

MCA and DoLS Newsletter, March 2014

It's been a busy few weeks for the Mental Capacity Act and Deprivation of Liberty Safeguards, so we have decided to devote the whole of this newsletter to these two issues. Please do read carefully as the developments will have a profound effect on your practice. We have tried to put everything in one place, so you may like to save this email and keep referring back to it over the coming months.

Please note that our MCA and DoLS training will reflect these developments with immediate effect. In particular, the DoLS judgement means that a lot of what you think you know about DoLS is no longer correct!! Feel free to contact us for clarifications and refresher training.

There is now a definition of what constitutes a “deprivation of liberty”

The Supreme Court gave a judgement on Wednesday 19th March in what has become known as the “Cheshire West” case. (Two other, less well publicised, cases involving Surrey County Council were joined to it). If you have attended DoLS training with us you have probably looked at it. It's the service user who has autism and who tries to put his incontinence pads into his mouth. The Supreme Court has ruled that his carers, who have been requiring him to wear a zipped body suit, are indeed depriving him of his liberty. But they have gone further and for the first time they have given a definition of what constitutes a “deprivation of liberty”.

- [Click here](#) for an analysis of the judgement itself from our own blog.
 - [Click here](#) to read the entire transcript of the judgement (paragraphs 49 and 50 are the key ones).
 - [Click here](#) to watch the judgement being read out via the Supreme Court YouTube Channel (yes, they really do have one!!)
 - [Click here](#) to read an analysis of the implications of the judgement from the “Community Care” website
 - [Click here](#) to read an analysis of what might happen next to DoLS, again from our own blog
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The House of Lords Select Committee on the Mental Capacity Act releases its report

This committee spent about 8 months in 2013 looking at how well the MCA, and DoLS,

had been implemented. Chaired by the Rt Hon Lord Hardie, QC, it released its report on 13th March 2014. Its findings were pretty devastating. It said that the MCA was supposed to empower people to take control over their own lives, but lack of understanding on the part of professionals had meant that it had often had the opposite effect. And DoLS was felt to be not working at all, and should be scrapped and replaced with something that would work.

- [Click here](#) for an analysis from our own blog
 - [Click here](#) to see Lord Hardie talking about the Committee's findings (YouTube again)
 - [Click here](#) to read the full report (143 pages)
 - [Click here](#) for an easy-read version of the report (32 pages)
 - [Click here](#) for another analysis from the "Community Care" website
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CQC's own report on DoLS

A few weeks before the House of Lords Committee published its report into MCA and DoLS, the Care Quality Commission had also published its annual report into DoLS. Many of its findings echo the House of Lords report. It's a good source of facts and figures, and case examples.

- [Click here](#) to see the full report
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Clarification on the capacity to consent to sexual activity

Many of you will have attended training with us on this issue. One of the most difficult aspects is whether the capacity to consent to sexual activity is "act-specific" or "person-specific". You may know that the Court of Protection has issued conflicting judgements on this thorny question.

Well, according to the Court of Appeal, both interpretations are correct. Specifically, when it comes to assessing whether an individual does, or does not, have the capacity to consent to sexual activity in general, then that is an "act-specific" assessment (ie "does P have the capacity to consent to sex in general?") However if there is a possibility of a criminal offence being committed against the person who lacks capacity, then the question becomes "person-specific" (ie "did P have the capacity to consent to sex with that particular individual at that particular time?")

- [Click here](#) to read the full judgement (paragraphs 47, 48 and 79 are especially relevant)
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