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BRIEFING

Number 60

Alternative Treatments and Consent after the Human Rights Act

MENTAL HEALTH LAW

Section 63 of the Mental Health Act provides that the consent of a patient detained under certain sections of the Act (including section 3) is not required for medical treatment given by or under the direction of the patient's RMO. The treatment must be for the mental disorder from which he is suffering and must not be treatment falling within sections 57 and 58 of the Act (see below). However, consent should still be sought and the Code of Practice[1] states that this is the personal responsibility of the patient's RMO.

Section 57 specifies certain treatments, namely psychosurgery and the surgical implantation of hormones for the reduction of male sexual drive, which require both the patient's consent and a second opinion. Section 58, provides that administration of medicine for the patient's mental disorder beyond an initial 3 month period (as well as treatment by ECT at any time) requires either the patient's consent, or a Second Opinion Approved Doctor (SOAD) appointed by the Mental Health Act Commission to certify that the patient either does not have the capacity to consent or does not consent but should be given the treatment anyway having regard to the likelihood of its alleviating or preventing the deterioration of the patient's condition.

It is the responsibility of the doctor proposing to treat a patient to determine their capacity to consent, as highlighted in paragraph 15.9 of the Code of Practice. However, as above, the statutory framework provides for treatment in either event. In addition, the common law provides that treatment of an incapable patient may be carried out in the patient's best interests under the common law doctrine of necessity. Even for treatment under S.63, this should also only be given if considered to be in the patient's best interests. In making this decision, the RMO should pay particular attention to any available alternatives, such as administering medication orally as opposed to by injection, and take the patient's wishes into consideration. This analysis should also be carried out by the SOAD under the S.58 procedure[2] in assessing whether the treatment is likely to alleviate or prevent a deterioration in the patient's condition.

It is also necessary to consider whether treatment without consent would constitute a breach of the Human Rights Act 1998.

Article 3 of the Convention of Human Rights prohibits "inhuman and degrading treatment". This is an unqualified right, and in certain circumstances could encompass compulsory treatment. However, this right is subject to a minimum level of severity, and the European Court of Human Rights has stated[3] "ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3… it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim".

[1] At paragraph 16.4

[2] "… where it is not possible to agree with the patient the form the treatment is to take and the consultant feels the imposition of treatment is essential he should, wherever there is a choice, select the method of treatment the patient finds least objectionable or which would represent the minimum interference with the patient" (1978 White Paper Cmnd.7320 para 6.18).

[3] Peers v Greece (Application number 28524/95).

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

In relation to mental patients, the Court has stated[4] "whilst it is for the medical authorities to decide on the basis of the recognised rules of medical science, the therapeutic method 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 responsible, such patients nevertheless remain under the protection of Article 3, the requirements of which permit no derogation". Whilst this statement appears to refer only to an incapacitated individual, the Judgment continues by stating (by way of a general rule, without reference to capacity) "the established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a method which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist".

Accordingly, the test is whether or not the proposed treatment is a "medical necessity" which must be "convincingly shown". This is a high standard which has been said[5] to exceed the civil test of "the balance of probabilities" although it is not the same as the criminal standard of proof "beyond reasonable doubt".

Whether there is any other less invasive treatment available would be relevant to Article 3. Therefore, the suitability of an alternative form of the medication for example must be taken into account by the RMO in assessing medical necessity. The question of whether or not a responsible body of opinion supports the proposed treatment is also relevant to the question of whether a Court would find it to be in the patient's best interests or medically necessary.

Article 8 is also relevant. This provides that everyone has the right to respect for his private and family life. Compulsory treatment was expressly held to be a prima facie interference with this right, in *Peters v Netherlands.* However, the right to a private life is qualified and a challenge under this Article would fail if the Court determined on the evidence that the proposed treatment was necessary and proportionate for "the protection of health", which is one of the derogations provided for in Article 8. In deciding what is "necessary and proportionate" one must look at the availability of alternative measures.

Finally, if medication is provided under the SOAD procedure, this raises questions under Article 6 of the European Convention of Human Rights (the right to a fair trial), which remain unanswered following the decision in *Wilkinson v Broadmoor Special Hospital Authority*"[6]. The Court in this case, whilst stating that it would be reluctant to overrule a treatment plan decided upon by an RMO and certified by SOAD, also said that if the SOAD certificate was to carry any real weight, if challenged in this way, it would be necessary to show that he had reached his own independent view of the desirability and propriety of treatment, rather than merely endorsing the RMO's decision.

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

[4] Herczegfalvy v Austria (1992) 18 BMLR 48.
[5] R (on the application of N) v Dr M and others [2002] EWCA Civ 1789
[6] [2002] All ER (D) 294 (Oct).

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