

Mental Health Act 1983 and Mental Capacity Act 2005

case law summary sheet



February 2023 edition: This sheet provides examples of recent case law relating to people with mental disorders and the use of the Mental Capacity Act (for several of the themes listed below there is case law stretching back over 10 years or more). The cases highlight how the MCA could and should be used in mental health services. Other cases involve people detained under the Mental Health Act 1983 where the MCA applies at the same time.

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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 ***.

EW COP = Court of Protection

EW CA = Court of Appeal

UK SC = Supreme Court

EW HC = High Court

UK UT = United Kingdom Upper Tribunal

EC HR = European Court of Human Rights

Surgery

■ [Re TS \(Pacemaker\) \[2021\] EW COP 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 \[2021\] EW COP 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 \(Urgent medical treatment\) \[2020\] EW COP 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.

■ [Sherwood Forest Hospitals NHS Foundation Trust & Nottingham University Hospitals NHS Trust v H \[2020\] EW COP 5](#)

A woman with bipolar disorder and advanced skin cancer. The court found she lacked the mental capacity to consent to surgery and it was in her best interests. The court noted *'...whilst Mrs H is physically acquiescent, she is not agreeing in any capacitous way'*. Use of sedation was a 'fall back' position. The judge was critical of the NHS Trust due to the delay in applying to court: *'...it requires to be confronted that the delay in this case may mean that a life is lost that could well have been saved. That is quite simply a tragedy. It is also profoundly troubling.'*

■ [Cardiff & Vale University Health Board v P \[2020\] EW COP 8](#)

A 17 year old with severe autism and impacted wisdom teeth causing severe pain. The judge was critical of the delay by the Health Board in applying to court because P: *'...has been suffering, and significantly so, for nearly five months. This is little short of an outrage. It is indefensible.'*

Covert medication

■ [An NHS Trust v XB \[2020\] EW COP 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.

Pregnancy and caesarean section

■ [North Middlesex University Hospital NHS Trust v SR \[2021\] EW COP 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 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.

- [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.

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: 1. *'the sexual nature and character of the act of sexual intercourse, including the mechanics of the act;* 2. *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;* 3. *the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;* 4. *that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant;* 5. *that there are health risks involved, particularly the acquisition 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.'*

Restricting contact with others (including via social media)

- [SCC v FP & Ors \[2022\] EWCOP 30](#) ***

FP is 36 year old woman with treatment resistant schizophrenia on a Community Treatment Order in a care home. Mr Justice Poole: *'...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.'* A good example of the MCA working alongside the MHA to enable an effective care plan.

- [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.

▪ [A Local Authority v TA & Ors \[2021\] EWCOP 22](#)

An 87 year old woman with Alzheimer's dementia. She was the tenant of a housing association property and her son (TA) looked after her. There were numerous serious safeguarding concerns about the son's care. The judge stated: *'It is the case of the local authority that TA exercises abusive and controlling behaviour towards his mother and so dominates her life that she (i) is unable to enjoy personal dignity; (ii) has lost contact with her community and with her family...and (iii) is denied access to important healthcare and treatment.'* Given the son's previous breach of court orders, the judge ordered him to vacate his mother's home and granted an injunction against him being within 100 yards of the property.

▪ [A County Council and an NHS Social Care Partnership Trust v LW \[2020\] EWCOP 50](#)

A 60 year old woman with bipolar affective disorder who had been on a mental health ward for three years (previously detained under the Mental Health Act). She was in a relationship with a man described as *'abusive, exploitative, coercive and wholly inimical'* to her welfare. The court found she lacked the mental capacity to decide about her residence, care needs and contact with her partner. The plan proposed and confirmed by the court was to discharge her to a care home where contact with her partner would be completely stopped.

▪ [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.

Mental capacity to consent to admission or accommodation

▪ [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. 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](#)

▪ [A PCT v LDV \[2013\] EWHC 272](#)

A woman with a learning disability on a mental health ward. 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.'*

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.

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).

▪ [RD \(anorexia: compulsory treatment\) \[2021\] EWCOP 35](#)

A 37 year old woman with severe anorexia nervosa. The judge stated: *'...she is completely overwhelmed by the anorexia nervosa from which she so clearly suffers. It means that she lacks capacity, both to take decisions and to implement those decisions..'* They continued: *'I am quite clear that further compulsory treatment is not in her best interests. It will achieve nothing and be futile.'*

▪ [A Mental Health Trust v ER & Anor \[2021\] EWCOP 32](#)

A 49 year old woman with severe anorexia nervosa and serious renal failure. The court found she had mental capacity to consent to physical treatment but in relation to her treatment for anorexia she could not use or weigh the relevant information. The court ruled it was not in her best interests to be forced to have inpatient treatment for anorexia.

▪ [Northamptonshire Healthcare NHS Foundation Trust v AB \[2020\] EWCOP 40](#)

See this case below under 'use or weigh' information.

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.

▪ [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.

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 above) and *London Borough of Tower Hamlets v PB [2020] EWCOP 34* (under alcohol use and the MCA).

Religious 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").'*

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.

DoLS for the objecting patient in a care home + prescription of clozapine

- [BHCC v KD \[2016\] EWCOP B2](#)

A woman with schizophrenia and a long history of detentions under the MHA 1983 living in a care home. She was objecting to the placement. The court confirmed that DoLS can be used to detain objecting residents in care homes and that clozapine could be prescribed under the MCA including potential covert administration in future.

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.

17 year old in hospital and neither MHA or DoLS apply

- [Buckinghamshire County Council v RT \[2018\] EWCOP 12](#)

A 17 year old boy lacking mental capacity to consent to admission, admitted to a mental health ward. The ward psychiatrist considered the criteria for using the MHA 1983 were not met. DoLS was not applicable as he was under 18. An urgent application to the Court of Protection was made to authorise his deprivation of liberty on the ward. Court order was granted the same day.

Dialysis as a treatment for mental disorder under the MHA

- [A Healthcare and B NHS Trust v CC \[2019\] EWHC 574 \(Fam\)](#)

Could dialysis be considered treatment for mental disorder? In this case the judge said yes 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.'*

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.

Leave of absence (MHA) and DoLS

- [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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