

Care Homes Briefing

Solicitors

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Plugging the Bournemouth Gap

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In 2005 the European Court of Human Rights held in the Bournemouth case¹ that the detention of incapacitated but compliant patients in accordance with the English Common Law in a way that amounted to a deprivation of their liberty was a breach of Article 5 of the Human Rights Act². Since that time the Government have of necessity had in mind the need to bring forward legislation to rectify this position.

The Mental Health Bill 2006 proposes to amend the Mental Capacity Act 2005 to insert provisions to deal with the Bournemouth problem. This would include a scheme of applying for “formal authorisation” from the relevant PCT or Local Authority, as appropriate, where incapacitated patients were being deprived of their liberty (other than cases where patients were detained under the Mental Health Act). Where the Care Plan for an incapacitated individual amounted to a deprivation of their liberty an application for such authority would need to be made at least every 12 months. The process proposed would follow the procedure set out in the flow chart published by the Department of Health (see attached).

Deprivation of Liberty

The key question for those operating mental health units is to know when this process will be engaged. The

European Court in the Bournemouth case made it plain that there is a distinction between *depriving* an individual of his liberty (which is unlawful) and *restricting* an individual’s liberty (which may not be unlawful). The key question is therefore to ascertain what amounts to a deprivation of liberty. The Government have made it plain that they do not propose to provide a precise definition for this as it will depend on the facts of any particular case.

Court Guidance

A recent Court case³ provides assistance on how the Courts are likely to approach this question.

In JE, the patient was 72 and blind and suffered from cognitive impairment due to a stroke. As a result of this his movements were very restricted and he was not permitted to leave the Care Home where he resided. He was unable to leave voluntarily as the doors were locked by a key pad that he could not operate. He repeatedly said he wanted to leave and go to live at home with his wife. He was never physically prevented from leaving. Court proceedings were brought on the basis that he was being deprived of his liberty contrary to Article 5.

As far as the question of deprivation of liberty was concerned, the Court approached this by considering whether in practice the patient was free to leave whenever he chose. Because of the security system, he could not

¹ HL v UK (2005) 40 EHRR 32

² The right to liberty.

³ JE v Surrey County Council [2006] EWHC 3459 Fam.

do so and the Court therefore held that this amounted to a deprivation of his liberty.

Implications

The Government have estimated that their proposals are likely to affect around 5000 individuals. This may, however, be an under-estimate. Based on the JE case it is likely that many residents in mental health units will be found to have been deprived of their liberty. This estimated statistic also under-estimates the fact that many healthcare providers are likely to adopt a “safety first” approach and apply for “formal authorisation”

wherever there is any possibility that an individual’s Care Plan might amount to deprivation of their liberty. Providers are likely to approach this on the basis that it is better to make the application and obtain the authorisation than to face a claim for compensation for unlawful detention if this has been overlooked.

The Government’s proposals are still only contained within the draft Bill. However recent correspondence between the Department of Health and the relevant Parliamentary Committee and the latest draft of the Bill make it plain that the Government are keen to press ahead with these proposals.

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