

Number 5

## Consent to Treatment and Mental Health

The recent case of *R-v- Collins and Others Ex Parte S<sup>1</sup>* has highlighted the difficulties in treating patients under the Mental Health Act for mental disorders and the importance of considering questions of capacity and consent.

Part IV of the Act sets out the provisions as to treatment and gives procedures and safeguards in relation to specific groups of treatment.

Treatment for physical disorders and for mental disorders in patients who do not come within Part IV of the Act are covered by the common law.

### Common Law

Consent (informed and free from the pressure of undue influence) must be obtained unless it can be shown that the patient lacks the capacity to consent. The treatment of an incapable patient (for physical or mental disorders) must be in the best interests of the patient.

### Mental Health Act 1983 Part IV

- **Section 57**

This covers treatment which can only be given with the patient's consent and with authorisation from a second opinion. Treatment such as psycho-surgery and the surgical implantation of hormones for the purpose of reducing male sex drive are examples.

- **Section 58**

This sets out treatment requiring consent or authorisation from a second opinion in the absence of consent. This covers treatment such as ECT and also the administration of medicine if a period of 3 months has elapsed since the first time during the period of detention when medicine for mental disorder was administered.

- **Section 62**

This confirms that Sections 57 and 58 do not apply to any treatment which:-

- Is immediately necessary to save the patients' life; or
- Which (not being irreversible) is immediately necessary to prevent a serious deterioration of his condition; or
- Which (not being irreversible or hazardous) is immediately necessary to alleviate serious suffering by the patient; or

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- Which (not being irreversible or hazardous) is immediately necessary and represents the minimum interference necessary to prevent the patient from behaving violently or being a danger to himself or to others. The procedural safeguards provided in Sections 57 and 58 do not apply to certain categories of urgent treatment therefore and it means that treatment for mental disorder can be given to the patient without his consent by virtue of the power given to the patient's Responsible Medical Officer by Section 63.

- **Section 63**

This provides that the consent of a person is not required for any medical treatment given to him for the mental disorder for which he is suffering (not being treatment falling under Section 57 or Section 58) if the treatment is given to him by or under the direction of the Responsible Medical Officer. The section only applies to formally detained patients.

In order to fall within the ambit of Section 63 the treatment must:-

- Be medical treatment - Section 145 of the Act defines this very widely. The definition includes nursing and care, habilitation and rehabilitation under medical supervision. Although it does not specifically refer to surgical treatment this is not expressly excluded.
- Be in respect of a patient who is suffering from a mental disorder as defined in the Act.
- Be given to the patient for the mental disorder.
- Be given under the direction of the Responsible Medical Officer.

It has been held that Section 63 covers the situation of force feeding a patient with anorexia nervosa and there has been criticism of the interpretation of the scope of Section 63 by those who see it as a potential means of administering medical procedures without consent under the umbrella of treatment for mental disorder.

The case of *Ex Parte S<sup>1</sup>* reconsiders the scope of Section 63 and has been welcomed by those representing patients.

### **Ex Parte S: The Facts**

A pregnant woman was advised at 36 weeks pregnant to have an induced delivery for the sake of her health and life and that of her child.

She refused treatment and following an interview with an approved Social Worker and two doctors the Social Worker applied for her admission to hospital under Section 2 of the Act.

She continued to refuse treatment and the hospital sought and obtained a declaration that they could perform a caesarean without consent. She was delivered of a baby and two days later her Section 2 was terminated.

On Appeal it was held that the Act could not be deployed to detain an individual against her will mainly because her thinking process was unusual even apparently bizarre and irrational.

### **Treatment conditions**

The following should therefore be noted when considering the administration of medical treatment:-

- Part IV of the Act allows treatment of detained patients for mental disorder without the patient's consent as set out in Sections 58, 62 and 63. Where the Act does not apply and for treatment for physical disorders the common law principles apply.
- A patient not falling within Part IV of the Act who is capable of giving consent is entitled to refuse treatment.
- A patient not falling within Part IV of the Act who is incapable of giving consent can be given treatment but only if it is in the patient's best interests and of urgent necessity to save the patient's life or to ensure improvement or prevent deterioration in physical or mental health. The treatment must be in accordance with good practice accepted by a proper body of medical opinion.
- Section 63 does not permit treatment simply for physical disorders and such treatment cannot be given without consent unless justification can be found under common law.
- In cases of doubt as to capacity where the Act does not apply the doctor should not hesitate to apply to the Court for a declaration that they may proceed to treat. Reference should be made to the guidelines handed down by the Court of Appeal<sup>2</sup> in *Ex Parte S<sup>1</sup>* as to the approach to be taken in these sort of cases.

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

Out of office 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.

<sup>1</sup> St George's Healthcare National Health Service Trust -v- S (No 2) Regina v Collins & Others Ex Parte S(No 2) August 3 1998 The Times Law Reports

<sup>2</sup> Copies available on request from Radcliffes