Mental Capacity Act 2005: a practice-based course

Supporting older people in care homes and the community as they would like.

Session Four
Restraint and Deprivation of Liberty

Restraint

What procedures, practices and equipment could be deemed to be ‘restraint’?

Discuss in your groups and make a list

Conditions that may justify restraint

- The person taking action must reasonably believe that it is necessary to perform an act which involves restraint in order to prevent harm to the person lacking capacity.
- Restraint must be a proportionate response (i.e. be only as serious and go on only as long as necessary) to the likelihood of the person suffering harm and to the potential seriousness of that harm.

Use of restraint

If restraint is used:
- staff must reasonably believe that the person lacks capacity to consent to the act in question,
- that it needs to be done in their best interests and that restraint is necessary to protect the person from harm.
- It must also be a proportionate or reasonable response to the likelihood of the person suffering harm and the seriousness of that harm.
- Restraint can include physical restraint, restricting the person’s freedom of movement and verbal warnings, but cannot extend to depriving someone of their liberty

Care Home setting - Cynthia

- Cynthia has been restrained.
- May be acceptable to keep her safe on this one occasion, BUT, does not demonstrate a person-centred approach.
- Does not show any acknowledgement of her feelings.
- Other strategies would be less restrictive and should be explored.

Community - Elsa

- This is restraint undertaken in order to allow the support worker to complete his work more easily and is not acceptable practice – it also contravenes health and safety legislation.
  - The support worker is not covered against possible criminal charges of assault and risks dismissal.
- Positive practice in this case would be to ask Elsa if she would mind moving while he cleans the living room.
  - If she doesn’t understand or doesn’t want to move, he will have to vacuum around her or clean when she is out, or ask her to help!.

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Deprivation of Liberty Safeguards (DOLS)

- Applies to a person who lacks capacity to decide about being taken and kept in a hospital or care home for treatment and this amounts to a deprivation of liberty.

Why do we need deprivation of liberty safeguards?

- The ‘Bournwood’ case
- The European Court of Human Rights (ECtHR) judgement:
  - the deprivation of liberty had not been in accordance with ‘a procedure prescribed by law’ and was, therefore, in breach of Article 5(1) of the ECHR
  - there had been a contravention of Article 5(4) of the ECHR because NI had no means of applying quickly to a court to see if the deprivation of liberty was lawful.

What is a ‘deprivation of liberty’?

- Some factors which may constitute ‘deprivation’:
  - Restraint is used, including seclusion, to admit a person to an institution where that person is resisting admission.
  - Staff exercise complete and effective control over the care and movement of a person for a significant period.
  - Staff exercise control over assessments, treatment, contacts and residence.
  - A decision has been taken by the institution that the person will be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate.
  - A request by carers for a person to be discharged to their care is refused.
  - The person is unable to maintain social contacts because of restrictions placed on their access to other people.
  - The person loses autonomy because they are under continuous supervision and control.

‘Restriction’ or ‘deprivation’?

- Scenario one
  - 168H v Switzerland
  - (ECtHR; 2002) 38 EHRR 314
- Scenario two
  - DE and KD v Surrey County Council (SEC)
  - (High Court judgment of 29 December 2006)

What is the process to follow if DOL may apply?

- Managing authority role (NHS hospital, care home or private hospital)
- Supervisory authority role (PCT for hospital, Local Authority for care homes)
- 6 assessments:
  1. age assessment
  2. no refusal assessment
  3. mental capacity assessment
  4. mental health assessment
  5. eligibility assessment and
  6. best interests assessment
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Restraint & Deprivation of Liberty

What happens next?

- Standard authorisation
- Urgent authorisation
- Role of the representative
- Reviewing
- Checks and balances
- Monitoring of DOL in care homes
- Avoid DOL if at all possible!

Sybil

- Sybil is 83 and has dementia.
- A new member of the night staff assists Sybil at bedtime.
- She is concerned that Sybil has bruises on her upper arm and that her incontinence pads do not appear to have been changed during the day. The other staff give no good reason, and the care plan notes are sketchy and appear to be incomplete.
- Sybil is frightened and tearful.

Discuss in your groups

1. You are the new night carer, what do you do?
2. What would you expect to happen next?

A revision of the main principles of the MCA

- 5 key principles
- 2 stage test of capacity
- 4 stage assessment of capacity
- 5 stage summary of ‘best interests’ criteria.

‘The 5:2:4:5 aide memoire’

Safeguards

It is now a criminal offence if the following ill-treat or willfully neglect anyone in their care:

- People who cause the care of a person who lacks capacity
- An attorney under a Lasting Power of Attorney (LPA) or Enduring Power of Attorney (EPA)
- A deputy appointed by the court

Allegations of offences may be made to the police or the Office of the Public Guardian.

The penalty for these criminal offences may be a fine and/or a sentence of imprisonment for up to five years.

What happened next

- The care assistant alerts the manager who contacts the police and the local Adult Protection Service and Inspection Unit (Care Quality Commission).
- A joint police investigation with social services is carried out and a member of staff is suspended while the police refer the matter to the Crown Prosecution Service.
- An independent mental capacity advocate (IMCA) may be instructed in these circumstances even if Sybil has family and/or friends.

Summary

- The Mental Capacity Act has given a legal framework within which restraint may be justified.
- The Act has clarified the status of restriction and deprivation of liberty.
- Deprivation of liberty can only be used according to a prescribed format, set out in the Mental Capacity Act.
- New offence gives people who lack mental capacity at any time more protection.