
Service and Clinical Governance Directorate

Policy & Procedural Guidance on The Admission and Treatment of Patients who lack Capacity ('Bournewood')

DRAFT 2

Implementation Date:	March 2005
Review Date:	March 2006
Policy Section Number:	Section 1
Policy Number:	

1. Introduction

On 5th October 2004 the European Court of Human Rights gave judgment in the case of *H.L. v United Kingdom*, which is otherwise known as the '*Bournemouth Case*'.

The case concerned Mr L, a 49-year-old man with autism and learning difficulties, who had been admitted to Bournemouth Hospital in 1997 as an informal patient, on the grounds that he required treatment for a mental disorder, was compliant, and did not have capacity either to consent to or refuse admission and treatment.

Mr L brought legal proceedings against Bournemouth Hospital on the grounds that he had been unlawfully detained. Those proceedings came before the High Court, the Court of Appeal and the House of Lords.

- The High Court ruled that Mr L had not been 'detained' and that he had been treated in his 'best interests' under the common law doctrine of 'necessity'.
- On appeal, the Court of Appeal held that Mr L *had* been detained and that incapable patients should only be admitted to hospital under the Mental Health Act 1983.
- On further appeal, the House of Lords overturned the decision of the Court of Appeal and ruled that Mr L had *not* been 'detained' and that his admission and treatment were lawful under the common law doctrine of 'necessity'.

On 5th October 2004 the European Court of Human Rights ('ECtHR') ruled that Mr L had been 'detained' and that there had been a breach of the right to liberty in Article 5 of the European Convention on Human Rights ('ECHR').

2. Implications of the European Judgement

- 2.1. The ECtHR has introduced additional considerations into the treatment of mentally incapable patients, and it should no longer be assumed that they may be admitted to hospital and treated under the common law, even if they are compliant and unresisting. This is because the ECtHR found that the common law doctrine of 'necessity' was both arbitrary and so lacking in the necessary procedural safeguards that it breached the right to liberty.

- 2.2. The judgment will have implications for incapable patients who must receive treatment in their best interests, and those implications may follow regardless of the hospital setting. For example, use of 'necessity' may be unlawful, not only in mental health settings, but also on the general wards of acute hospitals, and in care homes and independent hospitals.

3. Department of Health Guidance

- 3.1. In December 2004, the Department of Health issued interim advice in which it acknowledged that new procedural safeguards were required.¹ The Government has undertaken to consult stakeholders and to bring forward proposals designed to meet the requirements of Article 5 ECHR. This may involve amendments to the Draft Mental Health Bill or Draft Mental Capacity Bill. There is no indication of the timescale for this and, consequently, the Trust has found it necessary to introduce an interim protocol. This protocol incorporates the Department of Health advice, guidance issued by the Royal College of Psychiatrists' Faculty for the Psychiatry of Old Age² and guidance produced by the Trust's legal representatives, Hempsons.³
- 3.2. If and when the Government introduces safeguards for the protection of 'Bournewood' patients it will be necessary to review and amend this policy and procedure.

4. Procedure

- 4.1. Those considering admission must carry out an assessment of capacity in order to determine whether the patient is able to consent to admission and treatment. For the purposes of this policy and procedure it is assumed that the treating clinician is familiar with the tests of capacity as developed through case law and incorporated in existing BMA Guidance.
- 4.2. If the patient is found to be capable of providing valid consent to admission to hospital, then, if it is considered that informal admission is appropriate, no further

¹ Department of Health, *Advice on the decision of the European Court of Human Rights in the Case of HL v UK (The 'Bournewood' Case)* [Gateway Reference 4269]

² Royal College of Psychiatrists, *Guidance for Old Age Psychiatrists on Appropriate Restriction of Liberty of Inpatients Outside of the Mental Health Act following the European Court's decision on HL v UK (the 'Bournewood' Case)*, 2005

³ Hempsons Solicitors, *Bournewood Patients: The Common Law is not Enough*, October 2004

action need be taken. (However, the patient's capacity and consent to informal admission should be subject to continuous review.)

4.3. If the patient is found to be **incapable** of providing valid consent to admission to hospital, then, if it is proposed to admit him/her to hospital, the following procedure should be followed:

- Consider whether the steps that are to be taken with regard to the patient, and the care and treatment that are to be given to him/her in hospital, amount to 'detention' as the ECtHR understood that term. (The Court held that Mr L was 'detained' in Bournemouth Hospital because health care professionals "exercised complete and effective control over his care and movements", and because he "was under continuous supervision and control and was not free to leave".) If an incapable patient is not and could not be deemed to be 'detained', the *Bournemouth* judgment is of no effect and this interim protocol will not apply. However, practitioners should err on the side of caution and, in cases of doubt, act as if a patient is incapable. The rest of the protocol assumes that the patient is – or might be deemed to be – 'detained'.
- If appropriate, involve the patient's family, carer(s), friends and advocate(s) in the decision-making process and document the outcome of discussions.
- Consider alternatives to admission to hospital or residential care and document the outcome of all alternatives.
- Consider carefully whether the patient meets the criteria for detention under the Mental Health Act 1983. If so, and unless there are compelling reasons to the contrary, the patient should be so detained. **Use of the Mental Health Act will ensure that the patient's Article 5 rights are not breached.**
- If, after consideration of all the above, it is proposed to admit the patient informally to hospital, then careful consideration should be given to the degree of control and supervision that is necessary for the patient's safe management.

4.4 Where it is considered necessary to admit an incapable patient to hospital even though s/he cannot be detained under the Mental Health Act 1983, the Trust will – and its staff are urged to – take steps to ensure that s/he is provided with all safeguards consistent with the Trust's powers, duties and resources. In particular:

- There should be effective, documented care planning for such patients, including the Care Programme Approach where that is relevant. A patient's

family, friends and carers should be involved in the planning of care, so long as that is appropriate, and their involvement should be carefully recorded.

- Appropriate information should be given to patients and, if appropriate, to their family, friends and carers. This might include: information about the purpose and reasons for a patient's admission to hospital; proposals to review the care plan and the result of such reviews; and how decisions by the Trust may be challenged. The giving of such information should be carefully recorded.
- If appropriate (and where available), local advocacy services may be invited to support patients and their families, friends and carers. Any such invitations should be recorded.
- If appropriate, patients should be encouraged and enabled to retain contact with their families, friends and carers, and proper consideration should be given to the views of such people.
- If it is thought to be contrary to a patient's interests for a step to be taken that is set out in this interim protocol, that fact and the rationale for it should be documented and explained to everyone whom it will affect.
- The patient's capacity and care plan should be kept under continuous review. If appropriate, an independent element may be incorporated into any such review. Depending on the circumstances, this might be achieved by involving social work or community health staff, or by seeking a second clinical opinion from inside (or even outside) the Trust. A second opinion will be particularly important where members of a patient's family, or his/her carers or friends, do not agree with the Trust's decision(s).

4.5 The judgment of the ECtHR isn't confined to incapable patients who are to be admitted hospital in future. For those patients who are already accommodated on an in-patient ward and who are not detained under the Mental Health Act 1983, the treating clinician should:

- Identify whether the patient has capacity to consent to his/her continued accommodation in hospital.
- If the patient *has* such capacity, no further action is required.
- If the patient is found to *lack* such capacity consideration must be given to the degree of control and supervision that applies in his/her case. If s/he is or may be said to be 'detained' consideration should be given to using the Mental Health Act 1983.

- In the case of an informal patient who is thought to require hospital admission but who may not be detained under the Mental Health Act 1983, the measures set out in paragraph 4.4 should be followed.