



Thirty Nine Essex Street Court of Protection Newsletter: November 2011

Alex Ruck Keene, Victoria Butler-Cole, Josephine Norris and Neil Allen
Editors

Introduction

Those of you concerned with deprivation of liberty matters will no doubt by now have gleaned that the Court of Appeal handed down judgment on 9 November 2011 in the *Cheshire West and Chester* case. The judgment is one of sufficient importance that we consider that it merits a stand-alone newsletter.

We have no doubt that the judgment will be picked over by practitioners for many months to come; we thought, though, that it would be of interest to have a comment from outside the Counsel bubble. To that end, we are delighted that Lucy Series has agreed to provide a summary and commentary of this case. Lucy is researching mental capacity in community care settings for her doctorate in law at the University of Exeter. She studied Psychology and Philosophy at St Anne's College, Oxford and Bristol University. She has worked in social care in a wide variety of roles. She writes a blog (which the editors strongly recommend!) on human rights and community care at: <http://thesmallplaces.blogspot.com>.

As you will see, Lucy raises a number of important points of concern as to the implications of the judgment. As part of our self-imposed remit of stimulating debate in this

difficult area, we would welcome responses from our readers to her commentary, and undertake (in good newspaper fashion) to publish a selection in our next newsletter.

Cheshire West and Chester Council v P [2011] EWCA Civ 1257

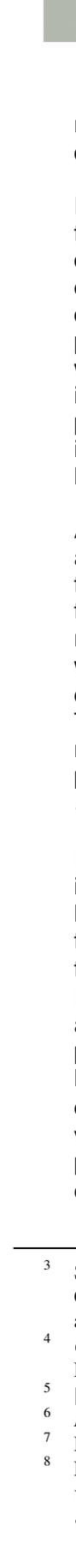
Summary

This case was an appeal by Cheshire West and Chester Council against a ruling that P, a man with cerebral palsy and Down's syndrome who lacked capacity to make decisions about care and residence, was deprived of his liberty.¹ P lived in a small group home that was not a care home, and hence not subject to the deprivation of liberty safeguards (DoLS) authorisation regime. Consequently, any deprivation of liberty found to be occurring by the court would have required authorisation directly from the Court of Protection itself, and annual reviews by the court.²

The case was heard by Munby LJ, Lloyd LJ and Pill LJ, who considered under what circumstances the care of an incapacitated adult

¹ *Cheshire West and Chester Council v P & Anor* [2011] EWHC 1330 (Fam).

² *Salford City Council v BJ* [2009] EWHC 3310 (Fam).



might satisfy the 'objective element'³ of deprivation of liberty under Article 5 ECHR.

P required a high level of care and received one-to-one close personal supervision during the daytime in order to manage risks associated with certain behaviours. In particular, P had developed a habit of pulling apart his continence pads and putting soiled pieces into his mouth; when this occurred he was subject to physical intervention by two staff members to remove the pieces and clean his hands. P's care plan also included the wearing of a body suit, designed to limit his access to his pads.

At first instance, Baker J considered that although those caring for P had taken great care to ensure he had as normal a life as possible, the fact he was 'completely under the control of members of staff', and the steps required to deal with his challenging behaviour, led to the conclusion he was deprived of his liberty.⁴ Their Lordships allowed the appeal against this ruling, and in doing so reaffirmed and refined the principles the Court of Appeal set out in *P & Q v Surrey County Council*⁵.

In *P and Q* Wilson LJ had said that an inquiry into whether or not a person is deprived of their liberty must consider the relative normality of their situation, with certain settings more likely than others to amount to a deprivation of liberty.⁶ In *Cheshire West*, Munby LJ offered a 'rough and ready' classification of which kinds of placements along the spectrum of 'normality' had amounted to a deprivation of liberty in the case law.⁷ Typically care of children or vulnerable adults in a domestic setting, a foster placement or small specialist services like those occupied by MEG⁸ will not amount to a

deprivation of liberty. He found that two cases lay "towards the other end of the spectrum" (para [100]), those of *HL v United Kingdom*⁹ and *DE v JE and Surrey County Council*.¹⁰

Munby LJ stressed that when interpreting the 'normality' of a setting, the relevant comparator is:

"... not with the previous life led by X (nor with some future life that X might lead), nor with the life of the able-bodied man or woman on the Clapham omnibus, but with the kind of lives that people like X would normally expect to lead. The comparator, in other words, is an adult of similar age with the same capabilities as X, affected by the same condition or suffering the same inherent mental and physical disabilities and limitations (call them what you will) as X. Likewise, in the case of a child the comparator is a child of the same age and development as X." (para [97])

Because of his disabilities, P's life was "inherently restricted" (para [35]), and he would be subject to similar restrictions by those caring for him wherever he lived. The "fundamental problem" with Baker J's approach was that he had not compared P's life with the restrictions a person with his disabilities and difficulties would be subject to in a "normal family setting" (para [110]). Only in extreme cases is restraint likely to be so pervasive as to constitute a deprivation of liberty (para [112]).

The judgment did, however, distinguish those situations "where a person has somewhere else to go and wants to live there but is prevented from doing so by a coercive exercise of public authority" (para [58]) as in *HL v UK*, *DE v JE and Surrey County Council* and *London Borough of Hillingdon v Neary*. These cases remain a deprivation of liberty.

Munby LJ also found that when determining whether deprivation of liberty was occurring it

³ See *JE v DE & Ors* [2006] EWHC 3459 (Fam); (2007) 10 CCL Rep 149 at para [77] for a description of the tripartite analysis of deprivation of liberty by the ECtHR.

⁴ *Cheshire West and Chester Council v P & Anor* [2011] EWHC 1330 (COP) at paras [58] – [60].
⁵ [2011] EWCA Civ 190.

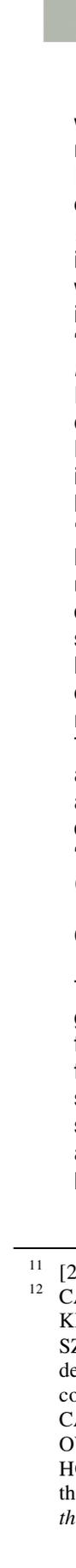
⁶ *Ibid*, paras [28] – [29].

⁷ Paras [98] – [101].

⁸ From the judgment *Surrey County Council v MEG & MIG v Anor* [2010] EWHC 785 (Fam), also known as 'Q' in *P & Q v Surrey County Council*.

⁹ (2004) 40 EHRR 761.

¹⁰ [2006] EWHC 3459 (Fam).



was legitimate to have regard to the 'objective' reason and purpose underlying the restrictions. In some limited circumstances, like those considered in *Austin & Anor v Commissioner of Police of the Metropolis* (the 'kettling' case),¹¹ improper motives or intentions could render what would otherwise not be a deprivation of liberty into one. However, a good motive or intention "cannot render innocuous what would otherwise be a deprivation of liberty" (para [76]). Deprivation of liberty in a domestic context could occur, but such cases would be atypical. Munby LJ gave as an example of deprivation of liberty in a domestic setting a husband who confined his wife to the house in order to enjoy his 'conjugal rights'. This was contrasted with a husband who confines his wife to the house unless he is with her because she suffers from dementia and might wander in front of a car; this situation would not typically be a deprivation of liberty. The crucial distinction between these cases was the husband's reasons, purpose and motives for the restrictions (paras [44] - [47]). The other members of the Court of Appeal agreed with Munby LJ's judgment and reasons, although Lloyd LJ commented that the discussion of motive, purpose and intentions "may occasion further debate in future cases" (para [119]).

Commentary

The Court of Appeal ruling in *Cheshire* will offer greater clarity as to what circumstances amount to a deprivation of liberty, as Baker J's ruling in the High Court was rather difficult to fit into the schema proposed in *P & Q*. Given research showing poor agreement among professionals and lawyers over the meaning of deprivation of liberty,¹² and wide regional variation in DoLS

applications from care providers,¹³ a clearer definition was very much needed. However, both of these Court of Appeal judgments will almost certainly have the effect of restricting the availability of deprivation of liberty safeguards to many vulnerable adults in institutional care settings in England and Wales. As a socio-legal researcher with a background working in social care, I feel disappointed by this aspect of the judgment. Although some may consider it illegitimate to take a 'policy' approach to the scope of Article 5, I think there is a strong case for regarding deprivation of liberty to be closely connected to the degree of control a person is subject to.

By focusing upon the restrictions on liberty another person with similar disabilities would ordinarily be subject to, the ruling means that a disabled or older person may be subject to a very high level of control indeed before they are eligible for procedural safeguards. If the Mental Capacity Act 2005 (MCA) only permits restrictions on liberty that are proportionate and necessitated by their disabilities, it is difficult to see under what circumstances restrictions could legitimately breach this threshold and yet Schedule A1 still apply.¹⁴ It seems counterintuitive, and potentially discriminatory, that a more disabled person may be subject to greater interferences with their liberty than a less disabled person before the law offers them an accessible means to challenge those restrictions.

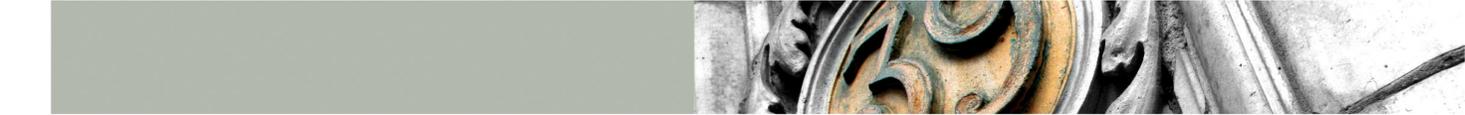
Beyond the minority of cases that reach the courtroom, it is worth recalling the nature of the safeguards that the DoLS offer. The framework contains two vital elements for protecting the rights of vulnerable citizens: external scrutiny, free – in theory – from conflict of interest, and the ability to invoke the force of law to rectify the arbitrary or illegitimate exercise of power. In

¹¹ [2009] UKHL 5; [2009] 1 AC 564.

¹² CAIRNS, R., BROWN, P., GRANT-PETERKIN, H., KHONDOKER, M. R., OWEN, G. S., RICHARDSON, G., SZMUKLER, G. & HOTOPI, M. (2011) 'Judgements about deprivation of liberty made by various professionals: comparison study'. *The Psychiatrist*, 35(9), 344-349. CAIRNS, R., BROWN, P., GRANT-PETERKIN, H., OWEN, G. S., RICHARDSON, G., SZMUKLER, G. & HOTOPI, M. (2011) 'Mired in confusion: Making sense of the deprivation of liberty safeguards'. *Medicine, Science and the Law*, 51(4), 228-236.

¹³ NHS INFORMATION CENTRE FOR HEALTH AND SOCIAL CARE (2011) 'Mental Capacity Act 2005, Deprivation of Liberty Safeguards Assessments (England) - Second report on annual data, 2010/11'.

¹⁴ A similar point has also been made by TROKE, B. & WARD, N. (2011) 'The death of DoLS?' in *Browne-Jacobson Solicitors Bulletin* [Blog post]. Available: http://www.brownejacobson.com/resources/bulletins/death_of_dols.aspx [accessed 11 November 2011].



their quasi-judicial role, highly trained and experienced independent assessors scrutinise an individual's care plan to ensure that restrictions are necessary, proportionate and promote their best interests. Representatives and advocates have an oversight role, ensuring that where assessors' recommendations are disputed, or not complied with, the force of law can be brought to bear. Without the DoLS, social care settings have very few such checks and balances for very restricted, highly vulnerable, citizens.

From the sounds of things P's own care plan was, in the end, very good. The same could be said of many service users in England and Wales, and it is important not to construct social care as universally poor. However, it is also important not to be complacent. A variety of national reports have raised serious concerns about the human rights of elderly and incapacitated patients in health and social care.¹⁵ In the care of adults with learning disabilities we have had a succession of high profile institutional abuse scandals. One such scandal in Cornwall affected over 165 adults, most of them living in small supported living services just like those occupied by P and MEG.¹⁶ National audits of learning disabilities services by the regulator concluded that there was a 'lack of external scrutiny', and they could not be sure people's human rights were being

upheld.¹⁷

In a recent study on the DoLS, a lawyer was quoted as suggesting that 'An alternative approach to widespread use of DoLS might involve better inspection and regulatory regimes'.¹⁸ The idea that an inspector visiting for an afternoon could detect any inappropriate or excessive restrictions in the care plans of all its service users belongs to the realm of fantasy. It is not the role the regulator has ever played, and it is certainly not one the new regulator is resourced, mandated or keen to adopt.¹⁹ We should also recall that Castlebeck services Winterbourne View,²⁰ Rose Villa²¹ and Arden Vale²² all received glowing reports from the Care Quality Commission, despite being found only months later to have excessively restrictive and often abusive regimes.²³ Supported living services like those P and MEG live in are not subject to site visits at all under the current regulatory regime. The level of protection offered by regulatory visits and DoLS to ensure human rights and the MCA are complied with bears no comparison.

¹⁵ CARE QUALITY COMMISSION (2011) 'Dignity and nutrition inspection programme: National overview'. London.

ROYAL COLLEGE OF PHYSICIANS & BRITISH SOCIETY OF GASTROENTEROLOGY (2010) 'Oral feeding difficulties and dilemmas: A guide to practical care, particularly towards the end of life'. *Report of a Working Party*. London. [NB: This report found evidence of elderly patients who lacked capacity having feeding tubes fitted unnecessarily, for the convenience of care home staff].
BANERJEE, S. (2009) 'The use of antipsychotic medication for people with dementia: Time for action'. *A report for the Minister of State for Care Services* London, Department of Health.
JOINT COMMITTEE ON HUMAN RIGHTS (2007) 'The Human Rights of Older People in Healthcare'. *Eighteenth Report of Session*. 2006-2007.

¹⁶ COMMISSION FOR SOCIAL CARE INSPECTION & HEALTHCARE COMMISSION (2006) 'Joint Investigation into the Provision of Services for People with Learning Disabilities at Cornwall Partnership NHS Trust'.

¹⁷ HEALTHCARE COMMISSION (2007) 'A life like no other: A national audit of specialist inpatient healthcare services for people with learning difficulties in England'. Commission for Healthcare Audit and Inspection.

CARE QUALITY COMMISSION (2009) 'National study: Specialist inpatient learning disability services'.

¹⁸ CAIRNS, R., BROWN, P., GRANT-PETERKIN, H., OWEN, G. S., RICHARDSON, G., SZMUKLER, G. & HOTOPF, M. (2011) 'Mired in confusion: Making sense of the deprivation of liberty safeguards'. *Medicine, Science and the Law*, 51(4), 228-236.

¹⁹ A freedom of information request I put in found that in 2010-11 any given care home had only a one in five chance of being inspected. Inspection levels in 2010-11 stand at 9% the levels in 2003-2007 when care inspections began. The CQC have pledged to inspect care homes annually, against fewer standards, subject to resources. However, the Health Select Committee has refused to endorse their request to the Department of Health for increased funding.

²⁰ CARE QUALITY COMMISSION (2011) 'Mental Health Act Annual Statement January 2011: Winterbourne View (Castlebeck)'.

²¹ CARE QUALITY COMMISSION (2010) 'Key inspection report: Rose Villa 31 March 2010'.

²² CARE QUALITY COMMISSION (2011) 'Mental Health Act Annual Statement January 2011: Arden Vale'.

²³ CARE QUALITY COMMISSION (2011) 'CQC review of Castlebeck Group Services'.



Like a Rorschach test, we all read into the DoLS a framework for the ills we perceived needed fixing. For some lawyers, the 'real ills' are cases like those of HL, Steven Neary and DE, people whisked away from loving family homes by interfering and overbearing public authorities. For some of us working in social care, concerns around liberty of the person could be conceived more broadly than disputes with family. By defining deprivation of liberty primarily in terms of disputes between family and practitioners, we remove from many what will be the only serious source of scrutiny of restrictive care plans, and the only realistic means of challenge. It seems to me a just principle that those whom we commit to the complete and effective control of others enjoy safeguards to ensure it is exercised in a legitimate and proportionate fashion.

Our next update should be out at the start of December 2011, unless any (more) major decisions are handed down before then which merit urgent dissemination. Please email us with any judgments and/or other items which you would like to be included: full credit is always given.

Alex Ruck Keene
alex.ruckkeene@39essex.com

Victoria Butler-Cole
vb@39essex.com

Josephine Norris
Josephine.Norris@39essex.com

Neil Allen
Neil.allen@39essex.com



Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex has a very busy practice before the Court of Protection. He is regularly instructed by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities. Together with Victoria, he co-edits the Court of Protection Law Reports for Jordans. He is a co-author of Jordan's Court of Protection Practice 2011, and a contributor to the third edition of the Assessment of Mental Capacity (Law Society/BMA 2009)



Victoria Butler Cole: vb@39essex.com

Victoria regularly appears in the Court of Protection instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights' and a contributor to the Assessment of Mental Capacity (Law Society/BMA 2009).



Josephine Norris: josephine.norris@39essex.com

Josephine is regularly instructed before the Court of Protection. She also practises in the related areas of Community Care, Regulatory law and Personal Injury.



Neil Allen: neil.allen@39essex.com

Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for legal and mental health charities.

David Barnes Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle Practice Manager
sheraton.doyle@39essex.com

Peter Campbell Assistant Practice Manager
peter.campbell@39essex.com

For further details on Chambers please visit our website www.39essex.com

London
39 Essex Street London WC2R 3AT
Tel: +44 (020) 7832 1111
Fax: +44 (020) 7353 3978

Manchester
82 King Street Manchester M2 4WQ
Tel: +44 (0) 161 870 0333
Fax: +44 (020) 7353 3978

Email: clerks@39essex.com

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