



## Mental Capacity Act 2005

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It is important to remember that the MCA and MHA are different Acts for different purposes.

The MHA is only about compulsory treatment of mental disorder, for the benefit of the patient but also, at times, for the protection of others.

The MCA is about empowering people to make decisions for themselves, as much as possible and, where they can't, determining what is in their best interests. It applies to almost all kinds of decision, with very few exceptions, one of which is the treatment covered by the MHA.

Where a patient is detained under the MHA for treatment of the mental disorder, the MCA will continue to apply for all other kinds of decisions. The patient may still have capacity to make decisions about medical treatment for physical health, for example, and if they do have that capacity they are perfectly entitled to refuse medical treatment for a gangrenous leg, for example, despite being detained for compulsory treatment of their mental health.

One common problem is the interface between the MHA and the Deprivation of Liberty Safeguards (DOLS). Unfortunately, the legislation here is very complex, and attempts to explain this in the case law has rarely been helpful.

The original intention of the DOLS was to fill a gap, bereft of procedural safeguards, where a patient lacked capacity to consent to be in hospital, but was not being formally detained under the MHA. So, in broad terms, DOLS is drafted to not be available if the MHA is already being used, or should be used, to detain the patient. The real problem comes where the assessor for DOLS thinks that the MHA should be used, but the MHA assessors disagree, leaving the patient in another gap.

At times the case law has referred to the "primacy of the MHA", but this has been watered down by a more recent judgment in which the same judge recognised that there are some cases (where P lacks capacity to consent to treatment and is deprived of liberty in hospital for treatment of a mental disorder but does not object to this) where a patient could legitimately be detained / deprived of liberty under either regime, and the decision should be guided by which is least restrictive in the circumstances for that particular patient.

The Law Commission promises reform of the MHA to clarify this, which would be very welcome. Again, it is a complex area at the moment where it is a good idea to readily get advice and support as need be.