

Shared Insights

Mental Capacity

Chris Stark and Clare Shepherd

8 November 2023

Key Highlights from the Session

Our Mental Capacity Shared Insights forum took place on 8 November 2023. It was hosted by Chris Stark (Partner) and Clare Shepherd (Senior Associate). We had just under 250 delegates in attendance, and it was fantastic to have so many people joining us.

During the session, Chris talked through some recent cases that have been heard in relation to mental capacity, care and

of Care report relating to the quality of mental health care and the Deprivation of Liberty Safeguards (DoLS). Clare focussed on transition planning in the Court of Protection and went through a helpful transition planning checklist.

Case law update

Chris ran through recent caselaw on the following topics:

The tricky interface between the Mental Health Act (MHA) and the MCA: Manchester University Hospital NHS Foundation Trust v JS & Others (Schedule 1A Mental Capacity Act 2005) [2023] EWCOP 33

At the initial hearing in this case, the judge held that a 17 young girl (JS), for whom there was no suitable community care provision, was ineligible to be deprived of her liberty on a hospital ward because she fell within Case E of Schedule 1A to the Mental Capacity Act (MCA).

JS could have and should have been detained under the MHA instead. The decision was appealed, in part because psychiatrists had assessed JS and did not consider it appropriate to detain her under the MHA. However, the appeal was dismissed and the first instance decision upheld. The appeal judge endorsed some practical suggestions given by

cases (set out in paragraph 118 of the judgment).

Whether a diagnosis is required under the MCA: North Bristol NHS Trust v R [2023] EWCOP 5 and An NHS Trust v ST & Another [2023] EWCOP 40

Both of these cases have confirmed that the MCA does not require a formal diagnosis before an impairment of, or



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disturbance in the functioning of, the mind or brain can be found. It is a question of fact for the court to answer, based on the evidence before it. However, in *TW v Middlesbrough Council* [2023] EWCOP 30, a diagnosis of Learning Disability (LD) was

placement. Despite expert evidence that Tony did not meet the criteria for LD, it was accepted that Tony has a longstanding impairment of the mind or brain as a result of prolonged deprivation of communication, education and life experience,

decisions about his care and residence was as a result of this.

the desired placement.

Whether a patient can demand treatment that is not clinically necessary: *R (JJ) v Spectrum Community Healthcare CIC* [2023] EWCA Civ 885

This recent Court of Appeal case confirmed that a patient cannot demand medical treatment that is not clinically indicated and therefore not offered to him by a clinician. A patient's choice is limited to the available treatment options, and while they can choose among those options, they cannot force a clinician to provide a treatment that they consider inappropriate.

CQC State of Care report focus on DOLS

report, in relation to DOLS. In particular, the year on year increase in the number of applications to authorise deprivation of liberty and the delays in processing those applications were highlighted.

In relation to the Liberty Protection Safeguards (LPS), which have been delayed beyond the life of the current government, Clare

