



Précis Paper

Habeas Corpus in Australian Law Today

Habeas Corpus is still alive after 700 years.

The Hon. Greg James AM QC and barrister Jill Gatland discuss *White v Local Health Authority* [2015] NSWSC 417, where habeas corpus was used to protect the liberty of the individual.

Discussion Includes

- The importance of personal liberty
- The writ of habeas corpus
- The legislative regimes in NSW for restricting personal liberty on the basis of mental illness
- The factual basis of the decision in *White v Local Health Authority* [2015] NSWSC 417

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Habeas Corpus in Australian Law Today

1. In this edition of BenchTV, Jill Gatland (Barrister) and the Hon. Greg James AM QC (Barrister) discuss guardianship orders and habeas corpus with reference to the Supreme Court of NSW's (Slattery J) decision in *White v Local Health Authority* [2015] NSWSC 417, where Ms Gatland acted as counsel for the plaintiff. Mr James QC contributed to drafting the *Mental Health (Forensic Provisions) Act 1990* (NSW).

The Writ of Habeas Corpus

2. Habeas corpus is defined as the right to personal liberty and bodily integrity and requires that any detention must be done in accordance with the law and due process. The writ of habeas corpus invokes the court to determine whether the deprivation of liberty is justified.

Legislative Frameworks that Enable Restriction of Personal Liberty

3. The *Guardianship Act 1987* (NSW) grants power to an appointed guardian of a disabled person to control the property of and determine the accommodation for that person.
4. Under the *Mental Health Act 2007* (NSW) a guardian of a mentally disabled person has the power to require that person, despite objection on reasonable grounds, to becoming a patient at a psychiatric hospital as though they were a voluntary patient. Under s 8 of this Act, voluntary patients are able to discharge themselves from the facility, requiring only that the facility give notice to the guardian.
5. Mr James QC notes that a person may be detained by police for a period of at least 3 days if suffering from a mental health condition, or longer in a locked psychiatric ward if a hospital certifies that the person requires attention by reason of mental illness because of the risk to themselves or others.
6. Notably, the *Mental Health Act* is concerned with the treatment of mentally ill patients rather than their detention. Ms Gatland indicates that the presence of community treatment orders within the Act suggests that detention of an involuntary patient can only occur in extreme cases and only where the patient actually requires treatment.
7. The Mental Health Review Tribunal is responsible for reviewing the merits and legal basis for the detention of persons under the *Mental Health Act 2007* (NSW), *Mental Health (Forensic Provisions) Act 1990* (NSW) and *Guardianship Act 1987* (NSW). Where a person is detained after being charged with criminal offences, and is found to be unfit to plead or not

responsible in law by reason of mental illness, the tribunal or courts will review the decision a week after detention.

8. Importantly, s 12 of the *Mental Health Act 2007* (NSW) contains a specific prohibition against detention of persons unless they are suffering from a mental illness that requires treatment.

SECTION 12:

General restrictions on detention of persons

- (1) *A patient or other person must not be involuntarily admitted to, or detained in or continue to be detained in, a mental health facility unless an authorised medical officer is of the opinion that:*
 - (a) *the person is a mentally ill person or a mentally disordered person, and*
 - (b) *no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the person.*
 - (2) *If an authorised medical officer is not of that opinion about a patient or other person at a mental health facility, the officer must refuse to detain, and must not continue to detain, the person.*
 - (3) *An authorised medical officer may, immediately on discharging a patient or person who has been detained in a mental health facility, admit that person as a voluntary patient.*
9. *Beckett v NSW* (2013) 248 CLR 432 states that those persons asserting the right to detain must first establish they have that right.

White v Local Health Authority [2015] NSWSC 417

10. In this case, Ms White had extensive cognitive and physical disabilities. She was admitted to a mental health facility under a guardianship and financial management order. After being detained in a locked ward for 12 months, she was subject to review by the Mental Health Tribunal. Medical evidence reported that Ms White was being held against her will and that she did not have a mental illness that required treatment. The Mental Health Tribunal made orders for Ms White to be released.
11. Under s 37 of the *Mental Health Act 2007* (NSW), reviews of involuntary patients by the Tribunal occur within the initial fortnight of detention, and thereafter in 3 and 6 monthly intervals. However, where a patient is admitted by their guardian, albeit against their will, they are deemed voluntary patients and a review is only conducted after 12 months.

12. As Ms White was entered as a voluntary patient by virtue of the guardianship order, she was unable to obtain any tribunal review prior to 12 months of detention. Thus, it is apparent that patients that are considered involuntary are afforded greater protections.

Guardianship Order Must Be Capable of Lawful Implementation

13. The direction by the guardian must be capable of being lawfully implemented in order to compel the establishment to take in the patient. The *Mental Health Act 2007* (NSW) only authorises detention where the person requires medical treatment for a mental illness.
14. The superintendent of the mental health facility reported before the tribunal that Ms White was being detained against her will, that she was not mentally ill, and did not require continual detention in the facility. Despite the finding of the Tribunal to discharge Ms White, the facility continued to detain her in direct contravention of the Tribunal's orders. As Ms White was no longer a voluntary patient pursuant to the *Mental Health Act 2007* (NSW), her detention was illegal because it was not justified by the Act. The court upheld Ms White's application for a habeas corpus order seeking her release.
15. Whilst Ms White's guardian and the Local Health Authority had grave concerns about Ms White's ability to capably function in society, she was not mentally ill and there was no statutory authorisation to legally keep Ms White detained.
16. Mr James QC notes that it is society's obligation to ensure that there are facilities available for those with intellectual and cognitive impairments who cannot exercise appropriate lifestyle choices to protect themselves.
17. In *Secretary of the Department of Health & Community Services v JWB & SMB* (1992) 175 CLR 218 ('*Marion's case*'), the parents of an intellectually disabled girl sought a hysterectomy as a measure to prevent their daughter experiencing hormonal changes. The High Court of Australia held that non-therapeutic surgery in the absence of proper lawful authority amounted to an unlawful assault. Similarly, the Supreme Court of Canada in *E v Eve* [1986] 2 S.C.R 388 rejected the guardian's request to perform a sterilisation procedure on a disabled woman.
18. Mr James QC concludes by noting that this is an area of law greatly impacted by ethical values, legal values, and resource driven decisions.

BIOGRAPHY

Jill Gatland

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Jill's areas of practice include administrative, alternative dispute resolution, commercial, crime, employment, equity, local government/environmental and taxation. Prior to joining the Bar, Jill was a Principal Litigator with the Australian Taxation Office for over 14 years. She has been involved on a pro-bono basis with major criminal appeals including the successful appeal against the conviction of Jeff Gilham in 2012.

Hon. Gregory ("Greg") James AM QC

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Former Judge of the Supreme Court of New South Wales
Former President of the Mental Health Review Tribunal of New South Wales

BIBLIOGRAPHY

Focus Case

White v Local Health Authority [2015] NSWSC 417

Benchmark Link

http://benchmarkinc.com.au/newslettercms/webversion/benchmark_17-04-2015_insurance_banking_construction_government.html

Judgement Link

<http://www.austlii.edu.au/au/cases/nsw/NSWSC/2015/417.html>

Cases

Beckett v NSW (2013) 248 CLR 432

E v Eve [1986] 2 S.C.R 388

Secretary of the Department of Health & Community Services v JWB & SMB (1992) 175 CLR 218
(*Marion's case*)

Legislation

Guardianship Act 1987 (NSW)

Mental Health Act 2007 (NSW)

Mental Health (Forensic Provisions) Act 1990 (NSW)

Police Administration Act (NT)