

Deprivation of Liberty in Care settings.



Lessons from the first three years of operation of a new legal mechanism, and research in Care Homes in one region of the UK.

1. European Context
2. The Bournewood case
3. New laws in the UK
4. Findings from small scale research study in English care homes
5. Issues and comparisons with other European care settings.

Context – Policy and legislation in Europe

1. Decision making on behalf of mentally incapacitated adults.
Principles concerning the legal protection of incapable adults
Council of Europe Committee of Ministers (1999)
2. UN convention on the rights of persons with disabilities (2006)
e.g. Article 14 *persons with disabilities have the right to be free from unlawful or arbitrary deprivation of liberty, and that the existence of a disability shall in no case justify a deprivation of liberty*
3. Council of Europe Action Plan 2006-2015
4. European Convention on Human Rights (1950) and five protocols

Context

Methods of decision making on behalf of mentally incapacitated adults.

1. Substituted judgement. The choice that a particular person would have made had he been competent to do so.
2. Best Interests decisions – now favoured in many nations
Based on what decision makers think 'objectively' best for P.



European Convention on Human Rights

Article 5 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 for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;



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Article 5 .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.



European Convention on Human Rights

Article 8 – Right to respect for private and family life

- 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 is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

UK Human Rights Act -1998



The ' Bournemouth' case and the ' Bournemouth Gap.....'

In the UK, the Mental Health Act is the main law which governs the detention of those with mental disorders

It is compliant with Article 5 – in that clear legal processes, and speedy appeals, are available.

It is also the case that individuals can enter psychiatric institutions 'informally' without the use of the main sections of the mental health act.

HL, was a 49- year-old man with autism, who, it was agreed, lacked capacity. For about three months in 1997, Mr L was an in-patient at Bournemouth Hospital.

He was NOT detained under the Mental Health Act 1983 ('MHA 1983'); rather, he was accommodated in his own 'best interests' under the common law doctrine of 'necessity'.

Mr L brought legal proceedings against the managers of the hospital, claiming that he had been unlawfully detained.

After the case moving through three levels of legal appeal, each of which contradicted the previous one, the case reached the European Court of Human rights, which delivered a judgement in 2004

The court found that HL was detained, so that the ‘right to liberty’ in Article 5 of the ECHR would be engaged.

Further, it held that detention under the common law was incompatible with Article 5 because it was too arbitrary and lacked sufficient safeguards (such as those available to patients detained under MHA 1983).

Finally, the ECtHR held that judicial review – which was the only way Mr L had been able to challenge his common law detention – did not provide the kind of rigorous challenge that was required by ECHR, Article 5(4).

The UK Mental Capacity Act 2005

Five key principles

- a presumption of capacity - every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise
- the right for individuals to be supported to make their own decisions - people must be given all appropriate help before anyone concludes that they cannot make their own decisions
- that individuals must retain the right to make what might be seen as eccentric or unwise decisions
- best interests - anything done for or on behalf of people without capacity must be in their best interests
- least restrictive intervention - anything done for or on behalf of people without capacity should be an option that is less restrictive of their basic rights -as long as it is still in their best interests.

The Deprivation of Liberty Safeguards (DOLS)

- Designed to plug the 'Bournewood Gap' and ensure compliance with articles 5.1 and 5.4 -
 - those deprived of liberty because of unsound mind must have been so deprived by an appropriate legal process and must have a speedy right of appeal

DOLS – added to the Mental Capacity Act in 2007



Who is covered by DOLS?

People resident in hospitals and care homes who lack the mental capacity to make decisions about their care/treatment

Largely – individuals with dementia

Also, individuals with learning disabilities

Also, individuals with brain injuries

DOLS – Key points

- care home/hospital must identify residents who may be deprived of liberty because of restrictions, and apply for an authorisation
- assessors visit and talk to relatives and other concerned parties.
- Assessment includes: Age/ Mental Capacity/ Mental Health/ No refusals/ Eligibility
- right to advocacy
- IF a deprivation of liberty is deemed to be occurring it can only be authorised if it is the least restrictive option and deemed to be in the best interests of the person

- Department of Health (2007) estimated that there were 500,000 people with a mental health problem who lack capacity to make decisions regarding care and treatment living in institutions in England and Wales.
- in 2010-11 8982 applications were made and 4951 of these were authorised (55% of applications).
- In terms of the individuals for whom a deprivation of liberty was authorised, 74% were over 65 years of age, and almost one third (29%) were over 85.
- As expected from the planning assumptions most DOLS authorisations have been for residents of care homes – some 3,838 in 2010- 11, compared to 1,134 for those in hospital settings.

Liberty

Enshrined in many European statutes

England - Magna Carta - 1215

France - Declaration of Rights of Man - 1789

Habeas Corpus OR amparo de libertad



Liberty for those who are mentally ill or mentally incapacitated? – not considered important or given legal force until late 20th century.

Cf Foucault -

What is Deprivation of Liberty?

Objective Factors

1. an objective element of a person's confinement in a particular restricted space for a not negligible length of time (Storck v Germany, (2005) 43 EHRR 96, para 74);
2. a subjective element, namely that the person has not validly consented to the confinement in question (Storck v Germany, para 74);
3. the deprivation of liberty must be one for which the State is responsible (Storck v Germany, para 89).



Deprivation of Liberty and UK Care homes – Our research

Starting point. We provide training for 'best interests assessors' (BIA's) within the university and all social workers and other professionals who wish to become BIA's have to complete a university based programme.

Decision makers in care settings play a pivotal role in this process.

Training for those working in care settings (care staff and managers) has been more patchy and less consistent.

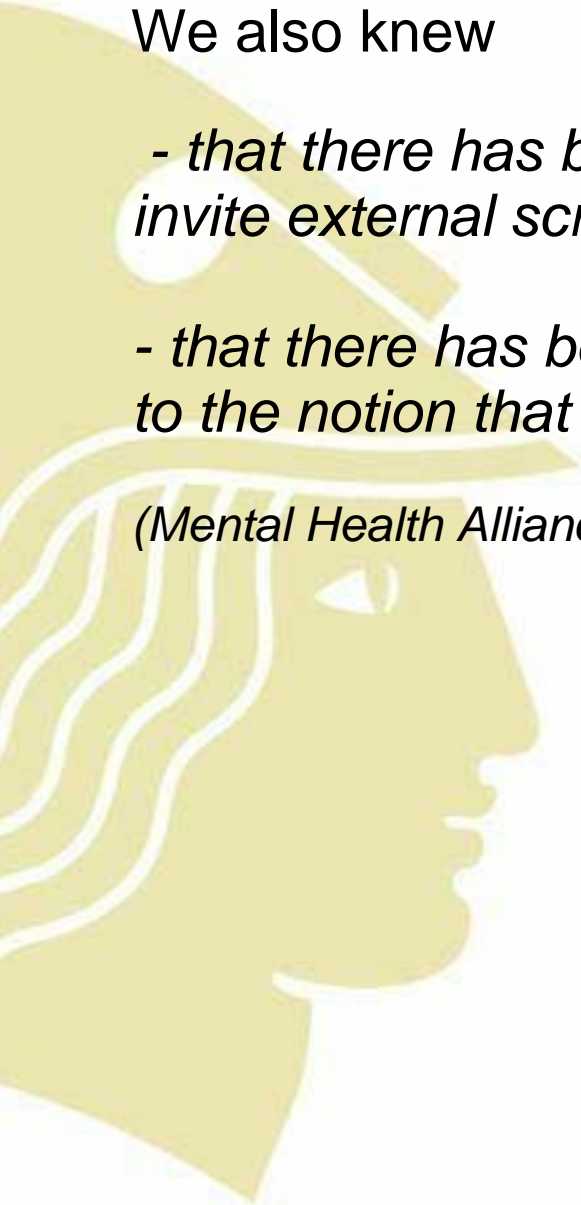
Cases regarding DOLS which have reached the 'court of protection' have produced some inconsistent and confusing judgements.

We also knew

- that there has been a reluctance of care homes in particular to invite external scrutiny

- that there has been a high level of resistance among providers to the notion that they were depriving their residents of anything

(Mental Health Alliance 2012)



We wanted to understand :

- the knowledge and understanding of decision makers in care homes in relation to The Mental Capacity Act and the Deprivation of Liberty Safeguards (DOLS)
- their understanding of what constitutes a deprivation of liberty and when they need to apply for assessment of ,and authorisation of , deprivations of liberty.

Other research has shown that in care homes where 'best interests' decisions about mentally incapacitated adults result in probable deprivations of liberty, many staff are unaware of the Deprivation of Liberty Safeguards regulations.

(Mental Health Foundation 2011)

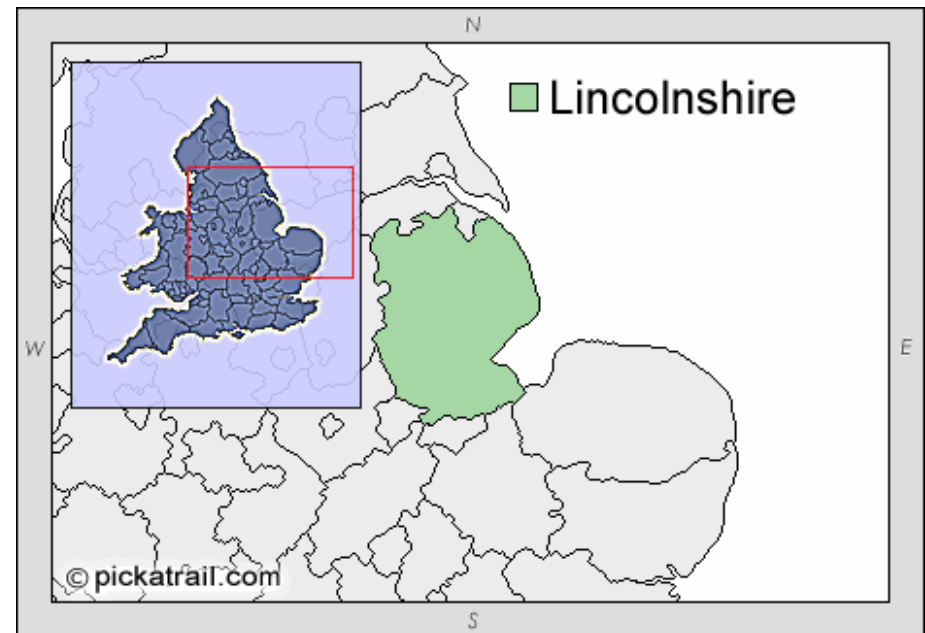
In the UK National Minimum Standards stipulate that 50% of the workforce in care homes must have vocational qualifications. This is not always the case and there are many non-nationals in the UK workforce who do not have training and also often do not understand the framework of policy and legislation that governs care.





Lincolnshire

- 2nd largest county in England , by area
- One of the most rural and sparsely populated (147/km²)
- Population -703,000 (2010)
- 10,413 with a diagnosis of Dementia in 2011.
- 2636 - residents of residential and nursing care homes.
- 466 with learning disabilities living in residential/nursing care.



Methodology

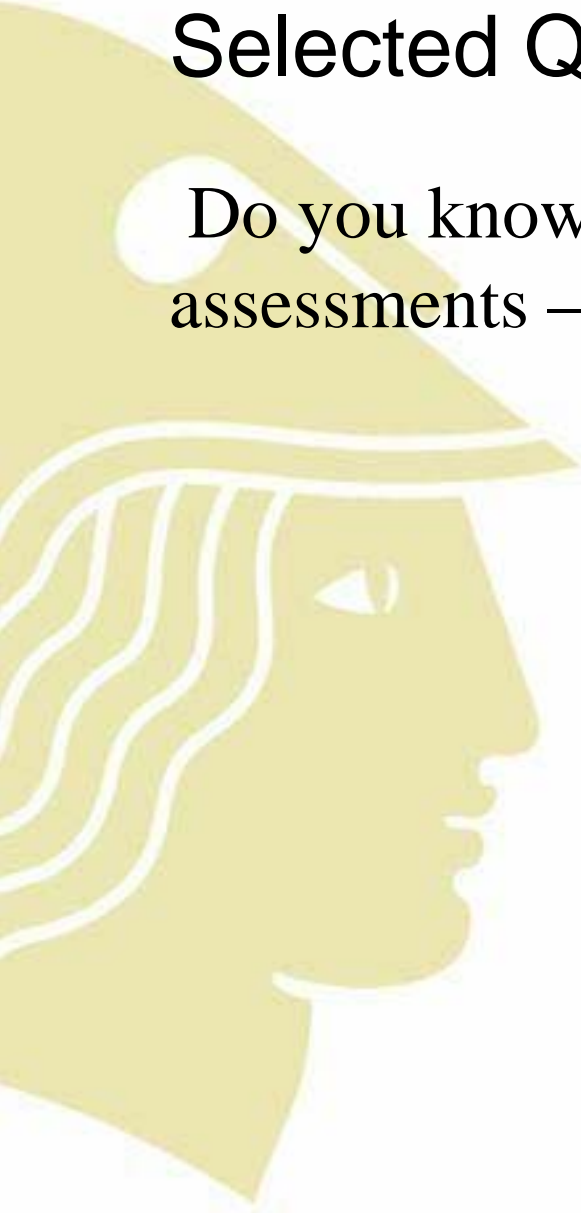
1. Questionnaires to approx 300 care home managers in the county
2. Semi structured interviews with a follow up sample of ten care home managers.





Selected Questions and responses

Do you know how to undertake mental capacity assessments – 15% did not.



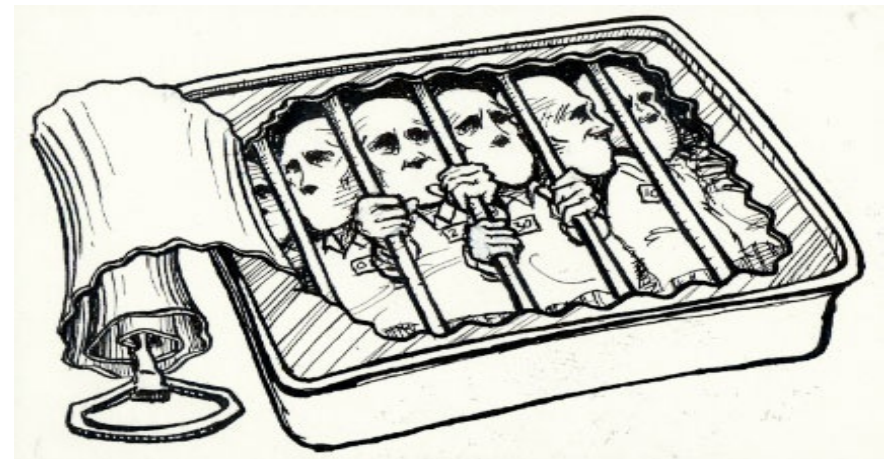
Selected Questions and responses

What do you think a deprivation of liberty is?

- *'taking away choice'*
- *'restriction of a person's ability to do something'*
- *'limiting access to the biscuit tin'*
- *'keeping the doors locked'*
- *'abuse in any form'*



Both the European court of Human Rights and the UK courts have suggested that the following factors can be taken into account when deciding whether steps taken involve more than restraint and amount to a deprivation of liberty:





- Restraint is used including sedation, to admit a person to an institution where the person is resisting admission
- staff exercise complete and effective control over the care and movement of a person for a significant period
- staff exercise control over assessments, treatment, contact and residence.
- a request by carers for a person to be discharged to their care is refused.
- the person loses autonomy because they are under continuous supervision and control



Common Misunderstandings



Confusing the objective situation with the justification for it

“if it is in their best interests we have been advised that it is not a deprivation of liberty....”

Munby (JE v DE) .. as a matter of logic and as a matter of legal principle there are two quite separate and distinct questions: has there been a deprivation of liberty? And, if so, can it be justified?

Selected Results

From eight completed interviews none of the respondents was aware of the nature and wording Article 5, or that the main driver and purpose of the DOLS regulations was article 5.



Compliance with Article 5 – Right to Liberty – across Europe

- 'Included in Society' – large scale study of people residing in residential institutions across a range of European Countries.
- Particular problems identified in some of the new accession countries - particularly some CEE (Central and Eastern European nations)
- Called for funding for community based residential alternatives to residential institutions.



Recent Cases

Stanev v Bulgaria Jan 2012 European Court of Human Rights judgement

Confirmed that his legal incapacitation and long term placement in a care home does constitute a deprivation of liberty and that he must be given his article 5 rights to mount a legal challenge to this detention.

Interights (international centre for the legal protection of human rights) formed a 'third party' in the legal challenge.

Interights Argue that Safeguards against unlawful deprivation of liberty under Article 5 should be accompanied by positive duties under Article 8 to develop community-based services.

Conclusions

- Mentally incapacitated adults are at risk of being deprived of liberty in care settings
- Article 5 provides important protections for the liberty of all citizens
- Both legal processes, and social work practice, have important roles to play in protecting the liberty of the vulnerable
- In the UK the Deprivation of Liberty Safeguards regulations provide a mechanism for both professions to help ensure the protection of liberty in care settings
- To date these regulations have proved difficult to interpret and have not been followed with consistency



With better training, more consistent judgements from UK courts, and in particular a much greater use of advocacy, the regulations remain a useful mechanism for the protection of liberty.

The 'included in society' project called for the kind of safeguards, monitoring, and inspection that DOLS can provide in the UK, to be established in all European nations.

For the future.....

We would like to undertake a comparative study of compliance with article 5 in other European nations.



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