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MCA/DOLS ISSUES & SAFEGUARDING

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Introduction

- How does the MCA/DoLS impact on safeguarding?
  - Mental Capacity Act (MCA) & DoLs overview
  - Other legal considerations
  - Safeguarding ‘interface’

Safeguarding – Overall legal Framework

- Care Act - Safeguarding duties
- How are these legally 'enforced'
  - **Mental Capacity Act (MCA) 2005 (& DoLS)**
  - Human Rights Act (HRA) 1998
  - Mental Health Act (MHA)1983
  - Court's 'inherent jurisdiction'
  - Criminal provisions
  - Confidentiality provisions

Safeguarding – Overall legal Framework

- Power/duty to 'intervene' will depend on there being legal 'authority' to do so
- Frequently duty to 'intervene' to keep P safe will depend on whether P has capacity
- Which is why MCA & DoLS interface with safeguarding is crucial
- Legally P has the right to make 'unwise' decisions – if P has capacity to do so
- If P lacks capacity – then duty to act in P's 'best interests'

Safeguarding Duties & Responsibilities

- In Re A [2010] Munby J summarised the duties & responsibilities owed to vulnerable adults by the LA as:
  - Provision of services under community care law and specific relevant statutory provisions
  - Responsibility for safeguarding from abuse & neglect arising from policy & the No Secrets guidance
  - A common law duty to investigate where welfare of a vulnerable adult is seriously threatened
  - Where the adult lacks capacity where necessary in best interests

Scenario - Sam

- Sam, aged 21, lives with dad, Malcolm. Sam requires a high level of support from LA, including periods of respite. Suffers from childhood autism & severe learning disability, he requires close supervision due to tendency to ‘lash out’ when anxious/upset. There are also concerns re his weight. Malcolm becomes unwell with flu & since Sam is due to go into respite shortly, Malcolm asks if Sam can go into respite early. Sam is admitted to a LA support unit for a ‘short period’. In support unit staff find Sam difficult to manage & decided a ‘longer stay’ was necessary to ‘get a better understanding of Sam’s needs’.

Scenario - Betty

- Betty, aged 81, has dementia. Her main carer is her son, Stephen. Over the last 3 months 3 safeguarding alerts have been made, noting that Betty has:
  - Redness around the eye, bruising to neck and face
  - Cut to her head and bruising/swelling to her cheek
  - Bruising to cheek
- It is decided that she should be removed from her home due to escalating risks whilst awaiting investigation.
- Betty ‘willingly left her home’ and was taken to a care home a few weeks ago.

Scenario - Fred

- Fred, aged 91 – has lived alone in his own home for a number of years. He has dementia, mobility issues, delirium and kidney problems
- Friends have raised concerns with the LA about ‘his spending & giving his money away’.
- Social workers visit Fred. They note he is sitting in his dressing gown with no trousers on. After ‘assessing’ Fred, they decide he should be removed from his home for safeguarding reasons.
- Fred does not want to leave, he is told he is ‘going to a hotel’ & that the police would be called if he did not cooperate. He is reluctant to leave and very distressed.

Scenario - Dan

- Dan, aged 19, is autistic, with significant needs. He lives in residential accommodation. He has very limited communication. His carers have brought him to the local swimming baths which they are gradually re-introducing him to. Whilst ‘orientating’ him, Dan becomes ‘fixated’ at the edge of the pool & refuses to move. Carers are unable to persuade Dan away & eventually the pool manager becomes increasingly frustrated at their lack of progress & calls the police.

Scenario - Kerry

- Kerry, aged 19, has a mild LD & physical health problems, including diabetes for which she requires regular insulin. She lives at home with her mum, Sue who has mental health problems, is a drug user & whose partner has a criminal record for domestic violence. There is concern that Kerry is leading a chaotic lifestyle, drinking, taking illicit drugs & not taking the insulin she needs to manage her diabetes. There is also concern that she is being sexually exploited.

Key Issues

- Is there legal authority to 'act'?
  - Basic legal authority
  - Compliant with HRA
- Is there a duty to provide the care/other intervention?
  - Where P lacks capacity
  - Safeguarding issues
- Can a P/family demand care/treatment?
  - Generally no right to particular care/treatment
  - Professional will not be required to do something contrary to clinical judgment

Key Issues

- Where adult has capacity then generally entitled to refuse any care/treatment/ intervention
  - Subject to certain provisions – mainly MHA where compulsion for treatment for mental disorder where criteria met
  - Important to try (as practicable & appropriate) & record
- Where adult lacks capacity then duty to act in 'best interests'
  - So their 'refusal' is not decisive
  - May still be a duty to act

Capable Consent

- Where P has capacity generally consent required for care/ treatment to be provided
- Consent
  - Real or informed?
  - For each intervention
  - Appropriately recorded
- To give valid consent P must have capacity
  - Which is presumed
  - Allowed to make ‘unwise’ decisions
  - Should not only consider capacity if treatment/care refused
- Some exceptions in particular circumstances where risk to others

Overview MCA

- Duty to have regard to the MCA Code of Practice
- Any decision must be in accordance with principles set out in s.1 MCA
- Only provides authority where P lacks capacity & act is in best interests
- Provides ‘authority’ for use of force to provide care and treatment, provided such force is proportionate and in best interests
- Subject to proxy decision makers’ refusals (LPAs) /advance decisions
- Will not authorise a deprivation of liberty (w/o further authority)

MCA Principles

- The Principles (s.1)
  - Presumption of capacity
  - All practicable steps taken to assist
  - ‘Allowed’ to make unwise decisions
  - All acts (on behalf of person lacking capacity) must be in best interests (BI)
  - ‘Regard’ to least restrictive option

MCA Assessment of Capacity

- P unable to make decision because of 'impairment of or a disturbance in the functioning of the mind or brain'
- P unable to make the decision if P is unable to
  - Understand the relevant information
  - Retain that information
  - Use/weigh up that information
  - Communicate the decision

MCA Assessment of Capacity

- Issues
  - Make sure you start in the ‘right place’ – presumption of capacity
  - Incapable or unwise?
  - Decision specific so:-
    - What is decision?
    - What information does P need to be told, able to understand etc
    - Timings & practical issues
    - Steps to assist P to make decision
    - Recording

MCA Best Interests

- Where P lacks capacity to make the decision need to consider P's best interests
- S.4 sets out a 'checklist'
- Have to have regard to relevant circumstances including
  - Whether P will regain capacity; P's past & present wishes & feelings, beliefs & values; consultation with others; permit, encourage P to participate

MCA Best Interests

- Issues
  - How does this work in practice?
  - Process
  - Is there really a BI decision to make?
  - Focus on wishes & feelings of P & importance of consultation

MCA Best Interests

- ‘The weight attached to the various factors will, inevitably, differ depending on the individual circumstances of the particular case’ (ITW v Z 2009)
- ‘Physical health and safety can sometimes be bought at too high a price … The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately paid in order to achieve some other good…What good is it to make someone safe if it merely makes them miserable?’ (Re MM 2007)

MCA- Authority To Act

- S.5 – provides ‘authority’ for acts in connection with care / treatment where
  - reasonable belief P lacks capacity &
  - reasonable belief act is in P’s best interests
- But
  - Subject to a valid applicable advance decision refusing treatment; cant act in conflict with LPA/Deputy decision; any ‘restraint’ involves additional criteria
  - Can’t deprive P of liberty w/o further authorisation

MCA- Authority To Act

- Can only ‘restrain’ P where
  - Reasonable belief necessary to prevent harm to P AND proportionate
- Restraint means
    - Use/threatens to use force to do act P resists
    - Restriction of liberty whether or not P resists
    - Deprivation of liberty is more than restraint

MCA – Deprivation of Liberty (DoL)

- Any DoL requires express authorisation
- This may be:
  - A court order from the Court of Protection (CoP);
  - or authorisation under the DoLS (the deprivation of liberty safeguards) where P is in a hospital or care home
  - In certain circumstances the MHA will have to be used

MCA- Authority To Act

- Issues
  - Understanding MCA can authorise force
  - Missing ‘restraint’ & additional criteria
  - When does CoP need to be involved?
  - Spotting a deprivation (DoL) & knowing what to do about it

What is a Deprivation?

- The ‘acid test’ is:-
  - **Whether P is under continuous supervision and control and not free to leave**
  - **NB ‘compliance’ is not relevant**

DoLS Authorisation?

- Hospital/care home completes form requesting standard authorisation
- This goes to the Supervisory Body (the relevant LA)
- Which arranges 6 assessments
- If authorisation needed straight away, hospital or care home can grant itself an ‘urgent authorisation’ (7 days may be extended further 7)

6 Assessments

- Age – over 18
- Mental Health – has mental disorder
- Mental Capacity – lacks capacity to decide whether to be cared for in hospital/care home
- Best interests – are restrictions necessary and proportionate to keep the person safe and are a less restrictive alternative
- Eligibility – should Mental Health Act be route instead?
- No refusals – is there valid advance decision or someone objecting with Lasting Power of Attorney

Effect of a DoLs Authorisation

- Legal authority to care home/hospital to deprive P of his liberty
- Safeguards for P
- No legal authority for care/treatment within care plan
- No express authority outside the care home/hospital
- CoP application may be required

Court of Protection

- Where P deprived of their liberty
- Not in hospital/care home (or under 18)
- Authorisation still required
- Will need an order from CoP
- CoP otherwise?

Court's Inherent Jurisdiction

- Development of Court role where vulnerable adult is 'capable' within the MCA
- Re SA
  - Capable within MCA definition so falls outside MCA
  - But due to other influences lacked capacity re arranged marriage
  - Court Inherent jurisdiction invoked

Lessons So Far

London Borough of Hillingdon v Steven Neary [2011] EWHC 1377 (COP)

Somerset v MK [2014] EWCOP

Milton Keynes Council v RR [2014] WL 1976380

Essex County Council v RF [2015] EWCOP 1

P v Surrey County Council, Surrey Downs CCG [2015] EWCOP 54

Bedford Borough Council v Mrs LC & Mr C [2015]

Re AG [2015] EWCOP 78

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