

# Deprivation of liberty in the community

September 2018

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## *Cheshire West on one slide*

- Liberty does mean the same for all
- Setting is irrelevant
- The ‘acid test’: continuous supervision and control and a lack of freedom to leave
- **Irrelevant** are
  - compliance or lack of objection;
  - the relative normality of the placement (whatever the comparison made); and
  - the reason or purpose behind a particular placement

## ***Cheshire West*: what did the Supreme Court actually want?**

*“[Those in the position of P, MIG and MEG] need a periodic independent check on whether the arrangements made for them are in their best interests. Such checks need not be as elaborate as those currently provided for in the Court of Protection or in the Deprivation of Liberty safeguards (which could in due course be simplified and extended to placements outside hospitals and care homes). Nor should we regard the need for such checks as in any way stigmatising of them or of their carers. Rather, they are a recognition of their equal dignity and status as human beings like the rest of us.”*

Paragraph 57, per Lady Hale

## ***Cheshire West*: outstanding questions and unforeseen consequences**

- Continuous (or complete) supervision and control?
- Freedom to leave? *Birmingham CC v D* [2017] EWCA Civ 1695
- ‘Private’ deprivations of liberty and the positive obligations of the state: *SSJ v Staffordshire County Council* [2016] EWCA Civ 1317
- 16 and 17 year olds and parental responsibility: *Birmingham CC v D* [2017] EWCA Civ 1695; Supreme Court October 2018
- Domestic DoL – *CCG v MSA* [2017] EWCOP 18

# The Law Commission proposals in one slide

- “Mental Capacity Act 1.5”
  - Reforms to section 4
  - Limitations to the section 5 defence
  - A revised approach to section 4B
  - Regulation-making power for supported decision-making schemes
- The Liberty Protection Safeguards
  - No definition of deprivation of liberty
  - Setting neutral
  - From age 16
  - Authorisation by responsible body – NHS for CCG/hospitals, LA for all other cases (including self-funders)
  - Additional scrutiny by AMCP in ‘objection’ cases
  - (In general) no place for LPS in mental health settings

# The Mental Capacity (Amendment) Bill

- ‘Front end’ not introduced
- Emergency deprivation of liberty
- No definition of deprivation of liberty
- LPS with variations
  - 18 plus (16/17 olds before Supreme Court in October)
  - Greater role for care home managers in ‘care home arrangements’
  - Current DOLS/MHA interface maintained – objection

# The consequences of getting it wrong

- **Consequences for P**
  - Deprived of their liberty when they should not have been OR
  - Denied access to the proper procedural safeguards
- **Consequences for the local authority**
  - Breach of Article 5 is unlawful under the Human Rights Act
  - May be ordered to pay damages and costs
  - Adverse publicity

# Damages

- Distinction between substantive and procedural breaches of Article 5:
  - ***Essex County Council v RF*** [2015] EWCOP 1 (where DJ Mort approved an award of £60,000 plus costs of between £50,000 and £64,000 and repayment of £23,000 in care home fees where the local authority’s conduct - depriving P of his liberty in a care home for 13 months - had been “*reprehensible*”)
  - ***Bostridge v Oxleas NHS Foundation*** [2015] EWCA Civ 79 (where the Court of Appeal held that a patient unlawfully detained in a mental hospital for over a year was only entitled to nominal damages as the NHS Trust could have lawfully detained him under the MHA 1983)

# Application for judicial authorisation

- ❑ Practice Direction 10AA – now PD11A
- ❑ Application form – COPDOL11
  - Annex A: Evidence in support of an application to authorise a deprivation of liberty
    - Duty of full and frank disclosure: must clearly identify in Annex A:
      - Factors needing particular judicial scrutiny;
      - Factors suggesting that the arrangements in relation to which authorisation is sought may not in fact be in the best interests of the person the application is about, or the least restrictive option; or
      - Factors otherwise tending to indicate that the order should not be made.
  - Annex B: Consultation with interested people
  - Annex C: Consultation with P

# Application for judicial authorisation

## □ Key evidence

- Capacity assessment
- Objective medical evidence of mental disorder (COP3 not sufficient)
- Care plan
  - Will be signed by the judge and kept on the court file
  - Must contain an accurate, comprehensive and up-to-date description of the measures that are in place that restrict P's liberty
  - Must apply to the Court for a review where there is a proposal to change the care plan to make it more restrictive
- Best interests assessment

# Participation of P

- Rule 3A was inserted into the Court of Protection Rules 2007 with effect from 1 July 2015, now Rule 1.2
- Menu of options for P's participation. In each case the judge must consider whether it is appropriate to give P a voice in the proceedings by:
  - Appointing a litigation friend
  - Appointing an accredited legal representative (this scheme aims to be up and running in October 2016....)
  - Appointing a Rule 3A Representative
  - Having P come and speak to the judge
  - None of the above
- See also Practice Direction 11A

# *Re NRA* [2015] EWCOP 59

- How should P participate in cases which are
  - Applications for welfare orders depriving P of their liberty AND
  - uncontentious AND
  - where there is a family member or friend who is willing and able to represent P?

## *Re NRA (cont)*

- Where there is a “devoted family member or friend” who has “fought P’s corner”, they can be appointed as a Rule 3A representative (R3A(2)(c))
- P need not be a party
- If there is no such person - will an advocate agree to be appointed?
- Consider how to share information with them

# *Re KT & Ors* [2018] EWCOP 1

- Where no one is able to take on role of Rule 3A representative or litigation friend
- No duty on local authority/CCG to fund advocate/representative
- Court will stay proceedings
- Some funding for s.49 visitors to “unblock” cases
- Continue to make applications – protection under section 4B where deprivation of liberty is necessary to carry out life-sustaining treatment or “vital acts”

# Re VE [2016] EWCOP 16

- Guidance for Rule 3A representatives
- Key responsibilities include:
  - weighing the pros and cons of P’s care and support package and comparing it with other available options;
  - considering whether any of the restrictions are unnecessary, inappropriate or should be changed;
  - informing the court about what P has said, and P’s attitude towards, the care and support package; and
  - checking from time to time that the care and support package is being properly implemented.
- “[i]n short, the court is asking you, as someone who knows the position on the ground, to consider whether from the perspective of P’s best interests you agree or do not agree that the Court should authorise P’s package of care and support.”

# SCC v MSA [2017] EWCOP 18

“Where a family member is responsible for providing care that includes significant restrictive physical interventions, the court should take great care in exercising its discretion as regards P's representation in proceedings pursuant to Rule 3A. However, I would go no further than that. If it be the case that a family member or friend who is so involved puts themselves forward to act as representative or litigation friend, subject to that scrutiny being carried out there can be no blanket objection, in principle, to their ability to undertake the role.”

# Capacity in the *Re X* context

- Assistance from *A PCT v LDV* [2013] EWHC 272 (Fam) (capacity to consent to admission as informal patient to psychiatric hospital): salient information:
  - that she was in hospital to receive care and treatment for a mental disorder;
  - that the care and treatment would include varying levels of supervision (including supervision in the community), use of physical restraint and the prescription and administration of medication to control her mood;
  - that staff at the hospital would be entitled to carry out property and personal searches;
  - that she had must seek permission of the nursing staff to leave the hospital, and, until the staff at the hospital decide otherwise, would only be allowed to leave under supervision;
  - that if she left the hospital without permission and without supervision, the staff would take steps to find and return her, including contacting the police.
- I.e. if you are to say a person has capacity to consent to what would otherwise be a deprivation of their liberty, they must be given and be able to retain, use/weigh/understand etc the information relating to the restrictions upon them

# Capacity in the *Re X* context (cont)

- Evidence on COP3, which can be completed by registered:
  - medical practitioner, for example the GP of the person to whom the application relates;
  - psychiatrist;
  - approved mental health professional;
  - social worker;
  - psychologist;
  - nurse, or
  - occupational therapist

who has examined and assessed the capacity of the person to whom the application relates.

- What makes a good capacity assessment? <http://www.39essex.com/mental-capacity-law-guidance-note-brief-guide-carrying-capacity-assessments/>

# Mental Health in the *Re X* context

- Need objective medical evidence of unsoundness of mind – i.e. mental disorder within meaning of the MHA 1983
- Cannot use e.g. social work evidence (but can have single document completed by registered medical practitioner or psychiatrist that combines COP3 and mental health requirement)
- Need for current medical evidence – no older than 12 months (and shorter where relevant)

# Best interests in the *Re X* context

- Who is to give the evidence? And how it is to be recorded? Care plan and best interests assessment
- The need for honesty and clarity – what exactly is the care regime in place for P, and why it is in his/her best interests? The operational care plan (cf the Care Act care and support plan)
- And note, ‘best interests plus’ (as in DOLS):
  - Not merely that consider to be in best interests, but also must be:
    - Necessary and
    - ProportionateTo meet the risk that P would suffer if they were not subjected to the deprivation of liberty
- Need to identify what would be the less restrictive options and why they are not practicable: *P v Surrey CC and Surrey Downs CCG* [2015] EWCOP 54
- And need to involve P and those with an interest in an application: Annexes B and C

# Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- <http://www.scie.org.uk/mca-directory/>
- [www.mclap.org.uk](http://www.mclap.org.uk)
- [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk)
- [www.courtofprotectionhandbook.com](http://www.courtofprotectionhandbook.com)

