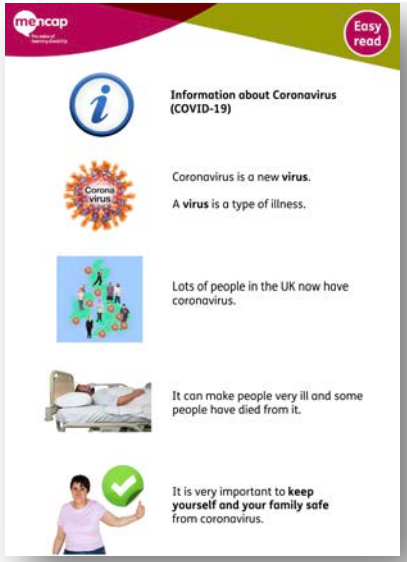

MCA 2005 AND COVID-19

Alex Ruck Keene

Neil Allen

Rachel Sullivan

AREAS WE WILL COVER

1. Capacity assessments under adverse conditions (Alex)
2. Best interests and public health restrictions (Neil)
3. Advance care planning (Alex)
4. DoLS dilemmas (Neil)

LOTS OUT THERE

Primary legislation

- Coronavirus Act 2020 (26.3.2020)
- Public Health (Control of Disease) Act 1984

Secondary legislation

- Health Protection (Coronavirus, Restrictions) (England) Regulations 2020
- Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020

Government Guidance

1. The Mental Capacity Act (2005) (MCA) and Deprivation of Liberty Safeguards (DoLS) During the Coronavirus (COVID-19) Pandemic (9.4.2020)
2. DHSC: COVID-19: Our Action Plan for Adult Social Care (15.4.2020)
3. Responding to COVID-19: Ethical Framework for Adult Social Care (19.3.2020)
4. DHSC: Guidance for those who provide unpaid care to friends or family (8 April 2020)
5. £2.9 billion funding to strengthen care for the vulnerable
6. Coronavirus (COVID-19): hospital discharge service requirements
7. Procurement Policy Note 02/20: Supplier relief due to COVID-19
8. Ethical Framework for Adult Social Care
9. COVID 19: guidance on home care provision
10. COVID-19: guidance for supported living provision
11. Admission and Caring of Individuals in Care Homes
12. Guidance on shielding and protecting extremely vulnerable persons from COVID-19
13. COVID 19 guidance on vulnerable children and young people
14. List of Key Workers
15. COVID 19: Guidance on social distancing and for vulnerable people
16. COVID 19: Guidance for households with possible coronavirus infection
17. CQC Letter on Suspending Routine Inspections
18. COVID 19: Personal Protective Equipment
19. Care Act Easements Guidance for Local Authorities
20. COVID 19: Scaling up Testing Programmes

15 April 2020 Policy Shift

1. Care home testing: all symptomatic residents in care homes to be tested (rather than just 5 before declaring an outbreak).
2. Policy to test all residents before care home admission, beginning with hospital discharges (NHS responsibility) then admissions from community. If tests awaited, isolate in meantime.
3. COVID-positive hospital discharges: to care provider if can accommodate; if not, local authority to secure alternative for remainder of 14-day period (with £1.3 billion available).
4. Recommend 14-day isolation for asymptomatic admissions. Government "will move to" test community-admissions. Anyone taken on by care provider, recommend 14-days isolation with PPE.
5. Testing for all social care colleagues and households. Increase PPE supplies. Over next 3 weeks, priority drops to local resilience forums whilst rolling out new online delivery system for social care.
6. Enhance support for workforce: single brand for social care to symbolise profession. Badge of honour. Supermarkets asked to give same priority to health workers. Aim to recruit 20,000 in 3 months to social care. Will pay for induction training.
7. Right to say goodbye. New procedures to limit risk of infection whilst giving right. Unacceptable for advance care plans including DNR to be applied in blanket fashion. Must be personalised process.

1. Capacity assessments under adverse conditions

Alex Ruck Keene

LEAST WORST WAY

- What are the barriers?
  - Visiting restrictions?
  - Public health?
  - Language?
  - Technology? (how to clean an iPad/mobile phone)

- Remote assessment acceptable :
  - *BP v Surrey County Council & Anor* [2020] EWCOP 17
  - DHSC guidance:
    - ✓ "26. To carry out a DoLS assessments and reviews, remote techniques should be used as far as possible, such as telephone or videocalls where appropriate to do so, the person's communication needs should be taken into consideration. Views should also be sought from those who are concerned for the person's welfare.

Least Worst Way

- Remember, ultimately, the decision is on the balance of probabilities – do you have any other evidence upon which you can draw to make the determination?

- In all cases, need to be clear as to the basis upon which you have reached your conclusion
  - And if adopted the 'least worst' approach more likely to mean that will have to keep under review

And Equivalent Assessments For DoLS

- Only able to rely upon equivalent assessment (except age) where carried out within the previous 12 months – **BUT**, this simply means don't then have to carry out assessment (see para 49).

- Not saying there cannot be an **assessment** based upon previous material:

  > DHSC Guidance: "27. Where appropriate and relevant, current assessments can be made by taking into account evidence taken from previous assessments of the person. The assessor undertaking the current assessment must make a judgement on whether the evidence from the prior assessment is still relevant and valid to inform their current assessment. If this information is used to support the current assessment or review this should be noted and referenced. Alternatively, if the assessment was carried out within the last 12 months, this can be relied upon without the need for a further assessment."

- Mental health assessment (even if consideration of papers) must be carried out by person meeting requirements under regulations.

2. Best Interests and Public Health Restrictions

Neil Allen

Best Interests: Whose Decision is it anyway?

N v ACCG [2017] UKSC 22 (Supreme Court)

- The "jurisdiction of the Court of Protection… is limited to decisions that a person is unable to make for himself… It has no greater power to oblige others to do what is best that P would have for himself. This must mean that, just like P, the court can only choose between the 'available options'."
- This was "a case in which the court did not have power to order the CCG to fund what the parents wanted. Nor did it have power to order the actual care providers to do that which they were unwilling or unable to do."

Which decisions are open to the person?

- Isolating in bedroom?
- Going into communal areas/garden?
- Going out?
- Supported with 2:1 outside whilst three's a public health crowd?

Policing the Public Health Restrictions

Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 Reg 9(1):

> "A person who—
>
> a) without reasonable excuse contravenes a requirement in regulation 4, 5, 7 or 8, or
>
> b) contravenes a requirement in regulation 6,
>
> commits an offence."

Reg 10: an authorised person may issue a fixed penalty notice if they reasonably believe offence committed.

Restrictions on movement

6.—(1) During the emergency period, no person may leave the place where they are living without reasonable excuse.

(2) For the purposes of paragraph (1), a reasonable excuse includes the need—

(a) to obtain basic necessities, including food and medical supplies for those in the same household (including any pets or animals in the household) or for vulnerable persons and supplies for the essential upkeep, maintenance and functioning of the household, or the household of a vulnerable person, or to obtain money, including from any business listed in Part 3 of Schedule 2;

(b) to take exercise either alone or with other members of their household;

(c) to seek medical assistance, including to access any of the services referred to in paragraph 37 or 38 of Schedule 2;

(d) to provide care or assistance, including relevant personal care within the meaning of paragraph 7(3B) of Schedule 4 to the Safeguarding of Vulnerable Groups Act 2006(**3**), to a vulnerable person, or to provide emergency assistance;

(e) to donate blood;

(f) to travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living;

(g) to attend a funeral of—

(i) a member of the person's household,

(ii) a close family member, or

(iii) if no-one within sub-paragraphs (i) or (ii) are attending, a friend;

(h) to fulfil a legal obligation, including attending court or satisfying bail conditions, or to participate in legal proceedings;

(i) to access critical public services, including—

(i) childcare or educational facilities (where these are still available to a child in relation to whom that person is the parent, or has parental responsibility for, or care of the child);

(ii) social services;

(iii) services provided by the Department of Work and Pensions;

(iv) services provided to victims (such as victims of crime);

(j) in relation to children who do not live in the same household as their parents, or one of their parents, to continue existing arrangements for access to, and contact between, parents and children, and for the purposes of this paragraph, "parent" includes a person who is not a parent of the child, but who has parental responsibility for, or who has care of, the child;

(k) in the case of a minister of religion or worship leader, to go to their place of worship;

(l) to move house where reasonably necessary;

(m) to avoid injury or illness or to escape a risk of harm.

(3) For the purposes of paragraph (1), the place where a person is living includes the premises where they live together with any garden, yard, passage, stair, garage, outhouse or other appurtenance of such premises.

(4) Paragraph (1) does not apply to any person who is homeless.

THREE'S A CROWD

Restrictions on gatherings

7. During the emergency period, no person may participate in a gathering in a public place of more than two people except—

(a) where all the persons in the gathering are members of the same household,

(b) where the gathering is essential for work purposes,

(c) to attend a funeral,

(d) where reasonably necessary—

(i) to facilitate a house move,

(ii) to provide care or assistance to a vulnerable person, including relevant personal care within the meaning of paragraph 7(3B) of Schedule 4 to the Safeguarding of Vulnerable Groups Act 2006,

(iii) to provide emergency assistance, or

(iv) to participate in legal proceedings or fulfil a legal obligation.

MCA/PHA Interface

Best interests to prevent harm to P:

- *Secretary of State for the Home Department v Skripal* [2018] EWCOP 6: "the duties of a responsible citizen".

Birmingham CC v SR; Lancashire CC v JTA [2019] EWCOP 28: "41. … It is strongly in SR's best interests not to commit a further offence… the provisions of the care plan … [are] … "*to keep him out of mischief*" …. This is strongly in his best interests, as well as being important for reasons of public protection."

DHSC DOL guidance:

"16. In many cases, where a person has a DoLS authorisation or Court Order then decision-makers will be able to put in place new arrangements to protect the person within the parameters of the authorisation or Order. Decision-makers should avoid putting more restrictive measures in place for a person unless absolutely necessary to prevent harm to that person. DoLS cannot be used if the arrangements are purely to prevent harm to others."

- If the reasons for the isolation are purely to prevent harm to others or the maintenance of public health, then public health powers should be used.
- If the person's relevant capacity fluctuates, the public health powers may be more appropriate.

3. Advance Care Planning

Alex Ruck Keene

DNACPR Orders

- Decision of a clinician that CPR would not either work – be 'futile' – or not be in the interests of the patient.

- Not binding upon the person faced with the patient where CPR may be needed, but likely to play a very significant part in their decision.

- **Must** involve patient unless to do so would cause harm: *R (Tracey) v Cambridge University Hospitals NHS Foundation Trust & Ors* [2014] EWCA Civ 822.

- Where the clinician's decision is that attempting CPR is futile, there is an obligation to tell the patient that this is the decision. The patient may then be able to seek a second opinion (although if the patient's multi-disciplinary team all agree that attempting CPR would be futile, the team is not obliged to arrange for a further opinion).

- Where patient lacks capacity to participate in the discussion, **must** involve those appropriately interested in their welfare, eg family: *Winspear v City Hospitals Sunderland NHS Foundation Trust* [2015] EWHC 3250 (QB).

Advance Care Planning

- Where the person currently has capacity to make decisions/participate:
  - Advance decisions to refuse treatment
  - Advance statements
  - Appointment of attorney
- Where person currently lacks capacity to make decisions/participate
  - Identification of wishes, feelings, beliefs and values

Capacity No Bar

- That a person doesn't have capacity to participate in advance care planning doesn't mean it cannot be done.

- Especially important in medical context to avoid the 3am best interests decision.

- Participation of individual and others (including attorneys/deputies): *Winspear* [2015] EWHC 3250 (QB).

RESPECT

- Recommended Summary Plan for Emergency Care and Treatment

- Process to create – and keep under review – personalised recommendations for a person's clinical care in a future emergency in which they are unable to make or express choices.

- Rolling out and being implemented in different sites: http://respectprocess.org.uk/

CARE PLAN **WITH** NOT "TO" THE PERSON

DHSC guidance (15.4.2020):

"3.12 It is unacceptable for advance care plans, including Do Not Attempt Resuscitation orders, to be applied in a blanket fashion to any group of people, and the CQC have been urgently contacting providers where this practice has been brought to their attention. Everyone at risk of losing mental capacity or nearing the end of their life should be offered the opportunity and supported, if they wish, to develop advance care planning that make their wishes clear, and to make arrangements, such as lasting power of attorney for health and social care decisions, to put their affairs in order. This must always be a personalised process."

4. DoLS DILEMMAS

Neil Allen

DHSC guidance:

"17. [M]ost changes to arrangements around a person's care or treatment linked to the pandemic … will not constitute a deprivation of liberty and a best interest decision would be the reasonable course of action….

21. The Department recognised the additional pressure the pandemic will put in the DoLS system. Fundamentally, it is the Department's view that as long as providers can demonstrate that they are providing good quality care and/ treatment for individuals, and they are following the principles of the MCA and Code of Practice, then they have done everything that can be reasonably expected in the circumstances to protect the person's human rights."

ARTICLE 5 ECHR

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: …

> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

<u>Procedures prescribed by law – 'unsound mind'</u>

- MHA 1983: psychiatric detention in hospital (except ss135/6, 17):
  - Cannot use MHA to detain on conditional discharge (MM) or CTO (PJ)
- MCA 2005:
  - DoLS: (18+ year olds in hospitals and care homes only)
  - Court of Protection: (16+ year olds anywhere) – s.16 dispute or COPDOL11 if undisputed
- Inherent jurisdiction of the High Court in limited circumstances

<u>Procedures prescribed by law – 'spreading of infectious diseases'</u>

- Public Health (Control of Disease) Act 1984
  - 2020 Regulations

No DOL

- *R (Ferreira) v HM Senior Coroner for Inner South London and others* [2017] EWCA Civ 31: no DOL in normal ICU case.
- *Director of Legal Aid Casework et al v Briggs* [2017] EWCA Civ 1169: no DOL where P is "so unwell that they are at risk of dying if they were anywhere other than in hospital and therefore, by virtue of their physical condition, they are unable to leave the hospital."

EXTENDING FERREIRA/BRIGGS

DHSC guidance:

9. Where life-saving treatment is being provided in care homes or hospitals, including for the treatment of COVID-19, then this will not amount to a deprivation of liberty, as long as the treatment is the same as would normally be given to any patient without a mental disorder. This includes treatment to prevent the deterioration of a person with COVID-19. During the pandemic, it is likely that such life-saving treatment will be delivered in care homes as well as hospitals, and it is therefore reasonable to apply this principle in both care homes and hospitals. **The DoLS process will therefore not apply to the vast majority of patients who need life-saving treatment who lack the mental capacity to consent to that treatment, including treatment to prevent the deterioration of a person with COVID-19.**

10. This means that, for example, a person who is unconscious, semi-conscious or with acute delirium, and needs life-saving treatment (for COVID-19 infection or anything else) is highly unlikely to be deprived of liberty. They must be treated based on a best interests decision.

11. If additional measures are being put in place for a person who lacks the relevant mental capacity when they are receiving life-saving treatment, for example to stop them from leaving the place of treatment, then the "acid test" set out in Cheshire West (set out below) should be considered. If the acid test is not met then the person is not deprived of their liberty and the DoLS will not be necessary.

Imprisonment is Not Necessarily a DoL

R (Jalloh) v Home Secretary [2020] UKSC 4: immigration requirement to remain at home for specified times during the day unless they had reasonable excuse to leave.

- Difference between tort of false imprisonment and deprivation of liberty


(1) Acid Test
(a) Continuous (or complete) supervision and control
AND (b) Not free to leave
(2) No Valid Consent
(3) State responsible
DEPRIVED OF LIBERTY
The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020
RESTRICTED MOVEMENT
DEGREE OR INTENSITY
ALL THE CIRCUMSTANCES
Eg type, duration, effect, and manner of implementation of measures
Essex CHAMBERS

ROL OR DOL?

Max is 24 years old, has a mild learning disability and lives with two other residents who receive 24-hour shared staff support. He lacks capacity to consent to his care arrangements. Owing to his agitation and anxiety, Max is prescribed medication with a calming effect. He can call upon staff members for assistance in the morning and evening if he requires it.

He is employed from 9am to 4pm, five days per week in the local garden centre which he is able to get to and from independently. If he wishes to see his family at weekends, a member of staff will take him and be there throughout the contact session owing to previous incidents of aggression from his brother.

Max is now furloughed from the garden centre and the staff keep the door locked to keep him safe from the virus. At times he wants to exercise but staff are not available to accompany him so he remains indoors.

REVIEW THE AUTHORISATION?

DHSC DOLS guidance para 15:

a) Does authorisation cover new arrangements? "If so, **in many cases changes to the person's arrangements for their care or treatment during this period will not constitute a new deprivation of liberty and the current authorisation will cover the new arrangements,** but it may be appropriate to carry out a review."

b) Are the proposed arrangements more restrictive than the current authorisation? If so, a review should be carried out.

c) If the current authorisation does not cover the new arrangements, then a referral for a new authorisation should be made to the supervisory body to replace the existing authorisation. Alternatively, a referral to the Court of Protection may be required.

"18. In some cases, a new authorisation may be needed. In such cases, an urgent authorisation can come into effect **instantly** when the application is completed and lasts for up to a maximum of seven days, which can be extended for a further seven days if required."

- NB limits on use of urgent authorisations.
- 7-day extension = exceptional (which pandemic is!)
- During pandemic, can use shorter Form 1A for urgent authorisations

AUTHORISATIONS

"20. Any authorisation in force (urgent or standard) is still applicable if the person moves within the same setting e.g. a change of ward. If the person moves to a totally different setting a new authorisation may be needed.

…

22. Where the person is receiving end of life care, decision makers should use their professional judgement as to whether DoLS assessments are appropriate and can add any value to the person's care or treatment."

ARTICLE 8 ECHR

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

CONTACT

- *London Borough of Hillingdon v Neary and others* [2011] EWHC 1377: "Significant welfare issues that cannot be resolved by discussion should be placed before the Court of Protection…"

- *Re SR* [2018] EWCOP 36: contact dispute.

- Every care home should have Wifi to facilitate contact!!

RIGHT TO SAY GOODBYE

'COVID-19 guidance for residential care, supported living and home care':

- Family and friends should be advised not to visit care homes, except next of kin in exceptional situations such as end of life.
- Visitors should visit the resident in their own room directly upon arrival and leave immediately after the visit.
- Alternatives to in-person visiting should be explored, including the use of telephones or video, or the use of plastic or glass barriers between residents and visitors.
- Symptomatic residents should isolate in single occupancy room.

Social Care Action Plan (15.4.2020):

- The right to say goodbye.

Mental Capacity (Amendment) Act 2019

CHAPTER 18

CONTENTS

THINGS WE DIDN'T HAVE TIME TO COVER!

Alex Ruck Keene

OTHER AREAS

- Scarce resource and best interests decision-making
  - Coronavirus Act impact on continuing healthcare and social care provision: see our guidance note: https://www.39essex.com/coronavirus-act-2020-social-care-and-send-guidance-note-for-england/
  - Medical treatment decisions under conditions of stretched resource: see webinar https://www.39essex.com/webinar-prioritising-access-to-life-saving-treatment-legal-considerations/
- Operation of the Court of Protection:
  - For guidance: see https://courtofprotectionhandbook.com/

QUESTIONS!

KEEPING YOURSELF UP-TO-DATE

- http://www.39essex.com/resources-and-training/mental-capacity-law/
- www.mentalhealthlaw.co.uk
- http://www.scie.org.uk/mca-directory/
- http://www.mentalcapacitylawandpolicy.org.uk/
- www.courtofprotectionhandbook.com
- www.lpslaw.co.uk

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