

Number 46

ECT and the SOAD Procedure

The Human Rights Act continues to have significant affects on psychiatric practice, and a recent case shows how it can affect even the most routine of daily psychiatric procedures.

Facts

The patient had a long history of admissions both informally and under the Mental Health Act for depression. As a result of the latest depressive episode, she was detained under Section 3 and a course of ECT was commenced following the SOAD procedures of the Mental Health Act.

After the patient had had two treatments, the hospital were contacted by a solicitor acting on behalf of the patient challenging the legality of the proposed treatment on grounds that included the following:

1. He argued that compulsory treatment constitutes a breach of Articles 3 and 8 of the Human Rights Act. In *Herczegfalvy v. Austria*, compulsory treatment was held to be lawful, and not to breach Article 3, if it constitutes a medical necessity. The patient's solicitor argued that this would only be the case for an incapacitated individual, and quoting from the Judgment:-

“... It is for the medical authorities to decide on the basis of the recognised rules of medical science, the therapeutic methods to be used, if necessary, by force, to preserve the physical and mental health of patients who are **entirely incapable of deciding for themselves and for whom they are entirely responsible...**”

The Judgment also, however, says

“As a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading”.

This is stated as a general rule, without reference to capacity. Compulsory ECT treatment would arguably therefore not constitute inhuman or degrading treatment whether or not the patient had capacity to consent, in view of the evidence that the treatment was a medical necessity, without which she was at significant risk of physical harm.

As for Article 8, it has been held ¹ that compulsory treatment is an interference with an individual's right to respect for their private life. However, a challenge under this Article would fail if the Court determined on the evidence that the treatment was necessary and proportionate for the protection of health, or one of the other derogations under Article 8(2).

2. Section 58 provides for treatment without consent if the patient is incapacitated or does not consent to the treatment but there is a likelihood it will “alleviate or prevent a deterioration of their condition”. A certificate must be obtained from a SOAD, appointed under the Mental Health Act Commission to review the RMO's decision. The patient's solicitor claimed that, as he believed she had capacity to refuse the ECT treatment and had done so, this was a relevant consideration to be taken into account by the RMO and the SOAD in determining whether or not the treatment would “alleviate or prevent a deterioration” and so in this case the decision to treat should be challenged on the basis that this was given insufficient weight, if any at all.

¹ Peters v. Netherlands

MENTAL HEALTH LAW

RadcliffesLeBrasseur
5 Great College Street
Westminster
London SW1P 3SJ

Tel +44 (0)20 7222 7040
Fax+44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU

Tel +44 (0)113 234 1220
Fax+44 (0)113 234 1573
DX 14086 Leeds Park Square

25 Park Place
Cardiff CF10 3BA

Tel +44 (0)29 2034 3035
Fax+44 (0)29 2034 3045
DX 33063 Cardiff 1

info@rlb-law.com
www.rlb-law.com

The SOAD procedure was challenged under Article 6 of the Convention, as follows. Individuals have a right to integrity of person and self-determination under the Common Law² and these rights are infringed by medical treatment in the absence of any lawful justification for the treatment (such as valid consent). These rights are civil rights, determination of which will be subject to Article 6(1) which requires a hearing by a fair and impartial Court. The SOAD procedure fails to provide this in the following ways:-

- (i) Over 90% of all SOAD's approve the treatment plan proposed by the RMO and the Commission itself has published guidelines which state that SOADs should not substitute their own opinion for that of the RMO but merely decide if the RMO's decision is "reasonable in the light of the general consensus of appropriate treatment for such a condition". Accordingly, the SOAD does not constitute a judicial or quasi-judicial body deciding upon the lawfulness of a treatment on its merits. It only reviews the RMO's decision, whilst allowing the RMO a very wide area of discretion.
- (ii) The s.58 procedure does not provide the requisite procedural fair trial guarantees such as: the right to an appeal which can be exercised before the substantive decision takes effect; the right to disclosure and to make representations on the RMO's evidence; the right to call evidence such as independent expert evidence; and the right to representation or Legal Aid. This would therefore not satisfy the European principle of "equality of arms" which the right to a fair trial embraces.

Unfortunately, the case was discontinued on the basis that it was not in the patient's best interests to continue with litigation and the questions were thus not determined fully by the Court.

The law in this respect is still therefore unclear although there has been assistance from a recent Broadmoor case³ which raised substantially the same issues. The patient there argued that compulsory treatment under s.58 of a patient with capacity was contrary to Articles 2, 3, 6 and 8 of the Convention. It was held in that case that the Court should carry out a full review of the merits of the treatment; it should include a review of the capacity of the patient and, if then appropriate, should consider whether the treatment itself contravenes the patient's human rights including whether it is necessary and proportionate under Article 8(2). Specifically, the Court held that cross-examination of the medical specialists was to be allowed to assist this review. Whilst stating that it would be reluctant to overrule a treatment plan decided upon by an RMO and certified by a SOAD, it is worth noting that the Court also said that if the SOAD's certificate was to carry any real weight if challenged in this way, then it would be necessary to show that he had reached his own independent view of the desirability and propriety of treatment. This would certainly seem to imply that an independent decision on the merits of the treatment must be taken and current practice by SOADs must be addressed.

The Court also indicated that if a patient had capacity to refuse consent to the treatment proposed, it was difficult to suppose that he should nevertheless be forcibly subjected to it.

© RadcliffesLeBrasseur
December 2001

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

Out of office emergency advice available 24hrs on 07802 506 306.
Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

Future editions can be received by email. Please e-mail: marketing@rlb-law.com or telephone 020 7227 7388.

² As established in *Airedale NHS Trust v. Bland*

³ *R (on the application of Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [Court of Appeal 22.10.01]

RadcliffesLeBrasseur
5 Great College Street
Westminster
London SW1P 3SJ

Tel +44 (0)20 7222 7040
Fax +44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU

Tel +44 (0)113 234 1220
Fax +44 (0)113 234 1573
DX 14086 Leeds Park Square

25 Park Place
Cardiff CF10 3BA

Tel +44 (0)29 2034 3035
Fax +44 (0)29 2034 3045
DX 33063 Cardiff 1

info@rlb-law.com
www.rlb-law.com