

Deprivation of Liberty & Cheshire West

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What are Deprivation of Liberty Safeguards?

- Protective framework set out in the Mental Capacity Act 2005 (“MCA”)
- Apply to individuals who:
 - Need to be accommodated under care/treatment regimes which deprive them of their liberty within the meaning of Article 5 ECHR
 - Lack capacity under MCA to consent to such regimes
 - Are accommodated In a hospital or care home
 - Do not require treatment under the MHA 1983
- Where deprivation is not in hospital or care home, need COP authorisation before DOL can be imposed

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- DOLS set out requirements for authorisation of deprivations of liberty
- Contain assessment process:
 - Managing authority (eg care home manager) identifies potential DOL, requests authorisation from supervisory authority (local authority)
 - Supervisory body commissions 6 assessments to determine whether DOL exists and if it should be authorised
 - Assessments completed within 21 days or before expiry of urgent authorisation

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- Assessments are:
 - Age
 - Mental health
 - Mental capacity
 - Best interests
 - Eligibility
 - No refusals

- If all assessments support authorisation, granted.
- If any assessment does not support authorisation, declined

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Consequences of DOL authorisation - Review

- Managing authority under a duty to monitor
- If circumstances change, DOL must be reviewed
- Standard authorisation
 - can be renewed at any time
 - expires after maximum of 12 months
- Care plan must contain procedure for monitoring the authorisation and circumstances prompting review

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Consequences of DOL authorisation - Appeal

- Once an authorisation is given, P or their representative can ask COP to determine:
 - the period for which the standard authorisation is to be in force
 - the purpose for which the standard authorisation is given, or
 - the conditions subject to which the standard authorisation is given
- If a SA is given, can also ask COP to determine whether there is a DOL
- Also, any other person can apply to the COP for permission to take P's case to court to consider whether an authorisation should have been granted.

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What is a Deprivation of Liberty?

- S64(5) MCA – has meaning given in Article 5 ECHR:
 - *No one shall be deprived of their liberty save in accordance with a procedure prescribed by law...the lawful detention ..of persons of unsound mind.*
- *Ultimately a legal question*
- *Guidance in the DOLS Code of Practice*
- *Current test has been developed by case law*

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Caselaw

- 3 broad elements to consider (Storck v Germany [2005])
 1. Objective element – confinement to certain place for not negligible length of time (Locks? Restraint? Supervision?)
 2. Subjective element – no valid consent to confinement (expressed wish to be elsewhere?)
 3. Confinement imputable to the State (direct involvement of public authority in the detention)

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R v Bournemouth CH&MH NHS Trust [1999]

- Autistic man, profound LD. Readmitted to Bournemouth as informal patient, not sectioned
- Unlocked ward, never attempted to leave, never detained or non-compliant with treatment
- HofL held no DOL because no restraint used, only the possibility of restraint if necessary.
- Case went to ECHR – HL v UK [2004]
- Held Article 5 rights breached and noted *“lack of any fixed procedural rules by which the admission and detention of compliant incapacitated persons is conducted.”*
- Legislative response was MCA (2005) and DOLs (2007)

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JE v DE [2006]

- Considered position in a residential care home
- Key – complete and effective control
- Starting point is individual's concrete situation – look at
 - Type
 - Duration
 - Effects
 - Manner of implementation of measures
- Court held was a DOL because P not free to leave to live where he chooses.

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P&Q v Surrey County Council [2011]

- CofA restricted concept of DOL
- Moved away from “complete & effective control”
- P in foster home, bedroom unlocked but restrained if tried to leave
- Q in specialist care home, unlocked but constantly supervised
- Neither situation a DOL
- Key factors:
 - Whether P expressed objections to the arrangements
 - Contact with family
 - Opportunities for recreation, education, social contact
 - Normality of arrangements

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Cheshire West & Chester Council v P [2011]

- P – 39 year old man, cerebral palsy, Down's Syndrome
- 2:1 staff ratio for all 4 residents
- High level of care – ADL,
- Physical intervention necessary to prevent choking
- Constant supervision but active social life

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- No DOL
- Referred to test in P&Q – starting point is concrete situation and context is crucial
- No one factor determinative
- Main element emphasised in judgment was concept of relevant comparator – look at relative normality
- Munby J held *“when evaluating and assessing the ‘relative normality’ (or otherwise) of P’s concrete situation in a case such as this, the contrast is not with the previous life led by X (nor with some future life X might lead), nor with the life of the able-bodied man or woman....but with the kind of lives that people like X would normally be expected to lead.”*

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- *“The comparator, in other words, is an adult of similar age, with the same capabilities as P, affected by the same condition or suffering the same inherent mental and physical disabilities and limitations as P.”*
- Applying this test to the circumstances of the case CofA held there was no DOL as *“because of his disabilities P is inherently restricted in the kind of life he can lead. There is nothing to show that the life P is living at Z house is significantly different from the kind of life that anyone with his concatenation of difficulties could normally expect to lead, wherever and in whatever setting they were living.”*

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Implications of Cheshire West

- Some advantages of “relative comparator” test:
 - Simplifies decision making process
 - Requires subjective consideration of P’s circumstances rather than application of rigid rules
 - From court’s perspective, reducing ambit of DOL in this way reduces s21A caseload

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Disadvantages

- Large amount of discretion given to those making decisions about existence of DOL
- Managing authority – once identified relevant comparator need to say whether restrictions they themselves deem necessary for P would also be necessary for hypothetical P with same conditions and limitations
- When would they say no? Possibly family a variable, otherwise rare
- Reducing caseload for court means denying protections to those designed to safeguard – no review process or appeal to court
- Greater the disability, less likely to be a DOL

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- Confuses definition of a DOL with what is in P's best interests
- Pre-*Cheshire West* questions of relative normality would not come into play until best interests assessment
- Now that question is asked before a request for authorisation is made
- Result – best interests question answered by P's own care staff at much earlier stage
- At odds with ECHR caselaw – *Stanev v Bulgaria* 2012 case which held was a DOL where P in social care home and unable to leave the home. Determinative factor was inability of P to leave.
- OS requested appeal to Supreme Court, application being considered. Clarification urgently needed.

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