

Psychiatric Advance Directives: An Understanding

Dr. Dharmender Nehra¹, Dr. Savinder Singh², Dr. Pratik Kumar³, Dr. Purushottam⁴, Dr. Ashish Kumar Malik⁵,
Dr. Vivek Srivastava⁶

¹Clinical Psychologist, Institute of Mental Health, Rohtak

²Director, Institute of mental health, Amritsar

³Resident, Institute of Mental Health, Amritsar

⁴Associate Professor, Department of Psychiatry, Pt. B.D. Sharma PGIMS, Rohtak

⁵Senior resident, Department of Psychiatry, Pt. B.D. Sharma PGIMS, Rohtak

⁶Junior Resident, Department of Psychiatry, Pt. B.D. Sharma PGIMS, Rohtak

Corresponding Author: Dr. Vivek Srivastava

ABSTRACT

Undoubtedly, 2017 is a watershed year for mental health professionals and sufferers; this year witnessed the historic moment of the advance of Mental Health Care Act (MHCA). The importance of this Act cannot be underestimated as it has come as a ray of hope as few rights have been given to the persons with mental illness, first time, like the right to make advance directives. Hence, it can be said that its coming is a tremendous achievement and a beacon of hope for the millions of people. It is a pivotal Act in the battle against the mental illness that also directs the public's attention toward the ongoing pandemic. Efforts to implement it will cause many challenges as well as renewed optimism. Understanding of concepts related to ADs is essential for mental health professionals as they have an important role to play with severe, persistent, mental illnesses. The purpose of this article is to collect the blinding flashes of insight, as well as the mundane aspects of ADs to begin to understand its benefits and prediction of barriers in its implementation and their possible solution.

Keywords: Person with Mental Illness, Mental Healthcare Act, Advance Directives; Barriers.

INTRODUCTION

Advance Directives (ADs) are the legal right of every adult individual, who has the mental capacity to decide at the time of making ADs, irrespective of his/her previous psychiatric illness as mentioned in the Mental Health Care Act (MHCA), 2017.

^[1] In ADs, one can specify in writing one's

treatment preferences and/or refusals and/or authorize/nominate representative (NR), who can take future treatment decisions on one's behalf, in case he/she lacks capacity to do so. It is to be remembered that when the person can make the decision; then one can supersede the previously written ADs at any time or if one wishes. It can be revoked, amended or cancelled by the person who made it, of course, by following the regulations established by the Central Authority (MHCA, 2017). During the making or revoking of ADs person needs to take care of the existing laws and must follow the regulations established by the central authority. It is the duty of the person writing the ADs and his NR to make sure that the treating institute and professionals have access to it when required. It is the duty of every medical officer in-charge/the psychiatrist in-charge of a person's treatment to give treatment, following valid ADs. Unless he/she or caregiver/NR of the concerned person, have reasons for not to follow the ADs; if it is the case, an application can be made to the relevant board (MHCA, 2017).

For instance, although, MHCA, 2017, ^[1] makes the direction to every insurer to make provision for medical insurance for treatment of mental illness on the same basis as is available for treatment of physical illness. In the similar context, Anil Gumber, in 2001 found that "more than 90 percent of Indian population and almost all

the poor are not covered under any health insurance scheme. Their health care needs are primarily met through direct out-of-pocket expenditure on services provided by the public and private sectors". [2]

Moreover, it protects individuals from receiving ineffective, unwanted, or possibly harmful treatment; and helps in preventing crises and the resulting use of involuntary treatment or safety interventions such as restraint or seclusion; assist in avoiding crises exert more control over own mental health treatment; avert involuntary treatment and enhance person-centered care, and shared decision making; allow for support system involvement in treatment decision making. [3]

What precautions need to be taken care of while making or assessing ADs?

Three criteria should be considered for making ADs:

1. Age assessment: Every person, who is not a minor, shall have a right to make an advance directive.

2. Mental health assessment: Although, as per MHCA, 2017 [1] an advance directive under sub-section (1) may be made by a person irrespective of his past mental illness or treatment. However, it is critical to assess whether the person is presently suffering from a disorder that may include acute confusion, delirium or drug-induced disorder of cognition; because letting someone go home with poor memory, impaired judgment and little appreciation of risk may be irresponsible or even negligent. [4]

3. Mental capacity assessment: One prominent proposal to remedy the discriminatory aspect of the mental health law is to replace the criterion of psychiatric diagnosis with a determination of mental (in) capacity as grounds for detention and involuntary treatment. [5,6] An assessment of capability to make decisions can and should be performed, especially, when lack of capacity to give consent to treatment/admission for care, is in doubt. While assessing the capacity of person, it should be kept in mind that any active

psychopathology does impair this capacity, and therein, subjective assessments of competence performed by Physicians without scientific instruments are often inaccurate. [7]

Chapter 3 of MHCA (2017), [1] i.e., "Advance Directive" consists of 9 Sections (5-13) which are presented in the question and answer form for the better understanding of the content specified, as follows:-

I. Who can make Advance Directives (ADs)?

In India "advance directive" means an advance directive made by a person under section 5(1) of Mental Health Care Act, 2017. [1] ADs are legal rights, unless contrary to any existing laws, of every adult individual, who has the mental capacity to make the decision at the time of making ADs in writing, irrespective of one's previous mental illness. In ADs, one can specify treatment preferences or refusals and authorize/nominate a representative (NR), who can take future treatment decisions; on one's behalf in the condition when one loses the capacity to do so. In simple words it can be said that ADs are rights of every individual, who is at least 18 years old and mentally capable to make decisions, by which one can express range of wishes in writing, for future treatment, including treatment preferences and refusals, and appoint a person(s), who can make treatment decisions on one's behalf, in case of lack of decision-making capacity. It is also to be remembered that however, a minor cannot make ADs but as per MHCA, 2017¹his "legal guardian shall have right to make an advance directive in writing in respect of a minor and all the provisions relating to advance directive, shall apply to such minor till such time he attains majority". Whereas the Mental Capacity Act [8] of UK, provides an additional right to British Citizens, i.e., Advance statements/ADs can be given in either written or oral form, with the exception of an advance decision to refuse life-sustaining treatment, which has to be written, signed

and witnessed in order to be valid. [9]

II. When shall ADs invoke & how long will it remain active?

Mental Health Care Act, 2017, [1] makes it very clear that “An advance directive made under sub-section (1), shall be invoked only when such person ceases to have the capacity to make mental health care or treatment decisions and shall remain effective until such person regains capacity to make mental health care or treatment decisions”. It is to be remembered that ADs shall be invoked if the person is incompetent (loses capacity) to make health care decisions and not applicable if at the time of the treatment, the person is competent to make treatment-related decisions.

III. Is it possible to over-ride the ADs?

As per Mental Health Care Act, 2017, [1] when the person has the capacity to make decision, then one can supersede the previously written ADs at any time or if one wishes, ADs can be revoked, amended or cancelled by the person, of course, by following the regulations made by the Central Authority. However, any ADs made contrary to any law for the time being in-force shall be treated as invalid from the outset. In simple words, it can be said that having mental capacity makes previously written ADs ineffective, and it can be changed by the person at any time, provided having the capacity to do so, at the time he/she wishes to change it. However, it is to be noted that as per the Mental Capacity Act, 2005 of UK, [8] there are certain circumstances when it can be overridden, for example, if there is a risk to oneself or others or if one is detained under the Mental Health Act of said country.

IV. How to make an Advance Directive?

The Mental Health Care Act, 2017, [1] specifies that “An advance directive shall be made in the manner as may be specified by the regulations made by the Central Authority.” It is relevant mention that in some Western countries, to be valid ADs must conform to a specific format including identification of witnesses and notarization;

[10] in our setting too, recently, Mental Healthcare Rules 2017, [11] specifies the regulations for making ADs, which are as follows: a) An AD shall be made in writing on Form CR- A; b) If an NR is named in the AD he shall sign the AD stating his willingness to act as the NR; c) All ADs shall be signed by two witnesses attesting to the fact that the AD was signed by the person making the AD in their presence; d) The person who makes an AD shall keep a copy with himself and will share a copy with the NR. [11]

V. Who will maintain an online register of ADs?

The Mental Health Care Act, 2017, [1] specifies that “every Board shall maintain an online register of all advance directives registered with it and make them available to the concerned mental health professionals as and when required” [clause (a) of sub-section (1) of section 91]. There is no doubt about the fact that quick and fast access to the available medical data through internet [12] has many advantages; and it can be forecasted that our country is also going to take advantage of these facilities as Mental Healthcare Rules 2017, [11] specifies that ADs shall be made available online within 14 days of the registration with the concerned Board.

VI. How to amend or cancel the ADs?

The Mental Health Care Act, 2017, [1] makes it quite clear that ADs may be revoked, amended or cancelled by the person who made it at any time and the procedure for revoking, amending or cancelling an advance directive shall be the same as for making an advance directive under section 6 (i.e., regulations made by the Central Authority). The Mental Capacity Act of UK, [7] states that this can be changed at any time while one has the mental capacity to do so.

VII. Will ADs be valid in all circumstances?

The Mental Health Care Act, 2017, [1] stipulates that the ADs shall not apply to the emergency treatment given under section 103 (for example-Code of Criminal

Procedure, 1973, etc. i.e., a person concerned in criminal proceedings or under sentence) to a person who made the AD. Whereas, the Mental Capacity Act, 2005 makes it clear that there are certain circumstances when it can be overridden, for example, if there is a risk to oneself or others or if one is detained under the Mental Health Act of UK. [8]

VIII. Do doctors have to follow ADs?

According to Mental Health Care Act, 2017, [1] “It shall be the duty of every medical officer in charge of a mental health establishment and the psychiatrist in charge of a person’s treatment to propose or give treatment to a person with mental illness, following his valid advance directive.” However, under section 11, mental health professional/relative/caregiver of the person shall make an application to the concerned Board to review, alter, modify or cancel the ADs. [1] It is needed to be remembered that mental health professional shall not be held liable for not following a valid advance directive if he has not been given a copy of the valid advance directive. [1]

IX. Who has the Powers to review, alter, modify or cancel ADs?

As per Mental Health Care Act, 2017, [1] “Where a mental health professional or a relative or a caregiver of a person desires not to follow an advance directive while treating a person with mental illness, such mental health professional or the relative or the caregiver of the person shall make an application to the concerned Board to review, alter, modify or cancel the advance directive”. Once the Board receives such an application, it can either uphold, modify, alter or cancel the ADs in question, of course, after giving an opportunity of hearing to the person who made the ADs and all other concerned parties, by taking into consideration the crucial points as mentioned below (Point X).

X. What Points need to be considered by the Board for Review process?

According to Mental Health Care Act, 2017, [1] board can either uphold, modify, alter or cancel the ADs after taking

into consideration following five points- (1) did the person making the ADs out of his free will and without any force, and undue influence or coercion; (2) did the person intended to apply the ADs in present circumstances, that may be different from those anticipated; (3) did the person have sufficient information to make the decision; (4) did the person have the capacity to make decision-related to healthcare at the time of making ADs; (5) does the content of written ADs contrary to any law.

XI. What are the duties of the person making ADs and nominated Representative?

Mental Health Care Act, 2017 [1] also specifies the duties of the person who made the ADs as well as one’s NR, i.e., the person who has written the ADs and his NR will have a duty to make sure that mental health professional has access to the ADs when required. Also, the concerned person or the NR shall inform the treating mental health professional about the new AD, [11] if any. The Act also given the right to the legal guardian to make ADs in writing in respect of a minor and all the provisions relating to those ADs shall apply to the concerned minor till the time he attains his majority. [1]

XII. Who has the power to review and modify ADs making procedure?

According to Mental Health Care Act, 2017, [1] Central Authority shall not only regularly and periodically review the use of ADs and make the recommendation for the same but also specify the procedure for making ADs. Besides, it also examines that existing procedure to protect the rights of the persons with mental illness (PMI). Furthermore, it may modify the procedure for making ADs or make additional regulations regarding the procedure for ADs.

XIII. Is it the liability of medical health professional to follow ADs?

Mental health professionals must follow the ADs, and if there are reasons for not following it, then an application must be made to the concerned board. Mental Health Care Act, 2017 [1] makes it quite clear that

neither any mental health professional shall be held liable for any unforeseen consequences in case one follows valid ADs; nor anyone is held liable for not following valid ADs, in case, not given a copy of the same.

XIV. Are there any additional regulations, regarding the procedure of advance directive:

Recently, Mental Healthcare Rules 2017, ^[11] mention some other regulations regarding the procedure of ADs, which are as follows: a) All ADs shall be registered at the Mental Health Review Board which has jurisdiction where the person resides; b) No fee shall be charged for registering an AD with the Mental Health Review Board; c) All ADs shall be made available online within 14 days of the registration with the concerned Board; d) There shall be no restrictions on the number of times the person changes an AD; e) Each change shall follow the same process and the previous AD automatically shall become null and void on filing a fresh AD with the Board; f) The concerned person or the NR shall inform the treating mental health professional about the new AD; g) No person shall release any copy of the AD or information in the AD to any unauthorized person or the media. ^[11]

CONCLUSION

Bridging the gap between treatment need and availability of treatment facilities has become a rallying cry for a generation of treatment providers and identifying and overcoming barriers to successful dissemination of best-practice treatment is a significant priority. Armed with information and treatment choice, we will be in a better position to implement the active, systematic, structured, and testable methods that are in the best interest of the person. The recent actions both in the country and abroad have served as a dramatic example of the need for ADs.

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