NHS
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Commissioning Support

MCA MCA/DoLS

Primary Care Briefing Note #2

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Introduction

The Mental Capacity Act 2005 (the Act) provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves. Everyone working with (and/or caring for) an adult who may lack capacity to make specific decisions, must be able to provide evidence of compliance with the principles of the Act. This rule applies whether the decisions are life-changing events or everyday matters.

Who is affected?

The Act applies to any person who has a condition that causes an *impairment of, or disturbance in the functioning of the mind or brain*. This might include somebody with dementia, learning disabilities, brain injury (for example, stroke or physical trauma to the brain), mental health problems, autism or confusion (for example, from an infection or due to substance misuse).

Mental Capacity Act principles

Professionals have to work within the five principles of the Mental Capacity Act 2005:

1. Start from the presumption that people have the capacity to make their own decisions, unless there is evidence that they might not be able to;
2. Do everything in your power to maximise a person's capacity: there are lots of ways to do this, including using pictures and suitable language, finding a quiet place at the time of day the person is most alert, or simply allowing the person time to think;
3. Remember that just because somebody makes a decision that others might consider unwise, that doesn't necessarily mean the person lacks capacity;
4. If someone does lack capacity to carry out a specific decision, those deciding on behalf of the person must act in their best interests, rather than the best interests of the care provider, or the individual's family;
5. You must always look for the least restrictive option that meets the need – this means choosing the option that restricts the person's freedoms and rights as little as possible.

Definition of Incapacity

The Mental Capacity Act 2005 defines lack of capacity in the following way:

> *A person lacks capacity in relation to a matter if, at the material time, he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*

Capacity is decision and time specific. Capacity assessments refer to a person's ability to make a particular decision at a particular moment in time; they are not a blanket judgment on a person's ability.

The test of capacity

There is a two-stage test of capacity in order to decide whether an individual has the capacity to make a particular decision, this test must be applied.

First stage

Is there an impairment of, or disturbance in the functioning of a person's mind or brain? If so, is the impairment or disturbance sufficient that the person lacks the capacity to make a particular decision?

It is essential that the decision makers uphold the principles of 'equal consideration'. The Act is clear that there should not be assumptions made about an individual's lack of capacity based on either their age or appearance or condition.

If the first stage of the test of capacity is met, the second test requires the individual to show that the impairment or disturbance brain or mind prevents them from being able to make the decision in question at that time.

Second stage - the functional test

This is a functional test focusing on how the decision is made, rather than the outcome or the consequence of the decision. The assessor must consider whether the person is able to:

- Understand the information relevant to the decision;
- Retain that information;
- Weigh that information as a part of the process of making a decision;
- Communicate his/her decision (whether by talking, using sign language or any other means).

This test must be complete and recorded; the documentation must demonstrate the above process. The decision about whether a person has capacity or not is made on the "balance of probabilities" – meaning, is it more likely than not, that the person has/doesn't have capacity. So, you may want to ask another professional, or advocate, to assess the person's capacity as well. If they lack capacity, you must make sure that any interference with what they want to do is proportionate to the likelihood of harm to that person, and to how serious that harm would be.

Best Interests checklist

Best interests are never simply medical; the whole person has to be considered. The questions in the best interest's checklist (below) must be considered, provided there is time, in the search for what is in a person's best interests.

Practitioners must consider the following when making a decision in the person's best interests:

- Is there an advance decision to refuse treatment that prevents the treatment being given, or a lasting power of attorney with the power to make that decision?
- Find out in advance whether an interpreter is needed to aid communication;
- Might the person regain capacity and, if so, can the decision wait?
- Take account of the person's past and present views, culture, religion and attitudes; involve the person in the decision as much as possible;
- Do not make assumptions based on the person's age, appearance, condition or behaviour – concentrate on the actual person;
- Consult interested family and friends;
- Look for the least restrictive option that will meet the need.

MCADoLS

The Mental Capacity Act Deprivation of Liberty Safeguards (MCADoLS) were introduced into the Mental Capacity Act 2005 through the Mental Health Act 2007 (which received Royal Assent in July 2007). The MCADoLS came into force 1 April 2009.

The MCADOL safeguards apply to anyone aged 18 and over, who has a mental disorder or disability of the mind – such as dementia or a profound learning disability - who lacks the capacity to give informed consent to the arrangements made for their care and/or treatment, and for whom deprivation of liberty is considered to be necessary in their best interests to protect them from harm.

The safeguards cover patients in hospitals, and people in care homes registered under the Care Standards Act 2000, whether placed under public or private arrangements.

The safeguards are designed to protect the interests of an extremely vulnerable group of service users, and to:

- Ensure people can be given the care they need in the least restrictive regimes;
- Prevent arbitrary decisions that deprive vulnerable people of their liberty;
- Provide safeguards for vulnerable people;
- Provide them with rights of challenge against unlawful detention;
- Avoid unnecessary bureaucracy.

The MCADoLS Acid Test - Deprivation of Liberty after the *Cheshire West* case

The six requirements remain the same following the *Cheshire West* judgement; the following six conditions must be met. The person must:

1. Be 18 years and over;
2. Have a mental disorder;
3. Lack capacity for the decision to be accommodated in the hospital or care home;
4. Not have made a decision, when they had capacity, to refuse treatment or care;
5. Not be ineligible for DoLS;
6. Need to be deprived of liberty, in their best interests.

The difficulty comes in working out whether a situation in a hospital or care home amounts to a deprivation of liberty.

The Supreme Court has now confirmed, in response to the *Cheshire West* case, that there are now two key questions to ask – these questions form the 'acid test':

1. Is the person subject to continuous supervision and control? (All three aspects are necessary.)

AND

2. Is the person free to leave? (The person may not be saying this or acting on it but the issue is about how staff would react if the person did try to leave.)

So this now means that if a person is subject both to continuous supervision and control and not free to leave they are deprived of their liberty.

The following factors are *no longer relevant* when considering whether a person meets the criterion under the MCADoLS:

1. The person's compliance or lack of objection;
2. The relative normality of the placement;
3. The reason or purpose behind a particular placement.

News Update

Increase in the number of prosecutions under the MCA

Figures obtained from the Crown Prosecution Service identify that 349 charges of ill-treatment or wilful neglect under s.44 MCA reached a first magistrates' court hearing in England and Wales in 2013-4, compared to 168 the year before. Six charges were also brought against those with lasting power of attorney, compared to just one in 2012-3. A reduction was seen in the number of prosecutions under the equivalent Mental Health Act offences, from 57 to 47.

These figures do not reveal the conversion rate from charge to conviction. Moreover, the offences may well become somewhat surplus to requirements as the Criminal Justice and Courts Bill 2014 is set to criminalise those workers and providers who ill-treat or wilfully neglect adults under their care. This is regardless of whether the victim suffers from mental disorder or incapacity. This reform therefore plugs a major current gap in the criminal law with regard to vulnerable adults.

Winterbourne View – Time for Change

On 26 November 2014, a report on the future of services for people with learning disabilities was launched by Sir Stephen Bubb, CEO of the Association of Chief Executives of Voluntary Organisations. This report, commissioned by the CEO of NHS England, sought to explore how a new national framework of support might be delivered locally, in order to allow the growth of community provision required to move people out of inappropriate institutional care.

In his report Sir Stephen sets out a roadmap for action. The top-line recommendations are:

- To urgently close inappropriate in-patient care institutions;
- A Charter of Rights for people with learning disabilities and/or autism and their families;

- To give people with learning disabilities and their families a 'right to challenge' decisions and the right to request a personal budget;
- A requirement for local decision-makers to follow a mandatory framework that sets out who is responsible, for which services and how they will be held to account, including improved data collection and publication;
- Improved training and education for NHS, local government and provider staff;
- To start a social investment fund to build capacity in community-based services, to enable them to provide alternative support and empowering people with learning disabilities by giving them the rights they deserve in determining their care.

In response, the Government has committed to publish a green paper on options for legislative change early in 2015.

Legal Update

Rochdale MBC v KW [2014] EWCOP 45 (Mostyn J)
Article 5 – Deprivation of Liberty

Summary

The case concerned a 52 year old woman, Katherine, cared for in own home. As a result of a subarachnoid haemorrhage sustained during a medical operation many years previously, she had cognitive and mental health problems, epilepsy and physical disability. At the time that the matter came before Mostyn J, she was cared for in her own home with a package of 24/7 care funded jointly by Rochdale MBC and the local CCG.

Mr Justice Mostyn described her situation thus:

> *"Physically, Katherine is just ambulant with the use of a wheeled Zimmer frame. Mentally, she is trapped in the past. She believes it is 1996 and that she is living at her old home with her three small children (who are now all adult). Her delusions are very powerful and she has a tendency to try to wander off in order to find her small children. Her present home is held under a tenancy from a Housing Association. The arrangement entails the presence of carers 24/7 [arranged by an independent contractor]. They attend to her every need in an effort to make her life as normal as possible. If she tries to wander off she will be brought back."*

Before Mr Justice Mostyn, both the local authority and KW (by her litigation friend Celia Walsh) agreed that the decision of the majority in Cheshire West compelled the conclusion that she was deprived of her liberty (the local authority being said to 'constrain to concur' with this conclusion).

Mostyn J decided to the contrary, holding that he:

> *"[found] it impossible to conceive that the best interests arrangement for Katherine, in her own home, provided by an independent contractor, but devised and paid for by Rochdale and CCG, amounts to a deprivation of liberty within Article 5. If her family had money and had devised and paid for the very same arrangement this could not be a situation of deprivation of liberty. But because they are devised and paid for by organs of the state they are said so to be, and the whole panoply of authorisation and review required by Article 5 (and its explications) is brought into play. In my opinion this is arbitrary, arguably irrational, and a league away from the intentions of the framers of the Convention."*

Freedom to leave therefore must mean that the person has the physical capacity to leave. Mostyn J noted that:

> *"Katherine's ambulatory functions are very poor and are deteriorating. Soon she may not have the motor skills to walk even with her frame. If she becomes house-bound or bed-ridden it must follow that her deprivation of liberty just dissolves. It is often said that one stress-tests a proposition with some more extreme facts. Imagine a man in hospital in a coma. Imagine that such a man has no relations demanding to take him away. Literally, he is not 'free to leave'. Literally, he is under continuous supervision. Is he in a situation of deprivation of liberty? Surely not. So if Katherine cannot realistically leave in the sense described above then it must follow that the second part of the acid test is not satisfied".*

The Re X process

A new process came into effect on 17 November 2014 on a pilot basis to implement the judgments in Re X and others (Deprivation of Liberty) [2014] EWCOP 25 and [2014] EWCOP 37.

That process is built upon:

1. A new form;
2. A new Practice Direction, the material provisions of which can be found at paragraphs 27 and following of Practice Direction 10A (Deprivation of Liberty); and
3. A model form of order which will be made – on the papers – if all the necessary criteria are satisfied: in other words, in broad terms, all the factors point to the situation being a "state" deprivation of liberty that is incontrovertibly in P's best interests requiring authorisation because they are unable to give the requisite consent.

All of these are available via:

http://courtofprotectionhandbook.com/legislation-codes-of-practice-forms-and-guidance/

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