SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY

B1013/05

JUDGMENT OF SHERIFF PRINCIPAL B A LOCKHART

in the cause

SARAH BEATTIE

Appellant

against

PETER DUNBAR, MENTAL HEALTH OFFICER

First Respondent

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Second Respondent

Act: Mr Buchanan, counsel, instructed by Messrs Cartys
Alt: Mr O'Carroll, counsel, instructed by Medical Health Officer, North Lanarkshire Council
Alt: Mr Howie, QC, instructed by Mental Health Tribunal for Scotland

AIRDRIE: 22 February 2006

The Sheriff Principal, having resumed consideration of the cause, dismisses the appeal; finds no expenses due to or by any of the parties; certifies the cause as suitable for the employment of counsel.

NOTE:

Background to the appeal

1. This is an appeal against a decision of a Mental Health Tribunal made on 2 December 2005 in which a compulsory treatment order was granted in respect of the appellant. Before dealing with the appeal and the submissions of parties, it is proper to set out the relevant statutory provisions.

A. Mental Health Officer's duty to apply for a compulsory treatment order.

Section 57(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 provides:

"Where sub-sections (2) to (5) below apply in relation to a patient, a mental health officer shall apply to the Tribunal under section 63 of this Act for a compulsory treatment order in respect of that patient."

Sub-sections (2) to (5) of the Act are in the following terms:

"(2) This sub-section applies where two medical practitioners carry out medical examinations of the patient in accordance with the requirements of section 58 of this Act.

(3) This sub-section applies where each of the medical practitioners who carry out a medical examination mentioned in sub-section (2) above is satisfied-

(a) that the patient has a mental disorder;

(b) that the medical treatment which would be likely to-

(i) prevent the mental disorder from worsening; or

(ii) alleviate any of the symptoms, or effects, of the disorder,

is available to the patient

(c) that if the patient were not provided with such medical treatment there would be a significant risk -

(i) to the health, safety and welfare of the patient; or

(ii) to the safety of any other person

(d) that because of the mental disorder the patient's ability to make decisions about the provision of such medical treatment is significantly impaired; and

(e) that the making of a compulsory treatment order is necessary.

(4) This sub-section applies where each of the medical practitioners who carry out a medical examination mentioned in sub-section (ii) above submits to the Mental Health Officer a report (any such report being referred to in this Act as a 'mental health report')-

(a) stating that the medical practitioner submitting the report is satisfied that the conditions mentioned in paragraphs (a) to (e) of sub-section (3) above are met in respect of the patient;

(b) stating, in relation to each of the conditions mentioned in paragraphs (b) to (e) of sub-section 3 above, the medical practitioner's reasons for believing the conditions to be met in respect of the patient;

(c) specifying (by reference to the appropriate paragraph (or paragraphs) of the definition of 'mental disorder' in section 328(1) of this Act) the type (or types) of mental disorder that the patient has;

(d) setting out a description of

(i) the symptoms that the patient has of the mental disorder; and

(ii) the ways in which the patient is affected by the mental disorder;

(e) specifying the measures that should, in the medical practitioner's opinion, be authorised by the compulsory treatment order;

(f) specifying the date or dates on which the medical practitioner carried out the medical examination mentioned in sub-section (2) above; and

(g) setting out any other information that the medical practitioner considers to be relevant.

(5) This section applies where:

(a) for the purposes of sub-section (4)(c) above each of the mental health reports specifies at least one type of mental disorder that is also specified in the other report;

(b) for the purposes of sub-section (4)(e) above each of the mental health reports specifies the same measures; and

(c) one of the mental health reports (being a report by an approved medical practitioner) states the views of that medical practitioner as to-

(i) subject to sub-section (6) below whether notice should be given to the patient under section 60(1)(a) of this Act;

(ii) whether the patient is capable of arranging for a person to represent the patient in connection with the application under section 63 of this Act;"

Accordingly the author of each mental report is required to state that all the five tests specified in section 57(3) have been met. The mental health report must also specify the measures which the medical practitioner considers should be authorised under the compulsory treatment order and the two medical reports must be fully in agreement with regard to the measures to be authorised.

If the requirements of sub-sections (2) to (5) are met, and the Mental Health Officer is in possession of the two mental health reports which conform with these provisions, the Mental Health Officer is required to apply to the Tribunal under section 63 of the Act for a compulsory treatment order in respect of the patient.

B. Further duties on Mental Health Officer. Section 61 of the 2003 Act places a duty on a the Mental Health Officer to prepare a report after receiving the two mental health reports and section 62 requires the Mental Health Officer to prepare a proposed care

plan;

C. Application for a compulsory treatment order.

Section 63 of the 2003 Act provides:

"(1) An Application to the Tribunal for a compulsory treatment order may be made by, and only by, a Mental Health Officer.

(2) An application-

(a) shall specify-

(i) measures which are sought in relation to the patient in respect of whom the application is made ... ... and

(b) shall be accompanied by the documents that are mentioned in sub-section 3 below; and

(3) Those documents are:

(a) the mental health reports;

(b) the report prepared under section 61 of this Act; and

(c) the proposed care plan;

relating to the patient."

D. Powers of Tribunal on application under section 63: Compulsory Treatment Order. Section 64 of the 2003 Act applies where an application is made under section 63 of the Act. Section 64(4) provides:

"The Tribunal may-

(a) if satisfy that all the conditions mentioned in sub-section (5) below are met make an order-

(i) authorising, for the period of six months beginning with the day on which the order is made, such of the measures mentioned in section 66(1) of this Act as may be specified in the order ... ... "

Section 64(5) provides:

"The conditions referred to in sub-section 4(a) are-

(a) that the patient has a mental disorder;

(b) that the medical treatment which would be likely to-

(i) prevent the mental disorder worsening; or

(ii) alleviate any of the symptoms or effects of the disorder,

is available to the patient;

(c) that if the patient were not provided with such medical treatment there would be a significant risk-
  (i) to the health, safety or welfare of the patient; or
  (ii) to the safety of other person;
(d) that because of the mental disorder the patient's ability to make decisions about the provision of such medical treatment is significantly impaired;
(e) that the making of a compulsory treatment order in respect of the patient is necessary;
(f) where the Tribunal does not consider it necessary for the patient to be detained in hospital, such other conditions as may be specified in regulations."

Accordingly, for the purposes of this appeal if the Tribunal is satisfied in respect of all the conditions set out in section 64(5) the Tribunal may make an order authorising, for the period of six months beginning with the day on which the order is made, such of the measures mentioned in section 66(1) of this Act as may be specified in the order.

E. Measures that may be authorised.

Section 66(1) provides:

"(1) Subject to sub-section (2) below, the measures referred to ... are:
  (a) the detention of the patient in the specified hospital;
  (b) the giving to the patient, in accordance with part 16 of this Act, of medical treatment ... ..."

'Medical treatment' is defined in the interpretation section of the Act namely section 329(1) as follows:

"'Medical treatment' means treatment for mental disorder; and for this purpose 'treatment' includes (a) nursing (b) care (c) psychological intervention (d) habilitation (including education, and training in work, social and independent living skills) and (e) rehabilitation (read in accordance with paragraph (d) above)."

It is accordingly open to the Tribunal to authorise the detention of the patient in the specified hospital and the giving to the patient of medical treatment. That medical treatment requires, in light of the provisions of section 66(1)(b) of the Act to be 'in accordance with part 16 of the Act'. Part 16 does not define what is meant by medical treatment but it sets out the safeguards for the patient and restrictions on the power of medical professionals and others to carry out medical treatment as defined in the Act.

There is a reference in part 16 at section 240(3)(b) to 'any other medicine'.

This includes the antipsychotic medication envisaged for the appellant in this case.

F. Misconceived case.

I was referred to Rule 44 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005 which states:

"(1) A case before the Tribunal is misconceived if it is-
  (a) outwith the jurisdiction of the Tribunal;
  (b) made otherwise in accordance with these rules and there is no reasonable prospect of success; or
  (c) frivolous and vexatious;
(2) Where a case appears to the clerk to be misconceived, the clerk shall refer the case to a convener;
(3) The convener may decide whether the case is misconceived either alone or with such other members as the Tribunal may direct;
(4) Before dismissing a case as misconceived, the convener may-
  (a) send notice of the proposed dismissal to the relevant persons inviting them to make written representations within 28 days or such other period as may be specified by the convener;
  (b) afford the relevant persons an opportunity to be heard;
(5) The convener may where appropriate, on dismissing a misconceived application refer the matter to the commission.
(6) Rule 72 shall apply to a decision made under this rule."

It is accordingly open to the Tribunal in terms of Rule 44(1) to hold the case as misconceived.

G. Appeals from Tribunal decisions.

Section 324 provides:

"(1) An appeal
  (a) to the Sheriff Principal under section 320(2) of this Act ... may be made only on one or more of the grounds mentioned in sub-section (2) below;
(2) the grounds referred to in sub-section (1) above are:

(a) that the Tribunal's decision was based on an error of law;

(b) that there has been a procedural impropriety in the conduct of any hearing by the Tribunal on the application;

(c) that the Tribunal has acted unreasonably in the exercise of its discretion;

(d) that the Tribunal's decision was not supported by the facts found to be established by the Tribunal."

Section 324(5) provides:

"In allowing an appeal under section 340(2) ... of this Act the court shall:

(a) set aside the decision of the Tribunal; and

(b) shall -

(i) if it considers that it can properly do so on the facts found to be established by the Tribunal, substitute its own decision; or

(ii) remit the case to the Tribunal for consideration anew."

Submissions for the appellant

2. Counsel for the appellant submitted that the first respondent should not have made this application to the Tribunal as it was incompetent. The Tribunal accordingly had no jurisdiction and the determination by the Tribunal was *ultra vires*. I was invited to set aside the decision of the Tribunal and substitute a decision of my own, namely one of dismissal of the application.

3. The Tribunal made a compulsory treatment order in respect of the appellant on 2 December 2005 in terms of section 64 of the 2003 Act. This decision followed an application for a compulsory treatment order by the first respondent in terms of section 63(1) of the Act.

4. Each of the medical practitioners who carry out a medical examination are required to be satisfied on the matters set out in section 57(3)(a) to (e) before they may submit a mental health report to the Mental Health Officer. Section 57(4) requires the reports to contain the information set out in sub-paragraphs (a) to (g) inclusive. It was emphasised that in terms of section 57(5)(b) each of the mental health reports required to specify the same measures.

5. It was submitted that for a Tribunal to make a decision in terms of section 64 of the Act there required to be before it an application by the Mental Health Officer in terms of section 63 of the Act

which met the requirements of section 57 of the Act. There required to be attached to the application two reports completed in terms of section 57.

6. In this case the appellant now restricted her appeal to two points:

1. That the medical report by Dr Odemy did not state in terms that he was satisfied that the making of a compulsory treatment order was necessary as required by section 57(3)(e) of the Act.

2. That, on any construction of the two medical reports submitted with the application, one by Dr Odemy and one by Dr Murphy, it could not be said that each of the medical reports specified the same measures which the two medical practitioners thought were necessary for the compulsory treatment order.

7. It was argued that because of these defects in the medical reports which were the foundation documents of the application, there could be no competent application to the Tribunal. If there was no competent application to the Tribunal, the Tribunal had no jurisdiction. It was to be noted that this point was made to the Tribunal at the commencement of the hearing on 2 December 2005 but was rejected.

8. It was submitted that the author of each mental health report required to pronounce himself or herself satisfied on the five matters set out in section 57(3) of the Act. The mental health reports then both required to specify the measures which the medical practitioners considered should be authorised under the compulsory treatment order section 57(4)(e). This had not taken place in this case and the application before the Tribunal was accordingly incompetent.

9. It was submitted that the fact that page 9 of Dr Odemy's report was missing when it went to the Mental Health Officer was fatal.

10. Counsel for the appellant took me through Dr Murphy's report and accepted that his report did meet the requirements of section 57. He compared this report to that submitted by Dr Odemy. On page 8 Dr Odemy had failed to shade in the sphere on the proforma beside the words "I am satisfied that the making of a compulsory treatment order is necessary for the following reasons". In response

to the instruction after the words "detail for example reasons why the treatment cannot be provided on an informal basis"; Dr Odemy wrote in his own handwriting "as stated above, she is unable to decide when she needs help because of her brain damage". It was submitted by counsel for the appellant that section 57(3)(e) required the medical practitioner submitting the report to certify the making of the compulsory treatment order was necessary. In this case Dr Odemy had not shaded in the sphere opposite these words and accordingly the application failed to meet the requirements of the sub-section.

11. Secondly, page 9 of Dr Odemy's report had been mislaid and was not lodged with the papers. Section 57(4)(e) required the medical practitioner to specify the measures that should be authorised by the compulsory treatment order. Page 9 of Dr Murphy's was again in proforma form and was completed by him to read:

> "It is my opinion that the following compulsory measures should be authorised by the compulsory treatment order (shade (a) to (h) to confirm as appropriate)
>
> (a) detaining the patient in a specified hospital;
>
> (b) giving the patient medical treatment in accordance with part 16 of this Act."

Dr Murphy had shaded spheres opposite (a) and (b).

12. As there was no page 9 in Dr Odemy's report, the Medical Health Officer did not have the benefit of the doctor's opinion on what compulsory measures should be authorised by the compulsory treatment order. In the absence of this page 9 the Tribunal, it was submitted, would be unable in the reports to find the measures which were understood to be specified by the two medical practitioners. There required to be unanimity between the two doctors on what medical treatment was required.

13. Put shortly, the appellant's submissions were:

1. Dr Odemy's report failed to shade the sphere in the proforma beside the words "I am satisfied that the making of a compulsory treatment order is necessary for the following reasons". Accordingly section 57(3)(e) had not been obtempered; and
2. There was no coincidence between the two reports on the question of treatment in terms

of section 57(5)(b).

Accordingly, it was submitted that the application put forward by the Medical Health Officer in terms of section 63(1) of the Act was incompetent as there were not two reports supporting it which met the statutory requirements.

14. Counsel referred me to various authorities to support the proposition that these statutory provision should be dealt with as mandatory provisions.

15. I was first referred to Bennion on Statutory Interpretation page 35 where the learned author said:

> *"Interference with liberty - Where an act confers a right to interfere with the freedom of any individual, the prescribed conditions are treated as mandatory and must be strictly complied with ..."*

16. I was also referred to various cases which supported that proposition, and in particular *West v Secretary of State for Scotland* 1992 SC 385, *Macfarlane v Mochrum School Board* 1875 3R 88 and *Reid v Secretary of State for Scotland* 1997 SCLR 1056.

17 I was asked to sustain the appeal and hold that the application was incompetent in respect that it was not accompanied by two medical reports completed in conformity with the provisions of section 57 of the 2003 Act.

Submissions for First Respondent

18. Counsel for the first respondent referred me to the duty of a Mental Health Officer in terms of section 57 of the Act. He was required, if sub-section (2) to (5) applied, to apply for a compulsory treatment order. In terms of section 57(4) his application required to be supported by reports of two medical practitioners, but there was no requirement in terms of that sub-section for the reports to be in any particular form. It was submitted that what the Mental Health Officer was required to do was to consider the reports put before him in the form in which they appear. He then required to decide whether his duty to submit an application had been triggered by considering whether the criteria of sub-sections (2) to (5) of section 57 had been met. It was accepted that each report required to

specify the measures that should be authorised by the CTO. It was further accepted that each of the two reports must specify the same measures. Whether or not they did so was a matter for the Mental Health Officer to decide on the basis of the material before him, however these reports were prepared.

19. As far as "measures" are concerned I was referred to section 66 of the Act. There was there set out a list of the measures which may be authorised by a compulsory protection order. The first measure identified (in section 66(1)(a)) was: "The detention of the patient in the specified hospital." It was not for the maker of the report to specify the hospital - rather the maker of the report must decide that the patient required to be detained in a specified hospital. Which hospital is in fact used is not a matter for the compiler of the report. The second measure identified (section 66(1)(b)) was:

> "The giving to the patient, in accordance with part 16 of this Act, of medical treatment."

20 He referred me to the definition of 'medical treatment' contained in section 329 of the Act which I set out earlier in this note. It was submitted that the purpose of part 16 was not to define what is or is not meant by medical treatment. That part of the Act sets out safeguards for the patient and restrictions on the power of medical professionals and others to carry out a medical treatment. It was noted that it dealt with a substantial variety of treatment and in particular at section 342(b) "any other medicine". This included antipsychotic medicine which was involved in this case.

21. Section 66 set out the measures which could be authorised by the Tribunal. Measure (a) involved detention of the patient in the specified hospital. Measures (b) to (h) inclusive, while all being compulsory measures, did not involve compulsory stay in hospital.

22. It was submitted that each medical practitioner was called upon to prepare a report as required by the provisions of section 57. In particular in terms of section 57(4)(e) each medical practitioner required to specify the measures that should, in his or her opinion, be authorised by the compulsory treatment order. He must at the outset decide whether or not the patient required to be detained in hospital, or, on the other hand, whether some form of community compulsory measure was required.

23. The other decision that the medical practitioner required to make was to decide whether the patient required to be given "medical treatment". This would be as defined in the Act and be subject to the provisions of part 16 of the Act.

24. After receiving the two medical reports, the Mental Health Officer, if he considered the provisions of section 57 had been met, was then obliged in terms of section 61 to prepare a report. Thereafter in terms of section 62 he had a duty to prepare a proposed care plan. He was then obliged to make an application in terms of section 63 to the Tribunal and specify the measures which are sought in relation to the patient. The applications required to be accompanied by various documents, namely the mental health reports from the two medical practitioners, the report prepared by the Mental Health Officer under section 61 of the Act and the proposed care plan.

25. Section 64 set out the powers of the Tribunal to which I have already made reference.

26. It was submitted that in this case the procedure which was set out in the Act was carried out by the first respondent, the Mental Health Officer. The patient was first examined by Dr Jennifer Murphy on 25 October 2005. Counsel went through Dr Murphy's report (no 8 of inventory of productions for the second respondent) and submitted that this report indicated clearly that the provisions of section 57(3) and (4) of the Act had been obtempered.

27. Counsel then referred to Dr Odemy's report (no 7 of the inventory of productions for the second respondent). In particular I was referred to page 4 where Dr Odemy gave details of the mental illness of the patient. I was referred to the top of the proforma at page 5 which said:

> "Based on the above description, please state the patient's need for medical treatment for medical disorder. Note that medical treatment includes nursing; care, psychological intervention, habilitation and rehabilitation (including education and training in work social and independent living skills) in addition to pharmacological interventions."

Dr Odemy then made various handwritten comments which included:

> "Because of her severe brain damage she is very unco-operative and refuses any help offered by health care team ... She requires nursing and general medical treatment which would be totally impossible without admission."

28. It was submitted that Dr Odemy was in that answer, not only dealing with the need for medical treatment as defined in the Act, but was also dealing with the response in the past to treatment. He gave the cause of her current need for medical treatment and critically stated that such treatment would be "impossible without admission". In that context "without admission" could only mean without admission to a hospital. He was effectively saying that the patient should be detained in a hospital for the purposes of medical treatment. Dr Odemy confirmed at the top of page 6 that he was satisfied that medical treatment was available which was likely to prevent the medical disorder worsening or alleviate any of the symptoms of effects of the disorder. At page 7 he confirmed that if the patient were not provided with such treatment there would be a significant risk to the patient's health, the safety or welfare or to the safety of any other person. When asked in the form why he believed this to be the case he said:

> "Sarah's behaviour can be irrational and unpredicted; she can be verbally abusive. She is unable to make decisions. It is therefore in her own interests that appropriate treatment is offered to her under supervision".

It was submitted that in these answers was a clear opinion that Sarah Beattie required compulsory measures to allow the treatment to be effective.

29. At page 8 the doctor confirmed that he was satisfied that because of the patient's mental disorder her ability to make decision about the provision of such medical treatment was significantly impaired. This was evidenced by her inability to seek help from health care workers. The doctor stated that she had refused to accept any advice or help offered to her in the past.

30. In the second box, the radio dial had not been shaded by the doctor. The dial was beside the words

> "I am satisfied that the making of a compulsory treatment order is necessary for the following reasons".

The form then said "Detail for example reasons why the treatment cannot be provided on an informal basis". The doctor wrote:

> "As stated above, she is unable to decide when she needs help because of her brain damage."

It was submitted, given what the doctor had already said in his report, it was no possible surprise that he has given reasons for that statement in the way he had. He had simply omitted to shade the radio dial opposite the words "I am satisfied that the making of a compulsory treatment order is necessary". However this did not detract from his opinion. It was quite clear that it was a *bona fide* mistake.

31. It was pointed out that the form which was used was not a form provided by statute. It was a form which had been provided to allow doctors to easily to deal with the various requirements of section 57.

32. It was conceded that page 9 had not been lodged. This contained the printed words:

> "It is my opinion that the following compulsory measures should be authorised by the compulsory treatment order ...
>
> (a) detaining the patient in a specified hospital and
>
> (b) giving the patient medical treatment in accordance with part 16 of the Act."

However at page 10 Dr Odemy shaded the dial indicating:

> "I believe that notice of the compulsory treatment order should be given to the patient by the HMO under section 60(1)(a) of the Act and also the patient is capable of arranging for a person to represent her in connection with the application under section 63 of this Act."

In handwriting after the words:

> "please explain your reasons for coming to these conclusions".

The doctor writes:

> "Sarah is aware of her detention and right to appeal against it".

33. It was submitted that, taken as a whole, it was quite clear that Dr Odemy's report indicated that he considered that the making of a compulsory treatment order was necessary, that the patient should be detained in a specified hospital and that she should be given medical treatment as defined in the Act in accordance with the provisions of part 16 of the Act. It was pointed out that part 16 of the Act

set out the safeguards for the patient and restriction on the power of medical professionals and others to carry out medical treatment as defined in the Act.

34. It was accordingly submitted that the Mental Health Officer was quite entitled to make an application to the Tribunal for a compulsory treatment order in terms of section 63 of the Act as the statutory criteria set out in section 57 had been met.

35. The application was made on form CTO1 "Compulsory Treatment Order Pack" which was item 6 of the second respondent's inventory of productions. It included the Mental Health Officer's report as required by section 61, and his proposed care plan in terms of section 62. In his report to the Mental Health Officer concluded "continued residence in hospital for treatment of her mental state is required". Form CTO1 contained powerful evidence from the Mental Health Officer, Dr Murphy and Dr Odemy of the need for compulsory treatment in hospital. At page 8 of the application the Mental Health Officer gives his comments on the medical reports submitted by Dr Murphy and Dr Odemy. He indicated that he agreed with Dr Murphy's report, about which no exception was taken by the appellant.

36. As far as Dr Odemy's report is concerned, the Mental Health Officer stated:

> "Dr Odemy, GP, confirms that in his opinion Miss Beattie experiences the effects of her acquired brain injury and associated impairment of her cognitive functions. He also believes that Miss Beattie experiences mental illness under the terms of the Act. Dr Odemy believes that Miss Beattie requires to be in hospital at present so that she can be provided with the necessary monitoring, care and treatment which will alleviate the symptoms she experiences. He does not believe that there is any alternative at this point and confirms that without this Miss Beattie may pose a risk to herself and her unborn child. I support these views."

37. At page 11 the Mental Health Officer sets out the care plan with reference to the mental health reports. At page 12 he sets out the medical treatment, namely antipsychotic medication. At page 13 he indicates that treatment should be in the psychiatric unit at Monklands Hospital. At page 16 he concludes, in conformity with the conclusion of the two doctors, that compulsory measures of care should be:

a. the detention of the patient in a specified hospital; and
b. the giving of medical treatment to the patient in accordance with part 16 of the Act.

38. It was submitted that this analysis of the factual position indicate that the Mental Health Officer correctly fulfilled his duties in respect of sections 57, 61, 62 and 63 of the Act. He was perfectly entitled to conclude that the measures which he proposed were required and that that conclusion was properly based on the information available to him and that the particular measures required were set out in both mental health reports.

39. The Tribunal which met on 2 December 2005 made a compulsory treatment order and its decision is item 5 of the second respondent's inventory of productions. That documents records that evidence was taken from the patient, the Mental Health Officer (the first respondent), the patient's RMO (Dr Murphy) and an independent advocate on behalf of the patient Mrs Mary McKenna. Having considered that evidence and the reports in the application the Tribunal concluded that it was satisfied that the patient was suffering from a mental illness and authorised that she be detained in Monklands Hospital and that she be given medical treatment in accordance with part 16 of the Act.

40. Following the Tribunal hearing the Tribunal issued full findings and reasons (item no 4 of the second respondent's inventory of productions). It was submitted that the decision set out, in a logical and clear manner, the matters which the Tribunal were required to consider under the Act and particular the provisions of sections 64(4) and 64(5).

41. It was clear from his own report that the Mental Health Officer had considered the two mental health reports provided by Dr Murphy and Dr Odemy, both of which conformed with the provisions of section 57. The application to the Tribunal was therefore competent. There was effective no challenge to the decision of the Tribunal on its merits.

42. As far as the specific issues raised on behalf of the appellant were concerned:

a. The issue of whether a compulsory treatment order was necessary and the attack on Dr Odemy's report. It was submitted that for the reasons given Dr Odemy's report did allow the conclusion to be drawn that he considered a compulsory treatment order was necessary; and
b. There was coincidence in the two reports supplied to the Mental Health Officer by Dr Murphy and Dr Odemy.

In these circumstances the whole procedures were carried out in accordance with the provisions of the Act. The appeal should accordingly be dismissed.

Submissions for the second respondent

43. Counsel for the second respondent associated himself with the remarks of counsel for the first respondent in dealing with the specific attack on the competency of the application made by the Mental Health Officer to the Tribunal. He supported the view that a consideration of all the papers indicated that both doctors were satisfied that the making of a compulsory treatment order was necessary and that the compulsory measures should involve detention in a specified hospital namely Monklands Hospital and the giving of the patient medical treatment as defined in the Act which would be administered in accordance with the provisions of part 16 of the Act.

44. Counsel for second respondent went on to submit that as far as the Tribunal were concerned, if an application to the Tribunal for a compulsory treatment order was made to the Tribunal by a Mental Health Officer in terms of section 63 of the Act, the Tribunal were bound to deal with the application. The powers of the Tribunal were set out in section 64 of the Act. If satisfied that all the conditions mentioned in sub-section 5 were met the Tribunal was empowered to make an order *inter alia* authorising, for the period of six months beginning with the day on which the order is made, such of the measures mentioned in section 66(1) of this Act as may be specified in the order.

45. Section 63 required the application to be accompanied by various documents, namely: (a) the mental health reports; (b) the report prepared by the Mental Health Officer under section 61 of the Act; and (c) the proposed care plan. It was submitted that if an application was made to the Tribunal under section 63, the Tribunal had a duty to consider that application. The conditions set out in section 64(5), on which the Tribunal required to be satisfied before an order could be made, contain at paragraphs (a) to (e) an exact repetition of the matters on which the medical practitioners who carried out the medical examinations in terms of section 57(2) of the Act required to be satisfied in terms of section 57(3). The terms of section 57(3)(a) to (e) conform precisely with the terms of section 64(5)(a) to (e).

46. It was submitted that it was for the Tribunal to consider the material placed before it and to consider whether the requirements of section 64(5) had been met. It was clear from consideration of item 4 of the second respondent's inventory, namely the Tribunals full findings and reasons, that the Tribunal had found the requirements of section 64(5) to be met. The Tribunal was in effect an independent check on the presentation made by the Mental Health Officer. Counsel for the second respondent associated himself with the submissions of counsel for the first respondent to the effect that the procedures carried out by the medical practitioners who provided the mental health reports, by the Mental Health Officer who submitted the application, and by the Tribunal who set out their findings clearly in their full findings and reasons, were all in accordance with the relevant provisions of the Act.

47. It was submitted that it had been shown that there was no error in law on the part of the Tribunal who had acted in terms of the provisions of sections 63 and 64 of the Act.

48. The only ground of appeal relied on by the appellant was in terms of section 324(a) that the Tribunals decisions was based on an error of law. It was submitted that this was clearly not the case.

49 As far as the Tribunal was concerned, there was an application before it. The Tribunal dealt with it in terms of the provisions of the Act. I was asked to dismiss the appeal.

Decision

50. I have no hesitation in dismissing the appeal in this case. As appeals from decisions of Mental Health Tribunals in terms of the 2003 Act have only now started to come forward, I have taken time to set out the relevant statutory provisions and to detail the submissions which were made to me. The submissions made by counsel for the first respondent and the second respondent in my opinion are well founded and I give effect to them. The only ground of appeal on which counsel for the appellant insisted was that the Tribunal made an error in law because it had allowed itself to consider an incompetent application. His reasons for this were:

a. <u>There was no specific conclusion in Dr Odemy's mental health report to confirm that he was satisfied that the making of a compulsory treatment order was necessary</u>.

In my opinion it is quite clear from a consideration of the totality of his report and in particular his handwritten comments at page 8 that Dr Odemy was satisfied that the making of a compulsory treatment order was necessary. He has in error omitted to shade the sphere beside the printed words "I am satisfied that the making of a compulsory treatment order is necessary for the following reasons". In my opinion he would not have written in the box after "detail for example reasons why the treatment cannot be provided on an informal basis", the words "as stated above, she is unable to decide when she needs help because of her brain damage", if he had been so satisfied. Additionally at page 10 he concludes that the notice of the compulsory treatment order application should be given to the patient by the MHO under section 60(1)(a) of the Act. He would hardly have confirmed that this should be done had he not felt that it was the appropriate course to pursue. I accept the various submissions made by counsel for both respondents in dealing with the attack by the appellant on Dr Odemy's report. In my opinion it is clear from his report that he considered that the making of a compulsory treatment order was necessary.

b. Dr Odemy's report did not have coincidence with the report from Dr Murphy.

Again I do not agree. For some unknown reason the proforma page 9 of Dr Odemy's report became detached from it when it was submitted to the Mental Health Officer. It was not before the Tribunal. The proforma page 9 which was completed by Dr Murphy states:

"It is my opinion that the following compulsory measures should be authorised by the compulsory treatment order:

(e) detaining the patient in a specified hospital;
(f) giving the patient medical treatment in accordance with part 16 of the Act"

51. I accept the submissions made for the two respondents that it is clear from Dr Odemy's report that he considered the appellant should be detained in a specified hospital. He wrote at page 8 in response to the printed requirement: "Please state the patient's needs for medical treatment for medical disorder. Note that medical treatment includes nursing; care, psychological intervention; habilitation and rehabilitation (including education and training in work, social and independent living skills) in addition to pharmacological interventions," the following: "Because of her severe

brain damage, she is very unco-operative and refuses any help offered by health care team ... she requires nursing and general medical treatment which would be totally impossible without admission."

52. It is accordingly clear to me that Dr Odemy considered the patient required to be detained and that she required to receive medical treatment which is defined in the Act. I accept the submissions that the provisions of part 16 of the Act prescribed the conditions under which medical treatment under the Act should be administered.

53. I have no hesitation at all in reaching the conclusion that Dr Odemy's report as presented to the Mental Health Officer and to the Tribunal complied with the provisions of sections 57(3) and (4) of the 2003 Act and that there is coincidence between his report and that of Dr Murphy. In my opinion there is no merit in either of the criticisms advanced on behalf of the appellant.

54. I set out at the beginning of this note the statutory obligations placed on the two medical practitioners who provide mental reports, the medical health officer and the Tribunal. In my opinion in this case all the relevant statutory provisions have been obtempered. The decision of the Tribunal is a proper one made in accordance with the provisions of the Act. I accordingly dismiss the appeal.

55. As the appellant is legally aided on a nil contribution I am not disposed to make any award of expenses in favour of either the first respondent or the second respondent. I am prepared to certify, as I was asked to do, that this case is suitable for the employment of counsel. Appeals in terms of the Mental Health (Care and Treatment) (Scotland) Act 2003 are only starting to become before the courts and I was greatly assisted by counsel in consideration of the complex provisions of the Act.

56. There is one final point which I would like to raise which may be of importance for the future. The original Tribunal hearing was adjourned on 10 November 2005 until 2 December 2005 to allow the appellant's solicitor to obtain an independent psychiatric report. I was referred to rule 62(5) of the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 205 which provides:

> "Subject to the following paragraphs, where any relevant person obtains in relation to an issue before the Tribunal a written report from a person having expertise in any subject relevant to that issue, that relevant person shall send a copy of the report to the Tribunal seven days prior to the next hearing of the Tribunal or at such period prior to

the next hearing of the Tribunal as specified by the Tribunal in a particular case."

Rule 62 further provides:

"(6) A relevant person may send a request to the Tribunal for permission not to send a report to the Tribunal under paragraph (5), giving reasons for the request, and, pending consideration of that request the copy report need not be produced.

(7) The Tribunal may afford the relevant person making the request an opportunity to be heard either by the convener alone or such other persons as the Tribunal may direct;

(9) The Tribunal shall, in deciding the request, consider any representations made and may either-

(a) give permission to the relevant person not to send part or all of the report in question; or

(b) order that part or all of the report be sent to the Tribunal within such time as the Tribunal may specify."

57. I was informed that an application was made on behalf of the appellant to the Tribunal not to send a copy of the independent report obtained to the Tribunal. This application had been granted. I was not informed of the reason for this. While the issue was not a live one before me, I express the view that I would have thought that only in very exceptional circumstances, and on specific cause shown, should an independent report obtained by the patient with a view to challenging the conclusions in the Mental Health Officer's report not be made available to the Tribunal. It seems to me to be in the interests of justice that such a report should be available. The Tribunal is concerned with what is best in the interests of the patient.