GARDEN COURT
CHAMBERS

Release from Detention: Mental Health Act 1983 and Court of Protection

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25 April 2024

Release from Detention

Helen Curtis, Garden Court Chambers

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Introduction

- Between April 2022 – March 2023, 51,312 people were detained under the MHA (cyber incident between August 2022 and March 2023 suggests figure could be higher)
- Between 2022 – 2023, the number of applications to deprive a person of their liberty increased to over 300,000 with only 19% of standard authorisations completed within the statutory 21-day timeframe
- In order to focus on the discharge destination from detention under the MHA or living in the least restrictive circumstances under the MCA, it is important to understand how the person came to be detained or deprived of their liberty
- Concepts of capacity, objection, treatment do not appear to be universally well understood or consistently applied which leaves people in 'legal limbo' and without access to legal protection

Mental Health Act patient in the Court of Protection

- *MC v Cygnet Behavioural Health Ltd and Secretary of State for Justice* [2020] UKUT 230 (AAC)

- MC long term s.17(3) leave in nursing home; still needs medication but no longer needed to be in hospital; applied for conditional discharge, adjourned to obtain standard authorisation; FtT – regretted – could not conditionally discharge with conditions which amounted to a deprivation of liberty and refused to discharge her.

- UT Judge Jacobs quoted from *MM* (para 27):
  'Whether the Court of Protection could authorise a future deprivation, once the FtT has granted a conditional discharge, and whether the FtT could defer its decision for this purpose, are not issues which it would be appropriate for this court to decide at this stage in these proceedings'.

Case study – an example of the interface

- P is forensic patient who had been conditionally discharged from a psychiatric hospital in 2017 to a specific care home and who consistently expressed a wish to leave the placement and live in the community/with family. P had not unpacked bags since moving to care home and sought an absolute discharge 'no strings attached' from the First-tier Tribunal

- *Capacity*: P initially lived at the care home subject only to the conditions attached to the conditional discharge. P was deprived of their liberty there without a standard authorisation, initially because P had been found to have capacity to decide where to live and receive care. Subsequently P was found to lack capacity to make these decisions and the care manager applied for a standard authorisation which was then challenged in the Court of Protection

Need for greater understanding of MCA

- [Deprivation of Liberty Safeguards (DoLS) - Care Quality Commission (cqc.org.uk)]
  - 'In mental health settings we continue to see a variable understanding of the interface between the MCA, which DoLS are part of, and the MHA. Where both frameworks could be used, it is not always clear how staff decided that using the DoLS framework would be most appropriate for a particular patient'

- Poor recording of mental capacity assessments; need for separate capacity assessments for separate decisions not well understood

- Need for regular review to ensure principle of least restriction is being observed and any restrictive measures remain necessary and proportionate

- Reliance on assessments conducted remotely – now unlawful following *Derbyshire Healthcare NHS Foundation Trust v SoS for HSC and (1) NHS England (2) PQR (3) MIND* [2023] EWHC 3182

Cases – more interface

- *Manchester University Hospital NHS Foundation Trust v JS* [2023] EWCOP 33
- Theis J upheld decision of HHJ Burrows [2023] EWCOP 12 and the test to be applied when determining whether a person could be detained under the MHA

- *SS v Cornwall Partnership NHS Foundation Trust (Mental Health)* [2023] UKUT 258 (AAC)
- Tribunal must adjourn to seek information on aftercare that would be available to a patient should the tribunal direct discharge

- *ML v Priory Healthcare Limited and SSJ* [2023] UKUT 237 (AAC)
- Misapprehension by FfT that there was no way for it to coordinate the MHA proceedings with the MCA authorisation. Made decision on s.72(1)(b) detention criteria without reference to the possibility of an alternative framework for managing the patient was available ie a less restrictive alternative to hospital detention

Section 17 leave, CTO, Guardianship

- Section 17 leave
- *DB v Betsi Cadwaladr University Health Board* [2021] UKUT 53 (AAC)
- Living in care home with supervised leave in the community. Not been inside a hospital for almost a year. Argued not appropriate to remain liable to be detained as care package did not contain a significant component of hospital treatment

- CTO
- Appropriate medical treatment is available in the community
- Apply to FtT for discharge from CTO otherwise renewable by RC

- Guardianship
- An order under MHA but not liable to detention under MHA therefore cannot be treated without consent
- Arguably underused by local authorities. Light touch for community patients

Local Authority X v MM & anor [2007] EWHC 2003 (Fam)

The fact is that all life involves risk, and the young, the elderly and the vulnerable, are exposed to additional risks and to risks they are less well equipped than others to cope with. But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else. Often it will be appropriate to do so, but not always. Physical health and safety can sometimes be bought at too high a price in happiness and emotional welfare. The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good – in particular to achieve the vital good of the elderly or vulnerable person's *happiness*. What good is it making someone safer if it merely makes them miserable? (para 120)

Thank you

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Young Persons

James Holmes, Garden Court Chambers

25 April 2024

Introduction

- This is a complex area of law.

- This is not helped by;
  - Lack of suitable placements.
  - Professionals encountering such cases not working cooperatively with one another.

- HHJ Hilder in *Bolton Council v KL [2022] EWCOP 24* has noted, as those that regularly practice in this area, there has an increase in applications to the Court of Protection involving 16 – 17 years olds.

Does the Young Person Lack Capacity?

- This is the first question all practitioners need to consider.

- Not always a straightforward question.
    - Fluctuating capacity.
    - Distinguishing between a young person who lacks capacity and young person who makes a decision which, objectively, would be regarded by others as unwise.

- Need to identify the specific decisions which the Young Person needs to make.

Which is the appropriate tribunal

- **Court of Protection**
  - Governed by the Mental Capacity Act 2005
  - Applies to those aged over 16 – young persons only
  - The person needs to lack mental capacity
  - Re X procedure – streamlined procedure

- **National Deprivation of Liberty Court – Family Division**
  - Inherent Jurisdiction
  - In relation to those under 18 years old – children and young persons.
  - Application of Article 5 Test – objective element and subjective element

- **Family Court Secure Accommodation Order**
  - Section 25 Children Act 1989, test being
  - (a) he has a history of absconding and is likely to abscond from any other description of accommodation; and if he absconds, he is likely to suffer significant harm; AND/OR
  - (b) if he is kept in any other description of accommodation, he is likely to injure himself or other persons.

A-F (Children)(No 2) [2018] EWHC 2129 (Fam)

- “6. … the Court of Protection has jurisdiction in relation to children who have attained the age of sixteen years and who lack capacity within the meaning of the Mental Capacity Act 2005. So too, in relation to such children, the Family Court has jurisdiction in the context of care proceedings under Part IV of the Children Act 1989 and the Family Division of the High Court, subject to the requirements of section 100 of the 1989 Act, can exercise its inherent parens patriae jurisdiction

Manchester University Hospitals NHS Trust v Anor [2023] EWCOP 33

- An appeal before the Theis J, Vice President of the Court of Protection from, a decision of HHJ Burrows.

- The appeal concerned – interpretation of Schedule 1A MCA 2005 and the basis upon which the court sitting in that jurisdiction should determine ineligibility.

- At paragraph [123] the following guide was given;

> *(1)In any application seeking authorisation to deprive the liberty of a 16 or 17 year old, the applicant should carefully consider whether the application should be made in the Court of Protection and, if not, why not.*
> *(2)If a Schedule 1A Case E issue is likely to arise any evidence filed in support of an application should address that issue, so the relevant evidence is available for the court, thereby reducing any delay.*
> *(3)In the event that the Court of Protection determines that P is ineligible the professionals should urgently liaise in the way outlined above.*

Identifying Suitable Placements

- As evidenced by the the numerous published judgments, there is a chronic shortage of placements for Young People.

- But what to do?

- **NHS Trust v ST (refusal of deprivation of liberty order) [2022] EWHC 719** – young 14 year child with ASD, moderate learning disability at the time of the hearing was 'detained' on a paediatric ward.

- **Manchester University Hospitals NHS Foundation Trust v JS [2023] EWCOP 12** – a vulnerable 17 year old, on a mixed adult ward and not a psychiatric facility

- If the Young Person has a Educational Health Care Plan, consideration of review, in particular Section I (Placement).

Identifying Suitable Placements (cont.)

- Creation of a bespoke placement for the Young Person, but there are issues;
  - Unregulated
  - High turnover of staff, who lack necessary training.
  - Young Person generally does not have access to support they need.
  - Oversight in National Deprivation of Liberty Court reduced.

Thank you

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Building a framework for transition:

Care management, provision and funding

Is P entitled to s.117 aftercare, CHC funding, social care or a joint package of care? Is joinder/participation of an ICB or Trust required?

- **Mental Health Act 1983 s 117 after-care** (joint duty on ICBs and social care) - for both of the following purposes (a) meeting a need arising from or related to a person's mental disorder; and (b) reducing the risk of a deterioration of the person's mental condition (and, accordingly, reducing the risk of re-admission to hospital for treatment for mental disorder) (s 117(6))
- **NHS Continuing Healthcare (NHS CHC)** - Arranged and funded solely by the health service to meet physical or mental health needs arising as a result of disability, accident or illness - NHS Commissioning Board and CCGs (Responsibilities & Standing Rules) Regs 2012 (2012 Regs), reg 20 (Assessment prior to discharge s.74 -Care Act 2014) (Assessment: 2012 Regs, reg 21; planning: National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care (NF) [185-200])
- **Joint packages** - (NF, para 287) – Arising where ineligible for CHC but needs are beyond LA provision alone.
- **Care Act 2014** (Duty to assess s9, decide eligibility s13 (Care and Support (Eligibility Criteria) Regs 2015), and plan ss. 24-25) (N.B. transitional assessments for support post 18 ss 58-9 CA 2014)
- **Children Act 1989 and Children (Leaving Care) Act 2000 –** Children and care leaver's provision.

Foundations

Co-operation:

- National Health Service Act 2006, s82 – In exercising their respective functions NHS bodies and local authorities must co-operate with one another in order to secure and advance the health and welfare of the people of England and Wales.
- Department of Health and Social Care Guidance on Discharge from Mental Health Inpatient Settings, 26 January 2024 core principles:
    - 1: individuals should be regarded as partners in their own care throughout the discharge process and their choice and autonomy should be respected
    - 2: chosen carers should be involved in the discharge process as early as possible
    - 3: discharge planning should start on admission or before, and should take place throughout the time the person is in hospital
    - 4: health and local authority social care partners should support people to be discharged in a timely and safe way as soon as they are clinically ready to leave hospital
    - 5: there should be ongoing communication between hospital teams and community services involved in onward care during the admission and post-discharge
    - 6: information should be shared effectively across relevant health and care teams and organisations across the system to support the best outcomes for the person
    - 7: local areas should build an infrastructure that supports safe and timely discharge, ensuring the right individualised support can be provided post-discharge
    - 8: funding mechanisms for discharge should be agreed to achieve the best outcomes for people and their chosen carers and should align with existing statutory duties

Foundations continued…

Individual circumstances

- P's wishes and feelings, history, community/family circumstances
- Care Act 2014, s74 - Where a relevant trust is responsible for an adult hospital patient and considers that the patient is likely to require care and support following discharge from the hospital, the relevant trust must, as soon as is feasible after it begins making any plans relating to the discharge, take any steps that it considers appropriate to involve the patient and the carer of the patient.

Early issues

- Capacity - What determinations are required? (Correct identification - Wiltshire CC v RB [2023] EWCOP 26)
- Statutory assessments for P -
  - Timing - PH v CCG [2022] EWCOP 12
  - Availability – ND (Court of Protection: Costs and Declarations) [2020] EWCOP 42
- Carers assessments (CA 2014, duty to assess s 10, decide eligibility ss.13, 20 and plan ss.24-25)
- Respite provision
- Urgent steps to preserve P's property/benefits?

Responsibilities and handover:

a) What is the intended placement? (care home, supported living, package of care in the community)

b) What restrictions and review mechanisms are sought?

c) What evidence is required in support of the move? Is a Trust/ICB or education authority required to be joined or provide input?

d) What are the handover requirements? Liaison/ planning with care staff and health counterparts in the community

Structuring support

<u>Core elements of planning:</u>

a) Placements/ care staff: Sourcing, handover, training (e.g. restraint and communication), support and planning
b) Health: Handover to community mental health, learning disability teams etc, ongoing psychiatric or psychology input, GP contact
c) Specialist input: SaLT/ OT/Psychology/Dietician/ISW etc
d) Activities: community access, day centre access, recreation, personalisation
e) Family input e.g. role, views, placement location/ travel, carer requirements/ assessments
f) Moving home: Belongings, furniture, and personalisation
g) Finances: deputy or appointee, benefits and transport costs

Checklist

a) Care Plans – Statutory plans and care placement plans
b) PBS planning- forms of restraint and staff training
c) Risk Assessments
d) Communication: communication passport and social stories
e) Conveyance plan
f) Day of Move plan (e.g. social stories, who will be there, welcome plans/introductions, contingencies)
g) Activities: Weekly planners
h) Education - EHCP under Children and Families Act 2014 s 37 can be maintained to age 25
i) Contingency/ crisis plan
j) Respite plan
k) Restrictions – identification/list of restrictions, any capacity issues arising (e.g. internet use)

Thank you

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