DNACPR Workshop
West Suffolk College
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Outcomes from this session...

MCA Getting the balance right

National MCA and DOLS updates

Case Studies

Recent Case Judgements

The Future of DOLS

MCA / DOLS Resources
The Mental Capacity Act 2005 is a vitally important piece of legislation, and one that will make a real difference to the lives of people who may lack mental capacity.

It will **empower** people to make decisions for themselves wherever possible, and **protect** people who lack capacity by providing a flexible framework that places individuals at the very heart of the decision-making process.

It will ensure that they participate as much as possible in any decisions made on their behalf, and that these are made in their best interests.

It also allows people to plan ahead for a time in the future when they might lack the capacity, for any number of reasons, to make decisions for themselves.
Mental Capacity – Have We Got The Balance Right? (2)

The Act depends on getting the balance right

Empower

Protect
The Act is intended to be enabling and supportive of people who lack capacity, not restricting or controlling of their lives. It aims to protect people who lack capacity to make particular decisions, but also to maximise their ability to make decisions, or to participate in decision-making, as far as they are able to do so.

The five statutory principles are:

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. 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.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. 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.
5. 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.
The Act depends on getting the balance right
The Mental Capacity Act was a visionary piece of legislation for its time, which marked a turning point in the statutory rights of people who may lack capacity.

The Mental Capacity Act placed the individual at the heart of decision-making. Capacity was to be presumed unless proven otherwise. Decision-making was to be supported to enable the individual as far as possible to take their own decisions. Unwise decisions were not to be used as indicators of a lack of capacity—like others, those with impairments were entitled to take risks and to make poor decisions.

When a person was found to lack capacity for a specific decision, the ‘best interests’ process ensured that their wishes and feelings were central to the decision being made and, importantly, provided protection from harm to vulnerable adults.
Mental Capacity Act 2005: Post-legislative scrutiny

The Act signified a step change in the legal rights afforded to those who may lack capacity, with the potential to transform the lives of many. That was the aspiration, and we endorse it.

Our findings suggest that the Act, in the main, continues to be held in high regard. However, its implementation has not met the expectations that it rightly raised. The Act has suffered from a lack of awareness and a lack of understanding. For many who are expected to comply with the Act it appears to be an optional add-on, far from being central to their working lives.

The evidence presented to us concerns the health and social care sectors principally. In those sectors the prevailing cultures of paternalism (in health) and risk-aversion (in social care) have prevented the Act from becoming widely known or embedded.

The empowering ethos has not been delivered. The rights conferred by the Act have not been widely realised. The duties imposed by the Act are not widely followed.
1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society...

Things which form part of your private life include:

- Personal autonomy – the right to make decisions about how you live your life
MCA Case Judgements of Interest - Summaries

• Steven Neary v Hillingdon Council (2011)
  (Article 8 – Private and Family Life)

• Derbyshire CC v AC, EC and LC (2014)
  (Mental Capacity Assessment – what needs to be understood for care / treatment)

• Border v Lewisham and Greenwich NHS Trust EWCA (2015)
  (Capacity and Consent)

• Elaine Winspear v City Hospitals Sunderland NHS Foundation EWHC (2015)
  (DNACPR – Consultation and Best Interests)

• P v Rochdale Borough Council & Others EWCOP (2016)
  (Finance / Role of the Deputy + Care arrangements in the Best Interests of P)

• Devon County Council v Manuel Martins and Teresa Kirk EWCOP (2016)
  (Placement decision and best interests Devon v Portugal)

• PLUS Mr A – East Sussex Safeguarding Adults Review (2017)
  (Self Neglect and Professional understanding and application)
Donald is aged 75 years and he has lived in the residential care home for the past five years.

Donald has diabetes (type 2), dementia (Stage 3) heart disease and glaucoma. He is known, at times to be both physically and verbally aggressive, to make inappropriate racial comments and on occasions can make unwanted sexual advances on some of the female residents. Although he has a family they no longer want to be involved with his care.

In recent weeks Donald’s health has been observed to be deteriorating.

You are the care home manager; what aspects do you need to consider in relation to DNACPR for Donald?

NB The details provided in this case study are totally fictitious and any similarity to actual persons is purely coincidental.
Aspects to be considered;

DNR – Who should decide?
The information that is to be given to Donald about the DNR
An assessment of capacity – and who should undertake the assessment
If Donald has the capacity to make the decision; it is his decision to make
If Donald doesn’t have the capacity to make the decision – Best Interests
Invitation to the Best Interests Meeting - GP, Donald, care home staff, family (if appropriate) IMCA if family are not able / appropriate.
Robust and transparent recording of the capacity assessment and best interests decision. Recorded by whom, where and when.
Within the capacity assessment – record questions asked and responses received. Assessment to be shared with the doctor and dated.
Aspects to be considered;

Within the best interests decision process identify the options that exist, the pros and cons of each, Donald’s wishes and feelings, values and beliefs, the decision that was reached, how the decision that was reached and if there are any objections.

The DNR Form - Health Care Professional Completing This Form; The most senior health professional in the care home with appropriate skills and knowledge and evidence competency should be the first signature – If there is not such an employee within the care home – this could be undertaken by the GP or Practice Manager (if appropriate)

Review and Endorsement by the Responsible Senior Clinician. The GP would be the second signature - to review and endorse the decision.
Aspects to be considered;

NB (1) if it was felt that it was in Donald’s best interests not to have a DNR in place and his situation deteriorated – it would be the paramedics decision to determine whether CPR should be introduced. Not having a DNR in place does not mean that a person will receive CPR if their situation deteriorated.

NB (2) The form is the final product of the process – as much information that is provided will assist the paramedics to make the required decision at a time when it is required to be made.

NB (3) Paramedics will not consider the form or the decision on the form if it is a photocopy. If a photocopy is required – have it endorsed and signed and dated by those who undertook the process. Good Practice Tip: Sign any photocopy it in blue so that it can be seen to have been signed and dated.

NB (4) The form should say with the person or go with them if they need to go to hospital – and come back with then to the care home.
Capacity and Consent - discharge the burden of proof.

Border v Lewisham and Greenwich NHS Trust [2015] EWCA Civ 8

Clinical negligence cases of interest - Anita Border and Dr Prenter (SHO)

A capacitous patient’s consent to medical treatment is still fundamental, even when the treatment takes place in accident and emergency.

“The duty to obtain the patient’s consent to treatment is a fundamental tenet of medical practice and is inherent in the case-law concerning the duty to take responsible steps to warn a patient of the risk of treatment so that the patient can make an informed decision about whether to consent to it.”

The appeal was allowed and the case was remitted to the trial judge to determine the outstanding issue of causation and final determination as to damages.
Elaine Winspear v City Hospitals Sunderland NHS Foundation EWHC (2015)

Carl Winspear was twenty-eight years old when he died shortly after 11.00 pm on the 03 January 2011. He had suffered all his life from cerebral palsy, epilepsy, spinal deformities and other associated health conditions. At the time of his death and all other relevant times he lacked capacity within the meaning of the MCA 2005.

In the middle of the night, a specialist registrar placed on Carl’s clinical record a notice to the effect that cardio-pulmonary resuscitation should not be attempted (DNACPR). This was done without consultation with Ms Winspear or any other family member or person representing Carl’s interests.

Blake J was not satisfied that it was other than practicable and appropriate to have attempted to contact Ms Winspear before the DNACPR notice was affixed to Carl’s records. He was therefore satisfied that there was a breach of the s.4(7) MCA 2005, such that no s.5(2) MCA 2005 defense existed to this claim, and also that there was a violation of the procedural duty under Article 8(2) ECHR.
Mrs P’s deprivation of liberty was authorised in a nursing home. By the time of the final hearing in the MCA section 21A proceedings, place of residence was not in dispute. The focus was upon whether the care arrangements amounting to a deprivation of her liberty were in her best interests. She had experienced two strokes was a coeliac “sufferer.” The only living being with whom she shared any love or devotion was her dog, Bobby. Her “face lights up” when she saw other dogs. But the deputy considered “it would seem irresponsible in the extreme to suggest that a dog visits a care home for elderly and frail people”.

27 … What is known is that her wishes and feelings before her second stroke were very clear. She enjoyed a good quality of life, she loved her dog, likes to be made to feel glamorous. Now she is wearing ill-fitting clothes, and financially unable to pay to have her feminine needs attended to, such as having her hair and nails done. The deputy failed to provide money for new clothes. Nor did he purchase the more varied food that was requested and refused a request by Mrs P’s legal representative to bring Bobby to see her. These were “all matters which are affecting the quality of her life. They are extremely important to and for her.”
These proceedings in the Court of Protection concerned an 81 year old man (Manuel Martins) suffering from dementia who was living in Portugal, having been taken there by his sister, Teresa Kirk.

Mr Martins has lived in this country for most of his life and has lived in Sidmouth in Devon for the last 50 years, owning a property there at one stage where he lived until 2014. Following his divorce, he lived alone with his cat, Tuna. In about 2012, he was diagnosed as suffering from vascular dementia.

A capacity assessment was undertaken by the social worker dated 12 June 2014 which concluded that he had the capacity to make a decision about going on holiday. At the same time, his wishes and feelings about that issue were recorded and he made it clear that he did wish to go on holiday with Mrs Kirk, but was also clear in stating that he wanted to return home to Sidmouth to be back with his cat.

42… I take into consideration all the matters required of me under the MCA in assessing where Mr Martins' best interests lie. I conclude that the balance plainly comes down in favour of a return to this country and a placement at A House. The advantages identified by the local authority and the Official Solicitor in their analyses, which I accept, manifestly outweigh the disadvantages.
Community Care - 26 October 2017

The review by East Sussex Safeguarding Adults Board concerned Mr A, a former alcoholic who died in July 2016 at an East Sussex Nursing Home after refusing care and treatment for his many health conditions, which included diabetes, epilepsy and Korsakoff Syndrome.

His sometimes aggressive refusal to accept treatment led to festering leg wounds that became infested with maggots during the final days of his life.

Mr A continued to regularly refuse treatment - despite repeated attempts to convey the dangers to his life that this entailed. By December 2015 his refusal of care, which one consultant linked to “paranoid thoughts and lack of proper insight”, had caused the cellulitis on his legs to develop into open wounds.

In January 2016 the nursing home reported that staff felt frustrated in the absence of advice about how to assist him and were worried that they would find him dead in his room.

By May, with no alternative placement secured, Mr A’s legs had foul smelling wounds but he continued to refuse antibiotics or dressings.
The Consultant Psychiatrist was asked several times whether Mr A could be sectioned under the MHA so that he could be forced to have treatment. The Psychiatrist correctly advised that sectioning must be done to enforce psychiatric care not physical care.

The review said that those enquiring, interpreted this advice as meaning that detention under the Act was not a viable course of action in Mr A’s case when they should have considered whether treating Mr A’s mental health could resolve his unwillingness to accept physical health treatment.

No alternative placement for Mr A was found. By 22 July, Mr A’s leg wounds were infested with maggots that would drop on the floor as he walked around the nursing home. The On-call consultant at the hospital advised that care could not be imposed on Mr A and admitting him to hospital would not help. Mr A collapsed and died on 24 July 2016.

The Review found that;

- Opportunities were missed to address Mr A’s mental health and its impact on his physical health
- There were a lack of recorded mental capacity assessments
- The option of detention under the MHA was not pursued or clarification from the Court of Protection
The Review concluded; Mr A’s health conditions and variable willingness to accept treatment may have indicated he had capacity when he did not. “Perhaps the variability in his apparent consent, rather than indicating fluctuating capacity, indicated an inability to translate intent into action – a common feature in self-neglect that can be associated with impairment of executive brain function, but which does not appear to have been considered here.”

The Review said there also appeared to be a lack of legal literacy, in regards to mental capacity among some professionals involved with Mr A, including care home staff and GP’s.

Another criticism made by the Review was that at no point did all the agencies and professional involved in Mr A’s placements, care and treatment come together.

The Review also highlighted a “short fall of placements suitable for adults with Mr A’s level of needs. It also said that agencies should have technology systems that alert professionals if a deprivation of liberty application goes unresolved to avoid a repeat of Mr A’s experience of being deprived of his liberty unlawfully.

See Suffolk’s Self Neglect and Hoarding Policy and Guidance [www.suffolkas.org](http://www.suffolkas.org/assets/2017-10-03-FINAL-VERSION-Suffolk-Safeguarding-Adults-Board-Self-neglect-Policy.pdf)
Article 5 – Right to liberty and security

Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in accordance with a procedure prescribed by law.

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.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.
People are entitled to be cared for in the least restrictive way possible and care planning should always consider if there are other, less restrictive options available to avoid unnecessary deprivation of liberty.

However, if all alternatives have been explored and the hospital or care home believes that it is necessary to deprive a person of their liberty to deliver the care or treatment they need, then there is a standard process they must follow to ensure that the deprivation of liberty is lawful and that they are protected.
What could constitute a deprivation of liberty?

Following 19 March 2014;

Supreme Court decision in *Cheshire West – 19 March 2014*

- Is the person subject to continuous supervision and control \ AND 
- Is the person not free to leave.

Where the requirements of this “acid test” are met and the person is in a care home or hospital a DOLS Referral MUST be made to the Supervisory Body.

What is not relevant to whether there is a Deprivation of Liberty:

1) P is compliant or does not object, 2) The relative normality of the placement or 3) The reason or purpose behind a placement (i.e. that it is in P’s best interests)

Where the requirements of the “acid test” are met and the person is NOT in a care home or hospital authorisation MUST be obtained from The Court of Protection.
Examples of how the DOLS have safeguarded the customers they were designed to protect

Mrs C - Customer who did not have the mental capacity to choose; was assisted by the provision of an alternative care home which was more appropriate for his needs and his wishes.

Mrs J – Customer was identified to have the mental capacity to choose where she would like to live and was supported to return home.

Mr W – Through the DOLS assessment process, specialist speech and language support was introduced to assist the customer to communicate. This helped them maximise their mental capacity and enabled them to make their own decisions regarding their care and accommodation needs.
Examples of how the DOLS have safeguarded the customers they were designed to protect

Mrs T – The DOLS supported the care provider to make improvements to their processes by identifying gaps that existed within their recording and care plans.

Mrs J – The DOLS maintained and supported the customer’s right to liberty and security in accordance with Article 5 of the Human Rights Act.

Mrs P – The DOLS processes provided a voice to the customer who wished to state their distress by being placed in a care home.

Mr H – Conditions were introduced to the DOLS authorisation to reduce the impact of the deprivation of liberty on the Customer.
## Deprivation of Liberty Safeguards (DoLS)

### Case Law Summary 2015-17

<table>
<thead>
<tr>
<th>Issue</th>
<th>Case</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is a deprivation of liberty?</td>
<td><em>Supreme Court: P v Cheshire West &amp; Chester Council, P &amp; Q v Surrey CC</em> [2014] UKSC 19</td>
<td>‘If the acid test is whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives, then the truth is that both MIG and MEG are being deprived of their liberty.’</td>
</tr>
<tr>
<td>Medication: covert and to manage behaviour</td>
<td>AG v BMBC &amp; SNH [2016] EWCOP 37</td>
<td>Use of covert medication to manage behaviour for a woman with dementia in a care home. The BIA should record this as a restriction and consider the need for conditions, reviews and shorter duration. Note: BHCC v KD [2016] EWCOP B2 confirms this approach.</td>
</tr>
<tr>
<td>Importance of Guzzardi</td>
<td>NRA &amp; Ors [2015] EWCOP 59</td>
<td>‘It is well established that the approach to the existence of a deprivation of liberty is governed by the Guzzardi principle.’ = restrictions assessed - type, duration, effect, manner, degree/intensity</td>
</tr>
<tr>
<td>Unescorted leave</td>
<td>Stankov v Bulgaria [2015] ECHR No. 25820/07</td>
<td>Unescorted leave (permission required, time limited and action taken if a person does not return) can still lead to a deprivation of liberty.</td>
</tr>
<tr>
<td>Article 8: private &amp; family life</td>
<td>Steven Neary v Hillingdon Council [2011] EWHC 1377</td>
<td>DoLS cannot be used to remove a person from their family or prevent a person returning to their family (ie. for safeguarding reasons). DoLS authorises a breach of Article 5 (deprivation of liberty) but not Article 8. Such action needs Court of Protection authority.</td>
</tr>
</tbody>
</table>
| Authorising signatory | P v Surrey County Council & Anor [2015] EWCOP 54 | ‘The alternatives had to be considered by the supervisory body as part of its determination independent of the best interests assessor’s ...’  
‘The responsibilities of a supervisory body, ..., require it to scrutinise the assessment it receives with independence and a degree of care that is appropriate to the seriousness of the decision’ |
| Available options | *Supreme Court: N v ACCG and others* [2017] UKSC 22 | The Court of Protection: ‘It has no greater power to oblige others to do what is best than P would have himself. This must mean that, just like P, the court can only choose between the “available options”.’  
Example: DM v Y City Council [2017] EWCOP 13 |
Case Study – Mr Jones

Mr Jones is aged 85 years and was diagnosed with dementia in 2011.

He lives with his wife in their marital home and attends a day centre once a week. His care needs have begun to increase and recently he has started “wandering.” Mrs Jones has called the police on a couple of occasions recently to help bring him back home.

Mrs Jones has contacted the local authority - requesting a second day a week for her husband at the day centre.

On your visit to carry out a social work assessment, his daughter tells you that her father is prone to leave the house in a confused state. In addition Mrs Jones says that she would be in interested in a weekend sitting service – enabling her to leave her husband safely so that she can have some free time. In addition Mrs Jones appears to be accepting that she cannot look after her husband on her own in an appropriate way and they would both benefit from some respite care – as long as her husband was placed close to the family home.

You are the social work practitioner;

• What aspects do you consider?
• What actions would you undertake?
Learning from Practice – (Case Study) Mr Jones

Through the investigation by the Local Government Ombudsman (LGO) Social workers are reminded that capacity assessments made under the MCA 2005 must be recorded properly. The LGO found a man had been forced to live in a care home against his wishes and without sufficient evidence of going through the proper process.

- The elderly man was moved to a nursing home some 14 miles away from his marital home after his needs increased considerably in June 2013, against both the man and his family’s wishes, who wanted him closer to home. This meant that his wife had to take two buses there and back to visit him.

- They didn’t complete the proper assessments, when he was moved to the home. According to the Act if a person lacks the ability to decide where to live, the decision to move them can only be taken lawfully if a proper mental capacity assessment and ‘best interests’ decision is carried out.

- The man’s wife, daughter & brother were told the police would be called if they tried to move him from the home.

- Because the man and his family made repeated requests for him to return home, the council’s DOLS Team should have been contacted, but never were.

- Social workers completed a Mental Capacity and Best Interest Decision Record in July that year, but the record was incomplete, failed to include some formal requirements and did not go into adequate detail to explain the reasoning behind the decision.

- His family were never given information about how they could appeal the decision with the Court of Protection.
DOLS Recent Case Judgements of Interest - Summaries

- AJ v A Local Authority EWCOP (2015)
  (Respite and Article 5 violation)

- Essex County Council v RF EWCOP (2015)
  (Unlawful deprivation of liberty)

- AG v BMBC & Others EWCOP (2016)
  (Covert Medication)

- Kasparov v Russia (2016) ECHR 849
  Article 5 may apply even to deprivation of liberty for a very short length of time

- Liverpool City Council & Others v The Secretary of State for Health EWHC (2017)
  (DOLS Funding)

- Ferreira v HM Senior Coroner for Inner South London EWCA (2017)
  (DOLS v Not DOLS)

- MM and PJ (2017) EWCA Civ 194
  (Community Treatment Orders)
Baker J gave detailed guidance as to the heavy burden that is placed upon local authorities in making sure that people deprived of their liberty in care homes (and, by extension, hospitals) are afforded effective access to the Court of Protection so as to secure their rights under Article 5(4) ECHR.

…47 "As it was clear that AJ would not go willingly to X House, and that such a move would only be achieved by depriving her of her liberty, the local authority, prior to that move taking place, ought to have either carried out a DOLS assessment or made an application to the Court. During the first few days of her stay at X House, there was no authorisation in place, nor was there an RPR or an IMCA appointed to support her. The fact that the first two weeks of her stay at X House were nominally labelled as “respite” care cannot justify the local authority’s failure either to instigate the DOLS process or apply to the court. The local authority plainly knew that Mr. and Mrs. C would not agree to AJ returning home at the end of their holiday and that, whatever may have been said about respite care, the move was intended to be permanent from the outset."
P was 91 year old gentleman, a retired civil servant, who had served as a gunner with the RAF during the war. He had lived alone in his own house with his cat Fluffy since the death of his sister in 1998. He was described as being a generous man ready to help others financially, as well as making donations to various charities.

He had dementia, and other health problems including difficulty in mobilising, delirium and kidney injury caused by dehydration.

In May 2013 P was removed from his home by the local authority and placed in a locked dementia unit. It was not clear that P lacked capacity at the time and he was removed without any authorisation. The local authority eventually accepted that that P had been unlawfully deprived of his liberty for a period amounting to approximately 13 months. A compromise agreement which included £60,000 damages for P’s unlawful detention was agreed between the parties.

This case involved a substantive breach of P’s rights. If it hadn’t been the unlawful actions of the local authority, P would have continued to live at home with support arrangements in place. The deprivation of P’s liberty during given the late stage of his life compounded its poignancy.
In this case, District Judge Bellamy has given some rare, and useful, clarification as to the seriousness of the consideration that must be given to the use of covert medication, especially in the context of a DOLS authorisation.

During a challenge to a DOLS authorisation in respect of a 92 year old woman, AG, it became clear that part of her care plan at the home involved the covert administration of strong sedative medication. There were no conditions relating to this medication contained in the care plan.

…25 I accept that treatment without consent (covert medication in this case) is an interference with the right to respect for private life under Article 8 of the ECHR and such treatment must be administered in accordance with a law that guarantees proper safeguards against arbitrariness. Treatment without consent is also potentially a restriction contributing to the objective factors creating a DOL within the meaning of Article 5 of the Convention. Medication without consent and covert medication are aspects of continuous supervision and control that are relevant to the existence of a DOL.
Liverpool City Council & Others v The Secretary of State for Health EWHC (2017)

Four councils have lost their High Court fight against the government over funding for deprivation of liberty cases.

Mr Justice Garnham rejected the councils’ argument that health secretary Jeremy Hunt’s ongoing failure to provide adequate funding for the (DOLS) had both created an “unacceptable risk of illegality” and breached a government agreement on funding ‘new burdens’ on councils. Liverpool, Nottinghamshire, Richmond and Shropshire councils brought the judicial review. Government funding for DOLS has been maintained at around £34m a year. The group claimed local authorities in England needed between £450m and £600m a year extra to cope with the surge of DOLS cases triggered by the Supreme Court’s ruling in March 2014.

He concluded the ‘new burdens’ doctrine, a government agreement with councils on funding for new local government responsibilities that arise from policy changes, contained no statement that promised local authorities more funding from government if a court judgment altered the understanding of what was required of councils.
Maria Ferreira suffered from Down’s Syndrome and significant learning difficulties. It was identified that she lacked the mental capacity to make decisions regarding medical treatment.

- MF was admitted to hospital for pneumonia.
- Her situation deteriorated and required ITU treatment
- MF was intubated and sedated in ITU
- MF was given mitts to prevent the removal of the tube

Maria Ferreira died in an intensive care unit after she dislodged a tube with her mittened hand. An inquest was to be held but whether a jury was required depended upon whether she died in “state detention” under the Coroners & Justice Act 2009.

The coroner did not call a jury inquest which is required if a person dies in “state detention” The hospital had not sought authorisation for DOLS.

Family argued that a jury was required because an application for DOLS should have been made.
Ferreira v HM Senior Coroner for Inner South London EWCA (2017)

The Court of Appeal dismissed the family’s appeal and concluded that Maria Ferreira;

• was not deprived of her liberty as she was being treated for a physical illness which was identical to that which would have been administered to somebody who did not have her mental impairment
• the root cause of loss of liberty was her physical condition, not any restrictions that were imposed by the hospital
• death in intensive care is not “death in state detention” for the purposes of the Criminal Justice Act.

10... not deprived of her liberty at the date of her death because she was being treated for a physical illness and her treatment was that which it appeared to all intents would have been administered to a person who did not have her mental impairment. She was physically restricted in her movements by her physical infirmities and by the treatment she received (which for example included sedation) but the root cause of any loss of liberty was her physical condition, not any restrictions imposed by the hospital.”
Mental Capacity and Deprivation of Liberty Summary
The Future of DOLS – The Law Commissions Report

- Criticism by the House of Lords on 13 March 2014 and a proposal from MIND for a review of the relationship between the DOLS and the MHA. Department of Health to consider DOLS in its entirety.

- Pre-consultation and the drafting of the Consultation Paper Summer 2014 – July 2015

- Public consultation on the provisional proposals; including consultation events and written responses - July 2015 > November 2015

- Interim report published - May 2016

- Final report and draft Bill published - 13 March 2017

- Publication of the Government’s interim response to the Law Commission’s report on Mental Capacity and Deprivation of Liberty -

Proposed amendments to the Mental Capacity Act

The draft Bill is proposing amendments to the Mental Capacity Act which are designed to improve decision-making in respect of all those who lack capacity to make particular decisions.

These include:

- All decision makers having an active duty to comply with the MCA and place a greater weight on the person’s wishes and feelings when making decisions under the Act

- Professionals having to confirm in writing that they have complied with the requirements of the Mental Capacity Act when making important decisions – such as moving a person into a care home or providing serious medical treatment.
The Law Commission recommends through its draft Bill, that the law should be replaced with a new scheme, called the Liberty Protection Safeguards.

In short, these would be designed to provide for:

- enhanced rights to advocacy and periodic checks on the care or treatment arrangements for those most in need
- greater prominence to issues of the person’s human rights, and as to whether a deprivation of their liberty is necessary and proportionate, at the stage at which arrangements are being devised
- the extension of protections to all care settings such as supported living and domestic settings
Proposal - The Liberty Protection Safeguards (2)

- the widening of the scope of protection to cover 16 and 17 year olds and planned moves between settings

- the cutting of unnecessary duplication by taking into account previous assessments, enabling authorisations to cover more than one setting and allowing renewals for those with long-term conditions

- the extension of responsibilities for giving authorisations, from councils to the NHS, if in a hospital or NHS health care setting

- a simplified version of the best interests assessment which emphasises that, in all cases, arrangements must be necessary and proportionate before they can be authorised.
The draft Bill replaces the DOLS in their entirety, with a new administrative process for authorising arrangements which would give rise to a deprivation of liberty.

The Law Commission believe that its recommendations create a clear and accessible scheme for authorising arrangements which give rise to a deprivation of liberty which would practically and effectively safeguard the Human Rights of the people that they are intended to protect.
The responsible body seeks to authorise arrangements which would give rise to a deprivation of a person’s liberty.

An advocate or appropriate person is appointed by the responsible body.

- The responsible body arranges a capacity assessment.
- The responsible body arranges a medical assessment.
- The responsible body arranges the necessary and proportionate assessment.

The responsible body consults with the required persons.

Independent reviewer reviews the information / assessments

Is it reasonable to conclude that the conditions are met?

- The person does not wish to reside or receive treatment at the particular place, or the authorisation is necessary and proportionate on the basis of harm to others

The arrangements may be authorised.

Safeguards

- Ongoing rights to advocacy and an appropriate person.
- Regular reviews.
- Access to court.

Referral to an AMCP
Next steps….

Nationally

• The government will consider the review and the Draft Bill
  Whether this is implemented, or whether adjustments are required and
  the timescale for doing so is up to the government.
• Potential for pre-legislative scrutiny i.e. a detailed examination of the
  draft Bill by a parliamentary select committee before the final version is
  drawn up by the government.

Locally

• **Making the MCA matter** – Organisations MUST ensure all staff are
  MCA compliant and confident; safeguarding the customer, practitioner
  and employer both now and when the arrangements are implemented.
• **Continuing to comply** with the current safeguards for
  authorising a deprivation of Liberty e.g. DOLS of COP.
### Key Aspects Arising from Recent Case Judgements

**“the nursing home offered best quality of care but at what cost? ...there was a complete certainty of physical safety but at the cost of happiness to M”**  
*Re: M October 2013*

**Local Authorities need to recognise when a deprivation of liberty will occur;**
- Check whether less restrictive options can be pursued
- If necessary – ensure that the required authority is in place.  
  *AJ & A Local Authority 2015*

**It is not necessary for KK to understand “every details” just the salient factors.**  
*CC and KK 2012*

**The wider lessons for practitioners arising from this litigation (2);**
“Professionals need to be on their guard to look out for cases where vulnerable people are admitted to residential care for respite when the underlying plan is for a permanent placement, without proper consideration as to their Article 5 Rights.”  
*AJ & A Local Authority 2015*

**“because the placements were benevolent it should not blind us to their essential character.”**  
*Supreme Court 19 March 2014*

**A capacitous patient’s consent to medical treatment is still fundamental, even when the treatment takes place in accident and emergency.**  
*Border v Lewisham 2015*
Guidance to support staff with these safeguards

National Guidance

- DOLS and You – BILD, Action on Elder Abuse & National Autistic Society (NAS)
- DOLS A Guide for Families and Carers – BILD, Action on Elder Abuse & NAS
- DOLS Factsheet – Alzheimer’s Society
- DOLS and You (Easy Read Guide) - The Department of Health
- DOLS A Guide for Families and Carers – The Department of Health
- Identifying A Deprivation of Liberty (Practical Guide) - The Law Society
- MCA in Practice – Department of Health and Steve Chamberlain
- Best Interests Decision Making – 39 Essex Chambers
- SCIE MCA Resource;  [www.scie.org.uk/mca](http://www.scie.org.uk/mca)

Local Guidance – Suffolk County Council

- Suffolk DOLS Prioritisation Tool
- Suffolk MCA Website;  [www.suffolk.gov.uk/mca](http://www.suffolk.gov.uk/mca)
Mental Capacity Act (MCA) resource

Information, guidance, and accredited training for care and health staff to support, protect and empower people who may lack capacity.

New video: Using the Mental Capacity Act
This film explains the key principles of the MCA and how they work in practice. It looks at how the MCA supports everyone to plan for their future, for when they may have impaired capacity.

Introducing the MCA
Why the MCA matters to everyone working in care, health, housing and other sectors.

> At a glance
> Five principles of the MCA
> MCA videos

MCA in practice
Guidance on assessing capacity and supporting decision making

> Assessing capacity
> Decision-making
> Best interests
> Care planning

MCA training
Accredited training, open or tailored courses, plus free learning resources.

> Accredited training
> e-Learning course
> Webinar
> Videos

Training course
Mental Capacity Act 2005 training
Support to understand and comply with the MCA legislation.

> View more: Training courses

News
Using the MCA to protect people's rights
Blog by SCIE

Nurse shortage? Develop nursing assistant role
Lessons from HC One's development programme for senior care workers. Evaluated by SCIE.

> View more: News

Mental Capacity Act webinar
Mental Capacity and Deprivation of Liberty Safeguards

About Mental Capacity and Deprivation of Liberty Safeguards (DoLS) and advice concerning mental capacity and deprivation of liberty.

All pages in this section

Mental Capacity Act 2005
The Act provides the framework for acting and making decisions on behalf of individuals who lack capacity to make particular decisions for themselves.

Independent Mental Capacity Advocate
This service provides independent safeguards for people lacking capacity to make certain important decisions.

MCA and DOLS training in Suffolk
We provide a number of training courses regarding the Mental Capacity Act 2005 and the Deprivation of Liberty Safeguards.

Deprivation of Liberty Safeguards
Information about how people in hospitals or care homes who lack the capacity to consent to certain treatments are protected.

Deprivation of Liberty following the Supreme Court Judgement
Essential reading and guidance for all staff following the Supreme Court ruling 19 March 2014 – P v Cheshire West and Chester Council.