Medical incapacity act[†]

A. S. Zigmond

Legislation making special provision for the mentally disordered has a long history. De Prerogativa Regis, an Act passed in 1324, was the first statutory guardianship law in England. Since then the notion of legislating for the mentally disordered, as opposed to legislating for the care and treatment of the physically ill, has gone on apace. There have been some 35 Acts of Parliament dealing with services specifically for the mentally ill in the past 250 years.

Later in this edition of the *Psychiatric Bulletin*, Szmuckler & Holloway (1998) argue that specific mental health legislation has had its day and is now an inappropriate concept, and commentaries from Sayce (1998) and Fulford (1998) follow. The current position is discussed here and an alternative model suggested.

The Mental Health Act 1983 authorises care and treatment for the mentally disordered if it is in the interests of their health or safety or for the protection of others and they are unable or unwilling to consent. Patients with physical illnesses may need care or treatment in the interests of their health or safety or for the protection of others (e.g. in cases of infectious disease) and be unable or unwilling to consent. There is no Physical Health Act. Mental health legislation encourages and permits intervention even when a mentally ill patient has capacity. That is he is able to understand, retain, believe and make a decision on relevant information. There is no equivalent legislation for the physically ill. The article by Szmuckler & Holloway makes the point very succinctly with the words, "There is something odd here".

At one time (before becoming a Mental Health Act Commissioner) I resented the Commission's existence on the grounds that my patients were the same as other patients and I the same as other doctors. I had not suddenly deserted my professional standards when I specialised in psychiatry. There is no commission to safeguard the care and treatment of the physicially ill, therefore why for the mentally ill? Of course the reason a Mental Health Act Commission is needed is not because the patients and doctors are different but because the law is different.

[†]See accompanying paper and invited commentaries, 662–665 and 666–670, this issue.

The question arises as to why specific legal provision for the mentally ill continues to exist. The issue has been brought to a head by discussion of the need, or otherwise, for a community treatment order. I would argue that the College should not only resist attempts to extend the legislation but should consider campaigning for the abolition of a distinct mental health law which only adds to the stigmatisation of the mentally ill. This is particularly relevant at the time of the launch of the anti-stigma campaign by the College.

Purpose of the Mental Health Act 1983

The Mental Health Act 1983 exists for three main reasons. First, to protect (from prosecution) the doctors and nurses who do things to patients either without or against the patients' consent. Second, it offers some protection to patients in the same circumstances. Third, it may help to protect the public. When patients lack capacity psychiatrists rely on the authority of the Mental Health Act to assess and treat them whereas other doctors rely on common law.

Why should there be a difference? If psychiatrists deserve protection from the possibility of being sued, so should other doctors. If psychiatric patients deserve a framework in which to receive treatment when they are incapable of making decisions for themselves, then all patients deserve such a framework.

When patients have capacity but refuse treatment other doctors must not intervene, to do so would not only be unlawful but would negate the patients' autonomy. There are exceptions when the public health is at risk. The National Assistance Act 1948 and Control of Diseases Act 1984 are examples of statutory authority to intervene to protect the public when a competent patient with a physical illness refuses consent. Interestingly they permit confinement of the patient but not treatment. It is hard to understand why psychiatrists should not be in the same position, reinforcing that psychiatric patients are capable and therefore responsible most of the time.

Solution

The Mental Health Act 1983 (and the 1984 Scottish equivalent) should be repealed.

https://doi.org/10.1192/pb.22.11.657 Published online by Cambridge University Press

It is proposed that the College should, in conjunction with other Royal Colleges, campaign for a Medical Incapacity Act. This would provide for the medical treatment, both mental and physical, of those who lack capacity from whatever cause. It would establish a statutory framework offering the same protections to *all* patients who are unable to consent to medical intervention, from both physical and psychiatric conditions, and permit investigation and treatment of both the physical and mental illnesses of such patients. Such intervention may be within or outside hospital.

The stigma caused by the Mental Health Act 1983 would be reduced by ending the identification of the mentally disordered as needing control and being without responsibility for their health even though they meet established criteria for capacity. It would, of course, also mean that patients with capacity would be responsible for their behaviour and have to accept the legal consequences of their behaviour. The National Assistance Act would need to be amended (or there would need to be new legislation) so that protection of the public health could include the mentally ill.

A Medical Incapacity Act would also stop the unhelpful distinction between treating a patient's mental and physical illnesses. The physical illness goes untreated because the patient lacks the capacity to consent and the Mental Health Act 1983 only deals with treatment of mental disorder. It would also stop reliance on the common law for some interventions and statute law for other interventions with the same patient.

Such a law could, if considered necessary and appropriate, also provide the same framework of protection from liability for all medical practitioners treating incapacitated patients that is currently available only to psychiatrists when treating patients detained under the Mental Health Act.

There are a number of possible models for a Medical Incapacity Act. One would be to base it on the Mental Health Act 1983 but change the criterion for admission from mental disorder to medical incapacity and amend those parts of the Act's terminology that would then be necessary (e.g. responsible medical officer and treatment for mental disorder).

Another option would be to expand the proposals in the Green Paper issued by the Lord Chancellor (1997) entitled *Who Decides? Making Decisions on Behalf of Mentally Incapacitated Adults*. This is discussed in detail by Szmuckler & Holloway (1998).

A Medical Incapacity Act which made no differentiation between the mentally and physically ill would go a considerable way to reducing the stigma felt by psychiatric patients. It would reduce the problem of other doctors viewing psychiatric patients in a different light from their patients (they want locking up). Of course we would only be permitted compulsorily to treat those of our patients who lacked capacity not those who are capable but refusing. Perhaps the biggest step is the need for us to stop believing psychiatric patients should be less autonomous than other patients.

References

FULFORD, K. W. (1998) Invited commentaries on: Mental health legislation is now a harmful anachronism. *Psychiatric Bulletin*, **22**, 666–668.

LORD CHANCELLOR'S DEPARTMENT (1997) *Who Decides? Making Decisions on Behalf of Mentally Incapacitated Adults*. London: HMSO.

SAYCE, L. (1998) Invited commentaries on: Mental health legislation is now a harmful anachronism. *Psychiatric Bulletin*, **22**, 669–670.

SZMUKLER, G. & HOLLOWAY, F. (1998) Mental health legislation is now a harmful anachronism. *Psychiatric Bulletin*, **22**, 662–665.

A. S. Zigmond, *Consultant Psychiatrist, High Royds Hospital, Menston, West Yorkshire LS29 6AQ*

https://doi.org/10.1192/pb.22.11.657 Published online by Cambridge University Press