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Mental Health Act 1983 assessments: The use of video technology.

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Keywords

Mental health, assessment, video technology, medical examination, Covid-19, medical recommendations, face-to-face, safeguards, statutory interpretation.

Abstract

Covid-19 requires practitioners to reflect on how they deliver health services. Using technology, in particular video technology, has increased especially in primary care. This article considers the implications of technology for assessments under the Mental Health Act 1983. NHS Covid-19 guidance anticipated its use in assessments, but this was held to be unlawful. Is this the right decision or is it too restrictive an interpretation of the 1983 Act? The article argues that consideration should be given to the potential role, if any, of video technology in assessments and identifies some issues that need to be addressed. Use of these modern technologies should be part of the current review of the 1983 legislation.

Introduction

The High Court in *Devon Partnership NHS Trust v Sec of State for Health and Social Care*(1)considered the legality of National Health Service guidance (the Guidance)(2) introduced in response to Covid-19. Part 14 anticipated using video technology for assessments under the Mental Health Act 1983 ("1983 Act")as technology advances allowed its use if practitioners were satisfied, they have personally seen or examined the person. Although driven by the need to avoid, if possible, face-to-face contact, it emphasised a case-by-case approach. Practitioners should consider the person's presentation (including complex needs), whether it would cause unnecessary distress, and whether reasonable adjustments could be made to ensure a fair experience. A video assessment could be undertaken where there was a significant risk of Covid-19 transmission, a significant risk in delaying the assessment, and minimum standards were met. These standards included the technology, the

person's views, quality control, the consequences of discontinuation, and record keeping. The setting (home, place of safety, hospital, police station, prison, and immigration removal centres) was also relevant.

Under s.12 of the 1983 Act medical recommendation supporting an application under ss.2 and 3 'shall be given by practitioners who have *personally examined* the patient.' Section 11(5) requires that the doctor 'has *personally seen* the patient' within fourteen days of the application. Section 13(2) requires the Approved Mental Health Professional (AMHP) 'to interview the patient in a *suitable manner.*' (3) Could the duties imposed by the italicised words be fulfilled through video assessments?

The arguments before the Court

Before courts give advisory opinions, the parties must show there is an actual rather than a hypothetical issue, that the party seeking the declaration has an interest in it, and the court has heard proper argument. To ensure a balanced argument, an Advocate to the Court was appointed to allow points of law to be decided based on best evidence. All three conditions were satisfied.

The Trust outlined its concerns about the risk of transmission of Covid-19 through face-to-face assessments. Although PPE reduces risk, it argued that it may have a negative effect on the person, for example, a psychotic person experiencing paranoid ideation and delusional ideas may react badly to four strangers in full PPE. On this basis video assessments comply with ss.11, 12 and 13 of the 1983 Act.

The Secretary of State argued that 'personally examined' and 'personally seen' did not presuppose physical presence. 'Personally' could mean face-to-face or that the examination cannot be delegated as it was a personal responsibility. In dismissing the first alternative, counsel referred to R v Managers of South Western Hospital and Another, Ex parte M. where Laws LJ said,

'…equally clearly the duty imposed by section 11(5) upon the section 3 applicant to conduct a personal interview with the patient cannot be performed through an intermediary.'(4)

Similarly, 'examine' refers to intensity not physical proximity. The requirement that the patient be 'seen' is met by video technology. The duty on the AMHP to interview in a 'suitable manner' is likewise consistent with video technology.

Counsel also referred to the legislative history. The 1983 Act consolidated the Mental Health Act 1959, but the phrases 'personally examined' and 'personally seen' have longer pedigrees. The former comes from the Pauper Lunatics (England) Act 1819 and the latter from the Lunacy Acts Amendment Act 1889. At that time face-to-face was the only way of assessing a person. The mischief aimed at was the delegation of assessments and subsequent rubber stamping by the physician. It is in this context that it must be interpreted today; it was not addressing face-to-face assessments because in the 1800s there was no alternative. Finally, counsel argued video assessments were compatible with article 5 of the European Convention on Human Rights as the European Court merely required that the patient be 'reliably shown to be of unsound mind.'(5)

The Advocate to the Court made five points. First, 'examine' in a medical context requires physical presence. 'Personally' cannot be interpreted in isolation. 'Personally examine' is a compound phrase requiring physical presence. The same applies to 'personally see'. He identified reasons why a psychiatric assessment requires face-to-face engagement – for example, body language, smell, self-harming scars. Testing proprioception may be difficult remotely. Second, given the 1983 Act did not envisage video assessments, the Coronavirus Act 2020 did not amend ss. 11(5), 12(1) or 13(2) to include them. Third, the legislative history suggests physical attendance is as important as non-delegation of responsibility. Fourth, as a matter of interpretation, physical liberty cannot be curtailed except under the clear authority of the law; such powers must be interpreted strictly.

Finally, the effect of changing the law during a crisis may lead to a permanent change not foreseen by the legislation.

The decision

The Court identified six considerations in deciding that the 1983 Act required face-to-face assessments and the Guidance was unlawful. They are:

1. The 1983 Act allowed for a person to be deprived of their liberty by an AMHP (and in some instances the nearest relative)without judicial involvement. Bennion on Statutory Interpretation says such powers must be construed 'particularly strictly'.(6)
2. The phrases 'personally seen' and 'personally examined' are compound phrases; this is the way they were understood in 1959 and 1983.
3. Psychiatric assessments often depend upon multi-sensory assessments, for example smell.
4. The 1983 Act was 'restrictive or circumscribed' rather than 'liberal or permissive'.
5. Parliament must weigh up the competing interests of deprivations being founded on objective evidence, and the need to ensure the working of the 1983 Act during the pandemic. Parliament alone has the responsibility to consider changes to the 1983 Act.

The Court's restrictive interpretation relied on its consolidating status. However, it was initially consolidating legislation but was heavily amended by the Mental Health Act 2007, particularly the definition of mental disorder, the criteria for admission, and eligibility to be an AMHP. It has moved far from its 1959/83 origins. At some point, should it lose its consolidatory status? Admittedly the 2007 reforms rejected the rights-based approach, nevertheless it significantly changed the admissions process.

The Scottish approach

Scotland is less prescriptive about technology in assessments. The Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) includes powers to intervene in the lives of people with mental disorders. The Mental Welfare Commission for Scotland published practitioner advice

on Covid-19 and the 2003 Act.(7)It said this was not affected by the Devon Partnership case as the language of the 2003 Act was different from the 1983 Act; it did not refer to 'personally seen' or 'personally examined'. Instead, it refers to 'carries out a medical examination.' The Code of Practice refers to the medical examinations being 'a direct face-to-face personal examination of the patient'. Similarly, a mental health officer's assessment should be face-to-face.(8)However, the guidance is also in part permissive. For the medical examination paragraph 26 refers to it being '*expected* that the examination would always include, a direct personal examination.' For the mental health officer's interview, paragraph 44 of the Code refers to face-to face- as standard practice routinely followed, but it recognises that there may be 'exceptional circumstances' when this is not possible, for example, ferry strikes.

The Commission reaffirms the need for a full assessment whatever mechanism is used. However, it concedes that for some assessments it is preferrable for the person being assessed by somebody who knows them using video technology rather than a face-to-face with somebody without an ongoing relationship with them. It gives the example of a second GP report or an extension of a Community Treatment Order. The consent of and participation by the person is critical to allow an assessment by professionals with whom they have a working relationship. The tribunal should be provided with as much background information on why technology is being used, for example the local Covid situation.

Discussion

Commenting on the Scottish position Schölin, Connolly et al state,

> *We stress that the 'relaxation' is not a lowering of standards but an attempt to harness aspects of our technological response to the pandemic that have been accelerated and that we may wish to retain in a post-COVID world.(9)*

Covid-19 presented challenges for health providers beyond the pandemic. New ways of working developed. Technology usage increased and, in some instances, became the new norm for

consultations. In general practice telephone and video consultations increased and GPs have seen how it works and like it.(10)Research identifies relative successes and a cautious embrace of video technology in mental health care and therapy. (11)(12) However, the need for protocols is stressed as is the need for training to ensure equity, access, and quality of care.(13)(14) Importantly, a distinction must be made between treatment and therapy, and the powers of detention.

Norris et al commenting on the American experience during Covid-19 note the increased reliance on telemedicine in rural mental health care, prisons, and forensic examinations for the courts. They highlight practical issues such as poor lighting, inability to assess, smell, technical difficulties, the challenges of finding the appropriate visual environment, potential distractions, and performance anxiety. The authors also emphasise the necessity for emergency backup. (15)

Conclusion

The Devon Partnership case poses interesting questions. As a matter of interpretation, was the Court right? Arguably it was not as it failed to recognise developments in medicine. Lords Simon of Glaisdale and Wilberforce in Farrell v Alexander adopted a more relaxed approach to interpreting consolidating legislation and expressed doubt on the principle of,

> *'(S)elf-contained statutes, whether consolidating the previous law, or doing so with amendments, should be interpreted, if reasonably possible, without recourse to antecedents, and … the recourse should only be had when there is real and substantial difficulty or ambiguity which classical methods of construction cannot resolve.'*(16)

Lord Lloyd-Jones in Belhaj shared the reservations about the principle of no change.(17)This is a more sensible approach than speculating on Parliament's thinking in 1959/83. Legislation on health and medicine can be out of date before the parliamentary ink is dry; it invites a contemporaneous approach as illustrated in R (Quintavalle) v Secretary of State for Health(18) where the House of Lords recognised developments in cloning techniques. The fact the 1983 Act did not foresee video

assessments, does not in principle rule them unlawful; it is open to the courts to interpret ss.11,12, and 13 in a way that recognises developments in assessments and technology whilst remaining true to the legislation.

More generally, is there scope for video technology in mental health assessments? If so, it would require challenging the Devon Partnership ruling, an amendment of the 1983 Act, or new legislation. Legal challenge is unlikely. Similarly, the prospect of amending the 1983 Act is remote. This leaves the option of new mental health legislation, which is currently under consideration. The government tasked the Wessley review of the 1983 Act with, amongst other things, examining processes that are out of step with a modern mental health system. The report did not discuss video admission assessments but proposed looking creatively at how the Second Opinion Appointed Doctor (SOAD) process might be enhanced using remote access technology.(19) SOADs are an important safeguard when treating patients under the 1983 Act, in some instances without consent. The recent government White Paper recognises that Covid-19 introduced new ways of doing things, including remote video consultations by SOADs.(20)

The arguments presented in the Devon Partnership case provide the basis for a discussion on whether, and if so when, video technology should be used in admission assessments. Key issues involve the human rights to a fair hearing, consent, quality of the technology, physical (smell, demeanour etc), the physical environment, and responding to emergencies. There are advantages. American research highlights its use in remote areas, although often they are areas where coverage is poor. Technology might allow a more immediate response to a crisis. Its use involving a known practitioner may be better for the person than face-to-face with a stranger. Very importantly, video technology must be carefully regulated, and detailed protocols developed.

Covid-19 has required us to rethink many aspects of health care. Some responses to the pandemic may become permanent. A discussion on the use of video technology as part of the mental health admission process would be timely and should be included in the review of the 1983 Act.

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