

THE LUNACY LAW IN FORCE IN VICTORIA

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IF one goes back to the beginnings of the lunacy law in Victoria, one will find that the greater part of the early legislation deals with Commissions *de lunatico inquirendo* (inquisitions). It is adorned with beautiful words like *supersedeas* and *traverse*. And it's all dead now, though it remains on the statute book. During my period of office there were never more than three "lunatics so found". Now there are none, and there will perhaps never be another. But it may be worth mentioning that the result of an inquisition would be the appointment by the court of a committee of the estate and, if necessary, of the person of the lunatic. One person might fill both positions. Now, if it is necessary to take charge of the estate of a person who is incapable of looking after his affairs, a receiver can be appointed, and if his person requires protection, a guardian. These appointments can be made by a much simpler process than an inquisition, but the procedure is seldom used, except in cases where the lunatic has assets outside Victoria.

The persons with whom I have been dealing stand in a small and comparatively unimportant class. Their personal freedom is not affected to any great extent, and the control which is exercised is under the direct supervision of the court, or Master.

We can now pass on to consider the processes by which a person's liberty is seriously affected and he comes under detention in a mental hospital or private mental home. In the great majority of these cases he is admitted, or committed, on a request by a relation, supported by two medical certificates. In some cases an order by a Justice, who must personally examine the alleged lunatic, is also required.

Criminal lunatics stand in a class by themselves. They may find their way into a mental or criminal hospital in three ways:

(1) By direction of the Chief Secretary when a person has been convicted or is awaiting trial. In these cases, two medical certificates are required.

(2) Upon arraignment for trial. A jury may be impanelled to try the issue of insanity. If they find the person to be insane, he is detained during the Governor's pleasure.

(3) After the evidence has been taken, the jury may return a verdict of "not guilty on the ground of insanity". In England the words used are "not guilty, but insane".

Mr. Justice Barry will have a word to say in special reference to the criminal insane.

Admission to a receiving house or ward is on request, but the form of certification is different. Two medical certificates are required as in the other cases. Summarising, the provisions as to admission fall into two general classes:

1. (a) Inquisitions; (b) Orders appointing guardians; (c) Jury verdicts of insanity. In this general class a court is dealing with the question. Medical testimony is called, of course, but the medical witness is not responsible for the final result, nor liable to any action in respect thereof.

2. (a) Request cases; (b) Justices' orders; (c) Chief Secretary's directions. In this general class, the two medical certificates are the basis of the action taken. The responsibility of the practitioner is a heavy one, and his liability for negligence may be serious. It will be dealt with in some detail later.

While speaking of insane persons being divided into classes, it may be convenient to mention that, referring to the type of person treated, there are also "mental treatment" cases (returned soldiers), voluntary boarders, and the classes of mental defectives, moral defectives, etc., created by the 1939 Act. Dr. Springthorpe spoke of these in 1940. He may wish to add something now.

1939 was also the year in which another new class of mentally deficient person was born in Victoria—the infirm person. He can be created, individually, by request and certificates—in a special form, but with the usual safeguards. I will deal with them when I come back to the general questions affecting medical certificates. At the moment I would like you to note this—that the infirm person is not subject to any restriction of his personal liberty, except that it is deemed to be necessary for his protection that his estate should be managed by the Public Trustee. The name (infirm person) is new in Victoria, but the underlying idea is not. Under the first lunacy Act, the Master was empowered and required to undertake the general care, protection and management of the estates of all "lunatics" and

“lunatic patients” in Victoria. Lunatic patients—that was easy to work out. They were people in mental hospitals and private mental homes. They were clearly defined. But, “lunatics”? They were defined as “any person idiot lunatic or of unsound mind and incapable of managing himself or his affairs whether found lunatic by inquisition or not.”

Mr. Prout Webb dealt boldly with the problem. He said it was his duty to take on himself the protection of these unfortunate people, if he was satisfied that they were incapable, etc. As far as I can recall, he adopted what he thought was a suitable procedure in each case, and this worked well. His successors were a bit staggered and obtained advice as to the legality of Mr. Webb’s practice. Although legal opinion was reassuring, it became the practice not to act until the receipt of a request and two medical certificates, and later on I had an opportunity of putting the position before Mann, C.J., and obtained his approval. So, when the Public Trustee came into being the stage was clear for the creation of “infirm persons” and to provide somewhat elaborate provisions for appeals to a judge against the Public Trustee’s decision, and for the cessation of control. One medical certificate is sufficient to set the Public Trustee thinking whether he should not release the estate, and if he says “No”, a judge can say “Yes”.

One might think that the statute law had pretty well covered the ground with regard to classes of mental deficient, but Dr. Sinclair will suggest that there are still some special types requiring special treatment.

So far I have been dealing only with the precautions which have to be observed before a person can be dealt with as insane. When he reaches a mental hospital or home, it seems to me that the lawmakers have made quite a creditable effort to ensure that no sane person shall remain in an asylum, and that no patient can be ill-treated while he is there. Dr. Adey will give us his views on the problems which arise, and some of the efforts which have been made to solve them. Meanwhile I may perhaps help him by referring to some of the things which lie on the surface, and are apparent from a perusal of the Acts. These are, of course, only the bare bones. How they are clothed depends on the men who administer the Acts.

I think the hospital staff will agree with me in putting in the forefront the provision of a Receiving House. This is a sort of purgatory, from which the inmate emerges to the heaven of

liberty or the hell of captivity. The medical certificate states, inter alia, that the person to whom it refers "is apparently insane, but, as the symptoms of insanity are not sufficiently marked to enable me to certify that — is insane, — is in my opinion a proper person to be received into a Receiving House" The Medical Superintendent should examine the admittee at once. He may forthwith, if he thinks proper, send him to a Mental Hospital, or discharge him, or he may keep him under observation for a month, and then send on or discharge, unless the Director or an official visitor approves of an extension for another four weeks. There seems to be one "catch" in the procedure, from the official point of view. It is desirable that the medical officers in the Receiving House should devote all their time to observing doubtful cases, but there is a temptation for medical practitioners to take the easy way out that is offered them, so as to avoid the responsibility of certifying for admission to a hospital. As a jury once, in *Harnett v. Bond* (1923), gave a verdict for £20,000 damages for keeping a man in an asylum for nine years in the belief that he was insane when, as the jury discovered later, he had always been sane, no one can blame a doctor for a spot of shirking in regard to insanity cases.

Safeguards in Internal Administration

The Director and Medical Superintendent must be qualified medical practitioners, and there must be a doctor available at a private mental home. That is all to the good. But all lawyers are not experts in admiralty law! And, it is not possible to require a man who proposes to become a medical officer at a mental institution to undergo special training. A man who becomes a Medical Superintendent has, no doubt, had valuable experience in his continual contact with patients. But, if he starts on the wrong track, he may never reach the highway. In fact, he may go on sinking deeper and deeper into a rut.

The Act tries to keep the Superintendent up to the mark by providing that he shall keep full records, case books, and so on. The Director and the official visitors can help in this process. But, in the end, the system is not everything. The personality of the Superintendent is almost everything, and the personality of the Director is also very important. Finally, do any of them, the head men, get a fair chance? Is their raw material adequate,

and particularly their staff? If Dr. Adey has time, he may tell us what the position is.

Discipline, Use of Physical Force, and Cruelty

The possibility of any scandal arising in matters of this kind depends on the humanity and good temper of the staff, from top to bottom. The chiefs are to some extent at the mercy of the lowest of their subordinates. So to some extent are the patients. But the most efficacious safeguard is the frequency of the visits and accessibility of the Director to complaints, assuming that resort to the Superintendent is fruitless, which, I think, would be an infrequent occurrence. If the patient is incapable of making a complaint directly, or through a visitor, the problem is difficult indeed. In referring to a visitor, I mean a relation, friend, or personal solicitor, not an official visitor, but these gentlemen could perform a very valuable task in the prevention of possible abuses, if they were (1) sufficient in number, (2) adequately paid, (3) the right type of men. But I fancy the answers to these questions would not be very satisfactory. The right of a patient to have letters to a judge, Minister of the Crown, etc., forwarded unopened is an additional safeguard.

Discharge

Patients are not dependent solely on the Superintendent when they are, or claim to be, fit for discharge. The Director has an overruling jurisdiction in this matter. So, with some restrictions, have official visitors.

Section 103 of the Act provides: "If a judge . . . receives information upon oath or otherwise, or has reason or cause to suspect, that any person who is not insane is detained in any hospital . . . such judge may order the Superintendent thereof to bring such person before him for examination"

If upon the examination of such person and of such Superintendent and of any medical or other witness it appears to such judge that such person is not insane, such judge may order that such person shall be immediately discharged, unless he is legally detained for some other cause."

By Section 86, any judge of the court may direct the Director or any official visitor or other fit person to visit any person detained in any hospital and to make a report in writing to such judge of the mental and bodily state of such patient. The

judge may, of course, follow up the report by action under Section 103.

In addition to the statutory provisions designed to prevent the detention of patients who are fit to be discharged, there is the right of the alleged lunatic to obtain a writ of habeas corpus.

I have suggested that the safeguards contained in the Acts, with regard to admission, detention, treatment and discharge, ought to be sufficient if the persons administering the law are humane, efficient and conscientious. So far as my personal contact with the administration of the department has given me an opportunity of judging, I would say that there is little room for criticism, except that the department is, on the whole, undermanned and underpaid, and that the expenditure on the amenities available for patients is insufficient. But here is an expression of opinion by Mr. H. G. Wells which is presumably the result of observation and which, if it is reliable, suggests that in England, where the legal safeguards are almost the same as in Victoria, there is a great deal to complain of. It occurs in "Christina Alberta's Father". This "father" suffers from the delusion that he is the reincarnation of Sargon the Magnificent, and that he is destined to rule and reform the world. He is quite harmless, but he creates a disturbance, gives utterance to his peculiar views, and is certified by a medical practitioner (a stranger to him) and lands in an asylum, from which, however, he is rescued after a short detention. Here is what Wells writes, when the certificate and justice's order are being signed, after a very cursory examination. Only one certificate, by the way, which seems to be insufficient. (Extract from Wells was read; could be furnished if desired.) A lot of this seems to be open to the criticism which can be levelled at most propagandist fiction. In order to wake the public up to the necessity for a reform, the colour is laid on with a trowel. For instance, "firmly rather than gently, in the grip of Mr. Jordan." This attendant habitually "crushes" the arm of the unfortunate he is guiding. The novelist can suggest that all attendants always do this sort of thing, by the simple process of inventing one who does.

The doctor and justice are represented as having no sympathy with the alleged lunatic, and not wishing to find out anything about him, or his position in life, or family. I don't believe the picture is a true one. Later on, when Sargon (or Preemby) is in the asylum, and an alienist comes to make enquiries on behalf of his daughter, he is told that no visitors can see the patient

for a week. The visitors' day has just passed. Could such a thing happen?

Wells says a lunatic has no rights to trial by jury or habeas corpus. A lunatic has in fact special rights to trial by jury, as to the issue of his insanity, in inquisition cases, and in the criminal courts. Wells may have been misled by the decision of the Privy Council in Gregory's case—that a certain section, 103, in the Victorian Act did not confer any right to trial by jury. But, if so, he appears not to have read the case carefully, because in that very case the alleged lunatic had taken out a habeas, and the court had decided that his action was well-founded. It is true that the court had, in view of certain affidavits by alienists, decided that his mental condition must be inquired into by a judge, but surely a judge is as likely as a jury to do justice in such cases. Difficulty may, of course, arise in the case of a lunatic who is incapable of speaking for himself coherently and has no friend or legal adviser who is willing to act for him. But, looked at broadly, Wells has made a grave overstatement of his case.

Again, there are various persons to whom the patient can, and no doubt often does, appeal, and I cannot believe that the appeals are always dodged or disregarded. I know they are not in Victoria.

Having found Wells to be so wide of the mark in the matters I have mentioned, one might be inclined to disregard the whole of the passage as "just propaganda", but I would like to hear what those who know better than I do have to say about it.

Form of Medical Certificate

"I, the undersigned, being a medical practitioner hereby certify that on the at separately from any other medical practitioner, I personally examined of (residence and occupation) and that the said is insane and a proper person to be taken charge of and detained under care and treatment and that I have formed this opinion upon the following grounds, viz.:

1. Facts indicating insanity observed by myself
2. Other facts (if any) indicating insanity communicated to me by others (here state the information and from whom).

Dated

Qualifications

Place of abode"

The form used in connection with Receiving Houses has been referred to previously.

The special words used in relation to "infirm persons" are: that the said is by reason of senility (*or disease or illness or physical infirmity or mental infirmity*) incapable of managing his affairs.

The form above set out indicates the steps to be taken by the medical practitioner before signing a certificate. In addition he should be familiar with the prohibitions contained in Section 26, *et seq.* Neither of the certifying practitioners shall be a partner, father, son, brother of, or an assistant to, the other.

If the admission is pursuant to a request, the certificate must deal with examinations made not more than seven days previously to the admission.

Section 30 provides that certifiers must not be:

Relative or guardian of patient.

Person making request.

Medical superintendent or medical officer of mental home.

Licensee or medical practitioner resident or regularly visiting partner, principal, assistant or relative of licensee.

Similarly regarding any other medical practitioner signing the certificate or request of official visitor or the Director.

It is just as well to be familiar with the requirements of the certificates, because a breach of the rules laid down may render the medical practitioner liable to prosecution, penalty not exceeding £50, or he may be guilty of a misdemeanour. But Section 255 provides that any person who signs a certificate or does any act in pursuance of the Act shall not be liable to any civil or criminal proceeding if such person has acted in good faith and with reasonable care. I do not remember any case in which a criminal proceeding has been taken for anything done under the Act, but civil proceedings have been taken fairly frequently.

I will conclude by dealing with some of the cases relating to medical certificates.

The charge to the jury by Mr. Justice Crompton in *Hall v. Semple* (1862), 3 F. & F. 337, dealt with several questions which had been in doubt up to the date of that case. Although only a charge to a jury, the case has been regarded as the leading authority on the questions dealt with in the charge, both in England and Victoria.

The defendant, Dr. Semple, had been called in by the plaintiff's wife, who desired him to sign a certificate that her husband was insane. For many years the husband and wife had been quarreling violently and publicly. It appeared, later, that Mrs. Hall had on one occasion been bound over to keep the peace. Members of the family gave evidence at the trial that Mrs. Hall was more to blame than her husband for the quarrels. Dr. Semple examined the plaintiff rather cursorily, and when his wife said that some rather peculiar statements made by him were untrue, he regarded them as delusions. He conferred with the wife's medical adviser, but did not realize that he would be wise to make enquiries from the husband's medical man. Plaintiff's detention was very brief. It was discovered almost at once that the certificate given by the other doctor related to an examination which had taken place more than seven days previously and the plaintiff was discharged. The jury awarded £150 damages.

The trial was a lengthy one, and there was ample evidence on which the jury could find a verdict for or against the defendant. The following extracts from the judge's charge lay down general principles which have been followed in a number of cases.

"A medical man who has merely signed a certificate . . . and has done nothing more towards causing the confinement . . . is not liable in trespass (false imprisonment) nor if he has merely consulted another medical man who has signed the other certificate and told him his own idea of the case is he liable for causing the other to sign such certificate. But if he signs such a certificate without taking due care and making due inquiries he is liable for the consequences which ensue and if on his own examination he is not satisfied he is bound to make due inquiries. Nor is he the less liable for the want of such due care and inquiries because he has acted bona fide.

"It is of great importance that the medical profession should very carefully sign certificates of this kind and that personal liberty should not be interfered with improperly by any abuse of power which the law has entrusted to these parties, and on the other hand it is very important to the medical profession that if a person acts really bona fide under the authority of the Act . . . he should not be made responsible for a mere error in judgment or mistake of facts. It is also very important to the interests of the public that persons who are really lunatics should be immediately taken care of.

In a case of this kind malice is not necessary to give a right of action The true ground of complaint is the negligence of the defendant and the want of due care in the discharge of the duty thrown upon him, and if a person . . . signs a certificate which is untrue, without making the proper examination or inquiries which the circumstances of the case would require from a medical man using proper care and skill in such a matter, if he states what is untrue and damage ensues to the plaintiff thereby, he is liable to an action. . . . If a medical man assumes the duty of signing a certificate without making, and by reason of his not making, a due and proper examination, and such inquiries as are necessary, and which a medical man under such circumstances ought to make . . . in the exercise of ordinary care so that he is guilty of culpable negligence, and damage ensues; then an action will lie although there has been no spiteful or improper motive, and though the certificate is not false to his knowledge.

The rule does not apply to a mere error in judgment. What he is required to do is to make an examination, and if it be necessary, to make further inquiries, and not to act without such inquiries as may be required.

There must, to make him liable, be negligence in the discharge of those proper duties which it must be taken he has assumed in undertaking to sign the certificate of insanity."

The importance of the case as a guide for the future lay in this: various causes of action had been alleged in the pleadings.

In the Victorian case, *Roberts v. Hadden*, 4 A.J.R. 167, 181 (1873) the jury awarded $\frac{1}{4}$ d. damages in respect of a six months' detention, but on appeal the Full Court held that the defendant was entitled to a non suit. The judgment of Barry, J., was unduly favourable to the defendant. He said: "We cannot say that the conversation and documents . . . afford no evidence of lunacy, and it would be necessary to go that length before saying that the defendant had not made sufficient enquiry. Even assuming that by an error of judgment he arrived at a wrong conclusion, he is not on that account to be held liable. Plaintiff has not shown that anything more should have been done than was done. No person in any skilled occupation is required to warrant the soundness of his opinions." (The first sentence goes too far.)

In *Smith v. Iffla*, 7 V.L.R. (L.) 435 (1881), there was a conflict of evidence as to the personal examination. Plaintiff

said that Dr. Iffla had asked him only three questions, while defendant said that the examination lasted twenty minutes. Outside inquiries were meagre. The family physician was not consulted. The jury awarded £520 in respect of two months' detention. The Full Court refused to disturb the verdict. *Hall v. Semple* was referred to as the leading case on this branch of the law. There are no other Victorian cases worthy of mention, and there is a long gap before there was another decision of any importance in England. In *Everett v. Griffiths & Anklesaria* (1921), 1 A.C. 631, Griffiths was a magistrate who had committed the plaintiff to an asylum on the certificate of Anklesaria. The only question submitted to the jury was, did the defendants exercise reasonable care? The jury disagreed. Lord Reading, the presiding judge, gave judgment on the law. He held that Griffiths had acted judicially, and an action for negligence would not lie against him. As to Anklesaria, the detention was not caused by his action.

This judgment was affirmed on different grounds in the Court of Appeal and in the House of Lords. In the latter court the medical practitioner was absolved on the ground that there was no evidence fit to be left to the jury of any want of care, none that ought reasonably to satisfy them. It was, therefore, not necessary to decide the point raised by Lord Reading, but Viscount Finlay expressed a contrary opinion. The House of Lords also left undecided another question which had been raised during the hearings in this case, namely, whether a medical practitioner can be sued for negligence by the person certified, inasmuch as he has not entered into a contract with him. Lord Haldane contented himself with saying that this question would have to be considered.

It was left to judges of first instance, Horridge, J., and McCardie, J., to finally settle the two points referred to above. In *Harnett v. Fisher*, (1927) 1 K.B. 402, (1927) A.C. 573, Horridge, J., held that defendant was under a duty to the plaintiff to satisfy himself that the plaintiff was a lunatic, and that the duty extended to exercising a reasonable degree of professional skill. He also adopted Viscount Finlay's view as to the damage resulting from the certificate—"the negligent giving of a certificate is the direct cause of the reception order and detention."

In the same year, McCardie, J., in *DeFreville v. Dill*, 96 L.J.K.B. 1056, followed the decision of Horridge, J.