IMPORTANT COURT JUDGMENTS 2

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Introduction

The Scottish Government is committed to conducting a review of the recently amended 2003 Mental Health Act, a review which will consider whether the provisions in that Act fulfil the needs of people with learning disabilities or autism. Otherwise the Government has no immediate plans to formally review that Act. However, for the following reasons it is essential that there be a full review of the 2003 Act.

1. **There was a failure to properly scrutinise the provisions in the Bill which preceded the 2003 Act. That can be deduced from a remark which Mary Scanlon made on the final day when that Bill was debated. She observed that *"I was struggling with the more than 2000 amendments with which we had to deal."***

2. **There is incontrovertible evidence that the 2003 Act is not being implemented as the Scottish Parliament had intended: as a consequence many people have had their human rights violated and some have even died prematurely.**

3. **If Scottish mental health and incapacity legislation is not amended in such a way that full account is taken of case-law of the European Convention on Human Rights (ECHR) then it is unlikely that it will be ECHR compatible.**

4. Since the passage of the 2003 Act, the UK has ratified the UN Convention on the Rights of Persons with Disabilities (CRPD), a legally binding international human rights treaty. Because it has been ratified by the UK, Scotland is under an obligation to comply with the CRPD but the 2003 Act is not compatible with it.

Winterwerp v the Netherlands (para 39),1979

In this judgment of the European Court of Human Rights (ECtHR) it was made clear that the detention of an individual on the basis of unsoundness of mind is unlawful unless, at a minimum, he has reliably been shown to be of unsound

mind and, in addition, the mental disorder is of a kind or degree warranting compulsory confinement. However, there is no requirement in the 2003 Act to ensure that those criteria are fulfilled prior to granting of a short-term detention certificate: section 44 of the 2003 Mental Health Act permits an approved medical practitioner to have a individual detained in hospital for up to 28 days if he or she "*considers that it is likely that"* the conditions specified in subsection 44(4) of the Act have been met. Regrettably some approved medical practitioners are too ready to grant a short-term detention certificate and some individuals have been wrongly detained and then treated against their will.

X and Y v Netherlands, 1985

In this case the ECtHR ruled that the right to respect for private life, guaranteed by Article 8 ECHR, included the right to physical and psychological integrity. Unlike Articles 2 and 3, Article 8 ECHR is a qualified right. The Convention permits interference with private life provided that it is done in accordance with Article 8(2) ECHR. However, a subsequent ruling by the ECtHR (X v Finland) makes it clear that it is not sufficient to leave it to the responsible medical officer to decide whether Article 8(2) ECHR is satisfied when a mental health patient is subjected to forced treatment.

Comment

Article 17 of the Convention on the Rights of Persons with Disabilities (CRPD) states "*Every person with disabilities has a right to respect for his or her physical integrity on an equal basis with others".*

This does not require that mental health patients should never be treated against their will. It does require, however, that a mental health patient should be at no greater risk of being treated against his or her will than a patient with a physical health problem. **Until such time as Scottish mental health and incapacity legislation is revised to remove from psychiatrists their virtually unlimited power to subject patients to forced treatment that legislation will not be compatible with the**

CRPD. Unfortunately, although the Scottish Government is aware that Scottish mental health legislation is not working as well as had been intended, it is reluctant to undertake a wide review of that legislation.

Herczegfalfy v Austria (para 82), 1992

The ECtHR found that where patients are **"***entirely incapable of deciding for themselves***"**, forced treatment does not constitute inhuman or degrading treatment if it can convincingly be shown to be a medical necessity. As far as the 2003 Act is concerned it should be noted that:

- the ruling does not authorise forced treatment unless capacity is lacking, and
- not all forced treatment carried out under that Act can convincingly be shown to be a medical necessity.

Re C (Adult, refusal of treatment) [1994]

One commentator reported that the essentials of this case were as follows: *The Family Division of the British High Court of Justice held that where a mentally ill person's general capacity fails to show that he is incapable of understanding the nature, purpose and effects of an advised life-saving treatment, the right to refuse or consent to medical treatment is not displaced. A patient diagnosed as a chronic, paranoid schizophrenic was permitted by the court to refuse his gangrenous foot to be amputated.* ***The court determined that individuals are entitled to seek a judicial determination regarding their capability to make decisions about their medical treatment and declared that if the person is found to be capable, such intentions may be found to constitute an advance directive for future medical treatment.***

Another commentator noted that the justice Thorpe said "*For the patient offered amputation to save life* ***there are three stages to the decision (1)to take in and retain information, (2)to believe it and (3) to weigh that information, balancing risks and needs",*** and *"the question to be decided is whether ir has been established that C's capacity is so reduced by his chronic mental illness that he does not sufficiently understand the nature, purpose and effects of the proffered amputation."* and *"Although his general capacity is impaired by schizophrenia, it has not been established that he does not sufficiently understand the nature, purpose and effects of the treatment he refuses. Indeed, I am satisfied that he has understood and retained the relevant information, that in his own way he believes it, and that in the same fashion he has arrived at a clear choice."*

The courts have since used this as the test of capacity to make a treatment decision. (For confirmation, google *Re C test of capacity.*)

Comments

1. An adult with severe dementia would be unable to take in and retain treatment information but that would not be sufficient to give the responsible physician carte blanche to provide treatment without seeking consent. Treatment carried out in the absence of informed consent would be lawful only if it were in the adult's best interests.

2. Some mental health patients, with good reason, do not believe that the responsible psychiatrist has correctly diagnosed their condition. Others, for example those with severe depression, might not dispute the diagnosis but might not believe that it was necessary for them to undergo the proposed treatment, especially if that proposed treatment is ECT. A refusal to accept that a treatment that carries a high risk of harm is necessary must not be taken as evidence that a mental health patient lacks capacity. On the other hand, if a teenage girl with anorexia refuses to believe that her life will be at risk if she continues to attempt to lose weight, then she could arguably be regarded as lacking capacity and hence could be treated against her will.

3. **The test of capacity at subsection 44(4)(b) of the 2003 Act is wholly unsatisfactory for a variety of reasons:**

- There is no objective test for significantly impaired decision making ability.
- The difference between impaired decision making ability and significantly impaired decision making ability has nowhere been explained.
- An adult with impaired decision making ability might nevertheless retain sufficient capacity to make a treatment decision.

Re MB(Medical Treatment)[1997]

This case concerned a woman for whom it was necessary to give birth by a caesarean section since she was 40 weeks pregnant and the foetus was in the breech position. Hence there was a risk to the child of death or brain damage if delivered in the normal manner. The woman agreed to a caesarean section but not to the insertion of needles for the purpose of anaesthesia since she was frightened of needles.

Referring to this case, the legal annex to the GMC's consent guidance states that

"*The Court of Appeal upheld the judges' view that MB had not, at the time, been competent to refuse treatment, taking the view that her fear and panic had impaired her capacity to take in the information she was given about her condition and the proposed treatment. In assessing the case the judges reaffirmed the test of capacity set out in the Re C judgment.*

"An individual's capacity to make particular decisions may fluctuate or be temporarily affected by factors such as pain, fear, confusion or the effects of medication.

"Assessment of capacity must be time and decision-specific."

R (on the application of Wilkinson) v Broadmoor Special Hospital Authority [2001]

Wilkinson had been convicted of rape in 1967 and had been made subject to hospital and restriction orders under the Mental Health Act 1959. In July 1999 a new responsible medical officer formed the view that Wilkinson would benefit from being given antipsychotic medication. Wilkinson was opposed to that treatment and made plain that he would physically resist it. However, Wilkinson was forcibly injected on two occasions in spite of its having been vigorously resisted.

Wilkinson applied for an order that the three doctors concerned attend a judicial review hearing to be cross-examined about the forced treatment. The application was refused but an appeal succeeded.

It was submitted that compulsory treatment in the circumstances of this case violated Wilkinson's fundamental human rights under Articles 2, 3, 6, 8 and 14 of the European Convention on Human Rights and that in order for the court to reach its own conclusions on the disputed issues of fact it was essential for the three doctors to be cross-examined.

Comments

1. It should be noted that Wilkinson averred that the forcible injection of antipsychotic drugs had the potential to violate his right to life guaranteed by Article 2 ECHR. It should also be noted that the long-term administration of antipsychotics to an elderly person with dementia significantly increases the risk of premature death of that person. In this connection, the then Minister

for mental health was given in December 2012 by a grieving daughter a 51 page report of the horrible death experienced by her mother, a dementia patient, who for quite inadequate reasons had been given antipsychotic drugs by means of depot injections in spite of the adverse reaction to those which she was obviously experiencing.

2. I have represented two women who were held down by several nurses or junior doctors and forcibly injected with antipsychotic drugs. In neither case were these injections a medical necessity hence each constituted inhuman or degrading treatment. Both women found the experience highly distressing. One, who was not even a mental health patient, wrote to me at considerable length about the distress the forcible injection of antipsychotics had caused her. She suffered from post-traumatic stress disorder and received psychotherapy but I am not convinced that it was particularly effective. The consultant, who had misdiagnosed the woman's condition, insisted that his "duty of care" justified the fact that he had ignored a refusal of that particular treatment from a patient that had not been assessed as lacking capacity. Happily the Ombudsman agreed with the representations which I had made and required NHS Grampian to offer an apology to the woman in question.

3. The above three examples are only a few of those which I could provide to prove that health professionals, like the rest of us, can make mistakes. This point should be borne in mind when Scottish mental health and incapacity legislation is reviewed.

<u>Magill v Porter vWeeks (para 88),2001</u>

The House of Lords ruled that a tribunal must be *"impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in that respect".*

<u>Comments</u>

1. Account should be taken of this judgment when the impartiality of mental health tribunals is considered.

- The composition of mental health tribunals is such that there is a risk that they will place too much weight on the allegations made by psychiatrists about their patients and there is ample evidence that this is indeed the case.

- In a paper produced by the Learning Disability Alliance Scotland it is reported that "*For the Period January to August 2016 only 1.8% of the applications for a Compulsory Treatment Order were refused by the Tribunal***".** It is inconceivable that such a small proportion of applications would be refused if tribunals properly tested the allegations made by psychiatrists.

2. ***It follows from the judgment in the Magill v Porter v Weeks case, together with the known facts, that mental health tribunals cannot be regarded as impartial and hence that they cannot be guaranteed to provide the fair hearings required by Article 6 ECHR.***

3. In response to a written parliamentary question about the lack of impartiality of mental health tribunals, the Scottish Government stated that "*There is a right under the Mental Health (Care and Treatment) (Scotland) Act 2000 to appeal to the Sheriff Principal*".

Unfortunately the grounds for an appeal, which are set out in section 324 of the 2003 Act, are so limited that they are virtually worthless. For example, it is doubtful whether there could be an appeal on the grounds that the Tribunal had failed to test the allegation that the patient lacked decision making capacity.

<u>Pretty v U.K. (para 52), 2002</u>:

The judgment in this case provides a definition of inhuman and degrading treatment, something that is prohibited in all circumstances**.** The definition is *"[...] 'ill treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering [...] Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3[...] The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by the treatment, whether flowing from conditions of detention, expulsion or other measures , for which the authorities can be held responsible".*

<u>Comment</u>

In psychiatric institutions treatment does occur which falls into this prohibited category: it is known that in Scotland some mental health patients are subjected to treatment which is cruel, inhuman or degrading. Such treatment includes the forced administration of antipsychotics to people with autism or dementia. Not only can such treatment cause "*intense mental suffering"* but it can also arouse feelings of "*fear, anguish and inferiority".* Further the suffering which flows from these naturally occurring conditions risks being exacerbated by the administration of antipsychotics to those patients.

H.L. v the United Kingdom, 2004

In section 75 of the judgment it was observed that one of the objectives of a draft Mental Health Bill was to bring "*the law more closely into line with modern human rights law (**notably the case-law of the European Convention on Human Rights)***".

In section 114 of the judgment it is emphasised that the lawfulness of the detention of an individual on the basis of unsoundness of mind requires that it is carried out in accordance with the procedure prescribed by law and also that the three minimum Winterwerp conditions are satisfied, i.e. he must have been reliably shown to be of unsound mind; the mental disorder is of a kind or degree warranting compulsory confinement; the validity of continued confinement depends on the persistence of such disorder.

Comments

1. Section 75 of the judgment clearly implies that it is necessary to take account of the case-law of the European Convention on Human Rights in order to bring Scottish mental health legislation into line with modern human rights law. **It must be highly doubtful whether Scottish mental health and incapacity legislation would be ECHR compatible if it were not revised to take account of the case-law of the European Convention on Human Rights.** It should be a cause for concern, therefore, that the Scottish Government has given no indication that it will take account of the case-law of the European convention on Human Rights.
2. It is known that there is not always conformity with the procedure prescribed by law when an individual is deprived of his or her liberty on the grounds of unsoundness of mind. In all such cases the deprivation of liberty is

unlawful, yet there is no provision in the 2003 Act to guard against this human rights abuse..

3. As noted above, the 2003 Act does not require the Winterwerp conditions to be satisfied when an individual is deprived of his or her liberty on the basis of unsoundness of mind. Again the 2003 Act makes it too easy for individuals to be unlawfully detained and hence wrongly stigmatised.

Napier v The Scottish Ministers 2004

In 2004 the Court of Session ruled that being forced to "slop out" had breached the human rights of Robert Napier when he had been a prisoner in Barlinnie Prison. The judge ruled that being forced to use a bucket in his cell when he wanted to urinate or defecate damaged Napier's human dignity and caused there to arise in him feelings of anxiety, anguish, inferiority and humiliation. The judge concluded that "slopping out" amounted to degrading treatment and hence breached Article 3 ECHR. The judge also ruled that slopping out breached Article 8 ECHR, respect for private life. He awarded Robert Napier £2,400 compensation.

Similar claims for compensation followed. In 2007 the House of Lords ruled that prisoners who brought human rights claims under the Scotland Act did not have to do so within a one-year time limit.

In 2009 it was reported that £11 million had been paid out as a consequence of successful compensation claims for being forced to slop out while in prison and that another £67 million of public money had been set aside to meet future claims.

Comment

The significance of Robert Napier's successful claim for compensation is that recent judgments of the European Court of Human Rights have established that, in certain circumstances, forced treatment can breach a patient's Article 3 and 8 Convention rights. Hence these judgments might provide them with grounds to sue for compensation. One successful claim could lead to numerous others. It would be prudent, therefore, to amend Scottish mental health and incapacity legislation in such a way that there will be no forced treatment of mental patients unless there is in place proper safeguards which will ensure that forced treatment never occurs unless all of the necessary criteria have been met.

Award of damages for memory loss from electroshock, 2005

In 2005 a jury in Columbia, South Carolina, awarded a woman called Peggy Salters $635,177 damages after it found that she had suffered long-term memory loss as a consequence of ECT treatment and that she had not been warned in advance of this risk.

Comments

1. The significance of this judgment for Scotland is that ECT patients here are not warned about the risk of long-term memory loss prior to being given ECT and hence might be able to raise a successful action for damages for this reason alone if they did suffer long-term memory loss.

2. Even where ECT does not cause long-term memory loss, patients who are given ECT against their will may be able to raise an action on the grounds that the giving of ECT in those circumstances constituted a breach of Article 3 and/or Article 8 ECHR.

Manweiler v Eastern Health Board, 2005

According to one of the press reports

"The High Court awarded a 63-year-old Dublin man 2,922,000 euros for false arrest, and negligence by psychiatrist and for the manner in which the Eastern Health Board defended the case".

John Manweiler had alleged that he had been falsely imprisoned in St Brendan's Hospital, Grangegorman for several months, living in the fear for long afterwards of being detained in a 'lock-up' ward in Grangegorman, being injected every few weeks with a massive dose of an antipsychotic drug, suffering severe side-effects from that including involuntary movements and, as he said hinself later, going around like a 'zombie'.

John Manweiler had been able to establish that he had been wrongly assumed to suffer from a psychotic condition. He should not, therefore, have been detained in a psychiatric institution and injected with drugs against his will.

Comment

Similar court actions could be brought in Scotland since it is known that not every psychiatrist here is correct in his or her diagnosis of mental illness.

Salontaji-Drobnajak v Serbia (paras 143, 144, 155), 2009:

The plaintiff raised the action because he had been partially deprived of his legal capacity. In its judgment the ECtHR stated that:

"*there had been a violation of Article 6(1) of the Convention as regards* the fairness of the proceedings resulting in the partial deprivation of the *applicant's legal capacity ";*

"*there had also been a violation of Article 6(1) of the Convention as regards the applicant's right of access to a court concerning the restoration of his full legal capacity".*

Comments

1. This judgment is particularly relevant to the giving ECT since the 2003 Act does not authorise the giving of unwanted ECT to any patient with capacity. Clearly if a patient were opposed to being given ECT then that patient should have the right to appeal against any decision as to his or her incapacity. However, there is no provision for an appeal against that decision. That would seem to be an obvious deficiency in the 2003 Act. 2. The judgment is, in fact, relevant to the giving of any treatment against the will of a patient since case-law has established that patients with capacity have a right to refuse treatment.

3. The omission of a provision for an appeal against a decision as to incapacity in the 2003 Act, along with section 242, demonstrates that this Act is not compatible with Article 12 of the Convention on the Rights of Persons with Disabilities since this Article attaches great importance to not wrongly depriving persons with disabilities of their legal capacity. 4. The Scottish Government was asked the following written parliamentary question:

"To ask the Scottish Government for what reason the Mental Health (Care and Treatment) (Scotland) Act 2003 does not contain a provision for appeal against a decision regarding incapacity, compared to the Adults with Incapacity (Scotland) Act 2000, which does contain such a provision."

The essence of the Government's response was as follows:

"*Even if incapacity can be established at a particular time, it would seem impractical for an order for compulsory treatment to stop and start if capacity fluctuates perhaps on a daily basis or even more frequently*."

That is a totally inadequate response for a number of reasons:

- It takes no account of the judgment of the ECtHR regarding the necessity of the providing the right to appeal against a decision as to incapacity.
- It ignores the fact that some mental health patients clearly do not have fluctuating levels of capacity and, in addition, appear to have sufficient capacity to make decisions about their treatment.
- Even where capacity does fluctuate, case law has established that when capacity is present, not only must any refusal of treatment be respected but, in addition, any such refusal of treatment must be treated as an advance statement should there be a lack of capacity in the future.

Salduz v Turkey (paras 62,63), 2008

This case concerned the fairness of a criminal trial of a juvenile (under 18) but the judgment has relevance to Scottish mental health legislation.
Mr Yuzuf Salduz was convicted of a criminal charge by a Turkish court mainly on the evidence of a statement which he had allegedly made to the police. However, he repeatedly denied the content of his statement to the police, both at the trial and on appeal and there was no lawyer present when Salduz was being questioned.
The ECtHR found that this constituted a breach of Article 6 of the European Convention (right to a fair hearing) since "*the absence of a lawyer while he was in police custody irretrievably affected his defence rights*"**.**

Comment

It is worth noting that in para 51 of its judgment, the ECtHR stated that the ECHR is designed to "*guarantee not rights that are theoretical or illusory but rights that are practical and effective".* Regrettably the rights set out in part 1 of the 2003 Act are theoretical or illusory: in practice little or no attention is paid to them when patients are subjected to compulsory measures.

Cadder v HM Advocate, 2010

Peter Cadder had been convicted of a criminal offence in 2009. He appealed against his conviction on the grounds that no lawyer had been present when he was interviewed by the police. His appeals failed even though he cited the case of Salduz v Turkey: the Scottish courts maintained that there were sufficient safeguards in the Scottish legal system for there to be no need to ensure that a suspect had access to legal advice when detained for questioning! However, Cadder was able to appeal to the Supreme Court on the

grounds that his appeal related to Scotland's compliance with Convention rights. The Supreme Court took account of the Salduz judgment and found that Cadder's right to a fair hearing under Article 6 ECHR had been breached because he had been denied access to a lawyer before being interviewed by the police. As a consequence, the Scottish Parliament passed emergency legislation to amend the Criminal Procedure (Scotland) Act 1995 which had permitted a person suspected of having committed a criminal offence to be detained and interviewed by the police for up to 6 hours without a right of access to a solicitor.

Comment

The Cadder judgment has implications for Scottish mental health legislation: if the purpose of an interview by a psychiatrist or mental health officer is to determine whether an individual should be detained in a psychiatric institution then that individual should have the right to be accompanied by a lawyer or a trusted friend.

Ibrahim Gurkan v Turkey (para 14), 2012

This judgment of the ECtHR emphasised that a tribunal must be "impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in that respect". This judgment is, of course, identical to the 2001 judgment of the House of Lords referred to above.

Gorobet v Moldova (para 52),, 2012

In this judgment the ECtHR found that forced treatment which had not been shown to be a medical necessity "*could amount at least to degrading treatment within the meaning of Article 3 of the Convention".* It also noted that "*no medical necessity to subject the applicant* (to forced treatment) *had been shown to exist*". The Court observed that

"***As the Court has held on many occasions, Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment irrespective of the circumstances and the victim's behaviour ..."***

The Court awarded Gorobet 20,000 euros in damages.

Comment

Mental health tribunals do not test the evidence that the treatment to be carried out under the compulsory orders which they grant is, in each case, a

medical necessity. It is, therefore, virtually certain that many patients are subjected to treatment which, by virtue of this judgment, falls into the prohibited inhuman or degrading category.

X v Finland, 2012

X had been subjected to forced treatment and it was not disputed that this had interfered with her physical integrity, something protected under Article 8 ECHR.

The ECtHR observed that the forced administration of medication was a serious interference with people's physical integrity and, accordingly, had to be based on a law which guaranteed proper safeguards against arbitrariness. In X's case such safeguards had been missing. Consequently, the ECtHR concluded that the lawfulness requirements under the ECHR had not been met and it awarded X 10,000 euros in respect of non-pecuniary damage and 8,000 euros for costs and expenses.

Comment

The Scottish Government should note that this judgment has particular relevance to aspects of the 2003 Act.

- This Act, unlike its predecessor, authorises the forced treatment of a patient detained on the basis of an emergency detention certificate, a certificate which any GP can grant. (Sections 36 and 243.)
- This Act ignores case-law and authorises the forced treatment of a patient with capacity. (Section 242) **The inclusion of this section in the 2003 Act demonstrates that not enough consideration was given to its internal consistency since in section 44 it is implied that involuntary treatment is permitted only where the patient has significantly impaired decision making ability.**
- The law in Scotland does not contain the proper safeguards to which the ECtHR made reference. In particular, the lack of impartiality of the mental health tribunal means that the Tribunal does not constitute a proper safeguard: it is far too ready to grant a request for a compulsory treatment order.

Aintree University Hospitals NHS Foundation Trust v James (paras 16, 18, 19), 2013

This application was made to the Supreme Court for a declaration under section 15 of the Mental Capacity Act 2005. In the judgment may be read the following observation:

"***Generally it is the patient's consent which makes invasive treatment lawful. It is not lawful to treat a patient who has capacity and refuses that treatment.***"

Comment

This judgment should make it clear that section 242 of the 2003 Act must be deleted.

Montgomery v Lanarkshire Health Board, 2015

The case of Montgomery v Lanarkshire Health Board was decided by the Supreme Court. Lords Kerr and Reed gave the lead judgment with which the others agreed. Lady Hale, the Deputy President, gave a concurring judgment.

Lords Kerr and Reed, when delivering their judgment, expressed the opinion that an adult of sound mind is entitled to decide which, if any, of the available treatments to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. Lady Hale, for her part, stated that a patient is entitled to take into account her own values and her choices must be respected, unless she lacks capacity. Lady Hale further expressed the opinion that the patient is at least entitled to information enabling her to take part in the decision concerning her treatment.

Comment

Involuntary mental health patients are not provided with the information enabling them to take part in the decisions concerning their treatment and neither are all other patients:

- As is made clear in the 2015 report of the Scottish ECT Accreditation Network (SEAN), psychiatrists who believe that their patients would benefit from being given ECT do not warn them of the risk of long-term and probably permanent memory loss.
- Elderly care home residents with dementia are not warned of the risks that the administration of antipsychotic drugs, which they are liable to be prescribed, significantly increases the risk of their dying prematurely, of having a stroke, of falling and fracturing a hip or of developing an unpleasant and irreversible condition called tardive dyskinesia.

Wye Valley NHS Trust v B, 2015

This case was heard by the Court of Protection, a court set under the provisions of the Mental Capacity Act 2005. In his judgment Mr Peter Jackson stated that

"Every adult capable of making decisions has an absolute right to accept or refuse medical treatment, regardless of the wisdom or the consequences of that decision. The decision does not have to be justified to anyone. Without consent any invasion of the body, however well-meaning or therapeutic, will be a criminal assault".

Comments

1. It would constitute discrimination in breach of Article 14 ECHR if it were assumed that persons with legal capacity had an absolute right to refuse treatment for a physical illness but did not have the same right to refuse treatment for a mental illness.
2. The Wye Valley NHS Trust v B is yet another example of a judgment which illustrates that case-law has established that adults with capacity have the right to refuse treatment. The Millan Committee was well aware of such case law and, in its Report which was laid before Parliament in January 2001, it stated in chapter 5, paragraph 3, that "***A competent adult is entitled to refuse treatment , for good or bad reasons, or for no reasons at all***".

That recommendation led to the incorporation into the 2003 Act of the concept of significantly impaired decision making ability and hence to the SIDMA test of capacity. As noted above, this is an unsatisfactory test.

Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities (CRPD) was ratified by the UK in 2009 and hence Scotland is bound by its provisions. Article 12 CRPD guarantees persons with disabilities equal recognition before the law. Now persons with capacity have an absolute right to refuse treatment for a physical disorder and there must be a presumption of capacity unless it has been properly established to be lacking. It might have been expected, therefore, that the CRPD Committee would interpret Article 12 CRPD to mean that persons with capacity have an absolute right to refuse treatment for a mental disorder and that there must be a presumption of capacity unless it has

been properly established to be lacking. In fact the CRPD Committee went beyond that; it took into consideration the general principles as outlined in Article 3 CRPD, namely, respect for inherent dignity, individual autonomy - including the freedom to make one's own choices - ... Taking such matters into account, the CRPD Committee issued a General Comment on Article 12 CRPD in which it recommended that (where necessary) there be supported decision-making and that state parties abolish laws and legislative provisions that allow or perpetrate forced treatment.

In Scotland there does seem to be an interest in providing for supported decision-making but that interest will be pointless unless it is accepted that person's wishes about medical treatment must be respected once they have reached a clear decision and made that known. At present there seem to be those who remain of the opinion that the views of a mental health patient can be disregarded by a responsible medical officer whether or not that patient has capacity as per section 242 of the 2003 Act. Almost certainly revised mental health and incapacity legislation which permitted this would not be compliant with the CRPD. However, it is possible that the CRPD Committee misinterpreted Article 12 CRPD when it concluded that mental health patients should never be given forced treatment.

Whether or not the CRPD Committee did misinterpret Article 12, there can be no doubt that Scottish mental health and incapacity legislation as it stands is not compliant with the CRPD. One reason for this is that it lacks the effective safeguards to prevent abuse in accordance with international human rights law as required by Article 12. When Scottish mental health and incapacity legislation is reviewed due note should be taken of this fact. Account should also be taken of the fact that some people have been wrongly detained under the provisions of the 2003 Act. The involvment of a court where practicable before detention would reduce the number of instances of unnecessary and unlawful detention. The requirement of a court to sanction non-consensual treatment would also have the potential to reduce the incidence of inhuman or degrading treatment provided that legislation or a Code of Practice made it clear that there must be no non-consensual treatment unless it has been properly established that the treatment is a medical necessity and that the patient lacks capacity. Given what is known about how some psychiatrists and

other health professionals have acted, there should be no question of permitting things to continue as at present.