

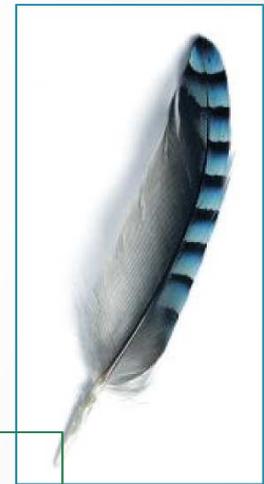
BIA Reports

Javeda Jafri

pronounced

Ja-vay-da

(Rhymes with Darth Vader)



Jay Training & Assessment Ltd

13 Churchgates | Church Lane | Berkhamsted | HP4 2UB

email: jaytraining@outlook.com **mobile:** 07711 270835



Plan for the session

- The joys of being a BIA!
- Our role
- Form 3 in brief
- Health and safety warning for Safeguarding cases!
- New research on BIA assessments

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mobile: 07711 270835



Neary v Hillingdon [2011]

EWHC 1377

- “The best interests assessment is anything but a routine piece of paperwork. Properly viewed, it should be seen as a cornerstone of the protection that the DoL Safeguards offer to people facing deprivation of liberty if they are to be effective as safeguards at all.”
(paragraph 174)

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The joys of being a BIA

Being a BIA helps to embed into practice, and give real meaning to, concepts like:

- person-centred practice
- autonomy
- fairness
- best interests
- proportionality
- human rights

See also:

<http://www.communitycare.co.uk/2015/12/02/best-interest-assessors-have-high-levels-of-job-satisfaction-despite-workload/>



Qualified BIAs have said:

- *BIA training has made a huge difference to my day to day practice as a nurse.*
- *Now I actually understand how case law impacts on our work in health and social care.*
- *The only time I get a chance to do 'real' social work is when I'm doing BIA work.*
- *As a BIA I feel I can sometimes make a real difference.*
- *I find my BIA work really challenging and stimulating and very satisfying even though the cases can be quite sad.*

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The role of the BIA

	BIA	MH Assessor
• Age Assessment	✓	
• Mental Capacity Assessment	✓ ?	✓ ?
• No Refusals Assessment	✓	
• Best Interests Assessment	✓	
• Eligibility Assessment	✓ ?	✓
• Mental Health Assessment		✓

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Form 3

- Age Assessment
- Mental Capacity Assessment
- No Refusals Assessment
- **Best Interests Assessment**
- Selection of Relevant Person's Representative

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Best Interests Assessment

- Background information
- Views of the relevant person (P)
- Views of others
- P is deprived of their liberty Yes or No
- The deprivation is necessary in order to prevent harm to P Yes or No
- The deprivation is proportionate to the likelihood & seriousness of harm to P Yes or No
- This is in P's best interests Yes or No
- Balance sheet
- Duration and conditions

Is P deprived of his/her liberty?



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Lady Hale in Cheshire West

"If the acid test is whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives, then the truth is that both MIG and MEG are being deprived of their liberty".

... "features which have consistently been regarded as 'key' in the jurisprudence which started with HL v United Kingdom 40 EHRR 761: that the person concerned 'was under continuous supervision and control and was not free to leave' "

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Is P deprived of his/her liberty?

In *Storck v Germany* (ECTHR; (2005) 43 EHRR) the European Court clarified that for a person to be deprived of their liberty within the meaning of Article 5 of the ECHR three elements must exist:

1. The objective element
2. The subjective element (that the person has not validly consented to the detention)
3. The confinement must be imputable to the State

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The 3 elements in DoLS

- P is under continuous supervision and control and not free to leave? Yes = Objective element ✓
- P lacks capacity? Yes = The subjective element is met ✓
- P in hospital or care home? Yes = Imputable to the state ✓

But we do need detail and evidence...

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What factors/restrictions contribute to the deprivation?

Guzzardi v Italy 7367/76 (1980) ECHR

- “the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question”

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ADASS guidance

Consider all measures which may restrict P including:

- locked/lockable doors/windows;
- wheelchair/lap-strap;
- degree of staff support inside and outside;
- sedative medication;
- restrictions on direct/indirect contact with family/friends;
- nature and degree of physical or verbal intervention/restraint;
- personal care arrangements;
- level of observation, etc.”



Is the deprivation necessary in order to prevent harm coming to P?



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Necessary?

- Detail actual or likely harm (physical, psychological, social, financial) that will be avoided by the arrangements that deprive the person of their liberty. Include type, severity and frequency of any actual harm. Consider history/evidence – give dates and examples where possible.
- What harm may occur if they weren't here and restricted?
- How likely is the harm to occur?
- Be clear about evidence your opinion is based on

**Is the deprivation
proportionate to the
likelihood and seriousness of
harm coming to P?**

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Proportionate

This is about Principle 5 – always considering whether there is a less restrictive way to achieve the outcome.

A proportionate response means using the least intrusive type and minimum amount of restraint to achieve a specific outcome. (MCA Code 6.47)



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Proportionate

ADASS guidance suggests we must consider:

- what else has been tried;
- whether there are any less restrictive options;
- if an option hasn't been tried or hasn't worked, why not;
- what has been explored already;
- what could be explored.

www.adass.org.uk/deprivation-of-liberty-safeguards-guidance



Is deprivation in P's best interests?

- MCA Code Section 4 (best interests) checklist + s4.61 of the DoLS Code
- P's views and the views of others you consulted
- Best interests is not just about physical health and safety but also emotional, social and psychological wellbeing
- Explain how you reached your conclusions

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The Balance sheet approach

- Useful table in Form 3
- Identify all available/viable options
- List benefits and disbenefits/risks to P of each option, indicating likelihood and seriousness of each benefit or burden and how weighty that might be for P.
- Include P's past or present statements or wishes, impact on relationships, any practical implications.



Case Example

Mr and Mrs B – been married for 57 years & lived in the same house all their married life.

July 2015 - Mrs B diagnosed with early stages of dementia.

Nov 2015 - She tripped over an uneven paving slab & bumped her head & broke her ankle.

In hospital staff found Mrs B quite disoriented and confused and wondered whether she could manage at home with her elderly husband.

Mrs B kept saying she wanted to go home. Mr B visited every day & she asked him to take her home. He explained she was still being treated.

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Case study continued...

Mrs B was physically better & still kept asking to go home. Mr B wanted to take her home but staff said they were still assessing her. The couple argued & staff heard Mr B shouting at his wife.

The next day Mrs B decided to leave the ward. Staff followed her & brought her back. She was becoming increasingly angry. Observation levels were increased & a mild sedative prescribed PRN.

Staff worried & thought Mrs B may be 'better off' in a care home. They had safeguarding concerns in light of Mr B shouting at his wife.

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Case study continued...

The doctor and nursing sister told Mr B they thought that Mrs B may benefit from 24 hour care in a specialist residential care home. He strongly objected to this suggestion and said he was going to take his wife home whatever they said.

Because of their concerns and 'in order to prevent Mr B removing his wife' the ward issued itself an Urgent DoLS authorisation & sent an application for a Standard Authorisation to the Supervisory Body. The BIA arrives...

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Case study continued...

Capacity? BI checklist?

Least restrictive?

Short authorisation?

Recommendations?

Conditions?

IMCA?

Article 8? Court of Protection?

But for DoLS Mrs B may well have ended up
in a care home...

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Safeguarding

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Care Act Statutory Guidance

14.8 Organisations must avoid safeguarding arrangements that do not put people in control of their own lives, or that revert to a paternalistic and interventionist way of working. People have complex lives and being safe is only one of the things they want for themselves. Professionals and other staff should not be advocating “safety” measures that do not take account of individual well-being...



Safeguarding

- Common difficulties in Safeguarding: lack of direct witness evidence, the lapse of time, turnover of staff, absence of consistent or sometimes, any, evidence from P him or herself.
- In *Re CM; LBB v JM* (2010) COP the judge confirmed that the burden of proof in establishing factual allegations lies on the public authority, and that the standard of proof is 'the balance of probabilities'.

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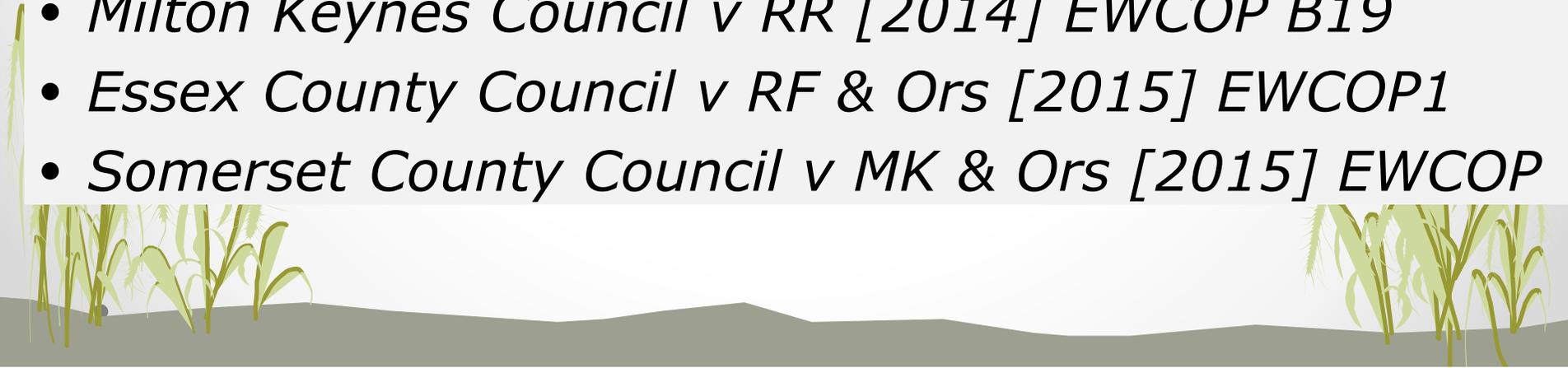
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Standard of proof?

Examples of cases where judges have found local authority evidence of abuse to be inadequate i.e. did not meet the test of 'balance of probabilities'

- *G v E and others* [2010] EWHC 621
- *LB Hillingdon v Steven Neary* (2011) EWHC 1377 (COP)
- *LB of Tower Hamlets v BB* [2011] EWHC 2853 (Fam)
- *Milton Keynes Council v RR* [2014] EWCOP B19
- *Essex County Council v RF & Ors* [2015] EWCOP1
- *Somerset County Council v MK & Ors* [2015] EWCOP



Interference with Article 8 rights upheld

Where judges have upheld interference with Article 8 rights ruling this to be in P's best interests, necessary and proportionate they have made it clear that these matters needed to come before the court because health and social care did not have the legal authority to make the decision.

- *PS (an adult) v City of Sunderland* [2007] EWHC 623 (Fam) 2007
- *A Local Authority v WMA & MA*, [2013] EWHC 2580 (COP)



LB Hillingdon v Steven Neary (2011) EWHC 1377 (COP)

- “Significant welfare issues that cannot be resolved by discussion should be placed before the Court of Protection, where decisions can be taken as a matter of urgency where necessary.”
- (DoLS) is not to be used by a local authority as a means of getting its own way on the question of whether it is in the person's best interests to be in the place at all.
- Using the DoL regime in that way turns the spirit of the (MCA) on its head, with a code designed to protect the liberty of vulnerable people being used instead as an instrument of confinement.”

Recording

- A judge deciding on the best interests of a person who lacks capacity operates within the same legal framework as a BIA and needs to consider the same information.
- Very often the judges start by reminding themselves of the principles of the MCA and the best interests checklist. A good BIA report will demonstrate that you have done the same.
- Judges often quote case law – this is no longer recommended for BIAs.

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mobile: 07711 270835

Recording

- Show that you know the law and have worked within its framework. Your report must show that you have taken into account the person's own wishes and the views of those you consulted whether you agree with them or not.
- Give evidence of where you obtained information from. Clearly credit your sources – who said what, where and when. What documents did you refer to. Keep copies of documents that affected your decision making.

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Recording

- Remember your audience
- Avoid vagueness, complicated language and jargon. Be accurate, clear and concise. Own your report – say 'I' and 'my' and 'me'!
- Your report should show that you have analysed and evaluated all the information you have gathered in order to reach conclusions that fairly balance rights with risks. The person reading your report should never be left guessing how you reached the conclusions.

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A word cloud centered around the title "Plain English". The words are of various sizes and colors (red, blue, green, orange, purple, yellow). The most prominent words are "Plain English" in large red letters, "Communication" in large green letters, and "Language" in large blue letters. Other visible words include "Sentence", "Simple", "Unpatronising", "Understandable", "Internal", "Words", "Fasy", "Noun", "Clear", "Grammar", "Clarity", "Hear", "Jargon", "Speech", "Detailed", "Standards", "Access", "Verb", "Tense", "Documents", "Adjective", "External", "Public", "People", "Campaign", "Necessary", "Concise", "Publications", "Adverb", "Said", "Guide", "Questions", "Metaphor", "Spoke", "Internal", "Understandable", "Ordinary", "Information", "Context", "Quality", "Pronoun", "Written", "Adjective", "External", "Public", "People", "Campaign", "Necessary", "Concise", "Publications", "Adverb", "Said", "Guide", "Questions", "Metaphor", "Spoke", "Internal", "Understandable", "Ordinary", "Information", "Context", "Quality", "Pronoun", "Written".



DoLS checks 'exposing care failings missed by other assessments'

Survey of BIAs reveals examples where the much-criticised legislation has improved outcomes

by **Andy Mcnicoll on September 14, 2016**

www.communitycare.co.uk/2016/09/14/dols-checks-exposing-care-failings-missed-assessments/

National BIA survey

National online survey of BIAs asked **Do BIA assessments under DoLS have a positive impact for people?**

(Contact: steven.richards@edgetraining.org.uk)

Triggered by Law Commission's interim statement on proposals to replace DoLS which said:

*"Most consultees perceived the DoLS to be overly technical and legalistic and, more significantly, to have **failed to deliver improved outcomes for people** who lack capacity and their families and other unpaid carers."* (emphasis added)



92 BIAs responded providing detailed evidence of impact of BIA assessments in the form of 468 examples of positive outcomes including:

- *finding the person has capacity so restrictions lifted with no negative effect*
- *review of inappropriate placement or medication*
- *improved community access/social activities*
- *person discharged home from hospital (rather than care home)*
- *specialist assessment required e.g. OT, SALT, MH*
- *changes to improve care delivery*

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Conclusions

Substantial and clear evidence that BIA assessments identify failings in care for vulnerable adults and also more importantly result in real changes and improvements to care delivery in many different ways.

What emerges from reading these 468 examples is *“an alarming and depressing picture of poor care arrangements, overly restrictive practices, inappropriate use of medication to manage behaviour, disempowered families, residents labelled as lacking capacity without this ever being properly assessed and inappropriate placements.”*

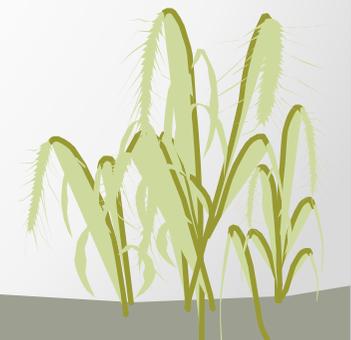


- *For many of the people, assessed by the BIAs, the inappropriate care or restrictions were not new but had been in place for several years and would have continued if a BIA assessment had not taken place.*
- *What appears **not** to be working effectively in many cases are existing care assessments and reviews for people in care homes or hospitals. Many of the 468 examples given in the survey appear to be for people who had had care assessments and care reviews already but these had failed to identify and address concerns that BIAs subsequently found during their assessment.*

National BIA survey

DoLS replacement law still at a very early stage and will undoubtedly undergo many changes from drafting to being submitted and then debated by Parliament. BIAs need to consider how they can come together to effectively influence the legalisation so that proper account is taken of the significance of an independent professional, face-to-face and MCA based assessment in protecting the rights of vulnerable adults.

*Report available at Community Care or
www.edgetraining.org.uk*



MSc Intellectual and Development Disability (IDD)

MSc Mental Health and Wellbeing (MHW)

MSc Social Practice and Wellbeing (SPW)

Some of the Core Modules	IDD	MHW	SPW
Concepts & Theories of Wellbeing	✓	✓	✓
Integrated working for Intellectual & Development Disabilities	✓		
Integrated working for Mental Health & Wellbeing		✓	
Integrated working for Social Wellbeing			✓
Safeguarding: Working with Risk & Opportunity	✓	✓	✓
Integrating Research with Professional Practice	✓	✓	✓
Dissertation	✓	✓	✓

Examples of Options	IDD	MHW	SPW
Best Interests Assessor (30 credits) ★★★★★	✓	✓	✓
Practice Educator (30 credits)			✓
Preparation for Advanced Practice in Social Work and Social Care (15 credits)			✓
Applied Health and Social Care Law (30 credits)	✓	✓	✓
Listening to the Voice of the Person across the Lifespan (15 credits)	✓	✓	✓
Psychopharmacology and Medicines Management (30 credits)	✓	✓	
Leading Cultural Change in Dementia Care (15 credits)		✓	✓
Autistic Spectrum Conditions (15 credits)	✓		

BIA Report Writing (full day)

17th October 2016

Venue: Central London - closest underground station Temple

www.edgetraining.org.uk/training-events

Call for Enquiries: 07341 277487 or

Email: assistant@edgetraining.org.uk

Please see flyer on your seat for further courses available from Edge Training & Consultancy



Any questions?

Thanks for listening 😊

JTA Ltd
jaytraining@outlook.com
07711270835



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