

Number 87

## Treatment, Nearest Relatives and Managers' Decisions

### Treatment under Section 63 - more new law

Last year we reported a Court of Appeal decision restricting the use of Section 63 significantly. The Court of Appeal held that on a careful consideration of the wording of Section 63, it could be used only to authorise treatment of a patient's classified mental disorder rather than any other mental disorder.

The case<sup>1</sup> has now been reviewed by the House of Lords and the Court of Appeal decision has been overturned.

The House of Lords held that on their true construction, the words of Section 63 did authorise a patient to be treated for any mental disorder from which he was suffering, irrespective of whether this fell within the classified disorder specified in the application, order or direction justifying his detention.

The court reviewed the Act and commented that Section 63 was drafted in the widest possible terms, namely:

*'the consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering, not being treatment falling within Section 57 or 58 above, if the treatment is given by or under the direction of the responsible medical officer'*

Because the section simply referred to mental disorder rather than "classified mental disorder", the House of Lords held that treatment was not restricted to the classified disorder as the Court of Appeal had decided. The House of Lords held that if it had been intended to restrict Section 63 to the patient's classified mental disorder, the section would have said this.

### Comment

This decision is to be welcomed. Our view had been that the Court of Appeal decision was unduly restrictive and unhelpful for the treatment of patients. In many cases it would also be a trap for unwary medical staff who were unaware of this case decision.

The use of Section 63 is, therefore, unrestricted and may be used for the treatment of any mental disorder from which a patient is suffering, whether classified or not.

### Choosing your nearest relative

The European Court has previously held<sup>2</sup> that Section 26 does not comply with the European Convention on Human Rights as it does not permit a patient to choose their nearest relative.

<sup>1</sup> R(on the application of B) v Ashworth Hospital Authority [2005] All ER(D)279 (MAR)

<sup>2</sup> JT v UK [2000]1 FLR 909

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The Government have still not made a Remedial Order to correct this. The court has recently reconsidered the impact of these provisions and the operation of the Mental Health Act<sup>3</sup>, and confirmed that a patient does have the right to choose a nearest relative and in particular to decide whether the nearest relative must be notified of an application for assessment or admission. Where the patient objects to the nearest relative being involved in this, the court held that it would be a breach of their rights under Article 8 if this were ignored.

### Managers' reviews of barring order

Where a patient's nearest relative seeks discharge and a barring order is made by the RMO under Section 25, the Code of Practice requires the managers to review that decision. The court<sup>4</sup> has recently held that at such reviews the managers must expressly consider the issue of the patient's dangerousness pursuant to the criteria in Section 25. A failure to give reasons for the managers' decision that did not make it plain that those criteria had been considered was held to be unlawful.

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### Correction

In Briefing No 84 we referred to patients voting in the forthcoming election with Section 17 leave. In fact the Representation of the People Act permits only postal or proxy voting by detained patients.

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<sup>3</sup> R (on the application of E) v Bristol City Council [2005] all ER (D) 57 (Jan)

<sup>4</sup> R (on the application of O) v W. London Mental Health NHS Trust [2005] All ER (D) 275 (Mar)