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Renewals and CTOs - are remote examinations permitted under the Mental Health Act?

14 December 2023

An analysis of the Derbyshire Healthcare High Court case

The High Court has today handed down its judgment in Derbyshire Health Care NHS Trust v Secretary of State for Health and Social Care and others [2023] EWHC 3182 (Admin) ("the Derbyshire judgment"). This case considered certain provisions of the Mental Health Act (MHA) and clarified whether a remote examination of a mental health patient is lawful under the Act in relation to renewals and Community Treatment Orders ("CTOs").

In short, the Court ruled that examinations under sections 20(3) (renewal of section for a patient admitted to hospital for treatment), 20(6) (renewal of guardianship application) and 20A(4) (renewal of CTO) of the MHA require in-person physical attendance on the patient by the responsible clinician or appropriate practitioner, and remote assessments in these situations are unlawful. However, the Court declined to make any declaration in relation to section 17A(1) and whether an in-person physical attendance assessment is required before a Community Treatment Order (CTO) is made. Ambiguity therefore remains in this regard.

Rebecca Fitzpatrick, Head of Browne Jacobson's Advisory and Inquest team, acted for Derbyshire Healthcare in the proceedings. A deeper analysis of the case and its ramifications are set out below.

Background

The Derbyshire judgment follows on the heels the 2021 Devon judgment. In short, the Devon judgment established that the phrases "personally seen" and "personally examined" in sections 11(5) and 12(1) of the MHA require the physical attendance of the person in question on the patient, prior to an application being made for detention under s.3 or s.4, or guardianship under s.7. In other words, it is not sufficient or lawful for a patient to be seen or examined remotely using video technology.

The Derbyshire case followed on from this by considering whether remote assessments are permitted when the detention of a patient in hospital, a guardianship or CTO is renewed and also when a CTO is first made.

PQR an interested party in these proceedings had previously challenged the lawfulness of his CTO in the context of his application to the Mental Health Tribunal, on the basis that a historic renewal during the pandemic in 2020 had been carried out remotely. The First-Tier Mental Health Tribunal decided that it did not have jurisdiction to determine the validity of PQR's CTO and that decision was upheld by the Upper Tribunal in August 2023 (see our analysis here). PQR was subsequently joined as an interested party to these proceedings.

Mind and NHS England were also interested parties in the case.

Derbyshire Healthcare sought a declaration as to the interpretation of the following:

- section 17A(1) – the making of a CTO
- section 20(3) – renewal of detention of patients admitted to hospital
- section 20(6) – renewals of guardianship
- section 20A(4) – renewals of CTOs

Sections 20(3), 20(6) and 20A(4) all require an examination of the patient by the responsible clinician or appropriate practitioner, but only the word "examine" is used in the legislation (rather than "personally examined" in the parts of the Act relating to the initial admission of

patients under s.2, 3. 4 or 7). Section 17A does not use the word “examine” at all. Consequently, there was confusion as to whether examinations carried out under these sections could be conducted remotely. Existing guidance from NHS England and the Association of Directors of Adult Social Services had offered differing views on this point, which had caused uncertainty for health and social care professionals on the ground nationally.

What did the High Court decide?

In respect of s.17A(1) (the creation of a CTO), the High Court declined to make any declaration. The Court noted that this section does not use the word “examine” and does not require a responsible clinician to examine a patient (face-to-face or otherwise) before making a CTO. The Court acknowledged that there may be times however when a responsible clinician will not be able to discharge their responsibilities under this section without conducting an examination in the physical presence of the patient. The court did not say in what circumstances such an obligation would arise. The Court acknowledged that uncertainty surrounding this section therefore remains.

The High Court however held that examinations under the remaining sections in relation to renewals require in-person physical attendance on the patient by the responsible clinician or appropriate practitioner. In doing so, the Court made the following key points:

- In the Devon case, the Divisional Court had held that a medical examination was to be understood as “necessarily involving the physical presence of an examining doctor”.
- Decisions to extend a patient’s detention or impose other restrictions on a patient’s liberty should be undertaken as effectively as possible. As held in the Devon case, it should not be up to the examining doctor to decide when physical attendance is necessary, because without the cues that could only be picked up from a face-to-face assessment, the doctor might wrongly conclude that physical attendance is not required.
- Although sections 20 and 20A deal with renewals rather than the initial detention of a patient, Parliament did not intend for there to be a “more relaxed regime” when it came to deciding if there should be an extension of compulsory powers over a patient.
- The Court rejected an argument that physical in-person attendance need not be required because the responsible clinician who is reporting that the patient should continue to be detained or subject to guardianship would have greater knowledge of the patient. The Court highlighted that the responsible clinician may only have just taken over that role, or be acting on a temporary (e.g. locum) basis and may not in fact know the patient well.
- The Court also rejected an argument that the word “examine” in section 20 and 20A is subject to an “updating construction”, and that it should now encompass things Parliament could not have envisaged at the time the legislation was enacted, i.e. examinations by remote means. There is no consensus in 2023 that examinations conducted remotely are of the same quality as an examination involving the physical attendance of the responsible clinician. Evidence filed in the case by the interested party and charity Mind was that on-line interactions can have difficulties, including computers crashing, patients finding it more difficult to speak over the telephone and, for autistic people, difficulties making a meaningful personal connection by video call.
- There may be occasions when it is more convenient for a patient to be examined by remotes means, or where it is the medically preferable solution, but it was not up to medical practitioners, however skilled, to decide when to hold remote examinations.

Lastly, the High Court declined to make any ruling on the lawfulness of PQR’s CTO, stating that the remedy PQR should have pursued in relation to any such challenge some 2 years earlier would have been an application for judicial review.

What does the judgment mean?

The judgment is helpful in that it has clarified that any examinations relating to renewals of section for patients in hospital, subject to guardianship or CTO (under sections 20(3), 20(6) and 20A(4)) must involve in-person physical attendance to be lawful. Remote assessments must not be used. The position in relation to the creation of CTOs under section 17A(1) remains ambiguous however, and there is no clarity as to whether an examination of a patient, face to face or otherwise, is required before a CTO is made – the Court held that this would “depend upon the facts of a particular case”.

Comment

This judgment brings welcome clarity to health and social care professionals about the legality of remote assessments in relation to MHA renewals.

At the hearing, the Trust argued that virtual assessments may be more clinically appropriate in some cases and that allowing such flexibility could have benefits for the individual concerned as well as mental health services as a whole in some situations. In particular,

when patients move out of the area, requiring them to travel long distances may not be conducive to their wellbeing. Equally, requiring the responsible clinician to travel long distances in such cases is unlikely to be an effective use of resources. Nevertheless, the Court has now limited further the use of remote assessments under mental health legislation and so any change in practice would likely have to be via a change in legislation passed by parliament. With the revised Mental Health Act receiving no mention in the most recent King's Speech (although interestingly a different approach being taken in Wales!), such change is unlikely to come any time soon.

Mental Health providers will have to consider on a case by case basis whether a remote assessment would be appropriate in new CTO cases, however the "belt and braces" approach would be for all MHA assessments for CTOs to be carried out in person going forwards.

In is interesting that in a post Covid world the NHS is increasingly using remote technology to assist in reducing some of the burdens on a struggling, sometimes under-funded and over-stretched system which also has long waiting lists of people waiting to be seen by services. However our courts have confirmed that there are limits to this under our existing legislation.

Mental health services are under particular strain at the moment due to the unprecedented rise in demand without the reciprocal increase in beds or staff to meet this demand. This judgement whilst no doubt very much welcomed by patients in terms of safeguarding the rights of some of the most vulnerable in our society and by practitioners in providing welcome clarity, will not necessarily assist in reducing that burden.

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