

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Docket # SJC-10119

IN RE ROBERT M. MAGRINI,
Respondent-Appellant

APPEAL OF AN ORDER OF THE NEWTON DIVISION OF THE
DISTRICT COURT DEPARTMENT AS AFFIRMED BY THE DISTRICT
COURT APPELLATE DIVISION

APPELLANT'S REPLY BRIEF

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In reply to the Brief of the Appellee, Newton Wellesley Hospital, the appellant, Robert Magrini, submits the following argument:

I. This Case Is Appropriate For Decision.

This Court has frequently decided issues that are technically moot "where the issue was one of public importance, where it was fully argued on both sides, where the question was certain, or at least very likely, to arise again in similar factual circumstances, and especially where appellate review could not be obtained before the recurring question would again be moot." *Lockhart v. Attorney General*, 390 Mass. 780, 783 (1984) (and cases cited). All of these criteria are clearly present in this appeal (see Appellant Magrini's Principal Brief at pp. 10-14),¹ and

¹ That the question is likely to arise again in similar factual circumstances is convincingly demonstrated by the 2006 Annual Report of the Department of Mental Health on the Impact of Chapter 249 of the Acts of 2000 (hereafter 2006 Annual Report) (copy appended as Addendum B). As the Report shows, between December 1, 2000 and December 31, 2006, individuals filed 279 requests for emergency hearings, but hearings were only held in 52 cases. 2006 Annual Report at 9 (App. D), Addendum at B-10. With district courts refusing to grant emergency hearings over 80% of the time, the question is certain to arise again in similar circumstances.

the Hospital does not argue otherwise.² See, Brief for Appellee/Newton Wellesley Hospital (hereafter "Hospital's Brief") at 9-12.

Based on the *Lockhart* criteria and the cases cited in Magrini's Principal Brief at pp. 10-14, this Court should decide this appeal on the merits.

II. Mr. Magrini's Emergency Hearing Request Fell Clearly Within The Scope Of G.L. c. 123, § 12(b).

The Hospital's principal argument appears to be that Mr. Magrini's emergency hearing request challenged Dr. Orlikov's June 19, 2006 application for Mr. Magrini's admission under c. 123, § 12(a), rather than the same doctor's simultaneous involuntary admission of Mr. Magrini to the Hospital pursuant to c. 123, § 12(b). Hospital's Brief at 13-22. However, the record clearly shows that Mr. Magrini sought relief, not from the application for his admission, but from his actual involuntary detention at the Hospital due to his admission. See Appendix at 15-16 (Hospital's Application for and Authorization of

² That Mr. Magrini's case became technically moot due to his acceptance of a voluntary admission pursuant to G.L. c. 123, § 10, rather than the outcome of the commitment hearing pursuant to c. 123, §§ 7 & 8, is a distinction without a difference. See Hospital's Brief at 10-11. Either way, Mr. Magrini's case would have become technically moot within less than two weeks of his involuntary admission under c. 123, § 12.

Involuntary Hospitalization - M.G.L. Chapter 123, Sections 12(a) and 12(b)); and at 18-20 (Request for Emergency Hearing and Motion for Emergency Hearing) (both asserting violations of c. 123, §§ 12(a) & (b)). Indeed, the Application for Admission and the Admission itself were accomplished on one document at the same time by the same individual, Dr. Orlikov. Appendix at 15-16.

Mr. Magrini does not dispute that § 12(b) authorizes emergency hearings to challenge only involuntary psychiatric admissions based on alleged abuse or misuse of the admission authority contained in § 12(b). Because admission decisions are required to be made within two hours of an individual's arrival at the hospital, 104 Code Mass. Reg. 27.07(2),³ there would neither be the time nor the need for an emergency hearing if the application for admission was rejected by the designated physician and the individual discharged from the facility.⁴ Mr.

³ The regulation is attached in the Addendum to this brief.

⁴ This is not to say that an admission that was obtained in part due to an abuse or misuse of the application procedure could not be challenged through the emergency hearing procedure. Just as evidence or confessions obtained in criminal cases in violation of lawful procedure can be challenged at trial as the

Magrini's hearing request was based upon his objection to his continued involuntary admission to the Hospital after the district court had just ordered him to be discharged.

Not only does the Hospital mischaracterize Mr. Magrini's emergency hearing request, it also seems to believe that the only "abuses or misuses" of the admission process that can be challenged under § 12(b) are a failure to inform a patient of his right to counsel, the failure to notify the Committee for Public Counsel Services that a patient has requested a lawyer, delay in conducting the initial psychiatric examination, or the admission being ordered by a person not authorized to make such a decision. Hospital's brief at pp. 15-16. However the term "abuse or misuse" is not so easily cabined.

As the Report of the Ad Hoc Committee to Review G.L. c. 123 s. 12 explained with respect to the emergency hearing procedure, "where counsel or the patient feel that the circumstances of admission

"fruit of the poison tree," so too admissions that have been obtained based in part on the abuse or misuse of the application procedure should be subject to challenge under the emergency hearing procedure. That however is not the situation presently before this Court.

constituted a misuse of the involuntary commitment procedures, counsel may petition the local District Court for an emergency hearing *on the issue of the appropriateness of commitment*. The District Court would hold emergency hearings in such cases on the day that the petition is filed in court or on the next business day, at the latest." Addendum C to Magrini's Principal Brief at C-7 (Ad Hoc Committee Report at 4) (emphasis added).⁵ Here, where the Hospital defied the discharge order of the district court and utilized the § 12(b) admission procedures to involuntarily detain Mr. Magrini without any court review for an eleventh day and without any prospect for a hearing for at least an additional week, Mr. Magrini and his counsel had every reason to "feel that the circumstances of admission constituted a misuse of the involuntary commitment procedures." For example, it is difficult to envision a more egregious abuse of the § 12(b) admission procedures than for a hospital to intentionally use serial 12(b) admissions to avoid

⁵ As the Hospital notes in its brief at 31-32, legislative history, including comments by committees or commissions involved in the drafting of the legislation, are appropriate aids to the proper interpretation of ambiguous terms. See, *Commonwealth v. Ray*, 435 Mass. 249, 253-54 (2001).

having to justify the commitment at the hearing required by G.L. c. 123, §§ 7 and 8. Yet under the Hospital's reasoning, such an individual would have no legal recourse under § 12.

The emergency hearing provision of § 12(b) is intended to protect the liberty interest of individuals against unlawful and inappropriate restraint. It must be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Acting Superintendent of Bournewood Hosp. v. Baker*, 431 Mass. 101, 104 (2000) (quoting *Industrial Fin. Corp. v. State Tax Comm'n*, 367 Mass. 360, 364 (1975)); *Hashimi v. Kalil*, 388 Mass. 607, 610 (1983). To fulfill the legislative intent to provide individuals wrongfully admitted to psychiatric hospitals against their will with immediate redress, the scope of the phrase "abuse and misuse" must be given its ordinary expansive interpretation. The narrow reading urged by the Hospital, which would

permit innumerable abuses and misuses to go uncorrected,⁶ must be rejected.

III. The General Court's Requirement That The Court "Shall Hold A Hearing" Is Mandatory, Not Directive.

Contrary to the Hospital's vain assertions, well established principles of statutory construction dictate that when the General Court used the word "shall" in the emergency hearing provision of § 12(b), it meant "shall." As this Court noted with respect to the use of the word "shall" in a similar hearing provision of the mental health code:

"Where the language of a statute is plain and unambiguous ... legislative history is not

⁶ In addition to the serial § 12 issue faced by Mr. Magrini, other abuses that have occurred and would not be redressable under the Hospital's grudging interpretation of § 12(b) include a conspiracy between a relative, the police and a judge to coerce a reluctant psychiatrist to involuntarily commit an individual in order to prevent him from attending his daughter's wedding, *Wagenmann v. Adams*, 829 F.2d 196, 201-205 (1st Cir. 1987), and a conspiracy between an employer and physician to have his maid involuntarily committed to a state hospital because she was romantically involved with a friend of the employer. *Karjavainen v. Buswell*, 289 Mass. 419, 425-27 (1935). As experience teaches, the extent of abuse and misuse of any procedure is limited only by the imagination and creativity of those determined to circumvent it. The General Court could not have intended to limit the emergency hearing procedure only to the relatively benign violations listed by the Hospital, while allowing more flagrant and outrageous abuses to go unchallenged until the full commitment hearing, M.G.L. c. 123 §§ 7 & 8, over a week later.

ordinarily a proper source of construction." *Hoffman v. Howmedia, Inc.*, 373 Mass. 32, 37, 364 N.E.2d 1215 (1977). In construing a statute, words are to be accorded their ordinary meaning and approved usage. [citations omitted]. The word "shall" is ordinarily interpreted as having a mandatory or imperative obligation. [citations omitted]. In addition, a general rule exists that directions to public officers for the protection of rights are mandatory. Since the words of the statute are clear and unambiguous and since, given their ordinary meaning, they yield a workable and logical result, there is no need to resort to extrinsic aids in interpreting the statute. [citations omitted]. It must be kept in mind that this statute provides a mechanism for a restraint on an individual's personal liberty. [citations omitted].... That the statute imposes a restraint on liberty also compels the conclusion that the time limit on holding of the hearing goes to the essence of the public duty.

Hashimi v. Kalil, 388 Mass. at 609-10. Similarly, in *Commonwealth v. Gross*, 447 Mass. 691, 693-94 (2006), this Court held that the use of the word "shall" in the statute specifying the time frame within which petitions to commit sexually dangerous persons must be filed was mandatory. *Hashimi* and *Gross* involved only a brief or, in the case of *Gross*, no delay of a hearing, not the outright denial of a mandated hearing as is the case here. The relief sought here is simply provision of the legislatively mandated hearing. All of the reasons relied upon by the *Hashimi* and *Gross*

Courts and more apply to the statutory hearing requirement at issue here.

In an effort to bolster its statutory construction argument, the Hospital has conjured up a list of allegedly absurd or unreasonable results that would flow from a literal reading of the statute. Hospital's Brief at 28-33. First, there is no evidence that any of these hypothetical results has or will ever occur. Furthermore, even a cursory review of this parade of horrors reveals not only that they are unlikely, but that, were any to occur, the district courts are well equipped to deal with them.

The first concern raised is the specter of having to hold hearings on facially frivolous hearing requests. Hospital's Brief at 28. Assuming that the court does have to hold hearings on such requests,⁷ there is no reason to believe that such requests would either be frequent or burdensome. First, all persons involuntarily admitted must be immediately notified of their right to appointed counsel and, if requested, the Committee for Public Counsel Services must be

⁷ As the Hospital notes, Mr. Magrini has suggested that the court need not hold a hearing on a request that is clearly frivolous on its face (e.g. "I am being held because Martians have taken over control of the hospital").

immediately notified and provide counsel forthwith. G.L. c. 123, § 12(b). The provision of counsel provides a substantial check against the filing of facially frivolous hearing requests.

Furthermore, the history of hearing requests under § 12(b) demonstrates that the specter of the court being inundated with frivolous requests is entirely imaginary. Over a six year period, there have been 41,140 § 12(b) admissions and only 279 emergency hearing requests. 2006 Annual Report at 9 (App. D), Addendum at B-10. This is fewer than 4 hearing requests per month statewide. Even if 25% of these requests were patently frivolous, yet had to be heard, they would not unduly tax the district court department.

The second "absurdity" raised by the Hospital is the prospect of patients filing repeated emergency hearing requests challenging their admission after they have already been subject to a civil commitment order following a § 7 evidentiary hearing. Hospital's Brief 29-30. First, the suggestion that emergency hearings would ever be sought in such circumstances is so remote that the argument itself has no force. Furthermore, the Hospital itself suggests the obvious

answer to this unlikely event. Hospital's Brief at 30. Having had the opportunity at the § 7 commitment hearing to raise all objections to commitment, any issues concerning the patient's pre-commitment admission are likely barred in the district court by well established issue preclusion and mootness principles. Moreover, the statute provides a potentially more effective process for review of the commitment through a petition for release to the superior court. G.L. c. 123 § 9(b).

Finally, the Hospital posits the possibility that patients might file requests on a daily basis, unduly burdening the court. Hospital Brief at 30. Certainly issue preclusion principles would be a strong basis for the district court to deal efficiently with such an unlikely circumstance. Compare *Thompson v. Commonwealth*, 386 Mass. 811, 818 (1982) (allocating burden of proof to the petitioner in an application for release under G.L. c. 123 §9(b) will prevent multiple "frivolous applications by litigious patients.") Finally, because of the relatively short time frame between admission and the § 7 commitment hearing, this speculative concern is of minimal consequence.

In summary, therefore, speculative concerns with no basis in fact are not a valid basis for a court to ignore the clear and unambiguous command of a statute. See, *Diamond v. Chakrabarty*, 447 U.S. 303, 316-18 (1980) (rejecting consideration of "parade of horrors" in construing statute).

IV. Deprivation Of An Individual's Right To A Hearing Is Per Se Prejudicial.

The Hospital suggests that, even if he was entitled to a hearing, Mr. Magrini suffered no prejudice from the Court's denial of his request. Hospital's Brief at 13. However, because Mr. Magrini was not accorded the hearing to which he was due, it is impossible to know whether he would have been ordered discharged or provided some other form of relief had the hearing been held.⁸

Where a hearing is a person's due, the deprivation of that right is actionable even in the absence of actual injury. *Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("the denial of procedural due process should be actionable for nominal damages without proof

⁸ Other possible relief might include an order requiring the Hospital to immediately file the § 7 commitment petition (or discharge the patient), and scheduling an expedited hearing on that petition, if filed.

of actual injury"); *Costa v. Fall River Housing Auth.*, 71 Mass. App. Ct. 269, 283 & n. 13 (2008) (rejecting harmless and mootness arguments because the denial of procedural rights is "a per se wrong 'actionable ... without proof of actual injury' beyond the procedural deprivation itself").

Furthermore, where the procedural deficiency implicates the policies or practices of the judiciary, this Court's constitutional and statutory superintendence authority is implicated, warranting the provision of guidance to the lower courts. *Kennedy v. Justices of District Court*, 356 Mass. 367, 373, 379 (1969) (exercising superintendence jurisdiction to establish principles that "will make the Massachusetts inquest procedure less vulnerable to future constitutional objection"); *Thompson*, 386 Mass. at 818-89 (addressing evidentiary issue already determined harmless because it "is meaningful beyond the decision of this case"); *Messing Rudavsky & Weliky v. Harvard*, 436 Mass. 347, 351 (2002) (exercising superintendence because "little guidance currently exists for lawyers as to what contact [with opposing party's employees] is appropriate").

Certainly, clarifying the proper interpretation and implementation of the emergency hearing provision of § 12(b) "is meaningful beyond the decision of this case" and will provide needed "guidance" to the district court judges who receive these requests.

V. There Were Serious Issues To Be Addressed That Warranted An In-Person Hearing In Mr. Magrini's Case.

The Hospital suggests that Mr. Magrini's emergency hearing request raised purely legal issues that were appropriate for disposition by the district court without the need for a hearing. Separate and apart from the fact that the statute requires an in-person hearing (see Magrini's Principal Brief at 20-29), the issues raised by Mr. Magrini's emergency hearing request warranted an in-person hearing where issues of motive, credibility and competence could be evaluated by the judge. The hearing request alleged an abuse based on the Hospital's defiance of the court's order of June 19, 2006 that Mr. Magrini be discharged. Rather than comply with the order, the Hospital, acting through Dr. Orlikov, readmitted Mr. Magrini at 10:00 am on June 19 and then, 15 minutes later when he was no longer free to leave, entered a note on his chart that he was discharged "due to the court

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decision." Appendix at 15-17. It is undisputed that Mr. Magrini was not free to leave the hospital at any time on June 19. Furthermore, but for the checked box on the pre-printed application form indicating that Mr. Magrini posed a risk of physical injury or impairment to himself, there was no clinical record indicating that he had been meaningfully examined on June 19 prior to his "re-admission." Appendix at 15-17.⁹ In light of these events, significant questions were raised about whether Dr. Orlikov's readmission of Mr. Magrini was based upon resentment that a court would tell him what to do or upon a sincerely held belief that Mr. Magrini remained at risk of injuring himself if released. An in-person hearing was needed where Dr. Orlikov's demeanor and credibility could be assessed, Mr. Magrini's current mental state could be observed, and counsel could more fully articulate the factual and legal reasons why the admission process set forth in § 12(b) had been abused or misused.

⁹ The nurse's entry in Mr. Magrini's chart on June 19 indicates "no concerns, no behavior issues." Dr. Orlikov's entry notes that Mr. Magrini is "disorganized," his "mood is calm, affect is congruent" and his insight and judgment are "poor." There is nothing in the chart suggesting any evaluation of his dangerousness as is required by the statute. Appendix at 17.

Without the benefit of such in-person observation, evaluation and argument, the district court judge was ill equipped to determine whether an abuse had occurred.¹⁰ The legislature in enacting the emergency hearing provision required more.

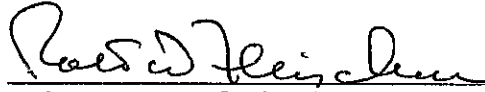
CONCLUSION

For the foregoing reasons and the reasons asserted in his Principal Brief, Mr. Magrini respectfully requests that this Court reverse the order of the Newton District Court denying his request for an emergency hearing pursuant to G.L. c. 123, § 12(b) and declare that an in-person hearing is required whenever the emergency hearing request sets forth allegations which a person could have reason to believe constitute an abuse or misuse of the § 12 involuntary restraint and hospitalization procedures.

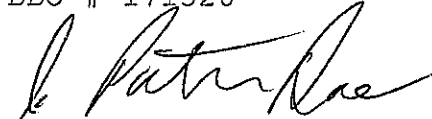
¹⁰ The Appellate Division's majority somehow concluded from the record, without any evidence whatsoever, that the Hospital had "acted in good faith." Appellate Division opinion at 4-5, Addendum to Magrini's Principal Brief at A-7. Whether this was so is precisely one of the inquiries that the district court should have undertaken at a § 12(b) hearing.

March 19, 2008

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