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Best Interests Assessment Process under the Deprivation of Liberty Safeguards (MCA 2005 / MHA 2007): *a brief overview*

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Case Study

Introduction

The Deprivation of Liberty Safeguards (DOLS) were introduced to provide a legal framework from the lessons learnt in the case of HL v the United Kingdom (2004 Application No: 00045508/99) to prevent breaches of the European Convention on Human Rights (ECHR). HL, an autistic man with a learning disability was admitted to Bournewood Hospital on an informal basis under common law, in his best interests. This decision was challenged by his carers. The European Court of Human Rights (ECtHR) held that this it constituted a deprivation of liberty in breach of Article 5(1) of the ECHR, and there had also been a contravention of Article 5(4) of the ECHR. This is because HL had no means to apply to the court to see if the deprivation of liberty was lawful (MCA 2005 Code of Practice). To prevent further similar breaches of the ECHR, the Mental Capacity Act 2005 was amended through the Mental Health Act 2007, in order to provide safeguards for people who lack capacity, and this would be implemented from the 1st of April 2009.

The principles of the Mental Capacity Act 2005 (MCA 2005), Deprivation of Liberty Safeguards (DOLS) and the respective Codes of Practice (CoP) will be referred to through a case study exercise, within which I will explore, account for and establish the whole range of factors, such as type, duration, effects and manner of implementation, to either restrict or deprive of liberty. This will provide an illustration of how DOLS will affect the professional in practice. Furthermore, I will explore the key criteria used by the Department of Health Deprivation of Liberty Standard Authorisation Forms Nos. 5 – 10 and 24 to record the decision, conditions and recommendations for the Managing Authority and the Supervisory Body to establish and authorise DOLS.

Brief Scenario

For the purpose of this exercise, the service user will be known as John Carter (JC), who is 41, suffers from a moderate learning disability and has suffered brain injury after a road traffic accident that resulted in epilepsy. His epilepsy is controlled by medication. Over the past few years, he has been living in a residential home where he was able to go out by himself to the local shops and parks. He enjoys his freedom of doing these activities daily. He is also able to manage small amounts of money for his daily needs.

Family History

He is one of two siblings: his younger sister Sally has two children. His father had died ten years ago. Very recently his mother had been diagnosed with dementia and is cared for in a residential care home. Until recently, his sister Sally had been visiting him regularly and had been attending to his affairs, though she has not recently been able to visit him due to her own children's illnesses.

Recent Events

JC was taken by the staff to visit his mother and during the visit she became agitated and began to shout at JC. JC's carers had to terminate the visit. Recent observations made by staff are that: JC isolates himself; he has lost his appetite and thus has lost weight; and, that he has not been his usual self. On several occasions, he had returned to the home without his sweets and money. JC has been found wandering, confused and distressed in the middle of the road, and was brought back on two occasions by Police Officers. When JC was accompanied by staff to the park, JC became agitated, shouting at children and was reluctant to return. JC continued requesting to see his mother and he has not been out for four days.

Management Plan

Decisions were made that JC has to be accompanied on any outings by two members of staff. They expressed that they are unable to guarantee that JC can be taken out at least once or twice a week. The Managing Authority, 'the care home' (Care Standards Act Part 2, 2000), has applied to the Supervisory Body, 'the Local Authority' (National Assistance Act 1948), for standard authorisation and have appointed a Best interest Assessor (Mental Capacity Regulations 2008). The Managing Authority should inform the relevant person's (Mental Capacity Regulations 2008) family

and friends about the application to the Supervisory Body (CoP DOLS 2008: 34).

Identifying Restriction or Deprivation of Liberty

Fig. 1: Rating Scale

restriction deprivation of liberty

I have considered JC's circumstances and behaviours within and outside the care home. The facts remain that he is unable to go out to the shops, parks or visit his mother without an escort as and when he wishes. Under these circumstances he is restricted of his liberty, and if JC is unable to go out at all, JC is deprived of his freedom of movement (Mental Capacity Act 2005: Sec 6(4)). His past history of activities shows that he had been enjoying the daily outings and had been semi independent for some years. Now JC is unable to go out and constraints have been imposed due to the fact that the staffing levels cannot be adjusted and practicable steps are not considered to resolve these issues, in a least restrictive manner, to maximise his choices. This impact on JC is not considered in his best interest (Principles of Mental Capacity Act 2005). Therefore, it would be considered that JC is subject to *Deprivation of Liberty*. The above rating scale (*Fig. 1*) is a useful tool for analysing weighting scores, that will assist the assessor in making decisions.

While investigating the issue around restriction and deprivation of liberty, it is vital to have access to all his care plans, daily records about his behaviour, weight charts, daily activity charts, medical records, risk assessments and management plans. Interviews will be arranged (Mental Capacity Act 2005: Sec 4(7)) to see JC's Registered Care Manager of the care home, the carers, his sister Sally, whilst also accessing any other assessments and reviews that have been carried out by other significant professionals who have been involved in his direct care over the last twelve months (CoP DOLS: 40). For this process of Best Interest Assessment, should his sister Sally agree, she would be appointed as the relevant person's representative by the Best Interest Assessor (Mental Capacity Regulations 2008: 77). If Sally is unable, then the Best Interest

assessor will refer to the Supervisory Body in appointing a relevant person's representative. The Best Interest Assessor explains the role to the relevant person's representative and informs the Supervisory Body. It may be necessary to consider a Section 39A Independent Mental Capacity Advocate (IMCA) to act in JC's best interest.

The types of interventions in JC's care plans and the lack of extra staff in the duty roster does not reflect that it is in the best interest of JC. As JC is not allowed out alone, indirectly he is physically prevented which indicates that he is restrained. JC has not been out for the duration of four days, and with no definite arrangements being put in place for him to go out, this leads me to believe that the score on the rating scale (*Fig. 1*) has moved to 8 and above. The psychological impact may be a causal link to his behavioural changes. Furthermore, JC's curtailed outdoor activities could exacerbate disturbed behaviour. The fact that he is going up to the front door and asking for his mother is indicative of his desires and wishes and may have a negative effect on his thoughts and behaviour. It is necessary that JC engages and participates in the management and decision making process as the relevant person (Mental Capacity Regulations 2008: 77).

He may also feel traumatised by his sister's absence, as she has been a support to him. It is required that Sally is aware of JC's situation and the application of standard authorisation and such needs to be clarified: whether she accepts or objects to the measures proposed by the Managing Authority. If these restrictions are to continue, the cumulative effect and the risk of psychological and physical harm would be detrimental to his quality of life. This cumulative effect would constitute deprivation of liberty even though the individual actions may not. In JC's case, Deprivation of Liberty is established and the actions proposed are not permitted under the Mental Capacity Act 2005, therefore it is necessary to proceed with a DOLS assessment.

DOLS Assessment Process (CoP DOLS 2008: 4.23 – 4.76)
The regulation for England specifies that all assessments required for standard authorisation must be completed within 21 calendar days. As the appointed Best Interest Assessor (BIA), the Supervisory Body has to be satisfied with the requirements under the Mental Capacity Act 2005 and Regulations 2008 and be protected against any liabilities. The DOLS assessment process requires that all six assessments are completed before

the authorisation is approved by the Supervisory Body. It is necessary for the Best Interest Assessor to coordinate the six assessments before recommending authorisation.

1. Age Assessment

DOLS only applies to those aged 18 years and over (CoP DOLS 2008: 1.12). If the age is in doubt, it should be established by a birth certificate or other evidence that the assessor considers reliable. This assessment can be conducted a Best Interest Assessor. In JC's, case he is 41 and this can be verified with his sister and the care home manager.

2. No Refusal Assessment (Mental Capacity Act 2005: Sec 24-26; CoP DOLS 2008: 4.26 – 4.28)

From the information gathered from JC's records, there is no evidence of advance decisions to refuse treatment. JC is compliant with prescribed medication for his epilepsy and staff have not raised any concerns. This assessment can be carried out by the Best Interest Assessor.

3. Mental Capacity Assessment

The purpose of this assessment is to establish whether JC (the relevant person) has the capacity to make decisions for specific tasks or activities at specific times. Section 1 to 3 of the Mental Capacity Act 2005 guides anyone who is competent to carry out the capacity assessment. The regulations for England specify that the mental capacity assessment can be undertaken by the Mental Health Assessor and the Best Interest Assessor. Alternatively, in some cases, the Supervisory Body can consider asking the eligible assessor, who may have known the relevant person, to carry out this assessment, which may be easier for the relevant person and for the purpose of DOLS.

For JC, the capacity assessment commenced by asking the following questions as the preliminary stage (Mental Capacity Act 2005: Sec 2 & 3):

- Does JC have impairment or a disturbance in his brain or mind? JC has impairment and a disturbance due to the fact he has an acquired brain injury, a moderate learning disability and epilepsy.

- Does the disturbance or impairment affect his decision making process? The second stage (Mental Capacity Act 2005: Sec 2 & 3) test

was to find out whether JC can understand, retain the information given to him, be able to weigh the pros and cons of that information, and be able to communicate his decisions. He has capacity to make decisions for specific tasks and at specific times. He is unable to make decisions to manage himself when he is out of the care home, as he has been found to be distressed, confused and wandering. Therefore, JC does lack capacity to be safe and to remember to return to his accommodation. He also did not know how and where he spent his money, but he knows that he wants to visit his mother though he would not know where she lives.

A patient may be so agitated or overactive in his or her behaviour that it may be impossible to impart relevant information…. . Mood may be very important in determining capacity. Anxiety may also have some effect on the assessed level of capacity……. . Disorientation is usually a marker of brain dysfunction, for instance in delirium or dementia and in these conditions capacity is commonly impaired… (Mental Capacity Guidance 2004: 155-7).

JC lacks capacity in certain areas of his activities and at certain times. This could be temporary and fluctuating. The change observed in JC's behaviour has been since the visit to his mother. This behaviour could be either responsive or reactive to his mother's behaviour. This could be different from the knowledge he may have retained of her normal behaviour, and the change in his mother's behaviour could have been traumatic. It is possible for him regain capacity to the level he was prior to this episode. Reviewing the possibility of his regaining capacity to this level should be a priority, and regarded as in his best interest. This means that specialist services need to assess and establish his ability to communicate, and his level of understanding of the use of simple language and pictorial aids.

- Does he understand the information about the choices he has (CoP DOLS 2008: 45)? Does JC need to continue to live in the care home at this relevant time? This needs to be clarified by consulting with his sister Sally, an IMCA and the Care Coordinators, in considering their points of view.

4. Mental Health Assessment

This assessment is conducted to establish whether JC has a mental disorder, as defined in the Mental Health Act 2007. That means any disorder or disability of the mind, apart from dependence on alcohol or drugs, which includes all learning disabilities. This is not to determine whether JC requires mental health treatment. The objective of this assessment is to medically diagnose JC as being of 'unsound mind', within the scope of Article 5 of the ECHR (CoP DOLS 2008: 46-7). The Supervisory Body has to appoint a doctor, who is Section 12 approved (Mental Health Act 1983), or a registered medical practitioner with at least three years post registration experience in the diagnosis or treatment of mental disorder and has completed the standard training (RCP 2008). Most importantly, the mental health assessor is required to consider how JC's mental health would be affected following the deprivation of his liberty, and this information should be passed on to the Best Interest Assessor (CoP DOLS 2008: 47). In JC's case, he has a brain injury, learning disability and suffers from epilepsy. But does this affect his decision making process and would the deprivation of liberty have any ill or adverse effects on his personal welfare? The Best Interest Assessor would clarify this information with the mental health assessor.

5. Eligibility Assessment (CoP DOLS 2008: 47)

This assessment can only be carried out by a Section 12 approved doctor and an approved mental health professional. This is to validate JC's status or potential status and Deprivation of Liberty. This would apply if he is not detained under the Mental Health Act 1983 and JC is not subject to guardianship or a community treatment order or conditional discharge under this act.

If JC (the relevant person) is unable to state an objection (CoP DOLS 2008: 48), or where persons are unable to communicate or only to a limited extent, the assessor would need to consider JC's current and past behaviour, feelings, wishes, beliefs and values (Mental Capacity Act 2005). In JC 's case, he wants to see his mother and his behaviour indicates that he wishes to go out by wandering to the front door of the care home. Is this behaviour reasonable or not? There is no proposed treatment or specialist care for JC.

6. Best Interest Assessment (CoP DOLS 2008: 4.58)

The purpose of this assessment is to establish whether deprivation of liberty is occurring or is going to occur. This raises the following questions:

- Is it in the best interest of JC to be deprived of his liberty?
- Is it necessary for JC to be deprived of his liberty in order to prevent him from harm?
- Is the deprivation of liberty a proportionate response to the likelihood of JC (the relevant person) suffering harm and the seriousness of that harm (CoP DOLS 2008: 51)?.

The Best Interest Assessor is appointed by the Supervisory Body under the guidance and the required criteria set by Department of Health (CoP DOLS 2008: 4.60). The 'best interests' principles and the check list are set within the Mental Capacity Act 2005 and the main Code of Practice (Mental Capacity Act 2005: Sec 4; Code of Practice: 5.13). These principles and guidance apply equally to working out a person's best interests for the purpose of the DOLS.

The additional factors to consider when JC's deprivation of liberty does not take place, include: whether there is sufficient evidence to show from the risk assessments that JC had been found to be confused and wandering aimlessly when returned by Police; whether he is vulnerable to being injured, bullied by children or by their parents, or being exploited financially; whether there is a risk of retaliation from the parents of children in response to his verbal abuse of children.

There is a risk of applying DOLS, as it may encourage frustration, isolation, may escalate physical aggression, exacerbate a loss of autonomy, self determination, self esteem, confidence and loss of regular physical exercise. There is a risk of boredom and lack of mental stimulation resulting in mental health deterioration and it may lead to challenging behaviours. Involving JC and the relevant professionals, including JC's relevant representatives, would boost his morale and mood.

Conclusion

To provide a meaningful assessment report after examining all of the reports and assessment forms, having explored JC's position and considered his capacity to make decisions (*temporary or able to regain?*), having considered his preferences and wishes / lifestyle (*he was able to go out daily to local parks and shops, managing small amounts of money, and maintaining contact with the sister*), and the risks of depriving his liberty and of applying DOLS, it is necessary that JC is Deprived of his Liberty and for DOLs to be established in his best interest. This is a proportionate response to the likelihood of JC (the relevant person) suffering mental and physical harm. The seriousness of the harm may impact on JC's short term and long term welfare.

Therefore, in relation to this case, I would recommend standard authorisation to the Supervisory Body, with conditions:

- *to recommend standard authorisation of Deprivation of Liberty Safeguards for two months, with the conditions that two members of staff are available to accompany JC out of the care home for at least one our per day.*

Recommendations:

- For specialist needs assessments to be carried out and to set up positive risk management plans, involving JC and his relevant representatives (Sally, IMCA, Psychologist).
- To encourage staff to engage him within structured activities within the care home.
- For the Supervisory Body to agree the level of staffing in meeting JC's needs.
- To arrange a time and date for a review meeting to monitor progress within the specified two months.

The decisions take by the Best Interest Assessor were necessary to reduce harm, being practicable and least restrictive in order to enable JC to progress in his best interest.

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