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Conveyance of Mentally Ill Person from their Property: Which Legislation to Use? – Mental Capacity Act (MCA) or Mental Health Act (MHA) or Court of Protection

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Abstract

Aim and methods: The aim of this review is to consider the appropriate use of either legislation the Mental Capacity Act (MCA) or the Mental Health Act (MHA) or Court of Protection to transfer the patient/person from one accommodation to another for the purposes of care they need. The methodology used for this article is review of literature.

Results: Conveyance of the person from one place to another poses a number of conflicting issues in terms of mental capacity, their independence, liberty and balancing with safety and protection of the person. MCA (Deprivation of Liberty Safeguards), MHA (various sections 2 and 3, Guardianship Order) and Court of Protection can be used appropriately for the individuals concerned and situations that demand at the point of assessment.

Clinical implications: Admissions to acute hospitals and mental health institutions that sometimes take place out of hours can be prevented to certain degree. If appropriate placement plans are made and adequate discussions are carried out to use MCA, MHA or Court of Protection then people would be appropriately placed in safe environment.

Introduction

The Mental Capacity Act 2005 (MCA) and The Mental Health Act 2007 (MHA) are used in a number of situations by health professionals, police and social services. The MCA is a statutory framework for people who lack capacity to make decisions for themselves or who have got the capacity but want to make preparations for the future should they anticipate losing capacity [1]. The MCA received the Royal Assent in 2005, and came into force in 2007. For patients who lack mental capacity to make decisions about their living circumstances and accommodation, the MCA allows the transferring of these persons in their best interests to another accommodation, hospital or nursing/care home. The section 6.11 of the Code of Practice of MCA emphasizes that in certain circumstances it would not be possible to provide care to people in their own accommodation1. For the best interests of these individuals, they may have to be moved to another suitable accommodation to ensure that there is sufficient care to meet their needs. Under this section individual may therefore have to be moved despite refusal to leave. Section 6 outlines that care must be taken to use the least restrictive option with restraint or force to be used, for example only to transfer the patient to the new accommodation. This action must be reasonable where it is necessary to protect the person from harm, and is a proportionate response to the risk of harm [1].

The MHA was first introduced in 1983, and further amendments were made in 2007. The 2007 Act makes some amendments to the MCA 2005 [2]. The main change is to provide for procedures to authorize the deprivation of liberty of a person in a hospital or care home, who lacks capacity to consent to being there.

MHA 1983 as amended by the 2007 Act is a legal framework which is used to treat people who suffer from mental disorder, and provides protection and safeguards the rights of individuals suffering from mental disorder [3]. The approved mental health professionals (AMHP), psychiatrists and other doctors who are section 12 (2) approved are eligible to use the MHA. Provisions of transportation or transferring under the MHA are part of the sections used. For instance, the section 2 and 3 of MHA would allow people suffering from mental disorder to be transported to the hospital. Another section of MHA that is used to remove people with mental disorder to a new accommodation is the Guardianship order. The section 30.2 of the code of practice MHA suggests that the purpose of guardianship is to enable patients to receive care outside hospital where it cannot be provided without the use of compulsory powers (this care may, or may not include specialist medical treatment for mental disorder) [4]. The section 30.9 of the MHA code of practice (2015) states that there must be a particular need for someone to have the authority to decide where the patient should live or to insist that doctors, AMHPs or other people be given access to the patient. It is almost impossible to separate the MHA and MCA when discussion is around moving people from one place to another. This article focuses mainly on the issues related to moving patients from their own homes to the nursing or care home. The transfer of patients from their homes to the hospital is another important aspect of conveyance, and beyond the scope of this article. The primary purpose of this review is to inform the local authorities, health care professionals, ambulance services and all who are responsible for patient care and transportation in the community about the use of existing MCA and MHA principles in patient transportation. It would also help and assist AMHPs and sections 12

(2) approved doctors to make decisions about patient movement between various facilities and from patient's own home to a different destination.

Aim

The aim of this review is to consider the appropriate use of either legislation the MCA or the MHA or Court of Protection to transfer the patient/person from one accommodation to another for the purposes of care they need.

Which Act to Consider?

When any assessment is considered, one of the first requirements is to establish whether there is a presence of mental illness or not. In many circumstances, this status is unknown before the assessment. The second component is considering whether the person being assessed has the capacity to make decisions about their own wellbeing and care. This step is fundamental when considering which act needs to be used and which is most appropriate for the individual. All professionals involved in this process of assessment must presume that the person being assessed has full mental capacity, unless proven otherwise. In some circumstances, when the decision to use guardianship order has been made, the nearest relative can object to this. Should this occur, in this case the order cannot go ahead. In such situations, a specialist court known as the Court of Protection must be used. The Court of Protection allows attorneys appointed by the court to take decisions on patient's/person's behalf (**Figure 1**).

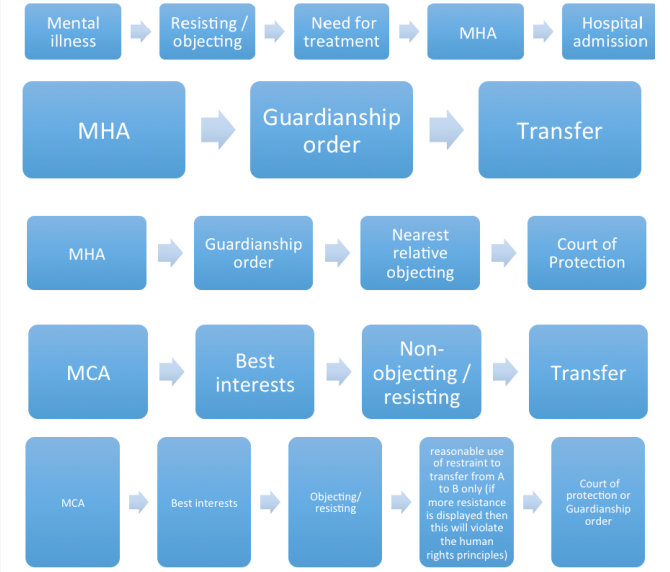

Figure 1: Flow chart depictions for initial assessments of individuals.

What is the Need for Placement?

In this context, the term 'placement' specifically refers to the care placement an individual who requiring assessment is needed to go into, either in the short (respite) or long term. The initial request for the assessment of the person must be explicitly clarified from the referring service. Whether the person suffers from a mental illness, past history of admission to psychiatric facilities, placement needs, complying or resisting the care and support. All possible measures must be taken to support the person in their own homes before making a decision to place somebody in a care home facility. Discussions are primarily to consider the level of support the individual needs at home. Such discussions may include carers, family or close relatives, friends or indeed anyone the person has previously named as someone to be consulted, as well as the individual themselves. If the provisions are insufficient, or it is felt that needs cannot be met unless the person is placed in a care facility, then placement must go ahead.

Many people who suffer from dementia need to be placed in a nursing home, when the needs cannot be met at home. This is one of the most significant decisions the patient and their families must take, to ensure ongoing help and support. Family caregivers report that their decision to place their loved ones with dementia in a nursing home is one of the most difficult and painful decisions they will ever make [5].

Consent of the Person/Patient?

It is pivotal to address the issue of whether the person concerned is able to consent, or is simply complying as they fear no other option is available. This goes back to the significance of capacity assessment if they are capacitated, then removal of this person from their property is not possible under the legislation of MCA. The only scenario in which this would be possible is if the Court of Protection proceedings are carried out by application being made to the Courts in their best interests, and the judge gives authorization for the removal of this person. Capacity assessment with this group of patients can therefore be complicated and may be convoluted, and numerous aspects need to be taken into account before any decision is made. Restraining or restricting an individual's liberty can be lawful under the MCA 2005, however, depriving an individual of their liberty is not lawful under the MCA 2005. It is this 'gap' that the new procedures are aiming to fill. 'Restraint' is defined in section 6 of the MCA 2005 as "the use or threat of force to secure the doing of an act that the individual resists; or the restriction of the individual's liberty whether that individual resists or not [6].

Is there a Need for Medical Treatment?

This step is important both in deciding which Act to use initially, and later on in the assessment process. Medical treatment can be given both under the MHA and MCA. MCA provides an overall framework through which decisions (including those relating to medical treatment) can be made on behalf of adults who lack decision-making capacity. The MCA is designed to enable the individual to make their own decisions as far as possible and empowers them. All decisions taken must be in the best interests of the person and must be least restrictive [7].

On the other hand, the MHA is primarily concerned with the reduction of risk: both for the individual concerned and others. The MHA provides for the legal detention of people in hospital for treatment that includes the transportation as well. However, prior to the enactment of the MCA, incapacitated individuals who were non-objecting to the processes of admission to hospital (including transportation) were often admitted informally, without exercising the MHA and using common law powers.

If it is deemed that there is no need of either medical or psychiatric treatment, and that the removal is only needed to provide assistance

with care, neglect and risk of wandering behaviour then either MCA best interests principles or guardianship order under MHA must be applied in order to transfer the individual to a second home. This second home might be a care/nursing home or supported residential living. This could apply for both objecting and non-objecting individuals.

Post Placement Issues

When a person moves to a new accommodation then there are steps that are to be followed, regardless of the type of home this is (residential/care/nursing home according to the individual's needs):

Step 1: If people are transferred under MCA in their best interests and willing to stay, non-objecting then best interest principles must be followed and documented in the care plan.

Step 2: If they are transferred under the MCA in their best interests and now they are not willing to stay and non-compliant to care then urgent deprivation of liberty safeguards (DoLS) must be instigated. This authorizes the staff caring for people who lack capacity to manage the repetitive behaviour of approaching the door and constantly wanting to leave the place. All efforts must be made to give opportunity to the individual to make their wishes known, help them to communicate what they want, support the family and relatives to help the individual.

Step 3: If they are under the guardianship order of MHA then they must stay at the designated place. If they are objecting to this then a DoLS authorization must be sought, as the guardianship order cannot authorize a deprivation of liberty (**Figures 2-4**).

Flow chart of what needs to be done in circumstances faced in similar situations:

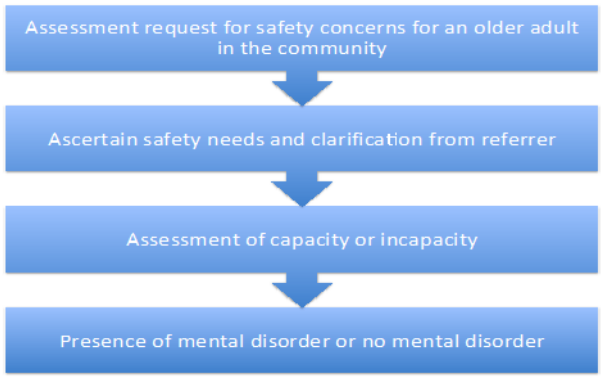

Figure 2: Needs assessment.

Discussion

Patient transportation from one place to another is a long-standing issue of discussion and varied and often opposing opinions. It has been discussed previously in the literature but the complexity of different services involved makes it a much more convoluted phenomenon. A case report by Stephenson et al. illustrated this very issue, describing the case of a lone elderly gentleman who had sustained a neck of femur fracture following a fall at home, who refuses to go to the hospital. The general practitioner at the scene was convinced that the patient lacked capacity to make such a decision.

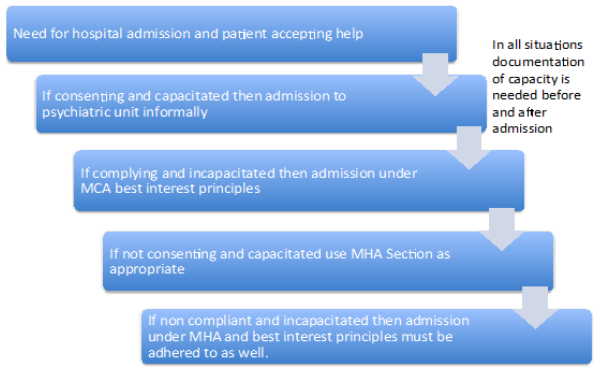

Figure 3: Presence of mental disorder.

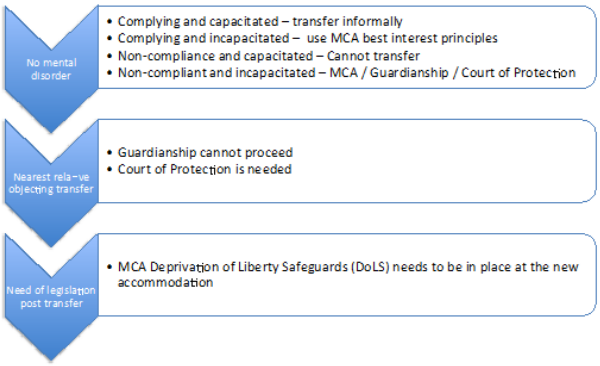

Figure 4: Need to transfer from A to B.

However, the police and ambulance crew were not prepared to take this patient to the hospital as the elderly gentleman was resisting. The case discusses several issues, with arguably the two most important being firstly, the issues of capacity assessment, and secondly, if the patient is found to lack capacity, does moving them against their wishes would amount to deprivation of liberty? However, this case report was not able to conclude significantly as the issues associated with MCA and its interface with MHA is simply more complicated. They explained that on some occasions, personnel involved in patient transportation from home to hospital can feel vulnerable to the lack of protection with regards to MCA [7]. While the MHA seems not a suitable for such a sole physical health reason to move a patient to the hospital the health professional, police and ambulance staff feel quite at risk of depriving the patient's liberty if the restraint is used.

There are instances where courts have intervened in deciding the best interests of people, for example where the situation has been challenged or the Guardianship order was found not suitable. In the case of (re F (Adult: Court' s Jurisdiction) [8] the court found that in the best interests of an 18-year-old women with a learning disability be

placed with the local authority (LA), instead of returning to her mother. It was felt that there would be substantial risk of abuse and neglect on part of mother, should the woman return home. The court also weighed the benefits and advantages associated in her going back to her mother but felt that the risk and harm would be more than the benefits anticipated (re F (Adult: Court' s Jurisdiction)) [8]. There have been court cases where the courts have decided for inadequate measures and support provided to people who lack mental capacity to make decisions; have reprimanded the LA. If a person lacks mental capacity to make decisions about future living and leaving their property then LA have to consider this very carefully and take some measures. Age UK (2012) [9] has proposed three things that are needed to be done. Firstly, a thorough inquiry under the safeguarding procedures for fact finding the reasons as to why the person cannot continue to stay in their property. Secondly, LA needs to come up with a viable care plan to manage the risk associated with living in the same property. If this is not appropriate or fails, then thirdly apply to the court of protection stressing the need to be removed from their property for their safety [9]. In another case Somerset v MK [10], the LA was clearly found to have been inadequate by the court in dealing with removal of a woman with autism from her own home for a period of 6 months. This was based on the fact that there was a bruise found on the chest of this young lady. As a matter of fact, this bruise was found by the mother and was also reported to the school which she attended. The young lady needed to go to a respite care whilst her mother had to go on a planned holiday. Subsequently, the respite home called on the pediatrician to examine her as they found further bruising on her. She had been restrained by the staff due to challenging behaviors and found to have no capacity to make decisions. On return of mother after two weeks she was not allowed to go back with her for the risk of further bruising. The courts suggested that the bruising was not caused by the mother, but the LA had taken wrong step in considering keeping the young lady in the respite which was against not only her rights but also her family's rights of being together; the process of the MCA was disregarded [10].

At this point, it is imperative to mention 'inherent jurisdiction' which sometimes applies in the situations discussed above. Technically, it means that the High Court has the power of hearing any case that comes to the Court unless the legislation or a rule has limited that power or granted jurisdiction to another court or tribunal to hear that case [11]. This indicates that the High Court can hear a vast number of cases in relation to the welfare of adults, so long as the case in question is not governed by procedures set out in rules or regulations [11]. Inherent jurisdiction can be applied for individuals who come under the realm of 'vulnerable adult' (terminology which has not been fully explained as to who actually falls under this category) who lack or do not lack mental capacity, they are 'reasonably believed' to be 'under constraint' or 'subject to coercion' or 'undue influence' or deprived of capacity to make relevant decision or having a free choice. Although adults at risk of neglect or abuse do not automatically come under the 'vulnerable adults' people suffering from mental health conditions and physical disability may be considered as being vulnerable [11]. It must be emphasized that inherent jurisdiction can be applied to:

1. Anybody irrespective of mental capacity.
2. Anybody on human rights grounds.

The Court of Protection applies fundamental principles of section 1 of MCA, which includes assumption of mental capacity unless proven otherwise, not mistaking unwise decisions for decisions taken without capacity and acting in the best interests of the person considering least restrictive way of achieving those best interests [11].

Generally, conveyance for moving a person suffering from a mental disorder from their home to a residential home setting involves the ambulance service, relatives/family members, independent mental capacity advocates (IMCAs) and social services. However, in circumstances when the person is actively refusing to leave the property, careful consideration needs to be made. Importantly, observations must be taken into account whether there is amounting to deprivation of liberty safeguards. In these circumstances, Guardianship order can be called for from a medical professional and an AMHP [12]. If it is felt that the guardianship order is not suitable, or the nearest relative is objecting, then the guardianship order cannot be processed. In such situations, where the person cannot be supported and persuaded to comply with decision to move and guardianship is found to be inappropriate, the next course of action must be an application for Court of Protection. The Court of Protection can then allow the patient transportation, despite the fact that they are deprived of their liberty [12]. Under the MCA Section 4B the ambulance crew are only protected against the possibility of deprivation of someone's liberty if the situation they have dealt with was genuinely an emergency requiring the administration of life sustaining treatment or an act carried out to stop serious deterioration in the patient's condition [12].

Conclusion

The issue of patient conveyance from their homes to another home like a care home, nursing home or residential accommodation is controversial particularly when people suffering from mental illness are involved. It becomes further complicated when they do not need hospital admission but require alternative accommodation for their safety and protection. If they are complying and having mental capacity to make decisions regarding their move, then it is convenient to convey them to the new accommodation; MCA, MHA or any other legislation will not be needed. If they lack mental capacity to make decisions regarding future accommodation, but are compliant with proposed move, with the help of family or IMCAs decisions could be made under the best interest principles to relocate them to new accommodation. The actual complications in the conveyance are presented when patients lacking mental capacity regarding their accommodation are resisting and refusing to move. In these circumstances, MCA best interest principles could be applied as far as deprivation of liberty is not an issue; family/IMCAs could also be used in helping the patient to comply with the move. In circumstances where this doesn't work and resistance is significant, then Court of Protection is the only way forward to convey the patient from own home to new accommodation. Guardianship order could also be used irrespective of the mental capacity in the presence of mental disorder but if nearest relative objects then this cannot proceed. If their objections are unreasonable then S29 of the MHA can be used to displace them as nearest relative in the courts.

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