

Number 85

Contacting a patient's family – how far does the right of confidentiality extend?

RadcliffesLeBrasseur have recently represented a private sector mental healthcare provider in a successful defence of proceedings in which a patient sought judicial review of the decision of his Responsible Medical Officer (RMO) who wished to contact the patient's parents without his consent. The purpose was to obtain information relevant to the patient's risk assessment, treatment and for the purposes of considering issues concerning the patient's proposals to seek leave.

The patient is detained at a hospital as a result of his conviction for actual bodily harm on his father. He is held under Sections 37 and 41 of the Mental Health Act 1983 for the purposes of treatment and will remain detained unless and until the Home Secretary and/or the Mental Health Review Tribunal determine that there no longer exist grounds for him to continue to be subject to the statutory detention.

The patient sought to prevent the RMO (and any other members of the hospital's clinical staff) from contacting his parents in order to seek information that the RMO considered necessary for a full diagnosis of the patient's mental condition and the preparation of an appropriate plan for treatment, including an assessment of the risk of releasing the patient, who had a history of violent offending.

The patient asserted that he was not suffering from any mental illness or disorder within the terms of the 1983 Act. This was not supported by the weight of the clinical evidence, both via the RMO, previous psychiatrists who had seen the patient and an expert psychiatrist who gave evidence at a hearing to determine whether the patient had sufficient capacity to instruct solicitors in this action.

The patient argued that the proposed enquiries, to which the patient took strong objection, were in breach of his rights under Article 8 of the Human Rights Act. Article 8 protects an individual's right "to respect for his private and family life, his home and his correspondence"; this has been interpreted to include to an individual's right to privacy and confidentiality.

It was argued on behalf of the hospital that the proposed contact with the patient's parents would not breach his Article 8 rights as it was only proposed to *seek* information from the patient's parents and this act would not itself involve disclosure of any confidential information concerning the patient. The only information that the hospital would provide would relate to the identity of the person seeking the information. It was not intending to make any disclosures as to the patient's clinical condition or as to the diagnosis of matters relating to his treatment.

Relationships between the patient and the RMO had broken down and the patient's objections to the RMO making contact with his parents were, on the evidence before the Court, motivated by the belief that the object of the RMO in seeking contact with his parents was to confirm that the patient was mentally ill. It was submitted on behalf of the patient that the information was not going to be used to form a considered opinion about the patient's treatment etc but in order for the RMO to keep the patient in detention under the Mental Health Act 1983. This belief was described by the expert psychiatrist who gave evidence at the Capacity Hearing as "delusional".

The Court's view

The Court held that, contrary to the patient's arguments, enquiries as proposed by the hospital did not constitute "treatment" under the terms of the Mental Health Act 1983. Treatment was something

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actually “done” to a person, all the more so when treatment was “medical treatment”. Detention of a patient against his will, the force feeding of a patient, the administration of drugs to a patient against his will and with force all require legal authority, otherwise they will constitute a legal wrong. Contact with family members did not fall within this category.

The Judge acknowledged that communication by the RMO of confidential medical information about the patient without his consent would, prima facie, amount to an infringement of Article 8. However, having considered the questions to be put by the RMO and having no doubt that the RMO was conscious of his professional obligations not to disclose confidential information without the patient’s consent, the Judge found that the object of the RMO’s enquiries was to obtain information and *not* to communicate it to the patient’s parents. The patient had not established that confidential information would be disclosed. Accordingly, the Court found that no Article 8 rights of the patient were infringed as a result of the RMO asking questions of the patient’s parents. The mere contact by the RMO with the patient’s parents could not itself infringe the patient’s Article 8 rights.

The Judge pointed out that the patient had not made any claim alleging that his parents would communicate, if asked by his RMO, confidential information relating to the patient’s family history. Had such a claim been clearly made that contact with his parents might be a breach of confidence the Court accepted that this would have given rise to an “interesting point and possibly difficult questions would have arisen”.

Justification under Article 8(2)

The Judge went on to say that had he found that the patient’s rights were engaged by Article 8 he would nevertheless have found that such enquiries were permitted under English law; there should be provision for such enquiries in a democratic society to prevent unnecessary detention and avoid premature discharge of those who are mentally ill. Those enquires should be made by the decision maker, in this case the RMO, with reference to proportionality and reasonableness. Accordingly, the Trust would have been successful in placing reliance on Article 8(2) to justify any breach of the patient’s Article 8 rights. Article 8(2) provides justification for a breach of confidentiality if such a breach is undertaken with the aim of addressing a public interest, e.g. for the protection of health, provided the breach is proportionate to the aim sought and is in accordance with the law.

The Judge acknowledged the importance of the Mental Health Review Tribunal having information that had a material bearing on its decision regarding the patient’s leave and possible discharge. The benefits of speaking to the patient’s parents could not be predicted but the risks of doing so outweighed the consequences that the benefits could not be surmised.

For more information on this case or mental health law in general, contact Alexandra Johnstone or Andrew Parsons at RadcliffesLeBrasseur on 020 7222 7040 or email alexandra.johnstone@rlb-law.com.

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Radcliffes Mental Health Team Receives Plaudits

The latest edition of the Chambers Directory of the Legal Profession has ranked the RadcliffesLeBrasseur team as number one for advising mental healthcare providers. Andrew Parsons has been ranked as a leading individual lawyer in the country. The Directory recognises our “established reputation in mental health” and hails the team as “pragmatic and responsive”.

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.

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