Legal Update for Care Providers – Changes to DOLS: The end of Cheshire West

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What We Will Cover

- Explain the 2026 Supreme Court changes
- Clarify the impact on Cheshire West
- Set out practical steps for care home providers
- Highlight some of the legal risk and compliance considerations

Where Did This All Start?

- This change in the law came about because of:
  - *A Reference by the Attorney General for Northern Ireland of a devolution issue under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 [2026] UKSC 16*
  - Sometimes referred to as AGNI

Reminder: Deprivation of Liberty

- For the purposes of Article 5 ECHR, a person is deprived of their liberty if three elements are satisfied:
  - The **objective element:** the person is confined to a particular restricted space for more than a negligible period of time
  - The **subjective element:** there is no valid consent to that confinement
  - The **state is responsible** for the confinement (basically the state is aware of it)

Reminder: Cheshire West (2014)

- Acid test: The **objective element** is satisfied <u>where a person is under continuous supervision + not free to leave</u>

- This test was applied regardless of compliance and did not focus on the subjective element

- Led to significant increase in DoLS applications

What Has Changed in 2026?

- Supreme Court has moved away from the acid test
- Cheshire West approach no longer correct on its own
- Now requires a multifactorial, case-specific assessment
- Borderline cases – where there is serious doubt, no inference of valid consent should be drawn

Don’t Panic !

The New Legal Test

- No single deciding factor
- Must consider the person's specific situation
- Focus on overall impact of restrictions rather than a checklist

Key Factors to Consider:

1) The Objective Test: Is it confinement?

- Type of restrictions (locks, supervision, restraint, medication?)
- Duration and intensity
- Effect of the restriction on the individual
- Purpose (care vs control?)
- Whether the person objects
- Relative normality of the situation
- The extent of isolation and availability of social contacts
- In borderline cases (think of the sliding scale – a prison cell being the most restrictive end of the sliding scale)

Major Shift: Consent

2) If it is confinement – does the person give consent?

- A person may consent even if lacking capacity under MCA
- Wishes and feelings carry significant legal weight
- Compliance doesn't mean automatic consent, but it is now relevant and you must consider

Objection is Now Central

- Objection strongly indicates a deprivation of liberty
- Includes behaviour, distress, refusal of care
- Need to evidence whether a resident is objecting or content

Impact on Social Care Providers

- Fewer situations will now meet the deprivation threshold
- Need for professional judgment, not a tick-box approach
- Greater emphasis on recording rationale and decision-making

DoLS in Practice Now

- DoLS still applies where deprivation exists
- Borderline cases should still be referred
- Continue to seek authorisation where uncertainty exists

Existing Authorisations

- Some residents may no longer require DoLS
- Providers should support reviews with local authorities
- Authorisations remain lawful until reviewed

Legal Risks for Providers

- Risk of unlawful deprivation if under-identifying cases
- Risk of over-restrictive care practices
- Increased scrutiny on documentation and decision-making

Required Actions for Providers

- Update internal policies and procedures
- Train staff on new multifactorial approach
- Review current residents with restrictions
- Strengthen recording of wishes, feelings and behaviours

Updates Awaited

- Updated guidance from DHSC will be published

- Current update – interim guidance – can be found here:
  - UK Supreme Court 2026 judgment on what constitutes a deprivation of liberty - GOV.UK

Good Practice Example

- Assess: Is the resident content?
- Record behaviour and engagement
- Consider if restrictions are proportionate
- Document reasoning clearly

Scenario 1: Content Resident

- Resident has 24/7 supervision and locked doors – they don't have capacity to make a decision about where they live and they do have a diagnosis of dementia
- HOWEVER, they appear happy, engages with staff, does not try to leave
- Question: Is this still a deprivation of liberty?
- Key point: Consider consent, wishes, and lack of objection

Scenario 2: Clear Objection

- Resident repeatedly tries to leave
- Becomes distressed and resists care
- Staff use 1:1 supervision and occasional restraint
- Key point: Strong indication of deprivation of liberty – DoLS likely required

Scenario 3: Fluctuating Presentation

- Resident sometimes appears content but at other times tries to leave
- Occasionally refuses care
- Key point: Fluctuating objection – refer and document carefully
- Likely requires authorisation due to uncertainty

Scenario 4: Family Disagreement

- Resident appears settled
- Family says resident would not want to be in care home
- No active objection from resident
- Key point: Focus on resident’s current wishes and feelings
- Family views relevant but not determinative

Scenario 5: Restrictions Due to Condition

- Resident has severe physical frailty
- Unable to leave independently
- Minimal active restrictions by staff
- Key point: May not amount to deprivation of liberty if limits arise from condition

Key Learning from Scenarios

- No automatic answers under new law
- Focus on objection, consent, and lived experience
- Always document reasoning
- When in doubt – seek legal/DoLS advice

Top 10 Mistakes Post-2026 Judgment

1. Still relying on acid test alone
2. Ignoring consent
3. Failing to record wishes
4. Assuming compliance = no deprivation
5. Not recognising objection
6. Poor documentation
7. Not reviewing existing DoLS
8. Over-restrictive care plans
9. Not training staff
10. Failing to refer borderline cases

CQC-Ready Recording (Examples)

- Record clearly:
  - ‘Resident appears content and expresses wish to remain’
  - ‘No attempts to leave observed’
  - ‘Restrictions proportionate to risk’
  - ‘Regular reviews undertaken’
  - CQC statement on the Supreme Court's judgment on deprivation of liberty - Care Quality Commission

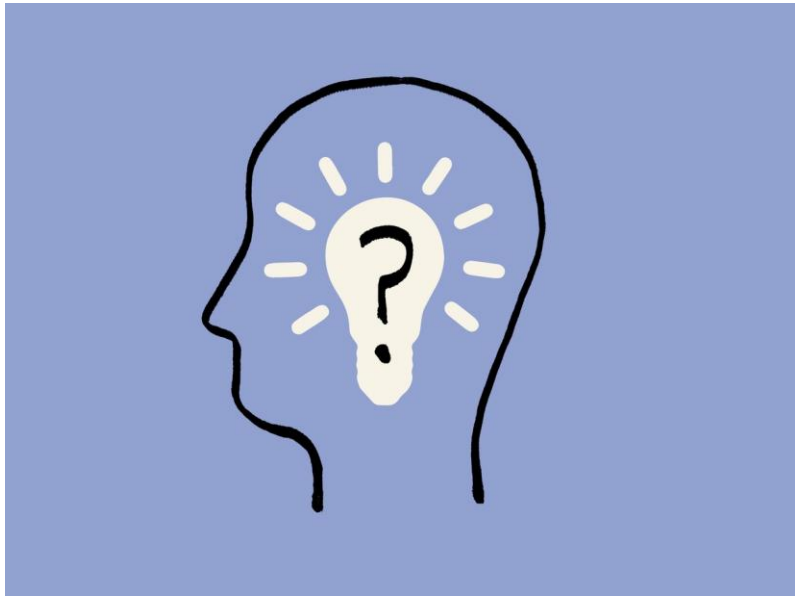
Key Takeaways

- Acid test no longer sufficient
- Consent and objection now matter
- Holistic assessment required
- Legal and documentation standards have increased

Support from Us

- Legal advice on complex cases
- Policy and training support
- Assistance with Court of Protection or DoLS challenges
- Contact us for tailored guidance

Questions?



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