

# **Capacity and Decision Making in Prison (or places of detention) ...a practice example**

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# Scenario

- 28 year old female- Diane
- Unknown mental health diagnosis- awaiting psychiatric assessment for possible PD and eating disorder
- In care and separation unit for food refusal to allow for effective observations
- Now refusing fluids (2 days)
- BMI 16
- You are the prison GP

# Capacity and BMI

- Re E (Medical Treatment Anorexia) [2012] EWHC 1639 (COP)
- P lacked capacity to accept or refuse treatment despite appearance of being articulate and intelligent
- The ‘presumption in favour of preservation of life should not be displaced’ versus the ‘value of her personal independence’
- This leads to considering a best interest decision under Mental Capacity Act 2005 for Diane

# Why not the mental health act at this point?

- Falls under PtIII MHA for sentenced or other prisoners.
- Emergency transfer unlikely except in extraordinary circumstances
  - 2 Reports completed by appropriate clinicians
  - Appropriate bed identified- and is available
  - MoJ agree the transfer and issue a warrant
  - Prison is able to mobilise transfer and escort
- PtIII transfers are cumbersome and have no equivalence to what could be expected in the community

# BI Decision for Diane

- The decision is the urgent need of hydration and secondary consideration of [possible] forcible feeding
- Unable to do this in prison so MCA criteria needs to be ensured
- Does Diane have capacity? - case law would suggest not
- Can we meet the diagnostic and functional test?

# MCA Test

- **Diagnostic:**
  - ‘an impairment of, or a disturbance of the functioning of, the mind or the brain’
- **Functional:**
  - to understand the information relevant to the decision; or
  - to retain that information; or
  - to use or weigh that information as part of the process of making the decision; or
  - to communicate his decision

# Why MCA and not common law?

- Consider: You have decided that Diane needs to urgently be in hospital for rehydration and decide to use common law best interests to achieve this.
- Diane is reluctant to leave her room and after much cajoling she gets to reception but then point blank refuses to get in the transport and is physically resisting.
- A governor states they will not allow forced removal to hospital if she is not compliant.
- What are your options?

# Under MCA

- **S44 MCA**
- (1) Subsection (2) applies if a person ("D")-
  - (a) has the care of a person ("P") who lacks, or whom D reasonably believes to lack, capacity,
- (2) D is guilty of an offence if he ill-treats or wilfully neglects P.

A documented decision referencing MCA decisions has s44 safeguards

# Manage Expectations

- This scenario was told to me by a prison GP
- This session does not advocate using the legislation as a stick- more a tool for reaching the correct decision
- Additionally Art.2 HRA places a duty on us to preserve life and to show we have done all we can to achieve this
- Sometimes the only outcome is to evidence your own understanding and compliance of the legislation even though the outcome for the patient may not be ideal.

END

- Questions

- Discussion

# MCA Principals

- a presumption of capacity
- the right for individuals to be supported to make their own decisions
- retain the right to make what might be seen as eccentric or unwise decisions
- best interests
- least restrictive intervention

# References

- Department of Health (2005). *Mental Capacity Act*. London, HMSO.
- Department of Health (1983 as amended 2007) *Mental Health Act*, London HMSO.
- Human Rights Act (1998), London, HMSO.
- Re E (Medical Treatment Anorexia) [2012] EWHC 1639 (COP) accessed online 20/10/16  
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