

Number 45

## No sex please - we're patients!

Human Rights and Policies Restricting Sexual Activity

Article 8 of the Human Rights Act provides individuals with a right to a private and family life. It encompasses sexual activity. A recent case has considered the extent to which it is possible to restrict the sexual activity of patients<sup>1</sup>.

### Facts

The patient was detained under Section 3 of the Mental Health Act in Ashworth Hospital having been diagnosed as suffering from a psychopathic disorder. The Hospital operates a policy prohibiting sexual activity and as part of this condoms were not issued to patients. The patient stated that he was homosexual and was known to be a carrier of Hepatitis C. He contended that the policy preventing the distribution of condoms was irrational as it provided for no exceptions and that it was therefore contrary to Articles 2 and 8 of the European Convention of Human Rights.

### Court Decision

Judicial Review was refused. The first issue for the Court was whether the patient was a "victim" and therefore able to make a claim under the Human Rights Act. There was no evidence that he had been infected with a sexually transmitted disease whilst at the Hospital nor that anyone else had. It could therefore not be said that he was a victim of a breach of Convention rights. However, the Court was prepared to assume that he might be a potential victim because of the risk of infection if he engaged in sexual activities with another patient who was infected.

However, although the Claimant was therefore in a position to make a claim, the Court did not consider that the policy was unlawful. On the basis of the evidence produced by the Hospital, the likelihood of sexual activity to which the use of condoms could be relevant was very low. It could therefore not be said that as a result of any such sexual activity there was a "real and immediate threat to life" for the purposes of a breach of Article 2. Furthermore, in view of the type of patients at Ashworth, the therapeutic need to have a no sex policy could not be said to be unreasonable nor, as part of that policy, a no condoms policy. The claim based on Article 2 therefore failed.

The claim under Article 8 was also rejected by the Court. The patient contended that he had a right not to be infected with a sexually transmitted disease if in breach of the no sex rule he took part in sexual activity. However, the Court held that as the patient had failed to show a real and immediate risk to his health and that the Hospital had not taken unreasonable steps in connection with the policy, a claim under Article 8 was not made out.

### Comment

We are now beginning to see more Human Rights cases decided by the Courts. The Courts have often taken a pragmatic view. It was of note that in this particular case the Court accepted that the Ashworth Hospital policy, although potentially infringing patients' human rights, was neither unreasonable nor irrational. However, the Court did make the point that if new or exceptional circumstances were to arise, the Hospital would be under a legal duty to review its policy.

<sup>1</sup> R (on the application of Hunter) -v- Ashworth Hospital Authority

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## HEALTHCARE LAW SPECIALISTS ANNOUNCE MERGER

Radcliffes will be merging with fellow healthcare specialists, Le Brasseur J Tickle (LBJT). The new firm will be called RadcliffesLeBrasseur. LBJT will move its London practice into Radcliffes' Westminster offices, and the merged firm will retain offices in Leeds, Cardiff and Singapore.

The merger will enable RadcliffesLeBrasseur to consolidate and enhance the reputations of LBJT and Radcliffes as renowned healthcare practices.

LBJT is nationally well-known and regarded for its work on behalf of defence organisations for doctors and dentists, private healthcare providers and their indemnifiers, and the NHS for which it has provided a full range of services since its creation. Like Radcliffes, the firm advises on employment, property, commercial law, and also PFI projects, as well as being a leading adviser on NHS law and governance. It also has unrivalled experience in regulatory work before the GMC and GDC as well as with special interests in the complementary professions.

As you will know, Radcliffes specialises in advising the healthcare sector and is particularly well-known for its expertise in mental health. It is instructed by some of the largest mental health NHS Trusts and private sector mental health providers

Andrew Parsons, Head of the Health Group at Radcliffes comments, "This is an exciting opportunity to develop the depth and range of healthcare advice provided to the clients of both firms across the country."

RadcliffesLeBrasseur will have 61 partners and a total of 304 staff, and is likely to be the biggest and most broadly based national healthcare practice.

Market place changes make it all the more important that healthcare providers, professionals, and their indemnifiers, have access to independent and authoritative health law advice. RadcliffesLeBrasseur will have a talented team with practical experience in the complexities of modern health law.

### **RadcliffesLeBrasseur**

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For more information on Mental Health Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: [andrew.parsons@rlb-law.com](mailto:andrew.parsons@rlb-law.com).

Out of office emergency advice available 24hrs on 07802 506 306.

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