

Number 92

What implications does the Bournemouth ruling have on ECT treatment?

Prior to the judgment of the European Court of Human Rights in the case of *HL v UK* (the “*Bournemouth*” judgment)¹ we had advised our mental health clients on a number of occasions that it was unnecessary to detain incapable but compliant patients or capacitated consenting patients under the Mental Health Act 1983 for the purpose of administering ECT. Indeed, although this practice was known to be fairly widespread in some units, we considered that it was unlawful because there was no “need” to detain the patient under the Mental Health Act.²

There seemed no doubt that healthcare professionals could rely upon the doctrine of necessity to treat incapacitated patients in appropriate circumstances, including via treatment with ECT.

Although the matter has yet to be tested by the English Courts, the *Bournemouth* decision in the European Court may have affected the legality of treating incapable patients with ECT. The Court did not address this issue and the Government has not issued any guidance on it.

It would seem to follow from the European Court’s judgment that in situations where patients who lack capacity have been informally admitted to hospital for treatment under the common law doctrine of necessity, this procedure will be unlawful if the patient is controlled to such an extent that he is deprived of his liberty unless ECHR compliant safeguards are provided (even though treatment is clinically regarded as in the patient’s best interests).

Given that ECT almost inevitably involves a high level of control being exercised over a patient, where such treatment is administered to an incapacitated patient this might amount to detention and arguably would only be lawful under the Human Rights Act 1998 if the Mental Health Act is utilised (i.e. the patient is detained). The patient may otherwise claim a breach of his/her rights under Article 5, which protects the individual’s right to liberty. In view of the *Bournemouth* judgment it is extremely questionable whether healthcare professionals treating such a patient could place full reliance on the principle of “necessity” to provide legal justification for such treatment. Imposing such treatment on a patient could be argued to be one of the most extreme methods of “control” and as such can only be done when the Mental Health Act is being used. Even if there are some milder forms of treatment where this is not the case (i.e. the nature of the treatment is not such as to constitute control) the very nature of ECT would, given the European Court’s view as expressed in the judgment, seem to require formal statutory protection of the patient’s human rights.

The Department of Health has published a consultation paper on *Bournemouth* with regard to the approach to be taken in response to the judgment of the European Court. The Government has indicated that subject to consultation responses, it is inclined to adopt an approach entitled “protective care”. This approach would consist of a new system to cover admission/detention procedures, reviews of detention and appeals. The new system would be specifically for people who lack capacity and it is

¹ See also Mental Health Law Briefing, Number 83

² This view is supported by Richard Jones at paragraph 1-720 of the Mental Health Act Manual (9th Edition), published prior to the European Court’s judgment.

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anticipated it would be used when a person needs to be detained in order that care and treatment can be provided in the person's best interests where a public authority is involved in arranging the placement. Accordingly, any such changes in the law may well address the difficulties of treating an incapacitated patient by ECT, although it is extremely likely that any such legislation will not be introduced for some considerable time. This leaves the position as discussed above in some uncertainty; should incapacitated patients only receive ECT treatment if detained under the Mental Health Act?

Our advice is that mental health providers should review their ECT policies in the light of the *Bournewood* judgment and seek legal advice on the issues arising from this briefing. Further advice on these matters or assistance in drafting policy guidelines is available from RadcliffesLeBrasseur.

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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