Mental Health Act 1983 and Mental Capacity Act 2005 case law summary sheet

January 2024: This sheet provides examples of recent case law about people detained under the Mental Health Act and the use of the Mental Capacity Act. The cases highlight how the MCA could and should be used while a person is subject to the Mental Health Act. Download this case law sheet and others (Mental Capacity Act and DoLS) from: https://www.edgetraining.org.uk/resources. Join our mailing list to be notified when the next edition is available.

- Quotations are taken directly from the court or tribunal judgments. All case law references are hyper-linked to the full judgment for further details. Cases added since the last edition are indicated with ***.

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)

EWCOP = Court of Protection EWCA = Court of Appeal UKSC = Supreme Court

EWHC = High Court UKUT = United Kingdom Upper Tribunal ECHR = European Court of Human Rights

Surgery

- Re TTN (Medical Treatment: Retinal Detachment)[2024] EWCOP 1 ***
  A 73 year old man with treatment resistant schizo-affective disorder detained under Section 3 of the MHA 1983. He required surgery for a detached retina and this may have included the need for physical and chemical restraint. The judge found he lacked mental capacity to consent to the surgery and authorised it in his best interests under the MCA.
- 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.

Covert medication

- An NHS Trust v XB [2020] EWCOP 71
  A man in his 50's 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 and 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.

Pregnancy and caesarean section

- 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 section. The judge was highly critical of a number of issues including the last minute application: *'It is not good enough for NHS Trusts to routinely say they were acting in good faith when in truth that simply becomes an exercise in burden-shifting. Here, there appears to have been a failure between the two Trusts to work together and exchange information in a helpful and appropriate manner.'*
- X & Y NHS Foundation Trusts v Ms A [2021] EWCOP 17 A woman detained under Section 3 of the Mental Health Act.

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.

Restricting contact with others

- SCC v FP & Ors [2022] EWCOP 30
  FP was a 36 year old woman with treatment resistant schizophrenia on a Community Treatment Order in a care home. Because of serious concerns about the impact of contact with her mother, her local authority applied to the Court of Protection to restrict contact between them. Previous less restrictive orders from the court to manage the contact had not worked. The judge stated: *'RT's* [mother] *conduct risks causing further harm to FP. Firstly, there is cumulative effect of telling FP she is being abused, that her medication is harming her, and that there is no other cause of her problems. FP's*

confidence in her carers and placement will be further undermined, leading her to feel unsafe and insecure. Secondly, there is the risk of further acute distress following contact, as has occurred in the past.'

'...with considerable regret, I am driven to the conclusion that it is contrary to FP's best interests for face to face contact with RT [mother] *to continue over the next few months. Whilst FP has said that she enjoys seeing her mother, the overwhelming balance of the evidence is that it is currently harmful to her.'*

Mental capacity to consent to admission or accommodation

- A PCT v LDV [2013] EWHC 272
  A 33 year old woman with a learning disability on a mental health ward. The use of the Mental Health Act or DoLS was questioned in addition to her mental capacity to consent to admission. This case provides guidance on the relevant information a person needs to understand, retain and use or weigh in order to have the mental capacity to: *'...to consent to a placement which amounts to a deprivation of liberty.'* The judge stated:

  'I consider that on the facts of this case, the clinicians and the court should ask whether L has the capacity to understand, retain, use and weigh the following information:

  (1) that she is in hospital to receive care and treatment for a mental disorder;
  (2) that the care and treatment will include varying levels of supervision (including supervision in the community), use of physical restraint and the prescription and administration of medication to control her mood;
  (3) that staff at the hospital will be entitled to carry out property and personal searches;
  (4) that she must seek permission of the nursing staff to leave the hospital, and, until the staff at the hospital decide otherwise, will only be allowed to leave under supervision;
  (5) that if she left the hospital without permission and without supervision, the staff would take steps to find and return her, including contacting the police.'

  Note: this case was very person specific in relation to the information to be understood. In relation to admission for care/treatment the case that judges refer to consistently (benchmark) is:

- 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*

Anorexia nervosa – MHA or MCA?

- A Mental Health NHS Trust v BG [2022] EWCOP 26
  BG was 19 and diagnosed with anorexia nervosa. She was on a mental health ward detained under the Mental Health Act. The Mental Health NHS Trust applied to the Court for declarations that she lacked mental capacity about her care and treatment including nutrition and hydration and that: '*It was lawful and in BG's best interests for no further treatment to be provided to her against her wishes and for her to be discharged home from hospital notwithstanding her admission pursuant to section 3 Mental Health Act 1983'.* Various routes have been attempted to treat her including a range of: *'..eating disorder-focussed therapy sessions'* and more recently, 9 sessions of ECT with no improvement. She has endured over a 1000 NG feeds under restraint. All the professionals now agree nothing more can be done for her. The judge agrees: *'To be asked to make an order which will be likely to lead to the death of a sentient, highly intelligent and thoughtful individual who, if otherwise able and minded, might accept treatment which could assist her is as grave a decision as can be made. It has of course weighed heavily for a long period with BG, her parents and Dr Z, and now me. Simply because*

all the evidence points one way does not extinguish the burden.' BG was discharged home on the day of the court hearing and died a month after (her last few days spent in a hospice).

Note: The cases involving people with anorexia nervosa have normally involved a mental health NHS Trust making a court application with the support of the person and their family. They have all related to people with severe anorexia nervosa who have had multiple hospital admissions for this over many years and also repeated use of the Mental Health Act to forcibly give treatment. They have been driven by the question of whether or not the Mental Health Act should be used again to admit and forcibly treat the person. In all cases the person has been found to understand information but unable to use or weigh information about their nutritional needs and therefore lacked mental capacity for this decision.

Bulimia nervosa

- Lancashire & South Cumbria NHS Foundation Trust v Q [2022] EWCOP 6
  A 50 year old woman with bulimia nervosa, emotionally unstable personality disorder (EUPD), recurrent depression and symptoms of post-traumatic stress disorder (PTSD). She had a history of admissions to mental health hospitals and detention under the MHA. At the time of the hearing she was under a Community Treatment Order (CTO). She suffered from very low potassium levels (hypokalaemia) which if left untreated, would be life-threatening. The case concerned her mental capacity to refuse treatment for hypokalaemia. The judge concluded she had mental capacity and stated: *'Q does not want to die, but she does not want to live under a medical and mental health regime which she finds oppressive and corrosive of her autonomy. As she puts it, she is simply "sick of it". On paper, that regime may not appear rigorous but for Q, it undoubtedly is. I regard her view, if she will forgive me for saying so, to be an unwise one. Whilst I hope that recovering her autonomy may be empowering for her, I consider, on the evidence, not least her own, that it is most likely to hasten her death.'* In addition, she had an advance decision to refuse treatment (ADRT) dated a year earlier and its validity was in question. Having found she had mental capacity to consent or refuse treatment for hypokalaemia the judge found she had (would have had) mental capacity to make the ADRT.

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.

Note: There is a large and varied body of case law that provides examples of the meaning of *'use or weigh'* information. Many of these cases involve people with mental disorder (not detained under the Mental Health Act). For full details see our separate case law sheet on the Mental Capacity Act at: https://www.edgetraining.org.uk/mcaresources

Religious delusions and mental capacity

- A County Council v MS and RS [2014] B14
  A man with schizophrenia presenting with religious delusions and on a Community Treatment Order (CTO). 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.'*

Dialysis as a treatment for mental disorder under the MHA

- A Healthcare and B NHS Trust v CC [2019] EWHC 574 (Fam)
  A 34 year old man with psychotic depression and a mixed personality disorder detained under Section 3. The NHS Trust applied to Court to consider if dialysis could be considered treatment for mental disorder under the Mental Health Act. In this case the judge agreed because: *'The physical condition CC is now in, by which dialysis is critical to keep him alive, is properly described as a manifestation of his mental disorder. There is a very real prospect that if he was not mentally ill he would self-care in a way that would have not led to the need for dialysis. Further, CC's refusal of dialysis is very obviously a manifestation of his mental disorder and dialysis treatment is therefore treatment within the scope of section 63 MHA 1983.'*

  NOTE: the vast majority of case law does not follow this approach and physical treatment is dealt with under the Mental Capacity Act. Examples include:

- Norfolk and Suffolk NHS Foundation Trust v HJ [2023] EWFC 92
  In this case the judge stated: *'The fact that HJ's presenting mental health state can, to an extent, be improved or can deteriorate depending on her physical condition does not mean that her mental health condition is caused by her physical health problems. She may well present with fewer symptoms of her mental health condition when she is in good physical health and not in pain, but* ***her gastrointestinal illness is not the cause of her Bipolar Affective Disorder.'***

- An NHS Trust v XB [2020] EWCOP 71
  In relation to the 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.'*

Mental Health Act or DoLS when admitting a person to a MH hospital

- AM v SLaM & Sec State for Health [2013] UKUT 0365
  The legal thought process that Mental Health Act decision makers should follow before admitting a person to a mental health ward. In particular, guidance on choosing between the MHA 1983 or DoLS.
- Manchester University Hospital NHS Foundation Trust v JS and Manchester City Council [2023] EWCOP 12 ***
  A 17 year old with autism, ADHD, learning disability and attachment disorder. She had a history of self-harm and absconding and was detained under Section 2 MHA on an acute adult medical ward. When this lapsed, the hospital incorrectly claimed she did not meet the threshold for detention under Section 3 of the Mental Health Act despite being held in hospital under significant levels of restriction including physical and chemical restraint. She was objecting so did not meet the 'eligibility' test. The judge criticised the hospital for not using the Mental Health Act and attempting to (unlawfully) detain her under the 'common law' after the Section 2 expired. The judge said: ***'I have concluded for the reasons I have given that she could have been detained and treated under the MHA. I would go further and say that she should have been so detained and treated.'*** In addition they stated: '*There seems to be a belief... that the decision to use the MHA should be viewed in isolation from what is available elsewhere at the time the decision to detain or not detain is taken.'* And: *'...where there is literally no option in which that young person will be safe, or as safe as possible in the circumstances...then it seems clear to me the patient should not be detained under the MCA but rather under the MHA.'* Following the case, JS was detained under Section 3. The judgment was unsuccessfully appealed by the NHS Trust (Manchester University Hospitals NHS Foundation Trust v JS & Anor [2023] EWCOP 33 ***).

Leave of absence (MHA) and DoLS

- A Hospital NHS Foundation Trust v Ms KL & Anor [2023] EWCOP 59 ***
  A 45 year old woman with mild to moderate learning disabilities and Emotionally Unstable Personality Disorder. She was under Section 3 of the MHA 1983 but on Section 17 MHA leave to an acute trust. The judge authorised treatment for acute myeloid leukaemia in her best interests and a 'portacath' under general anaesthetic to reduce risks during administration of treatment. This could include the use of restraint and a deprivation of liberty in the acute hospital, if necessary. The judge agreed she was eligible for DoL(S) while on Section 17 leave.
- A Hospital NHS Trust v CD and a Mental Health Foundation Trust [2015] EWCOP 74
  A woman with paranoid schizophrenia under Section 3 MHA and in need of a total hysterectomy due to a large ovarian growth. The judge found she lacked mental capacity to consent to the surgery. Section 17 leave could be granted for her to go to the general hospital and a court order then be used to detain her for the purpose of the physical treatment.

Displacement of Nearest Relative under MHA

- A Local Authority v SE & Ors [2021] EWCOP 44
  The Court of Protection as a high court was able to make rulings under both the MCA (contact, residence, care, DoL) and the MHA in displacing a nearest relative. See Guardianship below.

Guardianship and DoLS

- A Local Authority v SE & Ors [2021] EWCOP 44
  A complex case involving multiple issues including contact, residence, care and displacement of a nearest relative. An 18 year old woman in supported living subject to guardianship. Her care arrangements met the acid test and she lacked the mental capacity to consent to them. Court order granted to authorise the deprivation of liberty. Her father was displaced as nearest relative plus an injunction authorised to prevent him from removing SE from the accommodation.
- A Local Authority v AB [2020] EWCOP 39
  A 36 year old woman with Asperger's syndrome in supported living and subject to guardianship with a residence requirement. Her care arrangements met the acid test and she lacked the mental capacity to consent to them. Court order granted to authorise the deprivation of liberty.

Community Treatment Orders (CTO) and DoLS

- Welsh Ministers v PJ [2018] UKSC 66
  A man with a mild to borderline learning disability living in a care home subject to a CTO. The Supreme Court ruled a CTO cannot authorise a deprivation of liberty. If the restrictions in a care plan mean the person is deprived of their liberty and they lack mental capacity, this would need CTO + DoLS (care home) or CTO + Court Order (any accommodation).
- Sunderland City Council v AS [2020] EWCOP 13
  A man with a mild learning disability, acquired brain injury, bipolar disorder and personality disorder in a supported living placement subject to a CTO. The court found the care plan was a deprivation of liberty and authorised it.

Conditional Discharge and DoLS

- Secretary of State for Justice v MM [2018] UKSC 60
  Conditional discharge (CD) cannot authorise a deprivation of liberty. If the restrictions in a care plan mean the person is deprived of their liberty and the person lacks the mental capacity to consent, CD + DoLS (care home) or CD + court order

(any accommodation) would be required. Note: the Supreme Court said that even if a person has mental capacity to consent to the care plan, their consent would not valid.

- Cumbria, Northumberland Tyne & Wear NHS Foundation Trust & Anor v EG [2021] EWHC 2990
  In reliance on Section 3 of the Human Rights Act 1998 (and not the Mental Health Act alone) the court ruled that a person that has been conditionally discharged and has mental capacity, can be detained in the community under Section 17(3) MHA even though they have not stayed in or been treated by a hospital for a considerable period of time: *'It is therefore possible to read the sub-section that makes "liable to be detained" mean liable in law to be detained for treatment, even where that treatment is being provided in the community, so long as it could lawfully be provided in hospital.'*
- MC v Cygnet Behavioural Health Ltd and the Secretary of State for Justice [2020] UKUT 230 (ACC)
  Where a patient lacks mental capacity and a proposed CD by a MH Tribunal will lead to a deprivation of liberty, the Tribunal has a number of options, including a deferred conditional discharge to allow for a DoLS to be put in place.
- Birmingham City Council v SR and Lancashire County Council v JTA [2019] EWCOP 28
  SR and JTA had a learning disability and lacked mental capacity. They were ready for conditional discharge in the community. The court authorised deprivation of liberty *primarily* in their best interests.
- AB (Inherent Jurisdiction: Deprivation of Liberty) [2018] EWHC 3103
  A man with a learning disability under a CD in the community. AB had mental capacity to consent to the arrangements. Due to the decision in the *MM* case above, the judge used the inherent jurisdiction to authorise the deprivation of liberty.

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