

# Mental Capacity and Dementia

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# MCA 2005

- Empowerment
- Protection of the incapacitated
- Time specific
- Decision specific

# MCA 2005

## HL Select Committee Report:

“The Act has suffered from a lack of awareness and a lack of understanding...”

“...it is seen as an additional add on rather than being central to their working lives...”

# MCA 2005

HL Select Committee Report:

“.....paternalism and risk aversion have prevented the Act from being widely known or embedded.”

# MCA 2005

## The 5 Pillars

- Presumption of capacity
- Practicable steps
- Unwise decision
- Best interests
- Path of least restriction

# MCA 2005

“ A person lacks capacity if at the material time he is unable to make a decision for himself due to an impairment of or disturbance in the functioning of the mind or brain, whether temporary or permanent.”

# MCA 2005

In practice?

- Diagnostic tests
- Functional tests
- Causative link

# MCA 2005

A good capacity assessment:

- Contemporaneous documentation
- Clarity about the decision being addressed
- Explanation of choices and details P needs to understand
- Efforts to encourage P to decide
- Evidenced why P cannot understand, what the impairment is and why it is more than unwise



# Powers of Attorney

## Enduring Powers of Attorney ( EPA)

- Can no longer be made but remain valid
- Financial only
- Valid and operable upon signature
- Requires registration upon loss of capacity

# Powers of Attorney

## Lasting Powers of Attorney ( LPA)

- Financial or Health and Welfare
- Valid on registration
- Financial – operable upon registration
- Health and Welfare – operable upon loss of capacity
- Continues beyond upon loss of capacity

# Powers of Attorney

## Lasting Powers of Attorney ( LPA)

- Who is the attorney?
- How can they act – jointly? Singly?
- Are there restrictions, conditions, guidance?
- Are the attorneys able to make decisions on life sustaining treatment?
- Is it still valid?

# Advanced Decisions

- Hand in hand with LPA ( HW)
- Statement of refusal of specific medical treatment
- Cannot be overridden by LPA unless authority given
- Can be verbal except for life saving/sustaining treatment

# Advanced Decisions - Life sustaining treatment

- In writing
- Signed
- Witnessed
- Clear statement that relates to specified treatment even if life is at risk

# Court of Protection

- Financial
- Health and Welfare
- Healthcare

# Court of Protection - Financial

- Governed by the Court
- Terms of the Court order
- May be lay, professional, local authority, panel deputy
- Management of finances – shades of grey?

# Court of Protection - Health and Welfare

- Governed by the Court
- Terms of the Court order
- Rarely appointed
- Unlikely to be professional, local authority, panel deputy
- Best interest decisions/declarations of capacity



# MCA v MHA

- MHA – to provide treatment to those with a mental disorder and minimise/manage risk
- If the MHA criteria are met, the MHA takes precedent.
- Alternative options under the MCA?

# DOLS

- Bournemouth Gap – P under informal admission, not detained under MHA – but deprived of liberty
- DOLS only triggered if P lacks capacity under MCA

# DOLS - what is a deprivation of liberty?

- Pre Cheshire West – relative normality concept
- Compared the quality of life of P to a person of similar difficulties and disabilities

# DOLS - what is a deprivation of liberty?

- P v Cheshire West and Chester Council and P & Q v Surrey County Council
- Both cases – vulnerable disabled adult, residing in care or foster facility, subject to restrictions
- Question considered – were they deprived of their liberty?

# DOLS - what is a deprivation of liberty?

- HL – P deprived of liberty, 4:3 split that P and Q also deprived
- New test – DOL where person is under continuous supervision and control and not free to leave
- Normality irrelevant
- Reference to disability irrelevant
- Separated question of deprivation and justification

# DOLS - assessments

- Over 18
- Mental health requirement – unsound mind but NOT subject to MHA
- Mental capacity requirement – lack of capacity
- Best interests requirement

# DOLS - COP

- Termination of authority or variation of terms
- Direction to managing authority to terminate/vary
- Direction to supervisory body to terminate/vary

# DOLS - in practice

- Many people still not trained
- Post Cheshire West – 10 fold increase in number of applications anticipated
- Strain on LA?



# DOLS - the future?

HL Select Committee:

“the provisions are poorly drafted, overly complex and bear no relationship to the language and ethos of the MCA. The safeguards are not well understood and are poorly implemented.”

Comprehensive review recommended.