Appendix Two

The Bournewood Case

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Bournewood: the case

The Bournewood case started in July 1997 when a 49-year-old severely autistic man, known as HL, who could not speak, was admitted to Bournewood psychiatric hospital, Surrey, after becoming distressed at a day centre.

When the day centre staff were unable to contact HL’s carers (Mr and Mrs E) and could not contain the situation, a GP tried to calm him down with medication. When this didn’t work the GP referred him to the local hospital where he was seen by a psychiatrist. The psychiatrist couldn’t tell whether HL had a psychiatric condition or behavioural problem, so decided to admit him for observation. When he was discharged just over four months later, his carers claimed HL looked like “someone out of Belsen”.

Court rulings

While he was in hospital, Mr and Mrs E began legal proceedings over his detention. After failing in the High Court, they went to the Court of Appeal, which backed them in December 1997, ruling that the informal admission to hospital was unlawful, even though he was incapable of agreeing to or refusing treatment.

The Bournewood Community and Mental Health NHS Trust sectioned HL after this ruling, before releasing him in December 1997 with a care plan and monitoring arrangements.

The House of Lords then overturned the Appeal Court’s decision in June 1998 and found in favour of the hospital – now backed by the Department of Health. This ruling had huge implications as it ended the situation where people with conditions such as Alzheimer’s, dementia or learning disabilities would have to be sectioned under the Mental Health Act 1983 before being admitted to care for short periods of treatment.

A subsequent health service ombudsman report in 2002 found that the NHS trust should not have detained HL, saying that even if it felt it was right to keep him overnight “it is difficult to see why he was not discharged the next day. Any further assessment could have been conducted in the community”.

European Court of Human Rights’ verdict

Mr and Mrs E then took their case to the European Court of Human Rights, which ruled in October 2004 that HL had been deprived of his right to liberty under article 5 of the human rights convention. HL had not been detained under the Mental Health Act 1983, instead he was accommodated in his own “best interests” under the common law doctrine of ‘necessity’. The European court held that this doctrine was too arbitrary and lacked the safeguards provided to those sectioned under the Mental Health Act.
Serious case review

Mr and Mrs E then wrote to Surrey's adult protection committee in August 2005 asking for an independent review into HL's treatment. This was finally published in September 2008, although much to the couple’s disappointment only the summary was made public.

The serious case review found that HL's period in Bournewood had "resulted in an adverse effect upon his physical condition"; his detention was unnecessarily long and community-based alternatives had not been considered; and that the “system” did not allow it to be challenged.

It also said that if the detention happened today it could be investigated as potential professional abuse under Surrey’s multi-agency safeguarding procedures “due to alleged misuse of therapeutic powers”.

But it added: “Given the widespread practice at the time, applying today’s criteria to what happened then, it is unlikely it would have been found to have been professional abuse.”

Closing the “Bournewood gap”

The numbers of non-compliant patients being held against their will is unknown, but in a consultation between March and June 2005 to seek views on potential ways to close the “Bournewood gap”, the government estimated it could be as many as 50,000 of those permanently admitted to care homes and 22,000 hospital in-patients.

The consultation resulted in the introduction of safeguards for people who lack capacity and are detained for treatment or care. The deprivation of liberty safeguards, which come into force in April 2009, provide a framework for authorising and challenging detentions.

The Mental Health Act 2007 - as well as amending the Mental Health Act 1983 - was used as the vehicle for introducing deprivation of liberty safeguards into the Mental Capacity Act 2005. The safeguards will strengthen the rights of hospital patients and those in care homes, as well as ensuring compliance with the European Convention on Human Rights.

The safeguards include:

- A third party, such as a relative or carer, can request an assessment of whether or not a person is being deprived of their liberty.

- Anyone who does not have family or friends who can be consulted will have an Independent Mental Capacity Advocate instructed to support and represent them during the assessment process. IMCAs will also be a right for those whose representative or supervisory authority believes it is necessary.