

Deprivation of liberty

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Restraint

- Where a person lacks capacity to consent to it, restraint is **only** 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)
- A person restrains another if they
 - (a) use, or threatens to use, force to secure the doing of an act which P resists, or
 - (b) restrict P's liberty of movement, whether or not P resists.
- Not risk of harm to others – that is common law if immediate or potentially the MHA 1983
- In human rights terms – an interference with their Article 8 rights, not their Article 5 rights
- **NB, just because you can lawfully use restraint does not mean you should**

What is a deprivation of liberty?

- Going beyond ‘mere restriction on liberty’
- Article 5 ECHR:
 - Objective element
 - Subjective element: no valid consent
 - Imputable to the state

Cheshire West (2014)

- Article 5 ECHR:
 - Objective element: ‘acid test’ of continuous supervision and control and no freedom to leave
 - Subjective element: no valid consent: lack of MCA capacity = inability to consent
 - Imputable to the state
- For the majority, Lady Hale held to be irrelevant:
 - compliance or lack of objection
 - the relative normality of the placement (whatever the comparison made); and
 - the reason or purpose behind a particular placement

AGNI (2026)

- Technically “A Reference by the Attorney General for Northern Ireland of a devolution issue under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998”
- A very different approach to that of *Cheshire West*
- A long judgment, but at its heart the idea that deprivation of liberty is the exercise of compulsion to overcome a person’s will to require them to be somewhere they do not wish to be

Deprivation of liberty now

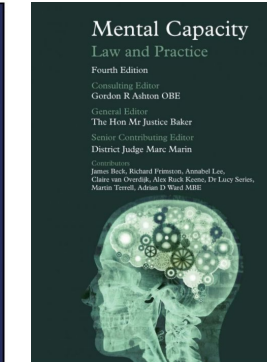
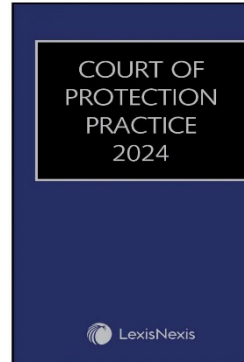
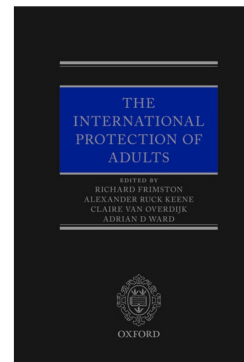
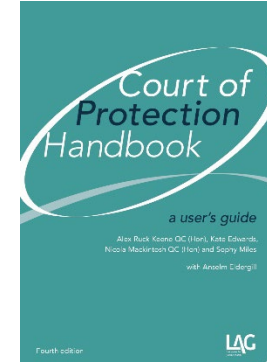
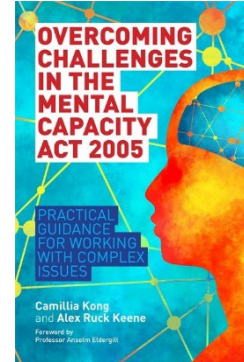
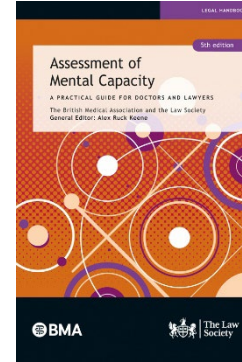
- A person who is physically or cognitively incapable of moving does not have 'liberty' to lose => no discrimination because not in the same position
- 'Multi-factorial' – the 'acid test' will often be necessary, but very unlikely ever to be sufficient
- The purpose and duration of the measures is relevant in marginal cases
- The objective cannot always be distinguished from the subjective element
- Lack of MCA capacity does not necessarily mean inability to give valid consent if basic awareness and consciousness of living arrangements sufficient to know and communicate happiness / unhappiness
- How this is 'operationalised' is a work in progress

The wider picture

- Much of this is (and always was) about Article 8 ECHR
- It is therefore about care planning first and foremost
- Those with cognitive impairments can still express reliable wishes and feelings, and they matter – what can you do to ensure that they are heard?

More resources

- [39 Essex Chambers Mental Capacity Law Resources](#)
- [Mental Health & Justice](#)
- [Mental Capacity Law and Policy](#)
- [MCA Directory | SCIE](#)
- [Mental Health Law Online](#)
- [Open Justice Court of Protection](#)



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