CONSTITUTIONAL LITIGATION AND DISABILITY RIGHTS

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INTRODUCTION

Social reform invariably requires political action. For some groups, however, it can be difficult to secure the appropriate level of political support to ensure that their interests are adequately protected and, in such cases, that may lead to demands to have those interests protected by justiciable rights. The attractiveness of such rights is that they are perceived to circumvent the political process that is generally seen as, at best, indifferent to reform. In the Irish context, the case for a rights-based approach to the problem of social exclusion has been made with particular force in relation to people with disabilities. This manifested itself primarily in relation to the campaign for justiciable statutory rights, but people with disabilities have also had recourse to the Constitution in order to advance their interests. In this article, I propose to review how they have fared in this endeavour and to evaluate the efficacy of constitutional litigation as a means of achieving reform for people with disabilities.

Constitutional litigation has been taken by people with disabilities in relation to five topics: improving services for people with disabilities; challenging the detention of persons with disabilities; vindicating the right of patients detained pursuant to mental health legislation to have access to the courts to pursue civil actions arising from their detention; seeking the provision of postal voting for persons with physical disabilities; and challenging the exclusion of deaf people from jury service.

In terms of delivering improvements for people with disabilities, the record of constitutional litigation would appear to be somewhat mixed. Litigation has certainly protected the right of people with mental health difficulties to have access to the courts arising out of their treatment under mental health legislation, while litigation seeking the extension of postal voting to voters


2. In this jurisdiction, much academic comment on the use of constitutional litigation to effect change has focused on the political and constitutional legitimacy of having recourse to the courts for this purpose. I address this question in Ch.1 of my book, Whyte, Social Inclusion and the Legal System: Public Interest Law in Ireland (Dublin: IPA, 2002), and defend the legitimacy of such litigation in part by relying on Ely's defence of judicial activism designed to ensure that the political process is open to all on an equal basis. It is at least arguable that people with disabilities do not have such access to the Irish political process and that, building on the reasoning of Stone J. in the famous fn.4 of US v Carolene Products 304 U.S. 144 (1938), this justifies heightened judicial scrutiny of legislation and government policy adversely affecting their interests.
with physical disabilities and the improvement of educational provision for children with learning difficulties, though unsuccessful in court, arguably acted as a catalyst for subsequent improvement in both contexts effected through the political process. In other respects, however, it is arguable that constitutional litigation has failed to deliver for people with disabilities. In the context of the aforementioned litigation on educational provision, the Supreme Court has interpreted the doctrine of separation of powers in a way that poses a serious obstacle to any attempts by people with disabilities to use constitutional litigation to obtain better services from the State. Moreover, challenges to the detention and medical treatment of people with disabilities have often floundered on the paternalistic approach adopted by the judiciary in such cases. Nor, as we shall see, have people with disabilities had any success in invoking the constitutional guarantee of equality to promote reform.

In short, the experience of people with disabilities with constitutional litigation reinforces the lessons learnt in other contexts, namely that litigation strategy is a tactic to be used warily and that engagement with the political process is generally unavoidable if reform is to be achieved.

Seeking improved services for people with disabilities
Attempts to use the Constitution to oblige the State to provide improved services for people with disabilities have had mixed success. Perhaps the earliest case in this context is State (C) v Frawley, in which Finlay P. held that it was not the function of the court to fix the priorities of the executive's health and welfare policy and that, accordingly, he would not direct the State to provide a prisoner with psychiatric illness with specialised treatment.

During the 1990s, a more sustained attempt to improve educational provision for children with learning difficulties resulted in a series of cases being taken to clarify how, if at all, the State's constitutional duty to provide for free primary education might be relevant to such children. To put this litigation in context, it should be noted that, while the State had played a pioneering role in developing educational systems for children with mild to moderate learning difficulties, it made very little provision for the educational support of children at the more challenging end of the learning difficulties spectrum.

3. This judicial approach is not confined to cases of litigants with disabilities that impair their mental faculties, but may also apply to an otherwise competent patient who is not considered to be in a position to make an autonomous decision in relation to treatment: see JM v Board of Management of St Vincent's Hospital [2003] 1 I.R. 321; or, where a patient has not properly assimilated the relevant treatment information, believed it and weighed it in the balance in arriving at a decision in relation to treatment, see Fitzpatrick v K [2008] IEHC 104 (April 25, 2008) HC.


5. More recently, in ET v Clinical Director of the Central Mental Hospital [2010] 4 I.R. 403, Charleton J. held that, short of evidence of an abuse of public authority or of a decision being made contrary to fundamental reason and common sense, or that failure to act would endanger or cause serious injury to health that is demonstrably avoidable, the courts could not interfere with decisions on the allocation of health resources—in the instant case, a place in the Central Mental Hospital.
Initially this litigation strategy seemed to hold open the prospect of success. In *O’Donoghue v Minister for Health*, O’Hanlon J. held that the State did have a constitutional obligation under Art.42.4 to provide appropriate education for children with severe or profound learning difficulties, in the process offering certain guidance to policy-makers on such questions as the teacher-pupil ratio and the commencement, duration and continuity of such education. This decision triggered the initiation of hundreds of legal proceedings in which the parents of children with learning difficulties sought to compel the State to provide these children with appropriate educational support and eventually, in November 1998, the then Department of Education announced a package of measures, costing £4 million per annum and providing an extra 65 teaching posts and approximately 200 childcare jobs, designed to ensure that every child with special educational needs would have access to special extra teaching and/or school-based childcare. This victory was followed up by success in the High Court in a second case, *Sinnott v Minister for Education*, in which Barr J.‘s major holding was that the constitutional right of a child with severe or profound learning difficulty to basic education was potentially lifelong and not restricted by age. One week after this decision, the Government announced a series of measures designed to help autistic children and also promised to establish an inter-departmental team to coordinate the State’s response to such children. However, when the *Sinnott* decision was appealed to the Supreme Court, a majority of the court held that, having regard to the doctrine of the separation of powers, the courts had no jurisdiction to issue a mandatory injunction directing the State to provide a child with autism with a specific type of education. Three members of the Supreme Court endorsed the decision of Costello J. in *O’Reilly v Limerick Corporation* in which that judge held that, under the Constitution, the courts were confined to dealing with claims of commutative justice and were precluded from entertaining claims based on distributive justice, that is to say, claims in relation to the distribution and allocation of common goods and common burdens.

The reasoning in *O’Reilly* has come in for some criticism. I myself have argued elsewhere that this position rests on certain pre-interpretative values that prize judicial restraint and that it fails to take account of other elements in the Constitution that support a commitment to social inclusion. In addition, it may be argued that the distinction between distributive and commutative justice fails to accommodate the clear duty of the courts to enforce certain civil and political rights that also have cost implications for the State. A number

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of such rights are explicitly listed in the Constitution, namely the right to vote (Art.16.1.20), the right to a fair trial (Art.38.1), the right to free primary education (Art.42.4) and the right of children whose parents have failed in their parental duties to be cared for by the State (Art.42.5). The Irish courts, moreover, have recognised at least one implied constitutional right that carries cost implications for the State, namely the right to criminal legal aid. This right was first recognised in 1976 in State (Healy) v O’Donoghue, but its existence was affirmed, post-O’Reilly, in Carmody v Minister for Justice, Equality and Law Reform. A striking feature of Carmody is that the Supreme Court did not advert to any possible inconsistency between the decisions in Healy and Carmody on the one hand, and the reasoning in O’Reilly on the other, possibly because the strength of the court’s commitment to the classical liberal value of liberty, which is protected by the right to criminal legal aid, blinded it to that difficulty. Whatever the reason, the judicial recognition of the right to criminal legal aid does appear to undermine somewhat the Supreme Court’s insistence on applying the distinction between distributive and commutative justice in relation to constitutional claims such as those advanced in the Sinnott case. Instead, it is arguable that a judicial bias in favour of first-generation liberal democratic rights and against second-generation socio-economic rights may offer a better explanation for the distinction between those constitutional claims with cost implications that are likely to be successful before the courts and those that are likely to be rejected.

Notwithstanding these criticisms of the reasoning in O’Reilly, that reasoning had previously been endorsed by the Supreme Court in MhicMhathina v Attorney General and was again approved in the subsequent case of TD v Minister for Education, and so the ultimate outcome of Sinnott was to diminish very significantly the potential for using the Constitution to compel the executive to provide services and facilities to people with disabilities and other marginalised groups.

While this outcome may be disappointing from the perspective of people with learning difficulties, it must still be acknowledged that the earlier High Court rulings did succeed in improving somewhat the educational provision

11. The right to protection of the person in Art.40.3 might also warrant inclusion here, given Hogan J.’s recent decision in H v HSE [2011] IEHC 297 (July 18, 2011) HC, that this required the State to adopt a holistic approach to the protection of the plaintiff’s welfare and general best interest which, in the instant case, required the State to arrange, presumably at some expense, the short-term protective detention of the plaintiff, a teenager suffering from an acute behavioural disorder.

12. A more tenuous example of another implied right requiring public expenditure is the possible right of citizens who cannot look after themselves independently to care and maintenance by the State, the existence of which right was not denied by the Supreme Court in Re Article 26 and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 I.R. 105.


17. In light of this outcome, it is ironic that Costello J. himself later resiled from his position in O’Reilly in an ex tempore judgment in O’Brien v Wicklow UDC (June 10, 1994) HC.
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for these children. As we have already noted, O'Donoghue was the catalyst for the improvement in educational support for children with learning difficulties announced in November 1998, and this change in the educational environment may be seen from the nature of the three post-Sinnott cases asserting a constitutional right to education on behalf of autistic children. Whereas in O'Donoghue and Sinnott the complaint was that the State had essentially made no adequate provision at all for the education of the respective plaintiffs, in the later cases of O'Carolan v Minister for Education and Science, O'C v Minister for Education and Science, and McD v Minister for Education and Science, the State had provided for the education of the plaintiffs but the parents of the respective plaintiffs resorted to litigation in order to obtain what they considered to be more appropriate forms of education. Each of these cases was unsuccessful, the judges in O'Carolan and O'C essentially applying a rationality standard of review to the educational provision made for the respective plaintiffs.

Thus, in evaluating the impact of constitutional litigation taken by people with disabilities in relation to the provision of educational facilities, it can be argued that the earlier litigation did succeed in requiring the State to engage more meaningfully with the needs of children with severe and profound learning difficulties. However, the Supreme Court's endorsement of Costello J.'s distinction between distributive and commutative justice means that the chances of success in future litigation seeking the provision of additional publicly-funded services or facilities, whether of an educational or other nature, for people with disabilities are now very significantly diminished.

Challenging the detention of people with disabilities

The Irish courts' first encounter with constitutional litigation taken by people with disabilities occurred in the context of challenges being made by people with mental health difficulties to their detention under mental health legislation. The resulting jurisprudence, perhaps understandably, reflects a strong paternalistic approach on the part of the judiciary to the plight of such people that generally militates against the success of the litigation from the patient's perspective, inasmuch as the paternalistic approach tends to support the decisions of the medical team treating the patient rather than the wishes of the patient. Recently, this paternalistic approach has also resulted in the courts upholding the concept of protective detention for people with personality disorders.

In addition, the Health Act 1947 also provides for the detention of a competent patient where he or she is a probable source of a prescribed infectious disease,
and one constitutional challenge has been taken to detention under this legislation.

Detention under mental health legislation In *In re Philip Clarke*, the plaintiff challenged the constitutionality of s.165 of the Mental Treatment Act 1945 (the "1945 Act") pursuant to which he had been detained by a member of the Garda Síochána. Section 165(1) authorised the Gardáí to detain any person believed to be of unsound mind, prior to an application for the person's reception in a district mental hospital, where such detention was considered to be in the interest of public safety or in the interest of the person detained. The plaintiff's main ground for challenging s.165 was that the section failed to provide for any judicial involvement in the process of deciding whether a person should be detained pursuant to the 1945 Act. However, this was rejected by the Supreme Court, O'Byrne J. stating:

"The impugned legislation is 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. The existence of mental infirmity is too widespread to be overlooked, and was, no doubt, present to the minds of the draughtsmen when it was proclaimed in Art.40.1 of the Constitution that, though all citizens, as human beings, are to be held equal before the law, the State may, nevertheless, in its enactments, have due regard to differences of capacity, physical and moral, and of social function. 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.

The section is carefully drafted so as to ensure that the person, alleged to be of unsound mind, shall be brought before, and examined by, responsible medical officers with the least possible delay. This seems to us to satisfy every reasonable requirement, and we have not been satisfied, and do not consider that the Constitution requires, that there should be a judicial inquiry or determination before such a person can be placed and detained in a mental hospital.

The section cannot, in our opinion, be construed as an attack upon the personal rights of the citizen. On the contrary it seems to us to be designed for the protection of the citizen and for the promotion of the common good."

Thus, primary responsibility for ensuring that there were no improper detentions under the 1945 Act was essentially placed on the shoulders of the doctors, though of course the courts could intervene in an individual case if there was evidence that a decision to detain was ultra vires or arbitrary, capricious or

unreasonable. Of additional interest here is the manner in which the court relied on the guarantee of equality to justify this paternalistic approach to people with mental health difficulties.

A similar approach was again adopted by the Supreme Court almost 50 years later when, in *Croke v Smith (No. 2)*,24 it held that the Constitution did not require any role for the judiciary in determining whether a person should be detained under s.172 of the 1945 Act which authorised the detention of a person in respect of whom a chargeable patient reception order has been made. According to the Supreme Court, the making of such an order did not amount to an administration of justice and, consequently, did not require any judicial determination. Nor did the absence of any provision for a judicial adjudication prior to detention amount to an infringement of the plaintiff's right to liberty. Again citing the provisions of Art.40.1, the Supreme Court held that the 1945 Act satisfied every reasonable requirement and did not constitute an attack upon the personal rights of the citizen. The onus was again placed on medical personnel to ensure that a person's right to liberty was properly respected. According to the Court, such personnel had to have regard to the personal rights of the patient, including the right to liberty which could only be denied if the patient was a person of unsound mind in need of care and treatment and which had to be restored if the patient recovered. Moreover, given that the 1945 Act provided for the investigation of complaints of unlawful detention by various bodies, the Constitution did not require the provision of an automatic review of detention by an independent tribunal.

More recently, in *BF v Clinical Director of Our Lady's Hospital, Navan*,25 Peart J. held that a patient's constitutional rights to dignity, bodily integrity, privacy or autonomy were,

"limited to the extent that may be consistent with his best interests, as determined by relevant medical personnel, and provided that such limitations as are imposed, are imposed in accordance with laws enacted for the protection of the patient from any arbitrariness or caprice on the part of those detaining him."26

Accordingly, in the instant case, he held that a patient who had been admitted on a voluntary basis into hospital could not object to his subsequent discharge and re-admission as an involuntary patient, where such a course of action was necessary in order to ensure that he received appropriate medical treatment.

Judicial acceptance of mental health legislation as necessarily paternalistic has also influenced the manner in which mental health legislation is interpreted. Thus in *Gooden v Waterford Regional Hospital*,27 Hardiman J. indicated that the paternalistic nature of the 1945 Act "rendered 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”, and this approach has been taken to the interpretation of the Mental Health Acts 2001–2009 in a number of subsequent cases, in each of which the courts upheld the legality of the detention of the applicant.

Two other features of the jurisprudence here also reflect the paternalistic approach that the courts have tended to take to litigants who are detained because of their mental health difficulties. First, the courts are reluctant to find that a defect in an earlier order made under mental health legislation necessarily renders invalid a subsequent order justifying detention. In _LK v Clinical Director, Lakeview Unit, Naas General Hospital_, Clarke J. had reserved the question of whether, in the absence of a deliberate and conscious violation of a detained person’s rights, an order made under s.184 of the now repealed 1945 Act providing for the temporary detention of a voluntary patient was necessarily invalid because of a technical deficiency in the lawfulness of the custody of the person concerned at the time when that person was assessed and

28. Fn.27 at 639. In the instant case, the Supreme Court held that s.194 of the 1945 Act did not have to be interpreted literally so as to prevent the continued detention of a voluntary patient, who had given notice of discharge, in circumstances in which the patient was a danger to himself or to the general public.

29. See _MR v Byrne_ [2007] IEHC 73 (March 2, 2007) HC; _T O’D v Kennedy_ [2007] 3 I.R. 689; _JB v Director of the Central Mental Hospital_ [2007] IEHC 201 (June 15, 2007) HC; _McG v Medical Director of the Mater Hospital_ [2007] IEHC 401 (November 29, 2007) HC; _AR v Clinical Director of St Brendan's Hospital_ [2009] IEHC 143 (March 24, 2009) HC; _EH v Clinical Director of St Vincent's Hospital_ [2009] 3 I.R. 774; _NB v Our Lady's Hospital, Navan_ [2010] 3 I.R. 426; _HSE v MX_ [2011] IEHC 326 (July 29, 2011) HC; and _PL v Clinical Director of St Patrick's University Hospital_ [2012] IEHC 15 (January 24, 2012) HC. However, a purposive approach to the interpretation of the Mental Health Acts is possible only where a literal approach would produce an absurd result or a result that would be at odds with the intention of the legislature: see _JD v Director of Central Mental Hospital_ [2007] IEHC 100 (March 20, 2007) HC (ex tempore) and _SM v Mental Health Commission_ [2009] 3 I.R. 188. In the latter case, McMahon J. stated that statutory provisions restricting liberty must be narrowly construed and so he held that an order made by a psychiatrist authorising the applicant's detention for a period not exceeding 12 months was invalid because it did not comply with s.15 of the Mental Health Act 2001 (the “2001 Act”). In _JB v Mental Health (Criminal Law) Review Board_ [2008] IEHC 303 (July 25, 2008) HC, Hanna J. declined an invitation to adopt a purposive interpretation of the Criminal Law (Insanity) Act 2006 that would confer an implicit authority on the Review Board to operate a supervisory regime for a person provisionally discharged pursuant to s.13 of that Act, as the judge considered that this would amount to the exercise of a legislative power contrary to the doctrine of the separation of powers. Peart J. took a similar view of s.13 of the 2006 Act in _L v Kennedy_ [2010] IEHC 195 (May 5, 2010) HC, while in _Han v President of the Circuit Court_ [2011] 1 I.R. 537 (though decided on May 30, 2008), Charleton J. similarly refused to interpret s.19 of the 2001 Act so as to confer on the Circuit Court a power to conduct a historic review of the reasons for detaining the applicant. In _AM v Kennedy_ [2007] 4 I.R. 667, Peart J. held that a purposive interpretation could not be applied to orders authorising detention under the Mental Health Acts, as distinct from the provisions of the Acts themselves, as that would nullify the very purpose of inserting safeguards in the statutory procedures put in place, a view subsequently endorsed by MacMenamin J. in _JB v Director of the Central Mental Hospital_ [2007] IEHC 201 (June 15, 2007) HC.

examined for the purposes of considering whether it was appropriate to make an order under s.184, stating:

"While it is undoubtedly important that the safeguards built into the Acts are complied with, having regard to the far reaching powers conferred under the Acts, it also needs to be taken into account that persons who are, properly, in need of psychiatric treatment may be exposed to significant danger if that treatment is not afforded. In those circumstances the balancing of rights involved may not, necessarily, be precisely the same in circumstances such as those with which I am concerned, on the one hand, and those pertaining to a person arrested as part of a criminal process, on the other.""\(^{31}\)

In *EH v Clinical Director of St Vincent's Hospital*,\(^{32}\) Kearns J. cited both *RL v Director of St. Brendan's Hospital*\(^{33}\) and *Cudden v Clinical Director of St. Brendan's Hospital*\(^{34}\) as "[putting] paid to any suggestion that a domino effect or theory of infection applied to cases of [detention under mental health legislation]",\(^{35}\) in the absence of a gross abuse of power or default of fundamental requirements.

Secondly, even where it has been established that a patient's detention is unlawful such that an order for release should be granted, the courts have asserted a jurisdiction to make ancillary orders as to how best to give effect to an order for release. This jurisdiction was first asserted in relation to the detention of a person with mental health difficulties in *JH v Russell*,\(^{36}\) wherein Clarke J. ordered that the plaintiff be released at a specified time that was approximately seven hours after the judge delivered a ruling that the plaintiff's detention under the Mental Health Acts was unlawful. In making this order, the judge invoked the Supreme Court decisions in *N v Health Services Executive*\(^{37}\) and *DG v Eastern Health Board*,\(^{38}\) dealing with an infant and a minor with a severe personality disorder respectively.\(^{39}\) In the former case, Murray C.J. said

\(^{31}\) \([2007]\) 2 I.R. 465 at 482.
\(^{32}\) \([2009]\) 3 I.R. 774.
\(^{33}\) (February 15, 2008) SC. Unreported, Supreme Court, February 15, 2008.
\(^{34}\) (March 13, 2009) SC. Unreported, Supreme Court, March 13, 2009.
\(^{35}\) \([2009]\) 3 I.R. 774 at 792. In *WQ v Mental Health Commission* [2007] IEHC 154 (May 15, 2007) HC, O'Neill J. noted that the 2001 Act provided for short, discontiguous periods of detention of a patient, and where each period of detention had to be fully justified. He continued: "A finding of invalidity of a Renewal Order which in itself is valid in all respects, because of a defect in a previous Renewal Order or Admission Order is a wholly undesirable eventuality and in all probability not in the best interests of persons suffering from a mental disorder." See also *RL v Clinical Director of St Brendan's Hospital* [2008] IEHC 11 (January 17, 2008) HC, affirmed by the Supreme Court, February 15, 2008.
\(^{36}\) [2007] IEHC 7 (February 6, 2007) HC.
\(^{39}\) In *L v Kennedy* [2010] IEHC 195 (May 5, 2010) HC, however, Peart J. held that this paternalistic jurisdiction did not apply to a patient with a personality disorder as distinct from a mental illness.
that the courts had a jurisdiction to make ancillary or interim orders, in the context of habeas corpus proceedings, in order to protect the rights and welfare of an infant pending effect being given to an order for release, while, in the latter case, a Supreme Court majority held that the High Court could order the protective detention of a troubled teenager in a penal institution, assuming for the purposes of the case that the High Court had a jurisdiction to make an order for protective detention. In the instant case, Clarke J. held that he could make an appropriate ancillary order, in circumstances in which the plaintiff's detention was unlawful but where it was accepted that he needed treatment in an institution, that would enable the hospital authorities to make a fresh application for the detention of the plaintiff under the 2001 Act.40 In CC v Clinical Director of St Patrick's Hospital,41 McMahon J. held that the common law duty of care would also justify a short extension of detention in order to ensure a safe and reasonable release.42

While the paternalistic approach taken by the courts tends to defeat most constitutional litigation taken by people with mental health difficulties challenging their detention, such litigation was successful in relation to two issues: a challenge to legislation providing for the detention of people with mental health difficulties charged with an indictable offence, and the clarification of the procedural rights of an involuntary patient challenging the legality of his or her detention by means of a habeas corpus application.

In relation to the former point, in RT v Director of the Central Mental Hospital,43 Costello J. struck down s.207 of the 1945 Act providing for the detention in the Central Mental Hospital of a person charged with an indictable offence, where there was prima facie evidence both that the person committed the offence and that he or she would be unfit to plead if placed on trial. According to the judge, the State had an exacting duty to protect the rights of weak and vulnerable citizens such as those suffering from mental disorder and, in particular, had to ensure that the legislation authorising detention contained adequate safeguards against error and abuse. Section 207 fell short of this standard, however, in a number of respects, as had been recognised in the Green Paper on Mental Health 1992—the detained person had no proper trial for the offence or in relation to his or her fitness to plead; once there was prima facie evidence that the detained person had committed the offence and was unfit to plead, the judge had no discretion but to grant the certificate that the accused was suitable for transfer to the Central Mental Hospital; the legislation set out no criteria for the ministerial power to detain thereby activated; no limit was set on the length of such detention; and it was not clear what happened the original charge once the certificate had been signed. In

40. Similar ancillary orders were subsequently made in AMC v St Luke's Hospital, Clonmel [2007] IEHC 65 (February 28, 2007) HC; JD v Director of the Central Mental Hospital [2007] IEHC 100, ex tempore, High Court, March 20, 2007; AM v Kennedy [2007] 4 I.R. 667; and the jurisdiction to make such orders was accepted in PL v Clinical Director of St Patrick's University Hospital [2012] IEHC 15 (January 24, 2012) HC.
41. [2009] IEHC 13 (January 20, 2009) HC.
42. See also McN v HSE [2009] IEHC 236 (May 15, 2009) HC.
addition to these defects, Costello J. also noted that the section could be used to prosecute a person who, because of mental illness, may have lacked the mens rea to support a conviction or to secure the transfer of a disruptive patient from another institution to the Central Mental Hospital, thereby, on both counts, possibly constituting an abuse of the criminal process. According to the judge, the section was also based on a patent illogicality in that it did not follow that, because a patient was unfit to plead, he or she was suitable for transfer to the Central Mental Hospital. Neither was there any provision for a review of the opinion of the Inspector as to the suitability of the Central Mental Hospital or of the continued detention of the patient. Taking all those factors into account, Costello J. concluded that the State had failed adequately to protect the right to liberty of patients detained pursuant to the section and that it was therefore unconstitutional. The judge noted that appropriate reforms had been provided for in the Health (Mental Services) Act 1981, but that that legislation had not been brought into force because its provisions were overtaken by developments in international law and in the psychiatric services.

Unfortunately, this robust attitude to the need to improve the standard of procedures regulating the detention of people with disabilities was not carried through in relation to other aspects of the 1945 Act and, as already noted, in Croke v Smith (No. 2), the Supreme Court subsequently held that the failure to provide for independent review of the continued detention of patients did not render the 1945 Act unconstitutional because of the obligation placed on the resident medical superintendent regularly and constantly to review a patient in order to determine whether the continued detention of the patient is warranted. In this context, the constitutional protection afforded to persons detained under mental health legislation compares unfavourably with that provided by the European Convention on Human Rights, for, in X v United Kingdom, the European Court of Human Rights held that such a person was entitled, under art.5(4) of the Convention, to automatic periodic review, of a judicial nature, of the legality of the ongoing detention. Commenting on Croke, Whelan said that it was a "major setback for the rights of patients detained under the 1945 Act".

The second area in which constitutional litigation taken by a person with mental health difficulties proved successful related to the procedural rights of patients challenging the legality of their detention prior to the bringing into force of the 2001 Act. In LK v Clinical Director, Lakeview Unit, Naas General Hospital, Clarke J. held that an involuntary patient challenging the legality of her detention under the former Mental Treatment Acts by way of application under Art.40.4 was constitutionally entitled to a reasonable opportunity to challenge the grounds put forward for continued detention and that, at a minimum she was entitled to a reasonable facility to enable her to put

46. Whelan, Mental Health Law and Practice (Dublin: Round Hall, 2009), para.1.10.

Provision for review of the involuntary detention of patients with mental health difficulties is now provided for in ss.17 and 18 of the 2001 Act.
before the court an expert view on the material issues raised by her application. Clarke J. left open the question whether it would be appropriate for the courts to entertain an application under Art.40.4 once the provisions of the 2001 Act concerning mental health tribunals were commenced, but one would imagine that the principles of constitutional justice would decree the same outcome in relation to cases taken under the 2001 Act.

People with personality disorders  The paternalistic approach to people with mental health difficulties is also evident in the judicial approach to people with personality disorders inasmuch as the courts have recently asserted an inherent jurisdiction to order the protective detention of such persons where they pose a risk either to themselves or to others.48 This jurisdiction to order protective detention was first asserted by Kelly J. in the case of a minor who was not mentally ill but who had a serious personality disorder that meant he posed a risk both to himself and to others and, on appeal, a majority of the Supreme Court held, on the assumption that such an inherent jurisdiction did exist, that it extended to ordering protective detention for a short period in a penal institution; see DG v Eastern Health Board.49 This jurisdiction was subsequently exercised by the High Court in a number of cases concerning minors.50 Then in HSE v. O'B51 Bermingham J. extended the jurisdiction to vulnerable adults, when he ordered the detention in the Central Mental Hospital of a 26-year-old man with intellectual disability and autism spectrum traits who exhibited features of a sociopathic personality disorder, where both medical experts and the man's family agreed that he needed to be confined in a high secure facility. It was agreed that the man was not suffering from a mental illness or disorder as defined in s.3 of the 2001 Act and so that legislation was inapplicable. However, the judge held that "where an adult lacks capacity and where there is a legislative lacuna so that the adult's best interests cannot be served without intervention by the Court, ... the [High] Court has jurisdiction, by analogy with cases like DG and the several High Court decisions from different judges of the High Court there referred to, to intervene".52 Bermingham J. went on to

48. In Application of Gallagher (No. 2) [1996] 3 I.R. 10, two members of a Divisional High Court, Geoghegan and Laffoy JJ., had rejected the argument that the former Trial of Lunatics Act 1883 permitted the preventative detention of someone who was dangerous but no longer insane. But given that Gallagher suffered from a personality disorder, it would appear that a court might now be able to order his protective detention in the exercise of this new inherent jurisdiction.


52. Fn.51 at 803. The High Court cases referred to in this quotation dealt with children at risk.
hold that, as the court order constituted a serious interference with O'B's right to liberty, the situation would have to be reviewed by the courts on a regular basis and he indicated that initially a review would take place every two months. He also required the HSE to facilitate the making of an expert report on the arrangements from someone who was independent of all of the parties to the litigation, given that there was no disagreement between the parties to the litigation as to the need to detain O'B.

**Patients with infectious disease** Finally, in this section, I turn to consider the legal position of a person with an infectious disease detained pursuant to s.38 of the Health Act 1947. Cases of detention under this provision are apparently quite rare, but one such case in 2009, *VTS v HSE*, presented an acute problem as the detained patient, who was regarded as a probable source of multiple drug-resistant TB, refused to submit to medical treatment and so faced an indefinite period of detention under the Act. In the course of his judgment on the patient's application for habeas corpus, Edwards J. held that, though the means used to execute the order of detention were unlawful, this did not undermine the lawfulness of the order itself. However, there was an obligation on the person invoking s.38 to ensure that the patient's rights were respected and vindicated to the greatest extent possible, consistent with the need to protect the public from the infectious disease.

The plaintiff had challenged the constitutionality of s.38 on the ground that it failed to provide sufficient safeguards for her personal rights. In particular, she complained of the absence of provision for periodic reviews of detention under the Act, the inadequacy of the existing system of appealing to the Minister for Health, the absence of formal mechanisms for ensuring access to the courts and legal presentation for patients, and the failure to make provision for the appointment of an independent advocate to represent patients. Upholding the constitutionality of the legislation, Edwards J. said that the presumption of constitutionality meant that decisions taken under s.38 would be made in accordance with principles of natural and constitutional justice and that the decision-maker would have regard to the patient's right to liberty. The provision was benign and paternalistic and, while it might be desirable to have more specific safeguards towards the defence and vindication of the patient's personal rights, the absence of such safeguards did not, of itself, render the section unconstitutional. According to the judge, the combination of the safeguards already within the section, the operation of the presumption of constitutionality and the existence of the remedy of habeas corpus for the person affected, if the section was not operated constitutionally, provided an adequate level of protection for the patient's personal rights. The reasoning here has strong echoes of the reasoning of the Supreme Court in *Croke v Smith (No. 2)* in relation to detention under the 1945 Act upon which the respondents had placed great reliance, which decision has attracted unfavourable comment.

55. See Whelan, fn.46 above.
Moreover, while Edwards J. relied in part on the availability of the remedy of habeas corpus, it is worth noting that the respondents relied on State (O) v Daly\(^{56}\) to deny that the State had any obligation to provide legal aid in such cases, leaving a question mark over the availability of this remedy in the case of people of modest means detained under s.38.

**Right of access to the courts to sue on foot of detention under mental health legislation**

In contrast to much of the litigation challenging the detention of persons with disabilities, constitutional litigation taken by persons with mental health difficulties has been successful in striking down restrictions on their ability to sue in the courts on foot of their detention pursuant to mental health legislation. By virtue of the former s.260(1) of the 1945 Act, no civil proceedings could be brought in respect of an act purporting to have been done pursuant to the 1945 Act unless the High Court was satisfied that there were substantial grounds for contending that the proposed defendant had acted in bad faith or without reasonable care. In O'Dowd v North-Western Health Board,\(^{57}\) a Supreme Court majority held, on the facts, that there were no grounds to support the plaintiff's contention that the putative defendants had acted without reasonable care.\(^{58}\) A similar conclusion was reached in Murphy v Greene,\(^{59}\) in which the Supreme Court also held that s.260(1) must be strictly construed, as it imposed a limitation on the constitutional right of access to the courts.

Eventually, however, the courts declared s.260 to be unconstitutional. In Blehein v Minister for Health and Children,\(^{60}\) Carroll J. held that the limitation of access to the courts to the two specific grounds mentioned in the section, namely that the defendant may have acted in bad faith or without reasonable care, was an unconstitutional interference by the Oireachtas in the judicial domain, contrary to the doctrine of the separation of powers and to Art.34 providing for the administration of justice by the courts, a view subsequently upheld by the Supreme Court.\(^{61}\) Delivering the judgment of the court, Denham J. said:

"[Section 260(1)] was a restriction on the administration of justice where several features of the section are important. It placed a burden on a plaintiff, it related to two specified grounds only, it limited access to the courts, it curtailed the discretion of the court in a situation where a balance of constitutional rights is required to be protected."

\(^{58}\) In contrast, Henchy J. concluded that, inter alia, the signing of the statutory form authorising the reception and detention of the plaintiff by a doctor who had not, in fact, examined him on his arrival at the hospital amounted to a lack of reasonable care that should have led the court to grant permission to bring proceedings.
\(^{60}\) [2004] 3 I.R. 610.
\(^{62}\) Fn.61 at 281.
Section 260 has since been replaced by s.73 of the 2001 Act, subsection (1) of which reverses the burden of proof by requiring the High Court to grant leave unless it is satisfied that the proceedings are frivolous or vexatious or that there are no reasonable grounds for contending that the defendant acted in bad faith or without reasonable care. However, s.73(3) re-enacts s.260(3) by providing that the plaintiff may not succeed in the substantive action unless s/he can establish that the defendant acted in bad faith or without reasonable care. In \textit{L v Clinical Director of St Patrick's Hospital}, Clarke J. commented that this restriction on the type of proceedings that a plaintiff may bring raises some questions about the constitutionality of s.73, though he did not have to decide this point on the facts of the case. As against that, the Supreme Court in \textit{Blehein} confined its finding of invalidity to s.260(1), noting that there was no specific infirmity at issue in, inter alia, s.260(3).

\textit{Postal voting for persons with physical disabilities}  
People with disabilities have also resorted to litigation in relation to two civic claims, namely the right to be assisted in exercising the right to vote and the right to serve on juries. In \textit{Draper v Attorney General}, the plaintiff, who was unable to access polling stations because she was confined to a wheelchair, claimed that the failure of the State to provide her with the facility of a postal vote amounted to a breach of both Art.16.1.20, dealing with the right to vote, and the guarantee of equality in Art.40.1. Both arguments were dismissed by the Supreme Court, who considered that an extension of postal votes to voters who were unable to attend polling stations carried with it a very high risk of abuse that could not easily be countered and that would also involve some cost to the State. While the State was free, having regard to the terms of Art.40.1, to make particular provision to facilitate voters such as the plaintiff in exercising their franchise, its failure to do so was not a breach of the guarantee of equality.

However, the eventual outcome of this saga highlights the fact that the impact of litigation strategy is not always confined to the ruling made by the court but may also generate desirable indirect effects. Thus, in the instant case, though Mrs Draper was unsuccessful in court, her case arguably acted as a catalyst for the enactment of the Electoral Amendment (No. 2) Act 1986 that did provide for postal voting for those persons unable to attend at polling stations because of physical illness or disability, thereby achieving Mrs Draper's ultimate objective.

63. In an earlier case involving Mr Blehein, \textit{Blehein v St John of Gods Hospital} (May 31, 2002) SC, the Supreme Court, per McGuinness J., held that s.260 did not apply to a challenge to the constitutionality of that section and this is undoubtedly also true of s.73.
64. [2010] 3 I.R. 537.
66. \textit{Draper} was subsequently approved by the Supreme Court in \textit{Breathnach v AG} [2001] 3 I.R. 230.
Eligibility of deaf people for jury service

The second civic claim that has arisen in recent litigation is the claim by deaf individuals that they should be permitted to serve on juries. By virtue of s.7 of the Juries Act 1976 and Pt I of Sch.1 thereto, persons with insufficient capacity to read, deafness or other permanent infirmity who were, as a result, unfit to serve on a jury, were listed among those ineligible to serve on juries. This was subsequently amended by s.64 of the Civil Law (Miscellaneous Provisions) Act 2008 to provide that persons with an incapacity to read or an enduring impairment, such that it is not practicable for them to perform the duties of a juror, were ineligible to engage in jury service. In Clarke v County Registrar for County Galway, the plaintiff, who had been excused from jury service despite not having been asked to be excused, inter alia, challenged the constitutionality of the exclusion of deaf people from jury service on the ground that it contravened the constitutional principle of the representative nature of the jury. However, O'Keeffe J. expressed the view that the principle of the confidentiality of jury deliberations meant that only jurors could be present in the jury room and that this precluded the plaintiff from having a sign language interpreter present, without which facility she could not effectively engage in jury service. A similar conclusion was apparently reached by White J. in a Circuit Court case in November 2010 but, two weeks after that decision, Carney J. indicated, in an ex tempore judgment, that it would be possible to permit a sign language interpreter to assist a deaf juror provided the signer took an appropriate oath of confidentiality. However, given that this is only an ex tempore judgment, the balance of judicial authority currently leans against the recognition of the right of deaf individuals to serve on juries.

Constitutional guarantee of equality

Finally, I turn to consider the role of the constitutional guarantee of equality in Art.40.1 in protecting the interests of people with disabilities. That this guarantee potentially has some role is clear from dicta of various members of the Supreme court in In Re a Ward of Court (withholding medical treatment) (No. 2). This case involved an application by the committee and family of a ward of court for a High Court order directing the discontinuance of the nutrition and hydration system that had kept the ward alive, albeit in a near persistent vegetative state, for approximately 20 years following catastrophic injuries.

68. O'Keeffe J. delivered his decision in court on July 14, 2010, but as yet there does not appear to be an approved version of his judgment.
sustained by her when she suffered three heart attacks during the course of a minor surgical procedure. Both Lynch J. in the High Court and a majority of the Supreme Court on appeal granted the order withdrawing the nutrition and hydration system. The Supreme Court majority held that the test to be applied in the circumstances of the mentally incompetent ward was whether it was in her best interests to prolong her life, a test consistent with the paternalistic nature of the wardship jurisdiction. However, the majority judgments also contain important dicta affirming that the loss of mental capacity does not adversely affect a person's constitutional rights, having regard to the guarantee of equality. Thus Hamilton C.J. said:

"The loss by an individual of his or her mental capacity does not result in any diminution of his or her personal rights recognised by the Constitution, including the right to life, the right to bodily integrity, the right to privacy, including self-determination, and the right to refuse medical care or treatment."\(^71\)

This position was also endorsed by O'Flaherty and Denham JJ., both of whom additionally invoked the guarantee of equality in this context. Thus, O'Flaherty J. said:

"Is it to be said that by reason of her mental incapacity these rights (of bodily integrity and privacy) have been lost by the ward? I cannot find any constitutional or other rationale for making such a finding. On the contrary, I believe that it would operate as an invidious discrimination between the well and the infirm."\(^72\)

For her part, Denham J. said:

"The right to equality arises in recognition that citizens are human persons. It exists as long as they are human persons. A citizen is a human person until death.

Due regard may be had to differences. It may be that in certain instances a person may not be able to exercise a right. But the right exists. The State has due regard to the difference of capacity and may envisage a different process to protect the rights of the incapacitated. It is the duty of the Court to uphold equality before the law. It is thus appropriate to consider if a method exists to give to the insentient person, the ward, equal rights with those who are sentient."\(^73\)

For many years in the aftermath of this judgment, however, the guarantee of equality was only rarely invoked on behalf of people with disabilities and, until very recently, invariably without success. Thus, in the context of the


detention of people with mental health difficulties, the courts on a number of occasions invoked the proviso to the guarantee, whereby the Oireachtas may have regard to, inter alia, differences in capacity when legislating, in order to uphold legislation providing for the detention, in appropriate cases, of persons with mental health difficulties.\textsuperscript{74} In the case of \textit{Draper v Attorney General}\textsuperscript{75} on voting rights, the Supreme Court held that the making of special provision to assist people with physical disabilities to exercise their franchise was permitted, but not required, by the guarantee of equality. More recently again, in \textit{Re Article 26 and the Employment Equality Bill 1996},\textsuperscript{76} the Supreme Court held that the right of employers to earn a livelihood trumped an attempt by the Oireachtas to require employers to finance the provision of special treatment or facilities for people with disabilities, where such treatment or facilities were necessary to enable a person with a disability to participate in employment. While the court accepted that the promotion of equality in the workplace between people with disabilities and their fellow citizens was an aspect of the common good and in accordance with social justice, the court held that the cost of such a policy should not fall exclusively on employers, but rather should be borne by society in general.\textsuperscript{77}

However, in two recent cases, Hogan J. has applied the guarantee of equality to the benefit of people with disabilities. In \textit{G v District Judge Murphy},\textsuperscript{78} he held that an inadvertent legislative lacuna which meant that a defendant whose mental capacity was in doubt could not take advantage of the option of pleading guilty to an indictable offence, thereby having it dealt with summarily by the District Court, amounted to a discrimination between such a defendant and a defendant of full mental capacity that violated Art.40.1. More recently, in \textit{DX v Judge Buttimer},\textsuperscript{79} he held that the defendant's refusal, based on her understanding of s.40(5) of the Civil Liability and Courts Act 2004, to permit

\begin{itemize}
  \item \textsuperscript{76} [1997] 2 I.R. 321.
  \item \textsuperscript{77} In the course of its judgment in this case, the Supreme Court seemed to have initiated a new approach to the issue of the burden of proof in cases taken under Art.40.1 when it said, at 347: “The forms of discrimination which are, presumptively at least, prescribed by Article 40, s.1 are not particularised: manifestly, they would extend to classifications based on sex, race, language, religious or political opinions.” In the present context, it is interesting to note that disability is not listed among the grounds giving rise to a presumption of discrimination, though it is possible this may have been through inadvertence rather than design. The recent Supreme Court decision in \textit{D v Ireland} [2012] IESC 10 (February 23, 2012) may, however, represent a step back from the court’s stance on the burden of proof in the \textit{Employment Equality Bill reference}, as the court here upheld a gender-based discrimination in the law criminalising under-age sex on the grounds that the courts should be deferential to legislative judgments in such matters and that the discrimination in question was objective and not arbitrary. See also Doyle and Feldman’s analysis of the High Court decision in \textit{D in Byrne and Binchy}, \textit{Annual Review of Irish Law 2010} (Dublin: Round Hall, 2011), pp.154–159.
  \item \textsuperscript{78} [2011] IEHC 445 (December 8, 2011) HC.
  \item \textsuperscript{79} [2012] IEHC 175 (April 25, 2012) HC.
\end{itemize}
a litigant with a speech impediment to be assisted in the course of matrimonial proceedings by a friend familiar with his manner of speaking, amounted to a breach of the constitutional guarantee of equality. He said:

"In practical terms, [Art.40.1 requires] that the courts must see to it that, where this is practical and feasible in the circumstances, litigants suffering a physical disability ... are not placed at a disadvantage as compared with their able-bodied opponents by reason of that disability, so that all litigants are truly held equal before the law in the real sense which the Constitution enjoins."\(^{80}\)

Both of these cases, however, concerned the conduct of legal proceedings and it remains to be seen whether the potential for applying the guarantee of equality for the benefit of people with disabilities may be realised in a wider context.

**CONCLUSION**

Reviewing the constitutional litigation taken by people with disabilities, it is clear that such litigation has produced only limited gains. The one clear-cut advance related to the striking down of s.260(1) of the 1945 Act, restricting access to the courts to persons detained under that Act who wished to bring civil proceedings on foot of their detention. It might also be conceded that litigation on the educational rights of children with severe or profound learning disabilities did act as a catalyst for improvement in educational provision even if, ultimately, the Supreme Court rejected the claim that such a right could be lifelong, and the same argument may be made in relation to the unsuccessful claim in *Draper* for an extension of the postal vote to people with mobility difficulties.

On the debit side, however, it must be recorded that the balance of judicial authority currently leans against recognition of the right of deaf people to participate in juries and that, as already noted, the Supreme Court decision in *Sinnott* firmly closes the door against any claim that the State is obliged to provide lifelong education for people with severe or profound learning difficulties. Moreover, constitutional challenges to their detention taken by people with mental health difficulties have, more often than not, failed because of the paternalistic approach adopted in such cases by the judiciary, an approach sometimes justified by the courts by reference to the proviso to the constitutional guarantee of equality. Reliance by judges on this paternalistic approach in the context of legal challenges impugning substantive decisions on the treatment of patients with mental health difficulties is not surprising and reflects the tendency of judges in other contexts to defer to the decisions of experts in the absence of evidence of arbitrary or irrational decision-making. What is

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80. Fn.79 at para.14 of the judgment.
striking about the impact of the paternalistic approach in the present context, however, is how it has affected judicial decisions on matters of procedure, an area in which one might expect to see more assertive judicial decision-making. Granted, in cases like RT v Director of the Central Mental Hospital,\(^81\) LK v Clinical Director, Lakeview Unit, Naas General Hospital\(^82\) and HSE v O'B\(^83\) the courts did intervene to protect the procedural rights of detained patients, but these cases are counterbalanced by decisions such as Croke v Smith (No. 2),\(^84\) O'Dowd v North-Western Health Board\(^85\) and VTS v HSE,\(^86\) in which it is arguable that the courts fell short in the protection of patients detained on grounds of health, particularly with regard to the requirement of a system of independent review of detention, thereby opening up a gap between the protection afforded to such patients under the Constitution and that available under the European Convention on Human Rights.

In conclusion, in evaluating the efficacy of constitutional litigation in promoting the interests of people with disabilities, one is forced to the conclusion that, on balance, the tactic of relying on the courts has not delivered as much as might have been hoped for and, for people with disabilities, as for other marginalised groups, the political route to reform cannot be avoided. For lawyers working with such groups, this lesson in turn has implications for the type of work that the lawyers might do, with litigation being seen as a support to political work rather than as an alternative.

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