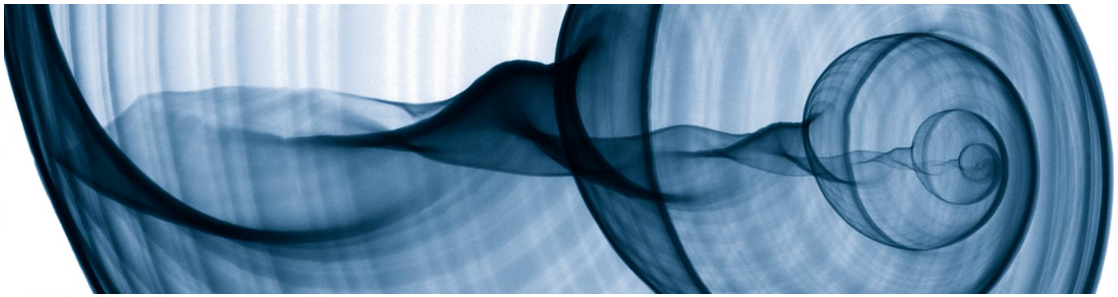

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The Healthcare Business Inside Out

New Challenges for Care Homes

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Deprivation of Liberty: new processes

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- The Daily Telegraph, 2nd February 2009
  - "Care homes fear chaos over checks on thousands of residents."
  - "All councils will have to send doctors and social workers to every home in which they have placed residents, and every primary care trust must do the same in hospitals."

Compare

- Department of Health's guidance for hospitals and care homes, 1st February 2009
  - "It is important to remember that depriving someone of their liberty in a hospital or care home should be a relatively rare occurrence. Therefore only a small number of people should need MCA DoLS authorisation."

Statutory rationale

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- MCA Code of Practice, para 6.50
  - "Sometimes there is no alternative way to provide care or treatment other than depriving the person of their liberty. In this situation, some people may be detained under the MHA 1983 – but this only applies to people who require hospital treatment for a mental disorder. Otherwise, actions that amount to a deprivation of liberty will not be lawful unless authorisation is obtained."
- To close the Bournewood gap:
  - Detained Residents: MCA, Schedule A1 – *people detained in a hospital or care home for the purpose of being given care or treatment in circumstances which amount to deprivation of liberty*

What is deprivation of liberty? Recent cases (i)

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- City of Sunderland v PS (2007)
  - Lawful for Local Authority to use “reasonable and proportionate” measures to prevent PS leaving a care home
- LLBC v TG (2007)
  - No deprivation of liberty or breach of Article 5 as family had unrestricted access to him in the care home. TG was personally compliant and only the ordinary restrictions of liberty applied.

What is deprivation of liberty? Recent cases (ii)(a)

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- HL v United Kingdom (2004) – Bournewood case
  - An informal LD patient, he was under continuous supervision and control, not free to leave, and his carers were unable to visit: this was unlawful.
- DE & JE v Surrey County Council (2006)
  - Patient with dementia and blindness – placed by LA in 2 care homes, with substantial degree of freedom and contact with outside world, but was not allowed to return to live with his wife: the LA was depriving him of his liberty.

What is deprivation of liberty? Recent cases (ii)(b)

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- Home Secretary v JJ and others (2007) – control order
  - 18-hour curfew; visitors had to be authorised; restrictions also while outside – this was deprivation of liberty (16 hours = acceptable limit);
  - "Restrictions designed, at least in part, for the person's benefit are less likely to be considered deprivation of liberty than those designed for society's protection."
- DoLS Code of Practice chapter 2

Restraint

- MCA s. 6 (4): = use or threat of force, to secure the doing of an act which P resists; or
- which restricts P's liberty of movement, whether or not P resists.
- Restraint which is reasonably believed necessary for the purpose of preventing harm to a mentally incapacitated person, and which is proportionate to the likelihood and seriousness of harm, is not deprivation of liberty.
- So what about keypads?

Case Study

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Mr Fred Bartlett is in a care home. He suffers from a mental illness that is generally well controlled with anti-psychotic medication.

He also suffers from thrombosis, for which he is prescribed warfarin. He has no insight into his disorder or need for either medication. His capacity is the subject of debate, with staff reluctant to restrain him for medication, which is becoming more and more necessary. His GP Dr Hyde feels that the common law is being stretched, and does not understand the new ‘detained resident’ process, but wants Fred admitted to hospital.

- *How can both types of medication be lawfully given?*
- *Should an application made for a standard authorisation?*