Consent and the Mental Health Act 1983

This is a guide to the Mental Health Act 1983 and its implications for practitioners with regard to consent.

Publication date: 22 October 2002

In the following article, references to legislation apply to England and Wales: references for Scotland and Northern Ireland are given at the end of the article

Code of practice

Chapter 15 of the *Mental Health Act code of practice*[1] relates to medical treatment and contains important guidance to practitioners about consent. Chapter 16 also deals with medical treatment and second opinions. In parts, the code states requirements of law.

Where it does not, you would still be well advised to follow the code as a guide to good practice. Where you feel you need to depart from the guidance in the code, you should be prepared to justify this on clinical grounds.

Voluntary patients with capacity to consent

Valid consent

Treatment for mental disorder cannot be given to an informal or voluntary patient (ie one who is not compulsorily detained in hospital) without valid consent, even if the treatment is likely to benefit them. Valid consent means that the patient voluntarily (ie without being subjected to coercion or unreasonable influence) agrees continually to the treatment, is capable of making that decision and is adequately informed.

The basic requirements for capacity to consent are set out in paragraph 15.10 of the code. Whether voluntary or involuntary, patients should be told of the nature, purpose and likely effects of the treatment. They must also be told of their right to withdraw consent to treatment at any time.

Voluntary patients without capacity to consent

The principles of the case of *Re F*[2] (see Consent to treatment and incompetent adults), apply to the treatment of mental disorder in patients who do not have the capacity to consent, but who may not be detained under the *Mental Health Act*. Doctors must work under the constraints on the treatment of mental disorder as set out in part IV of the act. You should note that the safeguards applicable to leucotomy and similar procedures (section 57), apply to voluntary patients as well as to those who may be detained under the act.

The Bournewood case caused considerable consternation among those caring for mentally incapacitated patients needing inpatient treatment for mental disorder who had long been regarded as "informal" patients. In 1994 a profoundly mentally retarded patient, "L", was discharged to live with carers after 30 years in hospital. In 1997 he was admitted to hospital after becoming agitated. As he was compliant it was not felt necessary to detain him under the *Mental Health Act*. His carers alleged that he was unlawfully detained. The Court of Appeal ruled that "L" had been unlawfully detained on the basis that his compliance did not equate to consent and the *Mental Health Act* provided a complete regime

which excluded the common law doctrine of necessity. It seemed, therefore, that a mentally incapacitated patient needing inpatient treatment for mental disorder could only be kept in hospital and treated if detained under an appropriate section of the *Mental Health Act*. This seemed to mean that large numbers of patients with learning difficulties or dementia in long term hospital care would have to be formally detained.

In 1998, however, this judgement was overturned by the House of Lords[3]. The position now is that it is possible for a mentally incompetent patient to be admitted to hospital and treated for a mental disorder when it is in their best interests, without being detained under the *Mental Health Act*. The doctors rely on the common law doctrine of necessity. However, for a patient to be considered 'informal' they would have to comply with the admission and treatment.

The GMC says in paragraph 21 of its guidance[4]:

"If a patient lacks capacity to decide, provided they comply, you may carry out an investigation or treatment, which may include treatment for any mental disorder, that you judge to be in their best interests. However, if they do not comply, you may compulsorily treat them for any mental disorder only within the safeguards laid down by the Mental Health Act 1983..."

Involuntary patients

Treatment without consent

Part IV of the *Mental Health Act* provides for the treatment of patients detained under the act. Section 57 also applies to any patient, whether or not they are detained (see above). Certain patients are specifically excluded from these provisions and have the same rights to refuse treatment as informal patients:

- *Urgent admission for assessment* (section 4) - a patient can be detained for up to 72 hours without the agreement of a second practitioner. The emergency application ceases after this period if the second opinion is not obtained (section 4(4)(a));
- *Patients already in hospital* - if an informal in-patient says that they intend to leave hospital and is considered a danger to themselves or others, they may be detained by a practitioner or a nurse of the prescribed class acting alone:
    - in the case of a medical practitioner the patient can be detained for up to 72 hours unless further detention powers have been taken (section 5(2))
    - for a nurse the period is up to six hours (section 5(4));
- *Court orders/warrants/hospital orders* - when the patient is:
    - remanded by the court for a report on their mental condition (section 35);
    - detained through a warrant issued by a Justice of the Peace if the patient believed to be suffering from mental disorder, has been, or is, ill-treated or neglected, or kept otherwise than under proper control, or is living alone and unable to care for themselves (section 135);
    - removed to a place of safety by a police constable when they appear to be suffering from mental disorder in a public place and to be in need of immediate care or control (section 136);
    - detained in a place of safety pending admission under a hospital order made by a court (section 37(4));
- *Conditional discharge* - restricted patients who have been conditionally discharged (sections 42(2), 73, or 74) and who have not been recalled to hospital.

The remaining patients who can be detained under the act, including those detained compulsorily for treatment (section 3), can be given particular forms of medical treatment for mental disorder without consent under section 63 of the act. The treatment must be given under the direction of the responsible medical officer under the safeguards set out in part IV of the act. Patients who have the capacity to consent have the same rights as anyone else, i.e. they can refuse treatment that is not for their mental disorder. The act does not provide for treatment for conditions other than mental disorder, although a physical disorder arising from a mental disorder can be treated compulsorily (see *Re KB* below). When the patient is incapable of giving consent, and need to be treated for a condition other than their mental disorder, the principles in *Re F*[2] should be applied.

Certain treatments for mental disorder "of special concern" are subject to part IV, but other treatment for a patient's mental disorder not listed there can be given without the patient's consent. You should consider the patient's wishes and those of their family and comply with them wherever practicable. Section 63 of the act says:
"The consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering, not being treatment falling within section 57 or 58 above, if the treatment is given by or under the direction of the responsible medical officer".
The courts have given a wide interpretation to the type of medical treatment that can be given under section 63 to patients for their mental disorder. In two cases the courts held what force feeding amounted to such treatment. In the case of *Re KB*[5] the High Court granted a declaration that force feeding by naso-gastric tube of the patient, who was suffering from anorexia, was lawful. Relieving symptoms of the mental disorder was said to be "...just as much a part of thetreatment as relieving the underlying cause...". In the case of *B v Croydon Health Authority*[6], the Court of Appeal upheld a declaration that tube feeding of B was lawful under section 63. B suffered from a borderline personality disorder coupled with post-traumatic stress disorder. Her symptoms included depression and compulsion to self harm. She stopped eating and her weight fell to 32kg. The Court of Appeal endorsed the view that treatment of the disorder included treatment of its symptoms and consequences.

The use of section 63 to enable medical treatment by way of force feeding of a patient on a hunger strike was also held to be lawful in a case in which the hunger strike was a manifestation or symptom of the patient's personality disorder[7].

In another case[8], the High Court declared that performing a caesarean section against the wishes of an incompetent patient detained under the *Mental Health Act* was permitted as treatment for the patient's mental disorder under section 63. The court found that failure to perform the caesarean was likely to result in a stillbirth, which would have a significantly harmful effect on the patient's mental health (see also Consent to treatment and competent adults - Self harm).

Additional safeguards - ECT and medication

Section 58 sets out more safeguards that apply to ECT and medication, unless the treatment is considered urgent under section 62. If a patient in detention needs ECT or medication for the treatment of their mental disorder when three months has elapsed since they were first given medication, then the patient's consent or a second opinion is needed. If the patient consents to the treatment, the responsible medical officer, or a specifically authorised medical practitioner, must also certify that the patient has consented, and is capable of understanding its nature, purpose, and likely effects. When the

patient is not capable of consenting, or refuses treatment, it may still be given if the authorised practitioner certifies the patient's lack of capacity or refusal, and that the treatment is likely to alleviate or prevent deterioration in the patient's condition and that it should go ahead. Before certifying this, the authorised practitioner must consult two people professionally involved in the patient's medical treatment - a nurse and one other who is neither a nurse nor a doctor.

Unless this procedure is followed, the treatment must not be given. Further guidance on this section is provided in the code, paragraphs 16.9-16.19.

The code advises in paragraph 14.5 that, if relevant, a detained patient should be told how refusal or withdrawal of consent can be overridden by the second opinion, and, where treatment has begun, that the doctor can continue it urgently if discontinuing it would cause serious suffering.

The secretary of state has the power to specify other treatments to which these safeguards will apply, but so far has only specified ECT.

Leucotomy and similar procedures

Section 57 provides legal safeguards for patients who undergo any surgical operation for destroying brain tissue or the function of brain tissue, or any treatment specified in the regulations by the secretary of state. Up till now, he has only specified the surgical implantation of hormones to reduce male sexual drive.

Treatments cannot be given unless the patient consents after knowing the nature, purpose and likely effects of the proposed treatments. A multi-disciplinary certificate from three people (one of whom is a doctor, but not the responsible medical officer) appointed by the secretary of state must confirm this. The appointed doctor must also confirm that the treatment is appropriate, having consulted two other people who have been involved with the patient's treatment, one a nurse and the other neither a nurse nor a doctor. This procedure must be followed before these treatments can be given to any patient, detained or informal.

Urgent treatment

In urgent cases, as mentioned above, the procedures in sections 57 and 58 can be bypassed and a treatment given without the patient's agreement or a second opinion.

Section 62 specifically allows the treatments listed in part IV to be given without following the normal procedures when the treatment is urgent.

Urgent treatment is defined in this section as treatment that:

- is immediately necessary to save the patient's life; or
- not being irreversible, is immediately necessary to stop a serious deterioration of his condition;
- or not being irreversible or hazardous, is immediately necessary to lessen serious suffering by the patient; or
- not being irreversible or hazardous, is immediately necessary and is the minimum interference needed to stop the patient from behaving violently or being a danger to himself or others.

The responsible doctor must decide whether a treatment is irreversible or hazardous.

Screening

The GMC[9] stresses the importance of consent in screening in paragraph 34 of its guidance:

"You must ensure that anyone considering whether to consent to screening can properly make an informed decision. As far as possible you should ensure that screening would not be contrary to the individual's interest. You must pay particular attention to ensuring that the information the patient wants or ought to have is identified and provided. You should be careful to explain clearly:

- the purpose of the screening;
- the likelihood of positive/negative findings and possibility of false positive/negative results;
- the uncertainties and risks attached to the screening process;
- any significant medical, social or financial implications of screening for the particular condition or predisposition;
- follow up plans, including availability of counselling and support services"

Scotland

The consent to treatment provisions of the *Mental Health (Scotland) Act 1984* are very similar to those in the English act. Sections 97 and 98 correspond largely to sections 57 and 58 of the act for England and Wales. The Mental Welfare Commission in Scotland has similar functions to the Mental Health Act Commission in England and Wales.

Northern Ireland

Again, the *Mental Health (Northern Ireland) Order 1986* has provisions on consent to treatment which are very similar to the English act. Articles 62 to 69 of the order correspond largely with sections 56 to 63 of the English act.

References

1. *Mental Health Act 1983 code of practice*. Published March 1999 pursuant to section 118 of the act. The Stationery Office.
2. *F v West Berkshire Health Authority and another* (1989) 2 All ER 545-571.
3. *R v Bournewood Community and Mental Health NHS Trust*, ex parte L (Secretary of State for Health and others intervening): 3 All ER (1998) 289
4. GMC. *Seeking patients' consent: the ethical considerations*. 1999. London, GMC.
5. *Re KB* (adult: medical treatment of mental patient) (1994) 19 BMLR 144.
6. *B v Croydon Health Authority* (1995) 1 All ER 683
7. *R v Collins and anor*, ex parte Brady (2001) 58 BMLR 173.
8. *Tameside & Glossop Acute Service Trust v CH*, (1996) 1 Fam LR 762.
9. GMC. *Seeking patients' consent: the ethical considerations*. 1999. London, GMC.