Bournemouth University

The National Centre for Post-Qualifying Social Work

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# Deprivation of Liberty Safeguards (DoLS) Judgement of the Supreme Court

P v Cheshire West and Chester **and** P and Q v Surrey County Council

# Implications for workforce development

## Introduction

On 19, March, 2014, the Supreme Court handed down its judgement in the above cases. The full judgement and press release can be found at:

- http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_judgement.pdf
- http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_PressSummary.pdf

The judgement is significant in the determination of whether arrangements made for the care and/or treatment of an individual lacking capacity to consent to those arrangements amount to a deprivation of liberty.

A deprivation of liberty for such a person must be authorised in accordance with one of the following legal regimes:

- A deprivation of liberty authorisation
- A Court of Protection Order under the Deprivation of Liberty Safeguards (DoLS) in the Mental Capacity Act (2005)
- Mental Health Act (1983)

The key point is that the test for deprivation of liberty has been revised and the Court has clarified that for the purposes of Article 5 of the European Convention on Human Rights in the following circumstances:

> *The person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements.*

The Court held that factors which are not relevant include the person's compliance or lack of objection and the reason or purpose behind a placement. It also confirms that the relative normality of the placement given the person's needs was not relevant. This means that the person should not be compared with anyone else in determining whether there is a deprivation of liberty, although young people aged 16 or 17 should be compared with people of a similar age and maturity without disabilities.

As a result of the judgement we will need to be increasingly attuned to the idea that deprivation of liberty will be occurring in places i.e. in people's own homes where it is assumed that the state is responsible for the care arrangements. Any person providing support or services could 'come across' a situation where a deprivation of liberty is occurring and needs to understand what to do about it.

In the context of the judgement, the House of Lords had already criticised the implementation of the MCA. They also suggested that the DoLS regime was not fit for purpose.

The government response "Valuing every voice, respecting every right: Making the case for the Mental Capacity Act" is available here: https://www.gov.uk/government/publications/mental-capacity-act-government-response-to-the-house-of-lords-select-committee-report

The ADASS response is also available here: http://www.adass.org.uk/DoLSjudgmentUpdate/june2014/

# Workforce Implications

There are a number of roles, responsibilities and duties which are currently involved in this key work and each will need to be analysed in the context of the judgement.

**Best Interest Assessors (BIAs)**

We should expect a greater number of applications for authorisations under the Deprivation of Liberty Safeguards (DoLS) although care providers are still responsible for identifying dep.lib therefore it is anticipated that there will be a need to an increase the numbers of trained assessors and formalise this training as part of a core "offer" that is made locally. In many cases it is Social Workers who undertake this role but it could be other professions. Local areas should ensure they have sufficient numbers who are trained, supported and have access to refresher training.

It has been said by some commentators that the default position in care homes where the population is suffering from dementia is that everyone in the home is deprived of their liberty by definition. We are not convinced that this should be the way forward - Indeed we would recommend an individual case-by-case consideration - not a kind of 'Bulk assessment/bulk judgement'. However, it is clear that there is likely to be a significant rise in the number of assessments. Given this predicted rise in demand the system will require greater capacity and the demand on administration will be equally significant. The ways in which BIAs are deployed may need to be revisited to ensure that they can retain their 'independent' judgement i.e. where they do not know the person being assessed.

The College of Social Work has been tasked by the DH to endorse suitable BIA training and have developed a number of key capabilities. For further information please see the College website www.tcsw.org.uk

**Independent Mental Capacity Advocates (IMCAs) and Independent Mental Health Advocates (IMHA)**

These roles are variably set up and commissioners should re-visit their local arrangements to ensure they remain fit for purpose and any contracts varied accordingly.

Training should be made available to those undertaking these roles and any training should be current and relevant.

**Approved Mental Health Professionals (AMHPs)**

It remains the duty of the local authority to ensure that they have sufficient and competent AMHPs in the area in which they operate. AMHPs will be at the forefront of practice where issues relating to the Judgement will be discussed and considered and AMHPs will inevitably be expected to help lead and support decision making (as they are currently under the Mental Health Act). As such AMHPs need an understanding of DoLS and the interface between the MHA 1983 and MCA 2005 even if they are not qualified BIAs. It needs to be remembered that whilst there is some crossover between AMHPs and BIAs the role is not the same.

Local authorities should work with the providers of current teaching programmes to ensure that effective arrangements are in place for teaching of issues relating to the decision and also assessment of knowledge and application is clear. Where AMHP support network, forums or meetings exist, ensuring that the judgement is a standing item is useful as new uploads and DH guidance are constantly being streamed. Where AMHPs are not directly employed by local authorities, they should still make the necessary checks in order to continue to fulfil the expectations of the Mental Health Act and Code of practice.

## Social Workers

All Social Workers should be aware of the Judgement and its implications in practice regardless of whether they are in a specialist role or not. They should be reminded through briefings and other CPD routes of this and of the need to consider the impact of the judgement on their assessments. They should be mindful of appropriate discussions with providers of care and support to ensure that proper guidance.

## Strategic Commissioners and Contracts Managers

Should review all existing service arrangements to ensure that they are compliant with the meaning of the judgement and brief service providers of any necessary changes. There is the potential that all placements in care homes, nursing homes and hospitals are subject to a deprivation of liberty and commissioners will need to work carefully with service providers on how to manage and co-ordinate the increase in demand for reviews and authorisations. There are already signs of an exponential rise in requests.

## Children's workers

Children's services staff should be fully aware of the implications of this judgement, for example those children and young people approaching adulthood and where reaching decisions in relation to parental capacity.

## Education and Training Providers

In house, procured and University training providers should be updated on the implications of the Judgement to ensure that they are teaching around the case and its outcomes in practice. Where employers are utilising on line resources, the providers of these services should be advised to update their material where it has not already been updated. These providers should review all of their programmes to ensure they do not contain any contradictory advice and guidance e.g. in relation to challenging behaviour, end of life, dementia care etc.

Bournemouth University and Learn to Care are in the process of updating its own resources. The National Centre for Post Qualifying Social Work has updated its workbooks for practitioners. One covers the MCA 2005 in general and the other covers the Deprivation of Liberty Safeguards. Please contact Sandra Adye on 01202 962745 or sadye@bournemouth.ac.uk in order to discuss orders.

We need to be more adept at understanding and using the core of the MCA 2005. It is suggested that deprivations of liberty could be reduced by careful application of the Act, especially the principles. More emphasis is needed on avoiding restrictive practice and restraint.

## Lawyers

Council and partner agency lawyers should be involved at an early stage in developing thinking around this as effective adherence to legal procedure is critical as case law precedence can leave decision makers at all levels to external scrutiny.

## Partner Organisations

Effective interventions are required at both strategic and operational levels . Local briefings should be encouraged and discussions held with senior local bodies or strategic groups depending on the arrangements in your area e.g. Local Adult Safeguarding Boards, Joint Commissioning Boards, and Joint Strategy Groups etc. A single body should be encouraged to take responsibility for the co-ordination of effective communication, training and written briefings which, where possible should be jointly agreed.

# Other issues:

- We need to be much more attuned to the idea that deprivation of liberty could be occurring in places where DoLS is not usable i.e. client's own homes, assuming the State is responsible for the care arrangements. All health and social care staff who could potentially 'come across' a situation where dep.lib is occurring need to be able to recognise what a deprivation of liberty is and know what to do about it.

- We need to be much more adept at understanding and using the main MCA 2005. It is suggested that dep.lib. may be reduced by the careful application of the Act, especially the principles. We need to place much more emphasis on avoiding restrictive practice and restraint. Training may need to take place to highlight these issues. Employers need to be confident that their staff have a good understanding of when an assessment of capacity might be necessary, how to go about it and how to make a best interests decision if appropriate. This includes staff in children's services where parental capacity to make decisions may be a concern.

- All current care home, nursing home and hospital placements should be reviewed in order to identify situations, which might now amount to a deprivation of liberty following the Supreme Court decision. Clients in supported living arrangements also need to be assessed. Any dep.lib. taking place in these environments will need to be reviewed and authorised if appropriate by the Court of protection.

- Employers need to revisit their resource allocations to DoLS teams/departments. As mentioned above it is likely that more BIAs will need to be trained. It is also possible that more admin staff might be needed to cope with any influx. There is also likely to be a need for extra IMCAs. It needs to be remembered that the Supreme Court judgement does not at this stage alter anything else in the DoLS framework. There is still a requirement that BIAs in particular are independent and should have little knowledge of the client prior to the assessment. It may be that one way to deal with this is to set up dedicated BIA teams.

- The recent criticism of the MCA and DoLS regime by the House of Lords also needs to be taken into account. The HoL demanded that Govt. tear DoLS up and start again. This does appear unlikely, indeed the DoH and ADASS are currently working to provide new clarification to support the use of the MCA and DoLs - we will monitor these developments and update members of any significant changes.

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**Drafted jointly by members of Learn to Care.**
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