



## XX v. WW and Middle South Area Mental Health Service

[2014] VSC 564

**Country:** Australia

**Region:** Oceania

**Year:** 2014

**Court:** Supreme Court of Victoria

**Health Topics:** Informed consent, Mental health

**Human Rights:** Right to liberty and security of person, Right to privacy

### Facts

XX, a mental health patient, had been detained and treated against her will at a treatment center under an Involuntary Treatment Order (â€œITOâ€•) in August 2013. The ITO was revoked by the Mental Health Review Board (â€œBoardâ€•). Following XXâ€™s return to the ward, conversations with staff and an assessment by a psychiatric nurse, WW recommended a new ITO under section 9 of the Mental Health Act 1986 (the â€œActâ€•) as he was satisfied that XX met the criteria in section 8 of the Act. As part of his report, WW commented that XX was irritable, verbally abusive, and at risk of absconding. WW was also concerned for the welfare of XXâ€™s children. The ITO was subsequently reviewed by two senior psychiatrists who agreed with WW.

XX filed a lawsuit seeking a declaration that the recommendation by WW was unlawful under the Act and constituted a violation of her rights under sections 13 and 21 of the Charter of Human Rights and Responsibilities Act 2006 (â€œCharterâ€•).

### Decision and Reasoning

The Court held that if the Board had discharged an ITO, a registered nurse practitioner could only make a new recommendation for an ITO if the complexion of the case had changed significantly. On the facts of the case, the Court held that WW had taken all relevant information into account, including the decision of the Board, and had acted in accordance with the Act by recommending an ITO.

The court also held that section 32(1) of the Charter, which requires all laws to be interpreted with regard to a personâ€™s human rights, did not permit words to be included in the Act which were not explicit or implicit in its original form. It finally confirmed that sections 4(2)(b) and 8(1)(c) of the Act entitled WW to take into account the potential risk to her children when making this decision.

The court rejected XXâ€™s arguments that WW had not acted in accordance with section 38(1) of the Charter and had breached her rights to privacy and liberty under sections 13 and 21 of the Charter. It held that in recommending the ITO, WW had fully taken into account her rights alongside the circumstances noted above, and he was therefore entitled to recommend the ITO as a reasonable limitation to her rights under section 7(2) of the Charter.

### Decision Excerpts

â€œ[H]e recommended a new ITO because he genuinely and firmly believed that it was necessary to keep the plaintiff in hospital to treat her against her will in order to protect her and her children from harm.â€• Para. 100.

â€œ[H]e seriously turned his mind to the possible impact of the recommendation for an ITO on the plaintiffâ€™s human rights and the implications for her, and that countervailing interests or obligations were identified.â€• Para. 117.