Deprivation of liberty

An overview of current procedure
Introduction

- European Convention on Human Rights
- What protection is afforded to people in the UK deemed lacking capacity who are under a deprivation.
- What constitutes a deprivation of liberty
- How can a deprivation be made lawful
- Future expected developments
Article 5 ECHR

Article 5 of the ECHR guarantees the right to personal liberty and provides that no one should be deprived of their liberty in an arbitrary fashion.

However, this is a qualified not absolute right meaning that there are exceptions.

In particular, Article 5(1)(e) which permits:

“the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants”

Article 5(4) also requires that “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.”
The Bournewood safeguards

In the case of HL v United Kingdom [2004] the European Court of Human Rights held that a procedure prescribed by law must be followed where a person with a mental disorder is cared for or given treatment in conditions that amount to a deprivation of their liberty.

This lead to a number of amendments to the (MCA 2005) by the MHA (2007) coming into force on 1 April 2009.

These included the introduction of:

A) s.4A
B) s. 4B
C) Schedule A1, 1A and s.21A
S. 4A - Restriction on deprivation of liberty

(1) This Act does not authorise any person ("D") to deprive any other person ("P") of his liberty.

(2) But that is subject to—

(a) the following provisions of this section, and

(b) section 4B.

(3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.

(4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P's personal welfare.

(5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty).]
MCA Amendments

Introduction of the DOLS Regime

Schedule A1 – Part 1

Authorisation to deprive residents of liberty etc

Application of Part

1(1) This Part applies if the following conditions are met.

(2) The first condition is that a person (“P”) is detained in a hospital or care home — for the purpose of being given care or treatment — in circumstances which amount to deprivation of the person's liberty.

(3) The second condition is that a standard or urgent authorisation is in force.

(4) The third condition is that the standard or urgent authorisation relates—

(a) to P, and

(b) to the hospital or care home in which P is detained.
The Purpose / Result of the Amendments

The Purpose
- Create a legal process prescribed by law that would comply with Article 5
- Provide appropriate legal protection for incapacitated individuals who are or may be deprived of their liberty.

The Result
- Introduction of:
  - (a) deprivation of Liberty Safeguarding regime; authorising the deprivations caused to patients in a care home or hospital setting; and
  - (b) conferring additional powers on the Court allowing them to:
    - (i) authorise deprivations that fell outside the scope of the DOLS regime
    - (ii) review the lawfulness of a detention of a patient currently subject to an authorisation under the DOLS regime.
So What Constitutes a Deprivation?

There is no statutory definition in the MCA 2005 of a ‘deprivation of liberty’

However, the ECtHR has confirmed that in the context of a person of ‘unsound mind’ a deprivation of liberty has three elements

1) the objective element of confinement in a restricted space for a non-negligible period of time;
2) the subjective element that the person has not validly consented to that confinement; and
3) the detention being imputable to the state
The case of Cheshire West brought clarification as to what amounted to a deprivation of liberty.

The majority held that there were two questions to ask in determining whether a person was being deprived of their liberty.

1) is the person subject to continuous supervision and control; and
2) is the person free to leave.

This is known as the ‘acid test’
‘Acid Test’ – Continuous Supervision and control

‘Continuous’

- Is not required to be 24/7
- ECtHR has taken a broad brush approach to what constitutes ‘continuous’
- Can include periods where the patient is not under supervision – (*Stanev v Bulgaria*)
- Does not require every decision to be made by those providing the care or treatment.

‘Supervision and control’

- Is there a ‘power imbalance’ between those providing the care and treatment and the person to whom it is being provided.
- A pragmatic way of answering the question is to ask whether the person(s) or body responsible for the individual have a plan in place which means that they need always broadly to know: (1) where the individual is; and (2) what they are doing at any one time.
- If the answers to both the above questions are ‘yes’ then it is highly likely the person is under continuous supervision and control.
‘Acid Test’ – Free to Leave

Crucially ‘Freedom to leave’ is not to be confused with the ‘ability to leave’ nor ‘attempts to leave’

This is because per Lord Ker liberty is “predominantly an objective state. It does not depend on one’s disposition to exploit one’s freedom.”

Therefore, the more relevant question to be asked is – if the person manifested a desire to leave, what would happen?

If steps would be taken to assist them in leaving ie unlocking doors etc then it points to a ‘freedom to leave’

If steps to stop them leaving or upon discovering them missing; steps to return them to the facility would be taken then arguably they are not ‘free to leave’
The Supreme Court made clear that the following factors are irrelevant in the application of the ‘acid test’
1) the person’s compliance or lack of objection;
2) the relative normality of the placement; and
3) the reason or purpose behind a particular placement.

Therefore, when a person is ‘under continuous supervision and control’, ‘not free to leave, lacking capacity to consent to this and it is 'imputable to the state’ a deprivation of that person liberty has occurred.

Thus, engaging the protection afforded to them under Article (5)(1) of the ECHR
A ‘deprivation of liberty’ can lawfully occur under the MCA 2005 in three situations.

1) where the deprivation is carried out in accordance with the DOLS regime

2) where the deprivation is authorised by a personal welfare decision of the Court of Protection

3) where that deprivation is necessary to administer life sustaining treatment or essential treatment to prevent deterioration pending relevant issues before the court - ie an application has already been made.
(1) The DOLS Regime – Qualifying Requirements

In order for the safeguards to apply the person must be or expected to be deprived of their liberty in a care home or hospital and

1) be over 18; *(the age requirement)*
2) be suffering from a mental disorder within the meaning of the MeHA or from a learning disability; *(the mental health requirement)*
3) lack capacity to consent to the arrangements for their care; *(the mental capacity requirement)*
4) require the treatment / detention for their best interests; *(the best interests requirement)*
5) not be detained under the provisions of the MeHA 1983; and *(the eligibility requirement)*
6) not have made a valid advance decision (including that of an attorney or deputy acting under their authority) to refuse some or all of the treatment proposed. *(the no refusal requirement)*
Who is Responsible for Making DOLS Authorisations?

- The responsibility for obtaining an authorisation falls to the 'managing authority' of the relevant institution who must then apply to the relevant 'supervisory body'.

- Without authorisation, those who carry out the detention will not be protected against:
  - 1) charges of battery or wrongful imprisonment; and / or
  - 2) in a case of a public body, an action for unlawful deprivation of liberty and declaration / damages under HRA 1998.

- However, authorisation will not exonerate liability for negligence or acts beyond the scope of the authorisation.
Who is the Managing Authority ‘MA’?

- In Hospital – the ‘MA’ is the body responsible for running the hospital where the person is likely to be resident.

- In privately run institutions - the responsible ‘MA’ will be the person who is / or is required to be registered under Chapter 2 of Part 1 of the Health and Social Care Act 2008 in respect
  1) (in private hospital) of regulated activities carried on in hospital, ie the provision of health care; and
  2) (in a care home) of the provision of residential accommodation together with nursing or personal care in the care home.
Who is the Supervisory Body ‘SB’

- In Hospital – the local authority for the area in which the person is ordinary resident

- In care homes – the local authority where the person is ordinary resident or where the care home is situated
Types of Authorisation

There are two types of authorisation that can be given under the DOLS regime:

1) the standard authorisation; and
2) the urgent authorisation.
Standard Authorisation

The ‘MA’ will apply for a standard authorisation where it seems likely that within the next 28 days a person will be accommodated in their hospital or care home in circumstances that amount to a deprivation of liberty.

Authorisations are hospital / care home specific meaning a change of address will necessitate a new authorisation.

Authorisations can last for a maximum of 12 months but can be renewed.

All of the Qualifying / Safeguarding Requirements must be for an authorisation to be given.

The assessments must be carried out within 21 days of a request made from the ‘MA’ and if all assessments are satisfied then a standard authorisation must be given by the ‘SA’.

When a deprivation could be authorised by both the DOLS regime and a court order the statutory procedure should be used where possible – *A Local Authority v PB*. 
Relevant Persons Representative ‘RPR’

- The supervisory body must appoint a person to be the relevant person's representative as soon as practicable after a standard authorisation is given.
- The supervisory body must appoint a person to be the relevant person's representative if a vacancy arises whilst a standard authorisation is in force.
- The selection of a person for appointment must not be made unless it appears to the person making the selection that the prospective representative would, if appointed—
  - (a) maintain contact with the relevant person,
  - (b) represent the relevant person in matters relating to or connected with this Schedule, and
  - (c) support the relevant person in matters relating to or connected with this Schedule.
- Any appointment of a representative for a relevant person is in addition to, and does not affect, any appointment of a donee or deputy.
Appointment regulations may make provision about who is to select a person for appointment as a representative.

(2) But regulations under this paragraph may only provide for the following to make a selection—

(a) the relevant person, if he has capacity in relation to the question of which person should be his representative;

(b) a donee of a lasting power of attorney granted by the relevant person, if it is within the scope of his authority to select a person;

(c) a deputy, if it is within the scope of his authority to select a person;

(d) a best interests assessor;

(e) the supervisory body.
Baker J in Re RD & Ors made clear that an RPR’s obligations include:

- Taking all steps to identify whether P wishes to exercise the right to apply to the Court of Protection (or the right to review) and, if so, it is the RPR’s duty to ensure that the application is brought (para 73).
- Representing and supporting P in making an application to the Court of Protection where the RPR concludes that P would wish to make the application in circumstances where P is unable to communicate that wish (para 77); and
- In supporting P, the RPR must assess for himself or herself whether an application should be made to the court in P’s best interests, independent of any wishes expressed by P, and must therefore assess for himself or herself the matters in s 21A(2) namely:
  - Whether P meets one or more of the qualifying requirements;
  - The period for which the standard authorisation is to be in force;
  - The purpose for which the authorisation is given; and
  - The conditions subject to which the authorisation is given (paragraph 78).
Urgent Applications

A ‘MA’ may be in a position that there is insufficient time for a standard authorisation to be sought.

However, if a deprivation of liberty was foreseeable but the ‘MA’ fails to seek a standard authorisation, the use of an urgent authorisation may be unlawful – NHS Trust v FG.

If the ‘MA’ makes an urgent authorisation it must:

1) state the period, not exceeding 7 days, that the authorisation is to remain in force
2) confirm details of the purpose of the authorisation
3) take steps to ensure that the relevant person understands the effects of the authorisation and their right to make an application to the court under s.21A

Only one extension may be granted, for a maximum of seven days where:

1) the request for a standard authorisation has been made;
2) there are exceptional reason why it has not been made; and
3) it is essential that the detention should continue.
s.21A – questioning the lawfulness of detention under DOLS –

Where a standard authorisation has been given the court can determine matters concerning

1) whether the relevant person meets one or more of the qualifying requirements;
2) the period during which the standard authorisation is given;
3) the purpose for which the standard authorisation is given; and
4) the conditions subject to which the standard authorisation is given.

Where an urgent authorisation has been given the court may determine

5) whether the urgent authorisation should have been given;
6) the period during which the urgent authorisation is to be in force; and
7) the purpose for which the urgent authorisation is given.

The court, in either case, may order

A) a variation or termination of the standard or urgent authorisation; or
B) the ‘SB’ or ‘MA’ to vary or terminate the authorisation.
When should a RPR bring an action under s.21A?

In *Re RD & Ords* Baker J gave some helpful general guidance as to the approach that should be adopted by RPRs and IMCAs in deciding whether to issue proceedings under s.21A at para 86:

(1) The RPR must consider whether P wishes, or would wish, to apply to the Court of Protection. This involves the following steps:

Consider whether P has capacity to ask to issue proceedings. This simply requires P to understand that he/she should not be subject to his/her current care arrangements. It is a lower threshold than the capacity to conduct proceedings.

If P does not have such capacity, consider whether P is objecting to the arrangements for his/her care, either verbally or by behaviour, or both, in a way that indicates that he would wish to apply to the Court of Protection if he had the capacity to ask.
Stated Preferences

2) In considering P’s stated preferences, regard should be had to:

- any statements made by P about his/her wishes and feelings in relation to issuing proceedings,
- any statements made by P about his/her residence in care,
- P’s expressions of his/her emotional state,
- the frequency with which he/she objects to the placement or asks to leave,
- the consistency of his/her express wishes or emotional state; and
- the potential alternative reasons for his/her express wishes for emotional state.
Stated Behaviour

In considering whether P’s behaviour constitutes an objection, regard should be had to:

- the possible reasons for P’s behaviour,
- whether P is being medicated for depression or being sedated,
- whether P actively tries to leave the care home,
- whether P takes preparatory steps to leave, e.g. packing bags,
- P’s demeanour and relationship with staff,
- any records of challenging behaviour and the triggers for such behaviour.
- whether P’s behaviour is a response to particular aspects of the care arrangements or to the entirety of those arrangements.
(4) In carrying out this assessment, it should be recognised that there could be reason to think that P would wish to make an application even if P says that he/she does not wish to do so or, conversely, reason to think that P would not wish to make an application even though he/she says that she does wish to, since his/her understanding of the purpose of an application may be very poor.

Consideration of P’s circumstances must be holistic and usually based on more than one meeting with P, together with discussions with care staff familiar with P and his/her family and friends. It is likely to be appropriate to visit P on more than one occasion in order to form a view about whether proceedings should be started.

Please see hand out attachment
Funding of s.21A cases

- S.21A objections to standard / urgent authorisations under the DOLS regime qualify for non-means tested legal aid funding.
- The RPR can instruct solicitors on behalf of the individual.
- However, if the court removes the authorisation and replaces it with an welfare order the patient would lose the right to a RPR and to non-means tested legal aid.
2) Where the deprivation is authorised by a personal welfare decision of the Court of Protection

A deprivation is usually authorised by the CoP in the following two circumstances:

1) when dealing with people aged 16 or 17; and

2) people being privately deprived of their liberty outside of a hospital or care home.
Private Deprivations – Imputability to the state

When identifying private deprivations of liberty the required detention being ‘imputable to the state’ is often a key issue.

The ECtHR has held \((Stork v Germany)\) that the state can be responsible for a deprivation of liberty in three ways:

1) the direct involvement of public authorities in the person’s detention; \((direct\ state\ responsibility)\)

2) if the courts have failed to interpret the law governing any claim for compensation for unlawful deprivation of liberty ‘in the spirit of Article 5’; or

3) the state has breached its positive obligation to protect the person against interference with his or her liberty by private persons. \((indirect\ state\ responsibility)\)
Direct State Responsibility

*Re A & Re C* have shown that the provision of care and support by a public authority to a someone in a domestic setting will not, of itself, trigger direct state responsibility.

Similarly, ‘mere knowledge of the home arrangements which led to the detention will also not be sufficient.

This is affirmed by Mr Justice Mostyn in *Rochdale MBC v KW*

However, in London Borough of Haringey v R it was held that the local authority was directly responsible for the deprivation of liberty.

This had arisen because the local authority had both funded the placement and provided specialist knowledge to enable the family to access the choice of providers. The ‘LA’ was ultimately making the determination as to what was in the person’s best interests by taking account of the families wishes and feelings.
The positive obligations imposed by Article 5 – Indirect state responsibility

Most private deprivations of liberty are likely to arise as a result of indirect state responsibility.

In Re A (a child) and Re C (a adult) Sir James Munby stated that where a public authority knows or ought to have known that a vulnerable child or adult is subject to restrictions on their liberty by a private individual, which may give rise to a deprivation of liberty, the following positive obligations are triggered:

1) a duty to investigate whether there is, in fact, a deprivation of liberty. If the authority investigates and finds no deprivation of liberty it has discharged its immediate responsibility;

2) a duty in appropriate circumstances to provide support services to the individual and / or the carer that will enable inappropriate restrictions to be ended, or at least minimised; and

3) a duty to refer the matter to the court if there are no reasonable measures that it can take to bring the deprivation to an end, or if the measures it purposes are objected to by the individual or the family.
Staffordshire County Council v SKR

**The facts** - a victim of a road traffic accident who had suffered multiple injuries resulting in the need for 24 hour care. A significant damages award was made enabling a property and affairs deputy to purchase and adapt a bungalow for SKR and fund a private care package.

SKR lacked capacity to make decisions about his care and treatment and his care regime created an objective deprivation of liberty.

The local authority had no knowledge of this case until it received a letter from the deputy informing it that SKR may be deprived of his liberty.

The issue therefore arose as to whether the state was responsible, directly or indirectly, so as to engage Article 5
Mr Justice Charles held that the state does not become directly responsible because:

1) the local authority had undertaken assessments;
2) that the placement was registered with the CQC
3) an application for a welfare order
4) a court awarding damages
5) the CoP appointing a deputy; or
6) the involvement of a deputy
Staffordshire CC v SRK

However, when considering indirect responsibility Mr Justice Charles concluded that a welfare order was needed to avoid a violation of the state’s positive obligation.

This obligation was triggered by the state’s knowledge of the concrete situation on the ground.

This knowledge having arisen when the following became aware of the subjective and objective elements being in place:

1) the court awarding damages
2) the CoP when appointing a deputy; or
3) the deputy/ attorney/ trustee to whom damages are paid
Charles J has set out the steps now required of a deputy in cases such as this:

1) a deputy should raise the issue of the deprivation of liberty with the relevant local authority;
2) by doing so, they would be taking ‘proper steps’ to check whether the local authority could ‘put in place arrangements that meant that P was not objectively deprived of his liberty or that would make the care arrangements less restrictive;
3) where the deprivation of liberty remains, the deputy should ensure the situation is authorised by the making of a welfare order; and
4) that the relevant decision-makers keep it under review.

Difficulties may arise if the ‘LA’ fails to act upon the notification from the deputy. It has been suggested in such situations that a responsibility is then placed on the person notifying the ‘LA’ to mount the application to ‘ensure that the situation on the ground is authorised’

However, this would not transfer the responsibility imposed upon the ‘LA’ to the deputy.
Impact in terms of costs

- In terms of costs of the application it is crucial that these are considered by P.I and Clinical Negligence Lawyers in their claims for damages.
- Since the cost of making any welfare order would be in most cases as a result of the accident, a direct causal link would be established.
- Thus, where any award is made for such future litigation, the ‘LA’ will look to recoup the costs from the deputy.
- In past cases where damages have been settled the ‘LA’ will bear the cost of any application.
- It should also noted that these orders will be reviewed by the court at least once a year increasing cost further.
Future Developments

The Law commission has reviewed the operation of the mental capacity and DOLS scheme under Schedule A1 and has consulted on a possible replacement scheme.

This scheme has been indicated in the ‘Mental Capacity and Deprivation of Liberty Interim Statement’ to include deprivations occurring outside of hospitals and care homes.

The final report is due in March 2017.