PUBLICATION RESTRICTIONS UNDER S 130 OF THE INTELLECTUAL DISABILITY (COMPULSORY CARE AND REHABILITATION) ACT 2003 AND SS 11B TO 11D OF THE FAMILY COURTS ACT 1980.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2010-485-1279

BETWEEN	L Appellant
AND	RIDCA CENTRAL (REGIONAL INTELLECTUAL DISABILITY CARE AGENCY) Respondent

Hearing: 15 September 2010

Appearances: Ms Douglass for the appellant
Mr La Hood for the respondent

Judgment: 21 September 2010 at 9.30 am

JUDGMENT OF MALLON J

Contents

Introduction

[1] L is 45 years old. She has an intellectual disability.[1] Throughout her life she has had aggressive outbursts. For most of her life she has lived in the community but with access to care from time to time. In about 2005 her aggressive tendencies escalated to the point where from time to time she was assaulting her care givers.

[2] The apparently most serious of these assaults occurred in November 2007 when she held, pushed about, punched and threatened her caregiver and prevented the caregiver from leaving. The incident came to an end about 35 minutes after it had begun when the police intervened. As a result of these events L was charged with common assault[2] and kidnapping.[3] While these charges were before the Court, further assault charges were laid in relation to incidents involving her caregiver and police officers.[4] She was found fit to plead and pleaded guilty to the two charges from the November 2007 incident and one charge of assault on a police officer, her first criminal convictions of any kind.[5] As a result of these events, and rather than pass sentence upon her on these three charges, an order was made for compulsory care under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the IDCCR Act).

[3] L has now been in compulsory care since April 2008. For most of that time the care has been secure care.[6] It is common ground that the restriction on her liberty that the compulsory care order entails exceeds the likely period of any restriction that might have been imposed on the three charges had she been sentenced under the Criminal Justice system. The compulsory care order has been continued on the basis of an assessment of her risk to the community and to herself,

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[1] She has been assessed as having an IQ below 70 and significant deficits in her adaptive functioning, and her difficulties have been apparent from before she was 18 years old. She thus meets the definition of "intellectual disability" under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the IDCCR Act).
[2] Section 196 of the Crimes Act 1961.
[3] Section 209 of the Crimes Act.
[4] Sections 9 and 10 of the Summary Offences Act 1981.
[5] She was ordered to come up for sentence if called upon within six months on four other charges of common assault and a further charge of common assault was withdrawn.
[6] Secure care is a defined term in the IDCCR Act.

her prospects for progress while in care and the nature of the offending that brought her under the care regime provided for by the IDCCR Act.

[4] On this appeal L challenges the most recent extension of the care imposed by the Family Court. That order was for a further 12 months of secure care, commencing on 7 April 2010, but with a request from the Family Court Judge that her care and rehabilitation plan provide for an orderly transition to supervised care[7] within six months.

[5] It is submitted for L that the Family Court ought to have imposed no more than supervised care for a 6 month period. Accepting that L will probably always pose a degree of risk in the community, the prospect for and nature of any gains in reducing that risk from continued care are said not to be sufficient to warrant the length of compulsory care that has been imposed on L nor that the form of care be secure care rather than supervised care. It is also said that the Family Court Judge had no power to delegate the decision as to whether L should move to supervised care after 6 months.

[6] It is submitted for the respondent that the Family Court decision was in all respects correct on the evidence before the Judge.

The regime under the IDCCR Act

[7] To come within the IDCCR Act a person must be suffering from an "intellectual disability" (which is defined in the IDCCR Act) and have been charged with or convicted of a criminal offence. There are different routes through which a person that meets this criteria can become subject to the IDCCR Act. For present purposes the relevant way is where an offender has been convicted of an imprisonable offence and, instead of passing sentence on the offender, the Court orders that the person is to be cared for as a care recipient under the IDCCR Act.[8]

[7] Supervised care is a defined term in the IDCCR Act.
[8] Section 34 of the Criminal Procedure (Mentally Impaired Persons) Act 2003.

[8] Such an order is a "compulsory care order".[9] The IDCCR Act makes provision for two kinds of compulsory care: secure care and supervised care.[10] Secure care requires the care recipient to stay in a secure facility. Supervised care may require the care recipient to stay in a facility or in another place.

[9] Before a compulsory care order can be made, the Court must be satisfied, on the evidence of one or more health assessors, that the person has an intellectual disability, that a "needs assessment" under the IDCCR Act has been carried out and that the person is to receive care under a care programme completed under that Act.

[10] The IDCCR Act provides the process by which a needs assessment is obtained and specifies that the purpose of that process as being to:

a) "assess the kind of care that the care recipient needs";

b) "identify 1 or more suitable services capable of providing care of that kind for the care recipient"; and

c) "prepare a care and rehabilitation plan for the care recipient".[11]

[11] A care and rehabilitation plan must identify the needs of the recipient. The Act sets out the kinds of needs this may entail (which is a broad list covering such things as their spiritual and dietary needs as well as their medical or psychological treatment needs).[12] The plan must also indicate the extent to which, and the manner is which, the needs identified can be met.[13] It must "deal with the kind of supervision the care recipient requires to avoid undue risk to the health and safety of the care recipient and of others".[14] It must set out a care programme that provides the objectives of the care proposed, the approach proposed to achieve those

[9] Section 5 of the IDCCR Act.
[10] Section 5 of the IDCCR Act. What each of these entails is described in more detail in *VM v RIDCA Central* HC Wellington CIV-2009-485-541, 8 December 2009 at [24].
[11] Section 16 of the IDCCR Act.
[12] Section 25(1) of the IDCCR Act.
[13] Section 25(3) of the IDCCR Act.
[14] Section 25(4) of the IDCCR Act.

objectives, the general nature of the care proposed, and the degree of security required for the care recipient and the protection of others.[15]

[12] A compulsory care order must specify its term.[16] That term cannot be longer than 3 years,[17] but there is provision for extension of the order.[18] It seems to be accepted[19] that if an extension is granted then that can be done indefinitely, that is with the effect that the compulsory care could extend for a total period well in excess of three years, provided the Court is satisfied that the extension should be made. In theory at least, that makes the extension power capable of having preventive detention effect.

[13] The extension power is as follows:

> **85 Extension of compulsory care order**
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> (1) The Family Court may, on the application of the co-ordinator, extend the term of a care recipient's compulsory care order.
>
> (2) If the Court extends a compulsory care order for a care recipient no longer subject to the criminal justice system,[20] the Court must consider and determine whether the care recipient must receive supervised care or secure care.
>
> (3) The Court may order that a care recipient no longer subject to the criminal justice system receive secure care only if it considers that supervised care would pose a serious danger to the health or safety of the care recipient or of others.

[14] It can be seen that s 85 provides no express guidance as to when the power is to be exercised. The Court "may" extend the order. If it decides to do so it must determine whether the care is to be secure care or supervised care. It is to be supervised care unless the Court considers that supervised care "would pose a serious danger to the health and safety of the care recipient or of others".

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[15] Section 26 of the IDCCR Act.
[16] Section 46(1) of the IDCCR Act.
[17] Section 46(2) of the IDCCR Act.
[18] Section s 46(3) and s 85 of the IDCCR Act.
[19] That is the view of counsel in this case and it is also the view expressed by Warren Brookbanks in his chapter "New Zealand's Intellectual Disability (Compulsory Care) Legislation" in Kate Dresfield and Ian Freckelton (eds) *Involuntary Detention and Therapeutic Jurisprudence: International Perspective on Civil Commitment* (Ashgate, Hampshire, 2003) at 533.
[20] Section 6(3) of the IDCCR Act defines when a person is no longer subject to the criminal justice system. For present purposes L became no longer subject to the criminal justice system when the order was made that, rather than be sentenced, she be subject to compulsory care.

[15] Direct guidance is provided elsewhere in the IDCCR Act in two places. First there is s 88 which provides that in deciding whether to extend an order the Court "must have regard to" the most recent certificate given under s 79 of the IDCCR Act. That is a certificate from a specialist assessor. In the case of a person who is no longer subject to the criminal justice system (as here) the certificate must state whether, in the assessor's opinion, the care recipient "still needs to be cared for as a care recipient" or "no longer needs to be cared for as a care recipient".[21] The Court "may" obtain a second opinion about this.[22]

[16] Secondly, direct guidance is provided by s 11 which is as follows:

> **11 Prinicples governing exercise of powers under this Act**
>
> Every court or person who exercises, or proposes to exercise, a power under this Act in respect of a care recipient must be guided by the principle that the care recipient should be treated so as to protect –
>
> (a) the health and safety of the care recipient and of others; and
>
> (b) the rights of the care recipient.

[17] Thus the power of extension must be "guided" by the principle set out in s 11. That principle is about how the care recipient is to be treated. That treatment is to be "so as to protect" the two things specified in sub paragraphs (a) and (b). One of those is the health and safety of the care recipient and of others. The other is the rights of the care recipient. The IDCCR Act elsewhere sets out specific rights of the care recipient,[23] but these do not address a care recipient's basic rights to liberty[24] and to be free from discrimination on the grounds of disability[25] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[26] It must have been intended that the extension power was to be guided by these rights as well as the specific rights provided in the IDCCR Act.

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[21] Section 82 of the IDCCR Act.
[22] Section 88(2)(b) of the IDCCR Act.
[23] Part 5 of the IDCCR Act.
[24] Expressed in s 18 as the right to freedom of movement and s 22 of the New Zealand Bill of Rights Act 1990 (NZBORA) as the right not to be arbitrarily arrested or detained (see also Articles 9 and 12 of the International Covenant on Civil and Political Rights).
[25] Section 19 of the NZBORA and s 21 of the Human Rights Act 1993 (see also Article 19 of the United Nations Convention on the Rights of Persons with Disabilities).
[26] Section 5 of the NZBORA.

[18] Other guidance might be found from the purpose of IDCCR Act as discerned from its title, its purpose provision and from the needs assessment and care and rehabilitation plan provisions. These are all in rather general terms: the title refers to "care and rehabilitation"; the purpose is to provide the Court with "appropriate" compulsory care and rehabilitation "options";[27] the needs assessment appears to assume that some kind of care (supervised or special care) is required; and the care and rehabilitation programmes can cover a wide range of things.

[19] It is apparent that Parliament intended the Court to evaluate what is appropriate in the particular circumstances while directing what the Court must have regard to and be guided by. The health and safety of the care recipient and of others may conflict with and need to be balanced against the care recipient's rights, particularly the care recipient's right to liberty. Given that conflict, the longer the period a person is compelled to be in care for, the greater the risk of harm to the person or to others there must be to justify the compulsion order. Further, if an intellectually disabled person is to be kept under compulsory care for a period longer than any form of detention (or restrictions upon liberty) imposed on a person without that disability but with the a comparable risk of harm to themselves or to others, there would need to be a very good reason to justify that.

[20] These issues are discussed in more detail in *VM v RIDCA Central (Regional Intellectual Disability Care Agency).*[28] There the High Court Judge considering an application for extension said this:

> [101] The main conclusion I have reached is that the issues which inform a s 85 consideration will be different from, or at least wider than, the initial consideration undertaken when the order was made. Extra factors come into play when considering extensions.
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> [102] The underlying consideration which should inform the extension decision is that a compulsory care order is a form of detention that requires on-going, and sometimes increasing, justification. It cannot be justified solely by reference to the needs of the care recipient or what is good for them.
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> [103] It must be justified by the risk the person presents, usually but not exclusively to others, and that risk must be of a nature and level to justify extending the length of the detention that has already occurred. Where the

[27] Section 3(a) of the IDCCR Act.
[28] CIV 2009-485-451 HC Wellington, 8 December 2009.

material indicates no likely further gains are to be achieved, a hard consideration is required to assess if the risk justifies more detention.

[104] To summarise the various points discussed in the judgment in relation to extension applications:

(a) risk to self or others is a necessary precondition to any extension. If the risk is primarily to self, it needs to be remembered there is no general capacity to control people for their own good;

(b) the maximum penalty for the offence which led to the care recipient coming under the Act is not a measuring stick for how long the detention should be. However, the general seriousness or otherwise of the offence is a relevant factor in considering whether further detention can be justified;

(c) the statutory test of "needed" involves considering a variety of factors including the initial offence, the length of detention to date, the assessments of likely further progress and the timeframes attached to any projected progress;

(d) the detention must be for as short a time as is necessary.

[21] To this I would note that a person subject to care may have committed other acts for which, but for the compulsory care order, they would otherwise have been charged and convicted (as is the case here). This supports the Judge's point that the seriousness of the offence that brought the person within the regime is just one factor relevant to the overall consideration of what is appropriate.

[22] The Judge's comments were made in the context of the Attorney-General in that case having submitted that the static risk of a person is sufficient on its own for continued renewals, regardless of the length of compulsory care (which is a form of detention) that might result. The Court of Appeal has granted leave to the Attorney-General to appeal the High Court's decision in *VM* on the question of whether the High Court Judge erred in his conclusion as to the relevant considerations under s 85. The appellant in this case supports the approach taken by the High Court in *VM* whereas the respondent in this appeal supports the position advanced by the Attorney-General in *VM*. The respondent gives the example of a seriously dangerous person, who does not have a mental illness but who does have an "intellectual disability", and who may be largely or wholly untreatable. In that scenario the respondent says risk alone can justify continued compulsory care.

[23] Like the Family Court below, I apply the approach taken in *VM*. I do so because I agree with the analysis (of which further detail is provided in the *VM* judgment); *VM* sets out relevant considerations only and does not say that a seriously dangerous person for whom prospects of rehabilitation are slight to non-existent could not be kept under compulsory care; *VM* has not at this point been overruled and it may not be; and L cannot on any view of it be considered a seriously dangerous person of the kind for which continued compulsory care could ever be appropriate regardless of the rehabilitation prospects for L while under that care.

The s 79 certificate

[24] When the application was made to the Family Court for the most recent extension, it was accompanied by the certificate under s 79 as required by s 88 of the Act. That certificate was dated 26 March 2010 and provided the special assessor's opinion that L still needed to be cared for as a care recipient.

[25] The accompanying review from the special assessor included the following information about the nature of the care L had:

> Little substantive progress appears to have been made since the last review was completed. [L]'s involvement with Clinical Psychologist Mark Lewis ceased shortly after the last review, due to his departure from the organisation. ... Little also appears to have been achieved with respect to planning for the expiration of the order, as recommended in the last two reviews. Overall, the focus of care seems to have been on containing [L]'s ongoing risk of aggression with relatively limited emphasis being given to rehabilitative elements or transition planning. There is evidence of on-going aggression by [L]. [L] is also still reliant on PRN medications to a significant degree.
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> The overall view formed by the writer is that [L]'s risks to others and to herself are being well managed within a containment approach but despite past reviews emphasising this there has been insufficient focus given to reducing the dynamic factors underpinning her recidivism risks or preparing her for transition after the expiration of the current order. This combination of events results in [L] continuing to present with risks which warrant consideration of a further extension of the order so that more can be done to reduce her underlining dynamic risk factors and prepare her for transition to a less secure setting.

[26] As to whether the care had reduced L's aggressive responses, the review said this:

... While the average number of incidents of physical aggression over the last six months is seven per month in the last three months this has declined from five (December 2009), to two (January 2010) and one (February 2010). Regrettably, [L] has assaulted a staff member in the week preceding the review. ... [L] was trialled with 1:1 staffing in September 2009 but returned to 2:1 staffing after high levels of aggressive behaviour were recorded – specifically, 11 incidents of physical aggression in September compared to an average of 7 per month for the period.

... In summary, the incident data for the review period indicates a decline in physical aggression by [L] in the last three months although this decline may be more attributable to staff ratios and external controls than to [L]'s application of anger management skills.

[27] As to the nature and kind of risk L posed, the review said this:

Overall [L] is considered to be at least moderate risk of reoffending in an aggressive and violent manner. ... The rehabilitation she has undertaken to reduce her risks of aggression has at this point been insufficient for [L] to gain consistent self-control. Future victims are likely to be support workers with whom [L] has ongoing contact in a supported living environment. Her risk to the general public is considered low and she has evidenced appropriate behaviour when in the community, although has been prevented from going on community outings due to unacceptable behaviour prior to these. [L]'s aggression appears to exclusively occur within the context of relationships with supportive others.

[28] As to progress to date the review said this:

[L]'s progress since the last review appears to have been only gradual. She has evidenced a decline aggressive acting out in the last three months although this seems to be more attributable to close staffing and early intervention by staff than to the development of self-control by [L]. ... If anything compared to the previous review period there may be more external control of [L]'s behaviours than at any previous point in the order. ... [L] has shown evidence of being able to respond to distress and triggering events for aggression without violence although this is also largely attributable to early intervention and guidance by staff. [L] appears to have forgotten what she learned with the psychologist and also continues to prefer PRN as a remedy for emotional upset over skills based coping in any event. Staff noted that [L] has been making a concerted effort not to aggress although she has not managed to successfully achieve an entire month since the last review without physical aggression. The overall level of incidents continues to be high.

[29] As to what progress could be made the review said this:

... [L] has, in the writer's view, not had sufficiently focused or intensive psychological and behavioural intervention to reduce her recidivism risks. There continues to be a containment approach to her management. [L] would benefit from more intensive intervention targeted at the issues which underpin her aggression. She has expressed a willingness to engage in an

> anger management group, and this would be of benefit to her. Future rehabilitation also needs to be better integrated into the residential setting within which [L] lives than has been the case to date.
>
> In the writer's view, unless a concerted effort is made to develop [L]'s self-control skills through group and individual based interventions which are integrated into her living environment there is no means of determining whether or not or at what point strong external control can be safely reduced. ... her skills are poor (in large part due to a lack of intensive intervention) and so strong external controls continue to be in place. The upshot is [L] remains at risk of violent behaviour and regrettably an extension to the already extended order appears warranted at this point.
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> ... The writer understands from discussions with the Care Coordinator that it may be possible within the existing RIDSAS resources to trial [L] in a less restrictive environment after she has successfully completed a period of sustained intervention targeted at her recidivism risks.

[30] The review concluded with recommending that L remain under the same level of care for a further 12 months. It made recommendations as to the type of interventions she should have, primarily that she resume work on broadening her range of mood and behaviour regulation skills with a clinical psychologist.

Family Court decision

[31] As well as having the above information, at the hearing in the Family Court the Judge heard from L, the care manager, the care co-ordinator, the specialist assessor, the district inspector and counsel. The main points that emerge from this are that L has a strong wish for the compulsory care to end, that she will struggle to cope in the community without care and that her caregivers consider that work can be done on her "dynamic risk" factors so as to improve L's ability to control her aggression.[29]

[32] The Judge's reasons for extending the care were as follows:

> [40] I was satisfied on this application that LL does present a degree of risk to the community that merits ongoing compulsory care for the reasons and in the context stated by the professionals in particular the specialist assessor Mr Trainor.

[29] Static risks were described as being those predictors or risk markers that are historical in nature and therefore cannot be changed by intervention. Dynamic risks were described as being risk factors that can be changed with intervention. In L's case her risk includes both factors and her treatment is directed at the dynamic factors.

[41] While I acknowledge that LL has been cooperative with the care and rehabilitation programme developed around her, I was also satisfied that the gradual progress which she has undoubtedly made is so far due almost entirely to that close supportive structure.

[42] I was also satisfied that, given the freedom of choice which she understandably wishes to achieve, the most likely probability is that LL would not stay within the supervised setting provided under her current plan. The evidence then satisfies me well beyond a mere balance of probability that LL would very soon put herself into situations where she would be at high risk of not being able to meet her own essential basic needs, would be vulnerable to victimisation by others, and would be at high risk of further offending because of the lack of adequate internal or external restraints on her aggressive tendencies.

[43] It is clear that although LL appears to be gaining some insight she has not yet achieved sufficient understanding of the causes and *"triggers"* of her aggressive behaviours or of the need and appropriateness of the supportive structures that are available to her. Lacking that understanding it is inevitable that she would reject any such supervision on a voluntary basis. I understood that while some progress had been made, the advances were fragile and would rapidly be lost if the existing supports were removed – or LL was allowed to reject them.

[44] Having regard to the factors considered relevant by the High Court on the *VM* appeal it is significant that LL's offending was relatively serious and that it arose in a context of voluntary supervised care. The charges were serious and they did not arise in isolation but occurred as a more extreme manifestation of possessive/aggressive behaviours that had previously been noted. Such behaviours are still exhibited by LL but are more effectively managed under the compulsory care regime. They can not yet be said to be effectively under control.

[45] There are positive prospects for rehabilitation of LL and, although it must be frustrating for her and disappointing to her advisors that progress has been so slow, some successes have been achieved. There is justifiable optimism that with a return to the one-on-one clinical psychological therapy and the promised gradual transition to a less restricted living environment that real progress can and will be made.

[46] The suggested further extension of the order was for a period of 12 months. On the basis of the care manager's evidence, I was initially inclined toward an extension of no more than 6 months as a balance between what LL wanted and what the evidence indicates she really needs. On further consideration of the evidence and information presented overall, I concluded that 6 months was not a realistic timeframe within which to expect a full transition to independence and autonomy to be achieved. It appeared inevitable that an extension of 6 months would simply mean putting LL through this stressful extension hearing process all over again by October this year.

[47] ...

[48] I have been guided by the principles and general duties set out in Part II of the Act and in particular the s 11 principles that LL should be

> treated so as to protect her own health and safety as well as the health and safety of others and her rights.
>
> [49] I have carried out the necessary balancing exercise mindful of the seriousness of the charges which brought LL under the Act and of the risks which are still present. I am satisfied that real progress towards rehabilitation is possible but it will take time. To attempt artificially to reduce that time as a gesture towards LL's right to individual liberty would be likely, in my view, to do more harm than good and would probably extend the eventual course of LL's compulsory care.

[33] The Judge ordered that compulsory care be extended for 12 months on the following basis:

a) "The order will continues to be for secure care within the setting provided under the current care and rehabilitation plan";

b) "The Care Co-ordinator and Care Manager are requested to review and update the Care and Rehabilitation plan to provide for an orderly transition to supervised care in a community setting within the next 6 months";

c) "The expectation of the Court will be that [L] be assisted to return to independent living in the community, free of a compulsory order, within the next 12 months".

Appeal grounds

Approach on appeal

[34] The IDCCR Act provides for a general appeal to the High Court.[30] Counsel are agreed that I am to come to my own view on the merits and I am justified in interfering with the Family Court decision only if I consider that it is wrong.[31] If I reach that view I can make any decision I think should have been made or I can give

[30] Section 133 of the IDCCR Act.
[31] *Austin Nichols & Co v Stichting Lodestar* [2007] NZSC 103; [2008] 2 NZLR 141.

directions to the Family Court to rehear the proceeding or to consider or determine any matter the High Court directs.[32]

First ground of appeal

[35] The first ground of appeal for L is not that the Judge applied the wrong test, but that, in applying the relevant factors from *VM*, the Judge was wrong to conclude that a further 12 month extension was justified. The respondent says that the Judge applied the relevant factors and reached a conclusion that was correct on the evidence.

[36] The Judge concluded that the degree of risk to the community warranted ongoing compulsory care on the basis of the specialist assessor's views.[33] Those views must be taken into account, but it must be remembered that those views are given by a health professional. It is for the Court to make the evaluation of what is appropriate guided not only by the health and safety of L and others (to which the specialist assessor's views will be relevant) but also by the rights of L.

[37] Here, the specialist assessor highlighted that for a good deal of the period L had not been given the kind of care that could have assisted her to make progress (containment had instead been the focus). At the time the compulsory care was first ordered the original recommendation was that she be made a care recipient "in order to address her issues with anger management and [to] establish a support package which will meet her needs while addressing her safety and that of others". This had not occurred despite the state having had two years to do so. This suggests that L's right to liberty might now be given greater weight than at the time the order was made and at the time of the first extension. As was said in *VM*, compulsory care is a form of detention that requires on-going, and sometimes increasing, justification. I consider that here it did require increasing justification when the state had the opportunity to take the steps it envisaged taking to protect the health and safety of L and others but did not use that opportunity.

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[32] Rule 20.19 of the High Court Rules.
[33] As is apparent from [42] of his judgment.

[38] One thing that might justify the extension is the prospects for progress in reducing L's risk. The Judge considered that there was "justifiable optimism" that "real progress" could be made. That seems to me to overstate the position. The assessor's opinion in the review was that L "would benefit from more intervention targeted at the issues which underpin her aggression". This issue was discussed at the hearing, but the evidence did not go much further. The care manager said he was "not pessimistic" and said that the missing factor here had been intervention targeted at the dynamic factors. Thus there was a view that there would be benefit, but just how much benefit, given the static risks that will remain, was not clear.

[39] As against the possibility of some benefit achieved from a further extension of the compulsory care the question of risk needed analysis. The review described L as aggressive and violent and provided information about the number of aggressive incidents, and that they had resulted in the containment approach, but the seriousness of those incidents was not discussed.

[40] Further, the identified risk was to L's caregivers rather than the wider public. At the hearing in the Family Court the specialist assessor's evidence was that L behaves herself well in public (she is social and enjoys getting about) and that the psychological input L was receiving was looking at how L might be able to translate her less risky behaviour in public into the care-giving setting. However, up until this point, the risk to the caregivers had led to L being kept in secure care rather than supervised care. It was therefore relevant to consider whether compulsory care should be continued at all, if it was going to need to be secure care so as to protect the caregivers.

[41] The review mentioned the offending that had resulted in the compulsory care order and described L's risk of re-offending in an aggressive and violent manner as "at least moderate". The Judge viewed L's offending as "relatively serious" and her risk of reoffending as "high". The review contained no analysis as to the kind of harm that the risk entailed and this was not discussed by the Judge either. This was relevant because if the risk was high, but the degree of harm to any person was slight, then continuation of compulsory care might not be justified.

[42] Here, the most serious past incident seems to have been the November 2007 incident. There is not a great deal of information about that other than what was in the summary of facts at the time. That summary did not refer to any injuries sustained by the caregiver but did say that she was traumatised by the incident. It is not known what degree of trauma was experienced but certainly it must have been an unpleasant and upsetting experience for the caregiver. There is, however, a danger of overstating the seriousness of the incident because L was charged with and pleaded guilty to the kidnapping charge. That charge carries a high maximum penalty 14 years, but there are a great variety of circumstances that fit a kidnapping charge and this was not at the more serious end of the range. As the respondent concedes, on sentencing for those charges, and but for L's intellectual disability, L's counsel might have persuaded a Judge to have passed a non-custodial sentence of community work and supervision.

[43] Further charges were laid following the November 2007 charges and the respondent has helpfully provided summary of facts for them. In February 2008, apparently while on bail for the November incident, L had an argument with her father. L called the police. The attending police told L not to call unless it was an emergency. This agitated L who began to punch the police officer with a closed fist. L was restrained and the officer did not receive any injuries.

[44] In March 2008 L had become enraged at her caregiver when the caregiver had asked her not to stare at her. She grabbed the caregiver's arm causing "a torn rotator cuff injury" to the shoulder of the caregiver. After a "short scuffle" the caregiver was able to leave. When being processed by the police on this matter, L "lashed out" at the officer striking her in the body with clenched fists and kicking her in the upper leg. The officer did not receive any injuries.

[45] The November 2007 incident was the most serious, followed by the March 2008 assault on the caregiver. These incidents came at a time when L's aggressive behaviour had been escalating. This has been attributed to L's mother leaving New Zealand to live in Australia. At the time L was originally assessed for compulsory care the assessor's view was that her aggressive behaviour would increase in severity. Since then, and now that L has been in compulsory care for over two years,

there is no suggestion in the evidence that L's risk of re-offending would involve offending of a more serious kind than that in the November 2007 to March 2008 period. In recent months the number of aggressive incidents in care has declined. It appears that the incidents while under compulsory care have involved L lashing out at her caregivers and also sometimes hitting herself. L's care co-ordinator advised through the respondent's counsel at the appeal hearing that none of the assaults involved injury requiring medical treatment.

[46] Thus, there was at least a moderate risk of further incidents involving L hitting out at caregivers but the risk of serious harm to them was probably low. This risk would continue under compulsory care but could be contained, particularly if the kind of care continued was secure care. As against this, if L was released from the compulsory care order there was a low risk of harm to members of the general public and a moderate risk of harm to those who might be involved in some way in caring for L but that harm was not likely to be of a serious kind.

[47] Although there is some mention of L hitting herself and at times as having thoughts of self-harm this risk does not seem to have been at a level which would have justified an extension. It was not the focus of the review and nor did it feature in the Judge's decision. The Judge did, however, consider that if released from the compulsory care order L was at high risk of not being able to meet her own essential and basic needs. He considered that not extending the order would be "a gesture" to L's liberty which would be likely "to do more harm than good" because she would likely end up back in compulsory care and having lost the progress that she has made to date.

[48] Compulsory care is, however, not to be extended merely because the Judge considers it would be better for her than if she is released from that care. The Judge was conscious of that, and that it was necessary to strike a balance between treating L so as to protect her health and safety and that of others and treating her so as to protect her rights. However, in finding that compulsory care would be better for L in the long run it is not apparent that the Judge has considered whether, if the state has had the opportunity to protect the health and safety of L and others over a period of time broadly proportional to the offending that had brought her within the regime

(including the other offending that occurred around the same time) but has not achieved much, then L may have earned the right to try living back in the community even if the Judge thought she would not be successful in that. L put the value of that right to her well when the Judge asked her about it at the Family Court hearing. The exchange was as follows:

> A. Nope, I don't want to stay any longer. I just want to move on and, you know, just get on with my life.
>
> Q. Yes.
>
> A. I mean, I've been there – you know I just want to get out, eh.
>
> Q. Sure.
>
> A. It's not fair on me. Why should I stay there and ... I mean that's my strong point, eh?
>
> Q. Sure.
>
> A. I need to get, I need to get out. The Judge can't say anything about, you know, where I can go and can't go.
>
> Q. Where would you go –
>
> A. It's, it's, it's my life. I don't care what the Judge says. I don't care if I get pulled up for anything, but I do.
>
> Q. Mhm.
>
> A. I pay, I've paid for my, what I've done, eh?
>
> Q. Yes.
>
> A. And I've learnt from it. I've come a long way.
>
> Q. Okay.
>
> A. And why should I, why should I, why should I stay there any longer. There's no, no point. I wanna move on.

[49] The respondent submits that there was no evidence to support anything other than that continued care. However, in my view, there does not need to be. The evidence from the assessor is just one input, albeit an important one, into the evaluation that must be made as to what is appropriate when all relevant considerations are assessed. Here, I consider that the Judge placed too much weight on the recommendation and insufficient weight on L's rights.

Second ground of appeal

[50] Counsel for L submits that the Judge was in error because he made no finding that L posed a serious danger to the health and safety of L or others. Such a danger is the basis on which the Court is to order secure, rather than supervised care. The respondent acknowledges this but submits that his reasons are apparent from the judgment as a whole.

[51] Because the Judge relied heavily on the specialist assessor's review I can infer that he decided upon secure care because that is what had been recommended. I can also infer from the review that the Judge accepted that until L has had further time with a psychologist she would continue to lash out at her caregivers and so interfere with their safety. But what is not at all clear is that this would involve "serious danger". It is not enough that if the care moved to supervised care, the health or safety of others is at risk. The legislation has used "danger" instead of "risk" and that danger must be serious. The assessor did not address this test and nor did the Judge. I consider that the Judge was in error in determining that secure care was appropriate without considering whether this test was met.

Third ground of appeal

[52] The third point counsel for L raises is that the Judge had no power to delegate the change from secure care to special care. It seems from the discussion at the Family Court hearing that the Judge knew this but, understandably, wanted to avoid the stress (etc) of a further application. The respondent says that the Judge's approach was to be commended. He could have said simply that the secure care was to be extended for 12 months. Instead he set out his expectations which could provide a pathway by which the order could eventually come to an end.

[53] As I understand it, this ground of appeal is really directed at whether the Judge ought to have ordered care for six months rather than 12 months. The Judge contemplated a six month extension but considered that this was realistically only likely to result in a further application for an extension in six months time. In

reaching that conclusion the Judge accepted the specialist assessor's assessment. The Judge seems to have accepted that there needed to be time before L could be moved to supervised care and that she needed supervised care before the care order could come to an end. The respondent says this was justified on the evidence before the Judge and because of the absence of evidence that a six month extension would have been sufficient.

[54] Having decided, in reliance on the assessor's recommendation, that an extension should be ordered, it did not necessarily follow that a 12 month extension was appropriate even if there was no evidence that any real progress could be made within a shorter period. It was necessary to balance what might be achieved in the recommended timeframe for continued care and the risks that L in the community presented against the period L had already been in compulsory care and the total time that she would be in compulsory care if the extension were granted. The Judge extended the compulsory care for 12 months without there being any certainty that the care would move to supervised care in six months time. Although the expectation was that L would move to supervised care in six months, it was also possible that L would remain in secure care for the entire 12 months if L continued to lash out at her caregivers at the same rate on the basis that would be better for the safety of the caregivers. Again I consider that the Judge gave insufficient weight to L's rights given that L had already been in secure care for two years and so there had been the opportunity to put in place transitional arrangements.

Updated s 79 certificate

[55] For the purposes of the appeal a further s 79 certificate and an accompanying review have been obtained. Counsel for both sides considered that it was appropriate that the Court have regard to this certificate and supporting information. I understand this to be because this Court can on appeal impose whatever order the Family Court could order, the Court must have regard to the most recent s 79 certificate in deciding whether to cancel or extend the term of a compulsory care order[34] and the Court should therefore have the most up to date information about L.

[34] Section 88(2) of the IDCCR Act.

The s 79 certificate, dated 11 September 2010, again provides the specialist assessor's opinion that L still needs to be cared for as a care recipient. The review continues to recommend secure care with trial reductions for reduced care and transitional planning.

[56] The review includes the following information about the care L has been receiving:

> While there were gaps in service provision pointed to by the author in the last review, ..., progress is now evident since the extension to the order was granted. [L] has been willingly engaged in individual treatment sessions with Clinical Psychologist Jared Watson and is also a participant in the 'Transformers' Emotion Regulation group also facilitated by Mr Watson and a colleague. ... While discussions have been active with respect to transitional arrangements the nature of any transition is dependent on further progress by [L] in managing her aggressive tendencies sufficient to enable a reduction in her current levels of supervision. The Care Manager has trialled a reduction to 1 to 1 supervision with [L] in relation to some of her activities and this appears to have worked well to this point. ...
>
> The overall view formed by the writer during this review is that [L]'s risks to others and to herself are still being well managed within a containment approach but there is now also an active focus on treatment efforts to reduce the dynamic factors underpinning her recidivism risks. In addition, transitional arrangements are being discussed and some trialling of reduced supervision has occurred. [L] is making progress.

[57] As to whether the care has reduced L's aggressive responses, the review said this:

> ... The overall trend in incidents is downward since April 2010 (when the last review was completed). This coincides with the improved focus on rehabilitation through [L]'s involvement in individual and group based interventions to improve mood management skills. Other positive trends of note include:
>
> - A reduction in the average number of incidents per month from 59 in the last review period to 24 in this review period;
> - A continuing decline in incidents of physical and verbal aggression. [L] last assaulted a staff member in April 2010;
> - Less frequent self-harming – no self-harming was reported for May or July at all;
> - A decline in the use of PRN medication (both prescribed and requested) especially in the last two months, suggesting [L] may be applying other coping strategies instead.

[58] As to progress to date the review said this:

> These positive trends indicate that [L] is benefiting from treatment and that she is capable of making changes to well entrenched patterns. When seen from the longer view these recent trends suggest a continued need for cautious optimism that [L] can make further progress. In support of the view that cautious optimism is warranted is the observation that [L] is still attracting incident reports and there is recorded evidence of physical aggression (although not assault) and some self-harming over the review period. [L] also eluded staff for about 50 minutes on shopping trip apparently because she did not want them to monitor how she spent her money on that outing, indicating her strong need for autonomy and willingness to breach supervision on occasion to achieve this.
>
> [L]'s changes in managing her aggression may also represent her efforts to portray a good impression to the Court rather than a genuine reduction in her propensity for aggression.
>
> ...
>
> Another piece of evidence which causes the writer to emphasise the need for caution about the significance of recent changes comes from the reports of staff and Mr Watson about [L]'s excitable and elevated behaviour over a period of several weeks when she was advised by her legal representative that an appeal had been lodged. [L] appeared to interpret this as meaning she would be coming off the order. Her consequent behaviour was clearly challenging for staff to manage and included aggression to property, hitting herself, and threats. [L] was also reported to have attempted to stop her Care Manager from leaving the facility, which was behaviour she had engaged in during her index offending. Recent efforts to cope and cooperate with treatment and with supervision may therefore be a less reliable gauge of [L]'s underlying attitudes to supervisory authority and support than that reflected in her extensive history of aggression and poor frustration tolerance in supportive environments. Time will tell.

[59] As to L's risk the review said this:

> Overall [L] is still considered to be at moderate risk of reoffending in an aggressive and violent manner. Her risk is likely to be elevated when she is emotionally unsettled, such as when experiencing stressful events, over stimulation, anxiety, anger, frustration, jealously possessiveness or resentment towards other. [L] also tends to misinterpret information and then react impulsively (as for exampled evidenced in her response to her lawyer's advice about the appeal). While she has shown an ability to learn and employ some behavioural coping strategies and has not assaulted anyone for some time she still evidences aggressive behaviour. [L]'s change efforts are also relatively recent when viewed from the more predictive history of aggression and poor emotion regulation which has characterised much of her life and behaviour while under the order. The maintenance of a structured, constructive and consistent supervisory environment is still an important element in managing [L]'s risk and reductions in supervision and being trailled cautiously.

The rehabilitation [L] has undertaken to reduce her risks of aggression appears to be assisting her to gain more self-control although she continues to evidence limited insights about the steps leading to aggression and her coping strategies tend to be employed late in the process after considerable internal build-up has occurred. It is not entirely clear that [L] can learn to recognise cues earlier in her process and therefore cease her general aggressiveness but this is being assessed in treatment. The writer is cautiously optimistic that [L] is progressing in efforts to reduce her well established risk. This caution is expressed in light of the recency of changes and the extrinsic motivations for [L] to behave herself within the context of the twice extended order.

In the writer's view [L] still poses a risk to support workers and other clients with whom she has ongoing contact in a supported living environment. Her risk to the general public is considered low and she continues to evidence generally appropriate behaviour when in the community, although has breached supervisory boundaries during this review period by eluding staff while on a community outing.

[60] The review summarises and recommends as follows:

Overall, the trends of the last six months suggest cautious optimism that [L] can make further change and improve her self-control. Further progress would enable more extensive reductions in her supervision regime to be considered and assist in assessing [L]'s ability to manage more independently in future.

...

It is respectfully recommended that:

8.1 [L] remains in need of care and rehabilitation and should continue to be a care recipient at the current level of secure care.

8.2 [L] continues to engage in individual and group based interventions to reduce her risks and improve her self-control skills.

8.3 Consideration is given to conducting an internal 'treatment/progress review' led by Mr Watson and Mr Tonks and/or Ms Pember and involving staff who have contact with [L]. The rationale for a review of this nature is to review progress to date, agree upon the formulation of [L]'s problem behaviours and advise staff how to best respond to these issues, and to gain greater clarity and consistency in terms of staff support for [L]'s progress.

8.4 Further careful efforts are made to trial reductions in the levels of staff supervision of [L] so that robust decisions about her ability to manage with greater independence are informed by data as her current order draws closer to expiration.

8.5 Transition planning for the end of the order in April 2011 continues to be discussed and progressed.

[61] The review attaches a letter written by L. In that letter L says that she has come a long way, looks forward to getting out so she can go into town and do some shopping and can go to night clubs and bars. She says thank you to the staff and expresses a wish to be a "civil client" when she "gets out". (A civil client is the term given to someone who continues on with care but on a voluntary basis rather than subject to court order.)

[62] Counsel for the parties to this appeal take different views as to whether this latest information supports the Family Court's decision to grant the extension of compulsory care. Because it refers to some progress having been made, to some extent it supports the Family Court's decision. On the other hand, the assessor has also expressed caution about the progress because she has "limited insights about the steps leading to her aggression", "her coping strategies tend to be employed late in the process", "[i]t is not entirely clear that [L] can learn to recognise cues earlier in the progress" and L is still at "moderate risk of reoffending in an aggressive manner". She is still in secure care and the recommendation is for that to continue. Further, like the earlier review, it is still for the Court to evaluate the progress that has been made and is envisaged in the context of the risks to health and safety that cessation of the order would entail and the rights of L.

Overall assessment

[63] A person with L's intellectual disability may always need a degree of care. While in that care and receiving the regular assistance of a psychologist some progress might be achievable. But that alone cannot justify an extension of the care. The question must be whether continued coercion (in the form of an extended compulsory care order) is justified in the light of: the progress that is realistically achievable and over what time frame; the time that has already passed under compulsory care; and the kind of risk to health and safety that has brought the care recipient into this regime and that the care recipient is considered to continue to pose.

[64] While it can be said that if an extension is not granted the safety of others is to some extent not fully protected, the threat to safety is realistically a threat of low

level harm and mainly directed at caregivers who are possibly more likely to be alert to these risks. That risk will exist, to some degree, possibly for so long as L is physically able to be aggressive. With a 12 month extension, L would be in compulsory care (most of that secure care) for three years because of the charges arising from the November 2007 incident, the assault on a caregiver and on two officers at around the same time, and her continued assaults on caregivers. For much of the time that L has been in compulsory care little progress was made and the focus was on containment (with consequent restrictions on her liberty). Some progress has since been made because L is now in the care of a psychologist. But even now the optimism is cautious and the historical risk factors continue.

[65] In these circumstances I cannot see how the small gains from continued compulsory care can warrant the continued restriction on L's liberty. L's liberty has been curtailed to a considerable degree (in secure care) for, now, nearly two and a half years which is a period that exceeds the likely period of any sentence under the criminal justice system at least for the offending that was charged. L was brought under this regime on the recommendation that her anger management was addressed and a support package provided. The state is now only fully providing the intervention that it envisaged when the care order was first made and it remains unclear whether it will be sufficiently successful for a change to supervised care let alone for a successful transition back into the community. The increasing justification necessary to extend the compulsory care is not present.

[66] That is not to say that L is better off in the community than in secure or supervised care. The evidence before the Family Court was that she will not manage very well on her own in the community – apart from her difficulties with managing aggression, she will have difficulty managing money and will be vulnerable to people taking advantage of her. But in my view the Act was not intended to permit compulsory care for this sort of extended term, for this sort of risk and for these small possible gains. The point has been reached where, as per *VM*, persuasion rather coercion should be utilised in providing care to L.

Result

[67] The appeal is allowed. The compulsory care order made on 11 June 2010 (but with effect from 7 April 2010) is quashed with effect in six weeks from the date of this judgment. The six week period is to provide L and her caregivers the opportunity for transitional planning. If suitable arrangements are made in a shorter timeframe then the parties can advise me whether this judgment can take effect earlier than the six weeks I have allowed. Hopefully L will follow through with her stated intention to have care as a civil client. All of the material before me, including the letter from her mother, indicates that L will remain in need of help. That help is available as a civil client and could only be for her benefit. But it is for L to decide, with the guidance of others including her mother.

Mallon J

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