

Waiting for the Liberty Protection Safeguards

December 2021

Alex Ruck Keene

Barrister, 39 Essex Chambers

Wellcome Research Fellow and Visiting Professor King's College London

Visiting Senior Lecturer, Institute of Psychiatry, Psychology and Neuroscience,
King's College London

Research Affiliate, Essex Autonomy Project, University of Essex

alex.ruckkeene@39essex.com

[@capacitylaw](#)

What should we be doing at the moment?

- Confidence as to legal framework – the meaning of deprivation of liberty
- Confidence as to how to take steps to authorise deprivation of liberty: inside and outside the scope of DoLS
- Applying the frameworks under COVID-19
- Applying LPS thinking

What is a deprivation of liberty?

- Article 5 ECHR:
 - Objective element: confinement to restricted space for non-negligible period of time –
 - Subjective element: either cannot or will not give valid consent
 - Imputable to the state

The consequences: damages

- Distinction between substantive and procedural breaches of Article 5:
 - *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)

Cf

- *LB Haringey v Emile* [2020] MHLO (CC): contested case: £143,000 for 8 years failure to authorise causing harm
- *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*")
- Burden of proof on **responsible body** to show no harm caused
- Applying s.4B approach as test

Applying DoLS at present

- DOLS statistics for 2020-21 (England – Wales not available)
 - 3% drop compared to average growth rate of 14% for previous years since *Cheshire West*
 - 137,515 urgent authorisation applications, and 117,220 applications for standard authorisations
 - 79,880 were in nursing homes, 71,885 were in care homes, 66,375 were in acute hospitals, and 5,685 were in mental health hospitals. 26,685 did not contain information on the detaining authority.
 - Of applications which were not granted, approximately 60% were due to change in circumstances
 - Roughly as many applications were completed in the year as were made
 - 10,000 fewer cases not completed at year end
 - Average length of time for completed applications 148 days.
 - Proportion of standard applications completed within the statutory timeframe of 21 days was 24% in 2020-21
 - A major acute hospital problem: 59,360 not granted and 3,140 granted...

- How are you doing?

Applying LPS thinking

- NB **not** the LPS itself – the MC(A)2019 is not in force, so you can't e.g. rely upon s.4B 'emergency' deprivation of liberty absent court order
- But you can start to apply LPS thinking – above all:
 - Front-loading thinking – will still require fresh assessment from BIA but should **already** be capturing consideration of confinement, capacity and deprivation of liberty at the point of care planning: good care planning practice already and integral to LPS in due course
 - Making sure you capture information about the confinement as part of the information relevant to the capacity test: [LDV](#)
 - Focusing on necessity and proportionality as part of the DoLS “best interests plus” test

Beginning to think about the LPS

- Categories not relevant to DoLS but who will be relevant to LPS
 - CHC v social care funding
 - Self-funders vs CHC/LA-funded individuals in care homes
- Assisting children's services get up to speed with the MCA: crucial post *Re D* [2019] UKSC 42:
<https://www.mentalcapacitylawandpolicy.org.uk/deprivation-of-liberty-and-16-17-year-olds-shedinar/>

‘Community DoL’

- Renewed focus required on community DoL applications – the **only** way to get authority to deprive someone of their liberty in the community (and very good preparation for LPS thinking)
- Section 4B – when application made, authority from the outset where necessary to provide life-sustaining treatment or reasonably believe necessary to prevent a serious deterioration in condition

Beginning to prepare for LPS

- Local impact assessments
- Sharing expertise
- Planning to share personnel
- Identifying sources of advocacy
- Above all, strengthening knowledge of the MCA

More resources

- [39 Essex Chambers | Mental Capacity Law | 39 Essex Chambers | Barristers' Chambers](#)
- [Mental Health & Justice | \(mhj.org.uk\)](#)
- [Mental Capacity Law and Policy](#)
- [MCA Directory | SCIE](#)
- [Mental Health Law Online](#)
- [Open Justice Court of Protection](#)

@capacitylaw

