B812/08

JUDGMENT

OF

SHERIFF PRINCIPAL

JAMES A TAYLOR

in the cause

Peter Di Mascio

APPELLANT

against

Mental Health Tribunal for Scotland

FIRST RESPONDENT

and

The Named Person

SECOND RESPONDENT

GLASGOW, 4 August 2008.

The Sheriff Principal, having resumed consideration of the cause, Refuses the appeal; Finds the appellant liable to the respondents in the expenses of the appeal as these might be taxed; Allows the respondents to make up an account and upon it being lodged, Remits the account to the Auditor of Court to tax and to report; Certifies the appeal as suitable for the employment of junior counsel.

NOTE:-

[1] This is an appeal by the mental health officer against a decision of the Mental Health Tribunal for Scotland ("MHT"). The MHT had varied the conditions attached to a

compulsory treatment order. The variation provided that the patient, AL, should reside with his named person, his mother, at his mother's house. Mr Olsen, Advocate, appeared for the appellant, Mr Campbell, Advocate, appeared for the MHT and Mr O'Carroll, Advocate, appeared for the named person. Mr Frank Irvine, the curator *ad litem* appointed to AL by my interlocutor of 20 May 2008, also appeared. The appeal was opposed by the MHT, the named person and the curator *ad litem*.

[2] Section 57 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the Act") places a duty upon a mental health officer to apply to a MHT for a compulsory treatment order under Section 63 of the Act should the conditions specified in Section 57(2) - (5) apply. Section 57(3) applies when two medical practitioners are satisfied that the conditions specified in Section 57(3)(a) - (e) are met. Section 57(4)(e) provides that each of the reports from the two medical practitioners may specify the measures that should be authorised by the compulsory treatment order. One has to go to Section 66 of the Act to find which measures may be imposed by a MHT should an application by a mental health officer be made to it under Section 63. For example, Section 66(1)(a) provides for the detention of the patient in a specified hospital. That is only one of the measures there specified.

[3] Once an application is made for a compulsory treatment order in terms of Section 63, the powers of the Tribunal are set out in Section 64. Section 64(4) provides that if the MHT is satisfied that all of the conditions set out in Section 64(5) are met the Tribunal may make a compulsory treatment order. Section 64(5) is in the following terms:-

> "The conditions referred to in subsection (4)(a) above are -
> (a) that the patient has a mental disorder;
> (b) that 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 for 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 any other person;

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

(e) that the making of a compulsory treatment order in respect of the patient is necessary; and

(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."

[4] In his opening speech, Mr Olsen submitted, as I understood it, that if the Tribunal considered that a compulsory treatment order should be made there was a presumption that the patient would be detained in hospital unless the Tribunal considered, in terms of Section 64(5)(f), that it was unnecessary for such detention. When afforded the right to reply, following the submissions of Mr Campbell and Mr O'Carroll, who both challenged such an interpretation, Mr Olsen indicated that such had never been his position. For the avoidance of doubt, it is my opinion that no such presumption can be inferred from the terms of the Act.

[5] A compulsory treatment order was made in respect of AL, albeit that when the procedures commenced the relevant statutory provision was the Mental Health (Scotland) Act 1984. On 5 October 2005, AL became subject to a compulsory treatment order in terms of Section 64 of the Act by virtue of the transitional arrangements. The order provided that AL should be detained in hospital. AL's detention in Dykebar Hospital, Paisley, commenced in July 2004.

[6] AL's named person, as defined in the Act, is his mother. The named person then sought revocation of the compulsory treatment order in terms of Section 11(2)(a) of the Act. (There was some doubt as to whether the application was made under Section 99 or Section 100 but parties were agreed that such distinction was of no moment). There then followed sundry procedure including an appeal to another sheriff principal. On 11 March 2008, after hearing nine days of evidence and submissions, the MHT varied *ad interim* the compulsory treatment order for a period of 28 days in terms of Section 106(2) of the

Act. Detention in Dykebar Hospital, Paisley was no longer part of the order and AL was allowed to return to live with his mother albeit that the MHT record in a note to their interlocutor that they instructed the named person not to remove AL from hospital care except for weekend passes. The purpose in this instruction was to allow time for the responsible medical officer to amend AL's care plan and for him to request South Lanarkshire Council to prepare AL's community care assessment. Before me parties were agreed that the instruction not to remove AL from hospital given by the MHT to Mrs L was inept. It was also a matter of agreement that such did not vitiate the rest of the MHT's decision. The application for revocation was continued to 7 April to enable the re-assessment to be carried out. On 7 April the MHT varied the compulsory treatment order in terms of Section 103 of the Act by removing from the order the requirement that AL should be detained in Dykebar Hospital.

[7] There was no dispute between the parties that when determining the application under Section 100(2)(a) the Tribunal required to have regard to Section 64 of the Act and in particular to what is set out in Section 64(5). (It was accepted by parties that there was no practical distinction between the conditions set out in Sections 64(5) and 83(2) and (3) of the Act). It was the inter-relationship between Section 64(5) and Section 1 of the Act which was the subject of debate. Section 1 is headed "Principles for Discharging Certain Functions". Section 1(1), (2), (3) and (4) are in the following terms:-

"(1) Subsections (2) to (4) below apply whenever a person who does not fall within subsection (7) below is discharging a function by virtue of this Act in relation to a patient who has attained the age of 18 years.

(2) In discharging the function the person shall, subject to subsection (9) below, have regard to the matters mentioned in subsection (3) below in so far as they are relevant to the function being discharged.

(3) The matters referred to in subsection (2) above are -

(a) the present and past wishes and feelings of the patient which are relevant to the function being discharged.

(b) the views of -

(i) the patient's named person;

(ii) any carer of the patient;

(iii) any guardian of the patient; and

(iv) any welfare attorney of the patient,

which are relevant to the discharge of the function;

(c) the importance of the patient participating as fully as possible in the discharge of the function;

(d) the importance of providing such information and support to the patient as is necessary to enable the patient to participate in accordance with paragraph (c) above;

(e) the range of options available in the patient's case;

(f) the importance of providing the maximum benefit to the patient;

(g) the need to ensure that, unless it can be shown that it is justified in the circumstances, the patient is not treated in a way that is less favourable than the way in which a person who is not a patient might be treated in a comparable situation'

(h) the patient's abilities, background and characteristics, including, without prejudice to that generality, the patient's age, sex, sexual orientation, religious persuasion, racial origin, cultural and linguistic background and membership of any ethnic group.

(4) After having regard to -

(a) the matters mentioned in subsection (3) above;

(b) if subsections (5) and (6) below apply, the matters mentioned there; and

(c) such other matters as are relevant in the circumstances,

the person shall discharge the function in the manner that appears to the person to be the manner that involves the minimum restriction on the freedom of the patient that is necessary in the circumstances."

It was accepted that the MHT does not fall within sub-section (7) and was discharging a function by virtue of the Act.

[8] Mr Olsen submitted that the MHT had erred at paragraphs 237 and 238 of its decision as these are set out in the Full Findings and Reasons. Paragraphs 237 and 238 are in the following terms:-

"237. The section 64(5) criteria do not address the form of the CTO. The options before the Tribunal as have been indicated were in the Tribunal's opinion, on the basis of the evidence it considered before it, effectively limited either to Anthony's immediate return to the community in the care of the family home, or his continued detention in hospital. The Tribunal could only be guided as to what was the most appropriate of those measures having regard to the matters set out in section 1 of the Act. The Tribunal heard evidence about Anthony's religious background. His parents are evangelical Christians who are members of the Cambuslang Evangelical Church. Anthony expressed to Professor Fraser a wish to visit the United States of America, and to meet Billy Graham. The Tribunal has had regard to these matters but, ultimately, is of the view that they do not determine which of the two options would be most appropriate for Anthony. He is not currently attending church on Sundays when home at the weekend. He had expressed the wish not to be visited by a minister minimising the importance of Anthony's religious affiliations, the Tribunal's greater concerns were in balancing his interests with those of public safety.

238. The Tribunal acknowledges Mr Di Mascio's concerns about public safety but is of the view that his opinions were one-sided and emphasised only public safety in preference to Anthony's interests as set out in section 1 of the Act. It was for the Tribunal to carry out the necessary balancing exercise."

[9] It was said by Mr Olsen that the MHT should not have carried out a balancing exercise. The test to be applied by the MHT was "In terms of Section 64(4), is it necessary for AL to be detained in hospital?". In deciding whether or not it was necessary for AL to be detained in hospital the respondent should have addressed the question:- "Is it necessary to avoid significant risk to the health, safety and welfare of AL or to the safety of other persons to detain AL in hospital?"

[10] In my opinion that is not the correct test. What Section 64 does is set out certain conditions which, if satisfied, entitle the Tribunal to consider whether it continues to be necessary for the patient to be subject to a compulsory treatment order and what measures should be specified in the order. Putting the question in the form proposed by Mr Olsen fails to pay due regard to the terms of Section 1 of the Act.

[11] What the Tribunal did was to consider the terms of Section 64(5). Having done so they concluded that the conditions set out therein were satisfied. It was necessary in this case to make a compulsory treatment order. I refer to paragraph 236 of the MHT's Full Findings and Reasons. The MHT then, correctly in my view, commented that Section 64(5) does not specify the form which the compulsory treatment order should take. Having satisfied itself that the Section 64(5) conditions were met it then had to consider what measures should be authorised by the order which it was now permitted to make. The measures are specified in Section 66. When determining what measures should be authorised the Tribunal had regard to the principles set out in Section 1. In my opinion that is the correct approach. Section 64(5) contains only the conditions which require to be met before a compulsory treatment order can be made or continued. The existence of these conditions is a necessary pre-requisite to the making of a compulsory treatment order. Section 1 makes it clear that when discharging the functions which they were, the MHT required to have regard to the principles set out therein. Section 1(3)(f) requires the MHT to have regard to "the importance of providing the maximum benefit to the patient." Nowhere in Section 1 is any reference made to the safety of any person other than the patient. There can be no doubt that when considering whether the measure set out in Section 66(1)(a), namely "the detention of the patient in the specified hospital" is necessary, the MHT will have regard to the safety of others. It would be perverse were they not to given the terms of Section 64(5)(c). Given the terms of the Full Findings and Reasons (see, for example, paragraph 130) the MHT was satisfied that there was a significant risk to the safety of other persons if AL was not provided with medical treatment. Thus one of the tests before a compulsory treatment order could be made was satisfied. Section 66(1)(a) provides that one measure could be the detention of the patient in a specified hospital. However it does not follow that because there is a significant risk to the safety of other persons that detention in hospital <u>must</u> be authorised. But since when discharging their function, the MHT required to have regard to the Section 1

principles, the MHT was correct when it said at paragraph 238 that they had "to carry out the necessary balancing exercise". They had to consider *inter alia* the safety of others, the safety of AL, the benefit to AL of the order and come to a decision bearing in mind also the principle of "minimum restriction on the freedom of the patient that is necessary in the circumstances" as set out in Section 1(4) of the Act. Thus the MHT did not err in law when interpreting the Act in the manner in which they did.

[12] It was then submitted on behalf of the appellant that the MHT had erred in law in taking into account irrelevant considerations and in failing to take into account relevant material. This attack on the decision of the MHT was predicated on the premise that the MHT had, to use Mr Olsen's expression, faced South Lanarkshire Council with a fait accompli. The appellant submitted that the MHT had come to their decision that AL should be released into the community because, to borrow on this occasion the MHT's expression, South Lanarkshire Council were obfuscating. Mr Olsen considered that there was a clear agenda on the part of the MHT. South Lanarkshire Council was being put under a duty to comply with the wishes of the MHT that AL be cared for in the community. The MHT, said Mr Olsen, was not there to force South Lanarkshire Council to do what the MHT wanted done. From reading the Full Findings and Reasons it is difficult to avoid the conclusion that the MHT considered that the appellant, or more particularly his employers, South Lanarkshire Council, was not doing all that could be done for AL. However, for it to be said that the MHT came to their decision that AL should not be in Arran Ward of Dykebar Hospital only because of a view expressed by the MHT that South Lanarkshire Council was obfuscating is going far too far. It discloses a thought process which it has to be said is rather alarming. In my opinion the MHT approached their task in a proper manner.

[13] Their starting point was their finding that there is no autism specific unit in Scotland to provide the necessary care for AL (Full Findings and Reasons paragraph 109). They then found that AL's detention in Arran Ward of Dykebar Hospital does not provide the necessary stimulation for him and he gains no therapeutic benefit from such detention (Full Findings and Reasons paragraph 112). It appears from what is recorded by the MHT that these two findings were uncontroversial on the evidence led over several days. Having concluded that there was no benefit to AL by his continued

detention in Dykebar Hospital, the MHT had an obligation to ascertain if there were better alternative care regimes. This duty arises from the terms of Section 1(3)(f) of the Act.

[14] The arrangements in Arran Ward were that AL was supervised by two male nurses at all times he was awake. This form of detention kept him and others physically safe. He was not allowed contact with any women other than his mother (Full Findings and Reasons paragraph 130). It did nothing to improve AL's condition (Full Findings and Reasons paragraph 113).

[15] The Full Findings and Reasons inform us what evidence was heard by the Tribunal as to the alternative care regimes which were urged upon them. Dr Watt, Medical Director, Mental Health Partnership, NHS Greater Glasgow & Clyde thought that Bute Ward of Dykebar Hospital might be appropriate (Full Findings and Reasons paragraph 132). This suggestion was discounted by the MHT as Bute Ward catered for patients with learning difficulties and IQs under 70. AL has an IQ over 70. The MHT explain more fully at paragraph 134 of their Full Findings and Reasons why this suggestion was rejected.

[16] Dr Isobel Campbell of the State Hospital, Carstairs gave evidence that if released into the community, AL would require the same level of security, namely two male nurses present during all waking hours, as existed in Arran Ward. At paragraph 142 of their Full Findings and Reasons the Tribunal record their assessment of her evidence as being that any risk of harm to the public no matter how remote warranted the aforementioned level of security which effectively ruled out, in her view, the management and care of AL in the community. In paragraphs 208 to 212 of their Full Findings and Reasons the MHT do not accept that approach as it was predicated on the basis that all risk must be "absolutely prevented". The MHT then state "The whole point of that risk, however, is that it can never be eliminated. It can only ever be managed." With that statement it must be difficult to argue.

[17] Evidence was led from Mr John Cameron, a Consultant Clinical Psychologist, who had been working with AL. His view as recorded by the MHT after hearing his

evidence was that AL needed to return home to his family. The risks presented by AL could be managed at home. At paragraph 146 of their Full Findings and Reasons the MHT record Mr Cameron's view as being that continued detention in Arran Ward had kept AL in a much more risky environment as it gave more opportunities for problems with attractive young women. On the other hand, home would be a more stable and predictable environment populated by people AL knew and for whom he posed minimal, if any, risk.

[18] Evidence was also heard from Mr Alan Gibson, Senior Support Worker, Threshold. The MHT record that Threshold is a Church of Scotland organisation skilled in providing services to persons with autism (Full Findings and Reasons paragraph 149). Mr Gibson's opinion, as recorded by the MHT, was that AL could obtain maximum benefit from a return to his home environment. Threshold would be able to support AL were he in the community (Full Findings and Reasons paragraph 152).

[19] Emeritus Professor W I Fraser, Psychiatrist, also gave evidence to the effect that AL should be returned home in phases. The MHT record his view as being that the need for two male nurses was a strategy for avoiding all risks. He is recorded as describing that as a hyperbolic level of safety (Full Findings and Reasons paragraph 162). Professor Fraser produced a sample safety plan and a sample risk profile summary in respect of patients who present risks to the safety of others. The Tribunal at paragraph 160 of their Full Findings and Reasons considered these documents to be very helpful.

[20] Dr J A Baird, Consultant Forensic Psychiatrist, considered AL should be placed in community care in his own tenancy (Full Findings and Reasons paragraph 174).

[21] On the other hand, the Tribunal heard evidence from Dr McDonald, AL's registered medical officer, and the appellant, AL's mental health officer, that the discharge of AL into the community represented a significant risk to others and that Al should continue to be detained in Dykebar Hospital. The MHT make the point that both the responsible medical officer and the mental health officer are employees of South Lanarkshire Council.

[22] Evidence was also given by Mrs L, AL's named person and his mother. The MHT record at paragraph 168 of their Full Findings and Reasons that they were impressed by Mrs L as being "highly skilled" in relation to autism and caring for AL. That view was endorsed by Professor Fraser. Mrs L produced a detailed home care support plan and a detailed risk assessment for AL when he was at home. The MHT also had before it the uncontradicted evidence that for some time prior to the MHT decision, AL had been allowed home at weekends. There had been no male nurses providing security for AL's waking hours at the weekend. There had been no incidents.

[23] It is thus clear that the MHT had before it a sufficient body of evidence which it had considered to be both relevant and credible to enable it to consider there was sufficient evidence to support AL being cared for in the community. Accordingly they were obliged in terms of Section 1 of the Act to vary the terms of the compulsory treatment order by allowing AL to reside with his mother in the community. In my opinion the MHT approached their task in a responsible and proper manner. They explain how they analysed the competing proposals for the continuing care of AL. They came to a view which on the evidence they were entitled to reach. In my opinion they did not come to their decision because they found South Lanarkshire Council to be obfuscating. The obfuscation was not the raison d'etre of their decision as submitted by Mr Olsen. Undoubtedly, as a consequence of the MHT's decision, South Lanarkshire came under certain statutory obligations. But the decision which brought these obligations into being was one which in my opinion was properly reached on the evidence recorded. The MHT arrived at their decision having properly applied the terms of the Act. Perhaps if one looks at one or two paragraphs of the MHT's Full Findings and Reasons in isolation one might be misled into thinking that which was urged upon me by the appellant. It is fair to say that the MHT did not consider South Lanarkshire Council to be co-operating. But to consider one or two paragraphs in isolation is to look at them out of context. I am satisfied that if one looks at the Full Findings and Reasons as a whole the submissions made on behalf of the appellant are not made out.

[24] In my opinion the MHT have explained very adequately how they analysed the evidence. As an illustration I commend paragraphs 211 to 215 and paragraph 222 of the Full Findings and Reasons.

[25] Mr Olsen's submission came very close on occasion to directing itself at protecting the reputation of South Lanarkshire Council rather than addressing the care provisions of AL. Article 11 of condescendence of the summary application, by which this appeal was commenced, specifically addresses itself to whether there were facts found to be established which supported various criticisms made of South Lanarkshire Council by the MHT. I do not consider it my function to enter this arena. The MHT had the benefit of hearing the evidence, seeing the witnesses and forming an impression of the witnesses. That is an advantage which an appellate court does not have. Mr O'Carroll submitted that this ground was not a competent ground for appeal. The grounds for appeal are set out at Section 324(2) of the Act. Mr O'Carroll submitted that the section reflected the importance of the fact finding role of the Tribunal. Nowhere does one find in Section 324 a ground of appeal that the Tribunal had no basis in fact for reaching their findings. I do not wish to express a concluded view on this matter since I was not addressed on it by Mr Olsen. However one ground of appeal which can be found at Section 324(2)(a), is that "The Tribunal's decision was based on an error of law." I think it would be possible to categorise a failure to have sufficient evidence to enable a finding to be made as an error of law. However in circumstances where the evidence is not recorded it is very difficult for an appellant to challenge a finding in fact on the basis that there was insufficient evidence to support it. In any event whether there was sufficient evidence to warrant the criticisms made of South Lanarkshire Council is of no significance in the determination of the appeal. I am satisfied that the criticisms of South Lanarkshire Council did not form the basis for the decision by the MHT to vary the terms of the compulsory treatment order.

[26] Mr Olsen drew my attention to the form of the Full Findings and Reasons. He pointed out that the section headed "The Facts Found to be Established" by the MHT contained paragraphs 76 to 130 only. Mr Olsen submitted that only these paragraphs could be looked at to provide support for the MHT's decision. What the MHT say in the section headed "Reasons For Our Decision" (Full Findings and Reasons paragraphs 131

to 193) and "Discussion of the Evidence" (Full Findings and Reasons paragraphs 194 to 251) could not be referred to in order to find facts to support the MHT's decision to vary the compulsory treatment order. Both Mr Campbell and Mr O'Carroll submitted that neither the Act nor the Mental Health Tribunal for Scotland (Practice & Procedure) (No 2) Rules 2005 laid down any requirement to make specific findings in fact as for example a sheriff is required to do in an ordinary action by virtue of Ordinary Cause Rule 12.2(3). Mr Olsen in reply referred to Rule 72(7) of the Practice & Procedure Rules which is in the following terms:-

> "The Tribunal shall record the decision in a document which contains a full statement of the facts found by the Tribunal and the reasons for the decision."

The document entitled "Full Findings and Reasons" (production 3 in the inventory lodged by the appellant) is such a document. In my opinion I am entitled to look at the document as a whole to ascertain the facts which the MHT found to be established. If by reading a paragraph in the section entitled "Discussion of the Evidence" it is clear that the MHT found a fact to be established which fact does not appear in the section entitled "The Facts Found to be Established" I can have regard to that fact when deciding whether the evidence supported the MHT's decision. To do otherwise would be to allow form to triumph over substance. Different considerations would apply if the Rules made more particular provisions regarding the form which the MHT should adopt when setting out their decision. Put another way I consider I am entitled to treat the headings in the Full Findings and Reasons as *pro non scripto*. As Mr O'Carroll put it, when one seeks to ascertain if facts have been established by the Tribunal one looks at the statement of the Tribunal and asks if a fair consideration of that statement gives rise to the view that the Tribunal has found a fact to be established. Mr O'Carroll accepted that the narration of evidence could not be a finding in fact but a conclusion formed upon such a narration should be treated as a finding in fact regardless of where that conclusion appeared in the Full Findings and Reasons.

[27] Mr Olsen also submitted that the MHT had erred in varying the compulsory treatment order without there having been a community care assessment and care plan. On 11 March the MHT made an interim variation to the compulsory treatment order

enabling AL to be cared for in the community in his mother's house rather than in Arran Ward of Dykebar Hospital, Paisley. The reason why the variation was *ad interim* was to enable South Lanarkshire Council to prepare a community care assessment and care plan which the MHT would then consider when they reconvened on 7 April 2008. On 7 April the assessment and plan were not available. This was because Mr Garroway of South Lanarkshire Council did not consider it possible to prepare such. In the appellant's production No 4 one finds the social work reassessment. Mr Garroway there records:-

> "The writer acknowledges that AL has been detained for a considerable period of time in Dykebar hospital and that his current needs are not best met in Arran ward. In the absence of an agreed risk assessment, shared by all parties involved it is not possible at this stage to set out a risk management plan to address the considerable risks which AL poses. For protection plans to be successful good partnership working in relation to risks and risk management is crucial and this does not currently exist. Prior to any discharge to the community, agreement needs to be sought on the degree to which the risk AL poses can be managed safely in the community and the methods proposed to manage these risks need to be clearly delineated. AL should not be discharged to the community until health staff have agreed it is safe to do so and can demonstrate that the risks posed by him have been lessened. The writer is clear that at the present time an appropriate community care package cannot be provided for AL which can provide sufficient protection for him, his family, his care staff and the public. Social work resources staff, do not support discharge to the community at this present time."

This put the MHT in a difficult position. Having heard the evidence and listened to the witnesses the MHT records at paragraph 246 of its Full Findings and Reasons:-

> "The Tribunal decided on interim variation of the CTO at this stage under Section 106(2) of the Act of practical reasons. It did not think, absent a compulsory order for the Tribunal, South Lanarkshire Council and the Health Board would make any progress towards AL being released from detention."

By failing to complete the care assessment and care plan, the officials of South Lanarkshire Council effectively frustrated the aim of the MHT set out in the interlocutor of 11 March 2008. Thus when the MHT reconvened on 7 April 2008 they record at paragraph 16 of their Determination of Appeal to Revoke or Vary (production No 6 for the appellant):-

> "16. We were of the view that our decision for variation of the CTO would be frustrated if South Lanarkshire Council were allowed to think it a matter for its discretion whether Anthony be detained in hospital or cared for the in the community. That was a decision not for it but for the Tribunal."

In my opinion the MHT were correct in asserting that it was for them and not South Lanarkshire Council to determine where AL should be cared for. As they acknowledge in paragraph 12 of production No 6, they could have adjourned the hearing once more to allow South Lanarkshire Council further time in which to complete the assessment and report. However standing the terms of Mr Garroway's report quoted above, it seems unlikely that would have produced a different situation when the Tribunal reconvened some 28 days after 7 April 2008. Mr Garroway reported that until health staff can demonstrate that the risks posed by AL have been lessened, AL should not be discharged to the community. From the terms of the Full Findings and Reasons it is doubtful if such would have been achieved in a further 28 days. The MHT had decided that he should be discharged to the community. In my opinion the MHT was entitled to reach their decision given the findings which they have made and the terms of the social work re-assessment. They had heard nine days of evidence and submissions. The MHT, and not an appellate court, was best placed to form a view of the evidence. As Mr Campbell submitted, the purpose of the interim variation in March was to allow time for further assessment. It was not to address the question of whether release into the community was a good idea. However the approach adopted by South Lanarkshire Council thwarted that approach. They appeared to be of the view that until all parties involved agreed upon the terms of a risk assessment AL could not be released into the community. Taking that to its logical conclusion, AL would never be released into the community if there was no such agreement. Effect would never be given to the MHT's decision.

[28] Counsel for the respondents were correct in submitting it was not for the Tribunal to specify the level of risk should AL be allowed to live at home. That is for those charged with the responsibility of carrying out the assessment of the risk. They have to assess the risk and record it. For Mr Garroway to say that he was unable to complete the risk assessment because the MHT had not specified the level of risk is difficult to comprehend. The local authority know about AL and the particular challenges presented by his condition. They know the situations in which he is likely to behave in an unacceptable manner. They should be able to assess how frequently these situations might arise when living at home. Having identified the situations, their potential consequences and the frequency of the situtations arising, the risk assessment could then address how the risks associated with a given situation which might arise might be minimised. One is then left with the residual risk which the risk assessment should be able to identify and report upon. If those carrying out the risk assessment had any difficulty they could have had access to the risk assessment prepared by the named person and which was commended by Professor Fraser whom the Tribunal record at paragraph 211 as "one of the United Kingdom's leading experts in autism." Having heard and assessed the evidence, the MHT came to the view that there was little or no risk while AL remained in the family home. It is beyond the home that the risk emerges. The MHT in coming to their decision had the benefit of previous assessments and the materials put before them by Mrs L which had been commended by Professor Fraser. They were not starting with a blank page. These materials were not before me. I did not hear the evidence. I am not going to fault the MHT in this respect.

[29] Although not a consideration in reaching my decision it is of interest to note that AL returned to live with his mother on 7 April 2008. It was a matter of agreement that there have been no incidents giving rise for concern to her, her husband, the MHO, the RMO or any other organisation or individual. Threshold have given support five days per week when Mrs L is at work. On Saturdays and Sundays, Threshold are not involved in the care of AL and the care regime is the same as existed when AL was subject to compulsory detention in hospital but allowed weekends at home. I was informed that the care package costs AL's mother £2,000 per month.

[30] For the foregoing reasons I have therefore refused the appeal. It was the position of the appellant, respondent and the curator *ad litem* that the case was suitable for the employment of junior counsel. Accordingly that is reflected in the interlocutor. Having had the benefit of submissions on the question of expenses, I have little difficulty in coming to the view that the appellant should be liable to the respondents for the judicial expenses occasioned by the appeal proceedings. I had a little difficulty in relation to the position of the curator *ad litem* and with some hesitation have come to the view that the expenses incurred by the curator *ad litem* should not be the subject of an award. I would like to conclude by thanking counsel and solicitors for their assistance in what could have been an emotive and difficult case. The submissions were made in a constructive and helpful manner and for that I am grateful.