Making decisions under new mental health legislation

Practitioners working in dementia care are commonly involved with patients who reside, or will require placement, in a residential or nursing home. Recent legislation sets out rigorous safeguards to protect patients in this regard. Topics covered in this article include the use of guardianship and the safeguards against deprivation of liberty.

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Practitioners from primary and secondary care are often involved in decisions relating to patients with dementia in care homes. Some of these decisions relate to necessity of placement. Others relate to the ongoing care of current residents who may lack the capacity to make decisions for themselves. The Mental Capacity Act 2005 and the Mental Health Act 2007 have important implications for those making decisions on behalf of patients who are deemed to have a mental disorder. A mental disorder is defined in the Mental Capacity Act as "an impairment or a disturbance in the functioning of the mind or brain"[1,2] and the most common condition that applies in this setting is dementia. The new legislation sets out rigorous safeguards to protect patients with a mental disorder and this paper highlights some of the key issues in this regard. The decision-making process is shown in the figure.

When a patient is faced with a decision the first question is whether they have capacity to make that decision. A person is deemed to have capacity if they can:

1. Understand the information relevant to the decision
2. Retain the information
3. Use or weigh that information as a part of the process of making the decision
4. Communicate their decision

If a person is deemed to have capacity, then their wishes must be adhered to. Two points of practice about capacity are worth noting. First, the decision of a person with capacity does not have to be sensible. A person is entitled to make a bad decision. The second is that capacity refers to a particular set of circumstances at a particular time. Capacity can change over time and can change from decision to decision.

For example, a patient with dementia may lack the capacity to understand a complex decision related to their medical management, but can retain the capacity to choose where they want to live. Alternatively, a patient with dementia may be deemed to lack capacity in relation to their medical management at one time, but their capacity to make this decision may be restored after a trial of cognitive enhancers. A further assessment based on the prespecified criteria will need to be made for every decision affecting the patient.

If a patient lacks capacity, two legislative options can be employed. The first option is the Mental Health Act and the second is the Mental Capacity Act. When a person is sufficiently unwell to fulfil criteria they can be detained in hospital against their will under Section 2 (admission for assessment and diagnosis with detention for 28 days) or Section 3 (admission for treatment with a duration of 6 months, especially if the diagnosis is already known) of the Mental Health Act.[3,4] This detention can include admission to a general hospital for treatment of delirium. However, another element of the Mental Health Act could be employed in this scenario, and this is the concept of guardianship.

Guardianship

Guardianship can be used to encourage people to use services or to live in a particular place. It facilitates care in the community without resorting to the use of compulsory powers. It applies to patients who are aged 16 years or older and who have a mental disorder of a nature or degree that warrants guardianship for their

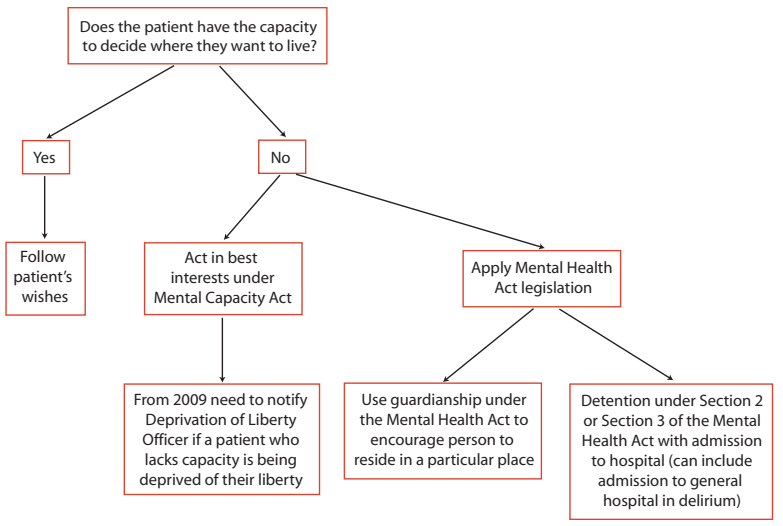

Figure: The decision-making process

welfare or protection.

Section 8 of the Mental Health Act outlines the powers conferred on the guardian:

- The power to require a person to reside at a specified place
- The power to require the patient to attend specified places for medical treatment, therapies
- The power to convey
- The power to require access to be given to the patient by a doctor, approved social worker, or other specified person

Guardianship does not allow medication to be administered against a person's will.

Most guardians are appointed under section 7 of the Mental Health Act, following the application of an Approved Mental Health Professional on the basis of recommendations of two doctors (section 37 of the Mental Health Act allows the courts to appoint a guardian if a person has been charged with a crime). The practical provision of guardianship legislation is the power to take and convey a person to a place that their care plan requires them to be. For example, an elderly person with advanced dementia can be conveyed to a nursing home under Guardianship legislation. However, this person cannot be forced to stay there and cannot be forced to take medication against their will. If these situations become necessary then an alternative form of legislation will need to be employed.

Safeguards against deprivation of liberty

In circumstances in which a patient lacks capacity the health professional may also act in their best interests under the Mental Capacity Act. The checklist in box 1 should act as a guide to decision makers. A key element of the best interests concept is that any decision that is made is done in the least restrictive manner.

In the past, the decision to place an incapacitated patient in a care facility presented no legal problem. From April 2009, amendments to the Mental Capacity Act mean that a person being deprived of their liberty without an appropriate authorisation or ruling from the Court of Protection is unlawful. This decision was taken in light of the October 2004 judgement from the European Court of Human Rights in relation to the Bournewood Case (HL v the United Kingdom).[5]

HL was a profoundly autistic man who was admitted informally to the Bournewood Hospital. Although he did not attempt to leave the facility, the Court found that he had been deprived of his liberty unlawfully because there was no legal framework in place that safeguarded this liberty.

The Department of Health thus

Box 1: Guide to best interests assessment

- Is the decision non-discriminatory (ie, age, or race not a factor)?
- Have all relevant circumstances (as far as practical) been considered?
- Has the possibility that the patient might regain capacity been considered—could the decision be delayed?
- Has the patient been encouraged to participate as much as possible?
- Have past and present views and beliefs of the patient been taken into consideration?
- If the decision concerns life-sustaining treatment, then the best-interest decision should not be motivated by the desire to bring about the person's death.
- Have the views of other people, including family been taken into account?
- Is there a lasting power of attorney or living will?
- Has an Independent Mental Capacity Advocate been consulted—if one is required (ie, if patient has no next of kin).

Box 2: Assessing a deprivation of liberty application

The supervisory body makes six assessments, usually within 21 days:

1. Is the patient older than 18 years?
2. Does the authorisation sought contradict the decision of a valid advanced directive, a lasting power of attorney, or a deputy appointed by the Court of Protection?
3. Mental Capacity Assessment
4. Mental Health Assessment
5. Eligibility assessment to ensure the patient is not subject to the Mental Health Act
6. Best interests assessment

introduced safeguards against deprivation of liberty.[6–8] This protects patients without capacity from arbitrary decisions being made on their behalf and affords them a legal framework of protection, and therefore a right to question their detention. These measures came into effect on 1 April 2009 and will apply to all people who fulfil the following criteria: patients in care homes and hospitals who are over 18; and have a neurological disorder or disability of mind; and lack capacity to give consent to the circumstances of their care; and this deprivation of liberty is considered, after independent assessment, to be in the patient's best interests.

What does it mean to be deprived of your liberty and how is distinction made between deprivation and a restriction? There is no clear definition within the Act of what constitutes a deprivation of liberty. According to the European Court of Human Rights in its judgement in the Bournewood Case. "To determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects, and manner of implementation of the measure in question. The distinction between deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance."

It is therefore assumed that each situation will be dealt with on a case-by-case basis. Therefore, a more concrete definition will have to be garnered from case law over time. The distinction between restriction and deprivation of liberty will probably be based on the frequency and intensity of restrictions placed on the patient. Key factors that should be considered include; whether the person is allowed to leave the facility, the choice that the person has about their life in the facility and the contact that the

person has with the outside world (eg, visitors). The essential point of contention in the case of HL was that the healthcare professionals "exercised complete and effective his control over care and movements" and this was deemed to be a deprivation of liberty.

How will this work in practice?

If a hospital or care home manager identifies that a patient who lacks capacity is being deprived of their liberty they must apply to the appropriate supervisory body for authorisation. If the person is in hospital, the application should be made to the appropriate primary-care Trust. If the person is in a care home, the application should be made to the local authority. The process can also be initiated by any person with a concerned interest in the patient such as a family member. It is the responsibility of the manager of this facility to ensure that an appropriate assessment is made. Authorisation should be given in advance, except in cases that are thought to be urgent. Box 2 shows the steps of assessment.

After these assessments, the supervisory body can make a judgement as to whether a deprivation of liberty is lawful. If appropriate, an authorisation can be made for detention. The duration of this detention will be determined on a case-by-case basis but the maximum period for a single authorisation is 12 months.

Conclusion

From April 2009, the Deprivation of Liberty Safeguards are enshrined in law. This has an impact on all health professionals who care for older adults, specifically those who have a mental disorder and require placement in a care facility. A system for assessing and implementing this legislation has been put in place. It is the responsibility of the health professional to be aware of this legislation and to initiate an assessment if the liberty of a patient is compromised.

Box 1: A typical case in which deprivation of liberty safeguards must be considered

A 74-year-old man with Alzheimer's disease and a Mini-Mental State Examination score of 15 out of 30 is placed in a specialist care home 100 miles from his only living relative who is unable to travel. Although he appears happy on the ward, he repeatedly vocalises his desire to go home to his mother (who is dead). He also talks repeatedly about missing his 14-year-old dog. Occasionally when someone is entering or exiting his ward he will attempt to leave. He can usually be coaxed by the staff to return to the communal lounge with the promise of a cup of tea.

Key considerations

- This man is unlikely to have capacity in relation to his residence and therefore falls under the Mental Capacity Act.
- Although he is attempting to leave it is not clear whether the staff are exercising "complete and effective control" in order to keep him on the ward.
- However, as he is deprived of the company of his only living relative and is unable to do anything about it, the overall effect would constitute a deprivation of his liberty
- He should be referred to the supervisory body for further assessment.

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