Shared Insights

Mental Capacity

Chris Stark and Clare Shepherd

8 November 2023

Browne Jacobson

Key Highlights from the Session

Our Mental Capacity Shared Insights forum took place on 8 November 2023. It was hosted by Chris Stark (Partner) and Clare Shepherd (Senior Associate). We had just under 250 delegates in attendance, and it was fantastic to have so many people joining us.

During the session, Chris talked through some recent cases that have been heard in relation to mental capacity, care and treatment. He also highlighted key points from CQC's latest State of Care report relating to the quality of mental health care and the Deprivation of Liberty Safeguards (DoLS). Clare focussed on transition planning in the Court of Protection and went through a helpful transition planning checklist.

Case law update

Chris ran through recent caselaw on the following topics:

- **The tricky interface between the Mental Health Act (MHA) and the MCA:** Manchester University Hospital NHS Foundation Trust v JS & Others (Schedule 1A Mental Capacity Act 2005) [2023] EWCOP 33

  At the initial hearing in this case, the judge held that a 17 young girl (JS), for whom there was no suitable community care provision, was ineligible to be deprived of her liberty on a hospital ward because she fell within Case E of Schedule 1A to the Mental Capacity Act (MCA).

  JS could have and should have been detained under the MHA instead. The decision was appealed, in part because psychiatrists had assessed JS and did not consider it appropriate to detain her under the MHA. However, the appeal was dismissed and the first instance decision upheld. The appeal judge endorsed some practical suggestions given by the parties to address similar "stalemate" situations in other cases (set out in paragraph 118 of the judgment).

- **Whether a diagnosis is required under the MCA:** North Bristol NHS Trust v R [2023] EWCOP 5 and An NHS Trust v ST & Another [2023] EWCOP 40

  Both of these cases have confirmed that the MCA does not require a formal diagnosis before an impairment of, or

Chris Stark
Partner

+44 (0)115 934 2059
chris.stark@brownejacobson.com

Clare Shepherd
Senior Associate

+44 (0)330 045 2291
clare.shepherd@brownejacobson.com

Shared Insights

Mental Capacity

disturbance in the functioning of, the mind or brain can be found. It is a question of fact for the court to answer, based on the evidence before it. However, in TW v Middlesbrough Council [2023] EWCOP 30, a diagnosis of Learning Disability (LD) was required in order for a man ("Tony") to be accepted at a particular placement. Despite expert evidence that Tony did not meet the criteria for LD, it was accepted that Tony has a longstanding impairment of the mind or brain as a result of prolonged deprivation of communication, education and life experience, which was best termed as a "functional LD". His inability to make decisions about his care and residence was as a result of this. The term "functional LD" was sufficient for Tony to be admitted to the desired placement.

- **Whether a patient can demand treatment that is not clinically necessary:** R (JJ) v Spectrum Community Healthcare CIC [2023] EWCA Civ 885

  This recent Court of Appeal case confirmed that a patient cannot demand medical treatment that is not clinically indicated and therefore not offered to him by a clinician. A patient's choice is limited to the available treatment options, and while they can choose among those options, they cannot force a clinician to provide a treatment that they consider inappropriate.

CQC State of Care report – focus on DOLS

Chris summarised the key findings from CQC's recent State of Care report, in relation to DOLS. In particular, the year on year increase in the number of applications to authorise deprivation of liberty and the delays in processing those applications were highlighted.

In relation to the Liberty Protection Safeguards (LPS), which have been delayed beyond the life of the current government, Clare mentioned that Labour previously voted against the proposed new system.

This suggests that LPS are unlikely to come into force in the near future, even if Labour are voted into power at the next election. Chris also pointed out that the new Mental Health Bill was not mentioned in the King's Speech (delivered on 7 November 2023), meaning reforms to the Mental Health Act will not happen any time soon. For a written summary of CQC's report, please see here.

Transition plans

Clare delivered a practical session on transition planning. She took delegates through the "Transition planning checklist", approved by District Judge Avis in 2018 for use in the Court of Protection. This checklist is widely used and outlines everything that needs to be considered and documented when moving someone between placements or hospitals.

Clare placed particular emphasis on the need to:

- Clearly document the level of restriction the person will be subject to at the new placement (and ensure this is easy to find in the plan).
- Make the plan person centred and ensure that the person coordinating the plan is familiar with P. The plan must be agreed by all those involved in advance of the move date.
- Outline a step by step account of how P will be moved, including timings, people involved, type of vehicle that will be used, comfort breaks for longer journeys, contingency plans and when and how to inform P of the arrangements.
- Clearly document any sedation and restraint that will be required, noting that high levels of sedation will likely require a separate application to Court.
- The full "Transition planning checklist" can be found on the following page.

We look forward to seeing you at our next forum, which will take place on 7 February 2024.

Shared Insights

Mental Capacity

Court of Protection

Checklist for Transition Plan (March 2018)

1. Stated Aim of Plan.
2. Details of P's current care plan and proposed plan, including full care plans for each setting (or references to those documents where it is not appropriate for full care plans to be included).
3. How an effective handover of care will be arranged.
4. Which named individual will take responsibility for the transition on the day and subsequently, ("the Transition Lead").
5. Which named individual if other than the Transition Lead, will co-ordinate communication between ward staff in respect of the discharge plans and handing over of information.
6. Step-by-step account of how P will be moved from A to B including:
    a) Timing (best time of day for the move taking into account P's needs and behaviours).
    b) Personnel involved.
    c) Type of vehicle (wheelchair taxi, ambulance, ordinary taxi etc).
    d) What plans made for comfort breaks if journey over 25 miles.
    e) Who will "meet and greet" on arrival?
    f) Contingency plan.
    g) When and how will P be told of the arrangements.
    h) What will happen from P's perspective (e.g. moving possessions, arrangements for meals on the day etc.).
7. Where the care plan involves any element of sedation:
    a) What type of sedation?
    b) Who will administer it?
    c) How will it be administered?
    d) When will it be administered?
8. Where the care plan involves any element of restraint:
    a) Identify the precise nature of the restraint,
    b) The rationale for it,
    c) Plans to minimise the need for restraint and
    d) Contingency plans in case the need for restraint is escalated.
    e) Initial plan if possible to state that no restraint or sedation required. If needed parties to return to court for specific order.
    f) Whether police will be present and if so, details of their involvement. If police are involved, ensure the transition plan includes sufficient to satisfy Coleridge J's guidance in Re MP, LBH v GP [2009] FD08P01058
9. Monitoring in the days/weeks immediately following the move.
10. All parties, hospital, care home, social worker and transport agency must confirm that they have signed off on the Plan.

District Judge Avis

28th March 2018

brownejacobson.com
+44 (0)370 270 6000

Please note:
The information contained in this document is correct as of the original date of publication.
The information and opinions expressed in this document are no substitute for full legal advice, it is for guidance only.

Browne Jacobson