

Deprivation of Liberty Safeguards

Syed Javaid

Consultant in Later Life Psychiatry

Honorary Clinical Lecturer, Liverpool University

Approved DoLS MH Assessor

11 September 2019



Background

- *"No freeman shall be taken or imprisoned, or disseised of his freehold, or liberties, or free customs, or outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land."*



Synopsis

- ▶ A discussion about the basic concept of mental capacity and related legislations.
- ▶ DoLS in practice



What does 'capacity' mean?

- ▶ Can the person make this decision at the time it needs to be made?



Mental Capacity: Historical Approaches

➤ **The status approach**

- If a person was deemed to lack capacity, this assessment would apply to all decisions that person could make.

➤ **The outcome approach**

- Focuses on the result of the decision-making process. Any outcome deemed to be unreasonable, unwise, against conventionally held values or against medical opinion could be considered as evidence of incapacity.



Legal frameworks for protection

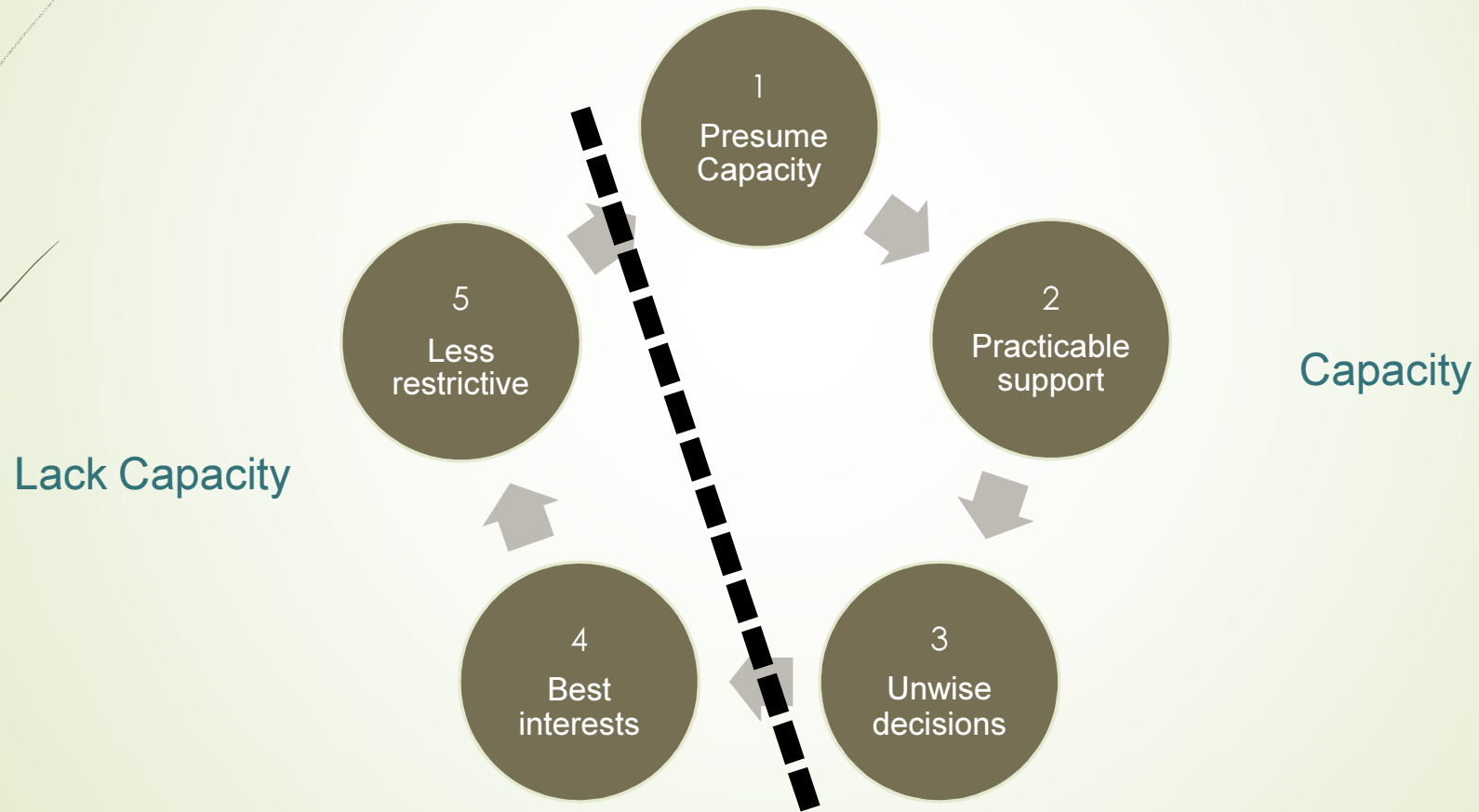
- European Convention on Human Rights
- Mental Health Act 1983
- Human Rights Act 1998
- **Mental Capacity Act 2005**
- Deprivation of Liberty Safeguards 2009



Mental Capacity Act 2005

- Aims to empower and protect vulnerable people who may not be able to make their own decisions
- The Act clarifies...What “lack of capacity” is:
- A person lacks capacity in relation to a matter if at the material time he/she is unable to make a decision for himself in relation to the matter because of an impairment of the mind or brain.

Underlying Principles






Assessing Capacity



The 2 stage test:


1. Does the person have an impairment of the mind or brain?
2. If so, does that impairment mean the person is unable to make the decision at the time it needs to be made?



“Inability” to make a decision

A person is unable to make a decision if they cannot:

- 1. *understand*** relevant information about the decision to be made
- 2. *retain*** that information in their mind
- 3. *use or weigh*** that information as part of the decision-making process
- 4. *communicate*** their decision by any means.



Deprivation of Liberty Safeguards

- Introduced into MCA through the Mental Health Act Amendments 2007
- Only applies to people who lack capacity (as defined in MCA)
- Safeguards cover people in hospital and care homes



What is deprivation of liberty

- Request by carers to discharge is refused
- Unable to maintain social contact due to restrictions
- Not allowed to leave without permission
- Contact with family and friends is restricted by staff
- Sedation
- Restraint



The 'Cheshire West' judgement

- MIG (17)-Learning disability- Lived with foster mother- attended a further education unit every day-Never tried to leave the foster home.
- MEG (17)-Learning disability-moved from foster home to a residential home-occasional restraint and sedation use.
- P (38)-Cerebral palsy and Down's syndrome-lived in a staffed bungalow-one to one support to help with day to day care and frequent outside visits-episodic challenging behaviour.



The Acid Test for Deprivation of Liberty

- ▶ The Supreme Court held that the acid test to determine if a deprivation is occurring is:

‘Whether the patient is under continuous supervision and control AND not free to leave’



Continuous Supervision and Control

- The concept has to be interpreted broadly
- Law Society guidance

‘Does the person or body responsible for the care of the person always broadly know where that person is and what they are doing at that time?’

‘What would the responsible person or body do if they did not know where the person was, or what they were doing?’



Not Free to Leave?

- ▶ ***'How staff would react if the person did try to leave or if relatives/friends asked to remove them.'***



Other points to consider

- Objection

'A gilded cage is still a cage.'

- Relative normality

- Reason/Purpose

- Comparator



Limitation of DoLS

- DoLS can't:
- Be transferred
- Extend beyond the care home or hospital
- Authorise actual treatment



➤ Any Comments??





➤ Thank You

