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Capacity to give evidence in court: issues that may arise when a client with dementia is a victim of crime

There are a number of issues that arise when an older person with dementia is a victim of crime. The safety of the individual and how to prevent further such incidents occurring is a clear priority. There may be considerations such as whether the person can continue to live safely at home. In addition, there is the prospect of future legal proceedings, and concerns such as the person's capacity to give evidence, and whether they will be able to cope with the pressures of attending court. Similar issues are also pertinent to younger people with serious mental illnesses living in the community.

Deinstitutionalisation and the move towards caring for older adults at home, when possible, have led to increases in both these vulnerable populations. Recent cases in our practice, including the sexual assault of an older woman with dementia living alone, have led us to review the available literature. This article will focus on the actual and perceived risk of crime towards older people and those with severe mental illness, the legal processes, including special measures, which should ensue, and the assessment of a person's capacity to give evidence in court.

Victims of crime

There are publications concerning older persons with mental illness as criminals themselves (Fazel & Grann, 2002), but the issue of them being victims of violent crime does not appear to have been addressed in the literature, outside the concept of 'elder abuse'. This term encompasses physical, financial, emotional and even sexual abuse of older people by family members and carers, and has a large literature base (e.g. Wolf, 1997). However, there is little written regarding crime perpetrated by strangers.

Statistics from the British Crime Survey (Chivite-Matthews & Maggs, 2002) indicate that older people are much less likely to be victims of crime than younger people. In 1991 only 12% of all reported crimes were perpetrated against those over 60 years, and by 1999 this figure had risen slightly to 14%. However, the survey reports that older people have similar levels of worry about crime as younger age groups, despite their lower levels of victimisation. These statistics replicate findings from other countries. The 2000 Crime Victims Survey from the Australian Institute of Criminology (Carcach *et al*, 2001) found that rates of assault for people over 65 years were 1.8 per 100 persons compared with 7.8 per 100 of the general population. Similar figures are available from the Bureau of Justice Statistics in the USA (Klaus, 2000).

Older people would appear to be at increasing risk from fraud as the numbers of older people with mental illness living alone at home increase. Cohen (1998) described a growth of conmen crime in North America, including telemarketing fraud, bank inspector fraud and renovation scams. She states that 'the criminal element involved in such activities is very skilled in targeting vulnerable older adults'. Aziz *et al* (2000) reported that repeat victimisation of older people is prevalent in illegal telemarketing in the United States. The Australian Crime Victims Survey reported that, though older people were less likely to be victims of consumer fraud than younger people, consumer fraud was one of the most common crimes perpetrated against this age group (Muscat *et al*, 2002).

There is a growing recognition of the vulnerability of younger people with mental illness to becoming victims of crime. Hiday *et al* (1999) reported victimisation rates in patients with severe mental illness and found that the rate was 2.5 times greater than in the general population. Brekke *et al* (2001) similarly found that younger people with mental illness were at least 14 times more likely to be victims of a violent crime than to be arrested for one. Many of the risk factors for victimisation identified in these studies, for example drug misuse or homelessness, would be less applicable to an older age-group. However, though one would presume an older group to have more stable living conditions, there are the additional risk factors of cognitive impairment and frailty, which render them vulnerable to criminals.

Managing risk of crime towards vulnerable older adults in the community

When a person with dementia is a victim of opportunistic or violent crime, they may learn from such an experience

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and be able to take extra precautions; nevertheless, they will remain vulnerable and indeed may be targeted by criminals. It may be appropriate to admit the person to hospital, but only if it is considered that treatment of symptoms of mental illness, such as paranoid delusions, may reduce their subsequent risk. A separate question to consider is whether the person should move into residential care. If this is against their wishes, it would require invoking a Guardianship Order. One might argue however that independence should not be foreshortened solely because of vulnerability to criminal elements in society.

There are procedures for alerting relevant professionals when abuse of any vulnerable adult is suspected. These are covered locally in our 'Vulnerable Adult Policy', and can be useful in the above context, as well as in more typical 'elder abuse' cases. When an incident of abuse is reported, a multidisciplinary meeting is convened, with representatives from health services, social services, police and family attending. This enables sharing of information and optimising joint working across professional boundaries to reduce the likelihood of further incidents. In our experience this has proved useful in cases such as an assault, as meetings have resulted in strategies to improve house security, heighten local police awareness of a vulnerable person and also increase support from social services and local voluntary services.

Assessment of capacity of patients to give evidence

There is no general capacity test, as a person's capacity to perform a task is dependent on the nature of the task involved. The most common area in medicine in which capacity is considered involves a person's capacity to consent to treatment. For psychiatrists and other professionals looking after vulnerable clients there are other areas where they may be asked to provide an assessment of capacity. These include capacity to manage financial affairs, testamentary capacity and driving capability. As regards the interface with the law, psychiatrists may give opinions on clients who have been arrested or charged, as to whether they have capacity to be interviewed and whether they are fit to plead. There are established criteria for the assessment of capacity in these situations (e.g. British Medical Association & Law Society 2004), but we have been unable to find clear guidance regarding the capacity of clients with mental illness to give evidence in court.

In our own experience, when asked for a report on a client's fitness to give evidence, we considered the question first in terms of the person's ability to give a clear, consistent account of the incident. Second, we considered whether the evidence given has any delusional quality, making it more probable that the evidence was affected by the nature of the mental illness. Third, we considered whether the clients appeared to understand the role and nature of court proceedings and their obligations. Fourth, there is the question of the client's vulnerability to pressure of cross-examination and the possibility of the court proceedings affecting their own mental health. Finally, in terms of projected timescales we have considered the likelihood of further cognitive deterioration and the need for re-assessment of capacity should there be lengthy delays.

Though there is an absence of medical literature assessing the capacity to give evidence, the Youth Justice and Criminal Evidence Act 1999 has simplified the criteria for legal competence. It states that legal competence requires that the person be able to understand questions and able to give answers that can be understood.

There is no longer the requirement to take an oath in order to give evidence, however if the witness is competent to take the oath, this is administered. Competence to give evidence is a decision for the judge. The judge may ask for the opinion of a psychiatrist or psychologist. The law presumes that ordinary individuals are competent and can be compelled to testify. Individuals may lack capacity to give evidence because of age or mental disorder. Although a psychiatrist can give an opinion on the competence of a witness, the question of their reliability is one for the jury.

Uglow (2003) has provided a useful summary on the internet regarding competence of witnesses. He notes that the UK is unusual in relying on the oral testimony of witnesses. Other European countries prefer written testimony. There are pros and cons of each. Oral testimony allows the judge and jury to listen to a witness directly without errors of transmission. It is considered that the formal setting enhances the likelihood of the witness telling the truth and allows the assessment of witnesses' credibility from their performance under cross-examination. Conversely, Uglow states that 'the formality, rituals, language and dominance and subordination of a courtroom create a reified environment far removed from common experience which places the uninitiated at a disadvantage'. There is also the issue of the 'law's delays' which obviously affect oral but not written testimony.

It would certainly seem that oral testimony places vulnerable witnesses at a disadvantage from the outset. Increased recognition of this has led to the development of policies to assist in the handling of vulnerable witnesses from the start of criminal proceedings. These are covered in a later section.

Court procedures to deal with vulnerable witnesses

The Youth Justice and Criminal Evidence Act 1999 covers the question of vulnerable witnesses in sections 16 and 17. Section 16 covers witnesses who are vulnerable because aged under 17 years or having mental or physical disorders. Section 17 covers intimidated witnesses. There is, however, no specific reference to the older witness with dementia. 'Special measures' can be applied for witnesses identified as vulnerable. These are covered in sections 23–30. They include strategies such as video-recording evidence or giving evidence via a live-link.

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Treatment of vulnerable witnesses in the criminal justice system

Until recently many court proceedings involving the most vulnerable witnesses have been abandoned or not begun because the witness has been unable to give evidence. The *Speaking up for Justice* report (Home Office, 1998) was published in recognition of the inadequate treatment of witnesses. It made recommendations for improving identification and subsequent treatment of vulnerable witnesses. There was no specific reference to witnesses with dementia. The Home Office (1999) publication *Action for Justice* was then produced as an action plan for implementing changes. These include:

1. improvements in identification of vulnerable or intimidated witnesses;
2. measures to provide protection for intimidated witnesses;
3. greater communication about the needs of a witness;
4. use of appropriate interview methods and pre-trial support;
5. special measures for use at the trial.

In our area, the police have commenced a training programme to improve identification of vulnerable witnesses, including witnesses with mental health problems. Once identified, consideration is given to specialist officers conducting initial interviews on video. An 'early special measures meeting' is then arranged between the police and the Crown Prosecution Service to discuss the needs of the witness and to plan appropriate special measures.

Conclusion

This article has attempted to draw attention to the vulnerability of older people with mental illness who are living in the community and the difficulties that can arise when they are involved with the criminal justice system as victims of crime. Unfortunately, many cases may not proceed because of the perceived difficulties involved with victims with illnesses such as dementia giving evidence. Recent legislation, as outlined in this article, should help to address the issue of vulnerable witnesses, but does not specifically address older people with mental illness. However, increasing awareness within the police force and the Crown Prosecution Service of the needs of vulnerable witnesses should improve the treatment of our clients within the legal system and enable more criminals who prey on vulnerable people to be brought to justice.

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