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Cheshire West and Chester Council v P (2011) EW

At first instance, the Court of Protection, (Baker J.) found that a man whose formidable mental and physical difficulty was being deprived of his liberty by virtue of the extent to which physical intervention was needed for his welfare. The Court of Appeal has now decided that he was not. The leading judgment by Munby LJ is certainly thorough and clever but we query whether it is moving in the right direction.

It is worth reminding ourselves that the MCA DOLS provisions originated as a result of *Bournewood*. In that case our courts flip flopped all the way up to the House of Lords as to whether or not HL was deprived of his liberty. Fundamental to the reasoning was the common law concept that taking steps which objectively amount to a deprivation of liberty for an individual who lacked capacity was acceptable if it was in their best interests. Our courts have a long record of safeguarding the interests of individuals who might be mistreated by the State. We did, after all, introduce the concept of habeas corpus to the world. Being deprived of one's liberty was seen as a bad thing but if society confined someone without capacity to object, in their best interests, this was necessarily a good thing and, therefore, lawful. It was not seen in the context of a deprivation of liberty at all.

After the Second World War, Europe was in no mood to trust countries to do good by it's citizens and, as the rightly accepted bastion of liberty and justice, UK lawyers were asked to draft the European Convention on Human Rights. However, as signatories to the Convention which was subsequently incorporated into domestic legislation through the Human Rights Act 1998, we opened ourselves up to the quite different approach adopted by the European Court to issues of how human rights are safeguarded. The European model, tempered by bitter experience of brutal regimes, is to require procedures to authorise and justify any deprivation of liberty which is to be objectively defined because the citizen could not trust the state to exercise power justly. This has not been our way of thinking. The only procedure we had for depriving an incapacitated individual of liberty was if they needed hospital admission under the Mental Health Act. For others who lacked capacity to make their own decisions there was reliance on a well developed but hard to define sense of justice and fairness to act in their best interests with judicial review available to resolve disagreements.

By Art.5(1) ECHR no one can be deprived of his liberty except for specific reasons of which the relevant one here is being of unsound mind. Art.5(4) provides that everyone who is deprived of his liberty is entitled to take proceedings to challenge the lawfulness of that detention. In *Storck v Germany* (2005) ECHR 406, the European Court held that the State has a positive obligation to protect the liberty of its citizens and to take measures to provide effective protection of vulnerable persons. As a result of *Bournewood* the government had to act. Two suitable Bills were available, one amending the existing Mental Health Act and the other which became the Mental Capacity Act. Regrettably, the government chose to introduce extremely complex provisions through the Mental Capacity Act rather than by simple amendments to the Mental Health Act. For example, there was already a Sch.1A in the MCA but when the DOLS were introduced it was unhelpfully put in a schedule called A1. A right of appeal was created in s.21(A) and the court could also authorise a DoL if it was ancillary to a welfare order - s.16(2).

It is vital, therefore, to know whether or not someone is being deprived of their liberty. If they are not, none of the procedural measures need to be taken at all and, since the procedures are complicated and time consuming, there is considerable pressure from public bodies like *Cheshire West and Chester Council* to find that someone has not been deprived of their liberty. There is no doubt an immense sense of relief on the part of the State that the court found that P was not deprived of his liberty at all. As a consequence it follows that none of the protections afforded by DOLS in the MCA apply.

Those affected will include those suffering cognitive deficits by reason of an injury, degeneration of the brain or organic causes. People suffering from learning difficulty, autism or enduring mental illness could all be caught. They are vulnerable and often, by reason of their disabilities, passive. Some will have articulate, caring families whilst many will be completely without anyone to show an interest. Given the lamentable inability of the Care Quality Commission to protect vulnerable people in care homes, judicial oversight could, literally, be a life saver which may not now be available.

The judgment raises two aspects which are of concern, namely purpose and the use of a comparator.

Purpose;

In *P and Q v Surrey CC* [2011] EWCA Civ. 190 the court rejected the idea that purpose could be relied upon as a factor in establishing whether restrictions went so far as to constitute a DoL. In doing so, the court followed the judgment of Munby J in *DE v JE and Surrey CC* [2006] EWHC 3459 (Fam) where he expressed himself as having great difficulty "in seeing how the question of whether a particular measure amounts to a deprivation of liberty can depend on whether it is intended to serve or actually does serve the interests of the person concerned". He went on to hold "**this is to confuse what I should have thought are, both as a matter of logic and of legal principle, two quite separate and distinct questions**". So, Munby J was clear that purpose was only relevant when, having found that there was a DoL, in deciding whether it was justified.

In *Cheshire West* he now finds that purpose is relevant after all. In order to avoid any suggestion of being illogical or offending legal principle the purpose must be ‘’objective." He gives the example of a man who imposes restrictions on his wife's liberty because he wants to protect her from the consequences of her dementia. The presences of dementia and the need to safeguard her are objective criteria and consequently relevant not to the query as to whether the regime is justified in her best interests but to whether there is a DoL. This, truly, is semantics. Purpose is dealt with in the Mental Capacity Act and it is called best interests.

So, objective purpose is relevant but not so for a purpose which is ‘subjective'. The judge goes on to say that if the man was acting out of a sense of love or duty that would be, essentially, neutral. However, because the relevance of purpose has now been admitted, the judge foresees a difficulty and is forced to introduce a proviso. If the man was acting maliciously then this might convert a restriction into a DoL. It is hard to see how the man's motive in wishing to see his wife's liberty curtailed so he can, say, conduct an affair can be relevant to the question as to whether his actions amount to her DoL. This reinforces the danger of introducing purpose into the stage at which it is to be decided whether a DoL exists.

The question of purpose has received judicial attention previously in another context. In *Austin v Metropolitan Police* [2009] 1 AC 564, the practice of the police herding people into a confined area i.e. kettling, was held not to be a DoL because the **purpose** was to ensure public safety. The pending appeal to the European Court of Human Rights should clarify the

relevance of purpose in the question as to what is a DoL as opposed to justification for a DoL.

Comparator;

Like *P and Q* the relative normality of the living conditions was an important factor (which is not without scope for criticism) but the comparator is a most worrying development. It introduces the notion that, in deciding whether or not there is a DoL, it is necessary to compare P in terms of the conditions under which others in a similar position are living. There are formidable problems with this approach. It would lead to a case by case examination as to whether or not particular disabilities were sufficiently similar to establish the comparison. Considerable evidential issues will arise and the scope for legal argument is enormous. This will be especially burdensome where the individual lacks capacity. Given that the judgment expressly states that what amounts to a DoL is extremely personal to the individual, it will be a significant handicap not to be able to ascertain that individual's views. Inevitably, the risk is that others will use the comparator in what they believe to be the person's best interests notwithstanding that this should not enter the argument until it is first established that there is a DoL.

Conclusion;

Since *Cheshire West* there has been a judgment which shows the trend is now firmly set on the wrong course. In *C v Blackburn with Darwen BC* (2011) EWHC 3321 (CoP) the judge followed *Cheshire West* and held that there was no DoL of a man held in a care home with substantial restrictions. There was no alternative accommodation available given C's range of difficulties. So people can now be effectively deprived of their liberty without the protections of the DOLS regime if the local authority chooses not to explore alternatives which they regularly do because they believe their arrangements are in the patient's best interests. So best interests means there is no DoL. The current position seems to amount to this, namely that if the court comes to the view that the regime is necessary in the best interests of the incapacitated person, for whom there is no other available option, then it is objectively not a DoL unless the motive for initiating the regime is malicious in which case it might be.

There is no doubt that the Court of Appeal has gone a long way towards setting out a workable framework to help decide the knotty question as to what amounts to a DoL but regarding best interests as relevant to the question of what amounts to a DoL puts us right back to pre- *Bournewood*. It will save local authorities an enormous amount of time and money but deprivation of liberty is not necessarily a bad thing when regarded as a state of affairs which requires proper procedures and legal scrutiny.

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