Advance Statements and Advocacy

It has been suggested that the right of mental health patients not to be subjected to forced treatment, as per the General Comment of the UN Committee on the Rights of Persons with Disabilities, could be protected by placing more emphasis on advance statements and independent advocacy. While this might give some additional protection to mental health patients it would be inadequate. As the Health and Sport Committee would learn if it were prepared to take oral evidence from former mental health patients or their representatives, individuals can be unexpectedly detained. Such individuals would have no cause to consider making an advance statement.

As far as independent advocacy is concerned, there are two points that can be made. One is that the standard of independent advocacy seems to be too low at present and there is no guarantee that this standard could be raised to an adequate level. It should be noted that a 2009 report of research commissioned by the then Scottish Executive was critical of the poor standard of legal representation provided to mental health patients and there seems to be no evidence that this has improved. The situation regarding independent advocacy might be no different. There is, however, a more substantial point: many patients do not lack capacity and hence it should be sufficient for them to withhold consent to treatment. Unfortunately, even in cases where such patients know their rights they are quite unable to uphold them: many psychiatrists clearly believe that the law permits them to subject their patients to forced treatment without first establishing that they lack the capacity to make a treatment decision. Psychiatrists should make no such assumption: the GMC consent guidance makes it clear that there must be a presumption that a patient has capacity and the guidance also draws attention to case law which has established that a patient with capacity has the right to refuse treatment even though death might be the likely consequence. Scottish mental health legislation should be amended to reflect this fact: it should not authorise forced treatment until it has been properly established that, as a minimum, the patient lacks capacity. In addition, Scottish mental health legislation should allow for an appeal to a court against a decision as to incapacity and no forced treatment should be permitted unless a court has heard and has not upheld that appeal. (The Adults with Incapacity Act at section 14 provides for such an appeal.)

A study of the Claire Muir case, which I have written about at length elsewhere, illustrates well what is wrong with the 2003 Mental Health Act. Briefly, Claire Muir was sectioned on 11 September 2006 by a locum consultant who had never met her previously and to whom she had not been referred by either a GP or a psychiatrist. On 1 July 2006 a midwife had expressed concern that, following the diagnosis of a failed pregnancy, Claire
Muir sounded psychotic and possibly suicidal. She was quickly referred to a psychiatrist who found her neither psychotic nor suicidal. Matters might have rested there had Claire Muir not complained about her miscarriage treatment. It may have been no coincidence that shortly thereafter a midwife attempted to give the impression that Claire Muir was delusional. That midwife spoke to a health visitor who in her turn expressed concerns to a community psychiatric nurse who then contacted Claire Muir’s GP. The GP declined to refer Claire Muir to an approved medical practitioner. The community psychiatric nurse then took it upon himself to refer Claire Muir to the locum who interviewed and then sectioned her several weeks after the referral. That Bulgarian locum failed to make any enquiries before granting a short-term detention certificate with respect to Claire Muir and so mistakenly imagined that she had been speaking literally when she had said to the midwife on 21 July 2006 that her daughter was invisible in nursery. (She had only meant that her daughter was not being included in activities at nursery. As can be verified from her medical records, Claire Muir explained that to her GP on 27 July 2006.)

Claire Muir remained on a section until she was put into the care of a different consultant in October 2007. Since he found “no identifiable psychiatric disorder” he took her off the section. Claire Muir was formally discharged from the mental health services on 14 December 2007. Although the locum who sectioned her seemed to imagine that she had a severe and enduring mental illness - he had put her on the Care Programme Approach - she has had no need of mental health services since.

In 2008 attempts were made by Claire Muir and her husband to have some of their complaints properly investigated. When those attempts failed Claire Muir raised actions against the employers of those responsible for her ordeal. She was unable to find a lawyer to represent her in court but, since the actions had been raised under the summary cause procedure, she could be represented by a lay representative at the initial hearings. From the documentation that was available the facts could be easily established, so I was pleased to act as that lay representative. Unfortunately, the sheriff was persuaded by the defendants to remit Claire Muir’s actions to the ordinary cause procedure. Hence the actions raised under the summary cause procedure did not proceed to proof, the stage at which the evidence would have been tested.

One effect of remitting the actions to the ordinary cause procedure was that Claire Muir had to start all over again. She was still unable to get a lawyer to represent her so she had to represent herself since a lay representative cannot represent a litigant at a hearing held under the ordinary cause procedure. Claire Muir successfully represented herself at the initial hearings but the cases did not then immediately go to proof as they would have done under the summary cause procedure. Under the ordinary cause procedure before a case goes to proof it can go to debate at which stage the defendants can attempt to have a case dismissed on technical grounds. In each of the three actions which Claire Muir raised under the ordinary cause procedure the sheriff was persuaded to permit the action to go to debate and in each case the action was dismissed on technical grounds. It has been alleged that this means that Claire Muir’s complaints were fully investigated and no evidence
found to support them. That is clearly false, not only because none of the actions went to proof but also because Claire Muir had grounds to appeal. Appeals were out of the question, however, because Claire Muir was not eligible for legal aid and did not have unlimited resources. Further, any claim that Claire Muir’s complaints had been fully investigated and no evidence has been found to support any is obviously false since the police are currently investigating one of Claire Muir’s complaints, the one in which it is easiest to establish that a mental health professional had committed an offence.

Much can be learned from the Claire Muir affair. She had no reason to fear that she might be sectioned and hence had no reason to make an advance statement. Also there was absolutely no evidence that she lacked capacity. Indeed the evidence is lacking that Claire Muir suffered from a mental illness. Beyond reasonable doubt she should not have been detained. Her detention led to her having what she has described as a “nightmarish experience”. It has also led to her being wrongly stigmatised, something that she can do nothing about now that her court actions have failed. The fact is that the 2003 Act makes no allowance for the possibility that the “professional judgment” (i.e. the opinion) of a psychiatrist might occasionally be in error when he or she considers it likely that the necessary criteria have been met to justify subjecting an individual to compulsory measures. Unsurprisingly mistakes are sometimes made as is evidenced by the Claire Muir case and also by others known to me.

There is another matter which is, perhaps, worthy of consideration. A psychiatrist is currently a member of the Health and Sport Committee. In my opinion, there should not be a psychiatrist on that committee when it discusses changes to Scottish mental health legislation since a psychiatrist is unlikely to be impartial when the desirability of reducing the powers of psychiatrists is being discussed. There would appear to be a case, therefore, for that psychiatrist withdrawing from the Health and Sport Committee for the time being so that he can be replaced by an MSP who would be more likely to be capable of taking an objective view. Ideally any replacement would have some knowledge of and an interest in both mental health matters and human rights. It would not be difficult to find such a replacement.

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