CARD 8

Care and treatment amounting to a deprivation of liberty – the deprivation of liberty safeguards
Where adults lack the capacity to consent to treatment, the MCA is clear they should be cared for using the less restrictive of the available options. There will be occasions, however, where adults lacking capacity need to be cared for in a manner that amounts to a ‘deprivation of liberty’.

In April 2009 the deprivation of liberty safeguards (DoLS) were introduced to provide protection for this group of adults.

**What is deprivation of liberty?**

In 2014 a supreme court ruling lowered the threshold in relation to identifying a deprivation of liberty. The court introduced an ‘acid test’: that the person is under continuous supervision and control and is not free to leave. Each element of the test must be satisfied. These factors are likely to be relevant:

- restraint is used, including sedation, to admit a person who is resisting
- professionals exercise complete and effective control over assessments, treatment, contacts and residence
- the person would be prevented from leaving if they made a meaningful attempt to do so
- a request by carers for the person to be discharged to their care is likely to be refused
- the person is unable to maintain social contacts because of the restrictions placed on access to other people.
How can deprivation of liberty be authorised?

Under the MCA, the deprivation of liberty of a person lacking capacity to consent to treatment can be authorised in one of three ways:

– by the court of protection exercising its powers to make personal welfare decisions under the MCA
– where it is necessary in order to give life-sustaining treatment or do any ‘vital act’ while a decision is sought from the court
– in accordance with the DoLS scheme as outlined below.

DoLS only applies to people who are in a care home or hospital. The care home or hospital is called the managing authority in the DoLS. Where a managing authority thinks it needs to deprive someone of their liberty, they must seek authorisation by a supervisory body. They can do this up to 28 days in advance. For care homes and hospitals, the supervisory body is the local authority where the person is ordinarily resident. This is usually the local authority where the care home is located, unless the person is funded by a different local authority.

A person may need to be deprived of their liberty before the supervisory body can provide a standard authorisation. In these situations, the managing authority can use an urgent authorisation. Urgent authorisations are granted by the managing authority itself.
The managing authority can deprive a person of their liberty for up to seven days using an urgent authorisation. It can only be extended (for up to a further seven days) if the supervisory body agrees to a request made by the managing authority to do this.

Recent case law suggests that where care and treatment is being provided in ordinary circumstances in acute settings, it is unlikely to amount to a deprivation of liberty.

Outside care homes and hospitals, the DoLS scheme does not operate and any deprivation of liberty must be authorised by the court of protection.