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Application of the Paternalism Principle to Constitutional Rights: Mental Health Case-Law in Ireland

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Abstract

In adjudicating on matters relating to fundamental constitutional or human rights, courts make important statements about the principles which apply. The principles articulated will have a profound impact on the outcomes of such cases, and on the development of case-law in the relevant field. In the fields of medical law and mental health law, various courts have moved away from deference to medical decision-making and paternalism to a person-centred rights-based approach. However, courts in Ireland have continued to interpret mental health law in a paternalistic fashion, praising paternalism as if it is particularly suitable for mental health law. This raises profound questions about judicial attitudes to people with mental health conditions and judicial reluctance to confer full personhood on people with disabilities. This article outlines case-law in Ireland regarding paternalism in mental health law and discusses the consequences for constitutional rights in Ireland.

Keywords : Mental Health Law; Paternalism; Human Rights; Ireland; Constitutional Rights; Convention on the Rights of Persons with Disabilities; European Convention on Human Rights; Best Interests

1. Introduction

In interpreting a Constitution, a court performs a fundamentally important task within the legal order. The court must consider carefully which principles to apply, and must also be willing to modify those principles as time progresses. As is often said, a Constitution is a 'living document'.[1] Courts may seek assistance from practising lawyers who represent the parties to the case, human rights bodies which act as amici curiae, human rights treaties to which the state is a party, persuasive decisions of courts in other jurisdictions and secondary sources such as academic commentary or law reform reports. In this article, I will consider the principle of paternalism as it has been applied by the Irish courts in mental health case-law. The principle was mistakenly adopted in 1949, and this adoption might be at least partly excused by the fact that in the late 1940s constitutional and human rights were only in their infancy. What is more surprising is that the principle has been repeatedly restated in subsequent decades, right up to at least 2018. While some individual decisions have moved away from the principle, or expressed some doubts, the principle still holds strong sway in case-law.

[1] See for example, in Ireland, *Norris v. Attorney General* [1984] I.R. 36, 96. In the USA, see A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997) p. 38. See further C. O'Mahony, 'Societal Change and Constitutional Interpretation', *Irish Journal of Legal Studies* 1 (2009) 71-115; A. Kavanagh, 'The Idea of a Living Constitution', *Canadian Journal of Law & Jurisprudence* 16 (2003) 55-89. https://doi.org/10.1017/S0841820900006639.

The article will proceed as follows: In Section 2, an outline of the paternalism principle will be provided, together with critique of its relevance to modern mental health law. Section 3 outlines the relevant Irish case-law, discussing in turn case-law prior to 2006 and case-law since 2006. The article ends with the Conclusion, considering how the courts might move forward on this issue.

2. The Paternalism Principle and Critique of its Relevance to Modern Mental Health Law

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

Paternalism is frequently contrasted with autonomy, and criticised as failing to treat people as autonomous agents.[4] Negative aspects include the implications that adults are treated as children and that 'superior' people decide what 'inferior' people need. However, the concept may also be used in a benign sense to justify restrictions of freedom 'for one's own good' such as a requirement to wear a life-jacket while boating.

Paternalism and beneficence[5] are dominant themes in medical ethics[6] although in recent years they have been challenged by newer theories such as patient autonomy, medicine-as-trade and therapeutic alliance.[7] Paternalism is also linked with the principle that doctors must act in the best interests of patients, although the meaning of 'best interests' is malleable.[8] In Ireland, the Medical Council's ethical code makes frequent references to best interests.[9] Some in psychiatry continue to advocate for a paternalistic approach, arguing that the nature of schizophrenia, for example, requires a paternalistic intervention.[10]

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[2] *Oxford English Dictionary* (online), 2020 Version.
[3] *Ibid.* 'Paternalistic' is defined as 'of, relating to, or of the nature of paternalism; practising paternalism.'
[4] See generally E. King, 'Paternalism and the Law: Taking a Closer Look', *University College Dublin Law Review* 4 (2004) 134-151.
[5] Beneficence means doing good for the patient and may mean on some interpretations that the physician's view on what is good for the patient is more important than the patient's view. This extreme form of beneficence is now often pejoratively referred to as paternalism – M. Donnelly, *Healthcare Decision-Making and the Law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge: Cambridge University Press, 2010) p. 11.
[6] See generally G. Laurie, S. Harmon and E. Dove, *Mason and McCall Smith's Law and Medical Ethics,* 11th ed. (Oxford: Oxford University Press, 2019).
[7] H. Teff, *Reasonable Care: Legal Perspectives on the Doctor-Patient Relationship* (Oxford: Clarendon Press, 1994) pp. xxiii-xxxi. Sarkar and Adshead have argued from a psychiatric perspective that respect for procedural rights and autonomy must replace unfettered paternalism – S. Sarkar and G. Adshead, 'Black Robes and White Coats: Who Will Win the New Mental Health Tribunals?', *British Journal of Psychiatry* 186(2) (2005) 96-98. https://doi.org/10.1192/bjp.186.2.96.
[8] The Mental Health Act 2001 states that decision-makers must act in the 'best interests' of a person (s. 4(1)) but does not provide a definition of best interests.
[9] Medical Council (Ireland), *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (8th edn, Amended, 2019) paras. 5.4, 10.6 and 16.4.
[10] J. D. Little, 'On Being Paternalistic', *Australasian Psychiatry* 28(2) (2020) 164-166. https://doi.org/10.1177/1039856219878641.

Paternalism has in recent years become associated with outmoded 'doctor knows best' thinking and, in general terms, it is considered incompatible with a rights-based approach to mental health law. Serious questions have been raised as to why beneficence should trump autonomy in the case of mental disabilities but not in the case of physical disabilities.[11] It has been noted that 'covert paternalism' can arise, dressed up in therapeutic language[12] and there are some situations where a disavowal of paternalism may be more apparent than real.[13]

In Ireland, the Law Reform Commission has noted that there is a move away from 'benign paternalism', stating that 'the force of paternalism is undermined by a growing recognition that all adults, including those living with a disability, have a right to autonomy and self-determination'.[14] The Commission also noted that the rise in importance of autonomy and self-determination is difficult to reconcile with paternalism, and that in certain circumstances the ethical principles of autonomy and beneficence may conflict.[15] When the Assisted Decision-Making (Capacity) Act 2015 was enacted in Ireland, it included no reference to paternalism or best interests.[16]

In 2008, the Mental Health Commission stated that the best interests principle needed to be clarified.[17] In 2012 and 2015, two reviews of the Mental Health Act were published, both of which recommended that the best interests principle should be removed from the Mental Health Act.[18] In each case, part of the rationale for the proposal was that the courts had inappropriately interpreted the best interests principle in an overly paternalistic manner. The Government now proposes to implement these recommendations.[19] There have been some doubts expressed by psychiatrists as to the wisdom of the recommendations.[20]

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[11] G. Richardson, 'Balancing Autonomy and Risk: A Failure of Nerve in England and Wales?', *International Journal of Law and Psychiatry* 30(1) (2007) 71-80. https://doi.org/10.1016/j.ijlp.2005.08.013.
[12] I. Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence', *Thomas Jefferson Law Review* 30 (2008) 575-596, 586.
[13] R. Huxtable, 'Autonomy, Best Interests and the Public Interest: Treatment, Non-treatment and the Values of Medical Law', *Medical Law Review* 22(4) (2014) 459-493, 479. https://doi.org/10.1093/medlaw/fwt035.
[14] Law Reform Commission, *Consultation Paper on Vulnerable Adults and the Law: Capacity* (Dublin, CP 37, 2005) para. 1.21. Similarly, see K. Gledhill, 'Report on the Compliance of the Mental Health Act 2001 with International Human Rights Law' in Mental Health Commission, *Report on the Operation of Part 2 of the Mental Health Act 2001* (Dublin, 2008) pp. 18-19.
[15] *Ibid.,* para. 7.20.
[16] The main provisions of the 2015 Act have not yet been commenced, and the current plan is to commence these in 2022 – Decision Support Service, Media Release: 'Confirmation of Budget Allocation Allows for Launch of Decision Support Service in 2022', 16 October 2020. On the 2015 Act generally, see M. Donnelly, 'The Assisted Decision-Making (Capacity) Act 2015: Implications for Healthcare Decision-making', *Medico-Legal Journal of Ireland* 22 (2016) 65-74 and B. D. Kelly, 'The Assisted Decision-Making (Capacity) Act 2015: What it is and Why it Matters', *Irish Journal of Medical Science* 184 (2015) 31-46. https://doi.org/10.1007/s11845-014-1096-1.
[17] Mental Health Commission, *Report on the Operation of Part 2 of the Mental Health Act 2001* (Dublin, 2008) p. 86.
[18] Steering Group on the Review of the Mental Health Act 2001, *Interim Report of the Steering Group on the Review of the Mental Health Act 2001* (Dublin, 2012); Expert Group on the Review of the Mental Health Act 2001, *Report of the Expert Group on the Review of the Mental Health Act 2001* (Dublin, 2015).
[19] Department of Health, *Guidance Document for Public Consultation on Review of the Mental Health Act* (Dublin, 2021). While a short Act has been passed to implement the Expert Group's proposals regarding guiding principles in the legislation - the Mental Health (Amendment) Act 2018 - the Government does not plan to commence this Act and will instead pass a new amending Act.
[20] B. D. Kelly, 'Best Interests, Mental Capacity Legislation and the UN Convention on the Rights of Persons with Disabilities', *BJPsych Advances* 21(3) (2015) 188-195 https://doi.org/10.1192/apt.bp.114.012922; V. Riordan, 'Best Interests and the Raison d'être of Health Care', *Irish Journal of Psychological Medicine* 34(4)

In medical law in the UK, the Supreme Court in the *Montgomery* case reviewed recent social and legal developments, noting that these developments 'point away from a model of the relationship between the doctor and the patient based on medical paternalism.'[21] In England and Wales, 'best interests' in the Mental Capacity Act 2005 have progressively been interpreted in a less paternalistic manner, with increasing emphasis on respect for the patient's view on what is best for him/her.[22] In *Aintree University Hospitals Foundation Trust* v *James*,[23] Lady Hale said that 'the purpose of the best interests test is to consider matters from the patient's point of view.'[24] This patient-centred approach is laudable, but a close reading of the case-law shows that the patient's views are only one component of the decision-making process.[25] In Australia, recent mental health legislation has been described by Bell J. as a 'paradigm shift from best interests paternalism to the least-restrictive kind of treatment, which draws upon elementary human rights concepts',[26] in a case described as Australia's most significant human rights decision on mental health law.[27]

The general move away from paternalism and towards autonomy is related to the move from a medical model of disability (including psychosocial disability) to a social model. The medical model of disability focuses on remedying impairment, and views disability as abnormal and undesirable. The social model of disability holds that disability (as opposed to the actual impairment) is a social creation, barriers created by society need to be removed, discrimination remedied and independent living facilitated.[28] The social model has now been embraced at United Nations level in the Convention on the Rights of Persons with Disabilities (CRPD), 2006,[29] which Ireland ratified in 2018.

(2017) 271-273 https://doi.org/10.1017/ipm.2015.39; H. Kennedy, '"Libertarian" Groupthink Not Helping Mentally Ill', *Irish Times*, 12 September 2012.

[21] *Montgomery v Lanarkshire Health Board* [2015] U.K.S.C. 11, para. 81.

[22] E. Jackson, 'From "Doctor Knows Best" to Dignity: Placing Adults Who Lack Capacity at the Centre of Decisions About Their Medical Treatment', *Modern Law Review* 81(2) (2018) 247-281. https://doi.org/10.1111/1468-2230.12328.

[23] [2013] U.K.S.C. 67.

[24] *Ibid.*, para. 45.

[25] J. Coggon, 'Mental Capacity Law, Autonomy, and Best Interests: An Argument for Conceptual and Practical Clarity in the Court of Protection', *Medical Law Review* 24(3) (2016) 396-414, 406. https://doi.org/10.1093/medlaw/fww034.

[26] *P.B.U. & N.J.E. v Mental Health Tribunal* [2018] V.S.C. 564, para. 101. The court was referring to the Mental Health Act 2014 (Vic.).

[27] I. Freckelton, 'Electroconvulsive Therapy, Law and Human Rights: P.B.U. & N.J.E. v Mental Health Tribunal [2018] VSC 564, Bell J', *Psychiatry, Psychology and Law* 26(1) (2019) 1-20, 2. https://doi.org/10.1080/13218719.2019.1604111.

[28] See, for example, G. Quinn and T. Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (New York and Geneva: Office of the United Nations High Commissioner for Human Rights, 2002) pp. 14-15.

[29] Convention on the Rights of Persons with Disabilities, 2006 [A/RES/61/106]. The relevance of the Convention to mental health law is discussed in numerous articles including, for example, S. Doyle Guilloud, 'The Right To Liberty of Persons with Psychosocial Disabilities at the United Nations: A Tale of Two Interpretations', *International Journal of Law and Psychiatry* 66 (2019) 101497 https://doi.org/10.1016/j.ijlp.2019.101497, E. Flynn, 'Ireland's Compliance with the Convention on the Rights of Persons with Disabilities: Towards a Rights-based Approach for Legal Reform?', *Dublin University Law Journal* 31 (2009) 357-385, P. Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law', *Modern Law Review* 75(5) (2012) 752-778. https://doi.org/10.1111/j.1468-2230.2012.00923.x.

The case-law of the European Court of Human Rights on mental health law does not contain any reference to paternalism as a principle.[30] The court has emphasised the importance of the right to liberty in a democratic society.[31] It has stated that the text of Article 5(1) of the ECHR sets out an exhaustive list of exceptions calling for a narrow interpretation,[32] and that the object and purpose of Article 5(1) is to ensure that no one should be dispossessed of their liberty in an arbitrary fashion.[33] The Strasbourg Court has, in recent years, begun to refer frequently to the CRPD to assist it in interpreting the ECHR as it applies in mental health or capacity cases.[34] The ECHR is part of Irish law, at a sub-constitutional level.[35]

3. Irish Case-Law

3.1 Case Law Prior to 2006

The Irish courts first began to consider constitutional aspects of mental health law in cases concerning the Mental Treatment Act 1945, which remained in force until 2006. The case-law on the 1945 Act may be divided into two streams with contrasting perspectives – a first stream emphasising paternalism and a second stream in which the right to personal liberty trumps the paternal interpretation of the 1945 Act.

3.1.1 First Stream – emphasising paternalism in interpreting the Mental Treatment Act 1945

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

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[30] P. Bartlett, O. Lewis and O. Thorold, *Mental Disability and the European Convention on Human Rights* (Leiden: Martinus Nijhoff, 2006); B. Hale, 'The Human Rights Act and Mental Health Law: Has it Helped?', *Journal of Mental Health Law* (2007) 7-16; P. Fennell, 'The Third Way in Mental Health Policy: Negative Rights, Positive Rights, and the Convention', *Journal of Law and Society* 26(1) (1999) 103-127 https://doi.org/10.1111/1467-6478.00118; L. Gostin, 'Human Rights of Persons With Mental Disabilities: The European Convention of Human Rights', *International Journal of Law and Psychiatry* 23(2) (2000) 125-159 https://doi.org/10.1016/s0160-2527(99)00039-4; P. Prior, 'Mentally Disordered Offenders and the European Court of Human Rights', *International Journal of Law and Psychiatry* 30(6) (2007) 546-557 https://doi.org/10.1016/j.ijlp.2007.09.002; Mental Disability Advocacy Centre, *Summaries of Mental Disability Cases Decided by the European Court of Human Rights* (Budapest, 2007); European Court of Human Rights, *Factsheet: Detention and Mental Health* (Strasbourg, 2020). See also cases cited in n. 34 below.

[31] *Winterwerp v The Netherlands* (1979-80) 2 E.H.R.R. 387, para. 37, citing *De Wilde, Ooms and Versyp v Belgium (No.1)* (1971) 1 E.H.R.R. 373, para. 65 and *Engel v The Netherlands (No.1)* (1976) 1 E.H.R.R. 647, para. 82 *in fine*.

[32] *Winterwerp v The Netherlands*, para. 37, citing *Engel v the Netherlands,* para. 57, *Ireland v UK* (1978) 2 E.H.R.R. 25, para. 194, *Klass v Federal Republic of Germany* (1978) 2 E.H.R.R. 214, para. 42 and *Sunday Times v UK* (1979) 2 E.H.R.R. 245, para. 65.

[33] *Winterwerp v The Netherlands*, para. 37, citing *Lawless v Ireland (Merits)* (1961) 1 E.H.R.R. 15, 27-28 and *Engel v The Netherlands* (1976) 1 E.H.R.R. 647, para. 58.

[34] For cases up to 2016 see O. Lewis, 'Council of Europe' in L. Waddington and A. Lawson (eds.), *The UN Convention on the Rights of Persons with Disabilities in Practice: a Comparative Analysis of the Role of Courts* (Oxford: Oxford University Press, 2018). Later cases include *A-MV v Finland* App. no. 53251/13 (ECHR, 23 March 2017); *N. v. Romania* App. no. 59152/08 (ECHR, 28 November 2017); *Fernandes de Oliveira v Portugal* App. no. 78103/14 (ECHR, 31 January 2019); *Rooman v Belgium* App. no. 18052/11 (ECHR, 31 January 2019).

[35] European Convention on Human Rights Act 2003. See U. Kilkelly (ed.), *ECHR and Irish Law*, 2nd ed. (Bristol: Jordan, 2008); F. de Londras and C. Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Dublin: Round Hall, 2010); S. Kingston and L. Thornton, *Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review* (Dublin: Law Society of Ireland and Dublin Solicitors Bar Association, 2015).

The applicant in *Re Philip Clarke*[36] argued that section 165 of the Mental Treatment Act 1945[37] was unconstitutional due to the absence of any judicial intervention or determination between the taking into custody of a person alleged to be of unsound mind and his or her subsequent detention under a reception order. He relied on various articles of the Constitution, including the right to personal liberty.[38] The Supreme Court held that section 165 was not unconstitutional as it was designed for the protection of the citizen and the promotion of the common good.[39] O'Byrne J said that the legislation was 'of a paternal character, clearly intended for the care and custody of persons suspected to be suffering from mental infirmity and for the safety and well-being of the public generally.'[40] At a later stage, he referred to the Act's long title as partial justification for this interpretation: 'This Act, as shown in the title, was primarily intended to provide for the prevention and treatment of mental disorders and the care of persons suffering therefrom. Coming to the particular part of the Act with which this case is concerned, it appears that it was also intended for the safety of the public generally.'[41]

The constitutional analysis by the Supreme Court in *Re Philip Clarke* is neither thorough nor deep, but this is hardly surprising given that the decision was made in 1949. It has been noted that the judgment 'is probably a creature of its time and seems to subject the appellant's arguments to a thin analysis and bland conclusion.'[42] Ironically, in a historical context, the case actually represented an important positive step in the recognition that personal liberty could not be interfered with merely because the Oireachtas permitted it, but instead there was a requirement that deprivation of liberty be objectively justified.[43]

The 'paternal' nature of the 1945 Act was also emphasised by the Supreme Court in *Croke v Smith (No. 2)*,[44] a decision on the constitutionality of section 172 of the Act[45] issued in 1996. Croke brought an application under Article 40.4 of the Constitution, challenging his detention and the constitutionality of s 172 of the 1945 Act on two grounds, one of which was that the detention was indefinite and there was no independent review procedure. While this argument had been accepted by Budd J in the High Court (and Budd J's judgment will be discussed below), the Supreme Court upheld the appeal, rejecting the challenges to the Act. Hamilton CJ pointed out that s 172 of the 1945 Act enjoyed a presumption of constitutionality and that it

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[36] [1950] I.R. 235.

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

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

[39] 'We do not see how the common good would be promoted or the dignity and freedom of the individual assured by allowing persons, alleged to be suffering from such infirmity, to remain at large to the possible danger of themselves and others' – [1950] I.R. 235, 248.

[40] [1950] I.R. 235, 247.

[41] [1950] I.R. 235, 250.

[42] T. Cooney and O. O'Neill, *Psychiatric Detention: Civil Commitment in Ireland* (Wicklow: Baikonur, 1996) p. 97. The authors also note that the assumption that involuntary commitment is a purely medical process appears to underpin the decision.

[43] *Re Philip Clarke* stands in contrast to the positivist interpretation of 'in accordance with law' in Art. 40.4 in cases such as *R. (O'Connell) v Military Governor of Hare Park Camp* [1924] I.R. 104; [1935] I.R. 243 and *State (Ryan) v Lennon* [1935] I.R. 170. See G. Hogan and G. Whyte, *J.M. Kelly: The Irish Constitution*, 4th ed. (Dublin: Butterworths, 2003) pp. 1535-1540.

[44] [1998] 1 I.R. 101.

[45] S. 172 of the Mental Treatment Act 1945 stated that a patient detained under a reception order could be detained indefinitely.

must be presumed that people who issue decisions under the Act will act in accordance with constitutional justice. He twice reproduced the Supreme Court's view in *Re Philip Clarke* that the 1945 Act 'is of a paternal character, clearly intended for the care and custody of persons suspected of suffering from mental infirmity and for the safety and well-being of the public generally.'[46] The Supreme Court was obviously not impressed by Budd J's view that 'the certainties implicit in the judgment in Clarke's case in 1949 may be diluted by now.'[47] The court did acknowledge that the obligation which rests on the Oireachtas is to ensure that a citizen, who is of unsound mind and requiring treatment and care, is not unnecessarily deprived, even for a short period, of his or her liberty and to ensure that legislation which permits the deprivation of such liberty contains adequate safeguards against abuse and error in the continued detention of such citizens.[48] The Supreme Court did not believe that the lack of automatic review of a patient's detention interfered with the patient's personal rights or right to liberty.[49] In fact, the Supreme Court stated that many of the sections of the 1945 Act vindicated and protected citizens' rights.[50]

The Supreme Court rejected the argument that periodic judicial or quasi-judicial intervention was required after the patient's detention. Hamilton CJ relied on the fact that medical professionals would periodically review the detention of patients as adequate protection of their constitutional right to personal liberty, thus adopting the approach that medical decision-making would be assumed to be correct and did not require review by external bodies. He referred uncritically to other sections in the legislation which appeared to provide avenues for complaint by patients, without any regard to the possibility that these sections might be of little use in practice. The decision was a major setback for the rights of patients detained under the 1945 Act. It would be another ten years before automatic periodic review of detention was required by law, whereas if the court had decided differently the Oireachtas would have been obliged to introduce the legislation immediately. Hogan has characterised the decision as an example of 'result-oriented jurisprudence'.[51] It was later relied on to justify the detention without independent review of a patient with an infectious form of tuberculosis.[52] Mr Croke took his case to Europe and received an undisclosed sum of money in friendly settlement as compensation from the Irish government.[53] By the time of the settlement, the government had published its new Mental Health Bill (which would later become the Mental Health Act 2001) and this was acknowledged as part of the terms of the settlement.

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

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[46] In the Supreme Court judgment in *Croke (No. 2)*, this extract appears at [1998] 1 I.R. 101, 112 and 132.

[47] *Croke v Smith (No. 2)*, unreported, Budd J, High Court, 27 and 31 July 1995, 124.

[48] [1998] 1 I.R. 101, 118. On this point, the Supreme Court relied on *O'Dowd v North Western Health Board* [1983] I.L.R.M. 186 and *R.T. v Director of Central Mental Hospital* [1995] 2 I.R. 65.

[49] The court adds: 'If, however, it were to be shown in some future case, that there had been a systematic failure in the existing safeguards, and that the absence of such a system of automatic review was a factor in such failure, that might cause this court to hold that a person affected by such failure was being deprived of his constitutional rights' - [1998] 1 I.R. 101, 131.

[50] For example - [1998] 1 I.R. 101, 114-5 and 119-120.

[51] G. Hogan, 'A Good and Kindly Man Devoted to Public Duty', *Irish Times*, 1 December 2000.

[52] *V.T.S. v Health Service Executive* [2009] I.E.H.C. 106. See M. Donnelly, 'Public Health and Patient Rights: S. v HSE [2009] I.E.H.C. 106', *Medico-Legal Journal of Ireland* 15 (2009) 66-73.

[53] *Croke v Ireland* App. no. 33267/96, Admissibility Decision (ECHR, 15 June 1999) and Judgment (Striking out), (ECHR, 21 December 2000); [1999] 1 M.H.L.R. 118.

> This passage [in *Re Philip Clarke*] has been generally accepted as expressing the nature and purpose of the Act of 1945. The Act provides for the detention of persons who are mentally ill, both for their own sake and for the sake of the common good.[54]

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

> I believe however that in construing the statutory provisions applicable in this case in the way that we have, the court has gone as far as it possibly could without rewriting or supplementing the statutory provisions. The court must always be reluctant to appear to be doing either of these things having regard to the requirements of the separation of powers. I do not know that I would have been prepared to go as far as we have in this direction were it not for the essentially paternal character of the legislation in question here, as outlined in *In Re Philip Clarke* [1950] I.R. 235. The nature of the legislation, perhaps, renders less complicated the application of a purposive construction than would be the case with a statute affecting the right to personal freedom in another context. The overall purpose of the legislation is more easily discerned and, where the medical evidence is unchallenged, the conflicts involved are less acute than in other detention cases. I do not regard the present decision as one which would necessarily be helpful in the construction of any statutory power to detain in any other context.[55]

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

3.1.2 Second Stream – emphasising the right to personal liberty in interpreting the Mental Treatment Act 1945

The second contrasting stream of cases regarding the 1945 Act took a very different line on the relevance of paternalism to deprivations of liberty on grounds of mental health. In 1995, a strong High Court decision was issued by Costello P, declaring that section 207 of the 1945 Act was unconstitutional as it interfered with a person's constitutional right to personal liberty.[56] Costello P made no reference to *Re Philip Clarke* or to paternalism as a principle. Instead, he emphasised the constitutional right to personal liberty and the failure of the 1945 Act to conform with international human rights standards. Costello P refers to the 'essentially benign' objectives of the 1945 Act, and states that 'the State's duty to protect the citizen's rights becomes more exacting in the case of weak and vulnerable citizens, such as those suffering from mental disorder.'[57] The constitutional imperative required the Oireachtas to be

[54] [2001] I.E.S.C. 14; [2005] 3 I.R. 617, 634.
[55] [2001] I.E.S.C. 14**;** [2005] 3 I.R. 617, 639-640.
[56] *R.T. v Director of Central Mental Hospital* [1995] 2 I.R. 65. S. 207 of the Mental Treatment Act 1945 concerned transfers from district mental hospitals to the Central Mental Hospital, a forensic hospital.
[57] [1995] 2 I.R. 65, 79.

particularly astute when depriving persons suffering from mental disorder of their liberty and that it should ensure that such legislation should contain adequate safeguards against abuse and error in the interests of those whose welfare the legislation is designed to support. And in considering such safeguards regard should be had to the standards set by the Recommendations and Conventions of International Organisations of which this country is a member.[58]

Costello P concluded that the section not only fell far short of internationally accepted standards but was unconstitutional. The State had failed adequately to protect the right to liberty of temporary patients, who had 'a right to liberty, at most, eighteen months after the reception order which restricted their liberty was made.'[59] The President of the High Court said that the State was obviously searching for an ideal solution to the problems with mental health legislation, but this 'prolonged search for excellence ... has had most serious consequences for the applicant.'[60] Quoting Voltaire, the President said 'the best is the enemy of the good'.[61]

The second judgment to take a different line was that of Budd J in the High Court in *Croke v Smith (No. 2)*, in 1995.[62] Budd J found that section 172 of the 1945 Act was an unconstitutional interference with the right to liberty. Budd J considered the role of the European Convention on Human Rights and the general principles of international law, concluding that while these were influential guidelines, they could not be used as a touchstone with regard to constitutionality. The judge referred to United States cases such as *Addington v Texas*[63], *O'Connor v Donaldson*[64] and *Jackson v Indiana*[65] to illustrate how seriously the courts in that jurisdiction had taken the need for a judicial process before citizens could be detained in mental hospitals.

Having been referred to *Re Philip Clarke*,[66] he acknowledged that he was bound by the decision of the Supreme Court but said that the decision solely concerned s 165 of the 1945 Act, which was not at issue in this case. Also, there had been changes since that case:

> The certainties implicit in the judgment in Clarke's case in 1949 may be diluted by now with increasing knowledge about the psyche, changing patterns of behaviour, conflicts between psychiatrists as to the nature of mental illness and awareness of the abuses of psychiatric treatment in other countries.[67]

Budd J eventually concluded that s 172 of the 1945 Act was an unconstitutional interference with the patient's right to liberty as there were no adequate safeguards to protect the patient against an error in the section's operation, there was no formal review procedure in respect of the opinion of the resident medical superintendent and of the Inspector of Mental Hospitals and there was no automatic review of long-term detention of a patient such as Mr Croke. This judgment treated the issue of detention of mental patients with the seriousness it deserved and

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58 [1995] 2 I.R. 65, 79.
59 [1995] 2 I.R. 65, 80.
60 [1995] 2 I.R. 65, 81.
61 Voltaire, 'La Bégueule' in *Contes en Vers et en Prose II* (1772, reprinted Paris: Classiques Garnier, 1993) p. 339; based on an old Italian proverb. This quote is given in French by Budd J in *Croke v Smith (No. 2),* High Court, 27 and 31 July 199, 128.
62 *Croke v Smith* (No. 2), High Court, Budd J, 27 and 31 July 1995.
63 441 U.S. 418 (1979).
64 422 U.S. 563 (1975).
65 406 U.S. 715 (1972).
66 [1950] I.R. 235.
67 *Croke v Smith (No. 2)*, Budd J, High Court, 27 and 31 July 1995, 124.

Budd J's conclusion that s 172 of the 1945 Act was unconstitutional could have had far-reaching implications for mental health law. It might even have spurred the Government into enacting a new Mental Health Act. However, as was noted above, the Supreme Court upheld the appeal against Budd J's decision and found that the 1945 Act was not an unconstitutional interference with the right to personal liberty.

3.2 Cases Since 2006

The Mental Health Act 2001 introduced major reforms of Ireland's civil mental health law and instigated a new era for those detained in psychiatric hospitals and units. The main focus of the Act was improvement of the legal regime concerning involuntary detention of persons with mental disorders. The content of the Act and the cases interpreting it have been the subject of extensive legal commentary.[68]

The main substantive sections of the Mental Health Act 2001 came into force on 1 November 2006[69] and a great deal of the post-2006 case law has imported the paternalism of *Re Philip Clarke* without question. The Act included a statutory 'best interests' principle in s 4[70] and this might have been expected to lead to a new emphasis on the rights of the patient, but instead the principle has frequently been interpreted in a manner which equates it with paternalism.[71] The courts have also relied on the paternal nature of the Act to justify a purposive interpretation of its provisions, even when this may mean that the rights of patients are diminished.[72]

O'Neill J said in *M.R. v Byrne and Flynn*[73] that 's. 4 of the Act … in my opinion gives statutory expression to the kind of paternalistic approach mandated in the case of *Philip Clarke*[74] and approved in the case of *Croke v. Smith*[75] and also … *Gooden v. St Otteran's Hospital*.'[76] According to Peart J in *J.H. v Lawlor, Clinical Director of Jonathan Swift Clinic, St James's*

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[68] See for example M. Keys, *Mental Health Act 2001* (Dublin: Round Hall, 2002); D. Whelan, *Mental Health Law and Practice: Civil and Criminal Aspects* (Dublin: Round Hall, 2009); A. M. O'Neill, *Irish Mental Health Law* (Dublin: First Law, 2005), P. Casey, P. Brady, C. Craven and A. Dillon, *Psychiatry and the Law*, 2nd ed. (Dublin: Blackhall Publishing, 2010); H. Kennedy, *The Annotated Mental Health Acts* (Dublin: Blackhall Publishing, 2007); D. Ryan, *The Mental Health Acts 2001–2009: Case Law and Commentary* (Dublin: Blackhall Publishing, 2010); N. Nolan, 'Case Law on the Mental Health Act 2001: Part 1', *Bar Review* 14 (2009) 13-18; N. Nolan, 'Case Law on the Mental Health Act 2001: Part 2', *Bar Review* 14 (2009) 42-46; C. Murray, 'Reinforcing Paternalism within Irish Mental Health Law - Contrasting the Decisions in *EH v St Vincent's Hospital and Others* and *SM v The Mental Health Commission and Others*', *Dublin University Law Journal* 17 (2010) 273-290; H. Davidson, 'When is a Voluntary Patient not a Voluntary Patient? An Examination of the Degree to which the Irish Courts Have Sought to Engage with the Jurisprudence of the European Court of Human Rights, in Relation to the Treatment and Detention of Voluntary or "Informal" Patients', *International Journal of Mental Health and Capacity Law* 22 (2016) 38-50.

[69] Mental Health Act 2001 (Commencement) Order 2006, S.I. 2006/411.

[70] S. 4(1) of the Mental Health Act 2001 states: 'In making a decision under this Act concerning the care or treatment of a person (including a decision to make an admission order in relation to a person), the best interests of the person shall be the principal consideration with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made.'

[71] The approach of the courts on this issue is not consistent and they have provided mixed signals. Some judgments have emphasised how the best interests principle enhances the rights of patients under the 2001 Act. Others have interpreted the principle as merely a restatement of paternalism as expressed in case law prior to the 2001 Act. See further Whelan, *supra* note 68, pp. 26-31.

[72] On purposive interpretation of the 2001 Act, see Whelan, *supra* note 68, pp. 31-35.

[73] [2007] I.E.H.C. 73; [2007] 3 I.R. 211.

[74] [1950] I.R. 235.

[75] [1998] 1 I.R. 101.

[76] [2001] I.E.S.C. 14; [2005] 3 I.R. 617.

Hospital,[77] section 4 introduced a 'patient-centred focus' but on the other hand the Act was paternalistic:

> This provision [s 4] highlights the patient centred focus of the Act's purpose. The Act proceeds to set forth a scheme whereby at all stages the constitutional rights of the patient are to be respected and protected. There are time limits and other safeguards built into the scheme, as well as requirements that the patient at all times has access to legal advice, notice and information regarding all matters pertaining to orders made to detain him/her, so that in a meaningful way his/her detention and the reasons for it must be properly, promptly and independently reviewed by a tribunal hearing at which he/she may be legally represented. The scheme in this regard has been appropriately described as paternalistic in nature. Its purpose is to protect the rights of the patient as well as to care for the patient. The paternalistic nature of the Act is clear also from the definition of 'mental disorder' contained in s. 3 of the Act.
>
> It must never be overlooked that persons detained under the provisions are detained so that they may receive care and treatment which they need and will not otherwise receive. Nevertheless the patient retains his/her constitutional rights, subject to necessary and appropriate restrictions to, inter alia, the right to liberty which are necessitated or permitted by the Act itself.[78]

In *P.McG. v Medical Director of the Mater Hospital*,[79] Peart J stated that the protections put in place by the 2001 Act 'are detailed and specific and it is of the utmost importance that they be observed to the letter, and that no unnecessary shortcuts creep into the way in which the Act is operated.' He continued:

> It cannot have been the intention of the Oireachtas when it enacted this piece of legislation that its provisions would have to be acted upon in such a literal way that the best interests of the patient would take second place.[80]

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

In the Supreme Court in *E.H. v Clinical Director of St Vincent's Hospital*, [81] Kearns J[82] stated that any interpretation of the term 'voluntary patient' in the 2001 Act 'must be informed by the overall scheme and paternalistic intent of the legislation as exemplified in particular by the provisions of sections 4 and 29 of the Act'.[83] He then approved of the judgment of McGuinness J in the *Gooden* case. He continued: 'I do not see why any different approach should be adopted in relation to the Mental Health Act, 2001, nor, having regard to the Convention, do I believe that any different approach is mandated or required by Art 5 of the European Convention of Human Rights.'[84] He also stated: 'There can be no doubt but that the Mental Health Act, 2001 was designed with the best interests of persons with mental disorder in mind.'[85] In his view,

[77] [2007] I.E.H.C. 225; [2008] 1 I.R. 476.
[78] [2008] 1 I.R. 476, 487.
[79] [2007] I.E.H.C. 401; [2008] 2 I.R. 332.
[80] [2008] 2 I.R. 332, 339.
[81] [2009] I.E.S.C. 46; [2009] 3 I.R. 774.
[82] Murray CJ, Fennelly, Macken and Finnegan JJ concurring.
[83] [2009] 3 I.R. 774, 788-9.
[84] [2009] 3 I.R. 774, 790.
[85] [2009] 3 I.R. 774, 781.

the fact that the 2001 Act provides for the assignment by the Mental Health Commission of a legal representative for a patient following the making of an admission order or a renewal order should not give rise to an assumption that a legal challenge to that patient's detention is warranted unless the best interests of the patient so demand.[86]

This judgment goes even further in its prioritisation of paternalistic 'best interests' over rights. While in *P.McG.*, Peart J had stated that it was 'appropriate' for the patient's legal representative to bring non-compliance with a section of the Act to the court's attention by way of an application under Article 40.4, the Supreme Court in *E.H.* introduced a new requirement that a legal representative consider the patient's best interests before mounting a legal challenge. Given that 'best interests' in this context appear to be equated with medical best interests, this represents a remarkable prioritisation of medical considerations over legal ones. It has been commented that courts tend to be deferential to medical opinion, [87] and this may be seen as a further example of this phenomenon.[88]

In *P.L. v Clinical Director of St Patrick's Institution (No.1)*,[89] Peart J. referred to the 'clear paternalistic and protective intention of the section'[90], referring to section 28 of the Mental; Health Act 2001, concerning the discharge of a patient. Birmingham J. emphasised the paternalistic intent of the Act in the *X.Y.* case in 2013.[91] O'Malley J. referred to the need to have regard to the overall scheme and paternalistic intent of the Act in a 2015 case.[92] As recently as 2018, Coffey J. quoted the *Gooden* case on paternalism without hesitation and stated that the paternal nature of the Act is underscored by the best interests principle in section 4.[93]

There are, however, some indications in the case law since 2006 that a paternalistic interpretation must be tempered by a concern for patients' rights. Peart J stated in *P.McG. v Medical Director of the Mater Hospital* [94] that there should not be a 'slack approach' to the observance of the requirements of this legislation and this would be an undesirable situation to arise in relation to legislation whose very purpose is to put in place a regime of statutory procedures for the protection of vulnerable persons against involuntary unlawful detention.[95] He noted that the protections put in place by the 2001 Act 'are detailed and specific and it is of the utmost importance that they be observed to the letter, and that no unnecessary shortcuts creep into the way in which the Act is operated.'[96] He said that 'there may be situations where some deviation from the provisions of the Act will not undermine' the protections provided for patients by the 2001 Act.[97] The same judge said in *A.M. v Kennedy* [98]*:* 'The greatest care must be taken to ensure that procedures are properly followed, and it ill-serves those whose liberty is involved to say that the formalities laid down by statute do not matter and need not be

[86] [2009] 3 I.R. 774, 792.
[87] See Teff, *supra* note 7, pp. xxiii-xxiv.
[88] For further commentary on the *E.H.* case, see Irish Human Rights Commission, *Policy Paper concerning the Definition of a 'Voluntary Patient' under S.2 of the Mental Health Act 2001* (Dublin, 2010); Murray, *supra* note 68; Whelan, *supra* note 68, pp. 165-170.
[89] [2012] I.E.H.C. 15; [2014] 4 I.R. 385.
[90] [2012] I.E.H.C. 15, para. 51.
[91] *In Re X.Y.: Health Service Executive v J.M.* [2013] I.E.H.C. 12, para. 12.
[92] *L.B. v Clinical Director of Naas General Hospital* [2015] I.E.H.C. 34, para. 43.
[93] *J.F. v Mental Health Tribunal* [2018] I.E.H.C. 100, paras. 37-38.
[94] [2007] I.E.H.C. 401; [2008] 2 I.R. 332.
[95] [2008] 2 IR 332, 338.
[96] [2008] 2 IR 332, 338.
[97] [2008] 2 IR 332, 339.
[98] [2007] I.E.H.C. 136; [2007] 4 I.R. 667.

scrupulously observed.'[99] He also said that to pretend that nothing wrong occurred 'is to deny the right to liberty other than in due course of law, and that is a slippery slope down which I cannot bring myself to venture.'[100] At Supreme Court level, Hardiman J said in *M.D. v Clinical Director of St Brendan's Hospital:* [101] 'The Act … is intended to constitute a regime of protection for persons who are involuntarily detained because they are suffering from a mental disorder. That purpose will not, in my view, be achieved unless the Act is complied with.'[102]

In *S.M. v Mental Health Commission*[103] McMahon J, referring to detention under the Mental Health Act 2001, stated that it must be remembered that what is at stake is the liberty of the individual and while it is true that no constitutional right is absolute, and a person may be deprived of his or her liberty 'in accordance with the law', such statutory provisions which attempt to detain a person or restrict his or her liberty must be narrowly construed.[104] He also stated that the approach to an interpretation of a section of the 2001 Act should be that which is most favourable to the patient while yet achieving the object of the Act.[105] McMahon J was of the view that the purposive approach 'may be given greater latitude in mental health legislation because of its paternal nature, but it cannot be resorted to willy nilly by the courts to thwart the clear meaning of the legislator.'[106] He said that it was also important to recall that in *Gooden* the court was prepared to act because the matter in dispute had not been provided for in the legislation and the court was prepared to give effect to the purpose of the Act in that situation.[107] He continued:

> I have little difficulty in accepting the appropriateness of using the purposive interpretive technique, perhaps more generously in the context of legislation which is paternal in nature, but where the rights and protection of the patient are specifically dealt with in the legislation itself, the occasions where this paternal approach comes into play are limited. The first obligation of the court in such a situation is to interpret the section and give effect to the plain meaning of the provision when it is clear. The paternalistic approach in not intended to rewrite the legislation.[108]

McMahon J said that he had no difficulty in accepting as a general principle that the courts in considering the Mental Health Acts should where possible adopt a purposive or teleological approach to the legislation and should in appropriate cases do so bearing in mind the paternal nature of the legislation itself. However, he said there is no room for the purposive approach to interpretation where a particular section is clear and unambiguous. The literal approach is the first and proper rule of interpretation when one has to construe the meaning of an Act. It is only when the literal rule leads to an ambiguity or an absurdity that other canons of interpretation are called in to assist.[109]

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[99] [2007] 4 I.R. 667, 676.
[100] [2007] 4 I.R. 667, 677.
[101] [2007] I.E.S.C. 37; [2008] 1 I.R. 632.
[102] [2008] 1 I.R. 632.
[103] [2008] I.E.H.C. 441; [2009] 3 I.R. 188.
[104] [2009] 3 I.R. 188, 203.
[105] [2009] 3 I.R. 188, 204.
[106] [2009] 3 I.R. 188, 195.
[107] [2009] 3 I.R. 188, 195.
[108] [2009] 3 I.R. 188, 196.
[109] [2009] 3 I.R. 188, 205.

In the *M.X.* case,[110] Mac Menamin J. took the innovative approach of acknowledging the emphasis on paternalism in the *E.H.* case, then holding that the paternalism principle was relevant to the rights to personal liberty or fair trial but not to issues of a person's rights while in involuntary care.[111] He even went further, explicitly incorporating CRPD principles into his interpretation of the 2001 Act.[112]

On two occasions, Hogan J. has commented on the potential difficulties with the paternalistic approach. In *S.O. v Clinical Director of Adelaide and Meath Hospital of Tallaght*, he stated that 'if the courts veer in the direction of the paternalistic protection of the patient, important safeguards might suffer erosion over time to the point whereby the effective protection of the rule of law might be compromised.'[113] In a case which is not a Mental Health Act case but considers whether a general hospital has a power to detain a person with dementia, *A.C. v Cork University Hospital*, he stated that the power sought was paternalistic but the common law has always rejected the claim that personal liberty could be compromised on this basis.[114] In a case concerning criminal 'insanity', he stated that while one may acknowledge that the legislation should be given a paternalistic interpretation, 'one cannot effectively re-write key procedural safeguards prescribed by the Oireachtas under the guide of paternalism.'[115]

The Supreme Court has only dealt with a small number of mental health cases in recent years, and has not explicitly re-evaluated the paternalism principle. The closest it has come to expressing a view on the matter is an acknowledgement, in summarising arguments by the parties in the *A.C.* case, that the paternalistic approach 'is increasingly under attack as failing to afford sufficient importance to the right of individuals to make their own decisions'.[116]

4. Conclusion

The Mental Health Act 2001 was intended to herald a new era in Irish mental health law, with an emphasis on civil liberties and human rights. While in general this change has occurred, the continued references by the courts to the need for a paternalistic interpretation of the Act appear to be a step backwards rather than forwards, more suited to interpretation of the 1945 Act than the 2001 Act. As Eldergill has commented, 'the main purpose of the 2001 legislation was patently not just to repeat the paternal character of the Act of 1945.'[117] Craven has expressed surprise that the paternalistic interpretation in *Re Philip Clarke* has survived the cultural and medical shifts away from paternalism since 1949.[118]

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[110] *M.X. v Health Service Executive* [2012] I.E.H.C. 491.
[111] *Ibid.*, paras. 58-59.
[112] *Ibid.*, para. 72. See further Flynn, *supra* note 29.
[113] *S.O. v Clinical Director of Adelaide and Meath Hospital* [2013] I.E.H.C. 132, para. 1. Hogan J. also discussed the need to balance this against another factor: 'Yet, if on the other hand, the courts maintain an ultra-zealous attitude to questions of legality and insist on punctilious adherence to every statutory formality, the *[sic.]* might lead to the annulment of otherwise perfectly sound admission decisions, sometimes perhaps years after the original decision has been taken.'
[114] *A.C. v Cork University Hospital* [2018] I.E.C.A. 217, para. 41.
[115] *F.X. v Clinical Director of Central Mental Hospital (No. 1)* [2012] I.E.H.C. 271, para. 34.
[116] *A.C. v Cork University Hospital* [2019] I.E.S.C. 73, para. 244.
[117] A. Eldergill, 'The Best Is the Enemy of the Good: The Mental Health Act 2001', *Journal of Mental Health Law* 21 (2008) 21-37, 23.
[118] C. Craven, 'Signs of Paternalist Approach to the Mentally Ill Persist', *Irish Times*, 27 July 2009.

Contrasting approaches have been taken in different cases to the key question of how mental health legislation should be interpreted. In the *Gooden* case, for example, Hardiman J appeared to suggest that deprivations of liberty for mental health reasons are less worth of close scrutiny then other forms of detention, and that medical considerations may prevail over legal ones. The judgment of Peart J in *P.McG.* suggests a willingness to defer to medical evidence regarding the patient's condition and permit this to trump some arguments about procedural rights. The Supreme Court in *E.H.* went even further, introducing a new requirement that a legal representative consider the patient's best interests before mounting a legal challenge.

An alternative approach is found in cases such as *R.T. v Director of Central Mental Hospital, the M.X. case* and the Court of Appeal in *A.C. v Cork University Hospital*. It has been articulated by McMahon J in *S.M. v Mental Health Commission*, when he stated that statutory provisions which attempt to detain a person or restrict his or her liberty must be narrowly construed, the approach to an interpretation of the 2001 Act should be that which is most favourable to the patient while yet achieving the object of the Act, and the paternalistic approach is not intended to rewrite the legislation.

For the present, the Supreme Court's decision in *E.H.* is the dominant precedent. The paternalistic interpretation of the Mental Health Act 2001 undermines the significant advances in mental health law which the Act was intended to bring about. The interpretation seems to place medical concerns above the patient's human rights and is inconsistent with the ECHR and CRPD. Within the next year, it is likely that the 'best interests' principle will be removed from the Mental Health Act.[119] It is still possible that, even after this removal, the courts might refer to the paternalistic purpose of the Act, although the Supreme Court has at least acknowledged that the principle is under attack. However. there is strong evidence that the principle of paternalism is completely inappropriate in mental health law. The most appropriate route for the courts out of this situation is for them to take the next available opportunity to explicitly state that the paternalism principle is no longer relevant in mental health law.

[119] See Department of Health, *Guidance Document for Public Consultation on Review of the Mental Health Act* (Dublin, 2021).