

Oral presentation

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What's wrong with capacity? Capacity as the test of compulsion

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from WPA Thematic Conference. Coercive Treatment in Psychiatry: A Comprehensive Review
Dresden, Germany. 6–8 June 2007

Published: 19 December 2007

BMC Psychiatry 2007, **7**(Suppl 1):S75 doi:10.1186/1471-244X-7-S1-S75

This abstract is available from: <http://www.biomedcentral.com/1471-244X/7/S1/S75>

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Background

The current trend in mental health law is to advocate an increased importance on the capacity of the persons with psychiatric disabilities, sometimes to the exclusion of other criteria of compulsion [1]. Strong arguments can be made for the academic coherence of this approach: unlike other standards of compulsion, it takes into account the move toward non-discrimination in its approach to people with psychiatric disabilities. Whatever the intellectual strength of these arguments, they may prove problematic in practice. Compulsion is relevant when patient and doctor disagree, and the existing studies of capacity determination do not tend to focus on this situation. Anecdotal evidence from users of psychiatric services suggests that in such situations, incapacity is closely tied to refusal of treatment. This paper examines capacity determination in the context of the refusing user, to determine how judges approach capacity in this context.

Method

The study makes a systematic assessment of cases of treatment refusal by users of psychiatric services when capacity is called into question in England and Wales. The paper is qualitative in nature. It assesses the approach to evidence of medical professionals and users, and considers how the courts approach the capacity determination.

Results

In only one case where capacity was seriously contested was the patient found to have capacity. The courts show little appetite for allowing intelligent disagreement between doctor and users of psychiatric services, and users are held to lack capacity as a result.

Conclusion

It is difficult to see, given the courts' approach to the evidence and the application of standards of capacity, that capacity will create a meaningful standard of compulsion that can appropriately protect the civil rights of users.

References

1. Szmukler G, Holloway F: **Mental health legislation is now a harmful anachronism.** *Psychiatr Bull* 1998, **22**:662-665.