

Bournewood: Law and capacity

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The Law Lords in June 1998 overturned the judgement in the matter of *L. v. Bournewood*. The Law Lords, on a majority decision, were of the opinion that a compliant incapacitated patient such as *L.* does not need the formal powers of the Mental Health Act and admission to hospital and subsequent assessment and treatment for mental disorder can be based on the common law principles of necessity. However, this position is quite contrary to the Appeal Court judges' view, "The right of a hospital to detain a patient for treatment for mental disorder is to be found in, and only in, the 1983 Act, whose provisions apply to the exclusion of the common law principle of necessity" (*L v. Bournewood Community Mental Health Trust*, 1997).

Lord Steyn, in his conclusion, was of the opinion that the effect of the decision of the House of Lords in overturning the Appeal Court decision was:

- (a) that the result would be an indefensible gap in our mental health law; and
- (b) the general effect of the decision of the House is to leave compliant incapacitated patients without the safeguards enshrined in the Act of 1983.

In the wake of the House of Lords judgement, the NHS Executive and the Welsh Office have

given the following instructions to Trust managers

Hospital managers have a discretion to review the detention of any patients who are admitted under Part II of the Act. In the light of the House of Lord's 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 cooperation 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 interest" (Wilcox, 1998).

References

- L v. BOURNEWOOD COMMUNITY MENTAL HEALTH TRUST* (1997) Court of Appeal Judgement. 2 WLR, 764.
 WILCOX, B. (1998) WHC (98) 32, July 1998. Welsh Office.

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