

Mental Welfare Commission response to queries related to when to use s13ZA v Guardianship following the Cheshire West Supreme Court decision

This note does not constitute legal advice. Services need to take their own legal advice as they judge appropriate. It sets out the view of the Mental Welfare Commission as to the implications for services of the Cheshire West decision, and the steps the Commission would regard as appropriate to ensure that decisions regarding care and treatment are ethically appropriate and consistent with the principles of the Adults with Incapacity (Scotland) Act 2000.

The Cheshire West decision (see http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf) poses challenges to the operation of incapacity law in Scotland as it currently stands. The UK Supreme Court's view on the definition of deprivation of liberty considerably broadens existing interpretations in Scotland which have been held, for the most part, by health and social services. These interpretations have evolved over the years from accepted common practice but have been further informed by the Scottish Government's Guidance in CCD5/2007 following the amendment to the Social Work (Scotland) Act 1968 with the introduction of Section 13ZA http://www.sehd.scot.nhs.uk/publications/CC2007_05.pdf.

The ruling states that deprivation of liberty is a matter of fact and does not depend on the purpose of the intervention or the nature of the person's individual circumstances. The majority of the judges agree that the fundamental characteristics of deprivation of liberty are being 'under continuous supervision and control' and lack of freedom to leave.

This is a substantial development from previous decisions of domestic courts and the European Court of Human Rights such as the HL or Bournemouth case. The implications for Scottish legislation will be the subject of debate for some considerable time yet. The Scottish Law Commission is due to report this autumn on proposed legislative changes. Following this we anticipate that the Government will have to respond to this and consult on what they consider are necessary amendments to existing legislation.

In the meantime, services need to operate within the existing statutory framework, and be informed by the developing caselaw. If services are satisfied that a person who cannot consent will be deprived of their liberty, it is necessary to consider what lawful authority justifies that detention. At the same time, unless and until Parliament or the courts determine otherwise, current legislation remains in full effect, including

the provisions of s13ZA of the Social Work (Scotland) Act 1968, and the principle set out in s1(4) of the Adults with Incapacity (Scotland) Act 2000 that ‘There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.’

In considering issues of deprivation of liberty in the context of discharge from hospital, it is also important to bear in mind that the same ECHR requirements obtain in health care settings as in social care. In other words, a person who is under continuous supervision and control and not free to leave a hospital is no less deprived of their liberty than a person subject to similar constraints in a care home.

The ruling in *Cheshire West* should not be a justification for delaying discharge to a social care setting if that is agreed to be the appropriate care setting for an individual.

In short, the Commission believes that what was good practice before the Cheshire West case will in large part remain good practice now, but that the decision makes it even more necessary that there is a proper and auditable process for taking decisions on care arrangements for people who lack capacity, and that this process fully reflects the principles of the 2000 Act.

Where it is determined, in accordance with those principles, that an application for welfare guardianship should be made, it is important to identify any particular measures which may constitute or contribute to a deprivation of liberty, ensuring that the measures are necessary and justified, and seeking specific authority in the order. Such measures may include restraint or any use of physical force, preventing a person from leaving or requiring them to return to their place of residence, or intrusive surveillance, whether personal or through technology.

Local authorities should also, in implementing their statutory duties, including under s57 of the 2000 Act, reflect on the guidance issued in CCD5/2007. Integrating key elements of this guidance into assessment and care management decision making processes would help establish an auditable trail of good practice which informed the decision as to whether or not statutory powers should be sought to implement a care plan or a significant change to existing care plans.

The following, we believe, are some of the more helpful elements of the guidance, many of which do not appear to be followed on a routine basis by local authorities at present:

- It is vital that local authorities ensure effective, up-to-date, documented assessment and care planning in relation to each individual who appears to lack capacity to consent to services
- Prior to formalised care planning reviews, the relevant community care staff should meet with the adult, their carer and, where there is one, the adult’s independent advocate to discuss possible steps which might have to be taken

and to provide them with relevant information about the care planning process. The carer should be regarded as a key partner in this process.

- Every effort must be made to maximise the capacity of the adult to make their own decisions through providing the necessary information and the support they may need to understand and act on this information.
- Where it is agreed that the adult lacks sufficient capacity to make some or all of the decisions required, the review meeting will need to consider whether authority under the 2000 Act will be necessary to implement essential aspects of the care plan to which the adult is unable to give informed consent, or whether it would be appropriate to use powers under s13ZA of the 1968 Act.
- The principles of the 2000 Act must inform consideration in each case of the action to be followed. As well as applying to decisions under the 2000 Act, it is explicit in s 13ZA of the 1968 Act that the general principles of the 2000 Act apply to whatever steps are taken by the local authority under the 1968 Act in relation to the provision of community care services to an adult with incapacity.
- It is essential to record the decisions about which power to use to provide services and the reason for taking this decision.
- In addition to this record, a formal letter should be sent out to the person, his/her primary carer, independent advocate (where there is one) and relevant professionals. This letter should inform them of the outcome of the case conference/review; confirm what package of care or actions were agreed; and state clearly whether or not an order is going to be sought, with reasons for the decision and arrangements for the next review. It should also include information as to how to lodge any future concerns that, due to a change in circumstances or views, it is believed that the adult may be being deprived of their liberty.
- Routine arrangements for monitoring and review of the person's care, as set out in the Scottish Government's guidance on Care Management in Community Care, need to be in place and followed rigorously where action has been taken under either the 2000 Act or the 1968 Act.
- S 13ZA cannot be used as authority for implementing a care plan where the adult does not agree with the proposed action or it appears that he/she is likely to indicate an unwillingness to remain in or agree to the care arrangements. Neither should it be used when any of the other parties involved voice an objection. In the case of an independent advocate any objections they voice should be as part of their role in representing the adult.

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