Detention on a general ward: understanding and applying the law

From April 2007 there will be two acts of parliament that govern the legal detention of patients in hospital: the Mental Health Act 1983 and the Mental Capacity Act 2005. This article addresses common questions posed to liaison psychiatrists by hospital doctors: how to legally detain patients on general wards and how these Acts are applied.

The Mental Capacity Act 2005 comes into force in April 2007. Before the Mental Capacity Act 2005 patients lacking capacity were treated under common law. This is often referred to as the 'duty of care' (doctrine of necessity). Under common law the doctor can and indeed must treat an incapable patient in their best interests [Re Y 1996]. Common law will be superceded by the Mental Capacity Act 2005 on April 1 2007.

The Mental Capacity Act 2005 covers many areas of finance and social care as well as health-care matters. This article will be restricted to health-care matters, specifically those related to legal detention or restraint of patients in hospital.

The Act has five main principles as described in *Table 1*.

How to assess capacity using the Mental Capacity Act 2005

There is a two-stage test of capacity within the Act:

Table 1. Five principles of the Mental Capacity Act

A person must be assumed to have capacity unless it is established that he lacks capacity
A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success
A person is not to be treated as unable to make a decision merely because he makes an unwise decision
An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests
Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action

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1. Is there an impairment of or disturbance in the functioning of the person's mind or brain?
2. If there is then has it made the person unable to make a particular decision?

Assessing the second stage of the test of capacity

In order to assess the second stage the Act states that the person is unable to make a decision for himself if he is:

- Unable to understand the information relevant to the decision or
- Unable to retain that information or
- Unable to use or weigh that information as part of the process of making the decision or
- Unable to communicate his decision (whether by talking, using sign language or any other means).

The Act states that 'any question whether the person lacks capacity within the meaning of the Act must be decided on the balance of probabilities'.

How often should one do a capacity assessment?

Capacity is assessed at one point in time for one particular question and is valid for that point in time and question only. This means that capacity needs to be assessed regularly and for each new question and each time the patient wants to leave.

Restraint

Restraint is defined as the use, or threat of use of force to secure the doing of an act which the patient resists or the restriction of the patient's liberty of movement whether the patient resists of not. Restraint or deprivation of liberty is permitted in incapacity, but it must be reasonable and must be proportionate to circumstances, as specified by the Mental Capacity Act 2005.

Restraint may be used if two conditions are met. The first is that the health-care professional believes that the patient is incapable and that it is necessary in order to prevent harm to the person lacking capacity. The second is that the restraint must be proportionate (in the degree and duration of the restraint) to the likelihood of the patient suffering harm and to the seriousness of that harm (Department for Constitutional Affairs, 2007).

The National Institute for Clinical Excellence (NICE) have also addressed the issue of restraint in their self harm guidelines (NICE, 2004). They suggest that in the case of self harm one should always assess mental capacity. If the patient is incapable then one should act in their best interests even if this goes against their wishes (this includes taking them to hospital if they have refused). They also suggest that clinicians should have easy access to legal advice about issues relating to capacity and consent at all times (NICE, 2004).

Mental Health Act 1983

The most likely section used on a general hospital ward is section 5(2), which is a 'holding power'. It is used where the doctor thinks that an assessment under the Mental Health Act 1983 ought to be done with a view to detention under section 2 (assessment section for up to 28 days) or section 3 (treatment section for up to 6 months) of the Mental Health Act 1983. It can only be done for inpatients and is furnished by the registered medical practitioner (the consultant in charge of the patient's care) in charge of treatment. The registered medical practitioner can nominate only one deputy, and this nominated deputy cannot delegate.

Nominated deputies and the consultant's responsibilities

There is dispute as to the definition of the deputy as the Mental Health Act 1983 says all consultants can nominate but the Code of Practice for the Mental Health Act 1983 says only psychiatrists can nominate (Department of Health and Welsh Office, 1999). The Mental Health Act Commission (1996) acknowledges this difference and suggests that any consultant can nominate. If the Trust decides to use an on-call rota to decide who will be the nominated deputy then each consultant is responsible for the ability of the whole rota with respect to section 5(2).

If the nominated deputy is considering implementing a section 5(2) then they should, if possible, contact the registered medical practitioner before implementing section 5(2). If not the deputy should report as soon as possible to the registered medical practitioner after implementing the section 5(2). The deputy should have easy access to the duty consultant (who takes over the registered medical practitioner responsibility while on call) and the relevant staff should know who the deputy is (Department of Health and Welsh Office, 1999).

What can and cannot be done on a section 5(2)

One can hold the person in hospital until a Mental Health Act 1983 assessment is done.

One cannot:

- Give treatment (this is done under common law or the Mental Capacity Act 2005)
- Implement another section 5(2) back to back
- Let the section 5(2) lapse
- Use section 5(2) in accident and emergency or outpatients
- Have leave from the section 5(2)
- Transfer a patient to another ward, as they are in a place of safety (unless the patient's life is at risk or there would be irreversible serious harm done)

How to do a section 5(2)

The first and possibly most important aspect is to stay calm. Always consider calling for assistance, security and/or the police as necessary. If the patient is in a general ward then the medical or surgical team are the responsible team and need to complete and sign the section. Only a fully registered medical practitioner can sign the form so a preregistration house officer (FY1) can not do it, it is illegal. It is advisable to get the consultant to complete the form. Read the form. It has areas to fill out such as why informal treatment is no longer appropriate. This needs to include something about suspecting mental illness, refusing to stay and saying that the patient is at risk to themselves or others. The area most often filled out incorrectly is the hospital. This needs to be the Trust's name. If the medical or surgical teams have implemented a section 5(2) then they should inform the psychiatrists as soon as possible. This allows sufficient time to get the GP, psychiatrist and approved social worker together to be able to assess the patient for a section 2 or 3. Section 5(2) lasts for 72 hours as the process of getting all the right people into the right place can often take time.

How to do section 5(2) paperwork

Legal paperwork is important, so how should it be completed? *Figure 1* shows a flow chart used in the authors' local teaching hospital.

Figure 1. Flow chart for implementation of section 5(2) of the Mental Health Act 1983.

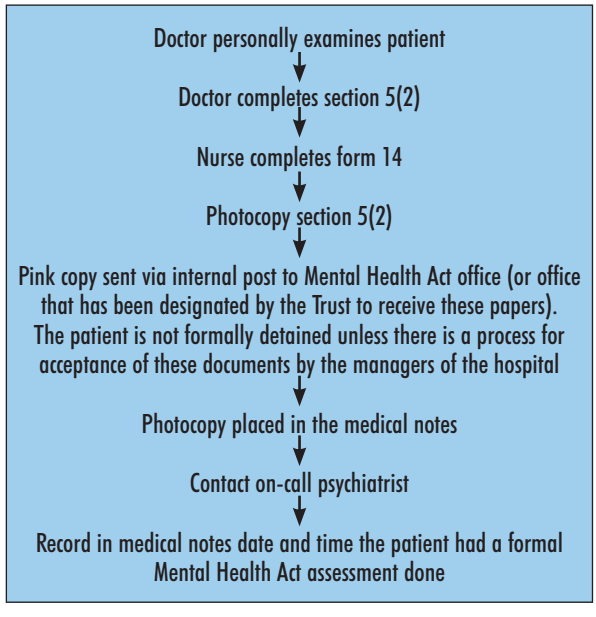

Table 2. Comparisons of the Mental Capacity Act 2005 and Mental Health Act 1983

Mental Capacity Act 2005	Pros	The patient can be restrained if certain criteria are met using the Mental Capacity Act 2005
		This can be done in any setting (accident and emergency, outpatients, GP surgery, ambulance)
	Cons	Assessing capacity using the Mental Capacity Act 2005 two-stage test needs to be regularly undertaken and recorded in the medical notes
		Patients can not be detained using this Act and the difference between restraint and detention is not clear
Mental Health Act 1983	Pros	Is done on one occasion. The capacity of treatment needs regular assessment and documentation, but not documentation relating to restraint/ detention
	Cons	Can only be used on an inpatient
		Only on patients who have suspected mental illness and are at risk
		There needs to be a due process of managers accepting legal documents and staff knowing who to contact

Conclusions

Table 2 gives some comparisons between the Mental Capacity Act 2005 and the Mental Health Act 1983 when considering legal detention of a patient. This article does not constitute legal advice, but is given as a guide. Each situation needs assessing on its own merits and if required professional legal help should be sought, e.g. from the Trust's solicitors or medical defence union. **BJHM**

Conflict of interest: none.

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KEY POINTS

- In April 2007 the Mental Capacity Act 2005 comes into force. All doctors should be familiar with the changes this brings.
- The Mental Capacity Act 2005 allows treatment against a patient's will if the patient lacks capacity. This treatment should be done in the patient's best interests.
- Doctors should be familiar with the five key principles and the two-stage test of capacity, in the Mental Capacity Act 2005, in order to determine whether a patient lacks capacity.
- The Mental Health Act 1983 should be reserved for patients who are likely to need psychiatric admission.