



Public Sector Insights: Mental Health and Capacity Matters

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Mental Health Matters

Eve Piffaretti, Partner

An NHS Trust v Mother & Ors

[2024] EWHC 2207 (Fam)

- issue as to whether technically G came within the scope of the Code
- G was not detained under section 2 or section 3 MHA

“... it would be incorrect to regard this case as being subject to different principles simply because it technically falls outside of the Code. In my judgement, the Trust is correct in contending that it is, in effect, bound by the Code, even though strictly speaking G is not detained pursuant to the Mental Health Act 1983. In my judgement, the Code is properly to be seen as guidance for registered medical practitioners and members of other professions in relation to the medical treatment of patients suffering from mental disorder.” per Francis J. at para.13

Dobson v Chief Constable of Leicestershire Police **[2025] EWHC 272 (KB)**

“In my view there is no distinct common law right to detain a person pending a mental health assessment.Section 136 limits the circumstances in which a constable might remove and detain a person on mental health grounds. A common law provision expanding those rights would in my judgment defeat the legislative purpose of section 136.”

Nottinghamshire Healthcare NHS Foundation Trust v MC

[\[2025\] EWHC 920 \(Fam\)](#)

- MC was a capacious patient, who required medical treatment for his physical health needs
- Declaration made that it was in MC's best interests for his treating clinicians not to use force even if this lead to his premature death, despite the treatment falling within the scope of s63 MHA
- Nottinghamshire Healthcare NHS Foundation Trust v RC [\[2014\] EWCOP 1317](#) followed (Mostyn J)



Capacity End of Life Decisions Advanced Decisions

Tina Whitman, Legal Director

Capacity – Back to Basics

Calderdale Metropolitan Borough Council v LS and MS

- Judgement of Mr Justice Cobb on 13 March 2025
- Proceedings to consider capacity to make decisions about:
 - Residence
 - Care
 - Contact
 - Use of social media
 - Sexual relations

Capacity – Back to Basics (2)

LS (31F)

- Mild intellectual disability and ADHD
- Resident in supported rented accommodation
- Calderdale had continuing concerns that LS lacked capacity to make decisions in all domains.
- LS' representatives accepted that LS lacked capacity to make decisions on use of social media, contact and sexual relations but asserted that she could make decisions on residence, care and contact with MS (her mother).

Capacity – Back to Basics (3)

- Decision of Cobb J
- Principles of the MCA:
 - Presumption of full legal capacity
 - Capacity is decision and time specific

“Capacity may fluctuate over time, so that a person may have capacity at one time but not at another. The “material time” within section 2(1) is decision-specific (...). The question is whether P has capacity to make a specific decision at the time when it needs to be made”

– Re JB [\[2021\] UKSC 52](#)

Capacity - Back to Basics (4)

Function of CoP is to promote and protect autonomy of those who are the focus of proceedings:

‘danger of elevating the instinctive need to protect a vulnerable adult to such a degree that it corrupts the integrity of an objective assessment of capacity’ – Warrington BC v Y, AB and CD [\[2023\] EWCOP 27](#).

Capacity and expert assessments

University College London Hospitals NHSFT v PK and AB

- Judgement of Mr Justice McKendrick on 14 May 2025
- Application for decision as to whether clinically assisted nutrition and hydration in PK's best interests.
- PK (73M) – diagnosed with dementia in 2019, left sided weakness since 2023, two TIAs in October 2024.

Best Interests: Medical Treatment (2)

- Medical treatment wished to withdraw naso-gastric tub
- Family wanted to maintain treatment based on PK's past wishes and feelings

- **MCA Code of Practice Paragraphs 5.31-5.33**
 - Strong presumption that it is in P's best interest to stay alive.
 - Futile treatment.
 - Factors to be weighed.

NHS Staffordshire and Stoke on Trent ICB v AB, Midlands Partnership University NHSFT, CD and EF

- Known as: **Re AB (ADRT: Validity and Applicability)**
- Decision of Mr Justice Poole dated 10 June 2025
- AB (43M) – hypoxic brain damage following a cardiac arrest in May 2024.
- Advanced Decision to Refuse Medical Treatment (ADRT) dated April 2024

Advanced Decisions (2)

- Issues with ADRT: was it genuine, valid and applicable?
- Section 24 MCA: made by P after he has reached 18 with capacity

“that if (a) at a later time and in such circumstances as he may specify, a specified treatment is proposed to be carried out or continued by a person providing health care for him, and (b) at that time he lacks capacity to consent to the carrying out or continuation of the treatment, the specified treatment is not to be carried out or continued.”

Advanced Decisions (3)

- Section 25 MCA
- Section 26 MCA

“If P has made an advanced decision which is valid and applicable to a treatment, the decision has effect as if he had made it, and had had capacity to make it, at the time when the question arises whether the treatment should be carried out or continued.”

- Paragraph 9.38 of the MCA Code of Practice

Advanced Decisions (4)

Impact of a valid and applicable ADRT



Disputes over validity and applicability



Responsibility of health care professionals



Findings



Re EM - Debunking “DoLS” Myths Equivalent DoLS Assessments

Holly Spencer-Biggs, Associate

Re EM - Debunking DoLS Myths

Re EM (Deprivation of Liberty & Care Planning and Costs) [\[2024\] EWCOP 76 \(T2\)](#)

- Complex case concerning a young woman with a multifaceted presentation including diagnoses of ADHD and ASD and serious mental health needs.
- Proceedings began when an application was issued in the High Court in 2023 inviting the Court to authorise restrictions upon EM that amounted to a deprivation of liberty
- A less restrictive placement had been identified and the Local Authority applied to withdraw the proceedings and “*lift the DOLS*”

Re EM - Debunking DoLS Myths

“On a DOLS”

- Article 5 ECHR and Schedule A1 MCA 2005

“To be “on” or “under a dol” means to be subject to an order (or authorisation) approving and authorising a care plan which allows the carer to use restrictions that amount to a deprivation of liberty in the best interests of P. Clearly, the emphasis here is on the care plan itself and not the legal status of the restrictions that can be used. The care plan to be used is still a decision to be made by the carer/clinician/MDT in charge on the basis of what they consider to be needed in the circumstances that arise, and what is in P’s best interests.”

- A Court authorised care plan that includes a DOL is not mandatory, the Court is not “imposing a prison sentence”

Re EM - Debunking DoLS Myths

“Care Plan is King”

- LA identified a less restrictive placement where EM would not be deprived of her liberty. LA submitted that this move could only happen if the Court “lifted the DOLS”. The Court noted that this is incorrect.
- If a care plan is devised whereby P is to move to another placement or remain in a current placement where they will not be deprived of their liberty, there will be no need for the Court to authorise a deprivation of liberty.
- *“The Court **approves** the restrictions is does **not create** them”*

Re EM - Debunking DoLS Myths - Summary

Care planning, assessments and consultations are what is most important



The focus on the Court to “make a DoL” forgets about the individuals involved



The individual is central to the whole process

Equivalent DoLS Assessments

“Paragraph 49 of Sch A1 MCA 2005 – sets out four conditions:

- 1) The Supervisory Body has a written copy of the existing assessment
- 2) The assessments meet all requires of the Schedule
- 3) The assessment was carried out within the previous 12 months (except for age assessments)
- 4) The Supervisory Body is satisfied the assessment remains accurate

For BI Assessments, the Supervisory Body should also consult with the RPR or IMCA

Equivalent DoLS Assessments

Guidance in the **DoLS Code of Practice** states:

Paragraph 4.6:

“Great care should be taken in deciding to use an equivalent assessment and this should not be done routinely...”

The older the assessment is, even if it took place within the last 12 months, the less likely it is to represent a valid equivalent assessment.”

Paragraph 4.8:

“SBs should record the reasons why they have used any equivalent assessment.”

Equivalent DoLS Assessments

London Borough of Hillingdon v Neary

[\[2011\] EWHC 1377](#)

- Did not deal with equivalent assessments
- Emphasised that the Supervisory body must examine assessments carefully
- If an assessment is outdated or inadequate “rubber-stamping” it can render the authorisation unlawful

Equivalent DoLS Assessments

It is recommended that the COPDOL11 triggers are considered when considering whether to equivalise an assessment. Caution should be used where there is:

- Objections
- Consultation concerns
- Changes in wishes and feelings
- Care plan changes
- Any potential conflict with any decision taken by an LPA or deputy within the scope of their legal authority

Equivalent DoLS Assessments – The Assessment Process

Existing assessment within the last 12 months
can be reused if accurate

Authorisation cannot exceed the maximum period set
out in the original best interests assessment.

Supervisory Bodies should clearly record the rationale
for using equivalent assessments

An individual who is settled in a care home could have the
benefit of 2 years worth of safeguards from one set of
assessments

Equivalent DoLS Assessments - Summary

Using equivalent assessments helps reduce the burden on resource when reassessing would only serve to confirm what the Supervisory Body already knew.

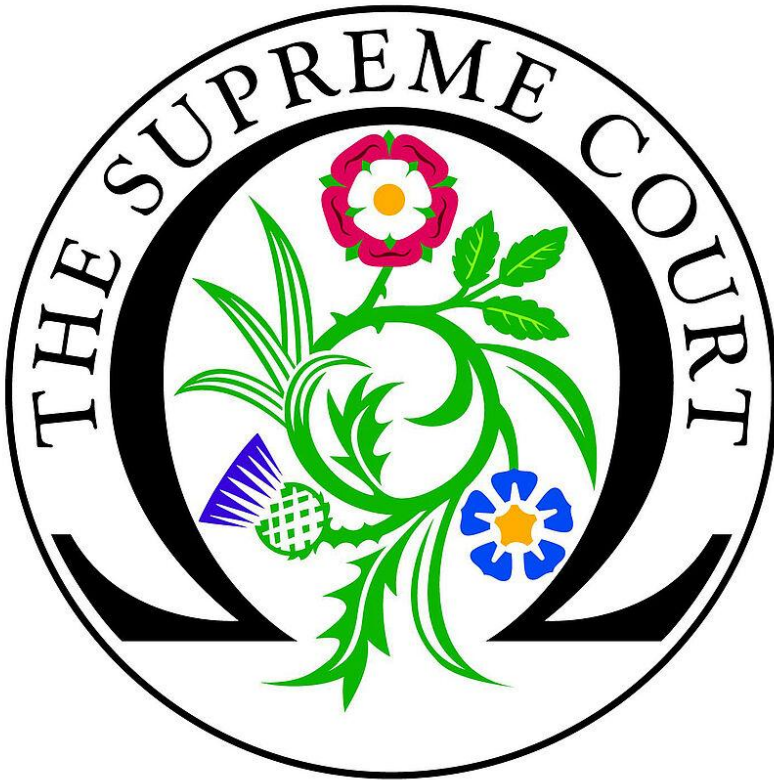
Supervisory Bodies must exercise caution, consult appropriately with those involved in P's care and document all decisions thoroughly



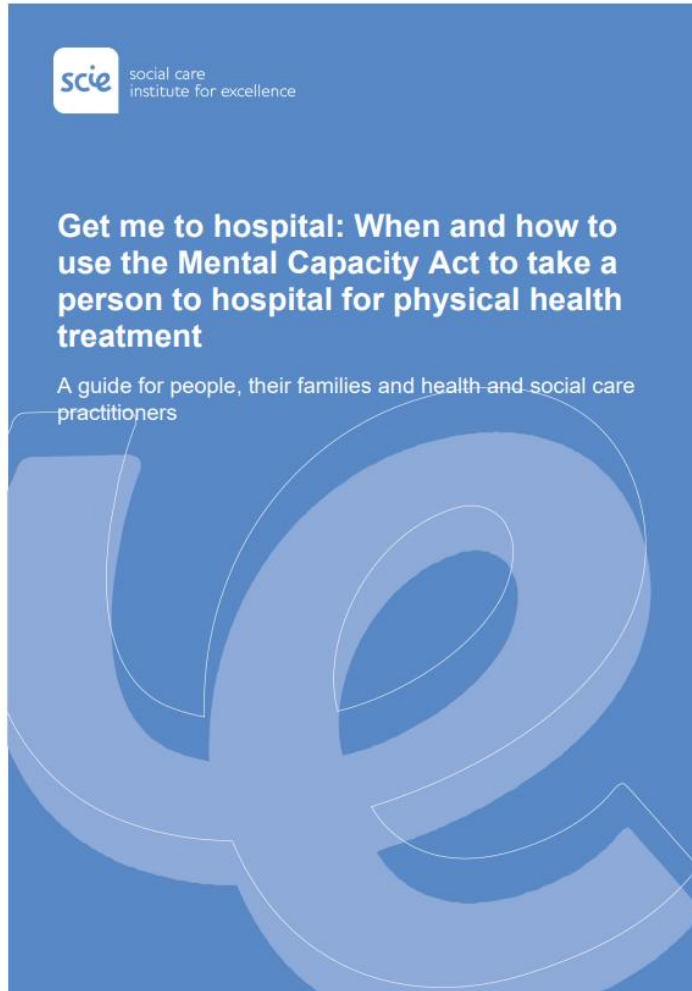
Looking to the future

Eve Piffaretti, Partner

Looking to the future



Looking to the future



Questions / need support ?

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Public Sector Insights: The Regulation of Fertility Treatment

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Tuesday 28th October 2025

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