

DEPUTY WORKSHOP

What P&A Deputies should know about H&W

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29 June 2017

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DOLS

- **Art 5 of the ECHR provides:**

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.
 - 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.

DOLS cont.

- Art 5 means:
 - You can be deprived of your liberty if you are of ‘unsound mind’.
 - But the procedure must be in accordance with a procedure prescribed by law (i.e. by the MCA stat scheme or the COP).
 - You are entitled to challenge the DOL before a Court.
 - You must have an enforceable right to compensation if article 5 breached.

DOLS cont.

- There are 3 elements to an art 5 deprivation:
 - An objective element - confinement in a particular restricted place for a not negligible length of time. Now acid test from *Cheshire West* applied – continuous supervision and control and not free to leave.
 - A subjective element: Lack of valid consent. If P lacks capacity this will always be met.
 - It must be imputable to the state.

DOLS cont.

State imputability: *Staffordshire CC v SRK* [2016] EWCA Civ 1317:

- Incapacitated P has 24 hour care package which meets the *Cheshire West* acid test.
- But, paid for privately by a Deputy. No LA/CCG involvement.
- In CA argument revolved around whether the State had violated its positive obligations to protect the applicant against interferences with her liberty carried out by private persons

DOLS cont.

- *Storck*: The State is obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge.
- Charles J at first instance found that the state had sufficient knowledge via (1) the QBD in awarding pi damages, (2) the CoP when appointing a deputy to hold and manage them, and (3) the deputy, trustees or an attorney to whom a damages award is paid, and who must make decisions on its application in the incapacitated person's best interests.

DOLS cont.

- The CA held that for such P's, an application to the COP for authorisation of their DOLs was required to satisfy art 5.
- Question arises as to who is responsible for such applications?
 - P?
 - LA?
 - Watch this space.....

P's care

- P may be entitled to free care if:
 - P has been detained pursuant to s.3 of the Mental Health Act 1983.
 - P meets the Continuing Healthcare Criteria.

MHA

- Find out whether your P has ever been sectioned pursuant to s.3 MHA.
- If so, an after-care duty arises jointly between the relevant NHS body (now CCG's) and the LA.
- MHA s.117(5) defines after-care as
... services which have both of the following purposes— (a) meeting a need arising from or related to the person's mental disorder; and (b) reducing the risk of a deterioration of the person's mental condition (and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder).

MHA cont.

- The duty to provide free after-care services arises irrespective of the resources of P *Tinsley v Manchester CC* [2016] EWHC 2855 (Admin)
- The duty to provide after-care services extends until P is assessed as not requiring them.
- Historically public bodies have been very poor at carrying out such assessments.
- This means P could have been paying for services which should have been provided free of charge, for many years.

MHA cont.

- Where P has been paying the LA for the services, a claim for restitution is usually dealt with in accordance with 2003 Special LGO report (*Advice and Guidance on the Funding of After Care under Section 117 of the Mental Health Act 1983*). This provides:

That people who have paid for section 117 aftercare should receive financial restitution with interest.

MHA cont

- Where P has been paying a third party for the services it is more complex.
- *Richards v Worcestershire CC*[2016] EWHC 1954 (Ch) where Court at first instance has doubted there is a good restitution claim – before CA at the end of the year.

Practice points

- If your P has been detained pursuant to s.3, ask the local Mental Health Trust what s.117 assessments and care plans there are.
- If dissatisfied with the response, apply to COP for authority to take the steps to investigate whether a claim. This requires disclosure of P's medical records.

CHC funding

- If a person's primary need is a health need, they will qualify for CHC funding, and all their care is provided by the relevant CCG, free at the point of delivery.
- MDT teams make these assessments (usually a combination of LA and CCG) using the Decision Support Tool.
- You can move in and out of eligibility for CHC funding.

Practice Points

- If you are concerned that the primary need may be a health need, request a CHC assessment from the CCG.

When welfare overlaps with finance

- Some examples:
 - P refuses a Care Act assessment thereby depriving him/herself of direct payments
 - P wants to spend money on drugs/alcohol/sex workers

What to think about

- Does P have the capacity to make the decision (and what is the test):
 - Does P have the capacity to choose how to spend his/her weekly income.
 - Does the test for capacity to refuse a Care Act assessment include having to understand/retain/use or weigh that there is a financial consequence to P in refusing.

If P has capacity

P can make an unwise decision.

You might want to apply to the Court for a declaration that P does in fact have the relevant capacity.

You are also (probably) under a duty to report any safeguarding concerns to the local authority.

If P lacks capacity

- Orders can be sought from the Court:
 - In a case where P is declining a Care Act assessment, the LA could obtain injunctions for the assessment (probably better to assess on what is known of P)
 - In a case regarding use of P's money, the deputy could get Court backing for a more restrictive regime for the provision of money to P (i.e. only to be provided to carers who are not authorised to spend it on certain things).

The end

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