Mental Capacity Act 2005 case law summary sheet

July 2023: This sheet provides examples of recent case law involving the Mental Capacity Act based around different decisions and issues. As with the other case law sheets (DoLS and MHA & MCA) we produce, it will be updated regularly.

- Download from: www.edgetraining.org.uk and join our mailing list to be notified when the next edition is available.
- Cases are listed alphabetically and quotations are taken directly from the court judgment. All case law references are hyper-linked to the full judgment for further details.
- Cases in bold provide the (decision specific) *relevant information* an assessor needs to provide to conduct a mental capacity assessment for that particular decision. According to the Supreme Court (B v A Local Authority [2019] EWCA Civ 913) such lists are guidance and should be modified if something does not apply or something else is important to include depending on the person's specific circumstances. The assessor then needs to assess if there is anything the person is unable to understand, retain or use/weigh from the information provided to establish if they are unable to make the specific decision (lack mental capacity).
- Cases below are mainly recent cases of significance. Cases added since the last edition are indicated with ***.
- Note: Whilst some of the cases below list the relevant information to be covered by the assessor, they do not include a 'list of questions'. The exact questions posed should be tailored according to the individual concerned; their circumstances, the progression of the conversation (during the assessment process) and their needs.

This case law sheet is written by Steven Richards and Aasya F Mughal, authors of:

- Working with the Mental Capacity Act 2005 (3rd edition)
- Working with the Mental Health Act (4th edition)
- The Deprivation of Liberty Safeguards (DoLS) Handbook (2nd edition)

Accommodation / residence / placement (including change of)

- **LBX v K, L, M [2013] EWHC 3230 (Fam)**
  This case (para 43) sets out the information a person should understand, retain and use/weigh in order to have the mental capacity to consent to their accommodation.
  - what the options are, including information about:
  - what they are?
  - what sort of property they are?
  - what sort of facilities are available
  - in broad terms, what sort of area the properties are in (and any specific known risks beyond the usual risks faced by people living in an area if any such specific risks exist)
  - the difference between living somewhere and visiting it
  - what activities P would be able to do if they lived in each place
  - whether and how they would be able to see their family and friends if he lived in each place
  - in relation to the proposed placement, that he would need to pay money to live there (as applicable), which would be dealt with by his appointee, that he would need to pay bills, which would be dealt with by his appointee. Note: If someone else is paying, this should be modified accordingly.
  - that there is an agreement that he has to comply with the rules ie the relevant lists of "do"s and "don't"s, otherwise they will not be able to remain living at the place
  - who he would be living with at each place
  - what sort of care he would receive in each place in broad terms, in other words, that he would receive similar support in the proposed place to the support they currently receive, and any differences if they were to live at home; and
  - the risk that his father might not want to see him if L chooses to live in the new placement. (note: this last point related directly to the case of LBX and could be ignored or modified unless it applied)

The Court of Appeal endorsed this list in the case *of B v A Local Authority [2019] EWCA Civ 913* but added that the list is *'..no more than guidance to be expanded or contracted or otherwise adapted to the facts of the particular case'.* See also *London Borough of Tower Hamlets v A & Anor [2020] EWCOP 21*

Advance Decisions to Refuse Treatment (ADRT)

- Cumbria CCG v Mrs Jillian Rushton [2018] EWCOP 41
  Poor communication and systems meant a person's ADRT was not followed. The judge stated: *'...the medical profession must give these advanced decisions the utmost care, attention and scrutiny. I am confident the profession does but I regret to say that I do not think sufficient care and scrutiny took place here. The lesson is an obvious one and needs no amplification. Where advanced decisions have been drawn up and placed with GP records there is an onerous burden on the GP to ensure, wherever possible, that they are made available to clinicians in hospital. By this I mean a copy of the decision should be made available and placed within the hospital records with the objective that the document should follow the patient.'*

Alcohol use and the MCA

- London Borough of Tower Hamlets v PB [2020] EWCOP 34
  PB, a 52-year-old man with a lengthy history of serious alcohol misuse and alcohol related brain damage assessed as meeting the criteria for a 'dissocial personality disorder'. PB had a range of physical comorbidities, including COPD, Hepatitis C and HIV. The judge found he had mental capacity about where he lived: *'Self-evidently, not every addict in some degree of denial can be regarded as incapacitous'.* and he is able to use or weigh: *'..the potential gulf between his aspiration to moderation and the likely reality, does not negate the thought processes underpinning his reasoning.'* Prior to this judgment, the Court of Protection had previously found he lacked mental capacity to consent to his residence and care and had authorised his deprivation of liberty in a community rehabilitation unit.

Care Act assessment

- **A Local Authority v GP [2020] EWCOP 56**
  A 19 year old man with autism, anxiety and a learning disability. He had not attended school since 2018 (living at home with his parents). There was concern about his development and lack of community access. Under Section 9 of the Care Act 2014, the local authority had a duty to assess his needs for care and support. Section 11 of the Act provides that if a person has mental capacity they can refuse the assessment but, if they lacks mental capacity the authority can undertake it despite a refusal if it is considered to be in the person's best interests. The judge laid out the relevant information a person would need to understand and use or weigh to refuse a Care Act assessment as follows:
  - A local authority has a statutory duty to meet a person's eligible care needs, which may be to prevent or delay the development of needs for care and support or reducing needs that already exist.
  - The assessor may speak to other adults or professionals involved in the person's care and that the person may refuse to consent to this.
  - The local authority will assess how the person's wellbeing can be promoted and whether meeting these needs will help the person achieve their desired outcomes.

Care and Support

- **LBX v K, L, M [2013] EWHC 3230 (Fam)**
  This case sets out the information a person should understand, retain and use/weigh in order to have the mental capacity to consent to their care and support needs:
  - What areas they need support with
  - What sort of support they need, who will be providing them with support
  - What would happen if they did not have any support or they refused it
  - That carers might not always treat them properly and they can complain if they are not happy about their care

Note: The funding and arrangements for appointing and monitoring care staff were not considered relevant.

Restricting **Contact with others** (including via social media)

- A local authority v P and a CCG [2021] EWCOP 48
  A 24 year old man with learning disability and ASD with a history of pursuing sexual relationships with others on the internet and absconding from his accommodation to meet others for sex. In relation to contact with others, the judge found: *'He is able to describe what dreadful things might happen, but unable to relate them to himself so cannot weigh those risks in the balance.'* The judge concluded he had mental capacity to engage in sexual relations but lacked mental capacity in relation to contact with others.

  This combination of decisions (mental capacity to engage in sexual relations but a lack of mental capacity to have contact with others) has been seen in multiple other cases for people with learning disabilities and/or ASD. It results in a specialist care plan in the person's best interests that manages their contact with others whilst allowing for them to engage in sexual relations. See also: A local authority v DY [2021] EWCOP 28 An 18 year old woman with a moderate learning disability and developmental trauma disorder.
- Re: BU [2021] EWCOP 54
  A 70 year old woman 'befriended' by a man with multiple convictions for fraud, theft and blackmail. The judge decided she lacked mental capacity about contact with him and ordered no further contact including the use of a penal notice (a warning attached to the court order that breach could lead to a fine or prison) against the man if he did attempt contact.
- Hull City Council v A & Ors [2021] EWCOP 60
  76 year old woman with vascular dementia living with her son. He was refusing access to carers and professionals despite previous court rulings. The judge ordered the removal of the woman to a care home to allow for her assessment.
- **LBX v K, L, M [2013] EWHC 3230 (Fam)**
  A man with a learning disability. The court considered whether he had the mental capacity to decide to have contact with his father and aunt. This case is used as the benchmark for assessments of mental capacity around contact which includes:
  - The nature of the relationship with the person they are to have contact with

- What sort of contact they could have with the person. This includes different locations, durations and arrangements such as the presence of a support worker
- The positive and negative aspects of having contact with each person based on their own evaluations. Such evaluations will only be irrelevant if they are based on false beliefs. For example, if a person believed that an individual might have contact with had assaulted them when they had not.
- Past positive and negative experiences.

Contraception

- **The Hospital Trust v Miss V [2017] EWCOP 20**
  A 21 year old woman with a severe learning disability. Found to lack mental capacity to engage in sexual relations and contraception and vulnerable to sexual exploitation having conceived a child: *'...in circumstances which in all probability amounted to rape.'* Her mother was against a contraceptive patch which was recommended by the NHS Trust involved in her care. The judge agreed to a six month trial of a contraceptive patch in her best interests. The judge re-stated and applied a long-standing prior ruling (A Local Authority v Mr and Mrs A [2010] EWHC 1549) on what a person needs to understand for this decision:
  - The reason for contraception and what it does (which includes the likelihood of pregnancy if it is not in use during sexual intercourse)
  - The types available and how each is used
  - The advantages and disadvantages of each type
  - The possible side-effects of each and how they can be dealt with
  - How easily each type can be changed
  - The generally accepted effectiveness of each type
- Oxford Uni Hospitals NHS Foundation Trust v Z [2020] EWCOP 20
  A 22 year old woman with a cognitive impairment and a bicornate (or heart-shaped) uterus. She was 35 weeks pregnant with her fifth pregnancy. Of her four children, one died soon after birth and the other three have been taken into care. All of her pregnancies have involved medical complications and the current pregnancy was considered high risk (poorly controlled gestational diabetes, anaemia and a severe vitamin D deficiency). Further pregnancies carry serious escalating physical risk to her. The hospital consider that given her obstetric history and current presentation it would be in her best interests: *'...to have an intrauterine contraceptive device inserted at the time of her caesarean section in order both to reduce the risk of an unplanned future pregnancy and to enable family spacing.'* The judge found she lacked mental capacity to consent to the insertion of an IUD and it would be in her best interests for one to be fitted during her planned caesarean delivery.

Covert medication

- An NHS Trust v XB [2020] EWCOP 71
  A man with treatment resistant paranoid schizophrenia detained in hospital under the Mental Health Act. He also had severe hypertension and without medication there was a very serious risk to his health (stroke, heart failure, renal disease) including his death). However, in relation to antihypertensive medication: *'...he disbelieves the diagnosis, despite clear evidence to the contrary. The source of his disbelief is his delusional thinking caused by his treatment resistant paranoid schizophrenia.'* The judge found he lacked mental capacity to consent to the medication it should continue to be given covertly, in his best interests. The judge criticised the NHS Trust for the delay in applying to the Court of Protection and failure to adequately involve the family as required under Section 4 (best interests) of the MCA.

Dental treatment/assessment

- Cardiff & Vale University Health Board v P (2020) EWCOP 8
  A 17 year old man with autistic spectrum disorder in visible pain from impacted wisdom teeth. The judge was critical of the delay by the Welsh Health Board and dental school in bringing action to court: *'...this young man, it seems, has been suffering, and significantly so, for nearly five months. This is little short of an outrage. It is indefensible.'*

Deprivation of Liberty Safeguards (DoLS)

We produce a separate DoLS case law sheet and Community DoL case law sheet.
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Do Not Attempt Cardiopulmonary Resuscitation (DNACPR)

- Elaine Winspear v City Hospitals Sunderland NHS Foundation Trust [2015] EWHC 3250
  Case concerned a DNACPR notice which was (illegal) because of a breach of Section 4(7) (consultation requirement under the statutory best interests 'checklist') of the Mental Capacity Act 2005: *"If, ...it is both practicable and appropriate to consult then in the absence of some other compelling reason against consultation, the decision to file the DNACPR notice on the patient's medical records would be procedurally flawed. It would not meet the requirements of s.4(7) MCA; it would accordingly not be in accordance with the law."*

Education – Special Education Needs (SEN)

- **A Local Authority v GP [2020] EWCOP 56**
  See details under Care Act assessment above. The judge laid out the relevant information a person would need to understand, retain and use or weigh to make decisions as to their education as follows:
  - The type of provision.
  - The type of qualifications, if any, on offer.
  - The cohort of pupils and whether P would match the profile of other pupils at the provision.
  - That P has additional rights up to the age of 25 because of his special educational needs.

Education, Health and Care needs assessment (EHC)

- **A Local Authority v GP [2020] EWCOP 56**
  See details under Care Act assessment above. The judge laid out the relevant information a person would need to understand, retain and use or weigh to request an EHC assessment.
  - An EHC plan is a document that says what support a child or young person who has special educational needs should have
  - Other people will be consulted during the assessment process including parents, teachers and other professionals
  - If assessed as requiring an EHC the young person has enforceable right to the education set out within their plan
  - An EHC plan is only available up to the age of 25 years.

End of Life

- Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67
  This was the first case on the MCA considered by the Supreme Court. Mr James was a 68 year old man, in hospital (critical care unit) for 7 months – stroke causing, severe neurological damage septic shock, multiple organ failure, on CPAP (supported breathing) for 12 hours a day plus a ventilator and CANH. His clinical team considered he was in a minimal conscious state and wanted to withhold 4 treatments if his condition deteriorated. Mr James' family disagreed. The court stated: *'...the focus is on whether it is in the patient's best interests to give the treatment, rather than on whether it is in his best interests to withhold or withdraw it. If the treatment is not in his best interests, the court will not be able to give its consent on his behalf and it will follow that it will be lawful to withhold or withdraw it.'*

There are large number of published cases around end of life decisions under the MCA. The common thread is where a hospital wishes to withdraw treatment in a person's best interests and the family disagree.

(Forcible) Entry to premises

- London Borough of Croydon v CD [2019] EWHC 2943
  A man refusing access to domiciliary care with a history of depression, excess alcohol use and severe self-neglect. Section 48 interim order (before a mental capacity assessment had been completed). The judge stated: *'I take the view that it is in CD's best interests that I should give directions and/or make orders without delay which enable the Local Authority to gain access to his accommodation in order, first of all to provide appropriate care for CD himself and secondly to make his accommodation safe for human habitation.'*
- A Local Authority v WMA [2013] EWCOP 2580
  A 25 year old man with atypical autism and pervasive development disorder living with his mother with extreme concerns about his welfare. Following earlier rulings that were not successful the judge ruled that in his best interests he should be removed to a supported living placement. Given the potential resistance from the man (lacking mental capacity) and his mother the judge agreed: *'...a power for the local authority to enter the home if necessary; a power to the police to restrain WMA if necessary; an order that WMA be removed from his current home and taken to B where the local authority will have power to retain him if needs be;...'*

Faith based delusions and mental capacity

- A County Council v MS and RS [2014] B14
  A man with schizophrenia presenting with religious delusions. The judge overrode the consultant psychiatrist's mental capacity assessment and decided the man did have the mental capacity to make a donation to his church: '*...I have accepted that his belief that he is a prophet is a delusional belief that does not mean that all of his religious beliefs are delusional or compromised by the presence of mental illness.'*

Fluctuating capacity

- Wakefield MDC & Wakefield CCG v DN & MN [2019] EWHC 2306
  A young man with ASD, general anxiety disorder and emotionally unstable personality disorder. The judge found: *'DN has capacity to make decisions regarding his residence and care and treatment arrangements, except when presenting in a state of heightened arousal and anxiety ("a meltdown")..'* The judge granted a declaration covering what could be

described as 'parallel' care plans that stated when the man was not having a 'meltdown' he had mental capacity about his care and support needs but when he was experiencing a meltdown he lacked mental capacity around care and support.

- Royal Borough of Greenwich v CDM [2019] EWCOP 32
  A 64 year old woman with a personality disorder (emotionally unstable, paranoid, histrionic and dependant types) and physical health conditions including COPD and unstable diabetes which had led to a below knee amputation. She required insulin twice a day administered by district nurses. She had a history of declining insulin or claiming she had already had it (when she hadn't). The judge stated: *'...there may be occasions when CDM has the capacity to make micro-decisions in respect of her diabetes and occasions when she does not, i.e. that her capacity does in fact fluctuate. However... logically, legally and practically, it is a macro-decision, and CDM lacks capacity to take the macro-decision,...'* In this case the woman's capacity fluctuated so often that the judge ruled that overall she lacked mental capacity to the decision.

- Cheshire West & Chester Council v PWK [2019] EWCOP 57
  A 24 year old man with ASD and mild learning disability. The judge found: *'...when PWK is overwhelmed by anxiety and speaks and behaves in a way he rapidly comes to regret. That anxiety is often but not always predictable and is liable to affect every part of his life and not just the issue of the moment, whatever that may be. It is the unpredictability of that anxiety and the seriousness and breadth of its impact which is decisive in this case in overturning the legal presumption of capacity.'* In relation to care and support the judge found he lacked mental capacity: *'I am satisfied, again applying a longitudinal perspective, that PWK lacks capacity in this area.'*

Hoarding

- **Re: AC and GC (Capacity: Hoarding: Best Interests) [2022] EWCOP 39**
  This case sets out the information relevant to making the decision to keep or discard items and belongings (hoarding). There are five areas of information: 1. Volume of belongings and impact on use of rooms 2. Safe access and use 3. Creation of hazards 4. Safety of building 5. Removal/disposal of hazardous levels of belongings. More detailed information on each of the five areas is given in the judgment (click on the case title above).

Internet and social media

- **Re: A (Capacity: Social Media and Internet Use: Best Interests) [2019] EWCOP 2**
  A 21 year old man with a learning disability living in supported living with extensive personal social care support. The case considered his mental capacity to a range of different decisions. There were concerns about his use of the internet and social media in relation to viewing extreme pornography and contacting a number of men under police investigation for modern day slavery, trafficking and sexual exploitation. The judge decided that mental capacity to use the internet and social media are 'inextricably' linked and it is therefore: *'...impractical and unnecessary to assess capacity separately in relation to using the internet for social communications as to using it for entertainment, education, relaxation, and/or for gathering information.'*

  The judge concluded he lacked mental capacity to use social media and the internet and a special internet access and safety care plan should be put in place in his best interests. The case can be read alongside Re B (Capacity: Social Media: Care and Contact) [2019] EWCOP 3 by the same judge in the same week.

  The list of information considered relevant is as follows:

  - Information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it
  - It is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites. Even if the person doesn't know how to use these settings themselves, they should know they exist, and be able to decide (with support) whether to apply them
  - If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended
  - Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly
  - Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm

The judge provided further guidance in paragraphs 28 & 29 of the judgment on the interpretation of the above list of relevant information.

- Re: C [2020] EWCOP 73
  A 28 year old woman with a moderate learning disability. Her mental capacity to use the internet and social media was considered following a police investigation into a large number of graphic sexual images were found on her electronic devices. The judge stated: '*As a young woman, understandably, she has sexual needs and desires. Similarly, she is no different from the majority of her peers in gaining pleasure and fulfilment from the use of the Internet and social media.'* The judge ruled she lacked mental capacity to use the internet and social media.

Lasting Powers of Attorney - Revoking/Ending

- **SAD & Anor v SED [2017] EWCOP 3**

The judge said the following information is relevant to this decision:

- Who the attorneys are;
- What authority they have;
- Why it is necessary or expedient to revoke the power; and
- The foreseeable consequences of revoking the power
- whether the donor is able to weigh and take into consideration the reasons for the original decision to appoint the attorneys.

The judge added*: 'it is also appropriate to consider whether the donor is able to weigh and take into consideration her reasons for the original decision to appoint the attorneys.'*

Marriage and Civil Partnership

- Re: BU [2021] EWCOP 54
  A woman in her 70's with dementia who was 'befriended' by a man who then moved into her house. He had an extensive history of convictions an imprisonment for fraud, theft and blackmail. The judge referenced previous case law as the benchmark for the assessment of mental capacity for marriage (see *London Borough of Southwark v KA & Ors [2016] EWCOP 20* below). Although the judge found the woman had mental capacity to marry they found in relation to the man concerned she would not be able to give valid consent as he would coerce her (for consent to be valid it must be both informed and freely given). The judge noted that the relevant information for marriage and civil partnership were slightly different because: *'...there is no requirement for a civil partnership to be consummated in order for it to remain valid whereas a marriage can be annulled in the absence of consummation.'*
- **London Borough of Southwark v KA & Ors [2016] EWCOP 20**
  The case set out a list of relevant information a person needs to understand, retain, use/weigh in order to decide to marry as follows:

  - Marriage is status not person specific
  - The wisdom of the marriage is not an issue
  - Broad nature of the marriage contract
  - Duties and responsibilities that normally come with marriage, including there may be financial consequences and that spouses have a particular status and connection with regard to each other
  - The essence of marriage is for two people to live together and love one another
  - The person must have capacity to enter into sexual relations
  - That a marriage will invalidate any existing will.

The judge noted that: *'It is not relevant to his understanding of marriage that he does not understand…a wife will need to obtain entry clearance.'*

Mental Health Act & Mental Capacity Act interface

We produce a separate MHA and MCA case law sheet. Download from: https://www.edgetraining.org.uk/mharesources

Personality disorder

- Re: AB [2021] EWCOP 21
  A 24 year old woman with organic personality disorder (and anxiety and depression) with a history of admissions to mental health hospitals and detention under the Mental Health Act. She has a history of behaviour that challenges and is currently awaiting sentencing for series of physical assaults (staff and general public). She is under DoLS in a care home and this case authorised her future discharge home, detained under a Court of Protection order (community DoL).
- See also: *Royal Borough of Greenwich v CDM [2019] EWCOP 32* and *Leicester City Council v MPZ [2019] EWCOP 64* (both detailed under *use or weigh information*) and *London Borough of Tower Hamlets v PB [2020] EWCOP 34* (under alcohol use and the MCA).

Pregnancy and caesarean section

- **North Bristol NHS Trust v R [2023] EWCOP 5**
  The case set out a list of relevant information a person (in this case a woman) needs to understand, retain, use/weigh in order to decide to have a caesarean section:

  i. The reason why an elective caesarean section is being proposed, including that it is the clinically recommended option in R's circumstances.

  ii. What the procedure for an elective caesarean involves, including where it will be performed and by whom; its duration, the extent of the incision; the levels of discomfort during and after the procedure; the availability of, effectiveness of and risks of anaesthesia and pain relief; and the length and completeness of recovery.

iii. The benefits and risks (including the risk of complications arising out of the procedure) to R of an elective caesarean section.

iv. The benefits and risks to R's unborn child of an elective caesarean section.

v. The benefits and risks to R of choosing instead to carry the baby to term followed by natural or induced labour.

vi. The benefits and risks to R's unborn baby of carrying the baby to term followed by natural or induced labour.

The judge also said at para 63 that the relevant information will include some information concerning the impact on her unborn child of R taking or not taking a decision on the matter. R's unborn child has no separate legal identity until they are born.

- North Middlesex University Hospital NHS Trust v SR [2021] EWCOP 28
  A woman with paranoid schizophrenia, substance misuse and a tokophobia (extreme fear of giving birth). The judge favoured the opinion of the midwives that knew SR over her consultant psychiatrist. The judge stated: *'I find that SR's irrational belief that she will die having her baby goes beyond the anxiety that many women giving birth for the first time will experience as the day approaches. It represents a disturbance in the functioning of her mind which renders her at times unable to retain, use and weigh information about labour and birth.'* The judge agreed to an 'anticipatory' judgment of her best interests where SR was found to have mental capacity about her obstetric care at the time of the hearing but may not at the time of delivery. As with several previous cases the judge was critical of the NHS Trust in the delay in bringing the case to court.
- University Hospitals Dorset NHS Foundation Trust & Anor v Miss K [2021] EWCOP 40
  A woman with schizophrenia detained under Section 2 of the MHA 1983 on a mental health ward who needed a caesarean. The judge was highly critical of a number of issues including the hospitals late application to the court.
- X & Y NHS Foundation Trusts v Ms A [2021] EWCOP 17 A woman detained under Section 3 of the Mental Health Act.
- East Lancashire Hospitals NHS Trust v GH [2021] EWCOP 18 A woman at home with agoraphobia (see 'use or weigh')
- A NHS Foundation Trust v an Expectant Mother [2021] EWCOP 33 A woman at home with agoraphobia (see 'use or weigh').

In the cases above, the judges found the women lacked mental capacity as they could not use or weigh the necessary information about obstetric care and treatment. The judges authorised obstetric care plans in their best interests including the use of restraint or sedation, if required.

Self-neglect

- London Borough of Croydon v CD [2019] EWHC 2943
  A man refusing access to domiciliary care with a history of depression, excess alcohol use and severe self-neglect. Section 48 interim order (before a mental capacity assessment had been completed). The judge stated: '*I feel able to conclude that there is reason to believe that at the moment, per section 2, he lacks capacity to make decisions about his personal care.'* The judge authorised entry to the premises and delivery of care on an interim basis.

Sexual relations

- **A Local Authority v JB [2021] UKSC 52**
  The Supreme Court confirmed the relevant information a person needs to understand to have the mental capacity to engage in sexual relations was that set out in the Court of Appeal judgment *A Local Authority v JB [2020] EWCA Civ 735* with one amendment as follows:
  - the sexual nature and character of the act of sexual intercourse, including the mechanics of the act
  - the fact that the other person must be able to consent to the sexual activity and must in fact consent before and throughout the sexual activity
  - the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent
  - that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant
  - that there are health risks involved, particularly of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.

This checklist of information is flexible depending on the circumstances of the case (the type or nature of sexual act and the age of partners will have different outcomes in terms of whether pregnancy is a risk).

- Hull City Council v KF [2022] EWCOP 33
  KF is 34 years old and has a mild learning disability. The case concerned her mental capacity about contact and sexual relations to a single known man (KW) with whom she has had a relationship of several years. On the issue of sexual relations, the judge considered that the inclusion of person specific information in addition to the information stated in the JB case above was appropriate. The judge stated: *'In my judgment, alongside the relevant information set out in JB (above), the information relevant to that decision in this case includes that KW has sexually assaulted KF previously, that the assault was very harmful to KF, whether further sexual intimacy between KF and KW gives rise to a risk of a further assault on KF and/or harm to her, the degree of that risk, the consequence if it should materialise, and the means by which the risk could be mitigated. KF is unable to retain, and weigh or use the relevant information.'*

Surgery

- Re TS (Pacemaker) [2021] EWCOP 41
  An 81 year old man with a delusional disorder detained in hospital under Section 3 of the MHA 1983. He required surgery for a pacemaker to be fitted. Although he understood the relevant information the judge found he lacked mental capacity because: *'His ability to weigh up the advantages and disadvantages is distorted by a paranoid belief that the authorities are persecuting him.'* The judge ruled it was in his best interests to have the pacemaker fitted and authorised the surgery and the use of restraint and a deprivation of liberty in the acute hospital, if required.
- Re ZA [2021] EWCOP 39
  A 53 year old woman with chronic schizophrenia, type 2 diabetes in urgent need of above knee amputation without which she was expected to die within 6-12 months (sepsis) or with surgery live for 5-10 years. When she had mental capacity, she did not want surgery. The judge found she lacked mental capacity and that in her best interests she should **not** have surgery: *'...she is entitled to have respect given to her wishes, formed as they were when she did have capacity. They remain important to her now and they are not to be discounted just because she lacks capacity.'*
- TC (Urgent medical treatment) [2020] EWCOP 53
  A woman with depression and chronic anxiety that meant she could not use or weigh relevant information and so lacked capacity to consent to surgery and chemoradiotherapy for advanced throat cancer. Treatment ordered in best interests.

Tenancy agreement for Supported Living (Secure Contracts in Wales)

Tenancy Agreement

London Borough of Islington v QR [2014] EWCOP 26
In relation to the decision to sign/enter a tenancy agreement for supported living accommodation

- Her obligations as tenant to pay rent, occupy and maintain the flat
- The landlord's obligations to her under the contract
- The risk of eviction if she does not comply with her obligations
- The purpose of and terms of the tenancy which is to provide her with 24 hour support so that she takes her medication and can maintain her mental health
- The landlord/support staff's right to enter her flat without her permission in an emergency if there is serious physical danger or risk to her
- If she moves to supported living accommodation the CTO will be changed to require her to live there

Note: The last point on the list is highly specific to QR and will not be relevant in most other cases or may need to be varied ie 'Guardianship'.

Surrendering a Tenancy (Notice to Quit)

London Borough of Islington v QR [2014] EWCOP 26
In relation to the decision to give up her secure council tenancy

- By surrendering her tenancy she loses the right to live or return there, and thus the opportunity to exchange that tenancy for another secure council tenancy
- She cannot move to a less restrictive environment than ABC unless she gives up her tenancy
- For the foreseeable future the terms of the CTO will not permit her to live in her flat
- She needs 24 hour support in her accommodation in order to remain well
- Giving up her tenancy does not preclude the grant of a council tenancy by LBI in the future if she is well enough to live completely independently

Points 2 and 3 on the list are highly specific to QR and will not be relevant in most other cases or may need to be varied.

Use or weigh information

- Re TS (Pacemaker) [2021] EWCOP 41
  The judge stated: *'His ability to weigh up the advantages and disadvantages is distorted by a paranoid belief that the authorities are persecuting him.'* See details under surgery above.
- Warrington Borough Council v Y & Ors [2023] EWCOP 27
  'Executive dysfunction and frontal lobe paradox.... not to be regarded as synonymous with the functional test for mental capacity. The former derives from clinical practice, the latter is the test prescribed by MCA. Neither is 'insight' to be viewed as equating to or synonymous with capacity. To elide those two would be to derogate from personal autonomy, every adult from time-to-time lacks insight into an issue or indeed into themselves.'
- A Local Authority v AW [2020] EWCOP 24
  In this case executive functioning was described as: '*...the ability to think, act, and solve problems, including the functions of the brain which help us learn new information, remember and retrieve the information we've learned in the past, and use this information to solve problems of everyday life...'*
- A NHS Foundation Trust v an Expectant Mother [2021] EWCOP 33

A 21 year old pregnant woman with severe agoraphobia. The judge found: *'...the mother lacks capacity to make decisions about whether her baby should be born at home or in hospital. Put simply, she is so overwhelmed by her agoraphobia that she is unable to weigh and process relevant considerations and unable to make any sort of decision about it.'*
Note: see also North Middlesex University Hospital NHS Trust v SR [2021] EWCOP 28 *under pregnancy cases*

- East Lancashire Hospitals NHS Trust v GH [2021] EWCOP 18
  A 26 year old woman with severe anxiety, depression and agoraphobia refusing admission for urgent obstetric care and treatment (possibly including a caesarean). An emergency court hearing was held between the hours of 22.00 and 23.45. The judge concluded: '*GH's agoraphobia and anxiety has overwhelmed her ability to use and weigh the information required to decide whether to agree to be admitted to hospital for obstetric treatment..'* She authorised her conveyance and admission to hospital for appropriate obstetric care but it became unnecessary to rely on this as GH's baby arrived safely at home.
- Royal Borough of Greenwich v CDM [2019] EWCOP 32
  A woman with a personality disorder. The court found she lacked the mental capacity to manage her diabetes as she could not use or weigh relevant information. A medical expert stated: *'There is a difference between CDM stating understanding of her diabetes management needs and her ability to put this into practice. She becomes emotionally dysregulated so frequently that her ability to act on her decisions is significantly compromised on a daily basis.'*
- Northamptonshire Healthcare NHS Foundation Trust v AB [2020] EWCOP 40
  A 28 year-old woman first diagnosed with anorexia nervosa when she was 13. AB lacked the mental capacity to decide about her treatment. The judge explained her inability to use or weigh information as follows: *'...given the chronic nature of AB's illness and its current clinical presentation, her decisions in connection with food, calorific intake and consequent weight gain are so infected and influenced by her fixated need to avoid weight gain at all costs that true logical reasoning in relation to these specific matters is beyond her capacity or ability.'*
- Leicester City Council v MPZ [2019] EWCOP 64
  Woman with a learning disability and personality disorder. The judge considered if she had mental capacity to make various decisions: residence, care, access to social media, tenancy agreements and sexual relations and concluded her personality disorder: *'...impacts on her ability to use or weigh information as it causes her to deny, dismiss or minimise information relevant to risks, especially when put to her by professionals as it challenges her pathological way of thinking.'*
- Cheshire West & Chester Council v PWK [2019] EWCOP 57
  A man with autism and a learning disability. The judge found he lacked mental capacity to make a range of decisions and stated*: '...I am amply satisfied that, because of the acute anxiety that this subject generates in him, he is unable to use and weigh that information as part of the decision-making process.'*

Note: There is a large and varied body of case law that provides examples of the meaning of *'use or weigh'* information.

Vaccinations

We produce a separate case law sheet on Covid-19 vaccinations. Download from: https://www.edgetraining.org.uk/news