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TRANSCRIPT OF PROCEEDINGS

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S CI 2016 01521

SUPREME COURT OF VICTORIA

CIVIL JURISDICTION

MELBOURNE

THURSDAY 28 APRIL 2016

BEFORE THE HONOURABLE JUSTICE KEOGH

GARTH JASON DANIELS v. EASTERN HEALTH BODY CORPORATE & ANOR

MR B DANIELS & MR G FLOYD appeared on behalf of Amicus Curiae for the Plaintiff.

MR PB HALLEY appeared on behalf of the First Defendant.

MS FM ELLIS appeared on behalf of the Second Defendant.

1 HIS HONOUR: Is it Mr Daniels Snr?

2 MR B DANIELS: It is, indeed, Your Honour.

3 HIS HONOUR: Bernard Daniels.

4 MR B DANIELS: That's correct, Your Honour.

5 HIS HONOUR: Is it Mr Floyd sitting next to you?

6 MR FLOYD: Glen Floyd, family advocate and friend of family, thank  
7 you, Your Honour.

8 HIS HONOUR: I see in the affidavit, sworn by your son, Mr Daniels,  
9 that he requests that you and Mr Floyd have the opportunity  
10 to speak on his behalf today.

11 MR B DANIELS: Could I, if I may, Your Honour, add a rider to that.  
12 In fact it was his express wish to in fact be here this morning.

13 HIS HONOUR: Yes, I understand that and I understand that that's  
14 currently not possible.

15 MR B DANIELS: Yes. That is not possible but there seems to be very  
16 strange and extenuating circumstances which gives rise to the  
17 particular reason why he could not be here this morning.

18 HIS HONOUR: Without necessarily going into those strange and  
19 extenuating circumstances, other than to - - -

20 MR B DANIELS: Yes.

21 HIS HONOUR: - - - ask permission to speak on behalf of your son,  
22 do you seek anything further at this stage? In other words,  
23 do you want the matter stood down until your son is able to  
24 be here?

25 MR B DANIELS: Your Honour, he has dearly requested, because I have  
26 spoken to him - - -

27 HIS HONOUR: Sorry, I missed that, Mr Daniels.

28 MR B DANIELS: I've actually spoken to him this morning and he's  
29 expressly asked that we put simply of Your Honour to put  
30 forward the very thing that he would like to have addressed  
31 Your Honour upon.

1 HIS HONOUR: And that is the subject of the originating motion and  
2 the summons.

3 MR B DANIELS: That's correct, and he'd ask, with Your Honour's  
4 permission, he would seek leave that both I, as his nominated  
5 person under the Mental Health Act, to try and progress his  
6 interests under the Act in view of the fact that he has been  
7 prevented from being here this morning and it's on that basis,  
8 Your Honour, that I seek Your Honour's permission, or leave,  
9 to address the court on his behalf with exactly the material  
10 he would have been happy to provide Your Honour with this  
11 morning.

12 HIS HONOUR: And your son is content to proceed in that fashion?

13 MR B DANIELS: Indeed he is.

14 HIS HONOUR: You have that leave.

15 MR B DANIELS: Thank you, Your Honour.

16 HIS HONOUR: Now, we'll get the appearances of the other parties,  
17 if that's okay, Mr Daniels.

18 MR B DANIELS: Certainly, Your Honour.

19 MR HALLEY: If the court pleases, I appear on behalf of Eastern  
20 Health.

21 HIS HONOUR: Yes, thanks, Mr Halley.

22 MS ELLIS: If the court pleases, sir, I appear on behalf of Monash  
23 Health.

24 HIS HONOUR: Thanks, Ms Ellis. So at this stage the materials that  
25 I have are the originating motion dated 20 April 2016; the  
26 summons on that originating motion dated 26 April 2016; the  
27 substantive affidavit of the plaintiff dated 25 April 2016  
28 and the briefer affidavit of the plaintiff dated 26 April  
29 2016.

30 Now, I haven't received any material from the  
31 defendants but I understood there was some material that I

1           might be seeing.

2 MR HALLEY: Yes, Your Honour, there's two affidavits on behalf of  
3 the first defendant that had been unsworn this date. There's  
4 an affidavit of Associate Professor Paul Katz, with exhibits,  
5 and an affidavit of Dr Reza Roohi. If the court pleases, if  
6 I could hand those up to you.

7 HIS HONOUR: Yes, thank you, Mr Halley.

8 MR HALLEY: Copies has been provided to my friends.

9 HIS HONOUR: Ms Ellis, did you have any additional materials or were  
10 you intending to rely upon the materials provided by Mr Halley  
11 or is your position somewhat different?

12 MS ELLIS: At this stage we intend to rely upon the materials  
13 provided by Mr Halley, in particular the affidavit of  
14 Associate Professor Katz and the attachments to that  
15 affidavit.

16 HIS HONOUR: Thanks, Ms Ellis. Mr Halley, can I just ask briefly  
17 what, without having read them because there does appear to  
18 be some volume here, what these affidavits go to.

19 MR HALLEY: Your Honour, the affidavits go to one point in  
20 particular and that's this, that on 6 April 2016, Garth  
21 Daniels ceased to be a patient of Eastern Health. He's now  
22 a patient at Monash SECU, which is run by Monash Health and  
23 so we don't see ourselves as a proper defendant to these  
24 proceedings as we no longer have the care, management of Garth  
25 Daniels.

26 HIS HONOUR: So who does?

27 MR HALLEY: Monash Health, the SECU, secure extended care unit at  
28 Monash Health.

29 HIS HONOUR: So Monash Health is named the second defendant?

30 MR HALLEY: Yes, that's right.

31 HIS HONOUR: So all your affidavits go to is the fact that you're  
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1 not a proper defendant.

2 MR HALLEY: Paul Katz' affidavit goes to the history of the  
3 admission in Eastern Health, as a matter of background, for  
4 Your Honour, but if you turn to I think, Your Honour, if you  
5 go to the affidavit which itself is fairly brief, paragraphs  
6 26 and 27 and 28 of the affidavit of Professor Paul Katz, which  
7 is outside the possession of Eastern Health. So on 6 April  
8 2016, the patient was transferred to Monash SECU, a facility  
9 operated by Monash Health. The first defendant he felt no  
10 longer retains any control over the patient's treatment or  
11 management. All current decisions related to the  
12 plaintiff's treatment and management are made by Monash  
13 Health, this includes any decision related to the application  
14 for or provision of ECT treatment and then it goes on to say  
15 there are no current plans for the plaintiff to return to an  
16 Eastern Health facility.

17 HIS HONOUR: So would you see your role as being very limited today,  
18 Mr Halley.

19 MR HALLEY: We say we shouldn't be here, Your Honour.

20 HIS HONOUR: That's very limited.

21 MR B DANIELS: On the point of order, Your Honour?

22 HIS HONOUR: Well, perhaps if I can ask you a question first,  
23 Mr Daniels. On the application that you've made in the  
24 originating motion, it seems to be that you seek as relief  
25 an injunction to prevent further ECT treatment.

26 MR B DANIELS: That is correct.

27 HIS HONOUR: On the basis of the request from the UN  
28 Committee - - -

29 MR B DANIELS: That is correct.

30 HIS HONOUR: - - - that that request must be complied with because  
31 the Convention on the Rights of Persons with Disabilities is

1 incorporated into Australia law and in particular in such a  
2 manner as to mandate compliance with the committee request.

3 MR B DANIELS: That is correct, Your Honour.

4 HIS HONOUR: So that's a fairly narrow point.

5 MR B DANIELS: Indeed. However, if I may, Your Honour, on the  
6 particular point to order, which is crucial to any decision  
7 Your Honour may make, at 7.55 this morning, I received this  
8 letter from Dr Anthony Cidoni, who is in fact the unit head  
9 at the Monash Dandenong mental health centre and if I may read  
10 this to the court, Your Honour, it specifically states that,  
11 "My apologies for the email of 22 April. It has not appeared  
12 to have gone through. I am re-sending it now and will email  
13 another up-date tomorrow. I acknowledge receipt of your  
14 correspondence of this week. For clarification", and these  
15 are one of the questions I raised with Dr Cidoni, "For  
16 clarification, Monash SECU", which is an acronym for Secure  
17 Extended Care Unit, "is a regional service and we hold a number  
18 of beds allocated to Eastern Health patients, one of which  
19 is currently occupied by Garth. Monash Health manages the  
20 care in consultation and liaison with the home service who  
21 provides follow-up on discharge". Now, it goes into further  
22 detail but I think what this essentially does, Your Honour,  
23 it negates the motion put forward by Mr Paul Halley that  
24 Eastern Health is not a party to this proceeding and in view  
25 of the fact and according to this letter, is that the directive  
26 for treatment of Garth actually emanates from Eastern Health.

27 Now, this is the second letter that I've actually  
28 received. This is the first one from Dr Cidoni confirming  
29 that Eastern Health is actually responsible - - -

30 HIS HONOUR: Sorry to interrupt but I think the fundamental issue  
31 is whether or not, if I grant an injunction to prevent the

1 continuation of the ECT treatment, that's right?

2 MR B DANIELS: Yes. The reason - - -

3 HIS HONOUR: So what you wish to do is to ensure that if any  
4 injunction is granted by me, that it's effective - - -

5 MR B DANIELS: That is correct.

6 HIS HONOUR: - - - in other words that the party injuncted is the  
7 party who would be making decisions in respect of and be  
8 responsible for the ECT treatment.

9 MR B DANIELS: Yes, and - - -

10 HIS HONOUR: So I wonder if that issue might be resolved by hearing  
11 briefly from Ms Ellis to see whether Ms Ellis takes the same  
12 approach as Mr Halley to confirm that her client is in fact  
13 the client responsible for the ECT treatment.

14 MR B DANIELS: If I may, Your Honour. The difficulty that we have  
15 is because of this dichotomy of two different mental health  
16 services taking joint responsibility for Garth, the fact is,  
17 assuming Your Honour does grant us the relief and injunction  
18 sought by Garth, that injunction may apply, for example, to  
19 Monash Health in which case it seems very likely that while  
20 the injunction is applied to Monash Health, he may very well  
21 be treated by Eastern Health. So until the matter is resolved  
22 as to who is actually responsible for my son's treatment, the  
23 only other proposal we could put to Your Honour is that that  
24 injunction applies to both institutions and I suppose we could  
25 go into further detail but it does concern me - - -

26 HIS HONOUR: You want security to ensure - you want security for  
27 your son to ensure that if an injunction is granted, it's  
28 effective.

29 MR B DANIELS: Absolutely, Your Honour.

30 HIS HONOUR: I think we can probably deal with that aspect, if we  
31 come to it, but we might hear briefly from Ms Ellis about the

1 position of her client in that regard and then we can come  
2 back to the fundamental issue which is as we spoke about a  
3 moment ago.

4 MR B DANIELS: I firstly appreciate that, Your Honour. What I'd  
5 like to put a rider to that too is because one of the  
6 difficulties I have had in dealing with both institutions is  
7 that, and it's essentially I think it would explain my concern  
8 for Garth - - -

9 HIS HONOUR: No, no. You've told me you've got a concern. I accept  
10 that you've got a concern. I don't think we need to go into  
11 details of the concern. If we get to the point where I  
12 consider an injunction should be granted, then what you want  
13 is to ensure that the injunction is effective.

14 MR B DANIELS: Indeed, Your Honour.

15 HIS HONOUR: Clearly, if I'm minded to grant the injunction, I'd  
16 be concerned to ensure that it was effective.

17 MR B DANIELS: Indeed.

18 HIS HONOUR: And I can't imagine that the other end of the Bar table  
19 would take a different view, that if it's determined that an  
20 injunction be granted, I would anticipate that everyone would  
21 be concerned to ensure that it was effective.

22 MR B DANIELS: Thank you, Your Honour.

23 HIS HONOUR: So I think we can deal with that concern if we come  
24 to it, Mr Daniels.

25 MR B DANIELS: Thank you.

26 HIS HONOUR: Just briefly, Ms Ellis.

27 MS ELLIS: Thank you, sir. I'm not sure if Your Honour - - -

28 HIS HONOUR: I heard you indicate that you rely upon the affidavits  
29 filed by Mr Halley, for the first defendant.

30 MS ELLIS: Yes.

31 HIS HONOUR: Does that mean that you take the same approach as is



1 detailed in those affidavits, that your client is responsible  
2 for decisions and implementation of decisions in relation to  
3 ECT treatment for the plaintiff.

4 MS ELLIS: Yes, sir.

5 HIS HONOUR: Mr Daniels, we come back, then, to the argument that  
6 you wish to advance and that is that because the CRPD had been  
7 incorporated into Australian law and in particular because  
8 of the manner in which it's been incorporated into Australian  
9 law, compliance with the request of the committee is mandated.

10 MR B DANIELS: Indeed.

11 HIS HONOUR: Is that the position you wish to advance?

12 MR B DANIELS: I certainly would like to do that and with Your  
13 Honour's permission, advance request to - I would appreciate  
14 it if Your Honour would allow it, if Mr Glen Floyd could  
15 actually address the issue of the United Nations' submission.

16 HIS HONOUR: Yes, thank you, Mr Daniels. I'll allow Mr Floyd to  
17 do that. Mr Floyd, can you tell me how it is you say that  
18 the CRPD has been incorporated into Australian law, that's  
19 the first point, and the second point, how it's been  
20 incorporated into Australian law in a way which mandates that  
21 the request of the committee be complied with.

22 MR FLOYD: Yes, I can, Your Honour. It boils down to probably six  
23 points of the articles of the CRPD that Australia fully  
24 ratified, I think on 3 May 2008, I'm not sure of the date,  
25 but it is fully ratified and so, Your Honour, is the optional  
26 protocol to the Convention of the Rights of Persons with  
27 Disabilities which allows, and Australia invites the  
28 committee for the rights of persons with disabilities, to  
29 intervene in any case that they feel has been put to them and  
30 it warrants their request to conduct an investigation.

31 HIS HONOUR: So, Mr Floyd, just to be clear, the CRPD was ratified,

1 as I understand it, by Australia on 17 July 2008.

2 MR FLOYD: Correct.

3 HIS HONOUR: But it hasn't yet been incorporated into Australian  
4 domestic law.

5 MR FLOYD: We understand and we like to rely on statements made by  
6 the Attorney-General on I think 3 September 2013 whereby  
7 Australia was specifically questioned in the United Nations  
8 as to whether or not any declarative statements they wish to  
9 make were de facto, moving back from the CRPD, and I'd like  
10 to quote the Attorney-General's representative in the United  
11 Nations, Your Honour, stating categorically Australia will  
12 abide utterly the CRPD articles in whole, no reservations.  
13 May I do that?

14 HIS HONOUR: There's a difference between such an utterance, isn't  
15 there, and legislation being enacted, be it either at a state  
16 level or at a Commonwealth level, which incorporates the CRPD  
17 into Australian law.

18 MR FLOYD: Yes, Your Honour. We merely take the position that as  
19 citizens being protected by the CRPD, and Australia having  
20 ratified that CRPD, and the Attorney-General declaring this  
21 is now Australian federal law, and giving categorical  
22 agreement that it will implement every article unchallenged,  
23 that's a statement made by the government, we take that to  
24 mean that represents Australian law and I don't know what  
25 complex transactions take place between statutes being  
26 amended in the Parliament when these things take place but  
27 we take that undertaking by the Australian government, the  
28 Attorney-General, declaring that these statutes absolutely  
29 operate from the point of his declaration.

30 HIS HONOUR: The statute or do you mean convention?

31 MR FLOYD: The CRPD articles. The CRPD articles. It's declared

1           they apply to Australia unreservedly.  It's a short  
2           two-liner, if I may read?

3  HIS HONOUR:  Certainly, Mr Floyd.

4  MR FLOYD:  Thank you.

5  HIS HONOUR:  What was the date of that again?

6  MR FLOYD:  I'll just give you the date.  I have it here, sir - Your  
7           Honour, "In response to the UN CRPD committee, member Theresa  
8           Degener's direct question to Australia whether the  
9           interpretive declarations were meant only as declarations or  
10          as de facto reservations, Australia's Attorney-General's  
11          Department very proudly and very directly responded on 3  
12          September 2013 with the following verbatim deepest legal  
13          commitment, 'Australia is a party to the convention.  All of  
14          the articles are binding on Australia and Australia sees  
15          itself as obliged to implement all of the articles to the  
16          convention'".

17                 We take that, Your Honour, to be Australia's  
18          declaration that they do apply and notwithstanding you might  
19          have ten years of convoluted alterations to various  
20          Australian statutes to fall in line with that, justice can't  
21          wait for such an administrative process.  We take this  
22          declaration to be a declaration by Australia's government  
23          that they do apply.

24                 Notwithstanding that, we then look to - if that's the  
25          case, and we state that is the case, that's our position, if  
26          that is the case, we then say that with the conflict of laws  
27          conventions in Australia, if there is any conflict between  
28          state statutes and federal statutes, the constitution clearly  
29          states that federal statutes apply and overrule and nullify  
30          state statutes.

31  HIS HONOUR:  I see that point made in the plaintiff's affidavit.

1 Is there a particular federal statute to which you refer,  
2 Mr Floyd?

3 MR FLOYD: Any and all, Your Honour. We don't - we haven't relied  
4 upon statutes that may or may not give effect to this. We're  
5 merely stating the fact that the Australian government has  
6 declared - the Attorney-General has declared that these human  
7 rights articles of the United Nations do apply forthwith  
8 unhindered, therefore we're requesting that or Garth is  
9 requesting that his rights be upheld under that convention  
10 that Australia has ratified.

11 HIS HONOUR: So the conflict, you say, is the conflict which exists  
12 between that statement from the Attorney-General's  
13 Department and - - -

14 MR FLOYD: Victorian law.

15 HIS HONOUR: - - - any Victorian law - - -

16 MR FLOYD: Correct, Your Honour.

17 HIS HONOUR: - - - rather than a conflict between any statutory  
18 enactment at a Commonwealth level and any Victorian  
19 enactment.

20 MR FLOYD: Correct, Your Honour. Correct, Your Honour.

21 HIS HONOUR: And you say that despite the fact that it's not a  
22 Commonwealth statute you rely upon but a statement from the  
23 Attorney-General's Department, that the same principle still  
24 applies.

25 MR FLOYD: Statement and legal declaration, binding declaration,  
26 we say, Your Honour, thank you, yes.

27 HIS HONOUR: Thanks, Mr Floyd.

28 MR FLOYD: You did ask me a more general question about the United  
29 Nation's involvement. Garth was requesting to actually read  
30 how his plaintiff cry for the cessation be stopped, he  
31 personally wanted to ask six points that actually speak to

1           these articles that protect him and he was - he has now asked  
2           me to read it out as the first person as though it were Garth  
3           standing here, giving his plea to the court for assistance.

4   HIS HONOUR:   So this is a submission made on behalf of Garth?

5   MR FLOYD:   It is in the affidavit, the larger affidavit, Your  
6           Honour, yes.

7   HIS HONOUR:   I've read the affidavit.

8   MR FLOYD:   Yes.   The points - - -

9   HIS HONOUR:   There's no need to read from it to me, but is there  
10           a point you wish to make about - I understand what Mr Daniels  
11           says in the affidavit, that he has - - -

12   MR FLOYD:   It's his request - - -

13   HIS HONOUR:   - - - capacity, that he does not consent to the  
14           treatment.

15   MR FLOYD:   Well, that's correct, yes, and that it's a violation of  
16           his rights that it be enacted upon him or any disabled person  
17           and he is a disabled person.

18   HIS HONOUR:   Yes.

19   MR FLOYD:   However, he's actually requested that he have this  
20           statement read to the court as though it - on his behalf by  
21           me as him reading which is the way he intended to do it, but  
22           not for being allowed to come here by the facility.

23   HIS HONOUR:   How long is the statement?

24   MR FLOYD:   Maximum three to five minutes.

25   HIS HONOUR:   Okay.   I'll allow that.

26   MR FLOYD:   Thank you.   It goes to the core of the articles of the  
27           UN convention, of the persons with disabilities and it's Garth  
28           examining these articles and merely stating the UN has  
29           declared that his rights are protected in this way as a  
30           disabled person, so has the Attorney-General declared they  
31           are protected in this way.   So I'll just read, Garth is

1 saying, "I, Garth Jason Daniels, am a person with a fully  
2 defined and recognised psychosocial disability and the UN  
3 CRPD Article 12 obliges all Australian government agencies  
4 to immediately respect my human rights and legal rights in  
5 my own capacity to give and withdraw informed consent for  
6 medical treatment, electric shock and to access justice".

7 Point 2. "I, Garth Daniels, under CRPD Article 13, say  
8 that the UN article protects my human rights and legal rights  
9 to ensure that no diversion programs to transfer any  
10 individual, me, to mental health commitment regimes or  
11 requiring me to participate in any Mental Health Services are  
12 implemented. Rather, such services should be provided to me  
13 on the basis of my free and informed consent".

14 These are the articles themselves, Your Honour, that  
15 the Attorney-General has ratified and agreed to.

16 "I, Garth Daniels, under CRPD Article 12 say that it  
17 obliges Australia to provide training and consultation and  
18 cooperation with me as a person with disabilities and my duly  
19 representative organisations at the national, regional and  
20 local levels for all actors, including civil servants, judges  
21 and social workers, on recognition of my legal capacity as  
22 a person with disabilities and on the primacy of my supported  
23 decision-making mechanisms in the exercise of my legal  
24 capacity and under Article 14, I state Australian agencies  
25 now violate Australia's fully ratified UN CRPD protective  
26 obligations towards me because I am now subjected to medical  
27 intervention against my will and Article 14 prohibit me to  
28 be deemed to be incapable of making - communicating a decision  
29 about my own treatment".

30 Two more, Your Honour, "I, Garth Jason Daniels, am a  
31 person with fully defined and recognised psychosocial

1 disabilities and under Article 14 I state Australia has agreed  
2 to repeal all legislation that authorises medical  
3 intervention against me without my free and informed consent  
4 as a person with fully defined and recognised psychosocial  
5 disabilities concern and I, Garth Daniels, am a person with  
6 fully defined and recognised psychological disabilities and,  
7 under Article 14, Australia has agreed to and must repeal all  
8 legislation that authorises committal of me as a protected  
9 individual to detention in mental health facilities or the  
10 imposition of compulsory treatments against me, either in  
11 conjunction or in the community or by means of a  
12 community-treatment order".

13 That's his wish to have that read, Your Honour, and they  
14 are the relevant CRPD articles we're relying on and there  
15 is - when it pleases the court, if there is time, I would like  
16 to just simply outline what this means in practical  
17 application throughout the community at all levels assisting  
18 persons with disabilities with the responsibilities under the  
19 ratified CRPD.

20 HIS HONOUR: Does that go beyond the point that's argued, Mr Floyd?

21 MR FLOYD: No, Your Honour.

22 HIS HONOUR: The point is a narrow point, isn't it?

23 MR FLOYD: No, it does not.

24 HIS HONOUR: It either - - -

25 MR FLOYD: It merely - - -

26 HIS HONOUR: - - - compliance with the request of the committee is  
27 mandated or it's not.

28 MR FLOYD: Correct. It doesn't go beyond that.

29 HIS HONOUR: And if it's not mandated, then this application can't  
30 succeed, is that correct?

31 MR FLOYD: You speak about this document, this is just simply an  
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1 outline of how those strict legal defined statutes the UN has  
2 said it should play out in the community and they're not.  
3 There's a major gulf between the ratified CRPD and what's  
4 happening in facilities all around the world and in Australia.

5 HIS HONOUR: That's as may be, Mr Floyd, but that's not the issue  
6 that we're here to determine, is it? As I understand, and  
7 that's why I started with what was the relief that was sought  
8 and the basis for the seeking of that relief, in the  
9 originating motion and in the summons, and my understanding  
10 is that the basis upon which the application is put is that  
11 compliance with the request of the committee, evidenced in  
12 the letter that's before the court, for the cessation of ECT  
13 treatment to Mr Daniels pending investigation by the  
14 committee is mandated by Australian law.

15 MR FLOYD: Correct, Your Honour.

16 HIS HONOUR: And what you rely upon there is the propositions you  
17 advanced earlier in relation to the statements of emanating  
18 from the Attorney-General's Department in 2013 and the  
19 principle that insofar as there is any conflict between state  
20 law and Commonwealth law, Commonwealth law is the law which  
21 must be complied with.

22 MR FLOYD: Correct, Your Honour, and we note the plaintiff and I  
23 were served with volumes of information late last night which  
24 we don't intend to argue any medical issues or matters.

25 HIS HONOUR: No, but currently, not before me, is any argument in  
26 relation to specific compliance with the Mental Health Act  
27 and the requirements under the Mental Health Act in relation  
28 to ECT treatment of Mr Daniels.

29 MR FLOYD: We, Your Honour, with respect, say that's immaterial to  
30 our case with the United Nations covenant.

31 HIS HONOUR: So you say it's immaterial and so they are not issues



1           which I need consider.

2 MR FLOYD: They are medical matters, Your Honour. We are not here  
3 to argue. They've had successive dealings with Mental Health  
4 Tribunals and Supreme Court on those matters. We're not  
5 arguing those. We say that the Victorian statutes are  
6 invalidated by the overarching Commonwealth federal  
7 obligations, declared obligations.

8 HIS HONOUR: And specifically, although it's raised in the  
9 affidavit, although there are raised in the affidavit, issues  
10 as to Mr Daniels' capacity to make decisions and give informed  
11 consent and the lack of any informed consent to this  
12 treatment, that's background material. It's not - - -

13 MR FLOYD: Absolutely.

14 HIS HONOUR: They are not issues which you wish to - - -

15 MR FLOYD: Yes, Your Honour.

16 HIS HONOUR: - - - have determined today.

17 MR FLOYD: Yes, Your Honour.

18 HIS HONOUR: Or in this proceeding.

19 MR FLOYD: That's merely Garth wishing to put the course of events  
20 and his fear of death under the events that have happened to  
21 him. It's not material to his legal case. We say this is  
22 a mere legal matter. We are not interested in the quantum  
23 of ECT or high or low frequencies. We say, Your Honour, CRPD  
24 law and Australian law prohibits it. It's unlawful. We're  
25 asking for an injunction to declare it - an order to declare  
26 it unlawful.

27 HIS HONOUR: So on that point, Mr Floyd, was there anything else  
28 that you wished to tell me?

29 MR FLOYD: I don't think so.

30 HIS HONOUR: I'm not seeking to cut you short but nor do we need  
31 to go into material that's irrelevant. I understand, from

1 the material that's already been submitted, the affidavit in  
2 particular, that Mr Daniels makes a contention that the  
3 requirements of the CRPD are, in effect, not being met  
4 within - - -

5 MR FLOYD: Obligations.

6 HIS HONOUR: - - - the Victorian community.

7 MR FLOYD: Correct, Your Honour. There's only one other question,  
8 you did ask me is there anything else, just one minor thing.  
9 It may or may not be applicable, I need your guidance. If  
10 Your Honour so declares and orders that the ECT be stopped  
11 as requested by the UN and our case, if that is the case, we  
12 also request that Your Honour please guide us as to whether  
13 or not you also have capacity under jurisprudence and this  
14 court's framework, to also order that Garth not be held  
15 involuntarily. He's now been lifted from one hour to two  
16 hours leave per day. He's attended this court so many times  
17 for entire days. He's a balanced, easy going, soft natured  
18 man. He's able to be cared for by his family. So if there  
19 is a ruling that the electroshock should be stopped  
20 immediately, we ask has the court got capacity, under your  
21 jurisdiction, to also consider that he's released to his  
22 family, also be considered because it is a violation of the  
23 CRPD but we don't want that to detract from our request to  
24 have the ECT stopped immediately as requested, Your Honour.

25 HIS HONOUR: Mr Floyd, I don't see how I could proceed that far.  
26 It's not the subject of your originating motion or summons.  
27 There's no material before me.

28 MR FLOYD: Understand, Your Honour, understand.

29 HIS HONOUR: So I really couldn't deal with that issue.

30 MR FLOYD: Thank you. That's all I have to say, Your Honour. Thank  
31 you.

1 HIS HONOUR: Thanks very much, Mr Floyd. I see Mr Daniels Snr  
2 wanting to rise.

3 MR B DANIELS: Thank you, Your Honour. I would just like to add  
4 some substance to what Mr Floyd has in fact said and I think  
5 this is really the essence which is contained in Garth's  
6 affidavit and with Your Honour's permission it's just one  
7 short paragraph. When he is said, "This application needs  
8 to be urgently heard because I fear the electroshock I am being  
9 forcibly treated will kill me and I have been shocked over  
10 90 times and 12 of the standard. I am being shocked twice  
11 a week and this is in violation of Australia's ratification  
12 of the convention of the rights of persons with disabilities.  
13 I am in fear of dying". And if I may, Your Honour, I just  
14 briefly refer to the Vienna conventions on the laws of  
15 treaties and I think it's 1974 or 1986 which essentially  
16 states that state parties will in fact as being party to those  
17 conventions, recognise and adopt those laws and treaties as  
18 part of their law.

19 Now, I'm not an expert on that but certainly there'd  
20 be conventions on law of treaties, I think it was 86 or 76,  
21 it just escapes me now, which I think errs on this because  
22 again we have a UN convention and the implication of that is  
23 that when state parties agree to be party of those  
24 discussions, that invariably it is adopted if not as law but  
25 certainly as a guideline and I suppose the force of this is  
26 contained in this one paragraph is he is in fear of dying and  
27 this is a very, very genuine concern and I do believe, without  
28 digressing too much, Your Honour, the fact that he's not able  
29 to be here himself, for whatever reason, he has actually asked  
30 me to emphasise that particular point and I'd be grateful if  
31 Your Honour would take that on board.

1 HIS HONOUR: Thanks very much, Mr Daniels, and I had read, in the  
2 affidavit of your son's, serious concern in relation to the  
3 ECT treatments that have been carried out so far and his  
4 concern about the effect of further treatments on him and so  
5 the court's certainly cognisant of those concerns.

6 MR B DANIELS: Thank you. Again may I just mention I am no medical  
7 practitioner but, you know, there's considerable supporting  
8 documentation which supports my son's view so it is not - - -

9 HIS HONOUR: I appreciate that - - -

10 MR B DANIELS: Thank you.

11 HIS HONOUR: - - - Mr Daniels, but as we've discussed, that's not  
12 really the issue that we're here dealing with today.

13 MR B DANIELS: No, precisely. Just sticking to the convention,  
14 Your Honour.

15 HIS HONOUR: Yes, thanks very much, Mr Daniels.

16 MR B DANIELS: Thank you.

17 HIS HONOUR: Mr Halley, I presume that you don't really have  
18 anything to say at this point.

19 MR HALLEY: Other than to assist the court if that would be helpful,  
20 otherwise I'd prefer not to, Your Honour.

21 HIS HONOUR: I think what I might do is hear from Ms Ellis and then,  
22 having heard from Ms Ellis, I'll come back to you, Mr Halley,  
23 and if you did have anything to add which might assist, you'll  
24 have that opportunity.

25 MR HALLEY: Thank you, Your Honour.

26 HIS HONOUR: Thank you. Ms Ellis.

27 MS ELLIS: Thank you, sir. Your Honour, in relation to the two  
28 questions that you posed to my learned friends, that is how  
29 is the CRPD incorporated into Australian law and, if so, how  
30 must it be complied with - - -

31 HIS HONOUR: Before we go on, do you see those as the questions?

1 MS ELLIS: Yes.

2 HIS HONOUR: So - - -

3 MS ELLIS: As the preliminary questions, yes.

4 HIS HONOUR: Yes.

5 MS ELLIS: In response to which I've got about six points - - -

6 HIS HONOUR: Thanks.

7 MS ELLIS: - - - most of which have been canvassed in discussion  
8 between yourself and my learned friends, the applicant. The  
9 first is that the United Nation's CRPD has not been  
10 incorporated into Australian domestic law. The ratification  
11 referred to by those for the applicant of the UN CRPD is not  
12 equal or tantamount to incorporation into Australian domestic  
13 law.

14 Secondly, the declaration by the Attorney-General read  
15 out to Your Honour by my learned friend is not legally binding  
16 on this court or the legislature and, further, it, in and of  
17 itself, is not equal to or tantamount to incorporation of  
18 those sentiments into Australian law.

19 Thirdly, there was no Commonwealth statute in  
20 particular that was referred to by my learned friends or  
21 relied upon which is said to be inconsistent with any state  
22 law. Rather, it was said that reliance was on any and all  
23 federal statutes.

24 Fourthly - - -

25 HIS HONOUR: Just on that point, I'm not aware, from investigations  
26 that I've undertaken since I became aware of this matter, of  
27 any Commonwealth statute.

28 MS ELLIS: And in the limited time that I have had this matter, nor  
29 am I aware of any, Your Honour. That's as far as I can take  
30 it. Any Commonwealth or state law which incorporates or  
31 ratifies what has been read out to Your Honour, the

1 declaration from the Attorney-General, which I trust and take  
2 no issue has been read to you faithfully, but the point is  
3 that it hasn't been incorporated into Australian law.

4 The fourth, I think I'm up to the fourth matter, is that  
5 any conflict, sir, between the statement or declaration of  
6 the Attorney-General and Victorian law in this case, the  
7 Mental Health Act 2014 perhaps is the referable law, is not  
8 resolved, in my submission, by this court adopting the  
9 statement of the Attorney-General as if it were in fact law.

10 Fifthly, if Your Honour accepts those four points, then  
11 the result of that is that compliance with the request of the  
12 committee is not mandated and in my respectful submission  
13 would be inconsistent with Victorian law, specifically the  
14 Mental Health Act, and refer Your Honour to s.5 which is the  
15 criteria upon which treatment orders are made.

16 HIS HONOUR: Sorry, could you just repeat that?

17 MS ELLIS: Yes. It was piggybacked on to, if Your Honour accepts  
18 the foregoing - - -

19 HIS HONOUR: One to four.

20 MS ELLIS: Yes, that compliance with the committee is not mandated  
21 and is in fact inconsistent with the Mental Health Act, made  
22 reference to s.5 of the Mental Health Act and I have a copy  
23 of it here, not highlighted but - oh, yes, highlighted.  
24 Section 5 of the Mental Health Act refers to treatment  
25 criteria and why I take Your Honour to this section is Your  
26 Honour would be aware that on 5 April 2016, inpatient  
27 treatment order was made in respect of Mr Daniels. That  
28 treatment order was to last, from recollection, for eight  
29 weeks from that date and the treatment order can be found as  
30 attachment to the affidavit of Associate Professor Katz. I  
31 think it's Attachment 5.

1           There is also determination for ECT and this is  
2 Attachment 7 to the affidavit of Associate Professor Katz and  
3 that is a determination that Mr Daniels receive 12 episodes,  
4 if I can describe it as that, of ECT over an eight-week period  
5 commencing from 5 April 2016.

6           So bearing those two determinations in mind, this is  
7 why I took Your Honour before to what is the treatment  
8 criteria, what does the Mental Health Act say treatment  
9 criteria is. Reading from s.5, "Treatment criteria for a  
10 person to be made subject to a treatment order", and that's  
11 what we have in this case, "is that the person has a mental  
12 illness and because of the mental illness, needs immediate  
13 treatment to prevent; (1) serious deterioration in the  
14 person's mental or physical health; (2) serious harm to the  
15 person or to another person". 5(c) is, "The immediate  
16 treatment will be provided to the person if the person is  
17 subject to a treatment order", which in this case Mr Daniels  
18 is, and, "(d) there is no less restrictive means reasonably  
19 available".

20           Now, I understand that my learned friends say that this  
21 threshold issue does not involve medical questions and/or the  
22 quantity of ECT, but in my respectful submission if Your  
23 Honour is considering that what is said in the letter from  
24 the UN mandates compliance, then it would necessitate looking  
25 at how that sits with current orders under current Victorian  
26 legislation.

27           Now, they're the only matters that I wish to raise to  
28 Your Honour in response to what has been said. That's the  
29 position of Monash Health.

30 HIS HONOUR: Thanks, Ms Ellis. Is there anything you wish to add,  
31 Mr Halley?

1 MR HALLEY: Your Honour, merely this as assistance. It's correct  
2 that the federal government, that is executive (indistinct  
3 words) to international treaties, but they don't become  
4 enshrined in domestic law until the legislature passes laws  
5 and, to our understanding, there are no such awards enshrined  
6 in these treaties and that's the crux of the matter.

7 HIS HONOUR: Yes. Mr Floyd, they're the areas of concern.  
8 Firstly, as far as I am aware, there is no federal or state  
9 statute which incorporates the CRPD into Australian law.  
10 Secondly, that the relief you're seeking here requires that  
11 there be incorporated, into Australian law, a provision which  
12 mandates compliance with the request of the committee.  
13 That's very specific. And apart from the Attorney-General's  
14 statement, to which you've referred, there is no such law.

15 Thirdly, we have in the Mental Health Act 2014, a  
16 Victorian statute which covers the field of issues of  
17 capacity, consent, treatment, and specifically ECT  
18 treatment, in respect of a person such as the plaintiff.

19 MR FLOYD: Yes, Your Honour. We view this that not 72 hours ago  
20 on a fundamental human rights issue, the deeply honoured Port  
21 Moresby Supreme Court overturned Papua New Guinea law and  
22 throughout the Australian government and the Papuan New  
23 Guinea government, who also were pressured into adjusting  
24 their constitution and this is a similar basis.

25 Nobody should be deprived of their liberty and that was  
26 the overturning by the Supreme Court there.

27 We rely on a similar convention that human rights are  
28 inviolable to all persons. No statute of state - we don't  
29 argue the remarks made by my learned friend about treatments  
30 being conducted. We know that that process has been gone  
31 through and they feel they're legally entitled to do that.



1           We say that's immaterial. That these laws are nullified.  
2 In a similar case, we're not relying on Papua New Guinea, but in  
3 a similar case whereby the United Nations' principles are that  
4 Australia has agreed, operate here, to all parties, including  
5 state parties. It is fundamental, international human  
6 rights law, Your Honour, that we say must override any complex  
7 administrative arrangements.

8           What are we to do? To wait 20 years before these  
9 grievances can be brought before people because some  
10 administrative function hasn't undertaken under law? We  
11 simply rely on the UN's overriding rights to protect persons  
12 irrespective of what state they be part of.

13 HIS HONOUR: The difficulty with all of that, Mr Floyd, is that we  
14 have a piece of legislation, the Mental Health Act, 2014, so  
15 only enacted in 2014, which specifically covers the field in  
16 relation to these issues.

17 MR FLOYD: We don't argue with that, Your Honour.

18 HIS HONOUR: And there is no other piece of legislation which  
19 incorporates the CRPD and specifically the requirement to  
20 comply with the committee request, to change or alter the  
21 operation of the Mental Health Act.

22 MR FLOYD: Understand that, Your Honour. We're merely asking the  
23 court to examine how powerful and potent and obliging are the  
24 obligations of the CRPD given the declarations made by the  
25 Attorney-General and given that, without reservation, these  
26 things apply to all disabled persons. That is our case, Your  
27 Honour.

28           We seek your interpretation of the power of the UN CRPD  
29 to protect Garth Daniels, who is in fear of his death.

30 HIS HONOUR: Thanks very much, Mr Floyd. What I might do is come  
31 back at 12.30, if that suits everybody, and I'll deliver a

1 judgment at that point.

2 MR B DANIELS: Excuse me, Your Honour. May I, with Your Honour's  
3 permission, just make reference - well, I know it's not before  
4 Your Honour, but if I refer to the Horwath v Australia case,  
5 the international convention for civil and political rights  
6 was, at the time, the state party argued, that it was not law  
7 and that case took 18 years to resolve but the crux of the  
8 matter, there was an inconsistency between state and federal  
9 law and if there is a consistency according to the  
10 constitution and it is in violation of that particular  
11 convention, then the - in fact I probably have it here.

12 HIS HONOUR: Mr Daniels, I understand the point you make but it all  
13 depends upon the proposition that there is a conflict between  
14 the laws of the State of Victoria and the laws of the  
15 Commonwealth, does it not?

16 MR B DANIELS: Well, no, Your Honour. The fact that the Mental  
17 Health Act's been brought into discussion, it's not the Mental  
18 Health Act that's on trial here, Your Honour. It is the  
19 obligation of the state party to comply with Commonwealth law  
20 or with the acceptances of the treaties which were, I've now  
21 been advised, were not ratified by the UN, but nevertheless  
22 if I refer to the Vienna convention, I think it was - forgive  
23 me, the date may be incorrect, that Australia has an  
24 obligation and all those parties to the laws of treaties is  
25 that they will conduct their business in a manner fairly  
26 consistent with that even if it was not ratified but that  
27 provided the guideline and this is exactly the procedure that  
28 developed in the international common civil and political  
29 rights with the Horwath case, when it was argued that it was  
30 a state issue and was not a Commonwealth issue. The ruling  
31 on that was eventually that it was a Commonwealth issue and

1           that the state had actually broken Commonwealth law.

2   HIS HONOUR:   It goes back to the issue of the conflict between laws  
3           so do you point to anything, other than the statements from  
4           the Attorney-General's Department that Mr Floyd has taken me  
5           to, that were made in late 2013, as establishing a conflict?

6   MR B DANIELS:   I don't have much to add to that at this point in  
7           time, Your Honour.   Sorry, this has just been brought to my  
8           attention and I am aware of this, Your Honour, that in New  
9           South Wales the law states that there must be consent for ECT,  
10          which is different to Victorian laws but that fact is that  
11          the CRPD is a document which the Commonwealth has very clearly  
12          indicated it's adopting.   Now whether adopting and ratified,  
13          I point again to the Vienna convention on the law of treaties  
14          that that is a guideline to which, for the basis of humanity,  
15          the government will actually adhere to and what I see here,  
16          to actually introduce the Mental Health Act, which has been  
17          debated, but again that is not relevant here, Your Honour.

18                 If we look at the Health Services Act, these two bodies,  
19          Monash Health and Eastern Health, are actually corporations  
20          and these are corporations which basically act as, you know,  
21          government agencies, which they're not, and as a corporation  
22          they should be subject to the law of the land - - -

23   HIS HONOUR:   So that's the point, isn't it, Mr Daniels?   What is  
24          the law of the land and we have the Mental Health Act, and  
25          nobody's suggesting that there's been non-compliance with the  
26          Mental Health Act.   The question is whether there is any  
27          inconsistency between the Mental Health Act and some other  
28          statute and at this stage there hasn't been any other statute  
29          to which I have been taken.

30   MR B DANIELS:   But it's the constitution that comes into play here,  
31          Your Honour.   There is an inconsistency between what the

1 state is doing - - -

2 HIS HONOUR: The inconsistency pointed to by Mr Floyd.

3 MR B DANIELS: Indeed.

4 HIS HONOUR: Yes.

5 MR B DANIELS: And that really is the crux of the matter. I mean,  
6 to address the Mental Health Act, as I say, was - I believe  
7 it's irrelevant to this because the CRPD is an overarching  
8 international covenant, in a sense. The state law that is  
9 being applied here at this particular point is in fact  
10 endangering the life of Garth Daniels and if I may digress  
11 for one minute - - -

12 HIS HONOUR: I've allowed you a fair bit of licence, Mr Daniels.

13 MR B DANIELS: Certainly.

14 HIS HONOUR: I really want to be satisfied that what you're going  
15 to say is relevant to the issue. Remember we started by  
16 agreeing on what the issue was - - -

17 MR B DANIELS: Certainly.

18 HIS HONOUR: - - - and whether there is a requirement that  
19 either/or both of defendants comply with the request of the  
20 committee. So we need to stick to that issue, Mr Daniels.

21 MR B DANIELS: I certainly appreciate that, Your Honour, and this  
22 is why I just have this concern that the Mental Health Act  
23 was introduced. That was not the issue. The issue was does  
24 the state adhere to the covenant on the rights of persons with  
25 disability and there is the issue.

26 The other medical stuff is superfluous to this  
27 argument, Your Honour. It is just a fundamental human right  
28 which can only be exercised under the CRPD as it currently  
29 stands and Australia has a moral obligation to in fact adhere  
30 to that because it was part of that convention.

31 HIS HONOUR: Yes.

1 MR B DANIELS: Thank you, Your Honour.

2 HIS HONOUR: Thanks very much, Mr Daniels. Is everyone content if  
3 we come back at 12.30? I know, Mr Halley, that you've taken  
4 the position that you really shouldn't be here but perhaps  
5 we might keep you here until at least 12.30, if that's okay.

6 MR HALLEY: Thank you, Your Honour.

7 HIS HONOUR: I will adjourn until 12.30.

8 (Short adjournment.)

9 LUNCHEON ADJOURNMENT

10 UPON RESUMING AT 2.17 PM:

11 HIS HONOUR: I apologise to the parties for not being able to deliver  
12 judgment at 12.30. I hope nobody was too inconvenienced.

13 (Judgment follows.)

14 HIS HONOUR: Mr Halley, you don't require me to determine the point  
15 as to whether or not your client is a proper defendant to the  
16 proceeding, do you?

17 MR HALLEY: No, not at this stage, Your Honour.

18 HIS HONOUR: Subject to any further discussion, the orders that I  
19 propose to make are that the proceeding be dismissed and that  
20 there be no order as to costs.

21 Now, I will hear, firstly, from the plaintiff,  
22 Mr Daniels or Mr Floyd, as to whether or not there is any other  
23 matter that you wish to raise at this point. I'm not inviting  
24 any argument in relation to the substance of the proceeding.

25 MR FLOYD: Just a question, Your Honour, thank you. We're just  
26 wondering whether or not we have been deprived of procedural  
27 fairness and natural justice because Garth Daniels was  
28 expecting to come here and present and plead his case this  
29 morning. He is the person affected by this and what do we  
30 do? We feel that because of the organisation, we believe in  
31 collusion, simply prevented him from coming and representing

1           himself.

2   HIS HONOUR:   Are you complaining about the absence of Mr Daniels  
3           in court this morning?

4   MR FLOYD:   We chose to proceed without him.   However, we were  
5           deprived of him being here and that's a question to Your  
6           Honour.

7   HIS HONOUR:   Mr Floyd, that's why I raised that when I was first  
8           advised that Mr Daniels couldn't be here and I asked  
9           specifically whether you wished to proceed in those  
10          circumstances.

11   MR FLOYD:   And we gave the undertaking we would.

12   HIS HONOUR:   If you just wait for a moment, Mr Floyd.   I asked  
13          specifically whether you wished to proceed in those  
14          circumstances or whether there was any other application you  
15          wished to make.   Clearly the opportunity was there for you  
16          to say if you felt prejudiced by the absence of Mr Daniels  
17          and whether you wanted to have the matter stood down or  
18          adjourned for that reason.

19                Now, in discussion with Mr Daniels Snr on that point,  
20                I was advised by Mr Daniels Snr that it was the desire of the  
21                plaintiff to actually proceed, have the argument proceed  
22                today on the basis that he would be represented in the argument  
23                by Mr Daniels Snr and by you.

24                In all of those circumstances, Mr Floyd, it would seem  
25                to be a bit late to complain now that you've been prejudiced  
26                by the absence of the plaintiff.

27   MR FLOYD:   It's not a complaint.   It's a question, Your Honour.   Do  
28           we have appeal rights to now, as the last Supreme Court case,  
29           by ten o'clock the next morning, appeal the decision.   It's  
30           a question do we have that same appeal process operating for  
31           us in this case.

1 HIS HONOUR: Are you asking whether the normal provisions in  
2 relation to an appeal, any appeal, from my judgment and any  
3 order I make apply?

4 MR FLOYD: Which was the result we were given from the last habeas  
5 corpus Supreme Court hearing dismissal. So my question is  
6 do we have the right to come back by ten o'clock and lodge  
7 an appeal? Is that what we're faced with?

8 HIS HONOUR: You'll have to check the rules but I don't think you  
9 have to come back by ten o'clock to lodge an appeal.

10 MR FLOYD: Thank you.

11 HIS HONOUR: Did you appeal the habeas corpus matter? That was the  
12 matter before Justice McDonald, wasn't it?

13 MR FLOYD: Correct.

14 HIS HONOUR: I didn't understand that that had been appealed but  
15 perhaps I'm wrong.

16 MR FLOYD: Well, we were given that option, Your Honour. I'm simply  
17 asking do we have the same option here. We chose not to take  
18 that option.

19 HIS HONOUR: No. Well, you've got all your options under the rules  
20 and they include the option to appeal and you're not limited  
21 to 10 am tomorrow morning.

22 MR FLOYD: Thank you.

23 HIS HONOUR: You can give consideration to those issues and there's  
24 sufficient time for you to do so.

25 MR FLOYD: Thank you.

26 MR B DANIELS: May I, Your Honour?

27 HIS HONOUR: Certainly, Mr Daniels.

28 MR B DANIELS: The question which I'd like to raise, it's something  
29 you said may not need to be addressed and that was presumptuous  
30 of me to perhaps think you would rule in our favour. However,  
31 in view of the fact that, you know, the case is dismissed,

1 a question still remains for Garth and for us, would the real  
2 treating department please stand up because we have this  
3 strange invidious position where we have two lawyers of two  
4 different corporations telling us which corporation is  
5 responsible for his treatment yet the psychiatrists treating  
6 him are at loggerheads as to who is actually treating him.

7 HIS HONOUR: Mr Daniels, in open court, we have the second defendant  
8 confirming, through its counsel, that it is the body  
9 responsible for the ECT treatment being administered to your  
10 son and agreeing with the position advanced by the first  
11 defendant, in open court, that it no longer has any  
12 responsibility for the care of your son under the Mental  
13 Health Act. I think you can act, given that those statements  
14 have been made in open court, I think you can act on the basis  
15 of those statements.

16 If that position were to change and it's not set in  
17 stone, I presume, for all time so it may well change, it should  
18 be a simple matter for you to enquire of those corporations  
19 as to who is currently responsible so that that matter can  
20 be resolved.

21 MR B DANIELS: Well, I'm sorry to be pedantic about this, Your  
22 Honour. The mere fact that at 7.55 this morning the actual  
23 treating psychiatrist from the Monash Health clearly  
24 indicated that, "Hey, we merely have Garth in a bed which  
25 actually belongs to Eastern Health and we're not responsible  
26 for his treatment. Eastern Health is". So from a layman's  
27 perspective, I find it very difficult to fully understand how  
28 we have two legal people arguing the case of the two  
29 corporations yet the actual people at the grass roots level  
30 are having this kerfuffle about who's actually treating him.  
31 Now, that has very serious implications from where I sit



1 because to me it's almost a question of trying to pervert the  
2 course of justice, in a sense, because I do not have access,  
3 one, directly to my son, who is advised by his treating  
4 psychiatrist, the registrar, that, "No, you're not being  
5 treated by Monash Health. You're actually a patient of  
6 Eastern Health", and then I've got the clinical director of  
7 that area confirming this morning that, "No, we're merely  
8 housing the acute bed, or rehab bed, for Eastern Health",  
9 which leaves me in a very, very invidious position to report  
10 back to my son because the question that was raised by my  
11 son - - -

12 HIS HONOUR: Sorry to interrupt, Mr Daniels, but I don't see how  
13 there's any further issue in relation to this point in the  
14 current proceeding.

15 MR B DANIELS: Okay. I guess, Your Honour - - -

16 HIS HONOUR: So if you wished to take any further step in the current  
17 proceeding, you've heard what has been said by counsel for  
18 each of the defendants and any further step to be taken by  
19 you presumably would be to appeal the orders that have been  
20 made today, then on the basis of what's been said, that would  
21 be an appeal that you would lodge naming as respondent to the  
22 appeal, the second defendant.

23 MR B DANIELS: Okay.

24 HIS HONOUR: So I think that's clear in relation to this proceeding.  
25 I can understand you might, from time to time, have  
26 frustrations in relation to your dealings with the various  
27 health authorities in particular as to who, from time to time,  
28 is responsible for the treatment of your son. I'm not sure  
29 there's anything much that I can do about that today. It's  
30 not an issue that's before me, other than to encourage  
31 everybody, insofar as is possible, to communicate clearly

1 about these issues.

2 MR B DANIELS: I don't have any dispute with Your Honour's decision.

3 I suppose the only thing that I have, I still at this point  
4 in time, when I have the assurance, I mean, you know, it's  
5 on record now, that Eastern Health is not involved and if that  
6 is actually the case, well then, of course, we would be able  
7 to take further action because it would then be seen to be  
8 a trespass of Eastern Health which they have now denied  
9 they've got any part in. But I think it's that clarification  
10 that I have, within a court, we have psychiatrists actually  
11 disagreeing with one another and we have the legal  
12 professionals saying this is the situation, so from my  
13 perspective, it really is a bit of a conundrum - - -

14 HIS HONOUR: I think you can act on the basis of what's been said  
15 in open court today. That truly reflects the current  
16 situation. Now, that doesn't mean that it will always  
17 reflect the circumstances to who is responsible for the  
18 treatment of your son, but we're told in open court, by  
19 counsel, on instructions, that the body currently responsible  
20 for your son's treatment is the second defendant. I'm sure  
21 that you can proceed on the basis that that is correct.

22 MR B DANIELS: One other question, Your Honour. Being somewhat  
23 impecunious and the people on the right are going to get a  
24 copy of the transcript, is there any possibility that the  
25 court would be kind enough to provide us with a copy of today's  
26 transcript, Your Honour, just for the benefit of my son,  
27 because he'd like to know that at least Mr Floyd and I have  
28 tried to put forward his rights as best we can.

29 HIS HONOUR: I'm not sure that a transcript necessarily emanates  
30 from Practice Court proceedings such as this. I'm sure that  
31 if the defendants obtain a copy of the transcript they would

1 provide it to you but as I understand it, we don't  
2 automatically get a transcript in this proceeding. It might  
3 be a matter of conveying the matters back to your son. You've  
4 had the advantage of having two people in court so hopefully  
5 you've got it covered, Mr Daniels.

6 MR B DANIELS: Thank you, Your Honour.

7 HIS HONOUR: I'm sure that if a transcript is obtained by the  
8 defendants they'll provide a copy to you.

9 MR HALLEY: There is a difficulty, Your Honour. It may be helpful  
10 if Your Honour does make an order that the defendants provide  
11 the plaintiff with a copy because it's a private service that  
12 transcribes and they prohibit us giving a free copy to the  
13 plaintiff and so if it's made by order of the court, then of  
14 course we'd have to comply with the court but there's been  
15 a problem previously that the transcribers transcribe and  
16 charge each party for copies of the transcript.

17 HIS HONOUR: Will you be obtaining a copy of the transcript?

18 MR HALLEY: Yes, Your Honour.

19 HIS HONOUR: In those circumstances, I'll make that order. When  
20 I'm making the orders finally, I'll come back to you as to  
21 the form of that order.

22 MR HALLEY: Thank you.

23 HIS HONOUR: That satisfies you, I think, Mr Daniels, with  
24 Mr Halley's cooperation.

25 MR B DANIELS: Yes, thank you.

26 HIS HONOUR: Was that it, Mr Daniels, in terms of issues you wish  
27 to raise?

28 MR B DANIELS: For today, yes, Your Honour. Thank you.

29 HIS HONOUR: Now, Mr Halley, any other issue apart from the  
30 transcript?

31 MR HALLEY: No. The only other issue is I do have instructions to  
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1 seek costs of today.

2 HIS HONOUR: I wouldn't be minded to make a costs order in the  
3 exercise of my discretion.

4 MR HALLEY: That's all I'll say, Your Honour.

5 HIS HONOUR: Mr Halley, I don't think it's an appropriate matter.

6 MR HALLEY: Thank you, Your Honour.

7 HIS HONOUR: Having said that I'll hear from Ms Ellis before I make  
8 any final determination. Ms Ellis, did you want to say  
9 anything about costs or any other issue?

10 MS ELLIS: No, I don't want to say anything about costs. I don't  
11 have instructions to seek costs. Having sought those  
12 instructions in the event Your Honour would go either way,  
13 my instructions are not to seek costs in relation to it.

14 Whilst I am on my feet, nor was I going to, on  
15 instructions, seek transcript but if my learned friend is  
16 going to do that and provide it to the plaintiff, I have  
17 nothing to say about that either.

18 HIS HONOUR: Thanks, Ms Ellis. In that case, should the orders of  
19 the court be:

20 1. The originating motion filed 20 April 2016 and the  
21 summons on the originating motion filed on 24 April 2016 are  
22 dismissed.

23 2. This is the transcript order, what do you think's  
24 required, Mr Halley?

25 MR HALLEY: Your Honour, that the first defendant, upon - - -

26 HIS HONOUR: The first defendant, upon receipt of the transcript  
27 of the proceeding are directed to provide a copy of the  
28 transcript to the plaintiff.

29 MR HALLEY: Yes, or directed by the court to provide a copy of the  
30 transcript to the plaintiff.

31 HIS HONOUR: The first defendant, upon receipt of a transcript of  
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1 the proceeding, are directed to provide a copy of the  
2 transcript to the plaintiff.

3 MR HALLEY: It's superfluous maybe but if it's directed by the  
4 court - it makes no difference but it might help.

5 MR B DANIELS: It would help, Your Honour, if it's by the court  
6 because I think when we got it by the court no questions were  
7 asked.

8 HIS HONOUR: I'll bow to everyone's request. So, by the court.

9 MR B DANIELS: Thank you, Your Honour.

10 HIS HONOUR: Perhaps rather than have a third order, we can add to  
11 order number one, after are dismissed, with no order as to  
12 costs.

13 Does that cover everything in terms of the orders that  
14 need to be made?

15 MR B DANIELS: Yes, thank you.

16 HIS HONOUR: We'll have those orders produced and provided to you  
17 immediately.

18 MR B DANIELS: Thank you.

19 - - -