
Deprivation of Liberty Safeguards assessments

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The British Medical Association (BMA) is an apolitical professional association and independent trade union, representing doctors and medical students from all branches of medicine across the UK and supporting them to deliver the highest standards of patient care. We have a membership of over 154,000, which continues to grow each year.

Key points

- The BMA is calling for an urgent review of Deprivation of Liberty Safeguards (DoLS) with a view to simplifying and streamlining the system.
- The authorisation for a DoLS is cumbersome, bureaucratic and time consuming and will inevitably divert resources from front line care.
- Considerable uncertainty remains in a wide range of circumstances about whether care or treatment will amount to a DoLS. This uncertainty could lead to confusion for health professionals and, potentially, to a defensive and bureaucratic mind-set.

Introduction

In the course of caring for adults with impaired decision-making capacity there may be times when it will be both necessary and in their best interests to deprive them of their liberty for a period of time. In 2009, the DoLS were introduced as part of the Mental Capacity Act 2005 to ensure that appropriate safeguards are in place to protect adults deprived of their liberty. DoLS provide a procedure for authorizing any deprivation of liberty in care homes, hospitals and supported living arrangements either arranged by the NHS, commissioned by CCGs or privately.

Cheshire West

In March 2014 the UK Supreme Court handed down two judgements, commonly referred to as Cheshire West.¹ These judgements outline the test that must be used in the determination of whether arrangements made for the care and treatment of an individual lacking capacity to consent amount to a deprivation of liberty.

In its judgement the Court said:

- The benign purposes of care arrangements are not relevant to the question of whether a person was deprived of liberty.
- What would be a deprivation of liberty for a non-disabled person is also a deprivation for a disabled person.
- The key feature is whether the person concerned is under continuous supervision and is not free to leave.
- The person's compliance or lack of objection, the purpose of the placement or its relative normality are immaterial.



Implications for health care and health professionals

Cheshire West has resulted in many more people being identified as deprived of their liberty in health and care settings. Despite helpful recent guidance from the Law Society, considerable uncertainty remains in a wide range of circumstances about whether care or treatment will amount to a deprivation of liberty.² The extent to which health professionals have responsibility to identify deprivations of liberty taking place in private care arrangements to which they may have access, and to refer them to the Court of Protection is now uncertain even where those care arrangements are long-standing and manifestly both necessary and in the best interests of the incapacitated adult. **The BMA is concerned that this uncertainty is likely to lead to confusion for health professionals and, potentially, to a defensive and bureaucratic mind-set.**

The BMA is also concerned about the authorisation process of DoLS which are cumbersome, bureaucratic and time consuming. We believe that the process will inevitably divert resources from front line care. Cheshire West has led to a significant increase not just in the numbers of people being deprived of liberty but also the circumstances in which deprivations of liberty can be identified as taking place. Hospice care, ICU and even transfer of the seriously ill in ambulances can all meet the criteria. The need to identify deprivations of liberty in these settings, and to seek certification represents both a culture shift, with a risk of stigmatising both the care and those being cared for, and a significant and confusing administrative burden. This is compounded further as any death while an individual is deprived of liberty by the state needs to be referred to the coroner. Entirely anticipated or unavoidable deaths such as those in hospices and ICUs will therefore have to be investigated, leading to unnecessary distress for those close to the patient and additional bureaucracy. **The BMA is calling for an urgent review of the DoLS with a view to simplifying and streamlining the system.**

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References

¹ https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf

² <http://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/>