Correspondence

Mental health legislation

Sir: Zigmond (*Psychiatric Bulletin*, November 1998, **22**, 657–658), Szumkler & Holloway (*Psychiatric Bulletin*, November 1998, **22**, 662–65) all argue that the distinction between mental and physical disorders implied in the Medical Incapacity Act is a false one. We share many of their views, but do not believe that a wholesale repeal of mental health legislation is appropriate. It is true that the current Medical Incapacity Act provides a legislative framework that creates an artificial distinction between mental and physical disorders. This is particularly exemplified by the Code of Practice (Department of Health & Welsh Office, 1993) guidance on the treatment of physical disorders under the Act. There is at present much confusion about the best course of action in cases where a patient's mental and physical disorders, although independent, are inextricably linked and case law has not been particularly helpful to clinicians. In Tameside and Glossop Acute Services Trust *v.* CH (1996) which concerned a 41-year-old pregnant female patient suffering from schizophrenia detained under Section 3 of the Mental Health Act who was resisting treatment needed to save her child, Wall J. concluded that a Caesarean section which was proposed by the obstetrician was within the broad interpretation of Section 63 of the Mental Health Act, that is, that a Caesarean section in this case was medical treatment of a mental disorder. There was no evidence that this particular pregnancy was causally linked to the patient's schizophrenia and the medical intervention necessary for a safe delivery of the patient's child, in the usual understanding of the term treatment, could not be said to be treatment of her mental disorder. Thus, this judgement appeared to sanction all treatments which could be shown, if even by a tortuous argument, to be liable to promote the patient's mental welfare irrespective of the closeness (causally speaking) of the condition being treated to the mental disorder.

In a similar case a different judgement was reached. In R *v.* Collins and Others, Ex parte S (1998) S was a single woman who was approximately 36 weeks pregnant was diagnosed with pre-eclampsia and advised that she needed urgent attention and admission to hospital for an induced delivery. She understood the potential risks, but rejected the advice because she wanted her baby to be born naturally. An application was made under Section 2 of the Mental Health Act under which she was delivered of a baby girl. On appeal to the Court of Appeal it was reiterated that: "a woman detained under the Act for mental disorder could not be forced into medical procedures unconnected with her mental condition unless her capacity to consent to such treatment was diminished".

We agree that it should be a concern about competence to give consent or to refuse treatment, irrespective of the nature of the disorder in question, that should trigger a judicial response. In the case of physical disorders, most people who lack capacity are not refusing treatment, they are simply incapable of giving consent. Whereas in mental disorders, the most problematic cases are subjects who both lack capacity and are refusing treatment. Furthermore, it is quite often the refusal of treatment which signifies the lack of capacity. This suggests to us that the dilemmas associated with lack of capacity in mental disorders may be in need of special solutions.

We believe that mental health legislation should be a subsection of any Medical Incapacity Act. When making decisions on behalf of mentally incapacitated adults who have physical disorders, the proposals in *Who Decides?* (Lord Chancellor's Department, 1997) seem to us appropriate. The presence of mental disorders, should activate use of a subsection of the Medical Incapacity Act pertaining to mental disorders. Under the current system, invocation of mental health legislation has echoes of certification and clearly includes deprivation of rights. We propose a more positive system wherein mental health legislation is not regarded as invoking authority to detain and treat, but as enshrining the protection of the rights of an individual without capacity while ensuring he or she receives necessary treatment.

References

DEPARTMENT OF HEALTH & WELSH OFFICE (1993) *Code of Practice*. London: HMSO.

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

R. *v.* COLLINS AND OTHERS, EX PARTE S (1998) Tameside and Glossop Acute Services Trust 8. CH (1996), 1FLR, 762.

FEMI OYEBODE, *Medical Director*, ELIZABETH PARRY, *Assistant to Medical Director, South Birmingham Mental Health NHS Trust, Trust Headquarters, Vincent Drive, Edgbaston, Birmingham B15 2TZ*