RadcliffesLeBrasseur

BRIEFING

Number 71

Children: Capacity and Consent – a Summary Briefing

MENTAL HEALTH LAW

The legal issues concerning children and Consent to Treatment are not always straightforward. This briefing provides a summary of the issues, albeit that in cases of difficulty, specific advice will be needed.

Children are treated differently from adults by the law of consent.

An adult patient with capacity may give or refuse consent to treatment. If he refuses treatment, unless the Mental Health Act allows this to be overridden, his decision must be respected although he must make the decision voluntarily and must receive treatment information specifically tailored to his individual circumstances prior to doing so.

Adult patients are presumed to have the mental capacity to make a treatment choice.

Accordingly, health professionals do not have to undertake a formal assessment of mental capacity unless there is something to suggest that they should e.g. a history of mental illness, pain or extreme anxiety.

If a formal assessment of capacity is required this should be done by reference to the "three stage test";

1. Can the patient retain and understand the treatment information?
2. Is he properly orientated in reality and
3. Is he able to weigh up the information given in order to made a reasoned choice?

16 or 17 year old children (a person is no longer a child when he turns 18) are similarly presumed to have capacity[1] and are able to give consent to treatment. The child must also make the decision voluntarily and after being furnished with the appropriate information.

However a 16 or 17 year child cannot give an absolute and binding *refusal* like an adult can.

A Gillick competent child (one below the age of 16 who has sufficient maturity and understanding and can nevertheless go through the three stage test - there is no presumption of capacity) can give consent to treatment but he cannot give an absolute and binding refusal.

Someone with parental responsibility can give consent to treatment for a child (as long as they –the person with parental responsibility - have the mental capacity to do so) but they cannot give an absolute and binding refusal.

This is because any decision relating to a child must be in the child's best interests.[2] Sometimes those close to a child may not be the best people to decide what is best. They may have certain religious beliefs that would compromise the child or may wish to prolong the child's life at any cost.

[1] Family Law Reform Act
[2] Children Act

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Health professionals cannot be forced to treat against their clinical judgement. Further, health professionals may override what they consider to be an unreasonable refusal by a child or parent. In such cases it is advisable to seek a declaration from the Court that the proposed treatment is indeed in the best interests of the child. This is not necessary if the treatment falls within the definition of treatment for mental illness as defined by the Mental Health Act and the child is compulsorily detained. The consent to treatment sections of the MHA (including s63) apply equally to children just as they do to adults.

At all times, and particularly if treatment is forced on a child, health professionals must take care to remain Human Rights Act compliant[3] and make sure that the treatment and its effects are proportionate to the aim.

Finally, it is important to have in mind that consent is not a signature on a form, it is a process. The whole process must be precisely documented. Health professionals should ask themselves; "Would this record help me remember what happened, what was said and most importantly the thinking behind my decisions if I am not here to continue the patient's care, if there is an audit or if the matter comes to court in years to come?"

New Legislation – Patient Advocacy Services

A new statutory instrument[4] came into force in September 2003. The regulations provide a definition for a "patient advocacy and liaison service" for the purposes of Section 134 (3)(a) of the Mental Health Act 1983. Section 134 deals with circumstances in which patients' correspondence may be withheld; however, correspondence with a patient advocacy and liaison service is exempted from this.

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[3] See previous briefings
[4] The Mental Health (correspondence of patients, patient advocacy and liaison services) Regulations 2003 SI 2003 number 2042.

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