SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2019] SC GLA 89

A1290/18

JUDGMENT OF SHERIFF S REID, ESQ

in the cause

DANIEL BOYLE

Pursuer

against

GREATER GLASGOW AND CLYDE HEALTH BOARD

Defender

GLASGOW, 7 November 2019

The sheriff, having resumed consideration of the cause, Sustains the defender's preliminary plea (plea-in-law 1) in part only to the extent of excluding from probation (i) in article 5 of condescendence, at the end of the first sentence, the words "which was unlawful"; (ii) in article 5 of condescendence, the whole second sentence thereof beginning with the words "It is this period…"; (iii) in article 5 of condescendence, in the third last sentence thereof, the letter "s" where it appears in the word "sections" and the number and word "268 and" which immediately follow thereon; (iv) in article 5 of condescendence, the whole of the penultimate sentence thereof beginning with the words "The Defender has breached…"; (v) in article 6 of condescendence, in the first sentence thereof, the letter "s" where it appears therein at the end of the words "Decisions" and "decisions"; (vi) in article 6 of condescendence, in the first sentence thereof, the number and word "268 and"; (vii) in article

6 of condescendence, in the third sentence thereof, the letter "s" where it appears therein at the end of the word "Decisions"; (viii) in article 6 of condescendence, the whole of sentences 4, 5, 6, 8 and 10 to 14 (inclusive) thereof; (ix) in the pursuer's first plea-in-law, the words "in a manner incompatible with the pursuer's rights in terms of Article 5(1)(e) of the ECHR and" and the words "and it being necessary to afford the pursuer just satisfaction" where they appear therein; and (x) in the pursuer's second plea-in-law, the words "in just satisfaction of the defender's unlawful acts"; *quoad ultra* Repels the defender's preliminary plea; thereafter, Allows parties a proof of their remaining respective averments on dates to be hereafter assigned; meantime, Reserves the question of the expenses of the diet of debate and preparation therefor; Assigns 19th November 2019 at 2pm as a hearing on the question of expenses and ancillary procedural issues (including the estimated duration of the diet of proof before answer and the fixing of a pre-proof timetable) to call before Sheriff Reid in open court.

SHERIFF

NOTE:

Summary

[1] The inglorious history of sections 264 to 273 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") was recounted by Lord Reed in *RM* v *Scottish Ministers* 2013 SC 139. Two years later, the saga of executive inaction continued to play itself out before Lord Turnbull in *S* v *Scottish Ministers* 2015 SLT 362.

[2] The legislation had sought to address the mischief of mentally disordered offenders finding themselves "trapped" in conditions of excessive security within the State Hospital at Carstairs and certain other secure institutions. To that end, the 2003 Act conferred upon detainees certain rights of appeal to, and review by, the Mental Health Tribunal for Scotland ("the Tribunal") concerning their conditions of detention; and, in turn, the Tribunal was empowered to make certain Orders if satisfied that the affected patient was indeed being held in conditions of excessive security. The problem that emerged in *RM, supra,* and *S*, *supra*, was that these statutory rights of appeal and review were rendered ineffective and unenforceable because, for over a decade, the Scottish Ministers failed to introduce regulations to define the class of detainee by whom the rights were exercisable and the hospitals to which they applied.

[3] That particular executive omission has now been resolved but the question remains: how did Parliament intend that these rights of appeal should be enforced? In the present case, having exercised his statutory right of appeal, and having obtained two separate Orders from the Tribunal (the first being made under section 268(2) of the 2003 Act ("the First Order"), the second under section 269(3) ("the Second Order")), each *inter alia* declaring that he was indeed being held in conditions of excessive security, the pursuer complains that the defender failed timeously to comply with the duties arising by virtue of those Orders.

[4] The interesting feature of the case is that the pursuer seeks the remedy of damages for the defender's (now admitted) failure to comply with the Orders. The claim is based upon two discrete grounds: first, an alleged violation of the pursuer's Convention Right under Article 5(1)(e) of the European Convention on Human Rights ("ECHR"); second, an alleged breach by the defender of its statutory duties under sections 268 & 269 of the 2003 Act. At debate, the defender challenged the relevancy of both grounds.

[5] In my judgment, the first ground of action (the alleged violation of Article 5, ECHR) is irrelevant and the related averments fall to be excluded from probation. That is because Article 5(1)(e), ECHR is concerned with the lawfulness of a person's detention, not with the conditions of, or treatment within, such detention; in substance, the pursuer's complaint in the present case relates to the conditions of his detention, not to the lawfulness of that detention; therefore, Article 5, ECHR is not engaged at all on the pursuer's averments (*Ashingdane* v *United Kingdom* (1985) 7 EHRR 528). The second ground of action (the alleged breach of statutory duty), insofar as it is founded upon the defender's failure to comply with the Tribunal's First Order (under section 268(2) of the 2003 Act), is also irrelevant and falls to be excluded from probation. That is because, on a proper interpretation of the 2003 Act, a failure to comply with the Tribunal's First Order is not intended to be enforceable by civil proceedings, Parliament having prescribed a specific remedy for such non-compliance, namely a statutory right of review under section 269(2) of the 2003 Act (*Cutler* v *Wandsworth Stadium Ltd* [1949] AC 398; *Morrison Sports Ltd* v *Scottish Power plc* 2011 SC 1; *Campbell* v *Peter Gordon Joiners Ltd* 2017 SC 13). However, in contrast, the second ground of action (the alleged breach of statutory duty), insofar as it is founded upon the defender's failure to comply with the Tribunal's Second Order (under section 269(3) of the 2003 Act), is relevant and suitable for enquiry at proof. That is because, on a proper interpretation of the 2003 Act

as now amended, a failure to comply with the Second Order of the Tribunal is intended to be enforceable by civil proceedings (including by means of an action of damages). I explain my reasoning below.

The pleadings

[6] According to the pursuer's averments, since 2009 he has been detained under a compulsion order and restriction order, initially at the State Hospital, Carstairs and thereafter, from July 2014, at Rowanbank Clinic, Stobhill, Glasgow.

[7] In or around August 2016, the pursuer applied to the Mental Health Tribunal for Scotland ("the Tribunal") for a declarator that he was then detained in conditions of excessive security, in terms of section 268 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"). He wished to be transferred to Leverndale Hospital, being a hospital of a lower level of security than Rowanbank Clinic. In November 2016, the Tribunal issued an Order (which I shall refer to as "the First Order") declaring that the pursuer was indeed detained in conditions of excessive security and directing the defender, in terms of section 268(2) of the 2003 Act, to identify a more suitable hospital for the pursuer's detention within a period of 3 months from the date of the Order. The defender failed to comply with the First Order.

[8] On 16 March 2017, a hearing was convened before the Tribunal in terms of section 269(2) of the 2003 Act. The Tribunal issued a further Order (which I shall refer to as "the Second Order") declaring that the pursuer continued to be detained in conditions of excessive security and directing the defender to identify a more suitable hospital for his detention within a period of three months of the date of the Order and, in any event, by 16 June 2017. The defender failed to comply with the Second Order.

[9] Eventually, on 6 December 2017, the pursuer was transferred from Rowanbank Clinic to Leverndale Hospital, being a hospital of a lower level of security than Rowanbank Clinic.

[10] The pursuer avers that he was detained within conditions of excessive security for a period in excess of 12 months, that is, from 24 November 2016 (the date of the First Order) until 6 December 2017 (the date of his eventual transfer to Leverndale Hospital), in breach of the defender's statutory duties under sections 268 & 269 of the 2003 Act. Further, the pursuer avers that, during this period, he was unlawfully detained in violation of his Convention Right under Article 5, ECHR because his detention, from 24 November 2016 onwards, was not "in accordance with a procedure prescribed by law".

[11] The pursuer complains that the defender's failure has resulted in a delay in the pursuer's rehabilitation treatment and eventual discharge. He also complains that, as a result of the delay, he was exposed to extra risk while remaining within Rowanbank and, indeed, that this resulted in him being assaulted by another patient in July 2017. Specifically, as a result of the delay, the defender complains that the pursuer was unable to continue with his care and treatment in a suitable environment, unable to participate in suitable outings and therapeutic work, and unable to enjoy freedoms and liberties out of the secure ward at Rowanbank Clinic; he avers that was unable to be reintroduced and reintegrated back into the community sooner than he would otherwise have been if he had been timeously transferred; and, as a result, he claims that the delay will itself result in a delay in his eventual discharge from hospital.

[12] In its Answers, the defender admits that since 2009 the pursuer has been detained by virtue of a compulsion order and restriction order; that in August 2016 the pursuer applied to the Tribunal for an order under section 268 of the 2003 Act; and that on 24 November 2016

the Tribunal issued the First Order. In its Answers, the defender denies that it failed to comply with the First Order and the Second Order; and, indeed, it avers that the convening of the Tribunal on 16 March 2017 is not known and not admitted. However, in his oral submissions at the beginning of the diet of debate, the defender's counsel conceded at the bar that the defender now admitted that it had failed to comply with both the First Order and the Second Order. Lastly, the precise date on which the pursuer was eventually transferred from Rowanbank Clinic to Leverndale Hospital is also neither expressly admitted by the defender nor the subject of contrary averment. It is merely covered by a general denial. However, from the tenor of the debate, I do not understand it to be in dispute that the pursuer was indeed transferred to Leverndale Hospital on 6 December 2017.

[13] For completeness, I also observe that the following disputed factual issues emerge from the pleadings: (i) the defender alleges that the pursuer voluntarily elected to remain detained within Rowanbank Clinic pending the offer of a bed in Leverndale Hospital, having unreasonably declined an earlier opportunity to be transferred to Woodland View in Irvine, Ayrshire (a facility of lower security than Rowanbank), because Leverndale Hospital was allegedly a more convenient location for him to receive family visits; (ii) the defender alleges that the pursuer's acceptance for transfer to Leverndale Hospital in or around 2015 had been withdrawn after the pursuer had tested positive for prescribed drugs; (iii) the defender alleges that a mere delay in carrying out the transfer of a patient between different levels of security has no causative effect on the date of the patient's ultimate discharge from hospital detention; (iv) details of the stage(s) reached in the pursuer's rehabilitation programme, or the time taken to get there, are not admitted.

The legal framework

[14] The pursuer's claim is founded upon two separate grounds, namely the alleged violation of Article 5(1)(e), ECHR and the alleged breach of the defender's statutory duties under sections 268 & 269 of the 2003 Act. It may be convenient to narrate the relevant provisions here.

[15] Article 5(1), ECHR, so far as material, states:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> (a) the lawful detention of a person after conviction by a competent court;
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court…;
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence…;
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition….
>
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

[16] Sections 268, 269 & 272 of the 2003 Act, so far as material, provide as follows:

> "268(2) On the application of [the patient], the Tribunal may, if satisfied that the test specified in regulations made under section 271A(2) of this Act is met in relation to the patient, make an order—

(a) declaring that the patient is being detained in conditions of excessive security; and
(b) specifying a period, not exceeding 3 months and beginning with the making of the order, during which the duties under subsections (3) to (5) below shall be performed.

(3) Where the Tribunal makes an order under subsection (2) above in respect of a relevant patient, the relevant Health Board shall identify a hospital—
(a) which is not a state hospital;
(b) which the Board and the Scottish Ministers, and its managers if they are not the Board, agree is a hospital in which the patient could be detained in conditions that would not involve the patient being subject to a level of security that is excessive in the patient's case; and
(c) in which accommodation is available for the patient…

(5) Where the Tribunal makes an order under subsection (2) above in respect of a patient, the relevant Health Board shall, as soon as practicable after identifying a hospital under subsection (3)….. give notice of the name of the hospital so identified to the managers of the hospital in which the patient is detained…..

269(1) This section applies where—

(a) an order is made under section 268(2) of this Act in respect of a patient; and
(b) the order is not recalled under section 271 of this Act…

(2) If the relevant Health Board fails, during the period specified in the order, to give notice to the Tribunal that the patient has been transferred to another hospital, there shall be a hearing before the Tribunal.

(3) Where such a hearing is held, the Tribunal may, if satisfied that the test specified in regulations made under section 271A(2) of this Act is met in relation to the patient, make an order—

(a) declaring that the patient is being detained in conditions of excessive security; and
(b) specifying—

(i) a period of 28 days; or
(ii) such longer period not exceeding 3 months as the Tribunal thinks fit,

beginning with the day on which the order is made during which the duties under subsections (4) to (6) below shall be performed.

(4) Where the Tribunal makes an order under subsection (3) above in respect of a relevant patient, the relevant Health Board shall identify a hospital—

(a) which is not a state hospital;
(b) which the Board and the Scottish Ministers, and its managers if they are not the Board, agree is a hospital in which the patient could be detained in conditions that would not involve the patient being subject to a level of security that is excessive in the patient's case; and
(c) in which accommodation is available for the patient….

(6) Where the Tribunal makes an order under subsection (3) above in respect of a patient, the relevant Health Board shall, as soon as practicable after identifying a hospital under subsection (4)… above, give notice of the name of the hospital so identified to the managers of the hospital in which the patient is detained….

272(1) The duties imposed by virtue of—

(a) an order under section 264(2) of this Act, or
(c) an order under section 268(2) of this Act,

shall not be enforceable by proceedings for specific performance of a statutory duty under section 45(b) of the Court of Session Act 1988.

(2) Without prejudice to the rights of any other person, the duties imposed by virtue of—

(a) an order under section 265(3) of this Act, or
(c) an order under section 269(3) of this Act,

shall be enforceable by proceedings by the [Mental Welfare Commission for Scotland] for specific performance of a statutory duty under section 45(b) of that Act of 1988."

Section 271A(2) states, so far as material, that Regulations specifying the test that must be met (under sections 268 & 269):

"… must include as a requirement for the test to be met in relation to a patient that the Tribunal be satisfied that detention of the patient in the hospital in which the patient is being detained involves the patient being subject to a level of security that is excessive in the patient's case."

The “test” referred to in sections 268, 269 & 271 is set out in the Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015 (SSI 2015/364). Regulation 5 of the 2015 Regulations states:

> “The test for the purposes of sections 268(2), 269(3) and 271(2)(a) of the 2003 Act is met in relation to a patient if detention of the patient in the hospital in which the patient is being detained involves the patient being subject to a level of security that is excessive in the patient's case.”

[17] For completeness, I pause to make two observations.

[18] Firstly, the foregoing provisions of the 2003 Act are the product of amendment introduced by the Mental Health (Scotland) Act 2015. As originally enacted, the 2003 Act included a section 270 which, like section 269, operated as a form of automatic review of the patient’s conditions of detention, if the Tribunal’s Second Order (i.e. the order made under section 269(3)) was not implemented. In other words, in its original form, the 2003 Act made provision for a three stage process: a First Order, a Second Order and a Third Order of the Tribunal. With effect from 16 November 2015, the 2015 Act repealed section 270 of the 2003 Act. As a result, the 2003 Act now makes provision for only a two stage process, namely a First Order and a Second Order of the Tribunal. That amendment is of some significance to my decision.

[19] The second observation is this. The foregoing provisions apply only to patients held in certain (lower security) hospitals (specified in the 2015 Regulations) (which includes Rowanbank Clinic). Sections 264 to 267 of the 2003 Act, which follow a broadly similar structure to sections 268 to 271, albeit with differences in detail, apply to patients detained in the (special security) State Hospital at Carstairs. I mention this because some of the cases to which I shall refer relate to detainees in the

State Hospital (to which sections 264 to 267 apply), but the principles are readily capable of being transposed to the present case.

Submissions for the defender

[20] For the defender I was invited to sustain its preliminary plea (plea-in-law 1) and to dismiss the action.

[21] The defender's submissions fell into three chapters. First, it was submitted that no relevant breach of Article 5(1)(e), ECHR had been averred because the pursuer's complaint related not to the legality of the pursuer's detention but to the conditions of that detention. The Convention Right was not engaged. Reference was made to *Ashingdane* v *United Kingdom* (1985) 7 EHRR 528 and *S* v *Scottish Ministers* 2015 SLT 362. The decision in *Aerts* v *Belgium* (2009) 29 EHRR 50 was distinguished and I was invited not to follow the "tentative" obiter analysis of Lord Stewart in *Sheritt* v *NHS Greater Glasgow & Clyde Health Board* 2011 SLT 480.

[22] Second, the pursuer's claim, so far as founded upon breach of statutory duties under sections 268 & 269 of the 2003 Act, was said to be irrelevant because those statutory provisions do not confer a civil right of damages upon the pursuer for breach thereof; the pursuer's averments fail to disclose whether the claim for alleged breach of statutory duty is "contractual or delictual" in nature (paragraphs 11 & 18, defender's written note); the only competent remedy for breach of an Order under section 268(2) was the convening of a further Tribunal hearing under section 269(3) of the 2003 Act; and the only remedy available to the pursuer for breach of an order under section 269(3) was to seek specific performance of a statutory duty under the Court of Session Act 1988, section 45(b), but that remedy was never sought by the pursuer (paragraph 12, defender's written note). The defender accepted

that it might be possible to seek damages as a "complementary remedy" to an order for specific enforcement of an order under section 269(3) of the 2003 Act (though no formal concession in that regard was made), but in any event no such remedy was ever sought (paragraph 14, defender's written note). Instead, the pursuit of a "self-standing" remedy of damages for the alleged breach of sections 268(2) and/or 269(3) was incompetent (paragraph 15, defender's written note.

[23] Third, the pursuer's averments of loss, injury and damage were said to be lacking in essential specification. The pursuer's pleas-in-law (which referred to the ECHR concept of "just satisfaction") were said to be inadequate to support a common law claim of damages for breach of statutory duty; the pursuer had failed to aver whether his claim was "contractual or delictual" in nature; and, in any event, no fair notice of the particulars of the claim had been averred (paragraphs 17 & 18, defender's written note). Reference was made to *Miller* v *Glasgow District Council* 1988 SC 440 and *Adebayo Aina* v *Secretary of State for the Home Department* [2016] CSOH 143. The damages claim was also said to be irrelevant insofar as the alleged breaches of duty were averred to extend over the entire period from 24 November 2016 to 6 December 2017 whereas, having regard to the terms of the Tribunal Orders, the defender could not be treated as being "in default", if at all, until after expiry of each of the three month periods allowed by the Orders.

Submissions for the pursuer

[24] For the pursuer, I was invited to repel the defender's preliminary plea and allow parties' a proof of their respective averments.

[25] The pursuer's counsel explained the pursuer's ECHR claim as follows: (i) Article 5(1)(e) provides that the detention must be "in accordance with a procedure prescribed by

law"; (ii) the pursuer's detention was *ex facie* not "in accordance with a procedure prescribed by law" because, between 24 November 2016 and 6 December 2017, he was being detained in conditions of excessive security in breach of the Tribunal's Orders under sections 268 & 269 of the 2003 Act; therefore (iii) the pursuer's detention during that period was unlawful in terms of Article 5, ECHR. An award of damages was the appropriate remedy to afford "just satisfaction" for violation of that Convention Right. *Ashingdane, supra,* was sought to be distinguished; particular reliance was placed upon the dicta of Lord Stewart in *Sherrit, supra*.

[26] The fact that Parliament had conferred a specific remedy (under section 269 of the 2003 Act) for a failure to comply with the First Order did not mean that other remedies at common law were implicitly excluded. Likewise, the express exclusion (in terms of section 272 of the 2003 Act) of the remedy of specific performance under section 45(b) of the Court of Session Act 1988 did not implicitly exclude other rights that may be available to the pursuer (such as a right to pursue the common law remedy of damages).

[27] Lastly, as regards the alleged lack of specification of the damages, reference was made to *R (Greenfield)* v *Secretary of State for the Home Department* [2005] 1 WLR 673, paragraph 6. I was encouraged to adopt a more broad brush approach in the assessment of damages and to take account of ECHR principles in relation to the award of compensation under Article 41, ECHR.

Supplementary submissions for the defender

[28] In supplementary oral submissions, the defender's counsel submitted that the pursuer's submissions deviated from its pleadings. Further, an Order by the Tribunal under sections 268 & 269 was of the nature of a declaration and, "for all intents and purposes", was merely a "direction of an administrative character". This was said to be underlined by the

fact that section 193 of the 2003 Act dealt specifically with the continued "lawfulness" of a patient's detention and provided that, prior to a Tribunal making any order as regards lawfulness, a wider variety of persons required to be consulted and afforded the opportunity to make representations. In the present case, on 16 November and 16 March 2017, the Tribunal was not dealing with the "lawfulness" of the detention as such but merely with "conditions" of detention; and, therefore, the broader duty of intimation under section 193 of the 2003 Act was not triggered. *Sherrit* was dismissed as obiter.

Supplementary submissions for the pursuer

[29] In supplementary submissions for the pursuer, the pursuer's reiterated that there was a danger in seeking to confine the concept of "lawfulness" to a binary issue of whether or not the patient should be detained or released. Lawfulness was said to involve a subtler consideration of whether or not the detention was "in accordance with a procedure prescribed by law". This required a consideration of the domestic law. In the present case, domestic law provided that the detention required to comply with certain conditions (relating to security). A failure to comply with that domestic law rendered the detention unlawful under Article 5, ECHR.

Discussion

[30] In *G* v *The Mental Health Tribunal for Scotland* 2014 SC 84, Lord Reed discussed the background to the enactment of sections 264 to 273 of the Mental Health (Care and Treatment) (Scotland) Act 2003. He explained (at paragraphs [3] to [11]) that the preceding legislation consolidated within the Mental Health (Scotland) Act 1984 had become increasingly out of step with current thinking about the treatment of mental disorders, the

rights of patients, and the relationship between patients and the wider community. The Scottish Executive appointed a committee under the chairmanship of Bruce Millan, the former Secretary of State for Scotland, to review the 1984 Act. The committee produced a Report in 2001 entitled "New Directions: Report on the Review of the Mental Health (Scotland) Act 1984".

[31] A particular problem identified by the committee was the mischief of "entrapped patients". These were patients who no longer required the level of special security afforded by the State Hospital but for whom appropriate local services with lower levels of security were not available (Millan Committee Report, Chapter 27). The evidence heard by the committee was to the effect that there was little incentive for local health boards and trusts to arrange such lower level secure psychiatric services; the local public was unlikely to welcome such services (indeed, quite the reverse); and funding arrangements created no incentive to develop them. The State Hospital Board strongly advocated that an explicit statutory duty be placed on health boards to commission local services to address the need for a range of medium and low security services for mentally disordered offenders.

[32] The Millan Committee expressed "considerable sympathy" with the position explained by the State Hospital Board on this issue but decided, instead, to propose "another means of addressing" the problem which was said to be more directed at the rights of individual patients. This alternative mechanism involved the creation of a "continuing right to appeal against the level of security to which [the patients] are subjected" (Millan Committee Report, paragraph 83). The committee acknowledged that to detain a patient unnecessarily in conditions of high security was inconsistent with respect for the patient's rights. Further, the proposed development of medium secure units was thought to make it

more likely that such an appeal right would be "practicable" (Millan Committee Report, paragraph 84).

[33] The committee went on to discuss how such a right of appeal might be made effective. In order to provide care at a lower level of security, arrangements would have to be made by the relevant health board. But such arrangements could involve practical difficulties which might be beyond the health board's control. If the necessary arrangements were not put in place, it would be undesirable that a patient who was still assessed as requiring some degree of secure care should simply be discharged. On the other hand, it was appreciated that the proposed right of appeal would be meaningless unless it led to an order which was "capable of being enforced" (*G, supra,* per Lord Reed at paragraph 8).

[34] Following consultation on this issue, the Millan Committee concluded that a "staged approach" was appropriate (*G, supra*, paragraph [9] per Lord Reed). The Millan Committee Report states (chapter 27, paragraph 89):

> "We therefore suggest that, should a patient successfully appeal to a Tribunal against the level of security, it should set a time within which the necessary provision should be arranged by the responsible health board. The time limit might be of the order of three months. Should arrangements not be made at the expiry of that period, representatives of the health board should be required to appear before the Tribunal to explain the position, and to confirm whether there is a prospect of a placement being found within a reasonable period. The Tribunal should be able to extend the time limit for a further period of no more than three months. If, at the end of that period, no provision has been made, the Tribunal could order that arrangements must be put in place to accommodate the patient within 14 days".

In brief terms, this translated to Recommendation 27.19 in the Millan Committee Report which states: "Patients should have a right of appeal to be transferred from the State Hospital, or a medium secure facility, to conditions of lower security".

[35] In a subsequent White Paper entitled "Renewing Mental Health Law – Policy Statement", the Scottish Executive broadly accepted the Millan Committee's

recommendations as the framework for a future Bill, although it rejected or modified some of the recommendations concerned with mentally disordered offenders. An Executive Bill was then laid before the Scottish Parliament but, as introduced, the Bill did not contain any provision reflecting the Millan Committee Recommendation 27.19 (concerning "entrapped patients"). It is not difficult to speculate as to the reason for the omission. At that time, there was only one specialist medium secure unit in Scotland, namely the Orchard Clinic in Edinburgh. The facilities to accommodate "trapped" patients elsewhere were simply not then available.

[36] Nevertheless, in response to "Parliamentary promptings" (*RM v Scottish Ministers* 2013 SC 139, per Lord Reed at paragraph 38), the Bill was amended at Stage 3 to incorporate the provisions which now form sections 264 to 272 of the 2003 Act. The amended Bill was passed by the Scottish Parliament on 20 March 2003. It received the Royal Assent on 25 April 2003. However, in acknowledgement to the practical realities of the situation, the commencement provision in section 333(2) allowed the entry into force of sections 264 to 273 of the 2003 Act to be delayed until 1 May 2006 "so as to allow sufficient time for additional facilities for affected patents to be commissioned" (*G, supra*, per Lord Reed at paragraph [11]).

[37] The appeal provisions within sections 264 to 272 of the 2003 Act were subsequently praised by Baroness Hale of Richmond as "progressive and far-sighted" in conception (*G, supra*, paragraph [71]).

[38] Unfortunately, this innovative legislation then became mired in governmental inaction. It sat toothless and impotent on the statute book for over 10 years following enactment due to the failure of the Scottish Executive to make the necessary regulations to

bring Chapter 3 of Part 17 of the 2003 Act (which incorporated the appeal provisions) into effective operation by 1 May 2006.

[39] In November 2012, in *RM, supra*, the Supreme Court granted a declarator that the Scottish Ministers' failure to draft and lay the necessary regulations before the Scottish Parliament prior to 1 May 2006, and their continued failure to do so since that date, was unlawful. Somewhat remarkably, nearly three years later, in May 2015, the necessary regulations had still not come into force. In *S* v *Scottish Ministers* 2015 SLT 362, Lord Turnbull noted the Executive's concession that "the state of unlawfulness" identified by the Supreme Court in *RM* had "not yet been cured". The necessary regulations had still not been issued to bring the appeal provisions into effective operation, though, in fairness to the Executive, another mental health Bill and a set of draft regulations were, by that stage, progressing through Parliament. Lord Turnbull concluded that a further declarator of illegality would serve no useful purpose.

[40] Later that year, the Mental Health (Scotland) Act 2015 ("the 2015 Act") was enacted, the Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015 were issued ("the 2015 Regulations"), and the 2003 Act appeal provisions for "entrapped" patients, in an amended form, finally came into effective operation.

The nature of the pursuer's right of appeal

[41] How does the statutory right of appeal work? The mechanism is broadly similar for detainees in the State Hospital (2003 Act, sections 264 to 266) and for detainees in other hospitals (2003 Act, sections 268 to 269). I shall focus upon the second category as the pursuer falls into that category.

[42] There are two stages to the appeal. The first stage is this. In short, under section 268 of the 2003 Act, on the application of (among others) the defined patient, the Tribunal may, if satisfied that the "test" set out in section 271A(2) is met, make an order (a) declaring that the patient is being detained in conditions of excessive security and (b) specifying a period, not exceeding three months beginning with the making of the order, during which certain specified "duties" are to be "performed". (I shall refer to this as "the First Order").

[43] What is the "test" that must be met before the First Order (and, indeed, the Second Order) can be made? It is defined in regulation 5 of the 2015 Regulations (issued under section 271A(2) of the 2003 Act). It is that the patient's detention involves the patient "being subject to a level of security that is excessive in the patient's case".

[44] Three "duties" are then triggered by virtue of the making of the First Order. The relevant health board must identify a hospital (which is not a State Hospital) which the health board and the Scottish Ministers agree is a hospital in which the patient could be detained in conditions that would not involve the patient being subject to a level of security that is excessive in the patient's case and in which accommodation is available for the patient (section 268(3)). As soon as practicable after identifying such a hospital, the health board must "give notice to the managers of the hospital (in which the patient is being detained) of the name of the hospital so identified" (section 268(5)). Lastly, although not explicitly stated, it seems to be implied that where the Tribunal makes a section 268(2) order, the health board must also notify the Tribunal when the patient has been transferred to the other hospital. That is because section 269(2) provides that if the health board fails, during the period specified in the order, to "give notice to the Tribunal" that the patient has been transferred to the other hospital, the second stage is triggered.

[45] The second stage is this. Under section 269(2), if the health board fails to notify the Tribunal of the transfer of the patient, a further hearing must be convened before the Tribunal. No application by the patient (or anyone else) is required: the Tribunal itself is obliged to convene it. At this further hearing, in terms of section 269(3), the Tribunal may, again if satisfied that the test set out in section 271A(2) is met, make an order (a) again declaring that the patient is being detained in conditions of excessive security and (b) specifying either a period of 28 days or such longer period (not exceeding three months) as the Tribunal thinks fit during which the specified duties must be performed. I shall call this "the Second Order". A key difference between the First Order and the Second Order relates to the period of time within which the duties must be complied with. A further key difference between the two Orders is that, in contradistinction to the First Order, if the Second Order is not implemented, the Act now makes no provision for any further mandatory Tribunal hearing to be convened.

[46] As I mentioned earlier, when the legislation was first enacted, there was a third stage. It appeared in section 270. It provided that, if the Second Order was not complied with, then yet a further hearing required to be convened before the Tribunal. At that further hearing, the Tribunal was empowered to make a third order in terms identical to the First Order and Second Order, but with this key difference: the third order was required to specify a period of 28 days (no more, no less) during which the foregoing duties required to be performed. However, section 270 of the 2003 Act was repealed by the 2015 Act with effect from 16 November 2015, so there is no longer a third stage.

[47] It should be noted that neither the First Order nor the Second Order results in the discharge or release of the patient from detention.

Is Article 5, ECHR engaged at all?

[48] In my judgment, on the pursuer's averments, Article 5, ECHR is not engaged at all. Accordingly, the pursuer's averments anent an alleged violation of Article 5, ECHR are irrelevant and fall to be excluded from probation. I reach that conclusion because Article 5(1) (e), ECHR is concerned with the legality of the detention itself, not with the conditions of, or treatment during, that detention. I explain my reasoning more fully below.

[49] The essential aim of Article 5, ECHR is to guarantee protection against the arbitrary deprivation of liberty. It is concerned with loss of personal freedom, not with the removal of, or restrictions upon, lesser liberties. Thus, Article 5(1)(a), (b) & (c), ECHR are concerned specifically with the detention of persons convicted of criminal charges, persons who breach court orders and persons who are suspected of committing crimes. Article 5(1) protects such persons from arbitrary detention, but it is not concerned with mere restrictions upon their freedom of movement (falling short of actual deprivation of liberty). By way of illustration, in *McDonald* v *Dickson* 2003 SLT 467, following his conviction on a number of charges on summary complaint, Mr McDonald was released on bail pending the preparation of reports. One of the special bail conditions to which he was subject was a curfew condition. He breached the curfew and was subsequently prosecuted on summary complaint for that offence. He contended that the special curfew condition was itself incompatible with his Convention Rights under Article 5(1)(a) & (b), ECHR. The Appeal Court rejected the argument. The Court held that the special curfew condition was a restriction upon his liberty, but it did not deprive him of his liberty, so Article 5(1) was not engaged.

[50] In the same way, Article 5(1)(e), ECHR, which deals *inter alia* with mental health patients such as the pursuer, protects those persons against the arbitrary deprivation of their liberty. It is not concerned with the protection of lesser liberties, such as the conditions of the

patient's detention or the treatment received during detention. The leading case law on Article 5(1)(e), ECHR has emphasised that it is concerned to guarantee only the legality of the detention itself, and is not concerned with the conditions of detention.

[51] Thus, in *Ashingdane* v *United Kingdom* (1985) A 93, 7 EHRR 528, following conviction, Mr Ashingdane was ordered to be detained in a psychiatric hospital on account of his mental illness (paranoid schizophrenia). He was ultimately transferred to Broadmoor Hospital, a "special hospital" for those requiring treatment under conditions of special security on account of their dangerous, violent or criminal propensities. After many years, the consensus of medical opinion was that his mental condition had improved; that his continued detention in Broadmoor was likely to have an adverse effect on his mental health; and that, while not fit to return to the community, he was suitable for treatment in an ordinary psychiatric hospital with a closed ward. Notwithstanding this medical evidence, Mr Ashingdane remained detained at Broadmoor for two years (between October 1978 and October 1980) after he had been declared fit for transfer to an ordinary psychiatric hospital. (In fact, unusually, Mr Ashingdane's transfer to an ordinary psychiatric hospital was blocked by the Area Health Authority due to a nursing union ban that then operated on the admission of patients of Mr Ashingdane's categorisation to the lower security hospital.) Mr Ashingdane complained that his Convention Right under Article 5, ECHR had been violated in the two year period during which he had remained detained at Broadmoor under conditions of excessive security. The European Court of Human Rights ("ECtHR") dismissed the complaint. Article 5(1) had not been violated. While Mr Ashingdane had suffered an injustice in having to endure the stricter regime at Broadmoor for two years longer than his mental state required, that injustice was "not a mischief against which Article 5(1)(e) of the Convention protects him" (paragraph [49]). That is because Article 5,

ECHR is concerned with the lawfulness of the detention itself; it is "not, in principle, concerned with suitable treatment or conditions" (paragraph [44]). As with the pursuer in the present case, Mr Ashingdane was not seeking to challenge the legal basis for his detention or seeking release from detention; rather, he claimed an entitlement to be detained in the more "appropriate "conditions of a different category of psychiatric hospital. The difference in the regimes at Broadmoor and at an ordinary psychiatric hospital were of vital concern for Mr Ashingdane and for the quality of his life in detention, but they were not such as to change the character of his deprivation of liberty as a detained mental patient (paragraph [47]).

[52] The ratio of *Ashingdane* was applied by the House of Lords in *R (on the application of Munjaz)* v *Mersey Care NHS Trust* [2006] 2 AC 148. In *Munjaz*, a patient who was detained in a mental health hospital complained that he was subjected to periods of seclusion within that facility. The House of Lords concluded that Article 5, ECHR was not engaged because the complaint related to the suitability of the complainer's treatment or conditions of detention, not to the legality of the detention itself.

[53] *Ashingdane* was also applied by the Lord Ordinary (Turnbull) in *S* v *Scottish Ministers* 2015 SLT 362. A mental health patient challenged the legality of the Scottish Ministers' failure to issue regulations under the 2003 Act providing a mechanism for patients to appeal to the Tribunal where they were held in conditions of excessive security. (This was part of the executive inaction described earlier.) Applying *Ashingdane* and *Munjaz*, Lord Turnbull concluded that the challenge was misconceived because it was, in substance, a complaint concerning the conditions of the patient's detention, not a challenge to the legality of the detention itself. Accordingly, Article 5, ECHR was not engaged "to any extent".

[54] In my judgment, in the present case, having regard both to its substance and in its technical definition, the pursuer's complaint relates not to the legality of his detention as such, but to the *conditions* of his detention. His claim is predicated upon the First Order and the Second Order, both of which comprise *inter alia* declarators that the pursuer is being detained "in *conditions* of excessive security" (my emphasis) (sections 268(2)(a) & 269(3)(a)). Neither the First Order nor the Second Order can be made at all, unless the Tribunal is satisfied that the test in section 271A(2) is met; that "test" (prescribed by Regulations) must include a requirement that the detention of the patient involves the patient "being subject to a level of security that is excessive in the patient's case" (section 271A(2) of the 2003 Act, as amended by the 2015 Act); and Regulation 5 of the 2015 Regulations, which defines the "test", states that the test is met:

> "…. if detention of the patient in the hospital in which the patient is being detained involves the patient being subject to a level of security that is excessive in the patient's case."

It is evident from these provisions that the "test" to be met before either Order can be made is explicitly dependent upon an assessment of the *conditions* of the patient's detention (specifically, whether the "level of security" to which the patient is subjected in his detention is "excessive"). Importantly, neither the First Order nor the Second Order has effect to discharge or vary the compulsion order or the restriction order by which the pursuer was originally, and remains, deprived of his liberty. Neither the First Order nor the Second Order authorises the release of the pursuer from his compulsory detention. Even if the Orders were implemented in full, the pursuer would remain deprived of his liberty. The best that the pursuer could ever hope to achieve from full and immediate compliance with the Orders is that he remains in detention, but somewhere else.

[55] That said, an attractive argument was advanced in support of the pursuer's ECHR claim. It was submitted that the pursuer's detention was unlawful because it was not "in accordance with a procedure prescribed by [domestic] law" (Article 5(1), ECHR), in the sense that his detention was, by admission, in breach of the Tribunal's Orders. The fact that the Orders might be said, at their inception, to require consideration of the "conditions" of the pursuer's detention, was not determinative of the ECHR claim; the essential issue was that, the Orders having been made and breached, the pursuer was plainly no longer being detained "in accordance with" domestic law in terms of Article 5(1), ECHR. By this route, it was said that the pursuer's detention was now unlawful in terms of Article 5, ECHR.

[56] The pursuer founded upon a similar analysis by Lord Stewart in *Sherrit* v *NHS Greater Glasgow & Clyde Health Board* [2011] SLT 480. In *Sherrit*, the claimant, a patient at the State Hospital, sought declarator that he had been held in conditions of excessive security in breach of his Article 5 Convention Right. (The claimant also sought damages for wrongful detention under the ECHR.) The interesting aspect of *Sherrit* is that, in obiter dicta, Lord Stewart countenanced the possibility that the continued detention of a patient in conditions of excessive security, notwithstanding the making of orders by the Tribunal to transfer the patient to a more suitable hospital environment, may render the patient's detention "unlawful" because the detention would, in those circumstances, no longer be "in accordance with a procedure prescribed by law" in terms of Article 5(1), ECHR.

[57] While the analysis is appealing, I have concluded that it is flawed. The problem for the pursuer remains that, according to binding precedent (notably *Ashingdane* and *Munjaz, supra*), the fundamental purpose of Article 5, ECHR is to guarantee protection against the arbitrary and unlawful deprivation of liberty. It is not concerned with lesser forms of interference with personal liberty, such as restrictions on movement (as in *McDonald, supra*)

or unsatisfactory conditions of, or treatment during, detention (as in *Munjaz* and *Ashingdane, supra*). When Article 5, ECHR speaks of "lawful detention", "the lawfulness of detention" and detention "in accordance with a procedure prescribed by law", it is referring to the law and procedure by which the person is actually deprived of his liberty; it is not referring to the law and procedure by which other interests (such as freedom of movement, conditions of detention, treatment during detention), all falling short of actual deprivation of liberty, are regulated. Put bluntly, Article 5, ECHR is not concerned with those lesser issues, however important they may be to the patient from time to time. The distinction is underlined by the terms of Article 5(4), ECHR which provides that everyone who is deprived of his liberty shall be entitled to take proceedings to test the lawfulness of that detention, those proceedings shall be decided speedily, and the person's "release ordered if the detention is not lawful". In the present case, no one, far less the pursuer, is seeking the pursuer's "release" from detention. Indeed, release from hospital detention may well not be in the pursuer's best interests at all, as it would bring to an end the regime of treatment and rehabilitation which he needs. In *Sherrit*, Lord Stewart suggested that a "more nuanced reading" of Article 5(4), ECHR may be called for, whereby "release" could be read as extending to "release from conditions of excessive security". That is an ingenious interpretation of Article 5(4), but it is unsupported by precedent and it is inconsistent with the fundamental purpose of Article 5, ECHR, as explained in the superior authority of *Ashingdane* and *Munjaz, supra*.

[58] Accordingly, in my judgment, both in substance and in its technical definition, the pursuer's complaint is concerned with the conditions of his detention, not with the actual deprivation of his liberty or his continuing status as a mental health detainee. Accordingly,

the pursuer's averments anent the alleged breach of Article 5, ECHR are irrelevant and fall to be excluded from probation.

Does civil liability for damages arise for the alleged breaches of statutory duty?

[59] The pursuer's oral submissions focused exclusively upon the foregoing ECHR claim. However, on closer analysis of the pleadings, a separate ground of action is discernible, namely the alleged breach of statutory duties under the 2003 Act. In article 4 of condescendence, the pursuer avers that "[t]he defender has breached its statutory duty towards the pursuer and the provisions of sections 268 and 269 of the 2003 Act. (A separate reference to a breach of Article 5(1)(e), ECHR then follows.) In article 6, the pursuer avers that the defender's failure "amounts to a breach of the pursuer's statutory rights" and that the pursuer is "entitled to damages" as a result. The defender's first plea-in-law, while it refers to Article 5(1)(e), ECHR, also alleges a "contravention of [the defender's] statutory duties under sections 268 and 269 of the [2003 Act]" and asserts an entitlement to "reparation". Likewise, although the pursuer's written submissions focus principally upon the ECHR claim, certain elements of the pursuer's written note are capable of being interpreted as advancing a stand-alone claim of damages for breach of statutory duty (see paragraphs 3.1 to 3.5 & 3.14). The defender's counsel fairly acknowledged that the distinction was discernable within the pursuer's pleadings though, in fairness to him, and with some justification, he also levelled criticism at the rather muddled nature of some of the pursuer's pleadings.

[60] As a result, I am left in a position whereby I can see from the pleadings that the pursuer's claim is founded in part upon an alleged breach of statutory duty, but I was afforded very little guidance (from the pursuer, at least) on the merits of that ground.

[61] Subject to that observation, I have reached the conclusion that the pursuer's averments are sufficient to support a relevant claim of damages for breach of statutory duty under section 269 of the 2003 Act (but not under section 268).

[62] The legal principles are well-established, though their application to individual cases can be challenging. Whether breach of a statutory provision gives rise to a private law right of action is a matter of statutory interpretation. Where the legislation is silent on the question of civil liability for breach, certain presumptions or "default rules" apply. The Supreme Court has recently considered these "default rules" in two leading Scottish appeals: *Morrison Sports Ltd* v *Scottish Power UK plc* 2011 SC 1 and *Campbell* v *Peter Gordon Joiners* 2016 AC 1513. In *Campbell*, *supra*, the court likened the judicial task in such cases to the de-encryption of hieroglyphs "without a Rosetta Stone". The judge's role in such cases is acknowledged to be that of "filling gaps left by the legislature". In *Morrison Sports Ltd, supra*, Lord Rodger, delivering the decision of the Court, stated:

> "… it is common ground that the well-known authorities, as to whether a breach of a statute or subordinate legislation gives rise to a private law of statutory right of action, are conveniently summarised in the speech of Lord Browne-Wilkinson in *X (Minors)* v *Bedfordshire County Council* [1995] 2 AC 633. Having separated out a number of different types of case, he dealt with breaches of statutory duty *simpliciter* (pp 731, 732):
>
>> '…The principles applicable in determining whether such statutory cause of action exists are now well-established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and the Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a

> private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action (*Cutler* v *Wandsworth Stadium Ltd* (1948) 1 KB 295; *Lonrho Ltd* v *Shell Petroleum Co Ltd (No. 2)* [1982] AC 173). However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus, specific duties imposed on employers in relation to factory premises are enforceable by an action of damages, notwithstanding the imposition by the statute of criminal penalties for any breach (see *Groves* v *Wimborne (Lord)* [1898] 2 QB 402…'

As Lord Browne-Wilkinson explains, if a statute provides some means, other than a private law action of damages, of enforcing any duty which it imposes, that will normally indicate that the statutory right was intended to be enforceable by those means and not by a private right of action….".

In *Campbell, supra,* the "default rules" were reiterated. Lord Toulson cited Lord Diplock's formulation of the correct approach in *Lonrho Ltd* v *Shell Petroleum Co Ltd (No. 2)* [1982] AC 173 at 185 as follows:

> "…so one starts with the presumption laid down originally by Lord Tenterden CJ in *Doe D. Murray* v *Bridges* (1831) 1 B & Ad 847 at 859 where he spoke of the 'general rule' that 'where an Act creates an obligation and enforces the performance in a specified manner…that performance cannot be enforced in any other manner' – a statement that has frequently been cited with approval ever since, including on several occasions in speeches in this House. Where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory obligation or for contravening the statutory prohibition which the Act creates, there were two classes of exception to this general rule. The first is where, upon the true construction of the Act, it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation….
>
> The second exception is where the statute creates a public right (i.e. a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what [is] described as 'particular, direct and substantial' damage 'other and different from that which was common to all the rest of the public'. Most of the authorities about this second exception deal not with public rights created by

> statute but with public rights existing at common law particularly in respect of use of highways…
>
> The principles summarised by Lord Diplock in *Lonrho Ltd, supra* are no more than general principles or default rules, but they have stood the test of time and I would hold that they continue to be the law unless the Supreme Court makes a conscious decision otherwise."

Lastly, it is worth repeating dicta from the leading classic authority. In *Cutler* v *Wandsworth Stadium Ltd* [1949] AC 398, Lord Simonds stated (at page 407):

> "…….. if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration".

[63] I turn to apply the foregoing principles to the present case. First, it can hardly be doubted, having regard to the scope, purpose and legislative genus of Chapter 3 of Part 17 (comprising sections 264 to 273) of the 2003 Act, that the alleged duties were intended "for the benefit or protection of a particular class of individuals" (*Lonrho, supra,* per Lord Diplock) or "for the protection of a limited class of the public" (*X (Minors), supra,* per Lord Browne-Wilkinson) or "to protect a very specific class of people" (*Campbell, supra*, per Baroness Hale, paragraph 48), namely, those "patients" (defined by section 268(1)) who were detained in "qualifying hospitals" (per section 271A(1); 2015 Regulations) in conditions of security satisfying the defined "test" (section 271A(2); 2015 Regulations, Regulation 5). The limited class of persons who were intended to benefit is clear. If it were necessary to have regard to it, the Millan Report, from which the legislation emanated, also identified that discrete category of "entrapped" mentally disordered offenders as the intended beneficiaries of the new right of appeal.

[64] Second, the language of sections 268 & 269 is saturated with notions of duty and obligation. Section 268(2) states that the First Order shall specify the period during which

"the duties" under subsections (3) to (5) of section 268 "shall be performed"; likewise, section 269(3) states that the Second Order shall specify the period during which "the duties" under subsections (4) to (6) of section 269 "shall be performed". Those duties are themselves framed in mandatory terms: the relevant health board "shall" identify a hospital (section 268(3) & (4); section 269(4) & (5)) and the relevant health board "shall" give the specified notice (section 268(5); section 269(6)). Section 272 (to which I shall return) then refers to "the duties imposed" by virtue of the First Order and the Second Order (section 272(1) & (2)), and makes specific provision regarding enforceability. I also observe that these "duties" are being imposed by virtue of "orders" of a judicial body, namely the Tribunal. Taken together, the language raises the definite expectation that Parliament was not expressing a mere "pious aspiration" (per *Cutler, supra*, at 407) by legislating in these terms but was, instead, intending to create legal duties in the fullest sense with the intention of conferring upon persons correlative rights to enforce them and to be compensated for non-performance, except insofar as such rights are excluded by the legislation.

[65] Third, does the legislation enforce performance of the duties in any specified manner? If so, according to the general rule, performance will not be capable of being enforced in any other manner. On this question, it seems to me that an interesting distinction emerges between the duties arising by virtue of the First Order (under section 268(2)) and the duties arising by virtue of the Second Order (under section 269(3)).

The First Order

[66] In my judgment, Parliament has indeed prescribed a specific remedy for the defender's failure to implement the First Order (made under section 268(2)). That specific remedy is the review process prescribed by section 269 of the 2003 Act. To explain, on a

proper analysis, section 269(2) is not, in nature, a right of appeal in the conventional sense. An appeal is an elective process: it normally requires a decision and choice by the appellant to pursue it; and it is initiated and pursued by the appellant. Section 268(2) involves such a right of appeal. In contrast, section 269(2) requires no decision, choice, application or even participation by the patient; it does not involve the exercise of any right vested in the appellant, but rather the discharge of an obligation incumbent upon the Tribunal itself; and it is a mandatory process, triggered automatically by the defender's failure to perform its duties under the preceding section. Properly analysed, section 269(2) creates a compulsory review process, not a right of appeal. That review process is the specific, though perhaps unusual, remedy chosen by Parliament to compel performance of the First Order under section 268(2).

[67] I am fortified in that conclusion by the terms of section 272(1) of the 2003 Act. This is a critical provision. It deals specifically with the issue of civil proceedings to enforce the Tribunal's Orders. In brief, section 272(1) expressly *excludes* enforcement of a First Order by means of proceedings for specific performance of a statutory duty under the Court of Session Act 1988, section 45(b). The express exclusion of that civil remedy is logical in circumstances where a mandatory review process (under section 269(2)) has been created by Parliament, and has yet to run its course. If the two civil remedies co-existed, conflicting decisions (of the Tribunal and the Court) might arise.

[68] In addition, in my judgment, the conclusion that the section 269 review process is the specific remedy intended by Parliament to compel enforcement of the duties arising by virtue of the First Order, is consistent with the recommendations of the Millan Committee from which the legislation emanated. The Millan Committee recommendation was for a "staged approach" (per Lord Reid, in *G, supra*) whereby, if the First Order was not

implemented, representatives of the health board would be given the opportunity to explain the position (including to confirm whether there was a prospect of a placement being found within a reasonable period) (chapter 27, paragraph 89). The Millan Committee's "staged approach" (and the enacted legislation) was progressive but it is, nevertheless, a compromise. It represents a balancing of competing interests, that is, the rights of the individual patients to be released from conditions of excessive security, and the realpolitik that suitable alternative hospital accommodation may just not be available, through no fault of the health board. The compromise is achieved thus: (i) the defender is afforded an initial period under section 268(2) (not exceeding three months) to comply voluntarily with the duties under the First Order, free from the threat of civil proceedings for specific performance under section 45(b) of the 1988 Act if it fails to do so; (ii) if it fails to comply voluntarily with the First Order, the defender knows that the prescribed remedy for its breach is the convening of a mandatory review under section 269(2), at which the board will require to explain itself, and may face the issuing of a Second Order, with which Second Order it must comply voluntarily within just 28 days (or such longer period not exceeding three months as the Tribunal may decide); and (iii) if it fails to comply voluntarily with the Second Order, the defender is then exposed to the full weight of civil proceedings against it including, expressly, summary petition proceedings at the instance of the Commission for specific performance under section 45(b) of the 1988 Act (section 272(2), 2003 Act). In other words, the statutory compromise was that health boards were to be afforded a period of grace, variable from case to case but not exceeding six months at best, in which to find suitable alternative hospital accommodation for the trapped patient; but, after that period of grace, the boards would face civil proceedings if they had failed to comply.

[69] This is not to be understood as meaning that Tribunal Orders cannot be made, or can simply be ignored, if no suitable alternative place is or is likely to become available. If that were the case, Parliament's intention in enacting these sections "could be frustrated by mere inertia on the part of health boards" and the terms of section 272(1) (preventing the immediate enforcement of the First Order by means of civil proceedings for specific performance) would be "supererogatory" (*G, supra,* per Lord Reed at paragraphs [41] & [42]). As Baroness Hale stated in *G, supra*:

> "It would obviously defeat the object of the legislation if the authorities were able simply to say that no bed was available in another, less secure, hospital. It must be the case, as Lord Reed observes (paragraph [38]) that this is irrelevant to the first stage: deciding whether (in the case of a State Hospital patient) he requires 'to be detained under conditions of special security that can be provided only in a State Hospital' (section 264(2)) or (in the case of a patient in another hospital) he is 'being subject to a level of security that is excessive' in his case (section 268(2)). It must also be the case, as Lord Reed says (paragraphs 41 and 54), that having decided that question in favour of the patient, the expectation is that the Tribunal will make an order unless in the particular circumstances of the case there is some good reason not to do so".

So, it is implicit that a First Order and Second Order can be made by the Tribunal, and the Second Order can be enforced by civil proceedings, at a time when no hospital has been identified in which the patient could be detained in appropriate conditions.

The Second Order

[70] In contrast with the First Order, performance of the Second Order is not subject to or enforced by any form of statutory "review" procedure, akin to the review process in section 269. Instead, insofar as Parliament has prescribed any remedy to compel performance of the duties arising by virtue of the Second Order, it expressly enacted (by section 272(2)) that those duties shall be enforceable by proceedings at the instance of the Commission for specific implement under section 45(b) of the 1988 Act.

[71] However, the express grant of such a right to the Commission was plainly not intended to exclude enforcement of the Second Order by others (or, I would suggest, by other remedies). That much is clear from the express reservation of "the rights of any other person" which prefaces section 272(2). On an ordinary construction, the right conferred on the Commission by section 272(2) is in addition and without prejudice to, not exclusive of, the rights of any other person to enforce the duties arising by virtue of the Second Order. What might those rights be, and by whom might they be enforceable?

[72] Applying the principles discussed in *Morrison Sports Ltd* and *Campbell, supra*, the duties arising by virtue of the Second Order can be seen to be intended for the benefit and protection of a limited and very specific class of person, namely "trapped" patients such as the pursuer. Those duties are, on an ordinary interpretation of the language used, intended to be duties in the fullest legal sense. In contradistinction to the treatment of the First Order, Parliament has not legislated to compel enforcement of those Second Order duties in any prescribed manner (specifically, by way of a review process) or otherwise in a manner habile to exclude a private law action. According to Lord Browne-Wilkinson's default rules in *X (Minors), supra,* where, as here, a statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, this indicates that a private right of action is available, since otherwise there would be no method of securing the protection the statute was intended to confer. Paraphrasing Lord Simond's dicta in *Cutler, supra*, since a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed "it can be assumed" that a right of civil action accrues to a patient who is damaged by the breach "for, if it were not so, the statute would be but a pious aspiration".

[73] How might those duties be enforced? The fact that section 272(2) of the 2003 Act expressly sanctions the remedy of specific performance under section 45(b) of the Court of

Session Act 1988 (albeit at the instance of the Commission) to enforce the duties imposed by the Second Order is significant. This remedy has been described as "peculiar and drastic" (*Carlton Hotel Co. Ltd* v *Lord Advocate* 1921 SC 237). It is summary in nature, because the facts ought to be capable of rapid determination, usually without the need for proof; and it is a remedy that is available only where the duty to be performed is clear and the precise terms of the requisite order can readily be stated (*McKenzie* v *The Scottish Ministers* 2004 SLT 1236). By expressly sanctioning this "drastic" remedy as a legitimate method of enforcing the duties arising by virtue of the Second Order, Parliament has confirmed that those duties are indeed clear, that the judicial order to be granted can be stated with precision, and that the underlying facts ought to be capable of rapid determination. If the duties are apt for enforcement by the Commission by the summary remedy of specific performance, then, logically, they must also be equally apt for enforcement by specific performance at the instance of an affected patient, such as the pursuer, who, after all, belongs to that limited class for whose benefit and protection the duties were enacted.

[74] But the matter does not end there. The summary remedy of specific performance under the Court of Session Act 1988 "was not intended to be an exclusive remedy" (*McKenzie, supra*, at paragraph [17] per Lord Carloway). Many statutory duties may be enforced by ordinary action, by a variety of civil remedies at common law such as declarator, interdict, an order *ad factum praestandum* or, as here, damages. Parliament's express and unqualified reservation, in section 272(2) of the 2003 Act, of "the rights" of any other person is consistent with the conclusion that all such common law remedies are capable of being pursued, as appropriate, by an affected patient, including the common law remedy of damages.

[75] In conclusion, in my judgment, upon a proper construction of the relevant legislative provisions, a breach by the defender of the statutory duties imposed by virtue of the First Order (under section 268(2) of the 2003 Act) does not confer a civil right of action for damages upon a patient who has suffered loss and damage as a result because the statute prescribes the specific manner in which performance of those duties is to be enforced, namely by means of a review hearing under section 269; whereas a breach by the defender of the statutory duties imposed by virtue of the Second Order (under section 269(3)) does give rise to such a civil right of action because no other means of enforcement of such duties is prescribed (or, for that matter, excluded).

[76] Accordingly, the pursuer's averments anent damages said to be attributable to breach of duties arising by virtue of the First Order fall are irrelevant and fall to be excluded from probation; but the pursuer's averments anent damages said to be attributable to breach of duties arising by virtue of the Second Order are relevant in principle.

Specification of the pursuer's averments of damage

[77] Naturally, the pursuer must make relevant averments of damage or loss said to be attributable to the alleged breach of duties arising by virtue of the Second Order.

[78] I must acknowledge that the pursuer's averments of damage in condescendence 5 are rather general. In addition, by reason of the exclusion of certain irrelevant averments from probation, the pursuer's remaining pleadings are left somewhat ragged and inelegant. However, I have concluded that, so far as subsisting, the pursuer's averments are sufficient in specification to give fair notice to the defender of the nature of the damage that is said to have been suffered by him. He avers that he was unable to continue with his care and treatment in a suitable environment; he was unable to participate in suitable outings and

therapeutic work within a suitable environment; he was not entitled to build up freedoms, time out of the ward, or to be reintroduced and reintegrated back into the community, in as timely a manner as he would have been had he been transferred timeously in implement of the duties; and that, as a result, his rehabilitation and eventual discharge would be delayed. It seems to me that the battle-ground for proof is adequately defined.

[79] The one criticism that I accept may be levelled at the pursuer's averments of damage is that the period during which the defender is said to have been in breach of its statutory duties (giving rise to actionable damage) is averred to extend from the date of the First Order (on 24 November 2016) to the date of the pursuer's eventual transfer to Leverndale Hospital (on 6 December 2017). Standing my conclusions above, that cannot be correct in law, because (i) the effect of the First Order was, in effect, to afford a period of grace to the defender in which it was to perform its duties thereunder; (ii) in any event, a breach of the duties under the First Order is not enforceable by civil action; (iii) likewise, the effect of the Second Order was to extend a period of grace to the defender in which to perform its duties thereunder; and (iv) while an alleged breach of the defender's duties under the Second Order would be enforceable by civil action, in law the defender could only be said to have fallen into alleged breach, at earliest, on 16 June 2017, upon expiry of that extended period of grace. Accordingly, for the avoidance of doubt, in my judgment, the maximum period during which the defender can relevantly be said to have been in alleged breach of its statutory duties arising by virtue of the Second Order (giving rise to actionable damage), is the period from 16 June 2017 to 6 December 2017. My interlocutor seeks to make the necessary deletions in order to make that position tolerably clear on the face of the pleadings.

Decision

[80] For the foregoing reasons, I shall sustain the defender's preliminary plea (plea-in-law number 1) in part only to the extent of excluding from probation (i) the pursuer's averments anent the alleged violation of Article 5, ECHR and (ii) the pursuer's averments anent actionable damage for the defender's alleged breach of statutory duties arising by virtue of the First Order. *Quoad ultra* I shall repel the defender's preliminary plea and allow parties a proof of their respective averments on dates to be hereafter assigned. The issue of expenses is reserved meantime.