



Deprivation of liberty provisions

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§1 — INTRODUCTION

Making decisions — New Mechanisms

MAKING DECISIONS

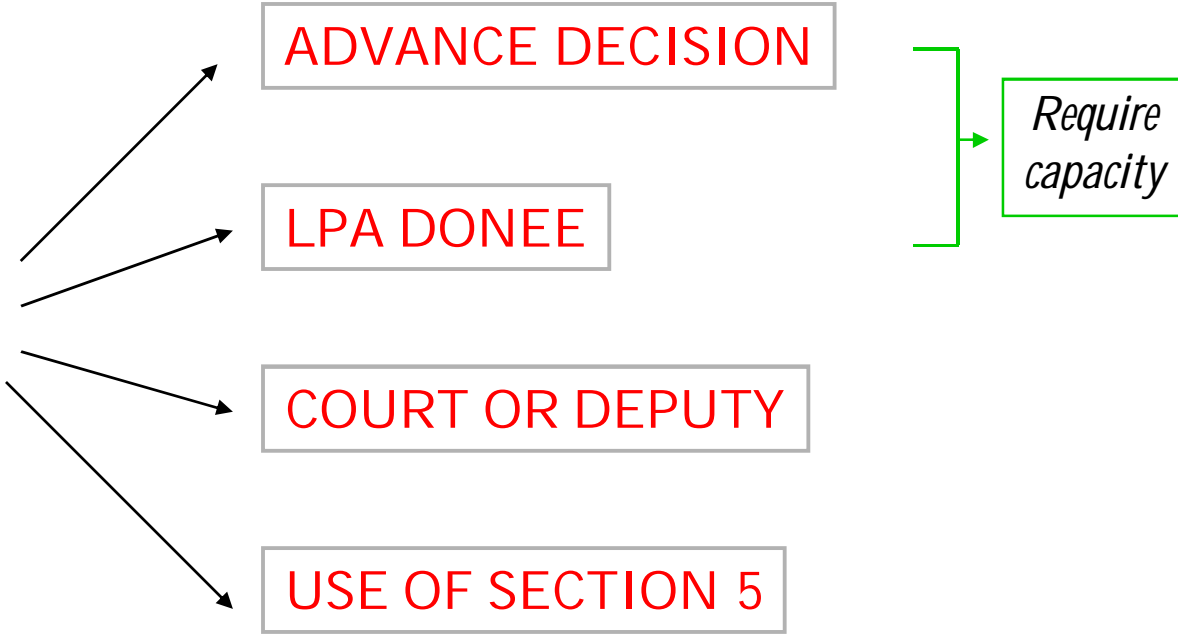
ADVANCE DECISION

LPA DONEE

COURT OR DEPUTY

USE OF SECTION 5

*Require
capacity*



§2 — DEPRIVATION OF LIBERTY

Ten commandments



1. Deprivation of liberty requires that the person has been confined in a particular restricted space 'for a not negligible length of time' (Storck). This is the 'objective condition'.
2. In addition, a 'subjective condition' must be met. This is that a person can only be considered to have been deprived of their liberty if they have not validly consented to the confinement in question.
3. The subjective condition is not met if the person lacks capacity to consent to their confinement (see *HL* and *Storck*).
4. The distinction between deprivation of liberty and restriction of liberty is one of degree or intensity, not one of nature or substance (see *Ashingdane v. UK*).
5. The starting-point is the specific situation of the individual concerned. Account must be taken of a whole range of factors arising in the particular case, such as the type, duration, effects and manner of implementation of the measure in question.
6. Of considerable importance is whether the professionals exercise 'complete and effective control' over the person's his care and movements, so that the individual is 'under continuous supervision and control and is not free to leave.' (See *HL*, *Storck* and *DE*)

Ten commandments



7. The state's obligations under the Convention are engaged if a public authority is directly involved in the detention (it is 'imputable to the state'), but also if the state has breached its positive obligation to protect the person against interferences by private persons.
8. This is because Article 5(1) imposes a positive obligation on the state to protect the liberty of its citizens. The state is obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge.
9. It is also essential that the person concerned should have access to a court and the opportunity to be heard in person or, where necessary, through some form of representation. Without this s/he will not have been afforded the fundamental guarantees of procedure applied in matters of deprivation of liberty. In the case of a detention on account of mental illness, special procedural safeguards may prove to be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (See *Winterwerp*).

Ten commandments



10. With regard to persons in need of psychiatric treatment in particular, the state is also under an obligation to secure to its citizens 'their right to physical integrity' under Article 8 of the Convention. Private psychiatric institutions, in particular those where persons are held without a court order, need not only a licence, but also competent supervision by the state on a regular basis of whether the confinement *and medical treatment* is justified (See Storck).

DOLs Checklist

The need for detention			
1	Has the person has been, or will they be, confined in a particular restricted space 'for a not negligible length of time'?	Yes	No
An absence of consent			
2	Has the person validly consented to this? (Requires capacity)	Yes	No
The cardinal principle			
3	Do professionals exercise 'complete and effective control' over the person's his care and movements, so that s/he is 'under continuous supervision and control and is not free to leave'?	Yes	No
The 'whole range of factors arising in the particular case'			
4	Is the hospital or home an open institution with complete freedom of movement?	Yes	No
5	Is the person on a secure ward?	Yes	No

DOLs Checklist

6	Is the person free to have personal contacts, write letters or make telephone calls?	Yes	No
7	Did the person object to or resist admission?	Yes	No
8	Has the person been physically prevented from leaving, e.g. by the use of restraint?	Yes	No
9	Has the person been returned by force or against their will?	Yes	No
10	Has a decision been taken that the person would be prevented from leaving if they made a meaningful attempt to leave?	Yes	No
11	Have carers requested that the person be discharged into their care, and their request been refused?	Yes	No

POs Checklist

12	Does the person have no choice (or only a very limited choice) about their life within the care home or hospital, e.g. as to where they can be within it, what they can do, who they can associate with and when and what they can eat?	Yes	No
13	Is the person allowed considerable freedom of movement within the care home or hospital?	Yes	No
14	Is the person's behaviour and movement controlled through regular use of medication or seating from which they cannot get up?	Yes	No
15	Does the person consider themselves deprived of their liberty? (HM WARNING)	Yes	No
16	Is the person's freedom of movement in fact enhanced thanks to the care provided in the hospital or home? (HM WARNING)	Yes	No

§3 — AUTHORISATIONS

General principle

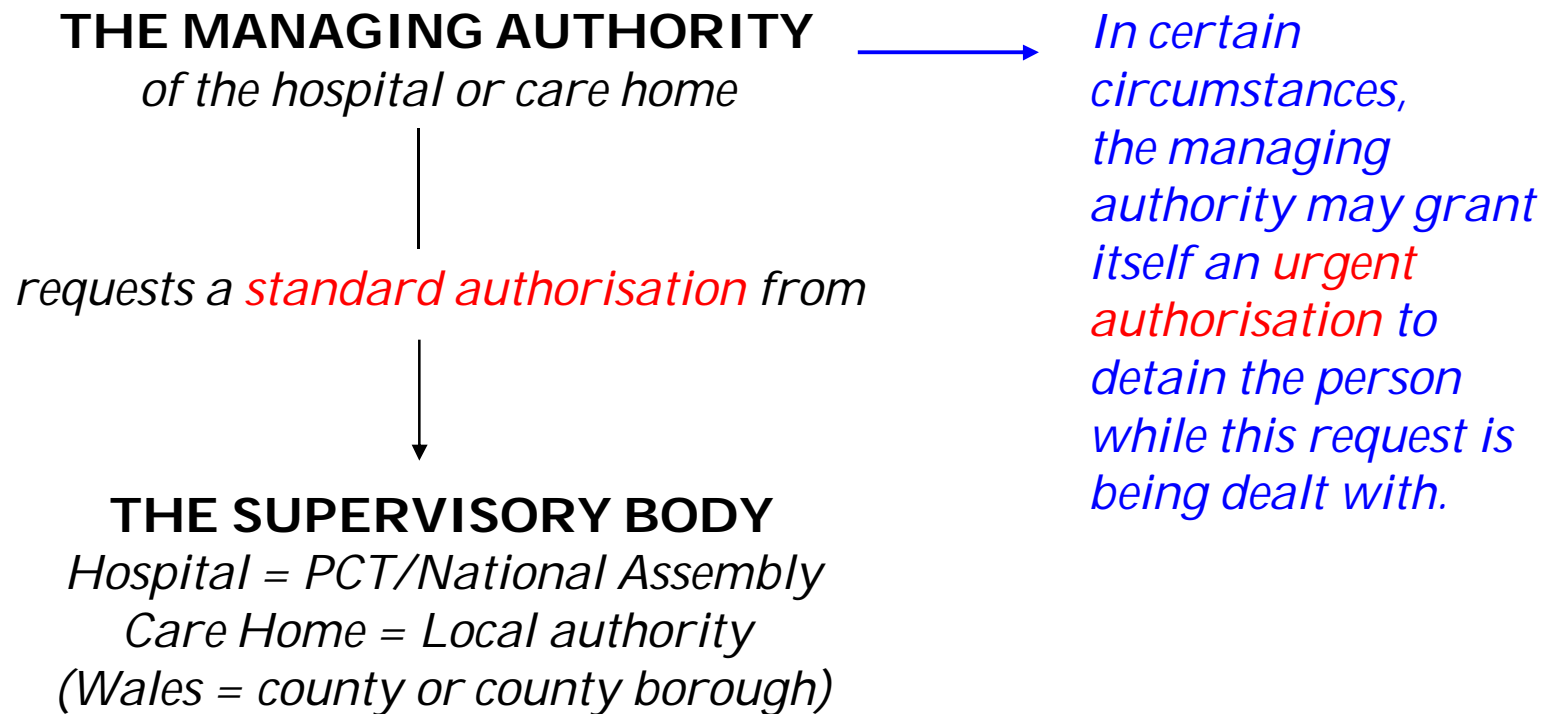
- The managing authority of a hospital or care home may deprive a person of their liberty by detaining them in circumstances which amount to a deprivation of their liberty

If

- A standard or urgent authorisation is in force which relates to the person and the hospital or care home in which s/he is detained
- *A person is not liable for non-criminal or non-negligent acts done for the purpose of the authorisation that is in force.*



Who is involved in the authorisation



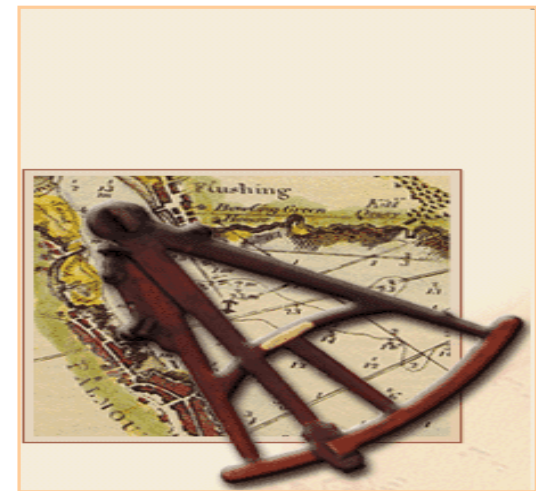
1. *A supervisory body may only give a standard authorisation under the above procedures.*
2. *A managing authority may only request a standard authorisation where authorised to do so under the MCA.*

Waypoint

- 3**
- **Detained resident**
 - **In a hospital or care home**
 - **Who meets the qualifying requirements**

One can think of the qualifying requirements as being equivalent to the sectioning criteria under the Mental Health Act.

As in the case of the 1983 Act, there has to be an assessment of whether the person meets these qualifying requirements.





Processing the request

Assess whether the person meets the qualifying requirements

The supervisory body must secure that the following assessments are carried out:

- a) an age assessment
- b) a mental health assessment;
- c) a mental capacity assessment;
- d) a best interests assessment;
- e) an eligibility assessment;
- f) a no refusals assessment.

The supervisory body must give a standard authorisation if all of the six assessments conclude that the person meets the qualifying requirement in question. It must not give a standard authorisation if this is not the case.



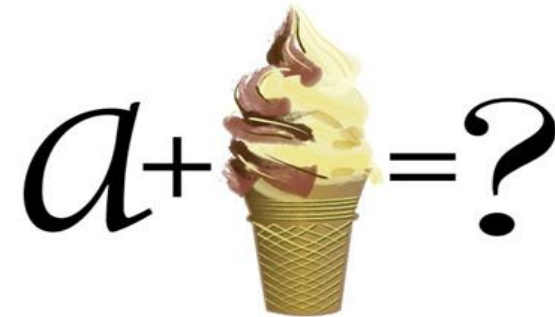
Age

<i>THE AGE REQUIREMENT</i>	THE ASSESSMENT
The person is aged 18 or over.	An age assessment is an assessment of whether the relevant person meets the age requirement.

X Children

Example

- John Daniels is aged 17.
- He does not meet the age requirement, and so a standard authorisation, authorising deprivation of liberty, may not be given.





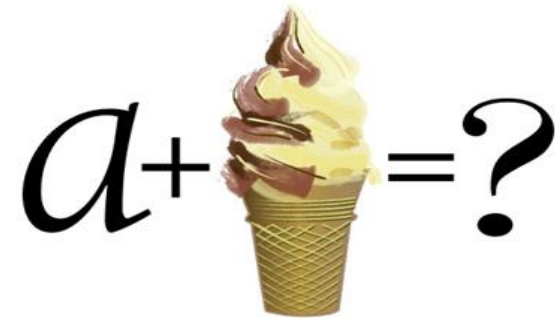
Mental health

<i>THE MENTAL HEALTH REQUIREMENT</i>	THE ASSESSMENT
The person is suffering from mental disorder within the meaning of the Mental Health Act 1983, but disregarding any exclusion for persons with learning disability.	<p>A mental health assessment is an assessment of whether the relevant person meets the mental health requirement.</p> <p>When carrying out a mental health assessment, the assessor must also—</p> <ul style="list-style-type: none">(a) consider how (if at all) the relevant person's mental health is likely to be affected by his being a detained resident, and(b) notify the best interests assessor of his conclusions

X Persons who do not have a mental disorder

Example

- Pamela Mason is aged 38. She has a learning disability. Her disability is not associated with abnormally aggressive or seriously irresponsible conduct.
- She satisfies the mental health requirement.
- Edward Deacon is aged 27. Apart from his dependence on drugs, there is no possible evidence of mental disorder.
- He does not satisfy the mental health requirement





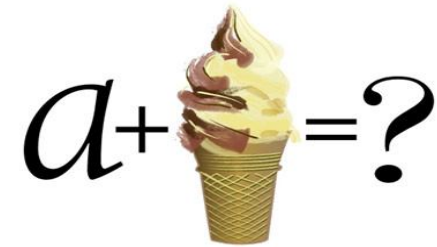
Mental capacity

<i>THE MENTAL CAPACITY REQUIREMENT</i>	THE ASSESSMENT
The person lacks capacity in relation to the question of whether or not s/he should be accommodated in the relevant hospital or care home for the purpose of being given the care or treatment in question.	A mental capacity assessment is an assessment of whether the relevant person meets the mental capacity requirement.

X **Persons who have the capacity to decide whether or not to reside in the care home or hospital**

Example

- Janet Drew has capacity in relation to the question whether or not s/he should be accommodated in Acacia Care Home for the purpose of being given the care or treatment in question. Leonard Parsons does not.
- Janet does not satisfy the mental capacity requirement.
- Leonard does.





Best interests

<i>THE BEST INTERESTS REQUIREMENT</i>	THE ASSESSMENT
<ol style="list-style-type: none"><li data-bbox="383 627 1025 722">1. The person is, or is to be, a detained resident.<li data-bbox="383 738 1025 882">2. It is in the best interests of the person for him to be a detained resident.<li data-bbox="383 898 1025 1106">3. In order to prevent harm to the person, it is necessary for him to be a detained resident.<li data-bbox="383 1121 1025 1425">4. It is a proportionate response to the likelihood of the person suffering harm, and the seriousness of that harm, for him to be a detained resident.	<p data-bbox="1061 627 1989 770">A best interests assessment is an assessment of whether the relevant person meets the best interests requirement.</p> <p data-bbox="1061 786 1989 930">The assessor must have regard to the conclusions of the mental health assessor, any relevant needs assessment and any relevant care plan.</p> <p data-bbox="1061 946 1989 1106">If the assessor concludes that best interests requirement is met, s/he must state in the assessment the maximum authorisation period.</p> <p data-bbox="1061 1121 1989 1297">This is one year, or such shorter period as s/he considers is the appropriate maximum period for the person to be a detained resident under the authorisation.</p> <p data-bbox="1061 1313 1989 1457">The assessor may also include in the assessment recommendations about conditions to which the standard authorisation is, or is not, to be subject.</p>

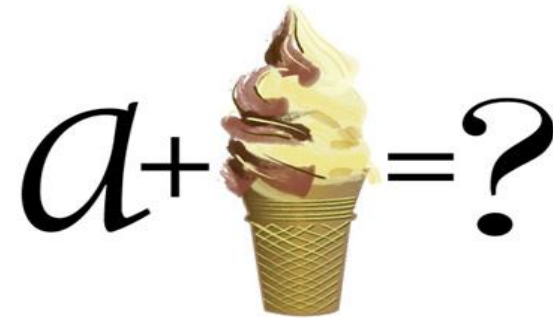


Best interests

- X** • Persons who are not in fact being detained.
- X** • Persons whose detention is not in their best interests.
- X** • Persons whom it is not necessary to detain in order to prevent harm to them.
- X** • Persons whose detention is not a proportionate response given the risk of harm.

Example

- Anthony Andrews is in a care home. He keeps trying to leave the care home, to return to his flat, which has in fact been sold to pay the care home's fees. He would be at significant risk if he lived alone. Before going to the care home, he lived in squalid conditions, was often picked up wandering at night and set fire to his kitchen.
- The best interests requirement is probably satisfied. In order to prevent harm to him, it is necessary for him to be a detained resident, and this is a proportionate response to the likelihood of him suffering harm, and the seriousness of that harm.





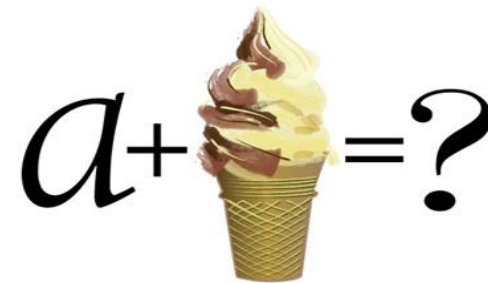
No refusal of treatment

<i>THE NO REFUSALS REQUIREMENT</i>	THE ASSESSMENT
<p>The person meets the no refusals requirement unless one of the following situations applies:</p> <p><i>Conflict with an advance decision</i></p> <p>The person made a valid advance decision refusing some or all of the treatment in question.</p> <p><i>Conflict with a decision of an LPA donee or deputy</i></p> <p>It would conflict with a valid decision of an LPA donee or deputy to accommodate the person in the hospital or care home for the purpose of receiving some or all of the care or treatment in question 'in circumstances which amount to deprivation of the person's liberty, or at all.'</p>	<p>A no refusals assessment is an assessment of whether the relevant person meets the no refusals requirement.</p>

X **Persons whose care or treatment in the hospital or home would be contrary to a valid LPA or advance decision.**

Example

- Ann Wandell is aged 19. She suffers from anorexia. Some time ago, when she clearly had capacity, she made a valid advance decision refusing any tube-feeding. Her condition has worsened and she now weighs under 5 stones. Although she agreed to go into a private hospital three days ago, she seems to lack capacity to decide about whether she needs necessary feeding.
- Her treatment may conflict with her advance decision.





Eligibility

<i>THE ELIGIBILITY REQUIREMENT</i>	THE ASSESSMENT
The person is not ineligible to be deprived of their liberty by the Mental Capacity Act.	An eligibility assessment is an assessment of whether the relevant person meets the eligibility requirement.

Remember that the eligibility requirement applies also to the Court of Protection

Who, therefore, is ineligible to be deprived of their liberty by the Mental Capacity Act?

Determining ineligibility

- 2 A person ("P") is ineligible to be deprived of liberty by this Act ("ineligible") if—
- (a) P falls within one of the cases set out in the second column of the following table, and
 - (b) the corresponding entry in the third column of the table — or the provision, or one of the provisions, referred to in that entry — provides that he is ineligible.

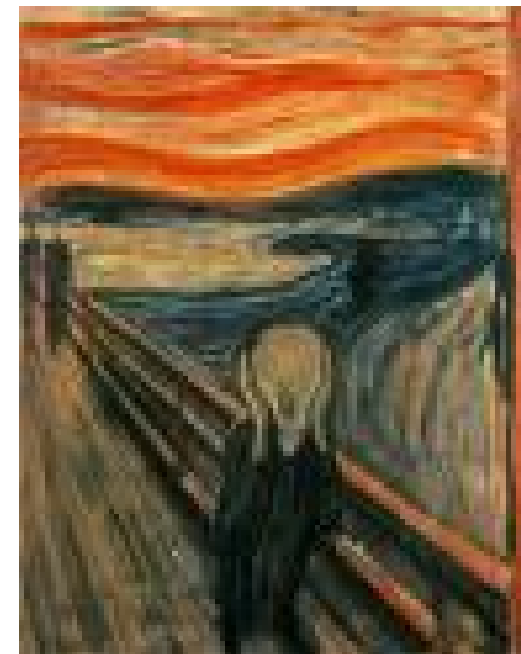
	<i>Status of P</i>	<i>Determination of ineligibility</i>
<i>Case A</i>	P is— (a) subject to the hospital treatment regime, and (b) detained in a hospital under that regime.	P is ineligible.
<i>Case B</i>	P is— (a) subject to the hospital treatment regime, but (b) not detained in a hospital under that regime.	See paragraphs 3 and 4.
<i>Case C</i>	P is subject to the community treatment regime.	See paragraphs 3 and 4.
<i>Case D</i>	P is subject to the guardianship regime.	See paragraphs 3 and 5.
<i>Case E</i>	P is— (a) within the scope of the Mental Health Act, but (b) not subject to any of the mental health regimes.	See paragraph 5.

Hospital treatment regime

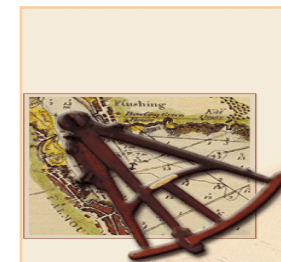
- 8 (1) P is subject to the hospital treatment regime if he is subject to—
- (a) a hospital treatment obligation under the relevant enactment, or
 - (b) an obligation under another England and Wales enactment which has the same effect as a hospital treatment obligation.
- (2) But where P is subject to any such obligation, he is to be regarded as not subject to the hospital treatment regime during any period when he is subject to the community treatment regime.
- (3) A hospital treatment obligation is an application, order or direction of a kind listed in the first column of the following table.
- (4) In relation to a hospital treatment obligation, the relevant enactment is the enactment in the Mental Health Act which is referred to in the corresponding entry in the second column of the following table.



To be, or not to be: that is the question:
Whether 'tis nobler in the mind to suffer
The slings and arrows of outrageous fortune,
Or to take arms against a sea of troubles,
And by opposing end them? To die: to sleep;
No more; and by a sleep to say we end



Who is not eligible?



1. People who are currently detained in a hospital under one of the following sections of the Mental Health Act 1983: sections 2, 3, 4, 35–38, 44, 45A, 47, 48, 51.
2. People who, though not currently detained, are subject to one of these sections or to a community treatment order, if the care or treatment in question consists wholly or partly of medical treatment for mental disorder in a hospital.
3. People who, though not currently detained, are subject to one of these sections, or to a community treatment order or guardianship, if accommodating them in the hospital or care home under the Mental Capacity Act would conflict with a requirement imposed on them under their Mental Health Act section.
4. People who are subject to guardianship under the Mental Health Act, if they object to being accommodated in the particular hospital for the purpose of being given some or all of the proposed medical treatment for their mental disorder (unless they have a donee or deputy who consents to each matter to which they objects).
5. People who meet the criteria for being sectioned under section 2 or 3 of the Mental Health Act 1983, if they object to being accommodated in the particular hospital for the purpose of being given some or all of the proposed medical treatment for their mental disorder (unless they have a donee or deputy who consents to each matter to which they objects).

§4 — CASE STUDIES

Examples

John Brown is taken by his friends to A&E, having taken an overdose. He is severely depressed. He attempts to leave A&E when he is told that a psychiatrist has been called to assess him.



Examples

Patty Smith is aged 85. She suffers from advanced Alzheimer's disease. She lives at home with her daughter who she recognises. Patty is quite psychotic and often believes that other family members, including her daughter's children, are intruders. She believes that she lives in Germany, where she was brought up, rather than in London. In the recent past, when she was living alone, she was picked up by the police on many occasions, wandering at night. She has good social services support, carers to look after her in the day (including incontinence nurses), is well fed and cared for. However, the front door is locked to prevent her from wandering again. She has tried to go home, although is not sure where home is, and often dresses in the morning to go to university.



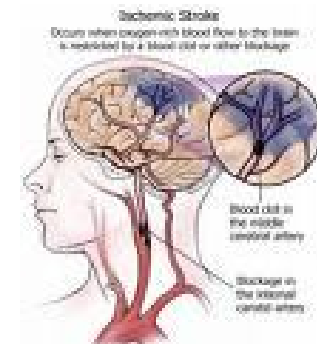
Examples

Samuel Disraeli is aged 35. He has a learning disability and has never lived independently. At present he lives in 24-hour staffed accommodation. He has responded well to firm boundaries over the years and has a very structured programme and set of rules and expectations. As a result, there has been no significant aggression on his part, and also no significant incidents of irresponsibility, for three years. He goes out with staff daily, has freedom of movement within the home, and good quality care. He is not allowed outdoors alone and would be prevented from discharging himself if he tried to do so. Because he has never lived independently, he is not aware that he has any choice in the matter.



Examples

Ivan Servic is aged 79 and had a stroke six months ago. He is partially paralysed down one side of the body but is still able to walk at a slow speed, and with poor gait and balance. He has been living in a care home since the stroke and dislikes it immensely. When asked about this, he says that the staff are nice but he wants to be independent. He would rather die at home than spend his last days in a home. He has been told that it would not be safe to return home to his flat and the doctor has made it clear that his safety prevents this. Indoors within the care home he is allowed to wander at will and his children can visit him at any reasonable hour of the day. He is not allowed outdoors alone because of the risk of falls and because it became clear he gets confused and cannot remember where he is or how to get back. When he lived alone before the stroke, he hardly ever went out because his walking was poor.



Examples

Helen David is aged 87. She also suffers from advanced Alzheimer's disease. She lives in an expensive care home under private arrangements which she made some years ago when she had capacity. She receives a good quality of care day to day and her children support the placement. One of them is the donee of an old EPA and pays the home's fees.

During the past year, Helen has been prevented from leaving on many occasions. Sometimes she simply wanted to go shopping, on other occasions she packed to go on holiday abroad or to visit friends in the countryside who in fact died some years ago. When the subject of DOLs is raised, neither the care home nor her children think that the Mental Capacity Act procedures are appropriate because her placement is a private arrangement and the care home only takes private patients; they say that it is not a 'public authority' and so is not covered by the Human Rights Act 1998.



Examples

Mohammed Ilyas is aged 22. He suffers from a schizophrenia-type illness and has just been admitted to an open psychiatric ward as an informal patient.

Initially, he was going to be sectioned but agreed to come in informally when it became clear what the alternative to refusing admission was. He has agreed not to leave the ward without permission, which is generally granted once a day for 30 minutes at a time. He has been advised that staff have the power to detain him under section 5 of the 1983 Act should he attempt to leave and that be thought to be injurious to his health.

**Informal
in-patients**

Examples

Jane Smith has been brought to A&E under section 136 following an episode of self-harm. She is seen by a psychiatrist who decides that she lacks capacity to decide whether or not to remain in hospital because of her current state of emotional turmoil. There is a risk that she may take another overdose. The psychiatrist decides that she should be detained under an urgent authorisation given under the Mental Capacity Act 2007. Can this be done? What considerations should determine whether the MHA 1983 or the MCA 2005 is used?

Section 136

Examples

Mark is an informal patient on Acacia Ward. He is depressed and was admitted three days ago following an overdose. Yesterday, he said that he was leaving and was detained under section 5(2). He was then assessed, this morning, by his consultant and an ASW. The consultant recommended his detention under section 2 but the ASW was of the opinion that an application was not appropriate. The consultant is of the view that he lacks capacity to decide whether or not to remain in hospital and whether he needs treatment. Although he has settled a little, it is likely that he would be at risk of self-harm if he returned home, where he lives on his own. Mark has just been told that the ASW refused to sign an application and has said that he intends to discharge himself this evening. He has been told, in effect ordered, to remain on the ward until his consultant sees him and decides whether he can go.

**Section 2 or 3
refused**

Examples

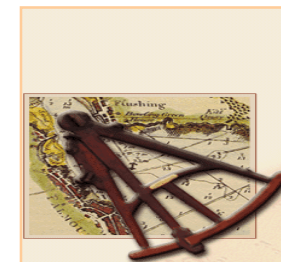
Sally is aged 89 and lives at home. She has developed Alzheimer's disease and for the past two years her health has been deteriorating rapidly. She has recently been assessed by a social worker and psychiatrist who have decided that she must be moved into residential care as soon as possible. They were particularly concerned that she was living in squalid conditions, was not eating properly, had flooded her sitting room and (on one occasion) left the gas on. Sally told them she was not willing to go and, when they wrote to tell her of their conclusions, she telephoned to tell them not to call at her home again.



Would the position be different if she had made an advance decision?

§5 — SUMMARY

Who is outside the scheme?



1. Children
2. People who do not suffer from a mental disorder within the meaning of the Mental Health Act 1983 (disregarding any exclusion for persons with learning disability).
3. People who have capacity to decide whether to be accommodated in the relevant hospital or care home for the purpose of being given the care or treatment in question.
4. Incapacitated people who have made a valid advance decision refusing some or all of the treatment in question.
5. Incapacitated people who have an LPA donee or deputy, if accommodating them in order to provide the care or treatment in question would conflict with a valid decision of their donee or deputy.
6. Incapacitated people if it is or would not be in their best interests be a detained resident.
7. Incapacitated people if it is not necessary to detain them in the particular hospital or care home in order to prevent harm to them.
8. Incapacitated people if detaining them in the particular hospital or care home is not/would not be a proportionate response to the likelihood of their suffering harm and the seriousness of that harm.

Who is outside the scheme?



9. People who are currently detained in a hospital under one of the following sections of the Mental Health Act 1983: sections 2, 3, 4, 35–38, 44, 45A, 47, 48, 51.
10. People who, though not currently detained, are subject to one of these sections or to a community treatment order, if the care or treatment in question consists wholly or partly of medical treatment for mental disorder in a hospital.
11. People who, though not currently detained, are subject to one of these sections, or to a community treatment order or guardianship, if accommodating them in the hospital or care home under the Mental Capacity Act would conflict with a requirement imposed on them under their Mental Health Act section.
12. People who are subject to guardianship under the Mental Health Act, if they object to being accommodated in the particular hospital for the purpose of being given some or all of the proposed medical treatment for their mental disorder (unless they have a donee or deputy who consents to each matter to which they objects).
13. People who meet the criteria for being sectioned under section 2 or 3 of the Mental Health Act 1983, if they object to being accommodated in the particular hospital for the purpose of being given some or all of the proposed medical treatment for their mental disorder (unless they have a donee or deputy who consents to each matter to which they objects).