You cannot pick and choose

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DOLS briefing note: GJ and The Foundation Trust (1), The PCT (2) and The Secretary of State for Health (3)

On 20 November 2009 the Court of Protection handed down the first significant judgment dealing with the interaction between the Mental Health Act 1983 (as amended) (the MHA), the Mental Capacity Act 2005 (the MCA) and how they apply to Deprivation of Liberty Safeguards (DOLS).

The judgment is long and relatively comprehensive. It sets out basic principles to be applied where a patient may fall under both the MHA and MCA and gives guidance on where the Court of Protection has jurisdiction to make an order for a DOL.

It is all about statutory interpretation and deals with whether the "relevant person" is eligible to be deprived of their liberty under the MCA.

Summary

The starting point for considering whether to deprive a patient of their liberty should be whether the patient can be detained under the MHA. If so, this is the Act that should be used to authorise the deprivation.

If the patient does not meet the criteria for detention under the MHA, the purpose of the treatment proposed needs to be considered. If this is for purely physical problems, the deprivation can be authorised under the MCA process.

If there is confusion as to whether the MCA can authorise the deprivation, an order from the Court of Protection can be sought.

Deprivation of Liberty Safeguards Code of Practice

The Code of Practice (paragraphs 4.40 to 4.51) gives guidance on the "eligibility requirement" which was essentially the basis of this case. This section of the code, along with Schedule 1A of the MCA sets out the factors that make a patient ineligible to be deprived of their liberty under the MCA, the main one being that they are detained as a patient under the MHA or deprivation under the MCA would be inconsistent with the MHA (such as where there is a condition of residence attached to a Community Treatment Order or Guardianship, for example).

The Code of Practice also confirms at paragraph 4.45 that if the patient is to be detained in hospital wholly or partly for the purpose of treatment of their mental disorder and they object to their admission or some or all of the treatment, and they meet the criteria for admission under the MHA, they cannot have their deprivation of liberty authorised under the MCA.

The factual background

GJ was a gentleman with vascular dementia, Korsakoff's Syndrome and alcohol-related amnesia. He also had diabetes. He was therefore someone with progressive, potentially untreatable psychiatric illnesses and a physical condition which could not be cured, only managed.

It was common ground that GJ did not have capacity to litigate, make decisions relating to the management of his property and affairs, residence or his medical treatment and future needs. This lack of capacity was thought to be permanent. The Court of Protection accepted that it had jurisdiction to hear the case.

GJ had previously had assistance in managing his diabetes from his partner. Sadly, she had died and since her death he had been unable to manage his diabetes. He needed injections of insulin which she had previously regulated, but because of the memory problems he had associated with his psychiatric conditions, he was unable to do so himself; sometimes forgetting his injections completely, sometimes forgetting that he had just injected himself and injecting himself again within a very short space of time. There was concern that he was putting himself at significant risk of hypoglycaemic attacks and possible brain damage as a result.

For six months, GJ had been detained under sections 2 and 3 of the MHA while efforts were made to treat him for his cognitive decline. These were unsuccessful and in July 2009 he was thought not to fit the criteria for continued detention under the MHA and discharged to a care home. That placement broke down and he was readmitted to the same unit he had previously been detained in, but as an informal patient.

At that point, an urgent DOLS authorisation was granted by the unit which was followed by a time limited standard authorisation, which was renewed for a further short period of time whilst the case was heard by the court.

It was the appropriateness of the standard DOLS authorisations that was in issue, with GJ arguing that he should not have been the subject of a DOLS authorisation as he should have been detained and treated under the MHA. The NHS bodies argued he did not qualify for detention under the MHA and the authorisations for the DOLS were properly given.

The judge, Mr Justice Charles, decided that GJ was properly deprived of his liberty under the provisions of the MCA and that he was not within the scope of the MHA. If the need for his package of physical treatment had not existed he would not have been detained in hospital in circumstances that amounted to deprivation of liberty.

GJ could therefore be treated for his physical disorder (ie, the diabetes) but not for his mental disorders (dementia, Korsakoff's and amnesia). He did, however, stress that this was a difficult and borderline case.

Guidelines

Mr Justice Charles set out a very helpful set of guidelines and a summary of the conclusions he reached after a very detailed analysis of the statutory framework and the way the provisions of the Acts inter-relate. These were:

1. The MHA should be considered first, and has primacy. This means the first step should be to see whether or not the patient falls within the scope of the MHA. If they do, the MHA should be used as the means of authorising detention. The MCA should not be considered as an alternative.

2. A person can only be deprived of their liberty where:

   the deprivation is authorised by an order of the Court of Protection under section 16(2) of the MCA;

   the deprivation is authorised in accordance with the DOLS procedure set out in Schedule A1 of the MCA; or

   it is necessary in order to give life sustaining treatment, or to carry out a vital act to prevent serious deterioration in a person's condition while a decision as respects any relevant issue is sought from the court.

3. The authorisation and order under the MCA can only be given if the patient is not "ineligible" to be deprived of his liberty by the MCA. Details of ineligibility are found in Schedule 1A to the MCA. If the patient is ineligible, the court has no statutory power to authorise a deprivation of liberty.

4. When looking at whether a patient is "ineligible" the decision maker should start by asking whether the criteria for detention under sections 2 or 3 of the MHA are met and if an application were to be made, whether the patient would be detained under the MHA.

5. They should then look at the reason the patient is being deprived of their liberty and apply a “but for” test, by asking the following questions:

    a) What care and treatment should the patient (who will usually have a mental disorder within the MHA definition) have if, and so long as, he remains in hospital:

        i. for his physical disorders or illnesses that are unconnected to, and are unlikely to directly affect his mental disorder (known as the package of physical treatment); and

        ii. for his mental disorders and his physical disorders connected to them and/or likely to directly affect his mental disorders (known as the package of treatment for mental disorder).

    b) If the need for physical treatment did not exist, would the decision maker conclude that P should be detained in hospital in circumstances that amount to a deprivation of liberty?; and then

    c) whether the only effective reason that the patient should be deprived of his liberty in hospital is his need for the package of physical treatment.

If the answer to (b) is “no” and the answer to (c) is “yes” then the patient cannot fall within the scope of the MHA and the deprivation could be authorised under the MCA. This is summarised in the flow chart at Appendix A.

He also set out a helpful reminder about section 63 MHA at paragraphs 52,54 and 57 and said that the new DOLS provisions did not cover taking a person to a care home or hospital at paragraph 9.

Conclusion

In considering the application of DOLS or the MHA you need to **focus** on the reason **why** a patient should be deprived of their liberty.

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Appendix One