



# Deprivation of liberty and deputies

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# Overview

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- Deprivation of liberty: how did we get here?
  - Article 5 ECHR
  - Bournewood case
  - DoLS
  - Cheshire West
- Private DoL: Staffordshire v SRK
- The implications
- The future

# What is a 'deprivation of liberty'?

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## European Convention on Human Rights

### *Article 5 – Right to liberty and security*

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

... e. the lawful detention ... of persons of unsound mind...

4. 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.

# What is a 'deprivation of liberty'?

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ECtHR case law establishes three essential elements needed for there to be a DoL:

- Objective element
- Subjective element (lack of consent)
- 'Imputable to the state'

# What is a 'deprivation of liberty'?

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HL v UK (2004) – “The Bournemouth Case”

- Autistic man living in community
- Readmitted as informal patient to Bournemouth hospital and not sectioned under the MHA 1983 as did not resist admission
- Dispute about his care and treatment between hospital and carers
- Deprived of his liberty not in accordance with law – no procedure, no opportunity to review conditions of his detention
- No compliance with Article 5(4) as no procedure to seek a review
- Forces government to change law and introduce Deprivation of Liberty Safeguards (“DoLS”)

# Deprivation of Liberty Safeguards

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- ‘DoLS’ regime added to Mental Capacity Act
- But only applies to:
  - **Hospitals (NHS or private)**
  - **Care homes (registered with CQC)**
- In any other type of placement, deprivation of liberty can only be authorised by an order from the Court of Protection.
- If no authorisation in place, deprivation of liberty is unlawful.

# Deprivation of Liberty Safeguards requirements

- Requirements for DoLS authorisation:
  - Person must be aged 18 or over (age requirement)
  - Person must lack *capacity* to make their own decision (mental capacity requirement)
  - Person must be suffering from a mental disorder within the meaning of MHA 1983 (mental health requirement)
  - Person does not require treatment under the Mental Health Act procedures (eligibility requirement)

# Deprivation of liberty safeguards requirements

- Proposed deprivation is in their best interests (best interests requirement): No less restrictive means of meeting their best interests. The detention is only justified *when less severe measures have been considered to be insufficient to safeguard the individual or public interest which might require the person concerned to be detained.*
- Must not be a valid and effective advance decision refusing the treatment in question (no refusals requirement)

# Review process if DOLS do not apply

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- If DOL in supported/community placement then needs to be authorisation by the court under section 4A Mental Capacity Act
- Application to the Court of Protection
- Guidance on ‘streamlined’ procedure for annual DoL reviews given in cases of *Re X (Deprivation of Liberty) [2014] EWCOP 25* and *Re NRA & Ors [2015] EWCOP 59*
- P not necessarily a party to such applications, with P’s participation in reviews secured through appointment of “Rule 1.2 Representative”

# P v Cheshire West and Chester Council [2014] UKSC 19

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- Facts: P an adult with cerebral palsy and Down's syndrome required 24 hour care to meet personal care needs.
- Placed in local authority community placement – bungalow shared with 2 other residents
- Court of Protection said this was a DoL
- Court of Appeal overturned CoP ruling and said not a DoL
- P through the Official Solicitor appealed to the Supreme Court

# DOL and Cheshire West

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- Dispute as to whether his placement amounted to a deprivation of liberty
- Local authority said no, P through Official Solicitor, and mother, said yes – highlighting importance of procedural safeguards under the DoLS regime
- OS and mother argued that DoLS regime and court reviews ensure vulnerable adults afforded protection without having to rely on own ability or family's ability to challenge lawfulness of detention
- Warned against danger of widening “Bournewood gap”

## DOL and Cheshire West

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- Supreme Court's judgment of 19 March sets out 'acid test':
  - 1. Is the person subject to continuous supervision and control?
  - 2. Is the person free to leave? (focus is not on the person's ability to express a desire to leave, but on what those with control over their care arrangements would do if they sought to leave).

## DOL and Cheshire West

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Not relevant to the application of the test:

- the person's compliance or lack of objection;
- the relative normality of the placement (whatever the comparison made); and
- the reason or purpose behind a particular placement (*"a gilded cage is still a cage..."*)

Baroness Hale at para 57 of the Judgment:

“Because of the extreme vulnerability of people like P, MIG and MEG, I believe that we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case”

# Staffordshire County Council v SRK [2016] EWCOP 27

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- SRK was severely injured in a road traffic accident. Due to those injuries:
  - he lacks capacity to make decisions on the regime of care, treatment and support that he should receive
  - applying the approach in Cheshire West SRK's care regime creates, on an objective assessment, a deprivation of liberty.
- SRK was awarded substantial damages.
- He lives at a property that has been bought and adapted for him.
- His regime of care and support there is provided by private sector providers.

# SRK Case: the facts

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- SRK has a brain injury following a round traffic accident. His personal injury award is administered by IMTC which pays for his care from private care providers in his own home which has been adapted for him. He receives 24 hour care and assistance seven days a week. He uses a wheelchair and requires assistance with all aspects of personal care and daily living. He has very limited communication.
- His care package he is constantly monitored either by support workers or by the use of assistive technology. His accommodation and care package was arranged and is provided without any input from the Applicant Council or any other public authority. The care is arranged by a specialist brain injury case manager and is provided by private carers.
- **All agree care package is in his best interests.**

# Staffordshire County Council v SRK

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- The Court held that a Court Order under section 16 of the MCA was required and that there was “state imputability” as the state ought to have known of the situation on the ground.
- A Court had awarded SRK damages and the Court appointed a deputy to manage the money. Therefore steps should be taken by the local authority to ensure they had knowledge of the care regime and if the least restrictive option of care for that person amounts to a deprivation of liberty an application be made to Court to authorise this.
- Therefore, care arrangements may still amount to a deprivation of liberty even when there is no element of state funding, and an appropriate authorisation must therefore be in place.
- Judgment upheld on appeal: *Staffordshire CC v SRK [2016] EWCA Civ 1317*

# SRK – Key Points

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- A welfare order by the CoP is needed to provide a procedure that protects P from arbitrary detention and so avoids a breach of positive obligations under Article 5
- The conclusion should be factored into calculations of damages awards in the future
- This is based on the fact that the State knows or ought to know about the situation on the ground
- Knowledge will exist in all of these class of cases because:
  - The court that awards the damages, the CoP that appoints the deputy and the deputy / attorney or trustee to whom the damages are paid should take steps to ensure:

# SRK – Key Points

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1. that the relevant local authority with duties to safeguard adults knows of the regime of care
2. if, as here, the least restrictive available care regime to best promote P's best interests creates a situation on the ground that satisfies the objective and subjective components of a deprivation of liberty (and so a derivation of liberty within Article 5) a welfare order based on that regime of care is made by the COP.

The court awarding damages, the CoP when appointing a deputy, and the deputy trustees, attorneys should all be award that the regime creates a (private) deprivation of liberty

# SRK – Key Points

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So what should a deputy with that knowledge do?

- Deputy must ensure that they have made a lawful best interests decision applying MCA principles
- Raise the relevant issues with care providers and the relevant local authority with statutory duties to safeguard adults
- Deputy needs to objectively check whether he or the LA could put in place arrangements that would be less restrictive and/or remove any restraint
- LA would then have knowledge of the DoL

# What to look out for...

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- Consider clients' circumstances and seek specialist advice where:
  - The client is aged 16 or over and lacks the mental capacity to consent to their placement and is now, or is likely in the future to be “under continuous supervision and control” and “not free to leave”; or
  - The client is currently aged under 16, but it is likely that when they reach the age of 16 they will lack the mental capacity to consent to their placement and will be “under continuous supervision and control” and “not free to leave”

EVEN WHERE CARE PACKAGE IS FUNDED PRIVATELY

# Costs consequences

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- Where it is established that a client will require authorisation for their deprivation of liberty, this is likely to carry with it costs implications for the client's representation in any future court reviews.
- Such costs should be taken into account in calculations of the client's special damages, in much the same way as financial deputyship costs are taken into account.
- Therefore where client's damages claim is ongoing, it is vital to raise this issue with those conducting the litigation so these costs can be included in the claim.

# The future of DoLS?

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- Mental Capacity (Amendment) Bill recently presented in the House of Lords
- If enacted, would apply to DoL in hospitals, care homes and supported living / other community settings
- Intended to be a simpler, less bureaucratic process for authorising DoL
- If enacted, likely to come into force by 2020 at earliest
- But: significant criticisms of MC(A) Bill as currently drafted: lack of involvement of P, too much power (and responsibility) given to care home managers, reduced role of advocates
- Light at the end of the tunnel? Maybe not just yet...

# ANY QUESTIONS?

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