Briefing on the implications of the 'Devon' case for Local Authorities and the AMHPs they approve and/or authorise.

Introduction

In response to the decision in the Devon case,[1] and the subsequent NHSEi guidance for organisations and practitioners on the implications of the judgment (most recently on the 3rd February), the LGA instructed Jonathan Auburn of counsel to provide a more specific view of the implications of the judgment on each of the main areas of decision-making under the MHA, including guardianship, CTOs, s.136, renewals under s20, and issues of liability more generally.

In summary, Mr Auburn agreed with the NHSEi guidance in relation to any assessments that resulted in detentions under s2, 3, 4, and applications for Guardianship under s7. He shares the view that assessments where video interviewing was used by either an AMHP or RC are affected by the Court's decision in the Devon case, and that those currently subject to detention or Guardianship as a result of such assessments need to be reassessed.

However, Mr Auburn's view differs from that of the NHSEi in relation to other parts of the mental health regime. This briefing builds on existing advice and provides further guidance in relation to those other areas of the statutory regime for mental health which were not directly in issue in the Devon case.

Implications for detentions under s2, 3 or s4 in which video technology was used

The decision of the Court in the Devon case is that the terms 'personally seen' (for AMHPs) and 'personally examined' (for medical practitioners) in ss11(5) and 12(1) of the Mental Health Act 1983 can only be interpreted as meaning that they (the AMHP and the medical practitioner) must be physically present with the person when assessing them and making a decision to detain them. Video assessments are not sufficient for these purposes.

[1] *Devon Partnership NHS Trust v Secretary of State for Health and Social Care* [2021] EWHC 101 (Admin)

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What DASSs and their AMHP services need to do:

- Although the liability for detention rests with the detaining hospital, it is advised that DASSs and their AMHP services should also review any cases of detention pursuant to s2, 3 or 4 which involved video interviews by the AMHP or medical practitioner, and alert the hospital if they find a case where they feel a decision to detain would not have been made had the person been seen face to face.
- In addition, services are advised to retain their own copies of any assessments, reports, or contemporaneous notes, should the circumstances relating to that detention need to be reviewed in the future, for example by the Ombudsman or a court.

Implications for those made subject to Guardianship using a video assessment

In common with detentions for s2, 3 and 4, where a person has been placed on Guardianship following a video interview, the decision concerning the Guardianship is impugned by the absence of an assessment conducted in the patient's physical presence.

What DASSs need to do:-

- As local authorities are the responsible bodies for Guardianship, responsibility for redress in any cases where only video interview was used, rests with the local authority.
- DASSs should urgently review any ***new*** applications for Guardianship received since the publication of the guidance in May 2020, and check whether any assessments involved only video assessments by one or more assessors (and did involve assessment in the patient's physical presence).
- If only a video assessment was used, the Guardianship is impugned, and a decision will be needed on whether to reassess the person and make a new Guardianship application.
- In addition, people who were previously made subject to Guardianship using only video interviews should be written to, with an explanation as to what has happened, and an apology.
- Papers and reports should be scrutinised to evaluate whether the person would have been made subject to Guardianship regardless of whether a video interview (only) had been used (if it is possible to determine this). If the review concludes that a person would not have been made subject to Guardianship had they been assessed face to face, in addition to an apology, a modest *ex gratia* payment should be considered. Keep clear records of all the information considered in making any such decision.

Decisions around discharging someone from s3 onto a Community Treatment Order (CTO)

Our view is that there is no requirement in law that either the RC or AMHP must 'personally see' the patient before deciding whether to discharge someone onto a CTO. Indeed, in relation to the AMHP role, there is no requirement in law that they see the

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person at all - only that they specify that they ‘agree’ with the RC’s decision, and any additional conditions.

There is therefore no need to review CTO decisions by AMHPs to discharge someone from s3 onto a CTO previously made using only video interviews.

However, given the expectation that AMHPs follow the guidance of the Code’[2], and only depart from its guidance where they have cogent reasons to do so, such decisions should (except in exceptional circumstances) only be made following direct contact with the person involved.

Going forward, where exceptional situations are identified, such decisions can still be made using video interviews, provided that professionals are confident that they can sufficiently make a decision in this way and are working within the NHSEi guidance. Where this happens, the reasons for proceeding in this manner should be clearlyrecorded.

However, where a person was detained under s3 in circumstances where a video interview (only) was used, and that person is subsequently discharged from hospital by their RC onto a CTO, because of concerns as to the manner in which the s3 detention was decided on, the CTO is also of doubtful validity, and should be regarded as having lapsed. The person concerned should not be put back onto a CTO unless they are first detained in hospital pursuant to s3.

Decisions to extend Guardianship or Community Treatment Orders under s20 of the MHA

In the Devon case, the courts’ decision that the terms ‘personally seen’ and ‘personally examined’ in ss11(5) and 12(1) of the Mental Health Act 1983 required that assessments had to be conducted face to face with the patient was based on a number of issues, including in particular that these terms had to be read as ‘compound phrases’. That is, the two words when used together have a distinct meaning within the context of s11 and s12.

However, this reasoning does not apply in other parts of the Act where this phrase is not used. Therefore, we do not believe that the same result necessarily applies in situations where the Mental Health Act refers only to ‘reviewing’, ‘examining’, or ‘interviewing’ a person, such as in relation to extensions for CTOs or Guardianship under s20 of the Act. It should be recognised that the issue of whether ‘reviewing’ or ‘examining’ does require direct contact with the person may be challenged in court in the future.

Therefore, we recommend that no action is needed in relation to any such assessments already completed. Going forward, direct face to face assessments should be regarded as the norm, but using video technology to review and consider extending a CTO or Guardianship might still be appropriate, subject to the particular needs and circumstances of the person being assessed. Authorities may wish to obtain their own legal advice in

[2] *‘The AMHP should meet with the patient before deciding whether to agree that the CTO should be made’: MHA Code of Practice §29.22.*

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specific cases. A record should be kept of the reasons for proceeding in a particular manner.

S136 and the use of video interviews

This section provides a police constable with the power to remove someone when the constable believes the person to be suffering from a mental disorder, to a place of safety '*for the purpose of enabling him to be examined by a registered medical practitioner and to be interviewed by an AMHP'.*

Again, there is no requirement in law that the person is 'personally seen' or 'personally examined' ***unless*** a decision is made that they need to be assessed for admission under s2 or 3 of the Act.

However, the presumption should be that such interviews take place face to face. The Code of Practice provides that interviews should begin within three hours of arrival at the health based place of safety, unless there are clinical reasons to delay, or the AMHP does not feel they can currently assess in an 'appropriate manner'.

A decision by an AMHP to use video technology (only) to complete an interview under s136 should only be made in exceptional circumstances, and where it is in the person's best interest (for example, to avoid a delay in the person being able to be discharged home, where an alternative plan has already been agreed).

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