RadcliffesLeBrasseur

BRIEFING

Number 22

Nearest Relative Rights – Ignore them at your peril?

MENTAL HEALTH LAW

A patient's nearest relative has important rights under the 1983 Mental Health Act. Section 26 defines who is the nearest relative ("NR") and confirms that the patient's NR can authorise any person (other than the patient or a person disqualified under the Act) to perform the functions of the NR.

In summary, the most important NR rights are that they can request the Local Social Services Authority to arrange for an assessment of the patient by an ASW; should be informed in writing why the ASW decides not to make any application; can make an application for admission for assessment (Section 2), for assessment in an emergency (Section 4), for treatment (Section 3) and for guardianship (Section 7). The NR must be informed about any application under Section 2 if practicable, and must be consulted prior to an application under Section 3 and Section 7 being made and can object. The NR must receive information about the patient's detention unless the patient objects and can discharge the patient after giving 72 hours' written notice unless the Doctor prevents this by issuing a barring order. The NR must be given 7 days' notice of the patient's discharge and can apply to Mental Health Review Tribunals in certain circumstances.

Ignoring the NR's rights is perilous. A recent example arose when an ASW did not undertake reasonably practicable steps to contact the NR before applying for admission under Section 3. The NR was detained himself in another hospital and the ASW did not think he should contact the NR both because he was subject to detention himself and because in any event, it would be too cumbersome to try and contact him.

The requirement under Section 11 is for the ASW to consult with the patient's NR prior to admission for treatment or guardianship unless this is not reasonably practical or would involve unreasonable delay. The issue for the ASW is how much effort should be expended before it can be said that contacting the NR is "impractical".

It is clear that although it is not practicable for an approved social worker to consult with a NR who is mentally incapable of being consulted or who is implacably opposed to being consulted, this does not mean that just because somebody is detained under the MHA that they should not be consulted as the NR. Detention under the MHA does not necessarily mean that you do not have the necessary mental capacity to act as NR.

Paragraph 2.16 of the Code of Practice makes it clear that circumstances in which the NR need not be informed or consulted include those where the ASW cannot obtain sufficient information to establish the identity or location of the NR or where to do so would require an excessive amount of investigation. It must be remembered however that practicability refers to the availability of the NR and not to the appropriateness of informing or consulting the person concerned. It would not be practicable for an ASW to consult with the NR if such consultation would have an adverse affect upon a patient's situation by, for example, causing significant emotional distress to the patient or placing the patient at risk of harm. It is **totally unacceptable** for an ASW not to consult simply because he anticipates an objection to the application.

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If an ASW has been unable to consult the NR before making the application for admission for treatment, then the ASW should nevertheless persist thereafter in seeking to contact the NR to inform him of the fact that the patient has been admitted under Section 3 and to confirm to the NR his powers to discharge under Section 23. The ASW should then inform the hospital as soon as this has been done.

The problem that arises for the detaining body (and which arose in the case we were involved with) is that they take the admission papers on face value that the ASW has taken all reasonable steps to contact theNR, when *in fact* this may not be the case.

In the above example, it turned out that the ASW did not comply properly with the statutory requirements and take enough steps to try and contact the NR. The question then arose as to whether or not this rendered the detention unlawful and which body is responsible for any action brought by the patient for damages for wrongful imprisonment. Section 6 of the MHA assists in answering that question. The duly completed application provides authority for the patient to be detained in the hospital named in the application. The legal question arises; if on the face of it the application appears to have been a valid application and yet, for example, the ASWs did not properly try and contact the NR, does this make the detention unlawful?

In the case of Re: SC (Mental Patient; Habeas Corpus) [1] The Court of Appeal confirmed that the law can be stated as follows:-

"Mental Hospitals are not obliged to act like private detectives and can take documents at face value. Provided they appear to conform with the requirements of the statute, the hospital is entitled to act on them"[2]

- Therefore, after having carefully checked any admission documentation for obvious errors, the Hospital Managers are entitled to act on the application without further proof of the facts stated therein;
- However, if the relevant provisions have not **in fact** been complied with the application will not be a duly completed application as required by Section 6 and the detention would be **unlawful**.

Re SC however offers the comfort to Hospital Managers that in circumstances where detention is in fact unlawful, despite an apparently proper application on the face of it, then the Hospital Managers will not necessarily be the appropriate body to sue as far as damages for wrongful imprisonment are concerned. In the example above, the Local Social Services Authority would be the more appropriate body.

It is recommended however that as soon as the Hospital Managers discover that any application is legally flawed and incapable of rectification under section 15 they should:

- Inform the patient of the situation and of the need for him to obtain legal advice;
- Make an appropriate note on the patient's file; and
- Consider exercising their powers under Section 23 to discharge the patient from his liability to be detained. If the patient is not discharged an application to the Court to order his release (known as a Writ of Habeas Corpus) would no doubt be made, on the basis that the continued detention of the patient is no longer justified.

[1] [1996] 1 All ER 532
[2] [1996] 1 All ER 536

- If necessary and appropriate a report under S.5(2) or (4) could then be made to ensure proper continuing care for the patient, pending completion of an application under Section 2 or 3.

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