



# Deprivation of liberty: The current law and the proposed reforms

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# Outline

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- **Deprivation of liberty:**
  - **Basis**
  - **Development – Cheshire West**
  - **Current law – SRK / Community DoL**
- **Liberty Protection Safeguards: the new law**

# What is a 'deprivation of liberty'?

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## European Convention on Human Rights

### *Article 5 – Right to liberty and security*

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

... e. the lawful detention ... of persons of unsound mind...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

# What is a 'deprivation of liberty'?

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Three essential elements arise from ECtHR case law:

- “Objective element”: is the person confined to a particular restricted place for a non-negligible period of time?
- “Subjective element”: has the person consented? Can they consent?
- Are the arrangements ‘imputable to the state’?

# Legal framework

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- Human Rights Act 1998
- Mental Capacity Act 2005 + Code of Practice; safeguards for those lacking capacity and the “best interests” test.
- ‘Bournewood case’ – leads to:
- Mental Health Act 2007, which contains:
- Deprivation of Liberty Safeguards

# HL v UK – “the Bournemouth case”

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- European Court of Human Rights case
- Autistic man living in community
- Readmitted to Bournemouth hospital and not ‘sectioned’ under the Mental Health Act 1983 as did not resist admission
- Dispute about his care and treatment between hospital and carers

# HL v UK – “the Bournemouth case”

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- Deprived of his liberty not in accordance with law – no procedure, no opportunity to review conditions of his detention
- No compliance with Article 5(4) as no procedure to seek a review

# HL v UK – “the Bournemouth case”

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- No formal procedures for:
  - Who could authorise detention
  - Reasons for admission
  - Need for continuing clinical assessment and review
  - No one to represent patient and seek a review
    - e.g. as in MHA tribunals – for lawfulness of detention

# The Deprivation of Liberty Safeguards

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- In response to ECtHR's judgment in *Bournewood*, government introduces deprivation of liberty safeguards ("DoLS") – via Mental Health Act 2007, which amends MCA
- DoLS scheme sets out procedure for authorising deprivations of liberty for those lacking capacity to make decisions if MHA does not apply
- Provides safeguards and protection for some of most vulnerable in society
- But scheme only applies to people in hospitals and registered care homes

# DOL and Cheshire West

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- *P v Cheshire West and Chester Council*
- Case concerns domestic living arrangements /care packages. Looks at “objective element” of DoL
- P an adult with cerebral palsy and Down’s syndrome required 24 hour care to meet personal care needs. Placed in local authority community placement – bungalow shared with 2 other residents
- Dispute as to whether P’s placement amounted to a deprivation of liberty

# DOL and Cheshire West

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- Local authority said no deprivation of liberty. Warned of “floodgates” opening and many cases needing court authorisation
- P’s and P’s mother’s representatives argued that this was a DoL, highlighting importance of procedural safeguards under the DoLS regime
- P and P’s mother argued that DoLS regime and court reviews ensure vulnerable adults afforded protection without having to rely on own ability or family’s ability to challenge lawfulness of detention
- Warned against danger of widening “Bournewood gap”

# Cheshire West – ‘the acid test’

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- Supreme Court held that P’s circumstances were a DoL requiring authorisation by the Court of Protection.
- Court laid down what has become known as the “acid test” for deprivation of liberty, namely:
- **Is P:**
  - a. under continuous supervision and control;**
  - and***
  - b. not free to leave?**

# DOL and Cheshire West

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- P subject to a DOL needs a “regular independent periodic check”
- Lady Hale said that DOLS could be simplified and extended to placements outside hospitals and care homes

Not relevant to the application of the test:

- the person's compliance or lack of objection;
- the relative normality of the placement (whatever the comparison made); and
- the reason or purpose behind a particular placement (*“a gilded cage is still a cage...”*)

Baroness Hale at para 57 of the Judgment:

“Because of the extreme vulnerability of people like P, MIG and MEG, I believe that we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case”

# Imputability to the State?

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- *Cheshire West* case involved care arrangements made by a local authority
- Care that is funded by a local authority or NHS will clearly be imputable to the state and require authorisation.
- For P residing in a care home or hospital setting, authorisation can be done using the safeguards in schedule A1 MCA 2005 (i.e. putting in place a standard authorisation).

# Imputability to the State?

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- But what about cases where P lives in private sheltered housing schemes, independent supported living etc.?
- Schedule A1 (“DOLS”) does not apply to P residing in such settings.
- Therefore any deprivation of liberty which is attributable to the state will need to be authorised by an application to the Court of Protection for an order.

# Privately arranged care

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- What about the situation where P's care is privately funded, with no involvement of the state?
- For P whose care is privately funded by an award of damages through a personal injury claim, are those arrangements imputable to the state?
- Do those arrangements need to be authorised?

# SRK case: the facts

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- SRK has a brain injury and lacks capacity to make decisions over a number of areas. He receives 24-hour care and assistance seven days a week.
- He is constantly monitored either by support workers or by the use of assistive technology. His accommodation and care package was arranged and is provided without any input from the local authority or any other public authority. The care is arranged by a specialist brain injury case manager and is provided by private carers, funded via the PI award of damages.
- There was no dispute about whether the care regime was in SRK's best interests.
- The issue before the court was whether SRK's confinement was attributable to the state and so engaged Article 5.

# SRK – Court of Protection decision

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- The CoP held that a court order under section 16 of the MCA was required and that there was “state imputability” because the state ought to have known of the situation on the ground.
- “Knowledge” was taken to be on the basis that a court had awarded SRK damages and the court had appointed a deputy to manage the money. Therefore steps should be taken by the local authority to ensure they had knowledge of the care regime. If the least restrictive option of care for SRK amounted to a deprivation of liberty then an application should have been made to court to authorise this.
- Therefore, care arrangements may still amount to a deprivation of liberty even when there is no element of state funding and appropriate authorisation must therefore be in place.

# SRK – the appeal

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Government sought leave to appeal the decision of Charles J on the grounds that:

- Existing civil and criminal law and safeguarding obligations on public bodies were enough to satisfy the state's positive obligations under Article 5;
- A deprivation of liberty cannot be attributed to the state where there was no reason for the LA/any public body to have any suspicion about abuse.

# SRK – the appeal

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The Court of Appeal upheld the CoP's decision:

If the state has been put on notice of a deprivation of liberty, then the deprivation of liberty **must** be authorised by the Court of Protection.

# SRK – the appeal

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CA rejected the SoS grounds of appeal on the basis that:

- The civil/criminal frameworks and safeguarding obligations only apply when someone has reported that something is wrong (i.e. retrospectively); there is no process that triggers a periodic assessment of P's situation. These frameworks cannot be said to meet the state's positive obligations under article 5 because they do not involve taking reasonable steps to prevent an arbitrary deprivation of liberty.

# SRK – key points

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The state can become responsible for a deprivation of liberty in two ways:

- Direct involvement by, for instance, arranging or paying for the care that creates the deprivation of liberty;
- Knowledge of the deprivation of liberty that means the state has a positive obligation to supervise / monitor the deprivation of liberty and thus ensure it is appropriately authorised.

# SRK – key points

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- The fact that the local authority was aware of the deprivation of liberty was insufficient to mean that the state was **directly** involved.
- The fact that the courts had awarded damages in the civil case and appointed the deputy was insufficient to render the state **directly** involved in the deprivation of liberty; in both cases, the state had not played a part as a decision maker.
- **But** the fact that the court had awarded damages, appointed a deputy etc. meant that **the state had knowledge** of the deprivation of liberty and thus came under **a positive obligation to supervise it**.
- And crucially, because the court's/state's award of damages led to the creation of the deprivation of liberty, the deprivation of liberty had to be authorised. Schedule A1 was unavailable. An application, therefore, needed to be made to court for a welfare order.

# SRK – key points

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- The decision applies to private arrangements made by any court appointed deputy.
- The decision means that there is now little distinction between public and private deprivations of liberty where the state is, or ought to be, aware of a person being confined under arrangements to which they cannot consent.
- In those circumstances the state needs to take steps to ensure that confinement is authorised by the court.

# SRK – key points

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So what should a deputy with that knowledge do?

- Deputy must ensure that it has made a lawful best interests decision applying MCA principles
- Raise the relevant issues with care providers and the relevant local authority with statutory duties to safeguard adults
- Deputy needs to objectively check whether he or the LA could put in place arrangements that would be less restrictive and/or remove any restraint
- LA would then have knowledge of the DoL and would need to take steps to apply to court to have the DoL authorised by way of a welfare order.

# Costs consequences

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- Where it is established that a client will require authorisation for their deprivation of liberty, this is likely to carry with it costs implications for the client's representation in any future court reviews.
- Such costs should be taken into account in calculations of the client's special damages, in much the same way as financial deputyship costs are taken into account.

# SRK – points to consider

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- It is unclear whether the decision applies to ‘private’ arrangements made by an attorney, rather than a deputy. An attorney is not appointed by the state.
- The court did not confirm whether it is the responsibility of the deputy or the local authority to seek an order from the CoP.
- Where P does not have a personal injury award, the costs of having their detention authorised will fall to be paid by P (unless they are entitled to legal aid).

# Mental Capacity (Amendment) Act

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- Received Royal Assent on 16 May 2019
- Introduces the Liberty Protection Safeguards (“LPS”)
- Reforms sought due to:
  - the substantial increase in DoLS cases
  - criticisms of DoLS legislation

# Mental Capacity (Amendment) Act update

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**“The Law Society believes that the proposed statutory scheme in the Mental Capacity (Amendment) Bill would weaken important safeguards provided under the existing Deprivation of Liberty Safeguards scheme...As it stands, we do not believe that the proposed Bill has sufficient safeguards and is not fit for purpose in its current form. It requires serious re-consideration and extensive revision”.**

**The Law Society**

# Mental Capacity (Amendment) Act update

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**“...we have serious concerns about how the current Bill is drafted, in particular around the expectation that care home managers will be responsible for the assessments that are required to authorise the deprivation of a person’s liberty, when that person lives in a care home. This raises concerns regarding real or perceived conflicts of interest and capacity and capability.”**

**Association of Directors of Adult Social Services  
(ADASS)**

# Mental Capacity (Amendment) Act update

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Key amendments made in response to initial criticism:

1. Extending the Liberty Protection Safeguards to 16 and 17 year olds;
2. Replacing the term “unsound mind” with “mental disorder”;
3. Explicitly stating that the cared-for person must be consulted with;
4. Explicitly stating that the cared-for person’s wishes and feelings must be considered as part of the necessary & proportionate assessment;

# Mental Capacity (Amendment) Act update

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5. Requiring responsible bodies to decide if care home managers should arrange the assessments and statement or if the responsible body takes on these functions;
6. Requiring that assessments cannot be carried out by someone with a financial conflict of interest;
7. Confirmation that the responsible body arranges the pre-authorisation review;
8. A duty to appoint an IMCA if a person doesn't have an 'appropriate person' representing them, unless it is in the person's best interests not to have an IMCA;

# Mental Capacity (Amendment) Act update

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9. Removing the requirement that a care home manager must notify the responsible body whether or not an IMCA should be appointed;
10. Requiring that medical and capacity assessments must be completed by those with appropriate experience and knowledge.
11. An important clarification to the extent of “portability” of authorisation was made to confirm that the government’s intention is that: *“An authorisation can apply to different settings so that it can travel with a person but cannot be varied to apply to completely new settings once it has been made, as this would undermine Article 5.”*

# Mental Capacity (Amendment) Act update

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- The bill returned to the Lords on 26 February 2019
  - Majority of amendments accepted
  - Further debate in relation to the definition of a deprivation of liberty
- The bill returned to the Commons on 2 April 2019
  - Disagreed with some of the amendments made by the Lords, in particular their proposed definition of deprivation of liberty
  - The definition was dropped from the legislation (see Code of Practice)
- The bill received royal assent on 16 May 2019

# LIBERTY PROTECTION SAFEGUARDS

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## In summary...

- No statutory definition of ‘deprivation of liberty’, but guidance to be given within Code of Practice
- LPS applies to individuals aged 16 and over
- The responsible body will be the local authority other than hospital managers for arrangements in an NHS hospital or the CCG in cases where a person is eligible for continuing health care
- LPS will apply in all settings including supported living or family home

# LIBERTY PROTECTION SAFEGUARDS

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- The conditions to be satisfied before arrangements can be authorised are as follows:
  - P lacks capacity to consent to arrangement
  - P has a mental disorder
  - the arrangements are:
    - necessary to prevent harm to P
    - are proportionate in relation to likelihood and seriousness of harm to P

# LIBERTY PROTECTION SAFEGUARDS

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- A pre-authorisation review must be carried out by someone not involved in day-to-day care to determine that the above three conditions are met
- P has the right to challenge the authorisation via the Court of Protection pursuant to the new s.21ZA (which will attract non-means-tested legal aid)
- The authorisation can be renewed in first instance for one year and thereafter for periods of up to three years

# LIBERTY PROTECTION SAFEGUARDS

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- If the person is aged 18 or over, and the proposed arrangements would be carried out wholly or partly in a care home, then potentially a different process could apply
- In such cases, the responsible body can decide if it will arrange the necessary assessments and other evidence to be provided, or whether the care home manager should do so.....

# LIBERTY PROTECTION SAFEGUARDS

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## Criticisms

- Shifts responsibility and costs for authorising deprivations of liberty to NHS or care homes
- The Act allows care home managers (if the LA feel it is appropriate) to lead on the assessments of capacity, and the judgment of necessity and proportionality, and pass their findings to the local authority as the responsible body.
  - Potential conflict of interest in giving care home managers this role (now cannot be undertaken by anyone with a “prescribed connection”)
  - Concerns raised regarding the level of expertise to carry out the necessary assessments and the capacity of care homes to take on this role

# LIBERTY PROTECTION SAFEGUARDS

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## Criticisms

- Under DoLS a deprivation can be for a maximum of one year. Under LPS, this can be renewed initially for one year, but subsequent to that for up to three years
- Significant emphasis on the Code of Practice, which will be in development for several months
- No role for RPRs, instead provision for an “appropriate person” or IMCA. Advocacy provisions therefore limited and restricted to when it is deemed in P’s best interests to be supported by an IMCA

# LPS – NEXT STEPS

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- The new Liberty Protection Safeguards system is due to come into force on 1 October 2020
  - subject to *“ongoing implementation planning with delivery partners and the Welsh Government and progress of the work on developing the Code of Practice and regulations for this reform”*.
- Department of Health and Social Care is *“working closely with stakeholders across the sector in England and Wales on developing draft chapters for the Code of Practice”* which will be *“a vital document for practitioners... providing detailed and easy to understand guidance which will ensure the successful implementation of the new system.”*
- The final draft of the Code is due to be laid before Parliament in spring 2020.

# LPS – NEXT STEPS

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- The Government is in the process of drafting the regulations brought forward by the Act
  - Due to be brought before parliament in spring 2020
- The Government is preparing for implementation:
  - Working closely with key delivery partners and stakeholders;
  - Initial materials will be published shortly which will be publicly available;
  - In the process of developing training

# LIBERTY PROTECTION SAFEGUARDS

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- And finally...
- *“There will still be people who have an authorisation in place under the current Deprivation of Liberty Safeguards system on the date the new system comes into force. The Government will work with delivery partners and stakeholders on developing transitional arrangements, but the expectation is that such people will remain under their existing authorisation until it expires.”*
- To keep up to speed, you may want to review:  
<http://www.mentalcapacitylawandpolicy.org.uk/>

# ANY QUESTIONS?

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