

# Deprivation of liberty – the fundamentals

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# Restraint

- Where a person lacks capacity to consent to it, restraint is lawful if (1) it is in their best interests; and (2) necessary and proportionate to the risk of harm that they would suffer otherwise (s.6 MCA 2005)
- Not risk of harm to others – that is common law if immediate or potentially the MHA 1983
- NB, just because you **can** lawfully use restraint does not mean you **should**

# What is a deprivation of liberty?

- Article 5 ECHR:
  - Objective element: confinement to restricted space for non-negligible period of time – *Cheshire West* and the ‘acid test’
  - Subjective element: either cannot or will not give valid consent
  - Imputable to the state

# Why does it matter?

- A safeguard against arbitrary detention
- Procedural rights if you are detained
- But remember – the real nub of the matter is Article 8 ECHR: *Neary*

# The objective element

- *Birmingham City Council v D* [2017] EWCA Civ 1695
  - Meaning of freedom to leave
- *A Local Authority v AB* [2020] EWCOP 39 and *Re AEL* [2021] EWCOP 9
  - Continuous supervision and control, the ‘true powers of control’ and the ‘policy of caution’

# The subjective element (1)

- The information relevant to the decision: *A PCT v LDV* [2013] EWHC 272 (Fam) (capacity to consent to admission as informal patient to psychiatric hospital)
- If you are to say a person has capacity to consent to what would otherwise be a deprivation of their liberty, they must be **given and be able to understand, retain, use and the information relating to the restrictions upon them**

## The subjective element (2)

- 16 and 17 year olds: *Re D* [2019] UKSC 42
    - Where 16/17 year old confined and cannot consent, parents cannot seek to consent on their behalf
    - I.e. apply ‘acid test’, ask whether young person can consent, and then, if they cannot, they are deprived of their liberty
- => Application under MHA (where relevant) or court order will be required

# What is a deprivation of liberty? Imputability to the state

- *Re D* [2019] UKSC 42

it is clear that the first sentence of article 5 imposes a positive obligation on the State to protect a person from interferences with liberty carried out by private persons, **at least if it knew or ought to have known of this**



# The medical treatment carve-out

- Life-saving treatment: the scope of the Article 5 carve-out
  - *R (LF) v HM Senior Coroner for Inner London South* [2017] EWCA Civ 31 (nb SC refused permission)
  - *Re D* [2019] UKSC 42
  - <http://www.39essex.com/mental-capacity-guidance-note-deprivation-liberty-hospital-setting/>
  - DHSC Emergency MCA/DOLS guidance

# If it is a deprivation of liberty?

- DoLS: 18 and over, care homes/hospitals
- MHA: in-patient admission for assessment/treatment of mental disorder
- Court order:
  - ‘Community DoL’
  - High Court inherent jurisdiction (?)

# DoLS fundamentals

- Capacity
- Mental disorder
- ‘Best interests plus’
- Representation and support
- Access to the Court of Protection – *Re RD* [2016] EWCOP 49
- Priorities in an imperfect situation

# Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk)
- <http://www.scie.org.uk/mca-directory/>
- <http://www.mentalcapacitylawandpolicy.org.uk/>
- [www.courtofprotectionhandbook.com](http://www.courtofprotectionhandbook.com)

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