



Decision making for adults lacking capacity

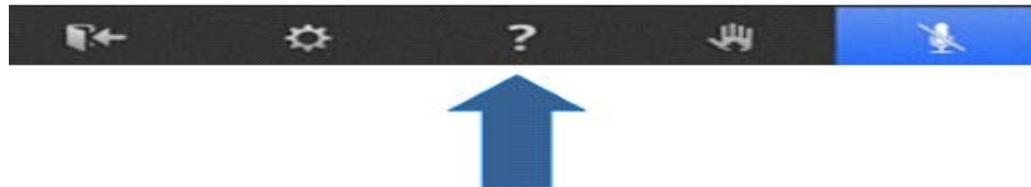
Helen Smith, Solicitor, Irwin Mitchell LLP

Welcome

- Welcome to this Contact Webinar
- If there is a technical hitch, please do bear with us
- Those of you joining by pc, laptop, tablet or smart phone should now be able to see this introduction slide

Timings and Questions

- As there are so many attendees, it is not practical for verbal questions to be taken, therefore you will all remain 'muted' throughout
- If at any point you have questions, please use the question icon on your GoToWebinar tool bar on your screen
- This will allow you to type your question in to the text box and submit this to the Webinar administrator
- I will select as many relevant questions to answer as time allows, if similar questions are received I will condense these where possible



Q & A

- Further relevant questions, not covered in the time allowed, will be answered and posted on the Contact website along with the recording of this Webinar, details of which will be circulated next week
- At the end of the Webinar a short questionnaire will launch, please take the time to complete this as this will assist with future online training events

Mental Capacity Act – why do we need it?

- 2 million people lack capacity to make decisions for themselves (dementia, learning disabilities, mental health problems, stroke, brain injury)
- Up to 6 million informal carers with no clear guidance as to how decisions are to be made and by whom
- No legal basis for “next of kin”
- Court of Protection had jurisdiction over *financial affairs only* (Lunacy Act 1890) and jurisdiction relates to *mental disorder only* (Mental Health Act 1959) so excluded drug/alcohol related conditions
- Mental Health Act 1983 – restricted powers
- Need for a comprehensive and workable legal framework.

Mental Capacity Act 2005

- Passed by Parliament in 2005 after wide consultation
- Covers **England and Wales** and came into effect in 2007
- Establishes a single and comprehensive legal framework for *decision making* for people over the age of 16 who may not be able to make their own decisions due to illness, learning disability or mental health problems (including effects of drugs/alcohol or temporary loss of capacity)
- Wide ranging in scope: deals with personal welfare issues, property and general affairs of an individual. Essentially covers any decision which the person cannot make for him/herself.

General principles – S.1 MCA 2005

A person must be assumed to have capacity unless it is established that he lacks capacity.

A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

What is Mental Capacity?

Does a Person Lack Mental Capacity?

Section 2 of the Mental Capacity Act 2005 defines:-

“a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain”.

The Act goes on to specify:-

- It does not matter if the impairment is permanent or temporary
- Age, of itself, does not establish a lack of mental capacity
- An “unjustified assumption” of a person’s condition should not, of itself, establish a lack of mental capacity
- Ability to communicate *“whether by talking, using sign language or any other means”*

What is Mental Capacity?

How to assess mental capacity

The measure of mental capacity is “decision specific”.

It is necessary to consider the complexity and magnitude of the decision.

The test in all cases is whether a person is able to:-

1. Understand information relevant to the decision;
2. Retain that information;
3. Use or weigh up that information as part of making the decision;
4. Communicate their decision whether by talking, using sign language or any other means.

Therefore, a person may have capacity in one context but not in another:
e.g. they may be able to decide where they want to live but may not be able to decide whether to buy or sell property.

Mental Capacity

What if the issue of capacity is not clear?

- For example, different professionals have different views?
- What if a local authority wants to protect a vulnerable adult, but P asserts his/her own capacity?

In case of any dispute, an application can be made to the Court of Protection to make a declaration on the issue of capacity.

Duty to act in ‘best interests’

Section 4 of the Act sets out a framework for considering what is in a person’s “best interests”.

- The decision should not be based solely on:
 - their age or appearance; or
 - their condition or an aspect of their behaviour which would lead others to make assumptions.
- The person making the decision should:
 - take into account all the relevant circumstances; and
 - must consider whether the person is likely to have capacity in the future and whether it is appropriate to wait until then to make the decision.
- The person to whom the decision relates should be encouraged to be as fully involved as possible in the decision making process.

Best Interests Continued

As far as possible the decision maker should consider:-

- The person's past and present wishes and feelings (including any written statement made when they had capacity);
- The beliefs and values that they would be likely to have if they had capacity;
- Factors they would consider "if able to do so";

Other people should also be consulted, if practical and appropriate, namely:-

- » Anyone named by the person as someone to be consulted
- » Anyone caring for the person or interested in their welfare, such as a parent or carer
- » Anyone appointed under a Power of Attorney
- » Any Deputy appointed by the Court

Who can make the decision?

- The decision maker will depend on the decision to be made.
- If it is a day to day decision, such as what should they wear, then the carer can make the decision.
- If the decision is what care package does someone require then the social worker or the organisation funding the package may make the decision.
- If there is a decision to be made which is likely to have a significant impact on their life then a best interests meeting may be required.
- If there is a Lasting Power of Attorney or deputyship in place then the person(s) appointed under such may be able to make the final decision.

Lasting Power of Attorneys

- An LPA is a legal document which allows a person to appoint someone they know and trust to make decisions on their behalf.
- The person making the LPA must have capacity at the time of signing the LPA to make the decisions contained within the LPA and must be over 18 years.
- They decide:-
 - Who to appoint;
 - How they are appointed; joint and/or severally
 - Any restrictions or guidance to be put in place.
- Two types
 - Property and Financial Affairs
 - Personal Welfare
- The LPA will continue to be valid even when the donor lacks mental capacity to make the decisions themselves.

Appointment of a Deputy

- Two types of Deputy: –
 - Property & Finance
 - Welfare
- An application can only be made where the person is over 18 years and the have been found to lack capacity for the relevant decisions.
- Court will generally only appoint a deputy where a series of decisions are likely to be required.
- More common for Property & Finance than Welfare.
- The court will require evidence that the person lacks capacity to make the decisions.

Who can be a Deputy?

- A Deputy can be anyone over 18.
- Court determines a Deputy's powers, including paying bills, operating bank accounts, managing investments, signing tenancy agreements etc.
- Bigger decisions, buying and selling property may require Court authority.
- Deputy has a duty to account to the Court.
- An appointed Deputy has a duty to follow 5 key principles of MCA and :-
 - Allow that person to make their own decisions wherever possible.
 - Assist that person in making their own decisions if possible.
 - To act in their "Best Interests".

Welfare Deputies

- MCA s 16 (4) states :
- When deciding whether it is in P's best interests to appoint a Deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that:
 - (a) a decision by the court is to be preferred to the appointment of a Deputy to make a decision, and
 - (b) the powers conferred on a Deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

Independent Mental Capacity Advocates (IMCAs)

- Extra safeguard for particularly vulnerable people in specific situations.
- Duty on local authorities or NHS bodies to provide this service where necessary
- Who? - People with no-one to consult or speak for them (other than paid carers)
- When? - When decisions are being made about serious medical treatment or significant changes of residence e.g. moving care homes or hospital
- What? - The IMCA represents and supports the person who lacks capacity. The IMCA makes representations about the person's wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision. The IMCA can challenge the decision-maker on behalf of the person lacking capacity if necessary.

Section 5 MCA

The MCA provides legal protection from liability for carrying out certain actions in connection with the care and treatment of people who lack capacity to consent, provided that:

- *reasonable belief* that the person lacks capacity in relation to the matter in question
- *reasonable belief* the action you have taken is in the best interests of the person.

Section 6 MCA – use of restraint

Use of restraint not protected under section 5 unless:

- Reasonable belief that it is necessary to prevent harm
- Proportionate response to that risk and likely nature of that harm

“Restraint” under s.6 does not include deprivation of liberty
– see later slides

General principles – MCA 2005

What does this mean?

- If somebody lacks capacity, most welfare decisions are made in their best interests, using the best interests checklist
- Consider their wishes and feelings, and take into account the views of the family
- LA/CCG is often the body coordinating these decisions – if there is a dispute then they will refer the matter to the Court of Protection to be resolved

How to resolve disputes

The Court of Protection –

- Established by the MCA
- Only has jurisdiction where a person lacks mental capacity
- Does NOT have jurisdiction in relation to people detained under the Mental Health Act
- Makes decisions on behalf of people who lack capacity
- Can make one off decisions
- Can appoint deputies or resolve disputes in relation to LPAs and/or deputyships
- Determines what is in somebody's best interests when there is disagreement, including in relation to a DoL (s 21A cases)

How to resolve disputes

If there is a dispute between parties in relation to the welfare of a person who lacks capacity:

- Try to resolve via a best interests meeting
- If not possible, apply to the Court of Protection (CoP)
- If the dispute relates to a Deprivation of Liberty (DoL) and P is expressing a wish not to be deprived of their liberty, then an application must be made to the CoP to protect P's rights

How to resolve disputes

Who should make the application?

- Usually the relevant statutory body apply - in most cases this will be the local authority, but where the issues are purely medical, the NHS authority should apply
- If local authority / NHS refuse to apply, or no state involvement, others can apply instead:-
 - If a financial Deputy has been appointed, can apply to the CoP seeking declarations as to P's best interests
 - Family members and others involved in P's care
 - Independent Mental Capacity Advocate (IMCA)
 - In urgent cases, application can be made in P's own name with a litigation friend

How to resolve disputes

- CoP can decide what is in a person's best interests in relation to his/her care, residence, contact, deprivation of liberty
- CoP can decide whether a life sustaining treatment is in a person's best interests
- CoP can terminate an LPA or deputyship order, and can appoint new deputies
- CoP can act very quickly and out of hours in urgent situations

How to resolve disputes

Who represents P?

- P will need a litigation friend
- Litigation friend must be able to act independently and on behalf of P, without putting forward their 'own' arguments
- For this reason, family members are often not appropriate to act as litigation friends where there is a welfare dispute, e.g. a dispute about where P should live
 - IMCA?
 - Official Solicitor?

How to resolve disputes

What funding is available?

- Public funding (“legal aid”) is still available in CoP welfare cases and there is no proposal to change that.
- Family members may qualify in their own right for legal aid.
- If IMCA / other litigation friend applying, legal aid is in P’s name.
- Private funds from P’s estate if he/she does not qualify for legal aid.
- If damages held in trust and P in receipt of state benefits, P now unlikely to qualify for legal aid.
- Non-means tested legal aid available for s21A cases (i.e. deprivation of liberty in care home or hospital).

Safeguarding / Court of Protection

- Care Act 2014:
 - Section 1 - duty to promote wellbeing
 - Section 9 – duty to assess needs
 - Section 18 – duty to meet needs
 - Section 42 – safeguarding
- Each LA has its own adult safeguarding policy and board.

Safeguarding / Court of Protection

Care Act 2014 sets out a clear legal framework for how local authorities and other parts of the system should protect adults at risk of abuse or neglect.

Local authorities have new safeguarding duties. They must:

- **Lead a multi-agency local adult safeguarding system**
- **Make enquiries, or request others to make them**
- **Establish Safeguarding Adults Boards**
- **Carry out Safeguarding Adults Reviews**
- **Arrange for an independent advocate**

Any relevant person or organisation must provide information to Safeguarding Adults Boards as requested.

Safeguarding / Court of Protection

- Raise concerns – individual complaints or collectively to the director or Social Services and/or Local Government Ombudsman.
- More information:
 - Care and support statutory guidance
- Social care institute for excellence:
 - <https://www.scie.org.uk/care-act-2014/>

Deprivation of Liberty

What is a 'deprivation of liberty'?

European Convention on Human Rights – 1953:

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.

Layers of increased domestic legislation

- Human Rights Act 1998
- Mental Capacity Act 2005 + Code of Practice; safeguards for those lacking capacity and the “best interests” test.
- ‘Bournewood case’ – leads to:
- Mental Health Act 2007, which contains:
- Deprivation of Liberty Safeguards

MCA 2005 – best interests

- In context of deprivation of liberty, the relevant issue is whether P can consent to DoL or to their residence and care arrangements generally
- Any acts done for a person lacking mental capacity should be done in their “best interests”
- Consideration should be given as to whether the desired outcome can be achieved in a less restrictive way

Interface between MCA and MHA

- Great swathes of people who lack capacity will not come within definition under Mental Health Act 1983 and therefore will not be treated under that Act
- For example, people with learning disabilities cannot consent to residential care, treatment
- Need protection and safeguards

HL v UK – “the Bournemouth case”

- European Court of Human Rights case
- Autistic man living in community
- Readmitted to Bournemouth hospital and not ‘sectioned’ under the Mental Health Act 1983 as did not resist admission
- Dispute about his care and treatment between hospital and carers

HL v UK – “the Bournemouth case”

- 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

HL v UK – “the Bournewood case”

- No formal procedures for:
 - Who could authorise detention
 - Reasons for admission
 - Need for continuing clinical assessment and review
 - No one to represent patient and seek a review
 - e.g. as in MHA tribunals – for lawfulness of detention

The Deprivation of Liberty Safeguards

- In response to ECtHR's judgment in *Bournewood*, government introduces deprivation of liberty safeguards ("DoLS") – via Mental Health Act 2007, which amends MCA
- This new scheme sets out procedure for authorising deprivations of liberty for those lacking capacity to make decisions if MHA does not apply
- Provides safeguards and protection for some of most vulnerable in society

DOLS referred to in the MCA Code of Practice

Provisions of the Code of Practice

- *“The deprivation of a person’s liberty is a very serious matter and **should not happen unless absolutely necessary**, and in the best interests of the person concerned. That is why the safeguards have been created: to ensure that any decision ... is made following defined processes and in consultation with specific authorities”*

DoLS procedure

- When do DoLS apply?
- The safeguards only apply if the deprivation is in a hospital or care home (CQC registered)
- If deprivation is in a community setting then it can only be authorised by way of an order from the Court of Protection.
- As to what constitutes a ‘deprivation of liberty’ – see later.

Deprivation of Liberty safeguards requirements

- Provide a safeguard for vulnerable people who “best cared for” in a residential care home or hospital
- The following requirements must apply:
 - 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)

Application of the rules – DOLs procedure

- Admission to a care home (CQC) or hospital
- Managing authority (e.g. care home) requests urgent or standard authorisation from supervisory body (local authority)
- Mental health assessment
- Best interests assessment – assess:
 1. Whether deprivation of liberty
 2. If so, whether justified and in best interests

Application of the rules - DOLs procedure

- Best interests assessor has duty to consult the managing authority and consider views of others with an interest in their welfare
- “Relevant Person’s Representative” (“RPR”) appointed - if no suitable family member or friend, paid RPR must be appointed
- If authorisation recommended then can be granted for a maximum period of a year

Application of the rules – DOLs procedure

- Conditions
- May be attached to the authorisation
- Could be e.g. minimum amount of hours in the community, allowed to move freely in the placement but alarm on the bedroom door
- Managing authority needs control over conditions

Application of the rules – DOLs procedure

- If the assessments recommend it then the supervisory body – local authority – must give the authorisation, issue in writing, attach conditions, appoint relevant person's representative

Process overview

1. Identification of the need for an authorisation
2. Application for authorisation
3. Initial consideration by the supervising authority
4. Assessment – BI assessor, consult
5. Assessment outcome, appoint RPR
6. Review – NB can also be reviewed by the Court of Protection

Summary of checks and balances

- Supervisory body (local authority) may review the standard authorisation.
- Deprivation of liberty assessed again on expiry of authorisation.
- RPR can request review.
- Can be referred to Court of Protection to review.
- Care homes and hospitals must notify the CQC about any application to deprive a person of their liberty.

Review process if DOLS do not apply

- If DOL in supported/community placement then needs to be authorisation by the court
- A DOL can now exist in a fully private setting (the case of *SRK [2016]*)
- Apply to the Court of Protection
- Guidance on court based reviews of the DOL given in the case of *Re GJ, NJ and BJ (Incapacitated Adults) [2008]*
- Can be court based or paper review

What is the test for deprivation of liberty?

- *P v Cheshire West and Chester Council*
- Previous case law established 3 elements of test for deprivation of liberty:
 - P is “objectively” deprived of their liberty
 - P has not consented to DoL
 - DoL is “imputable to the state”
- In *Cheshire West* case, second and third elements not in dispute. Arguments centred on the first element.

DOL and Cheshire West

- 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
- Supreme Court judgment handed down on 19 March 2014
- Provides much needed clarity on the law in relation to deprivation of liberty

DOL and Cheshire West

- 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”

Cheshire West – ‘the acid test’

- **Is P:**
 - under continuous supervision and control;**

and
 - not free to leave?**

Cheshire West – ‘the acid test’

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...*”)

Cheshire West – ‘the acid test’

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”

Cheshire West – the implications

- Large numbers of people will now be considered to be deprived of their liberty who were not previously.
- For example if someone is vulnerable to exploitation and they require someone to accompany them at all times when outside, these measures may be in the person's best interests, but may still amount to a deprivation of liberty and will require authorisation (either via DoLS or authorisation by the CoP).
- This is even if the person appears content or does not express any objections to the arrangements.
- Purpose of authorisation to ensure that independent reviews carried out to make sure protective care arrangements are in person's best interests and not overly restrictive.

DoL and intensive care: *Ferreira*

- *R(Ferreira) v HM Senior Coroner for Inner South London & Ors [2017] EWCA Civ 31*
- Court of appeal judgment (26/1/17) concerning DoL in intensive care
- Maria Ferreira, 45-year-old woman with Down's syndrome and learning disabilities, died in intensive care
- Family asked coroner to treat her as having been deprived of her liberty at time of death, and thus to call a jury
- Coroner declined to do so

DoL and intensive care: *Ferreira*

- Court of Appeal held:
 - *“any deprivation of liberty resulting from the administration of life-saving treatment to a person falls outside Article 5(1) ... “so long as [it is] rendered unavoidable as a result of circumstances beyond the control of the authorities and is necessary to avert a real risk of serious injury or damage, and [is] kept to the minimum required for that purpose”. In my judgment, what these qualifications mean is in essence that the acute condition of the patient must not have been the result of action which the state wrongly chose to inflict on him and that the administration of the treatment cannot in general include treatment that could not properly be given to a person of sound mind in her condition according to the medical evidence.”*

DoL and intensive care: *Ferreira*

- Court of Appeal went on to hold that, even if the acid test did fall to be applied, it could not be said that either Maria Ferreira or the majority of patients in ICU were not free to leave, the true cause of **their lack of freedom to leave not being a consequence of state action but their underlying illness**, a matter for which (absent special circumstances) the state is not responsible.
- But judgment has been criticised for lack of consistency with *Cheshire West*.

Any questions?

Thank You!

- Thank you for attending with us today
- A short questionnaire will launch at the end of this webinar
- Please take the time to complete this it will help us plan future online training events including other topics you would like to see
- The recording of this Webinar, presentation and questions will be on the parent participation Resources page of Contacts' website next week – an email confirming this will be sent to you once this is available



Helen Smith
Solicitor

Helen.smith@irwinmitchell.com