

MIDNIGHT LAW:

Deprivation of Liberty In Intensive Care



SITUATION

The patient in England and Wales is not free to leave the ward/unit and is under constant observation. They are not in a position to give consent to the arrangements for them, either because of their condition or because of clinically necessary medication that they are being given.

CONSIDERATIONS

- (1) Formal legal authority is required to deprive someone of their liberty. However, the courts, up to and including the Supreme Court, have made clear that the concept of deprivation of liberty applies differently in the context of the provision of immediately necessary life-sustaining medical treatment to a patient in hospital.
- (2) The starting point is that there is no deprivation of liberty, even if the patient cannot consent to the arrangements, where:
 - The patient is so unwell that they are at immediate risk of dying anywhere other than in hospital; and
 - The arrangements for delivering treatment to the patient are the same as they would be if the patient were able to agree to them.
- (3) This means that most patients requiring intensive care (or its equivalent) will not be considered to be deprived of their liberty, so formal authority is not required, and should not be sought.
- (4) Formal authority should be sought where:
 - There are specific contingency plans either (1) to prevent the patient leaving if they are physically capable of leaving; or (2) to prevent family members from removing them from the hospital; and/or
 - The patient is subject to section 17 of the Mental Health Act 1983 (i.e., on leave from a mental health hospital to receive care in intensive care).
- (5) Note that the same tests apply above to those under 18, but with the following variation:
 - A parent can consent to the confinement of a child up to the age of 16 if they are acting within the scope of their parental responsibility. Where they give that consent, no formal authority will be required at any point.
 - Where the child turns 16, if the child cannot consent to the arrangements for them, the same tests apply as they do to adults.

KEY POINTS

- (1) The courts have emphasised that the primary concern in relation to patients in intensive care is to ensure that care is being delivered in the best interests of the patient. Deprivation of liberty will only relatively rarely be a relevant issue.
- (2) Where the patient's circumstances do amount to a deprivation of their liberty, then steps should be taken to obtain formal authority. Whilst those steps are taken, the priority should continue to be to deliver care in the best interests of the patient.
- (3) The mechanism for obtaining formal legal authority will be changing in 2022, as the Deprivation of Liberty Safeguards will be replaced by the Liberty Protection Safeguards, but the principles set out above will remain the same.

GUIDING PRINCIPLES:

- The starting point is the care and treatment which is right for the patient
- It will only be in limited circumstances that arrangements in intensive care will give rise to a deprivation of liberty requiring formal authority

KNOW THE LAW:

[Mental Capacity Act 2005](#)
R(Ferreira) v HM Senior Coroner for Inner South London [2017] EWCA Civ 31
Re D [2019] UKSC 42

FURTHER READING:

[39 Essex Chambers | Mental Capacity Guidance Note: Deprivation Of Liberty In The Hospital Setting](#)

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