

Orders for forced 'shock therapy' breached human rights of schizophrenia patients, court rules

Updated Thu 1 Nov 2018, 4:11pm

Orders forcing two Victorian patients with schizophrenia to undergo electroconvulsive therapy (ECT) were made in breach of their human rights, the Supreme Court of Victoria has ruled.

The ruling was made after Victoria Legal Aid (VLA) brought a court challenge against the Victorian Civil and Administrative Tribunal (VCAT), over its decision to order the patients, known as NJE and PBU, to be given ECT against their will.

VLA lawyer Hamish McLachlan told reporters outside court that the ruling will make it harder for mental health services to declare a patient is not capable of informed consent.

"What the Supreme Court has decided is that the decisions that were made by VCAT were incorrect and not in accordance with the law and, in so doing, that's imposed a higher bar to mental health services," Mr McLachlan said.

"This case wasn't about ECT being good or bad — we have clients who agree to have ECT and find it helpful.

"What the case was about was ensuring that when people are faced with having ECT without their consent that their human rights are upheld in the process."

There are around 700 applications in Victoria each year for forced electroconvulsive therapy.

Electroconvulsive treatment involves strapping electrodes to a person's head and then sending electric shocks to the brain to treat mental illness.

Under Victorian law, electroconvulsive treatment can be forcibly administered if the tribunal decides the patient cannot give informed consent or no other "less restrictive" treatment will work.

However, ECT without consent needs to be agreed to by a legal member, a qualified psychiatrist and a community member, and patients have the right to a lawyer.

Patient was capable despite denial of condition

Court documents showed the patient PBU was given 12 separate shock therapy treatments in April and May 2017.

He disputed his psychiatrist's diagnosis that he had schizophrenia and argued against the forced treatment at a VCAT hearing held on May 23 last year.

"He wished to be discharged from hospital to a prevention and recovery facility and then return home, which the medical staff did not support," Justice Kevin Bell wrote in his ruling.

VCAT found PBU could understand and remember relevant information but "could not use or weigh that information" and was therefore not capable of giving informed consent to the treatment.



PHOTO: Justice Bell ruled the patients' rights were undermined by the forced treatment. (ABC News: Margaret Burin)

RELATED STORY: Patient fights forced 'shock therapy' in test case

RELATED STORY: Two patients facing forced 'shock therapy' horrified by process, lawyers say

Key points:

- VCAT ruled patients were incapable of informed consent for ECT
- Supreme Court finds that ruling "incompatible" with patients' human rights
- Lawyer says ruling imposes "higher bar" for mental health services

 **Victoria Legal Aid**
@VicLegalAid

'The decision provides clear guidance that #mentalhealth patients have the same fundamental #humanrights as everyone else in the community.' Read more from @hamish_mcl about the Supreme Court's decision on compulsory electro-convulsive treatment #ECT legalaid.vic.gov.au/about-us/news/...

25 11:06 AM - Nov 1, 2018

16 people are talking about this

Justice Bell found that while "belief or insight may be relevant when determining whether a person has the capacity to give informed consent" it should not be the determining factor.

"It would be discriminatory to treat this consideration as determinative in relation to people having mental illness when it is not determinative in relation to people not having mental illness," Justice Bell wrote.

Patients have right to 'unwise' decisions

In NJE's case, she was ordered to undergo twelve rounds of ECT in April 2017.

She attended a VCAT hearing in June 2017.

"NJE understood that ECT was a procedure that would result in her having seizures and ... she was concerned that it may cause her to have memory problems, as her legal representative submitted," Justice Bell wrote.

VCAT found NJE "lacked the capacity to give informed consent" because "she had not actually given careful consideration to the advantages and disadvantages of ECT".

But Justice Bell ruled that was not a standard applied for people without mental illness.

"A person does not lack the capacity to give informed consent simply by making a decision that others consider to be unwise according to their individual values and situation," he wrote.

"VCAT determined that PBU and NJE lacked the capacity to give informed consent and were therefore liable to receive compulsory ECT.

"In doing so, it erred in law by interpreting and applying the capacity test in the Mental Health Act incompatibly with the human rights of PBU and NJE under the [Victorian Charter of Human Rights and Responsibilities]."

While patients might still be compelled to undergo treatment, Mr McLachlan said the ruling meant they must be treated the same as other members of the community.

Editor's Note 01/11/2018: An earlier version of this story stated that around 700 Victorians receive shock therapy treatment every year. That figure actually refers to the number of applications for forced shock therapy treatment.

Topics: courts-and-trials, mental-health, health, melbourne-3000, vic

First posted Thu 1 Nov 2018, 1:46pm