
- "Seriousness" refers both to the *extent* of the diminution, and to the *consequences* of the diminution
- In assessing capacity, it is permissible to project into the future
- Balancing right to good health and right to self determination; excessive paternalism to be avoided
- Distinction between the legal test, and the evidence pertinent to determining whether the test is satisfied; balance of probabilities applies to the latter but not the former; the former is a matter of judgement; not possible to quantitatively define seriousness
- 8 questions posed

(43) 15/075

- Section 79
- Late onset schizophrenia or delusional disorder
- Only one second limb consideration: danger to self from suicide
- Only one previous hospitalisation
- General history of compliance
- Not compulsorily treated until recently
- List of circumstances and historical features often applying to applicants not fit to be released from compulsory status
- Comparing the list with applicant's circumstances and history
- Applicant found fit to be released from compulsory status.