

## **DEPRIVATION OF LIBERTY – WHAT NOW ?**

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Care providers are being encouraged to check they are not unlawfully depriving service users of their liberty, following a new ruling by the Supreme Court. It is against the law to deprive anyone of their liberty without legal authorisation.

### **The Cheshire West case**

On 19 March, the Supreme Court ruled on the case of three people with learning disabilities receiving care and support in different settings. One was living with a foster carer, one was in a small care home and one was in a supported living scheme in a shared bungalow.

The case has become known as the “Cheshire West case”, after the local authority funding the care of two of three.

There was no dispute about whether the care regimes were in their best interests, or that they lacked the mental capacity to consent to them.

The question was whether the three were deprived of their liberty.

### **Deprivation of liberty – “under continuous supervision and control” and “not free to leave”**

The Court decided that all three were deprived of their liberty, because they were under the “continuous supervision and control” of their carers, were “not free to leave” and lacked capacity to consent to what was being done for them.

The fact that the supervision and control was for their own benefit did not stop it being a deprivation of liberty. Nor was the fact that they seemed happy with the arrangements.

The Court also rejected the idea that they could not be deprived of their liberty because the supervision and control was just what would be normal for anyone with their needs.

The Court did not define continuous supervision and control, but it is clear that it doesn't necessarily have to be observation in the traditional nursing sense.

The Court was more concerned with whether the carers were effectively exercising control over every aspect of the person's life. In two of the three cases, it noted that the service user “would not be allowed out without supervision, or to see anyone whom [the carers] did not wish her to see, or to do things which they did not wish her to do.”

Likewise, the Court did not say precisely what free to leave means, but it is clear that just being able to go out with an escort (or even unescorted) won't be enough, if the carers are effectively controlling when and where the person can go. If the person has never, in fact, tried to leave, the question is what would happen if they did.

## **Implications of the judgment**

The ruling means that many more service users may be deprived of their liberty than previously thought.

Although this ruling was about three people with learning disabilities, it will apply to people with all kinds of needs, including people with dementia or brain injuries.

It will apply to people in hospitals and care homes. It will also cover people in supported living, shared lives schemes and other domiciliary settings, where the state has been involved the arrangements for their care (and possibly private arrangements where the care is state regulated).

## **What care providers need to do**

Deprivation of liberty isn't necessarily a bad thing. Some people's needs are so great that only continuous supervision and control is enough to keep them safe. And if they lack capacity to make decisions about their own care, providers are required to do what is in their best interests.

But the Court stressed that deprivation of liberty must be formally authorised, so that there is a proper independent check that it is necessary. Without authorisation, it is a breach of the service user's human rights, and so against the law.

Both the Department of Health and the Care Quality Commission (CQC) have issued guidance encouraging care providers to review whether any of their service users are being illegally deprived of their liberty.

If providers find that any service users are under continuous supervision and control and not free to leave, they should first review whether that level of restriction is actually necessary. If it isn't, a less restrictive approach should be put in place.

But if that level of restriction is necessary, and the user lacks capacity to consent to it, formal authorisation must be got for the deprivation of liberty.

## **Getting authorisation for deprivation of liberty**

Care home and hospital providers are already familiar with the procedures for authorisation under the Mental Capacity Act Deprivation of Liberty Safeguards (MCA DOLS) or the Mental Health Act (where relevant).

For adults in other settings, authorisation has to be given by the Court of Protection (the specialist court which deals with mental capacity issues).

Amongst other things, the Court will need good evidence that the care regime is in the user's best interests and no less restrictive option is possible, as well as evidence from a qualified professional about the user's mental capacity. If it authorises the deprivation of liberty, the Court will say when and how it is to be reviewed.

There are standard forms for applications to the Court and fees have to be paid. The Court has a special deprivation of liberty team to help manage these cases, but providers would be well advised to take advice from a lawyer with expertise in mental capacity work before applying. They may also want to talk to their local authority's DOLS team.

Although it is carers who need to be authorised to deprive users of their liberty, the application to the Court could also be made by the authority responsible for commissioning the care. The CQC is encouraging providers to talk to their commissioners.

Ideally, of course, everything should be authorised before the deprivation of liberty starts. But CQC has made clear that providers should go on providing the care they think is necessary until a decision can be got from the Court.

Providers must notify CQC of the outcome of any application for an authorisation to deprive any of their service users of their liberty (either under MCA DOLS or direct to the Court).

### **Further information**

The Department of Health's guidance is at [www.gov.uk/government/publications/deprivation-of-liberty-safeguards-supreme-court-judgments](http://www.gov.uk/government/publications/deprivation-of-liberty-safeguards-supreme-court-judgments)

The (rather fuller) guidance from CQC is at [www.cqc.org.uk/sites/default/files/media/documents/20140416\\_supreme\\_court\\_judgment\\_on\\_deprivation\\_of\\_liberty\\_briefing\\_v2.pdf](http://www.cqc.org.uk/sites/default/files/media/documents/20140416_supreme_court_judgment_on_deprivation_of_liberty_briefing_v2.pdf)

Contact details for the Court of Protection are on its website at [www.gov.uk/court-of-protection](http://www.gov.uk/court-of-protection)