

Care Homes Briefing

#

Solicitors

Number 73

The Care of Home Residents suffering from Dementia

Care Homes continue to attract media attention in various ways. The latest report refers to a review carried out by a firm of health and social care analysts which concluded that training of staff to deal with patients suffering from dementia was inadequate.¹

The care of a patient with dementia is likely to raise a range of legal and ethical issues, from whether the patient can be involved in treatment decisions to sensitive end of life issues such as withdrawing treatment from a patient.

A person with dementia will generally experience a progressive decline in their abilities to understand information due to damage caused to the brain as a result of their condition. The impact of dementia may be very different from person to person and the condition itself may range from the mild to the very severe. All these factors will almost certainly have significance for the care and treatment of the patient.

One of the most important legal considerations relating to the care of a patient with dementia, particularly when the person is in the early stages of the disease, will be the determination of whether the person has capacity to make decisions about their treatment and care. The

Mental Capacity Act 2005 (MCA) makes it clear that a person must not be assumed to lack capacity or be assumed to be unable to make a decision merely by reference to a person's age, appearance or condition. It will thus always be important for those responsible for the care and treatment of patients in a care home setting to undertake an assessment of the patient's capacity to make any particular decision.

It is important to remember that the statutory test for capacity is both matter and time specific. Particularly in the context of a person with early signs of dementia, that person may have fluctuating capacity and/or may have capacity to make certain decisions but not others. For example, such patients may be able to understand and retain information about straight forward and immediate matters but not have the same degree of understanding in relation to more complex treatment decisions.

The emphasis placed by the Mental Capacity Act on maximising the potential capacity of patients to make decisions, for example by using simple language, will have to be taken into account by those responsible for the care of patients with dementia. This may require considerable time and effort in seeking to explain matters to such a patient. The MCA expressly requires a person in the position of decision maker for a patient who lacks capacity to "as far as reasonably practicable, permit and encourage the person to participate, as fully as possible in any act done for him and any decision affecting him".

¹ See for example report by Nick Trigg on "Care Homes warned over dementia" dated 17 March 2009 at <http://new.bbc.co.uk>

Where dementia affects a patient to such a degree as to mean that that person lacks capacity to make decisions about specific aspects of their treatment and care, those responsible for that person's care must make decisions in accordance with that person's best interests. This will involve considering whether that patient has in the past expressed wishes and feelings relevant to the matter about which the decision is to be made. Other factors that need to be considered in reaching a relevant decision include the beliefs, such as religious beliefs, of the patient and any other values that would be likely to influence the person's decision if he or she still had capacity to make the relevant decisions. Accordingly, it is an important aspect of good practice in the management of care homes for a system to be in place

by which information is gathered about the background of the patient, preferably at the time of the pre-admission assessment before he or she is admitted to a care home. An essential aspect of such procedures will be to gather information from friends and relatives of the patient as the views of people such as these are required to be taken into account as far as practicable when making decisions about the patient under the terms of the "best interests checklist" as set out in the MCA.

RadcliffesLeBrasseur have extensive experience of advising care homes in relation to issues concerning patients with dementia. The firm also provides regular training on relevant issues such as capacity and decision making. Should you require advice on any aspect of the care of patients with dementia or consider that you would benefit from our training services, you are welcome to contact us.

Alexandra Johnstone
© RadcliffesLeBrasseur
March 2009

Deprivation of Liberty Safeguards

As you will know, the Deprivation of Liberty Safeguards come into force on 1st April 2009. It is clearly important to ensure that staff are aware of the new regime, in particular, to ensure that there is no unlawful detention (which could then lead to a claim for compensation).

To assist with this, we have prepared a policy for healthcare staff summarising the new law and setting out the steps that need to be taken. This is available for £950 plus VAT.