

# Health Service Circular HSC(98)122 *L v Bournewood Community and Mental Health NHS Trust*

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NHS Executive

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## Summary

In a decision given on 25 June 1998 the House of Lords overturned the December 1997 ruling by the Court of Appeal in this case (Martin Brown's letter of 19 December to NHS Trust Chief Executives refers). This note provides preliminary guidance to managers and clinicians on the practical consequences of the House of Lords decision.

## Background and Other Information

This note gives preliminary guidance on the practical consequences of the House of Lords decision. More detailed guidance will be included in the revised Mental Health Act Code of Practice which, subject to Parliamentary approval, will be published in the late autumn. The wider implications of the judgments of the law lords are being considered in the context of development of Government policy on mental incapacity more generally.

The House of Lords overturned the earlier ruling by the Court of Appeal. A note on the outcome is annexed to this circular. The effect is to reinstate the previous understanding regarding hospital admission of incapacitated patients for treatment for mental disorder. The decision confirms that provisions in section 131(1) of the Mental Health Act 1983 allow an incapacitated patient, who does not appear to be unwilling to be admitted, to be admitted as an informal patient.

This means that apparently compliant incapacitated patients such as 'L' do not need to be formally detained under the Act. Admission to hospital and subsequent assessment and treatment for mental disorder can be based on common law principles of necessity. The requirements of the principles are that (1) there must be 'a necessity to act when it is not practicable to communicate with the [patient]', and (2) 'the action taken must be such as a reasonable person would in all the circumstances take, acting in the best interests of the patient' (*per* Lord Goff *In Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, at 75H).

The ruling does not affect guidance in the Code of Practice that consideration should be given to formally detaining a patient who lacks capacity to consent to admission to hospital but is not compliant and objects to admission, or subsequently demonstrates unwillingness to remain in hospital. Non-compliance may be evidenced by a patient who resists necessary treatment or persistently and purposely tries to leave hospital. Compliance should not be assumed if the patient's intentions are not clear.

On admission to hospital patients should always be subject to a full clinical assessment including assessment of mental capacity. Arrangements for continuing care and treatment in hospital should be reviewed on a regular basis in accordance with the principles of the Care Programme Approach. This applies whether or not a patient lacks capacity on admission. If a patient lacks capacity at the time of an assessment or a review it is particularly important that both clinical and social care requirements are considered and that account is taken of the patient's ascertainable wishes and feelings and the views of their immediate relatives or carers on what would be in their best interests. It is good practice for the clinical

- A team to arrange for such patients to be visited periodically by the hospital managers or by an independent advocate if no-one from outside the hospital would otherwise take a continuing interest in their care.

*Patients Detained as a Consequence of Court of Appeal Judgment*

- B Hospital managers have discretion to review the detention of any patient who is admitted under Part II of the Act. This applies in particular to the above group of patients. In the light of the House of Lords decision managers should consider reviewing, on a case by case basis, whether it is necessary for these patients to remain subject to formal detention under the Act. In doing so managers should consider information about the patient's current clinical state and level of co-operation with necessary treatment. Managers should also take account of other relevant information about his or her social care requirements and should ascertain the views of immediate relatives and carers on what would be in the patient's best interests.

D *Duties under Section 117 of the Act*

- Under section 117(1) of the Act (as amended by the Mental Health (Patients in the Community) Act 1995) after-care duties apply when a patient leaves hospital following a period of detention under section 3, whether or not discharge from hospital takes place immediately after the patient is discharged from detention under the Act. There is therefore a section 117 after-care entitlement however long the patient stays in hospital informally after ceasing to be detained under the Act.

*Discharge Arrangements*

- F Arrangements for discharge should always be carried out in accordance with the principles of the Care Programme Approach whether the patient is formally detained under the Act or treated as an informal patient.

**ANNEX**

**L v Bournewood Community and Mental Health NHS Trust – a note on the outcome of the appeal to the House of Lords**

G *The Appeal*

- On 2, 3, 4 and 8 June 1998 the House of Lords (Lords Goff, Lloyd, Nolan, Steyn and Hope) heard an appeal by the Bournewood Community and Mental Health NHS Trust against the decision of the Court of Appeal in October 1997 that Mr L was unlawfully detained when admitted informally to Bournewood hospital on 22 July 1997 and treated there afterwards. The Secretary of State for Health, the Mental Health Act Commission and the Registered Nursing Homes Association intervened in the appeal. The House of Lords allowed the appeal and restored the order of the High Court refusing habeas corpus, a claim for damages for false imprisonment and judicial review of the Trust's decision to admit Mr L (who was the respondent to the appeal through his 'next friend', his carer Mr GE).

*The Judgments*

- J Lord Goff delivered the main judgment allowing the appeal. Lords Lloyd and Hope agreed. Lords Nolan and Steyn also allowed the appeal agreeing that s131(1) of the Mental Health Act 1983 permits the admission of compliant incapacitated patients where the requirements of the common law principle of necessity are satisfied. But in partially dissenting judgments, Lords Nolan and Steyn held that Mr L was detained when admitted and treated informally in hospital from July to October 1997, agreeing in this respect with the Court of Appeal.

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