

Mental Health Law Briefing

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Hospital Managers: A New Approach to Conditional Discharge?

Before the new Code of Practice was published, the old Code of Practice to the Mental Health Act provided no express guidance as to whether hospital managers have the power to make an Order for deferred discharge or “conditional” discharge (in the sense of discharge subject to a prior condition being met). The Mental Health Act Commission in their Tenth Bi-ennial Report had made it plain that Hospital Managers exercise options similar to an MHRT and therefore could order, amongst other things, such conditional discharge.

Some commentators had taken a different view. Reference was made to the dicta of Jackson J in R (SR) v Huntercombe Hospital Maidenhead and in particular his comment that:

“The Claimant’s discharge was not made conditional upon the preparation of an aftercare package. Indeed the Managers would have had no power to make such a conditional order”.

While at first glance this seems to support a suggestion that Hospital Managers may not make an order for conditional discharge, it misunderstands the context in which Mr Justice Jackson made those comments¹

The challenge in SR was not directed at the legality of a conditional order being made per se nor was there any argument as to whether, in general, Hospital Managers can make orders for discharge which are conditional upon some condition precedent being met. The dicta simply addressed the specified ground of challenge. It would be taking the Judge’s comments out of context to suggest that they are general authority for the proposition that conditional discharge (in the sense of a condition precedent) may never be ordered by Hospital Managers.

There is in principle no reason why discharge should not be ordered subject to a condition precedent, although in many cases it would be better to adjourn. For example, a patient may well have improved so as to justify discharge if particular support is available. On the other hand, without that support (perhaps particular hostel accommodation) the patient’s condition may require continued detention.

New Code of Practice

However, the new Code of Practice to the Mental Health Act 1983 (amended to take account of the Mental Health Act 2007) seems to take a different view.

¹ RadcliffesLeBrasseur acted for the Hospital Managers

Paragraph 31.38 of the Code provides:

“If panels conclude that the patient ought to be discharged, but practical steps to put aftercare in place need to be taken first, they may adjourn the panel for a brief period to enable that to happen before formally discharging the patient. Alternatively, they may order the patient’s discharge from a specified date in the future. They may not discharge patients provisionally but defer the final decision to discharge until certain conditions have been met”.

This paragraph seems to have no basis in law and indeed runs directly counter to the view expressed by the

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Mental Health Act Commission in its twelfth Bi-ennial Report (see paragraph 4.92 of that Report), although in many cases it would indeed be better to adjourn the hearing to a specified date rather than seeking to make a conditional order.

As a matter of both principle and law, there is no reason why Hospital Managers should not order discharge subject to the satisfaction of some condition precedent. Nevertheless, given the status of the Code of Practice following the Munjaz² case, Hospital Managers would be well advised to avoid conditional discharge. In Munjaz the House of Lords held that the Code of Practice should be followed unless there were cogent reasons not to do. It is difficult to anticipate cases where it would be more appropriate to order conditional discharge rather than simply to adjourn.

² R (on the application of Munjaz) –v- Mersey Care NHS Trust [2005] UHKL 58