

# Mental Health Act 1983 and Mental Capacity Act 2005

## case law summary sheet



**April 2021 edition:** This sheet provides examples of recent case law relating to people with mental disorders and the use of the Mental Capacity Act. 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 an \*\*.

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

#### ■ [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.

#### ■ [Hull University Teaching Hospitals NHS Trust v KD \[2020\] EW COP 35](#)

A woman with paranoid schizophrenia in need of an operation for a collapsed lung, to which she objected. The court found she lacked the mental capacity to consent to surgery and it was in her best interests to have it.

#### ■ [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 has severe hypertension and without medication there is 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

#### ■ [X & Y NHS Foundation Trusts v Ms A \[2021\] EW COP 17](#) \*\*

A woman in her thirties with paranoid schizophrenia under Section 3 of the Mental Health Act. The judge found she could not use or weigh the necessary information about the caesarean section and authorised this in her best interests. See also the case of [East Lancashire Hospitals NHS Trust v GH \[2021\] EW COP 18](#) listed under use or weigh below.

#### ■ [Guys & St Thomas' NHS Foundation Trust & South London and Maudsley NHS Foundation Trust v R \[2020\] EW COP 4](#)

A woman with bipolar disorder detained on a mental health ward under the Mental Health Act and 39 weeks pregnant. The judge was critical of the late application by the NHS Trusts involved: '*I do however deprecate the delay in bringing the application.*' The case was brought because even though the hospital considered the woman had capacity at the time, they thought she might lose capacity during labour when a caesarean might be required.

#### ■ [NHS Trust & Ors v FG \[2014\] EW COP 30](#)

A woman with a schizoaffective disorder and persecutory delusions detained under the Mental Health Act. The judgment provided guidance for NHS staff in relation to pregnant woman with mental disorders including: '*In the vast majority of these cases obstetric care will be provided to P under the MCA with the powers under the MHA being used to facilitate P receiving that care at an acute hospital under the MCA. A patient detained under the MHA, may be granted conditional leave from the psychiatric hospital pursuant to s17 MHA.*'

## Restricting contact with others (including via social media)

- [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 has been on a mental health ward for three years (previously detained under the Mental Health Act). She is 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.

- [Re: SF \[2020\] EWCOP 15](#)

A woman with a mild learning disability and dementia. The judge considered her mental capacity to make various decisions including contact with strangers (she lacked mental capacity) and contact with her husband (she had mental capacity) because: *'...SF has a premorbid level of knowledge of her husband which she has retained and uses it to make decisions about her relationship with him.'*

- [A Local Authority v H \(No 2\) \[2019\] EWCOP 51](#)

A woman with a learning disability. The court found she had the mental capacity to consent to sexual relations but lacked the mental capacity about contact with others. There is an extensive body of case law around this issue.

- [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 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.'*

## Anorexia nervosa – MHA or MCA?

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

This is one of several cases dealing with severe anorexia nervosa and whether, even though the person meets the criteria for detention, continued use of the MHA is appropriate. See below - use or weigh information.

- [Re: W \[2016\] EWCOP 13](#)

A 28 year old woman under Section 3 of the Mental Health Act. The court found she lacked the mental capacity to make decisions about treatment for anorexia nervosa and it was in her best interests for the Section 3 to be discharged; and for her to receive care in the community with a very high chance she would die.

## Use or weigh information

- [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.'*

### Sexual relations

▪ [A Local Authority v JB \[2020\] EWCA Civ 735](#)

The court set out the relevant information a person must understand, retain, and use or weigh to have the mental capacity to consent to sexual relations (para 100). Not every element of the above list may be relevant in every case.

▪ [HD v A County Council \[2021\] EWCOP 15](#) \*\*

A woman in her late twenties with mild learning disability. The case highlights the impact of the above judgment. Mr Justice Cobb: *'I am driven to the conclusion that while HD understands the need for a sexual partner to consent to engage in sexual relations, it is clear from the evidence that she cannot currently understand the need for a sexual partner to have capacity to consent to sexual relations'*. The Judge also noted: *'HD currently is fitted with a contraceptive implant. There is some uncertainty about how this procedure was achieved in 2018 given her apparent lack of capacity to have been able to consent to it'*.

### 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 has 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 granted the same day.

## 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.

## Guardianship and DoLS

### ▪ [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.

### ▪ [GW v Gloucestershire CC \[2016\] UKUT 499 \(AAC\)](#)

A woman with Huntington's disease in a care home under both guardianship and DoLS. The Upper Tribunal confirmed that Guardianship and DoLS have different powers and can complement each other.

## 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.

### ▪ [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.

### 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.'*

### Young people and deprivation of liberty

- ***In the matter of D (a child) [2019] UKSC 42***

The Supreme Court found: *'.. parental responsibility for a child of 16 or 17 years of age does not extend to authorising the confinement of a child in circumstances which would otherwise amount to a deprivation of liberty.'* For children aged 15 or under however, parental responsibility may 'authorise' the deprivation of liberty of a child.

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