Widening the ‘Bournewood Gap’?

David Hewitt[[1]](#footnote-1)\*

**In re F (Adult: Court’s Jurisdiction)**

**Court of Appeal, 26 June 2000**

The rights of a compliant, incapacitated adult could best be preserved by subjecting her to greater

compulsion

**Introduction**

These proceedings were a sequel to the case reported as Re F (Mental Health Act: Guardianship),[[2]](#footnote-2) in

which the Court of Appeal held that wardship proceedings were preferable to guardianship

proceedings under section 7 of the Mental Health Act 1983 where there were concerns for the

wellbeing of a seventeen-year-old girl who had a mental age of between five and eight years.[[3]](#footnote-3)

**Facts**

The young woman who had been the subject of the previous case, Miss T, was now eighteen

years-of-age, and the wardship jurisdiction had therefore become unavailable. Her parents had

withdrawn their consent for her to reside in local authority accommodation and, following her

father’s death, her mother had continued to seek T’s return home. Invoking the inherent jurisdiction

of the High Court, the local authority had sought declarations, the effect of which would be to keep

her in residential accommodation and to restrict contact with her mother and other members of her

family. At first instance, Johnson J held on a preliminary issue that the High Court did enjoy the

requisite jurisdiction, pursuant to RSC Order 15, rule 16, and gave the mother permission to appeal.

**The Appeal**

For the purposes only of the Appeal, and despite her mother’s contrary view, it was agreed that T

lacked capacity to decide where her future home should be. Her mother sought to set aside the

order of Johnson J and to strike out the claim of the local authority as disclosing no reasonable

cause of action. The Official Solicitor appeared as guardian of T and sought an investigation of her

best interests.

**Argument**

The mother’s counsel, Mr Richard Gordon, QC, argued that none of the three routes by which

the local authority might obtain relief was applicable to this case. First, there was no statutory

justification for granting what was in effect an immunity against liability: the extensive

guardianship powers contained in the 1959 Mental Health Act had been circumscribed by the 1983

Act, and an order under the 1983 Act had in any case already been refused; the only other

analogous powers - in section 135 of the 1983 Act or section 47 of the National Assistance Act

1948 - were of severely limited effect. Second, there was no possibility of wardship proceedings as

T was now over 18 years-of-age. And third, the doctrine of necessity could not apply. It was this

last submission that was to take up most of the Court’s time.

Mr Gordon argued that the 1959 Act had ousted the High Court’s former *parens patriae*

jurisdiction, which had not been revived when the 1983 Act restricted the guardianship regime.

Consequently, the Court’s inherent jurisdiction was now severely limited in scope, and could only

be used to make ‘advisory declarations’ such as those relating to medical issues such as sterilisation,

caesarian section or hysterectomy. It would no longer cover ‘coercive declarations’, such as those

sought in this case, which concerned long-term intervention without limit of time and without a

clear view of the subject’s future requirements.

For the local authority, Mr Nigel Pleming, QC argued that the doctrine of necessity would operate

whenever decisions were made about the care and protection of an incapable adult, no matter that

those decisions might be extremely trivial. As was demonstrated by the case of *R v Bournewood*

*Community and Mental Health NHS Trust, ex parte L*,[[4]](#footnote-4) most such decisions were made by family

members, or by medical or care staff, without recourse to the courts.

The Official Solicitor was represented by Mr Roger McCarthy, QC, who submitted that the Court

was not constrained by the terms of the local authority’s application, and might make a declaration

in terms more suited to the facts as they emerged. Such a declaration need not, therefore, have a

coercive effect. He sought an investigation, not only of T’s capacity but also, should it prove

appropriate, of her true wishes, and argued that it would be helpful if, whatever its decision on the

merits of the appeal, the Court were to make findings of fact as to where her best interests would

lie. There were other issues, such as T’s right to association with her family, which might more

appropriately be resolved at a substantive hearing.

**Decision**

The President of the Family Court, Dame Elizabeth Butler-Sloss, agreed with Mr Gordon both that

there was no statutory authority for intervention by the local authority and that the possibility of

wardship had now disappeared. She pointed out that without the doctrine of necessity, the court

would be unable to regulate the future arrangements for T.

As far as necessity was concerned, she said that three questions must be answered:

***1. Do the present facts demonstrate a situation in which the doctrine of necessity might***

***arise - that is to say a serious justiciable issue that requires resolution in the best***

***interests of an adult without the mental capacity to decide for herself?***

T did not have the capacity to decide where she should live, and the respective views of her mother

and the local authority on this point were irreconcilable. T’s welfare was in dispute, and she was at

such risk that if she were under 17 years-of-age she would probably have been made the subject of

a care order. The President cited the judgment of Sir Thomas Bingham, MR in Re S *(Hospital*

*Patient: Court’s Jurisdiction)*,[[5]](#footnote-5) in which he reviewed the declaratory jurisdiction in respect of those

persons who lacked the capacity to make decisions in their best interests. He said:

“The consequence of this inability is not that the treatment of patients is regarded by the courts

as a matter of indifference, nor that patients are regarded as having no best interests. Instead, in

cases of controversy and cases involving momentous and irrevocable decisions, the courts have

treated as justiciable any genuine question as to what the best interests of a patient require or

justify. In making these decisions the courts have recognised the desirability of informing those

involved whether a proposed course of conduct will render them criminally or civilly liable;

they have acknowledged their duty to act as a safeguard against malpractice, abuse and

unjustified action; and they have recognised the desirability, in the last resort, of decisions being

made by an impartial, independent tribunal.”[[6]](#footnote-6)

The President had no doubt that in this case there was a serious, justiciable issue which required a

decision by the courts.

***2. Has recourse to the inherent jurisdiction been excluded by the statutory framework of***

***the mental health legislation?***

As far as the guardianship provisions of the 1959 Mental Health Act were concerned, the President

noted that they were:

“... neither comprehensive nor exhaustive and did not cover a multitude of every day activities

in which decisions are made on behalf of a person unable to decide for him/herself.”

The amendments introduced by the legislation of 1982 and 1983 - principally, the 1983 Mental

Health Act - had done nothing to alter this position. Although the House of Lords had held that

the common law could not be used to fill a vacuum in the statutory regime,[[7]](#footnote-7) the regime in question

- which provided powers of detention - was intended to be exhaustive. However:

“ ... the English mental health legislation does not cover the day-to-day affairs of the mentally

incapable adult and the doctrine of necessity may properly be invoked side by side with the

statutory regime.”

The President noted that in the *Bournewood* case, the House of Lords had held that in relation to

informal patients, the doctrine of necessity was preserved by section 131 of the 1983 Act. She cited

the following words of Lord Goff of Chieveley:

“It was plainly the statutory intention that [patients who are admitted as informal patients under

section 131(1) but lack the capacity to consent to such treatment or care] would indeed be cared

for, and receive such treatment for their condition as might be prescribed for them in their best

interests. Moreover the doctors in charge would, of course, owe a duty of care to such a patient

in their care. Such treatment and care can, in my opinion, be justified on the basis of the

common law doctrine of necessity, as to which see the decision of your Lordship’s House

in R*e F (Mental Patient: Sterilisation).* It is not therefore necessary to find such justification in the

statute itself, which is silent on the subject. It might, I imagine, be possible to discover an

implication in the statute providing similar justification, but even assuming that to be right, it

is difficult to imagine any different result would flow from such a statutory implication. For

present purposes, therefore, I think it appropriate to base justification for treatment and care of

such patients on the common law doctrine.”[[8]](#footnote-8)

T’s mother had invested a faith in Black v Forsey that in the light of Bournewood was misplaced. The

inherent jurisdiction of the High Court to grant declaratory relief had not been ousted by the 1983

Mental Health Act.

***3. If the doctrine of necessity is not excluded, does the problem arising on this appeal come***

***within the established principles so as to give the court jurisdiction to hear the issue of***

***T’s best interests and to grant declarations?***

The President noted that there was “an obvious gap in the framework of care for mentally

incapacitated adults”, and that if the Court could not intervene, T “would be left at serious risk

with no recourse to protection, other than the future possibility of the criminal law”. This, she felt,

would represent “a serious injustice to T, who has rights which she is unable, herself, to protect”.

The President then considered dicta in several authorities.

In *Re F (Mental Patient: Sterilisation)*,[[9]](#footnote-9) Lord Donaldson, MR had said:

“... the common law is the great safety net which lies behind all statute law and is capable of

filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of

society as a whole. This process of using the common law to fill gaps is one of the most

important duties of the judges.”

In *Re S*,[[10]](#footnote-10) the court had once again considered the patient’s best interests, and, according to the

President, in *Bournewood*, Lord Goff himself had:

“... recognised ... that the concept of necessity had a role to play in all branches of the law

 where obligations existed and was therefore a concept of great importance.”

In *Re C (Mental Patient: Contact)*,[[11]](#footnote-11) which Bingham, MR had cited, the parents of an adult

mentally incapacitated girl could not agree on contact with her mother. Eastham J held:

“ ... in an appropriate case, if the evidence bears out the proposition that access is for the benefit

of the patient ... I see no reason at all why the court should not grant access by way of a

declaration.”[[12]](#footnote-12)

These authorities were analogous to the present disagreement and, the President said, it was clear

that if declarations were required to determine where T should live,

“... there is nothing in principle to inhibit a declaration that it was in her best interests that she

should live in a local authority home and should not live anywhere else, nor, while she was in the

home to regulate the arrangements for her care and as to with whom she might have contact...

I am clear that it is essential that T’s best interests should be considered by the High Court and

that there is no impediment to the judge hearing the substantive issues involved in this case.”

However:

“The assumption of jurisdiction by the High Court on a case by case basis does not ... detract

from the obvious need expressed by the Law Commission and by the Government for a

well-structured and clearly defined framework of protection of vulnerable, mentally

incapacitated adults ... Until Parliament puts in place that defined framework, the High Court will

still be required to help out where there is no other practicable alternative.”

The President therefore indicated that she would dismiss the appeal.

Lord Justice Thorpe had delivered a judgment in the earlier appeal in this case. Citing the decisions

in *Re A*[[13]](#footnote-13) and *Re S (Adult Patient: Sterilisation),[[14]](#footnote-14)* he argued that although they

“ ... establish the function of the court where jurisdiction is conceded, they offer no guide as to

the extent of the jurisdiction when it is disputed.”

He suggested that it was with the case of Re F (Mental Patient: Sterilisation)[[15]](#footnote-15) that “the

determination of the ambit of the jurisdiction commences”. There, Lord Goff had hinted that the

Court’s inherent powers might be applied to wider purposes. He had said:

“When the state of affairs is permanent, or semi-permanent, action properly taken to preserve

the life, health or well-being of the assisted person may well transcend such measures as surgical

operation or substantial medical treatment and may extend to include such humdrum matters

as routine medical or dental treatment, even simply care such as dressing and undressing and

putting to bed.”[[16]](#footnote-16)

In *Bournewood*, said Thorpe LJ, Lord Goff had acknowledged that the doctrine of necessity did not

originate in *Re F*, but in various decisions from the eighteenth and nineteenth centuries.[[17]](#footnote-17) These

and the more recent authorities showed that the common law doctrine was “not necessarily”

ousted in the way the appellant had suggested. Thorpe LJ therefore concluded:

“It would in my opinion be a sad failure were the law to determine that Johnson J has no

jurisdiction to investigate, and if necessary, to make declarations as to T’s best interests to

ensure that the protection that she has received belatedly in her minority is not summarily

withdrawn simply because she has attained the age of 18.”

It was precisely because guardianship regimes, whether statutory or inherent, might restrict the

liberty of the individual that the 1983 Mental Health Act had reduced their scope, but:

“ ... it cannot follow that that reduction intended to benefit patients must operate

consequentially to deny patients the protective aspects of guardianship which the common law

is able to furnish through the application and, if necessary, the extension of declaratory relief

justified by the common law doctrine of necessity.”

Thorpe LJ conceded that, taken at its most liberal extent, such a line of argument might be seen to

restore the old *parens patriae* jurisdiction. However, he added: “I would not wish this judgment to

be so understood.”

Because he felt that “we are breaking new ground on terrain which is partly constitutional”, Sedley

LJ chose to add a few words of his own. For him, the “critical question” was whether the gap

created when the 1983 Act limited the powers of guardians, “represents a legislative policy which

the courts must respect or a lacuna which they may fill”. That it had been the intention of

parliament to cut back the power of the state could be the appellant’s only case, for this would

otherwise be “a strong case of necessity”, and further, if the alleged dangers were real, it would

certainly be open to the court to

“... sanction not only the provision of local authority accommodation (which in any case needs

no special permission) but the use of such moral or physical restriction as may be needed to

keep T there and out of harm’s way.”

This last was apparent *from R v Bournewood Mental Health Trust, ex parte L*,[[18]](#footnote-18) in which Lord Goff

had said:

“The concept of necessity has its role to play in all branches of our law of obligations - in

contract ..., in tort ... in restitution ... and in our criminal law. It is therefore a concept of great

importance.”[[19]](#footnote-19)

And so, Sedley LJ concluded:

“I would accordingly not think it right to set prior limits to the applicability of the doctrine.”

Had this case come before the courts in the 1980s, shortly after parliament had circumscribed the

guardianship role, the local authority would have faced a more difficult task. But times had

changed. The 1981 White Paper had said:

“The guardian ... is given the powers that a father has over a child of 14. These powers are

therefore very wide, as well as somewhat ill-defined, and out of keeping, in their paternalistic

approach, with modern attitudes to the care of the mentally disordered.”[[20]](#footnote-20)

However, this thinking had subsequently been revised: the Law Commission had remarked that

post-1959 reforms had overlooked “the benign side of guardianship”, and that statute law had

come to reflect “a single-minded view of personal guardianship as a method of restricting civil

liberties rather than as a method of enhancing them”;[[21]](#footnote-21) in consequence, ministers had now

published a green paper which proposed legislation to give a court powers which include deciding

where a person who lacks capacity is to live and what contact he or she should have with particular

individuals.[[22]](#footnote-22) It was plain, Sedley LJ concluded:

“ ... that the legislative will which produced the very elements of 1983 Act with which we are

concerned is no longer there ... What was once an eloquent silence has with the passage of time

and events acquired the character of an uncovenanted gap in provision for the incapacitated.”

Sedley LJ took the view that it was essential also to consider the effect of the European Convention

on Human Rights, because the right to liberty in Article 5 was engaged by the stance both of T’s

mother and of the local authority. Article 5 (1) (e) would permit the state to restrict the personal

freedom of persons of unsound mind, and the fact that it might only do so in accordance with a

procedure prescribed by law:

“... does not mean that the common law cannot grow or shape itself to changing social

conditions and perceptions: see *SW and CR v UK* (1996) 21 EHRR 363. It means that any such

change must be principled and predictable. For the reasons set out in the two preceding

judgments I consider that the development of the law which our decision represents passes both

limbs of this test.”

Secondly, of course, any restriction must not breach the Article 8 right, which, as Sedley LJ

reminded the Court, was to respect for family life, and not to the absolute enjoyment of such life.

Furthermore, rather than being vested in either parent or child, such a right:

“ ... is as much an interest of society as of individual family members, and its principal purpose,

at least where there are children, must be the safety and welfare of the child ... The purpose, in

my view, is to assure within proper limits the entitlement of individuals to the benefit of what

is benign and positive in family life. It is not to allow other individuals, however closely related

and well-intentioned, to create or perpetuate situations which jeopardise their welfare.”

Sedley concluded:

“ One of the advantages of a declaratory remedy, and in particular of an interim declaration, is

that the court itself can do much to close the so-called Bournewood gap in the protection of

those without capacity.”

Accordingly, the appeal was dismissed and leave to appeal to House of Lords refused.

**Discussion**

*1. Widening the doctrine of necessity*

Although plainly aware that it was supplementing the existing law, the Court was at pains to stress

that in so doing, it was merely working an existing seam within the common law doctrine of

necessity, a seam that had already found expression, for example, in the case of *Re C (Mental*

*Patient: Contact)*.[[23]](#footnote-23) However, both the doctrine itself and the range of remedial options it carries are

surely now much wider. And it is likely that the range of practitioners who might avail themselves of

those options - which previously would have been restricted to various types of clinician - is also

much wider: the judgment will endow upon social workers both fresh solutions and new

responsibilities.

The boundaries of the new, expanded doctrine may perhaps be discerned from the words of

Sedley LJ, who spoke of sanctioning “not only the provision of local authority accommodation ...

but the use of such moral or physical restriction as may be needed to keep T there and out of

harm’s way”; and also from the judgment in Re F (Mental Patient: Sterilisation),[[24]](#footnote-24) which Sedley LJ

cited, in which Lord Goff spoke of interventions transcending the merely medical, and extending

“to include such humdrum matters as routine medical or dental treatment, even simply care such

as dressing and undressing and putting to bed”. These boundaries are capable of being very widely

set, and may come to confound Lord Justice Thorpe’s insistence that his judgment should not be

read as advocating the restoration of the old parens patriae jurisdiction.

2. *Closing the Bournewood gap?*

As we have seen, Lord Justice Sedley advocated the use of declaratory relief to plug the so-called

‘Bournewood gap’. Although it is unclear whether he saw this as the purpose of his judgment, such

was certainly not its result. It was Lord Steyn who first located this particular gap. In giving far

from unconditional support to their Lordships’ judgment, he said:

“The general effect of the decision of the House is to leave compliant incapacitated patients

without the safeguards enshrined in the 1983 Act. This is an unfortunate result ... The common

law principle of necessity is a useful concept, but it contains none of the safeguards of the 1983

Act. It places effective and unqualified control in the hands of the hospital psychiatrist and other

healthcare professionals ... [N]either habeas corpus nor judicial review are sufficient safeguards

against misjudgements and professional lapses in the case of compliant, incapacitated patients.”[[25]](#footnote-25)

Earlier, speaking of what might become “an indefensible gap in our mental health law”, Lord Steyn

had made the object of his concern very clear. He said that Parliament had:

“ ... devised the protective scheme of the 1983 Act as being necessary in order to guard amongst

other things against misjudgement and lapses by the professionals involved in health care;”[[26]](#footnote-26)

and he added:

“If protection is necessary to guard against misjudgement and professional lapses, the confident

contrary views of professionals ought not to prevail.”[[27]](#footnote-27)

In Steyn’s conception, the ‘Bournewood gap’ revealed the need for incapable, compliant patients to

be protected from, not by, the professionals. Other judgments in In re F (Adult: Court’s Jurisdiction)

took the contrary view. When Lord Justice Thorpe mentioned Bournewood, it was to claim that,

“ ... in expressing his concerns, Lord Steyn recognised the width of the common law doctrine

of necessity to which provision in the Code of Practice would have to yield.”

Although the President clearly imagined that she was plugging a gap of some kind, it was not that of

the *Bournewood* ilk. It seems, in fact, that what she had in mind was the void left - it may be said,

deliberately so - when the guardianship provisions of the 1959 Act were reduced in size. Yet, despite

many references to the judgment of the House of Lords in the *Bournewood* case, neither the

President nor her brothers considered whether it might itself offer a complete solution to T’s

unfortunate situation. If *Bournewood* was insufficient, that could only be because of the local

authority’s desire to augment its power to confine Miss T with the power to restrict her social

contacts. Yet, the Court of Appeal did not attempt either to distinguish the two powers or to

consider whether the latter might be unprecedented within the doctrine of necessity and its use

excessive.

As we have seen, the President spoke of “an obvious gap in the framework of care for mentally

incapacitated people” which might leave T “at risk with no recourse to protection”, despite the fact

that “she has rights which she is herself unable to protect”. It is clear, however, that the President

did not believe that all of those rights were deserving of intervention by the Court, for one of the

effects of her judgment would be to deprive T of her liberty and of the ability to associate with

whomsoever she chose. Having identified this void in the statutory framework, she sought to plug

it with the common law, the very medium in *Bournewood* in which that gap had first been located.

Likewise, those to whom she chose to entrust the common law weapon were precisely those whose

use of it Lord Steyn had tried to restrain.

Although this judgment will relate to persons who resemble the unfortunate Mr L, its principal effect

will not be to give them greater rights, or even enhanced protections: rather, it will be to add to the

stock of compulsions that might be brought to bear upon them; extending those compulsions

beyond the hospital ward or day centre so as to control every facet of their contact with the modern

world. As a result of *In re F (Adult: Court’s Jurisdiction)*, the ‘*Bournewood* gap’ now yawns even

wider.

3. *The European Convention on Human Rights*[[28]](#footnote-28)

Lord Justice Sedley expressed his confidence that the expansion of the doctrine of necessity in

which he was complicit *would* comply with Article 5 of the ECHR. In so doing, he confirmed that

he viewed the doctrine so expanded as a potential deprivation of the liberty of those to whom it

was applied. However, his comments were confined to sub-section (1) (e) of the Article, and he

made no reference to the requirement of Article 5(4), that:

“Everyone who is deprived of [her] liberty by arrest or detention shall be entitled to take

proceedings by which the lawfulness of [her] detention shall be decided speedily by a court and

[her] release ordered if the detention is not lawful”.

As has been already pointed out, this judgment creates no new rights: there are no new restraints

upon the use of compulsion and no new tribunal to police them. Presumably, therefore, it was

assumed that in cases falling within the expanded doctrine of necessity, the ‘Court’ that will satisfy

Article 5(4) is the High Court. However, the inherent jurisdiction of the court may be - in fact, is

most likely to be - invoked *before* there has been a deprivation of liberty. Will such a state of affairs

be sufficient to satisfy Article 5(4)?

Likewise, it is surely conceivable that some future local authority will decide to forego an

application to the Court and instead subject a compliant, incapable patient to compulsion without

a prophylactic declaration. In those circumstances, the patient’s only remedy would presumably be

an application for judicial review. Given the narrow scope of such proceedings, could the

Administrative Court really be said in such circumstances to be determining “the lawfulness of

[the patient’s] detention”, and not simply its bureaucratic compliance?

It is a further requirement of Article 5 - as interpreted by the *Winterwerp* decision - that a detention

of the kind that Sedley LJ has implicitly conceded will occur under the expanded doctrine will

only persist as long as the ‘unsoundness of mind’ by which it is purportedly justified.[[29]](#footnote-29) If the

subject of the new powers of compulsion wishes to assert that he is no longer labouring under

such an unsoundness of mind, how might he do so? If only by means of an application for *habeas*

*corpus* or judicial review, again, will the requirements of Article 5 be met? The existing authorities

suggest that they will not.[[30]](#footnote-30)

**Conclusion**

The judgment in *In re F (Adult: Court’s Jurisdiction)* does not justify the claims that have been made

for it. It does not widen the protections available for compliant, incapacitated patients, rather, it

reduces them. In extending the use of compulsion away from the medical sphere and into areas of

social and personal life, it widens even further the so-called ‘*Bournewood* gap’ and creates the

possibility of successful challenge under the European Convention on Human Rights.

1. \* Solicitor, Hempsons Solicitors; Mental Health Act Commissioner. [↑](#footnote-ref-1)
2. [2000] 1 FLR 192. [↑](#footnote-ref-2)
3. A review of this case can be found elsewhere in this issue of the JMHL at p186. [↑](#footnote-ref-3)
4. [1999] AC 458 [↑](#footnote-ref-4)
5. [1996] Fam 1 [↑](#footnote-ref-5)
6. Ibid.,at page 18 [↑](#footnote-ref-6)
7. Black v Forsey [1988] SC (HL) 28; the statutory regime in question was that created by the Mental Health (Scotland) Act 1984 [↑](#footnote-ref-7)
8. [1999] AC 458, at page 485 [↑](#footnote-ref-8)
9. [1990] 2 A.C. 1 [↑](#footnote-ref-9)
10. See footnote 4 above [↑](#footnote-ref-10)
11. [1993] 1 FLR. 940 [↑](#footnote-ref-11)
12. Ibid., at page 945 [↑](#footnote-ref-12)
13. [2000] 1 FCR 193 [↑](#footnote-ref-13)
14. CA, 18 May 2000 [↑](#footnote-ref-14)
15. See footnote 8 above [↑](#footnote-ref-15)
16. [1990] 2 A.C. 1, at p 76G [↑](#footnote-ref-16)
17. Rex v Coate (1772) Lofft. 73, per Lord Mansfield at p75; Scott v Wakem (1862) 3 F & F 328, per Bramwell B at p333; Symm v Fraser (1863) 3 F & F 859, 883 per Cockburn CJ [↑](#footnote-ref-17)
18. See footnote 3 above [↑](#footnote-ref-18)
19. [1999] AC 458, at p490 [↑](#footnote-ref-19)
20. Cmnd. 8405 [↑](#footnote-ref-20)
21. 1995, Report no. 231 [↑](#footnote-ref-21)
22. Cm 4465 [↑](#footnote-ref-22)
23. See footnote 10 above [↑](#footnote-ref-23)
24. See footnote 8 above [↑](#footnote-ref-24)
25. [1999] AC 458, [ref] [↑](#footnote-ref-25)
26. Ibid., [ref] [↑](#footnote-ref-26)
27. Ibid., [ref] [↑](#footnote-ref-27)
28. See also: John Hodgson, Detention, Necessity, Common Law and the European Convention: Some Further Aspects

of the Bournewood Case [1999] 1 Journal of Mental Health Law, pp23-32 as to the general question of whether a purely common law construct such as the doctrine of necessity can ever be consistent with the ECHR [↑](#footnote-ref-28)
29. Winterwerp v Netherlands (1979) 2 EHRR 387 [↑](#footnote-ref-29)
30. X v United Kingdom (1981) 4 EHRR 181, (1981) 1 BMLR 98 [habeas corpus]; Kay v United Kingdom, Application number 17821/91, Report of Commission, adopted 1 March 1994 [judicial review] [↑](#footnote-ref-30)