

Legal Literacy in safeguarding

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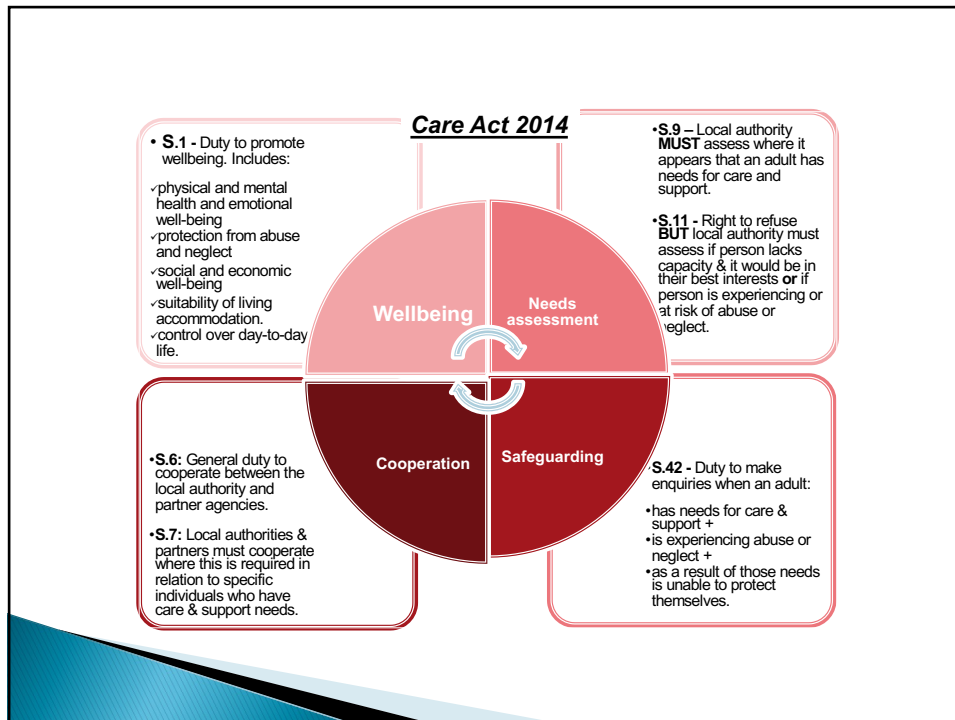
Limits of safeguarding



- ❑ The duty under s.42 is limited to making **enquiries** to enable the local authority to decide whether action should be taken.
- ❑ The duty does **not** extend to mandating any particular action by the local authority.
- ❑ Any intervention therefore requires statutory authority or authorisation from the Court of Protection or High Court.

London Borough of Hillingdon v Neary [2011] EWHC 1377: 'The ordinary powers of a local authority are limited to investigating, providing support services, and where appropriate referring the matter to the court. If a local authority seeks to regulate, control, compel, restrain, confine or coerce it must, except in an emergency, point to specific statutory authority for what it is doing or else obtain the appropriate sanction of the court.'

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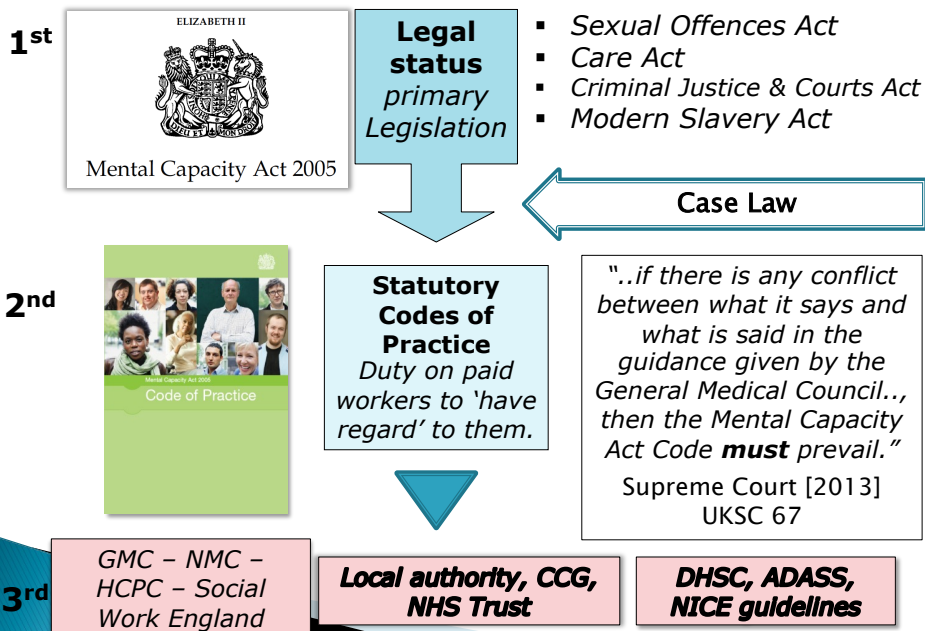
Approach to Safeguarding

- ▶ **Legal Literacy**- knowledge of legal options
- ▶ **Relational Literacy**- ‘knowing and being’
- ▶ **Organisational Literacy**- MSP, multi-agency approach, ‘slow burn approach’
- ▶ **Decision making literacy**- Sharing information, consent, capacity, professional curiosity.


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Human Rights Act – European Convention on Human Rights



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Consent: Care Act assessments

A Local Authority v GP [2020] EWCOP 56

GP is a 19 year old man with autism, anxiety and a learning disability. He has not attended school since 2018 (living at home with his parents). There is concern about his development and lack of community access. Under Section 9 of the Care Act 2014, the local authority have a **duty to assess** his needs for care and support. Section 11 of the Act provides that if he has mental capacity **he can refuse** the assessment but, if he lacks mental capacity the authority can undertake it despite a refusal if it is considered to be in his best interests.

Does the person have mental capacity: *'To Refuse an assessment of his care and support needs pursuant to the Care Act 2014'*

What is the information the person needs to understand (staff give to them):

- *'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 GP's care and that GP may refuse to consent to this.*
- *The local authority will assess how GP's wellbeing can be promoted and whether meeting these needs will help GP achieve his desired outcomes.'*

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Adult health and social care – starts with CONSENT

informed consent = the person was informed + understood:

- the **Nature** (what) +
- the **Purpose** (why) +
- the **Consequences** of treatment/care

Montgomery v Lanarkshire Health Board [2015] UKSC 11

AND the consent was freely given (not coerced)

When a person cannot consent, the **Mental Capacity Act** can be applied (16+ and impairment/disturbance of mind/brain)

Assessment of Capacity

Best Interests


Restraint

Definition: use or threat of force to make a person do something they resist or restriction of liberty of movement, whether or **not** the person resists.

Criteria: Lack capacity + Best Interests + prevent harm to person + Proportionate act


Deprivation of Liberty

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Decision-making and mental capacity

NICE guideline



October 2018


Consent: *'The voluntary and continuing permission of the person to receive particular treatment or **care and support**, based on an adequate knowledge of the **purpose, nature, likely effects and risks** including the likelihood of success, any alternatives to it and what will happen if the treatment does not go ahead. Permission given under any **unfair or undue pressure is not consent.**'*

Implied consent: *'By definition, a person who **lacks capacity** to consent **cannot consent** to treatment or care and support, **even if they cooperate with the treatment or actively seek it.**'*

RCS Professional and Clinical Standards


November 2016

*'The Supreme Court case of **Montgomery vs Lanarkshire Health Board** in 2015 was a **landmark decision** for the doctor-patient relationship and the **process of informed consent.**'*



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Safeguarding Adults



Care Act 2014

Safeguarding: imposes a duty on local authorities to provide a safeguarding response, including:

- ✓ duty to share information for safeguarding purposes (section 45)
- ✓ the duty to make enquiries or cause others to do so (section 42)
- ✓ the duty to provide advocacy, where a person has no one to advocate on their behalf (section 68)

Section 42 – the duty to make enquiries. Applies where a local authority has **reasonable cause** to suspect that an adult:

- ❖ has needs for care and support (whether or not the authority is meeting any of those needs);
- ❖ is experiencing, or at risk of abuse or neglect;
- ❖ as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.

The **duty** applies whether a person lacks mental capacity or not

Note: s.42 provides a framework for responding to concerns but does **NOT provide legal powers to take action** beyond making enquiries.

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Care Act 2014

The duty to make or to cause adult safeguarding enquiries to be made does **not** include:

- ✗ Power of entry or right of unhindered access to an adult
- ✗ Power to remove an adult from their home
- ✗ Power to restrict or regulate contact with family members or friends

Section 7: Co-operating in specific cases

(1) Where a local authority requests the co-operation of a relevant partner, or of a local authority which is not one of its relevant partners, in the exercise of a function under this Part in the case of an individual with needs for care and support or in the case of a carer, a carer of a child or a young carer, **the partner or authority must comply** with the request unless it considers that doing so—

- (a) would be incompatible with its own duties, or
- (b) would otherwise have an adverse effect on the exercise of its functions.

(3) A person who decides not to comply with a request under subsection (1) or (2) **must give** the person who made the request written reasons for the decision.

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Analysis of Safeguarding
Adult Reviews


April 2017 – March 2019

Findings for sector-led improvement

**The first national review of SARs
231 SARs analysed**

- ❑ **MCA compliance:** *'For direct practice, **attention to mental capacity was the most prevalent theme**. The majority of the observations in this theme were related to poor practice...'*
- ❑ **The assumption of capacity:** *'Several SARs comment on how **reliance on the assumption of capacity** served to close down awareness of the need to monitor decision making ability...'*
- ❑ **Unwise decisions:** *'There were reports that...perpetuated the incorrect belief that the Mental Capacity Act 2005 gives adults the 'right' to make **unwise decisions**' & 'The concept of **lifestyle choice** sometimes contributed to failures to refer or pursue self-neglect...'*

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Analysis of Safeguarding Adult Reviews
April 2017 – March 2019
Findings for sector-led improvement

- ❑ **Shortcomings in capacity assessment:** *'Where assessment did take place it sometimes fell short of expected standards...assessments did not appear to have considered all **relevant information**...the ability to **'use or weigh'** relevant information had not been explored.'*
- ❑ **Executive dysfunction:** *'A number of SARs discuss the question of **executive capacity**, noting that faced with unwise decisions practitioners sometimes relied on an assumption that the individual was making a 'lifestyle choice' rather than exploring whether had difficulties carrying out decisions even when they had stated the intention to do so.'*
- ❑ **Failure to apply to court:** *'Several SARs note an **absence of application to the Court of Protection for assistance** in assessing capacity or determining best interests...'*

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ELIZABETH II

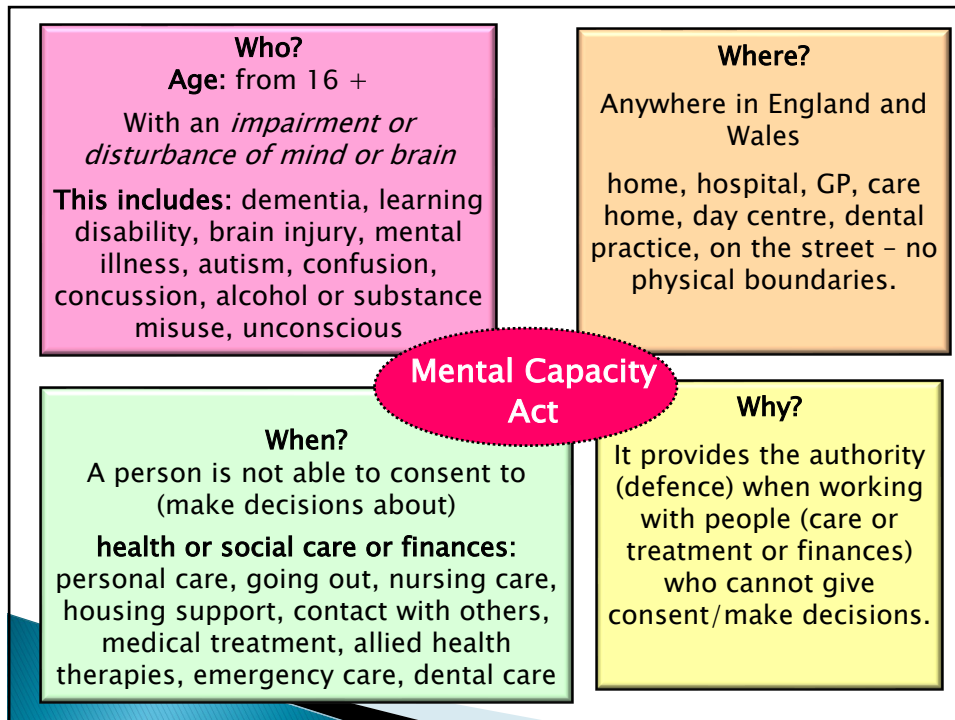


Mental Capacity Act 2005

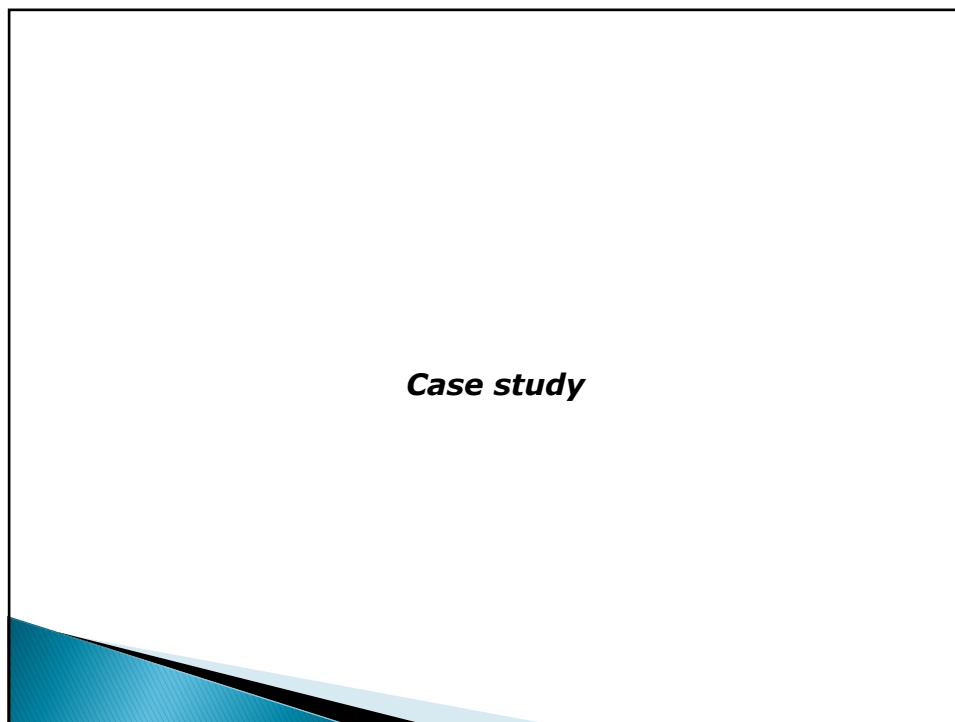
Relevance of the MCA to safeguarding:

- ✓ The Act is usually the starting point before other legal options are considered.
- ✓ It has extensive reach and applies to all health, welfare & financial decisions.
- ✓ It provides the framework for making decisions on behalf of people who lack mental capacity and allows actions to be taken in a person's best interests even if they are resistant to care and support.
- ✓ It has its own specialist court (Court of Protection) which is available 24/7 and has extensive powers.
- ✓ S.44 contains a criminal offence of ill treatment or wilful neglect of a person lacking capacity (rarely used).

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Re B (Capacity: Social Media: Care and Contact)
[2019] EWCOP 3

Mr Justice Cobb judge finds the following:

1. **Litigate** – she lacks mental capacity to litigate.
2. **Finances** (property and affairs) – *‘What is apparent is that, when asked, Miss B has a very poor understanding of finances, a grossly inflated sense of her income from benefits, and demonstrated no real appreciation of how her money is spent. She showed no understanding of the risks of financial exploitation, or of the ability to prioritise her expenditure.’* She lacks mental capacity to manage her finances.
3. **Residence** – the local authority consider she lacks mental capacity but the judge disagrees and finds that she HAS mental capacity to decide where to live (residence)

NOTE: the Residence judgment has been overturned on appeal as it failed to take account of the consequences (risks) of each place of residence – living with Mr C v moving into supported living. The first judge put risks separately under ‘care’ but Court of Appeal say this was wrong. **B v a Local Authority [2019] EWCA Civ 913**

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Re B (Capacity: Social Media: Care and Contact)
[2019] EWCOP 3

4. **Care and support** – she lacks mental capacity around her care and support needs: *‘...she cannot identify the type or amount of support she needs in the home (personal hygiene, managing her medication, or cooking meals), or in managing her own behaviours; she denied the need for, or benefit of, her respite care home. She does not understand the risks posed by Mr C..’*
5. **Contact with Mr C** – she lacks mental capacity to have contact with Mr C: *‘.. she has shown herself to be unable to accept the fact of Mr C’s convictions (she has been told by five different professionals on seven separate occasions about these), and has been repeatedly dismissive of attempts to ‘educate’ her as to the convictions and their implications. She simply is not ‘using and/or weighing’ the information. Moreover, she has maintained firm denials of her own conduct in contacting men on the internet or sending inappropriate messages or images, when the opposite is patently known to be true.’*

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Re B (Capacity: Social Media: Care and Contact)
[2019] EWCOP 3

- 6. Use of social media to contact others** – ‘On the evidence, I am therefore satisfied that Miss B currently does **not** have capacity to decide to use social media for the purposes of developing or maintaining connections with others. I consider that attempts in the form of **practicable help** should be offered to enable her to acquire capacity; until those steps have been taken, I propose to make an **interim declaration only** under section 48 MCA 2005 at this stage.’

Court of Appeal - B v a Local Authority [2019] EWCA Civ 913

‘Whether the list or guideline of relevant information is shorter or longer, it is to be treated and applied as no more than guidance to be adapted to the facts of the particular case.’ B does not look at pornography – this would not apply to assessing her capacity (as opposed to Re A).

- 7. Sexual relations** – ‘The evidence placed before me reveals that she continues to **understand the mechanics of sexual intercourse and the risk of pregnancy** (per Dr. Rippon). The evidence however reveals that she is once again **less objectively clear in her understanding or appreciation of the risks of sexually transmitted infection.**’ Interim declaration she lacks mental capacity pending the completion of support around sex education.

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Re B (Capacity: Social Media: Care and Contact)
[2019] EWCOP 3

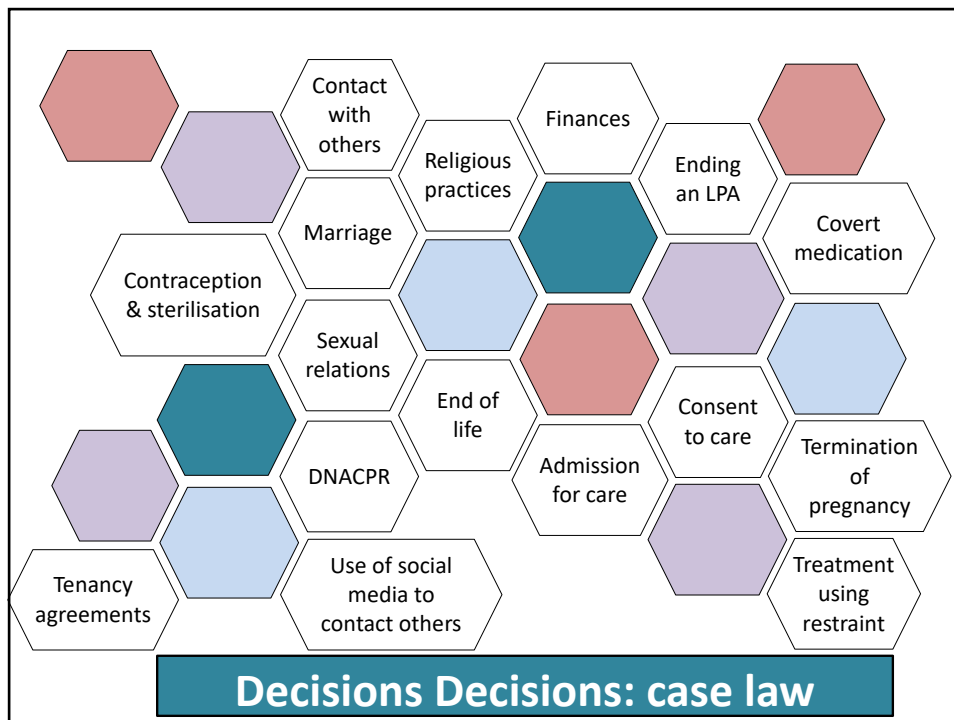
Note: Not in the ruling but they could be added later and are relevant to this case (and shown in other cases). Mental capacity for decisions to:

- ▶ **Contraception** (case law on what to understand already)
- ▶ **Marriage** (case law on what to understand already)
- ▶ **Tenancy agreement** (case law on what to understand already)
- ▶ **Deprivation of liberty** – the care plan of limiting and controlling access to Mr C and social media plus effectively escorted outside.

Re A (Capacity: Social Media and internet use: Best interests)
[2019] EWCOP 2

A week before Bridget's case, Mr Justice Cobb heard a different case about a 21 year old man with a learning disability living in supported living. This case mirrors Bridget's in many respect and considers capacity to a similar range of decisions. In this case Mr Justice Cobb decided what information was needed to assess capacity for social media contact with others.

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S.3(4): 'The information relevant to a decision includes information about the reasonably foreseeable consequences of (a) deciding one way or another, or (b) failing to make the decision.'

The courts have given detailed guidance about the information that a person needs to understand, retain and use or weigh for numerous decisions including:

- ✓ **Sexual relations:** *A Local Authority v JB*, [2020] EWCA Civ 735.
- ✓ **Use of social media & internet:** *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2
- ✓ **Residence, care and contact with others:** *LBX v K, L and M* [2013] EWHC 3230 (Fam),
- ✓ **Refusing a Care Act needs assessment:** *A Local Authority v GP (Capacity - Care, Support and Education)*
- ✓ **Hoarding:** *Re: AC and GC (Capacity: Hoarding: Best Interests)* [2022] EWCOP 30

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**Books
Posters
and an App**

**Mental Capacity Act 2005
Deprivation of Liberty Safeguards (DoLS)
Mental Health Act 1983**



Books



Working with the Mental Capacity Act 2005 (3rd edition)
The 3rd edition (2018) of this best selling book provides one of the most comprehensive and practical guides to the Act available. Designed for daily use by health and social care professionals it explains how to use and apply the Act in practice. It contains a series of charts, tables and other tools to better explain different parts of the Act. Specific issues such as consent, safeguarding adults and interaction with the Mental Health Act are all addressed. A chapter considering how different services such as GPs, CCGs, acute hospitals, hospices, dentists, ambulance staff, care homes and others should use the Act.

Reviews on Amazon include: "Very easy reading and great references to updated case law. I'm glad I got this book" "It's a brilliant guide to reflect on when carrying out assessments" "Very pleased"

250 pages - A4 - Paperback - £22.50 - ISBN: 978-0-9552349-5-8
Authors: Steven Richards and Aanya F Mughal



Deprivation of Liberty Safeguards (DoLS) Handbook
A comprehensive guide on DoLS for use by care homes, hospitals, DoLS assessors, advocates and anyone needing a practical but detailed explanation of the safeguards.

Reviews on Amazon include: "Excellent!" "A must read for DoLS" "Simple to understand" "Useful easy reference" "Brilliant guide to complex process" "A must have very good guide" "Clear, comprehensive, practical guide" and "Very informative book which clearly outlines the principles of the DoLS and how to analyse and assess a situation."

147 pages - A4 - Paperback - £19.50 - ISBN: 978-0-9931324-0-7
Authors: Steven Richards and Aanya F Mughal



Working with the Mental Health Act (3rd edition)
Each detention section is explained in terms of the detention criteria, powers, time limits, duration, staff needed, leave of absence, patient rights, treatment rules, means of discharge, forms required and Code of Practice guidance.


Reviews on Amazon: "Brilliant" "Essential" "Best book by far for this subject" "Excellent book, factual and easy to use" "Contains lots of understandable and detailed information" "Very good"

160 pages - A4 - Paperback - £17.50 - ISBN: 978-0-9552349-6-1
Authors: Steven Richards and Aanya F Mughal

How to order:

- Online at: www.amazon.co.uk or www.bookswise.org.uk
- Available to order in-store from all good bookshops

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Scope and impact of the MCA

Court of Appeal – Master of the Rolls, Lord Dyson:

‘As I have said, the Mental Capacity Act does not impose impossible demands on those who do acts in connection with the care or treatment of others. It requires no more than what is **reasonable, practicable and appropriate.**’ [2013] EWCA Civ 69

‘It is not sufficient for the Defence to establish simply that an officer **acted honestly and in good faith....**For my part I am satisfied that where the provisions of the Mental Capacity Act apply, the common law **defence of necessity has no application.**’
ZH v Police for the Metropolis [2012] EWHC 604

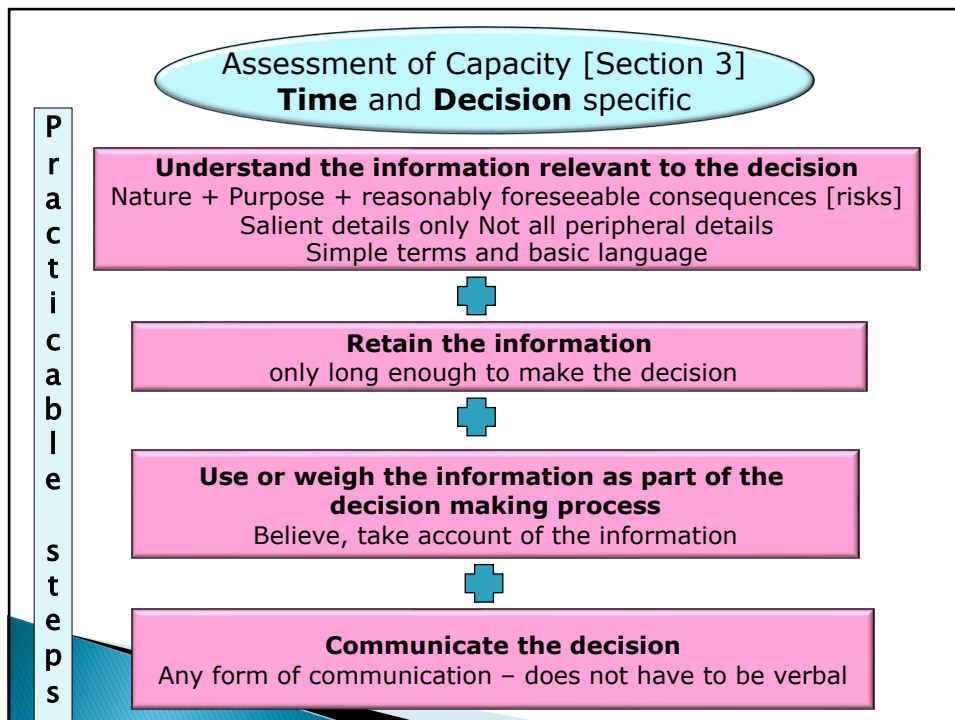
A man with autism + public swimming pool + police. Trespass to the person, assault and battery and false imprisonment.. **£28,250** damages



College of Policing


“If police officers are the only professionals present at an incident in which questions of mental capacity are raised, they are accountable for ensuring that any assessment or intervention is lawful under the MCA.”

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**Executive capacity/dysfunction
= USE OR WEIGH:**



Kings College Hospital NHS Trust v C and V [2015] EWCOP 80

Judge: *'the capacity actually to engage in the decision making process itself and to be able to see the various parts of the argument and to relate one to another.'*

'What is required is that the person is able to employ the relevant information in the decision making process and determine what weight to give it relative to other information required to make the decision.'

Insight – The Court of Appeal ([2006] EWCA Civ 28) “..., we think that it is plain that a patient will lack that capacity if he is not able to appreciate the likely effects of having or not having the treatment. ..this was the position so far as Mr B was concerned in that he did not accept even the possibility that he might be mentally ill and thus in need of treatment”.

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Executive dysfunction & mental capacity

- A person may give give coherent answers in an interview, but be unable to translate their intentions into action due to **executive dysfunction**.
- **A Local Authority v AW [2020] EWCOP 24:** ... *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.*
- **NICE, Decision-making and mental capacity (p.42):** *'The completion of tasks that involve several steps or decisions normally involves the operation of mental processes known as 'executive functions'. If these executive functions do not develop normally, or are damaged by brain injury or illness, this can cause something called 'executive dysfunction'. This involves a range of difficulties in everyday planning and decision-making, which can be sometimes hard to detect using standard clinical tests and assessments.'*

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NICE, Decision-making and mental capacity, para 1.4.1.9: *Structured assessments of capacity for individuals in this group (for example, by way of interview) may therefore need to be supplemented by real-world observation of the person's functioning and decision making ability in order to provide the assessor with a complete picture of an individual's decision-making ability.'* Cited in *Sunderland City Council v AS and Others [2020] EWCOP 13*

 HM Government

**Mental Capacity Act 2005
Code of Practice**
Including the Liberty
Protection Safeguards

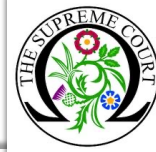
'If the person cannot understand (and/or use and weigh) the fact that there is a mismatch between what they say and what they do when required to act, it can be said that they lack capacity to make the decision in question. However, this conclusion can only properly be reached when there is clear evidence of repeated mismatch between what the person says and what they do. This means that in practice it is unlikely to be possible to conclude that the person lacks capacity as a result of their impairment on the basis of one single assessment.'

 (para 4.38)

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Capacity in the supreme court

JB v A Local Authority [2021] UKSC 52



- The importance of clearly formulating the 'matter' upon which the person's decision is required.
- The correct formulation of 'the matter' leads to a requirement to identify the information **relevant** to the decision. This includes the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision.
- The ordering of the assessment:

(1) Is the person able to make a decision in relation to the matter?

This 'should not involve a refined analysis of the sort which does not typically inform the decision...made by a person of full capacity.'

If not,

(2) Is the inability because of an impairment of or a disturbance in the functioning of, the mind or brain? 'The second question looks to whether there is a clear causative nexus between P's inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P's mind or brain.'



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'Best Interests' (Section 4)

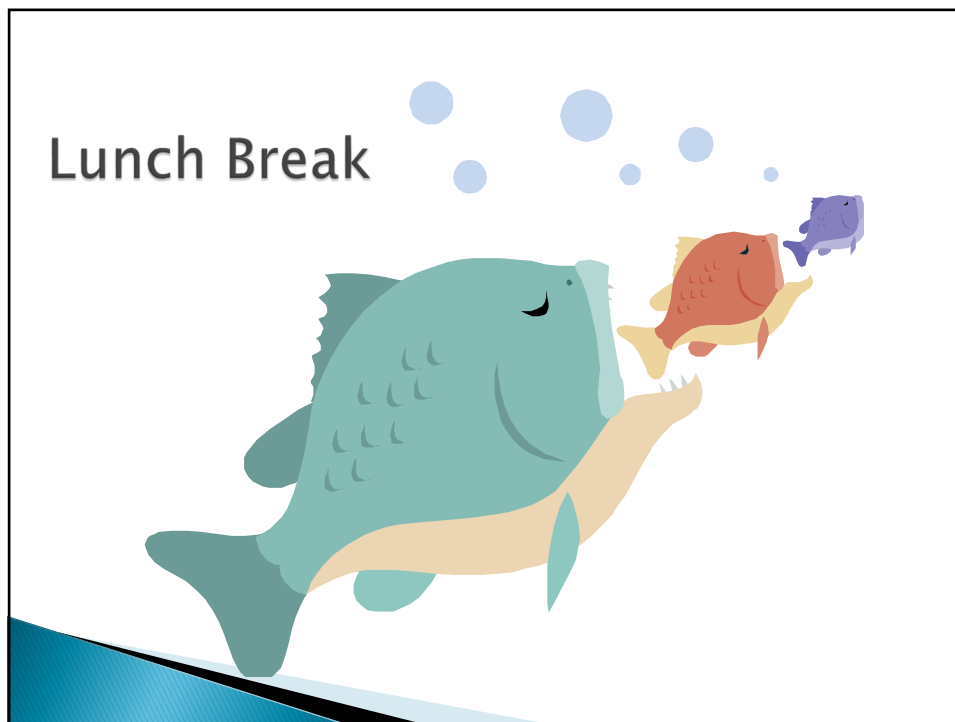
1. All **relevant circumstances**, *diagnosis, care needs etc*
2. The person's *reasonably ascertainable* past and present **wishes/statements + their beliefs and values** + any other factors they would take into account
3. **Consult** others as *practicable and appropriate* to do so. Examples: carers, relatives, attorneys, deputies,
4. **Consider less restrictive options** - can the same result be achieved in a less restrictive way?

- ▶ Will the person have **capacity sometime in the future** in relation to the matter? If so, when?
- ▶ Must **encourage** and permit the person to participate
- ▶ Don't base the 'best interests' decision solely on **age, appearance, behaviour or condition**
- ▶ If the decision is about **life-sustaining treatment**, do not be motivated by a desire to bring about the person's death.

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	<p>Best Interests = the Gold Standard: <i>'A child, unlike most adults, lacks the capacity to make a decision in relation to future arrangements for him. Where there is an issue in relation to them, the court is there to take the decision for him as it is for an adult who lacks that capacity. The gold standard, by which most of these decisions are reached, is an assessment of his best interests.'</i></p> <p><i>'We are satisfied that the current law of England and Wales is that decisions about the medical treatment of children, like those about the medical treatment of adults, are governed by what is in their best interests.'</i></p> <p>Alder Hey Children's NHS Foundation Trust v Alfie Evans [2018] UKSC</p>
 <p>The state of health care and adult social care in England 2017/18</p>	<p>October 2018 www.cqc.org.uk</p> <p><i>'Good practice in applying the Deprivation of Liberty Safeguards (DoLS) and the Mental Capacity Act (MCA) closely aligns with putting the person at the centre of care and focusing on human rights.'</i></p>

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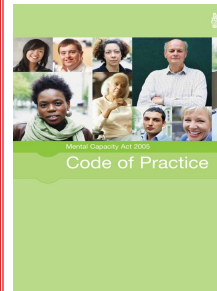


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When to assess capacity?

*'The presumption of capacity is important; it ensures proper respect for personal autonomy by requiring any decision as to a lack of capacity to be based on evidence. Yet the section 1(2) presumption like any other, has logical limits. **'When there is good reason for cause for concern...the presumption cannot be used to avoid taking responsibility for assessing and determining capacity.'***
Royal Bank of Scotland PLC [2020] UKEAT 0266_18_2702

Unwise decisions? 'There may be cause for concern if somebody repeatedly makes unwise decisions that put them at significant risk of harm or exploitation or makes a particular unwise decision that is obviously irrational or out of character. These things do not necessarily mean that somebody lacks capacity. But there might be need for further investigation...' (Paragraph 2.11 MCA Code).



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SELF NEGLECT: *'It should be noted that self-neglect may not prompt a section 42 enquiry. An assessment should be made on a case by case basis. A decision on whether a response is required under safeguarding will depend on the adult's ability to protect themselves by controlling their own behaviour. There may come a point when they are no longer able to do this, without external support.'* (Care Act statutory Guidance)



May 2014: South Essex Partnership University NHS Foundation Trust and Bedford Borough Council

- ▶ 'A man with a diagnosis of paranoid schizophrenia was left 'in squalor' after his care team failed to adequately assess his mental capacity to look after himself at home, an ombudsman investigation has found.'
- ▶ Failure to carry out a proper capacity assessment of his ability to make decisions about managing food and looking after himself was a service failure. Thus, the presumption of mental capacity resulted in him being malnourished. A joint payment of £2000 for the impact of failing to properly assess his capacity and £500 to his sister for distress and inconvenience was recommended (JW 111510 and 11010604)

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Case study - Mr A – Self-neglect?

18 December 2015 – Mr A is 64 years old and lives in a nursing home. He has multiple health conditions, including diabetes, epilepsy and Korsakoffs Syndrome. A specialist wound service notes Mr A is refusing all medication and wound care and that his cellulitis (skin infection) is urgent, deteriorating and painful. The same day his GP assesses that he lacks capacity to personal care and wound care. Although he understands about the wounds, when offered hospital admission locally to treat them he refuses saying the only hospital he can be treated in is Kings College London (fixed delusion). He is now having regular seizures due to refusal of medication. A best interests meeting is requested to consider his care and treatment.

Just to be clear! Given his co-morbidities the wounds will not get better on their own. Without direct treatment they will deteriorate further...Mr A will always consistently refuse the wound care he needs...

12 January – a best interest meeting takes place. Outcomes recorded as.. discuss private hospital care with LPA as option (not an option), involvement of psychologist and to look for a different placement.

Any issues with the outcome of best interest meeting? What options could/ should have been considered in relation to the decision?

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15 February – a month after the best interests meeting the GP makes a referral for a Mental Health Act assessment to detain him to treat the leg wounds. During all of this time Mr A is refusing care and his wounds are deteriorating. *Why is the Mental Health Act not appropriate?*

4 March – a consultant psychiatrist assesses Mr A and confirmed he lacked capacity to his care needs and medication. They note he is at risk of serious physical injury or even death given his refusal of treatment. The use of the MHA is not deemed appropriate (treating ulcerated legs is not a treatment for mental disorder) + his mental disorder is NOT of a nature/degree requiring in-patient mental health treatment.

12 May – Four months after the best interests meeting, Mr A is continuing to refuse care and treatment and nurses from CCG are continuing to look for alternative placement. A professionals meeting notes his legs are in a very poor state with an offensive smell.

19 May – GP contacts mental health team (again) who advise that MHA cannot be used for enforcing wound care. One week later the GP notes a significant deterioration in Mr A's legs and makes another Mental Health Act referral!

It is now five months since the GP confirmed Mr A lacked capacity – what can the MCA do to enforce the care/treatment?

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22nd July – The nursing home contact GP as the leg wounds now contain maggots and they are concerned for health of other residents as when Mr A walks around the home the maggots are dropping out of his wounds (as always he is refusing appropriate wound care/coverings). The GP calls the local hospital where the on-call consultant tells them that if Mr A refuses care it cannot be imposed so hospital admission is not appropriate.

Is the on-call consultant right? If not, what should they have said?

Ambulance staff: ambulance staff attend the care home a number of times and request Mr A to come to hospital with them – Mr A refuses saying he only wants to go to Kings College hospital. The ambulance staff say they cannot do anything as he is refusing consent to go.

What should the ambulance staff have done? (legally!)

24th July – another MHA referral is made and as before is rejected.

Later that day Mr A collapses in the nursing home and dies.



Safeguarding review finds poor legal knowledge exacerbated problems in case where 64-year-old died after maggots infested his leg wounds

by **Tristan Donovan** on October 26, 2017 in **Adults, Mental Health**

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East Sussex Safeguarding Adults Board review

www.eastsussexsab.org.uk/policy-procedures/safeguarding-adult-reviews

Capacity assessments:

*"..there were a number of points at which mental capacity assessments should have been completed. That such assessments were not done indicates that **knowledge and understanding of the Mental Capacity Act is not as well integrated within practice** as it needs to be."*

*"Mr A was, by all accounts, an articulate man who could forcefully express his views on where he wanted to live, and whether or not he accepted care and treatment. Information from a number of sources indicates that he did **not believe what was told** about his medical conditions, and **remained fixed on the belief that the only treatment he required was from Kings Hospital London**, where he had received treatment in the past.."*

"At most points at which capacity was assessed, he was found to lack capacity to make decisions relating to his living situation, and to his care and treatment."

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Best interests:

*“..the best interests meeting that took place in January 2016, in confirming the plan to continue to search for an alternative placement, did **not** address the question of how daily care and treatment was to be secured. Second, throughout the ensuing period, as his condition deteriorated further, lawful means of either securing care and treatment or addressing the factors underlying his refusal were not actively sought. Best interests interventions **using the protections of the MCA** were not actively pursued,..”*

*“With one exception (in January 2016) there was an **absence of explicit best interests decision-making processes**, representing missed opportunities to take a more proactive approach to setting in place a strategy for securing his best interests, ...”*

Court of Protection:

*“There is, however, **no evidence that any of the agencies involved sought legal advice** that would have enabled them either to be confident in pursuing a best interests intervention that would ensure treatment, or to seek authority from the Court.”*

*“..**no consideration was given to referring Mr A's case to the Court of Protection**, when such a referral would have been entirely appropriate at various points during the final six months of his life.”*

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Published April 2019
Revitalise Respite Holidays (18 002 187)

Local Government &
Social Care
OMBUDSMAN

Self Neglect versus using the Mental Capacity Act

‘John’ suffers from Huntingdon’s Disease and his wife ‘Jean’ is his main carer. In September 2017 John went into a care home for **two weeks respite** while his wife had heart surgery. The care providers pre-admission assessment noted that John **‘does not have capacity to make many decisions..’** and that he may resist personal care. A body-map on admission showed his skin was intact and his Waterlow (skin integrity) score was 8 – not within a risk category.

Two weeks later when Jean collected John to go home she hardly recognised him. He was dirty, unshaven and smelled. When she got home she found his sock was stuck to his foot with pus. An emergency GP diagnosed a **grade 4 (highest level) pressure sore** on his ankle. The GP raised a safeguarding alert with the local council about the sore on Mr X’s ankle.

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Local Government &
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Published April 2019
Revitalise Respite Holidays (18 002 187)

*'The report which the care provider completed for the safeguarding enquiry said that **Mr X declined personal care** and was often already dressed when day staff arrived.'*

*'The care provider's **head of nursing** provided further information to the safeguarding enquiry in November 2017. She said "We are mindful that guests **maintain their independence and allow them dignity and choice for themselves.**"*


The care provider apologies and refunds the cost of the two week stay plus offers another stay free of charge!!!

The Ombudsman:

*'In addition to the actions already taken, the care provider will (within one month of my final decision) put in place additional **training for staff on the Mental Capacity Act** and let me have details;*

*The care provider will also within one month of my decision offer Mr and Mrs X a further **payment of £500** in recognition of the considerable distress caused to them both by the failure of care.'*

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Self-neglect: the role of the court

CD v London Borough of Croydon [2019] EWHC 2943

The local authority made an urgent application to Court.

Mr Justice Cobb: *'It is apparent on my review of the material that CD's capacity to make decisions about his care has **fluctuated...**'*

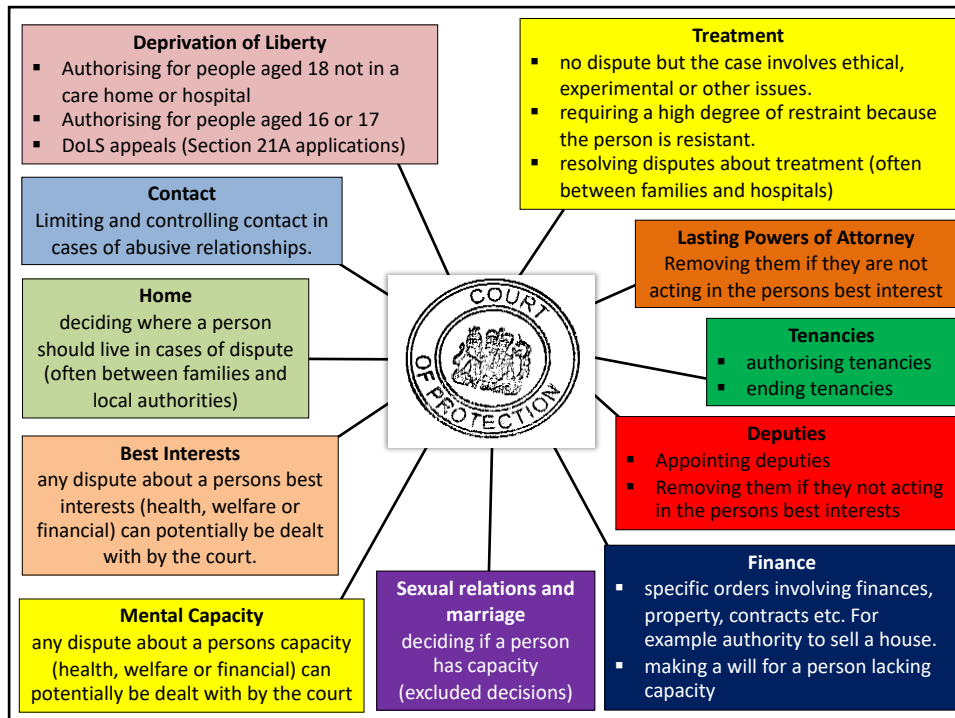
*'I am able to state, on the evidence that I have received, that in a number of respects there is **evidence of impairment of, or disturbance in the functioning of, the mind or brain...**'*

'On the basis of the information available to me today and drawing together the strands of the history and in particular those parts of his psychiatric history which are known, 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 granted an interim order under **s.48 MCA** giving the local authority the power to:

- ✓ **Gain access to his accommodation**
- ✓ **Provide appropriate care**
- ✓ **Make his accommodation safe for human habitation.**

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Contact - the limits of safeguarding....
Milton Keynes Council v RR [2014] EWCOP B19
(case on BBC news website and BBC Radio 4)

October 2012 older woman with dementia living with her son who provides care. Several safeguarding alerts raised (bruising and cuts to face), LA staff visit the woman at home while son is out, she is unable to explain cuts and bruises so LA staff remove her to a care home (she 'willingly left her home') pending safeguarding investigation.

Local authority **FAIL** to apply to Court of Protection beforehand for authority to remove (the son would object) **AND** once she is removed they take **19 days to apply to Court** for deprivation of liberty and Art 8 breach (private & family life).

Judge Mort: *"The way they have dealt with this case has been woefully inadequate from the start. It has resulted in avoidable and unlawful interference in respect of RR's Art. 5 right to liberty and security of person and her Art. 8 right to respect for her private and family life and her home."*

Urgent access to the Court - DCC v HLH [2019] EWCOP 9 - Lord Justice Baker
'All practitioners and professionals working in this field ought to be aware that there is always a judge of the Family Division on duty available to sit in the Court of Protection twenty-four hours a day, seven days a week, every day of the year, to deal with urgent applications, usually by telephone.'

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Safeguarding & Contact - the limits of DoLS



7th December 2018

Council's restrictions on couple's contact were neither 'justifiable, proportionate nor necessary'

*'Local authorities cannot impose restrictions on a person's contact with their relatives without lawful authorisation and **must refer the matter to the Court of Protection** for determination at the earliest opportunity where there is a dispute.'*

*'Deprivation of Liberty Safeguard (DoLS) authorisations and the conditions under an authorisation do **not** provide lawful authority for contact with family members to be restricted.'*

'In a recent case, SR, an 83-year-old woman diagnosed with Alzheimer's dementia, lost precious contact time with her husband, JR, after a council unlawfully placed restrictions on their contact by failing to make an application to the courts.' **Note:** action to restrict contact was triggered by safeguarding concerns: *SR v A Local Authority [2018] EWCOP 36*

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Safeguarding adults – removing people from family/home

A Local Authority v WMA [2013] EWHC 2580

- ▶ 'Mark' is 25 years old and has atypical autism and pervasive development disorder, IQ of 64. He leads an isolated and insular life with his mother. Local authority concerned about the impact of the isolation on his long term development.
- ▶ Lives in 'squalid' state, mother generally refuses all offers of help and Mark follows this, Court orders have failed to persuade mother to engage with support, 12 hour weekly support 1 to 1 for Mark reduced to 2 hours by mother. Have had to be moved to new housing by council due to terrible state of previous and this new housing has required a special deep clean after a short period with Mark and his mother living there.
- ▶ His mother has hindered Mark's adult development. She dominates his life, keeps him at home doing nothing for most and her low expectations of him hold him back.
- ▶ Not enough food in house, out of date foodstuffs and dirty environment. Mark does not have enough or adequate clothing. His mother wears one of his new t-shirts to the Court hearing!

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Safeguarding adults – removing people from family/home

A Local Authority v WMA [2013] EWHC 2580

▶ **His Honour Judge Cardinal:**

‘What orders are necessary? I find that these are:

- ▶ *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;*
- ▶ *and the local authority will have the power, of course, in addition, to sign the **tenancy agreement** on his behalf.*

*These measures are **proportionate and necessary.**’*

- The action will also lead to a **deprivation of liberty** (community) which the judge authorises.
- **Contact** between the mother and son will continue but be managed with the agreement of the court.

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Article 8 – Private and Family Life (ECHR) and the Mental Capacity Act

A Local Authority v WMA [2013] EWHC 2580



His Honour Judge Cardinal:

*“I must bear in mind at all times **Article 8** of the Human Rights Convention. The right to respect for WMA’s private and family life should be borne in mind. Any interference with this must be **necessary and proportionate** in a democratic society.”*

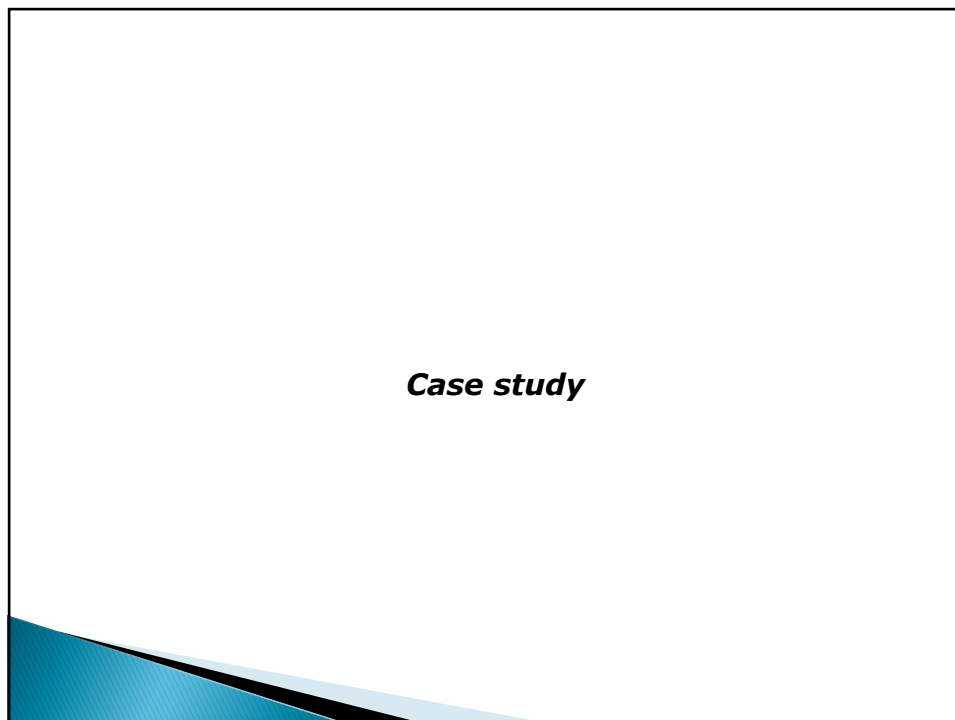
*“The **2005 Act is in itself compliant with that Article** but any intrusion directed by me into WMA’s autonomy must be consistent with his best interests.”*

*“I shall, in accordance with established practice, ascertain the **best interests** of WMA and if they justify a **necessary and proportionate** violation of those rights.”*

*“I accept, of course, the local authority must **continue to respect private and family life** for WMA. He must continue to see MA for regular contact....”*

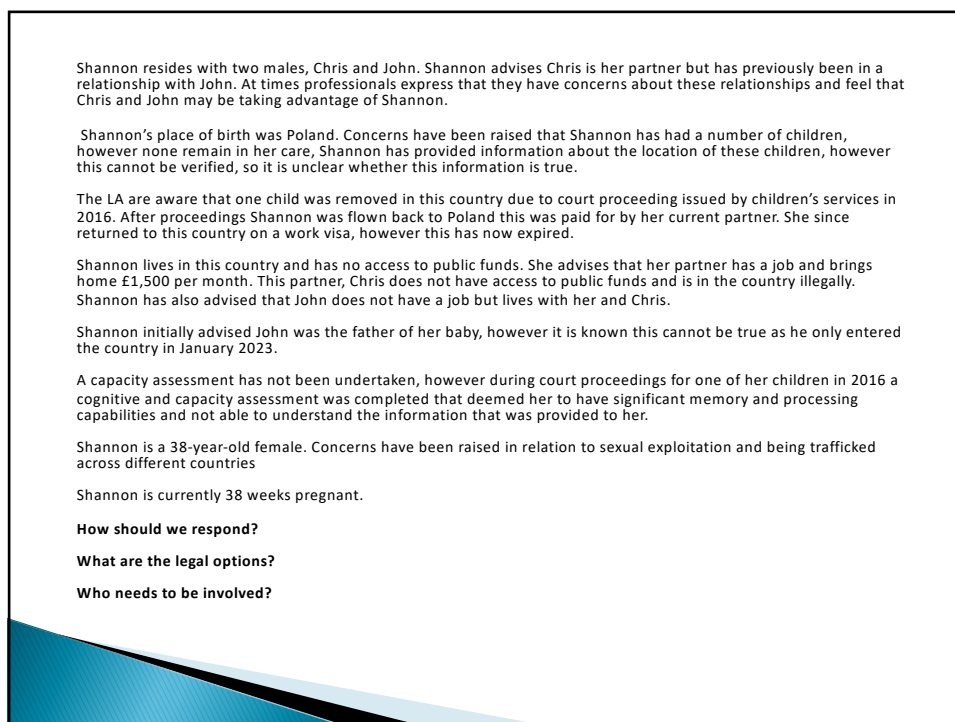
Court of Appeal has upheld this approach – Best Interests first and then consider Article 8: *K v LBX v L [2012] EWCA Civ 79*

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Case study

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Shannon resides with two males, Chris and John. Shannon advises Chris is her partner but has previously been in a relationship with John. At times professionals express that they have concerns about these relationships and feel that Chris and John may be taking advantage of Shannon.

Shannon's place of birth was Poland. Concerns have been raised that Shannon has had a number of children, however none remain in her care, Shannon has provided information about the location of these children, however this cannot be verified, so it is unclear whether this information is true.

The LA are aware that one child was removed in this country due to court proceeding issued by children's services in 2016. After proceedings Shannon was flown back to Poland this was paid for by her current partner. She since returned to this country on a work visa, however this has now expired.

Shannon lives in this country and has no access to public funds. She advises that her partner has a job and brings home £1,500 per month. This partner, Chris does not have access to public funds and is in the country illegally. Shannon has also advised that John does not have a job but lives with her and Chris.

Shannon initially advised John was the father of her baby, however it is known this cannot be true as he only entered the country in January 2023.

A capacity assessment has not been undertaken, however during court proceedings for one of her children in 2016 a cognitive and capacity assessment was completed that deemed her to have significant memory and processing capabilities and not able to understand the information that was provided to her.

Shannon is a 38-year-old female. Concerns have been raised in relation to sexual exploitation and being trafficked across different countries

Shannon is currently 38 weeks pregnant.

How should we respond?

What are the legal options?

Who needs to be involved?

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Training Events 2019 – London – see handout for details

Tenancy agreements and the Mental Capacity Act

Hoarding and the law

Liberty Protection Safeguards (LPS)

Advanced assessing capacity and best interests

DoLS Mental Health Assessors refresher

Children, young people and Deprivation of Liberty



BIA legal update/annual refresher

BIA report writing

AMHP legal update

DoLS authorising signatories

Court of Protection – report writing

Safeguarding adults – level 3

Mental Health Act administration – skills and practice

LPS Conference: 4th October 2019

AMHP Conference: 6th December 2019

Email: assistant@edgetraining.org.uk www.edgetraining.org.uk

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Modern Slavery Act 2015



Modern Slavery Act 2015

*Importantly, European jurisprudence remains key, with the definition of an offence under s 1 to be construed in accordance with Art 4 of the European Convention on Human Rights (ECHR). **Article 4 of the ECHR** states:*

- 1. No one shall be held in slavery or servitude.*
- 2. No one shall be required to perform forced or compulsory labour.*

For there to be trafficking, the travel of someone has to be done with a view to them being exploited. So what is the definition of exploitation? Section 3 of the Act defines exploitation as covering:

- *Slavery, servitude and forced or compulsory labour (s 3.2);*
- *Sexual exploitation (s 3.3);*
- *Removal of organs (s 3.4);*
- *Securing services etc by force, threats or deception (s 3.5); and*
- *Securing services etc from children and vulnerable persons (s 3.6).*

Paramjit Ahluwalia, Garden Court Chambers

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Modern Slavery Act 2015

Modern Slavery Act 2015 and learning disabled people

The Guardian, 14 June 2019

Father and son jailed for holding man as slave at scrapyard in south Wales, near Swansea. The 20 year old victim had *learning disabilities* and was given one meal a day (tin of soup or can of beans) but compelled to work for 16 hours a day and not paid. He was homeless before being picked by the father and son.

The Independent, 30 August 2019

Woman who forced pensioner into modern slavery for four years is jailed

'Maria Miller, 65, made the now 74-year-old woman sleep on the floor and carry out tasks such as weeding the garden or clearing out animal shelters in exchange for meals or being allowed inside the house. Miller, from Chingford, also took control of the victim's bank account,..'

*'The court heard Miller met the victim, who has **learning difficulties**, outside a pet shop and invited her to volunteer in her charity shop.'*

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Inherent Jurisdiction: the great safety net



What? A doctrine of **common law**, which gives the high court the power to make orders and grant injunctions, when there is no statutory power to intervene – the great safety net.

When? '...the inherent jurisdiction can be exercised in relation to a **vulnerable adult** who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either:

- i. under constraint or
- ii. subject to coercion or undue influence or
- iii. for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.' Re: SA [2005] EWHC 2942 (Fam)

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When all else fails.... the Inherent Jurisdiction

In the case of ***A Local Authority v DL [2011] EWHC 1022 (Fam)*** the High Court considered the use of the inherent jurisdiction to safeguard a vulnerable older couple living with their adult son. The judge stated:

*'Each case will, of course, have to be carefully considered on its own facts, but if there is evidence to suggest that an adult who does not suffer from any kind of mental incapacity that comes within the MCA but who is, or reasonably believed to be, **incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors** they may be entitled to the protection of the **inherent jurisdiction ...**'*

The judge confirmed the inherent jurisdiction could be applied.

Southend-on-Sea Borough Council v Mr Meyers [2019] EWHC 399 (Fam) 97 year old man living with his son...*'...the two men have become so enmeshed that the autonomy of each has been compromised. In reality, KF exerts an influence over his father which is malign in its effect if not in its intention. The consequence is to disable Mr Meyers from making a truly informed decision which impacts directly on his health and survival.'*