

Legal Aspects of Dementia

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ST5 Old Age Psychiatry

Case Study: Agnus

- 72 year old female
- Alzheimer's dementia
- Presenting as:
 - Acutely confused
 - Fluctuating irritability
 - Restless
 - Evidence of hallucinations
 - Suspicious
- Refusing to get into ambulance

What would you do?

Does she have capacity?

What is “Mental Capacity”

- Ability to make a decision

“A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain”

Section 2(1) MCA

- Decision & time specific
- Dementia does NOT mean lack capacity

Assessing capacity

- Who?
 - Assessor should be directly involved in persons care at the time the decision needs to be made
- Level of proof?
 - On balance of probability
- Documentation?
 - Specific decision
 - What they need to understand & information provided
 - Steps taken to promote understanding
 - How **diagnostic test** assessed & evidence
 - How **functional test** was assessed & evidence

5 Statutory Principles

1. Assumed capacity



2. All practicable steps taken



3. Don't lack capacity because decision is unwise





4. Best interests



5. Least restrictive




Two-Stage Test

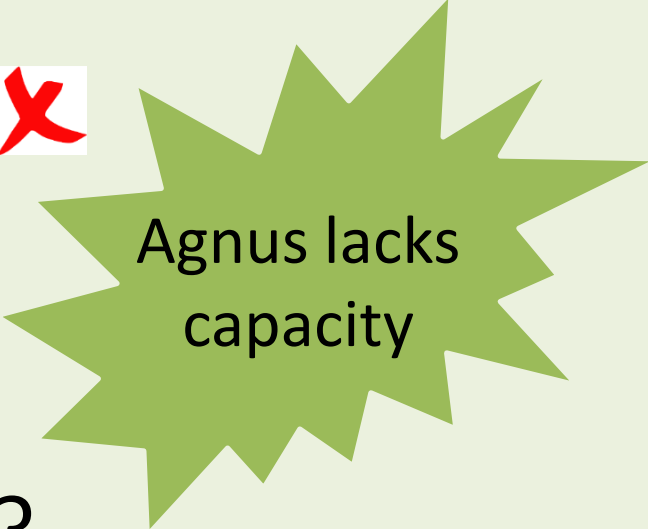
1. Is there impairment of, or disturbance in the functioning of, their mind or brain?

- Dementia 
- Learning disability
- Acquired brain injury
- Impaired consciousness
- Delirium 
- Intoxication

Two-Stage Test

2. Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to? – i.e. can they:

- Understand information 
- Retain information 
- Weigh up the pros and cons 
- Communicate their decision



Agnus lacks capacity

So what now?

What are you wanting to treat?

Physical Health



Mental Capacity Act
(MCA)

Mental Disorder



Mental Health Act
(MHA)

Mental Capacity Act 2005

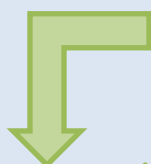
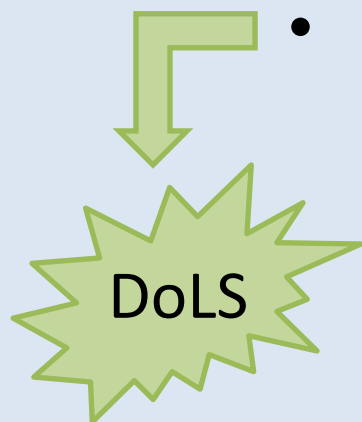
- ≥ 16 years of age
- Enables use of:
 - Restraint – use or threat of force to secure the doing of an act which the person resists
 - Restriction – restrict liberty of movement whether or not the person resists

Provided:

- ✓ It's in the person's best interests
- ✓ Proportionate to the harm you're trying to prevent

Agnus

- Admitted to hospital
- Needs IV antibiotics
- Repeatedly removes Venflon
- Repeatedly tries to leave



What legal frameworks do we need to consider?

Deprivation of Liberty (DoL)

- Article 5 of the European Convention on Human Rights (ECHR):

“Everyone has the right to liberty and security of person”

“No one shall be deprived of their liberty unless in accordance with a procedure prescribed in law”

Case law: HL vs United Kingdom 1999

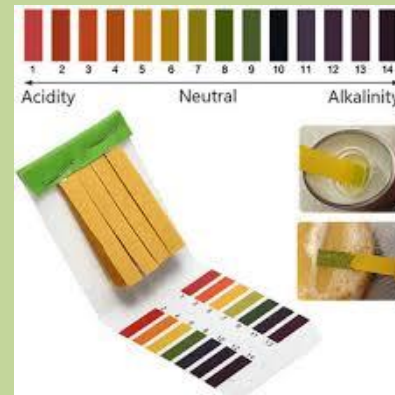
Deprivation of Liberty Safeguards (DoLS)

- Introduced in 2009 as an amendment to MCA
- Procedure prescribed in law to prevent care of people in England & Wales infringing on ECHR
- Only valid in hospitals and care homes
- Direct application to Court of Protection (CoP) needed for DoL in own home or supported living

Identifying DoL?

March 2014 Supreme Court ruling on *P v Cheshire West* and *P & Q v Surrey*, led by Lady Hale identified:

- “Acid Test”
 - Person subject to continuous supervision and control
 - Not free to leave – not whether patient wants to but how those supporting them would react if they did want to



Identifying DoL?

March 2014 Supreme Court ruling on *P v Cheshire West* and *P & Q v Surrey*, led by Lady Hale identified:

- Irrelevant factors:
 - Purpose, reasons or motives behind placement
 - Whether they objecting or compliant
 - Relative “normality” of placement



Application for DoLS

NHS hospital



NHS Trust

Care home/Private hospital



Manager/person registered
under Health & Social Care
Act 2008

Local Authority

Responsible for:

- Considering DoL requests
- Commissioning statutory assessments
- Authorising DoLS “Standard Authority”

Managing Authority
(MA)



Supervisory Body
(SB)



When?

- As soon as DoL identified
- Up to 28 days before potential DoL



MA can issue urgent authorisation (≤ 7 days)
Renewable by 7 days on permission of SB

Statutory Assessment

- Best Interest Assessor (BIA)
 - Social worker, nurse, OT or psychologist
 - Decides if evidence of deprivation of liberty
 - Advise on:
 - How to reduce restrictions
 - Duration of authorisation (max 1 year, renewable)
- Mental Health Assessor (MHA)
 - Psychiatrist, geriatrician or GP
 - Decides if suffer from mental illness or not

Criteria for Standard Authority

1. Person ≥ 18 years of age
2. Evidence of a mental disorder
 - Includes dementia, delirium & learning disability
 - Excludes dependence on alcohol or drugs
3. No refusals
 - Advanced decision to refuse treatment
 - Lasting Power of Attorney
4. Patient lacks capacity
5. Patient meets eligibility criteria
 - Not detained or under obligations of MHA
6. In patient's best Interests

Safeguards Under Standard Authority

- Relevant Person's Representative (RPR)
 - Family or paid advocate
- Support of Independent Mental Capacity Advocate (IMCA) if RPR unpaid
 - Support both patient and RPR
- Right to insist on review of Standard Authority by Supervisory Body at any time
- Right of appeal to CoP free of charge

DoLS & the Coroner - Update

- DoLS is no longer included in the definition of “state detention”
- Deaths on or after 3rd April 2017 no longer require investigation by the Coroner unless:
 - Unnatural
 - In police custody
 - Evidence of restriction equating to deprivation of liberty but not under authority of DoLS

Agnus

- Now medically fit
- Persistent agitation and aggression
- Paranoid and suspicious
- Evidence of hallucinations
- Assessed by mental health team for admission to psychiatric ward
- Assessed as lacking capacity

What legal framework should she be admitted under?

What are you wanting to treat?

Physical Health



Mental Capacity Act
(MCA)

Mental Disorder



Mental Health Act
(MHA)

Mental Health Act 1983

- No lower age limit
- Mental disorder

“Any disorder or disability of the mind”

Detention Criteria

Section 2 – Assessment
≤28 days - not renewable

Section 3 – Treatment
≤6 months - renewable

Mental disorder of nature OR degree

AND

For health and safety of patient OR protection of others

AND

Appropriate medical treatment is available

Interface Between MHA & MCA

Mental disorder ← What are you treating? → Physical health

Capacitous?

Yes - consenting

No

Yes - not consenting,
history of changing
their mind or significant
risks

Informal admission

MHA

Capacitous?

Yes

No

Agree a care plan

MCA

Evidence of DoL

Yes

No

Is there evidence of
mental disorder?

MCA only

Yes

DoLS

MHA & DoLS in Psychiatric Inpatients

	Objecting to admission, care &/or treatment for mental disorder	Not objecting to admission, care &/or treatment for mental disorder
Has capacity	MHA only	Informal admission MHA
Lacks capacity	MHA only	MHA DoLS or CoP order

- “Objection” includes any resistance to care or treatment:
 - Non-compliance with medication
 - Pulling at doors
 - Resisting nursing support

Questions



ELEPHANTS

Larger than the moon

Useful Links

Mental Health Act Code of Practice

[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435512/MHA Code of Practice.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435512/MHA_Code_of_Practice.PDF)

Mental Capacity Act Code of Practice

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf

Keeping up to date with new legislation – sign up for free updates

<http://www.39essex.com/resources-and-training/mental-capacity-law/>

Free e-learning on MCA and DoLS

<http://www.scie.org.uk/assets/elearning/dols/Web/module8/main.html>

DoLS and the Coroner

<https://www.judiciary.gov.uk/wp-content/uploads/2013/10/guidance-no-16a-deprivation-of-liberty-safeguards-3-april-2017-onwards.pdf>

Delirium assessment tool

<http://www.the4at.com/>