RadcliffesLeBrasseur

Care Homes Briefing

Solicitors

Number 43

The covert administration of medicine

Consent to medical treatment is probably the most significant principle underlying the law relating to treatment of psychiatric patients. To force medical treatment upon a patient is likely to contravene the prohibition against inhuman and degrading treatment under the Human Rights Act 1998[1]. The lawful exception to this is treatment for a patient's mental disorder under the terms of the Mental Health Act 1983 ("MHA"), which provides safeguards to patients treated for a mental disorder.

Accordingly, it follows as a general principle that the covert administration of medication, with a view to hiding the fact that the medication is contained in, for example, food or drink, will be unlawful as the patient will not have been given the opportunity of consenting to or refusing such medication[2].

Patients Lacking Capacity

Where a patient lacks mental capacity and is thus unable to refuse or consent to treatment, covert administration of medication may be lawful provided that (1) it would be in the view of a reasonable body of medical opinion *necessary* to use this means to save the patient's life or prevent deterioration in his health and (2) accords with the best interests of the patient. If there is any doubt about the patient's capacity then a second opinion should be sought, in the usual way. If there remains doubt legal advice should be sought with a view to a possible application to the Court.

The decision whether or not to administer medication covertly should be considered by the multi-disciplinary team and it is good practice to consult the family of the patient with regard to such decisions. The clinician responsible for the patient's care should consider the following points, all of which should be recorded in the notes of the patient:

- Whether the patient is competent to consent to or refuse treatment;
- Why it is proposed to administer medication covertly;
- If a patient is incompetent, whether it is necessary to save a patient's life/prevent deterioration in his health and accords with his best interests;
- Whether, in the case of an incompetent patient, the patient is likely to recover so as to be capable of making his own treatment decisions in the near future.

Patients with Capacity

The position is more difficult if a patient has capacity. A person who has been detained under the MHA is not necessarily incapable of giving or refusing consent. The

[1] Article 3 of the European Convention on Human Rights
[2] See NMC's position statement on covert administration at www.nmc-uk.org

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MHA does, however, make provision for patients to be treated for their mental disorder without consent in certain circumstances[3]. In circumstances when a detained patient does not consent, the use of covert medication may be justified under the MHA, particularly where this might enable treatment to be given without the use of considerable restraint of the patient, or risk to staff.

Conclusion

It should be clear from the above that the use of covert administration will depend upon a number of variables. Consideration should be given to whether the patient is competent, whether the patient is detained under the MHA or informal, and the basis upon which the use of covert administration is proposed. Providers of health care should therefore seriously consider introducing a policy relating to medication administered in this way if one is not already in place. Staff should be given guidance as to the criteria that should be considered when reaching a decision on whether covert medication can be justified; a policy can assist in directing staff through those reasoning processes.

The Mental Capacity Act 2005, when enacted (probably in 2007), will have implications for this subject. In particular, patients are more likely then to have considered making an Advance Decision or may have appointed a person to make healthcare decisions for them under a Lasting Power of Attorney. It is advisable that policies be reviewed in preparation for the 2005 Act coming into force.

We have considerable experience in drafting and advising on policies of this kind. Should you require any assistance you should not hesitate to contact us.

Alexandra Johnstone

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Errata

Unfortunately Care Home Briefing No. 41 contained a typographical error. At the bottom of the first page where reference is made to the situations where Part IV of the Act does not apply, reference was made simply to S.37 rather than, as should have been the case, S.37(4).

An amended copy of Briefing 41 correcting this typographical error is available on our website at www.rlb-law.com.

[3] See section 62 and 63 MHA, including where a SOAD has certified that the patient should receive the treatment even though he or she has not consented to it.

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