

Number 20

Taking photos of patients without capacity

Queries often arise regarding the legal issues concerning taking photographs of residents who lack the capacity to consent to this.

Photographs may be taken for identification purposes, especially useful if the resident may stray from the home and become lost.

The issues that are raised are touched on by the General Medical Council in guidance entitled “Making and Using Video and Audio Recordings of Residents”.

Before taking a photograph of the resident, the resident should be informed that he or she is going to be photographed; staff should also ensure that the resident is aware of the purpose for taking the photograph and consents to it. Photographs should not be used for any purpose for which the resident has not given his consent, without first obtaining further consent. The GMC guidelines provide that certain images, (eg laparoscopic images) can be taken without separate consent, but that otherwise consent should be obtained to any recording for the assessment or treatment of residents.

Accordingly, consent should be obtained from competent residents when it is proposed that their photographs are taken. However, where a resident is incapable of giving consent, because of illness or mental capacity (such as senile dementia), photographs should only be taken of such residents where the breach of confidentiality can be justified on grounds of the resident’s best interests or where it is necessary for the prevention of disorder or crime, for the protection of health or for the protection of the rights and freedoms of others. It is also important to note that the GMC requires agreement to be obtained from a close relative or carer where any recording, including a photograph, is to be made of an incompetent resident.

The judgment of whether a resident is capable of giving or withholding consent to having their photograph taken, must be based on the resident’s ability to understand what that involves. Where there is any doubt about the resident’s capacity to do this, advice should be obtained from a doctor on the issue of capacity.

Whilst it may be justified to take a photograph in order to protect the resident from the risk of serious harm, with a view to disclosing that photograph to another body, such as the Police, there is less possibility of being able to justify this when the resident remains habitually in a hospital or home given that that resident can no longer be said to be at a continuing risk of serious harm. Obviously photographs have to be taken at an early stage but consideration should be given to the need in individual cases.

Where it is thought necessary to take and disclose photographs, it is important to ensure that the use of photographs is proportionate to any aims of protecting the resident, to avoid a claim brought on behalf of the resident that the unit had breached the resident’s rights under Article 8¹ of the Human Rights Act 1998. In order to rely successfully on the qualification that justifies breach of the right to a family

¹ The right to a private life

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life with the corresponding duties regarding confidentiality, on the basis of public interest etc, it is necessary to establish that the steps taken were proportionate to the aim sought to be achieved.

All units should have a policy dealing with this matter, given the implications of the Human Rights Act 1998 and the GMC guidelines (that have been revised to take account of that legislation). Further advice on these matters or assistance in drafting policy guidelines is available from RadcliffesLeBasseur.

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For more information on Care Home Law contact Andrew Parsons at RadcliffesLeBasseur on 020 7227 7282, or email: andrew.parsons@rlb-law.com.

Out of office emergency advice available 24hrs on 07802 506 306.

Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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