

Summary of Counsel advice on the use of restraint under the Mental Capacity Act 2005

Decision in question – moving P to a place for care and/or treatment

P (person) – lacking in capacity to make this specific decision for themselves

s5(1) MCA 2005

D (decision maker) must take reasonable steps to determine P's capacity and reasonably believe that P lacks capacity in relation to the specific decision and it is in P's best interests for the decision to be undertaken.

MCA Code of Practice 6.8

Where P cannot get sufficient or appropriate care in their own home and may have to move but lacks capacity to consent to the move, D must consider whether the move is in P's best interests by referring to the best interests checklist, and in particular P's past and present wishes and feelings, as well as the views of other relevant people; and consider whether there is a less restrictive option.

Although para 6.8 refers specifically to a person being moved from their own home, the general principles of this guidance apply to people being moved from a hospital / healthcare setting to a residential placement.

MCA Code of Practice 6.9

Some cases will require an IMCA (Independent Mental Capacity Advocate) where P lacks capacity and is unbefriended.

s6(4) MCA 2005

D will only be protected from liability if restraint is necessary in order to prevent harm to P and the actions are proportionate taking into account the likelihood of harm being caused and the seriousness of that harm.

Consider

- Is restraint necessary – really needed?
- Has the situation of the incapacitated person become so bad that there is a real need for them to be removed immediately from their present living conditions? Can the decision wait?
- Would this kind of restraint need to be used wherever P lived, and unavoidable whoever was caring for P?
- The more force that needs to be used, the more serious must be the harm likely to happen to P if they are not moved.
- Are your actions properly planned?

MCA Code of Practice 6.11

D may carry out actions relating to the move as long as the MCA's principles and requirements for working out best interests have been followed, even if P continues to object to the move. But restraint, e.g. transporting P to their new

home, can only be used where this is necessary to protect P from harm and is a proportionate response to the risk of harm.

MCA Code of Practice 6.44

Restraint must be the minimum amount of force for the shortest time possible.

Practice Summary

Documentary evidence should be provided every time restraint is used in this kind of situation. D must keep a record of having gone through the necessary statutory tests before a decision is taken to use restraint, by referring to the 'quick summary' at the start of chapter 6 of the MCA Code of Practice:

- Is the action to be carried out in connection with the care or treatment of a person who lacks capacity to give consent to that act?
- Who is carrying out the action – decision maker?
- Is it appropriate for D to do so at the relevant time?
- Have all possible steps been taken to try to help P make a decision for themselves?
- Has a mental capacity assessment been undertaken? Does D reasonably believe P lacks capacity to give permission?
- Has the best interests checklist been applied and all relevant circumstances considered?
- Is a less restrictive option available?
- Is it reasonable to believe that the proposed act is in P's best interests?
- If restraint is being considered, is it necessary to prevent harm to P and is it a proportionate response to the likelihood of P suffering harm and the seriousness of that harm?
- Does the restraint amount to depriving P of their liberty?
- Does the action conflict with a decision that has been made by an attorney or deputy?

Applying to the Court of Protection

- In cases of real doubt as to whether the tests in s5 and s6 MCA are met, it would be sensible to seek authorisation from the Court of Protection to use restraint to move P.
- A care plan should be provided to the Court, outlining the various options for restraint and the circumstances in which they will be used, so that the Court is clear as to what it will be authorising.
- Where appropriate, the local authority or other body applying to the Court for authorisation to remove the person should, in advance of the application, discuss and if possible agree with the police the way in which the removal should be effected, including the extent and nature of restraint which is expected to be required. Information on any disagreement between the applicant and the police should also be presented to the Court. (See *LBH v GP* (2010) 13 C.C.L. Rep. 171)