DoLS on the AMU
Detaining people in hospital
What are the DoLS?
  - Background – prior to 2007, 2007-2014
  - Dispelling myths
How do I apply for DoLS?
When do I not need to apply for DoLS?
Death whilst under DoLS

Questions?
About me

- Trained as a consultant geriatrician
- Work as a FT Acute medical consultant
- Nosey
- Like watching legal dramas
- Find legal stuff interesting
- Like to be right

- Naturally lead to lots of interesting cases
- Post BREXIT – Will we still be subject to the ECHR?
Emergency life-sustaining interventions and the provision of emergency care to a patient lacking consent to such treatment should always be given as clinically required and there should never be any delay for prior deprivation of liberty authorisation to be sought.
This has to be for treatment/safety

Options?
- MCA +/- DoLS authorisation
- MHA
- Kettling – ruled lawful by ECHR
- Court of Protection
- Children’s Act (for those <18)
- Common law? (not actually lawful)

I will focus on DoLS
DoLS – what are they meant to be?

- Rigourous procedure of assessment and authorisation
  - Independent of the hospital
- Aims to protect persons who lack capacity to agree to proposed care plan and/or location from being deprived of their liberty
- Once the authorisation is given (standard or urgent), the hospital or care home may deprive the person of their liberty by detaining the person (subject to the terms of the authorisation) for the purpose of their being given care or treatment.
- It should be noted, however, that a person lacking capacity may be treated on a ‘best interests’ basis without a DoL authorisation if the treatment does not involve or require a deprivation of liberty.
Anyone admitted from a care home with a DoLS authorisation needs one whilst in hospital

Anyone who dies under DoLS authorisation requires a coroner’s inquest

Anyone kept in hospital who lacks capacity needs a DoLS authorisation
Amendment to the MCA in 2007

- Case HL
- 49M, Autism
- Bournewood Hospital
- Article 5, ECHR, “Right to liberty”
- Use of ‘Common Law’

Depriving someone of their liberty is therefore illegal under common law
Understanding DoLS applications

- Apply to Supervisory body
  - Authorisations
- Urgent – up to 14 days. Immediate permission
- Standard – longer (usually up to 1 year)
  - 6 assessments
    - Age, No Refusals, Mental Capacity, Mental Health, Eligibility, Best Interests
- Cannot apply for only urgent
  - Either standard alone
  - Or standard and urgent together
Pre March 17th, 2014

- Distinction between restriction and deprivation
  - ‘Loop-hole’ exploited by many as vague

- DoLS team assessed before urgent expired

- Re-examined in varying levels of court
English Court System

Supreme Court

CRIMINAL
- Court of Appeal
- Crown Court
- Magistrates Courts

CIVIL
- Court of Appeal
- High Court of Justice (Queen’s Bench, Chancery, and Family)
- County Courts
Clarified the law

‘Acid’-test
- (1) Is the person subject to continuous supervision and control?
- (2) Is the person free to leave?

The focus is not on the person’s ability to express a desire to leave, but on what those with control over their care arrangements would do if they sought to leave or someone extracted them.

NB: for a person to be deprived of their liberty, they must be subject both to continuous supervision and control & not be free to leave.

Huge implications for acute trusts and the DoLS team
Anyone meeting acid-test criteria may be at risk of deprivation of liberty
- Need to consider if DOLS authorisation required

If acid-test criteria met and DOL authorisation not sought
- May be an illegal act

“But acute stays in hospital are short and we discharge ASAP”, “it takes ages to fill in the paperwork”, “it’s a waste of my time”

Act of parliament required?
- Law society recommending 28 days before require full authorisation
- Law has not (yet) changed
DoLS pragmatics for acute trusts

- Code of practice for DoLS
- Section 6 (6.3 and 6.4)
  - Specifically addresses acute stays
  - Physical illness
  - Predicted a short stay
- DoLS authorisation not required if predicted patient will regain capacity soon
  - Or more specifically if one can make a convincing argument that they might
- DoLS authorisation not required if person is not subject to continuous supervision/control
- Deliberately setup to avoid droves of DOLS applications for short stays “matter of a few days”
  - How long is this?
  - Be wary of stating a number (CQC)
6.3 However, an urgent authorisation should not be used where there is no expectation that a standard deprivation of liberty authorisation will be needed. Where, for example:

- a person who lacks capacity to make decisions about their care and treatment has developed a mental disorder as a result of a physical illness, and
- the physical illness requires treatment in hospital in circumstances that amount to a deprivation of liberty, and
- the treatment of that physical illness is expected to lead to rapid resolution of the mental disorder such that a standard deprivation of liberty authorisation would not be required,
- it would not be appropriate to give an urgent authorisation simply to legitimise the short-term deprivation of liberty.

6.4 Similarly, an urgent deprivation of liberty authorisation should not be given when a person is, for example, in an accident and emergency unit or a care home, and it is anticipated that within a matter of a few hours or a few days the person will no longer be in that environment.
Issues re DoLS authorisations

- DoLS teams are very busy
  - Same countrywide (10X in England, 14X in Wales)
- There is a large backlog to assessments
- It is common for the urgent to expire before the team have assessed
  - Grey area re legally authorised DoLS or not
  - Seek clarity with your local council social services team re where accountability lies
Death under DoLS

- The Policing and Crime Act 2017
  - Came into force April 3rd, 2017

- Death in any person subject to DoL is no longer ‘in state detention’ for the purposes of the Coroner’s and Justice Act, 2009.

  - 1 Duty to investigate certain deaths:

    - (1) A senior coroner who is made aware that the body of a deceased person is within that coroner's area must as soon as practicable conduct an investigation into the person's death if subsection (2) applies.

    - (2) This subsection applies if the coroner has reason to suspect that—
      - (a) the deceased died a violent or unnatural death,
      - (b) the cause of death is unknown, or
      - (c) the deceased died while in custody or otherwise in state detention.

- DoLs authorisation alone no longer requires a coroner’s investigation
Summary

- We probably don’t need to apply for DoLS authorisation on acute medical units very often
  - We do if we think someone is going to be in ages pending assessments, etc.
- Careful documentation of reasons sensible
- Law is likely to change, but not soon (and BREXIT negotiations will delay this)
Need help?

- Happy to be contacted personally
  - james.edwards@nnuh.nhs.uk

- Thanks for listening
- Thanks for this opportunity to talk about this subject

- Questions?