



Deprivation of Liberty case update

A briefing from our Health team - January 2012

Deprivation of Liberty case update

Cheshire West and Chester Council v P (by his Litigation Friend the Official Solicitor) [2011] EVCA Civ 1557

In this recent Court of Appeal case, Lord Justice Munby drew together the threads of decisions of the Courts as to factors that can be relevant in identifying whether an individual who lacks capacity to consent to their treatment or care is being subjected to a deprivation of liberty.

Background

The Court of Appeal was asked to consider whether P's care plan at Z house constituted a deprivation of his liberty for the purposes of Article 5 of the European Convention on Human Rights. The appeal was brought by the Local Authority responsible for meeting P's community care needs and who provided him with accommodation at Z house. P was a 39 year old man with cerebral palsy and Downs Syndrome. He had significant physical and learning disabilities and it was accepted by all parties that he lacked mental capacity to make decisions as to his care and residence. Until 2009 he lived with his birth mother but when her health began to deteriorate the Local Authority concluded that she was no longer able to care for her son.

On an interim basis it was declared lawful and in P's best interest for him to continue to reside at the Local Authority establishment at which he had been placed, or any other placement with the Local Authority pending a final hearing.

In November 2009, P moved to live at Z house. During the proceedings the Local Authority produced a detailed care plan for P which identified five behaviours that P displayed: accessing/destroying continence pad, grabbing or smearing the contents and placing in his mouth or ingesting it; picking at his

skin causing wounds; aggression towards others; banging/slapping his head; reducing co-operation. The care plan considered each of these behaviours and the rational for intervention together with the risk associated with the presenting behaviours, their frequency, behaviours and intervention/support plan.

Decision

The Judge found that the P's care plan at Z house did **not** amount to deprivation of liberty. The judgment is of particular interest due to the fact that Lord Justice Munby drew the following threads together in relation to the jurisprudence that exists on deprivation of liberty cases:

Deprivation of Liberty

- i) The starting point is in "concrete situation", taking account of a whole range of criteria such as the "type, duration, effects and manner of implementation" of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, not nature or substance.
- ii) Deprivation of liberty must be distinguished from restraint. Restraint by itself is not deprivation of liberty.
- iii) Account must be taken of the individual's whole situation.
- iv) The context is crucial.
- v) Mere lack of capacity to consent to living arrangements cannot in itself create a deprivation of liberty.
- vi) In determining whether or not there is a deprivation of liberty, it is legitimate to have regard both to the objective "reason" why someone is placed and treated as they are and also to the objective "purpose" (or "aim") of the placement.

- vii) Subjective motives or intentions, on the other hand, have only limited relevance. An improper motive or intention may have the effect that what would otherwise not be a deprivation of liberty is in fact, and for that very reason, a deprivation. But a good motive or intention cannot render innocuous what would otherwise be a deprivation of liberty. Good intentions are essentially neutral. At most they merely negative the existence of any improper purpose or of any malign, base or improper motive that might, if present, turn what would otherwise be innocuous into a deprivation of liberty. Thus the test is essentially an objective one.
- viii) In determining whether or not there is a deprivation of liberty, it is always relevant to evaluate and assess the “relative normality” (or otherwise) of the concrete situation.
- ix) But the assessment must take account of the particular capabilities of the person concerned. What may be a deprivation of liberty for one person may not be for another.
- x) In most contexts (as, for example, in the control order cases) the relevant comparator is the ordinary adult going about the kind of life which the able-bodied man or woman on the Clapham omnibus would normally expect to lead.
- xi) But not in a kind of case that comes before the Family Division or the Court of Protection. A child is not an adult. Some adults are inherently restricted by their circumstances. The Court of Protection is dealing with adults with disabilities, often, as in the present case, adults with significant physical and learning disabilities, whose lives are dictated by their own cognitive and other limitations.
- xii) In such cases the contrast 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. The contrast is with the kind of lives that people like X would normally expect to lead. The comparator 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 as X. Likewise, in the case of a child the comparator is a child of the same age and development as X. “

(Lord Justice Munby at para 102)

In determining the case Lord Justice Munby noticed a fundamental problem with the previous decision made. The Judge had not applied himself as to whether the limitation and restrictions on P’s life at Z House were anything more than the inevitable result of his various disabilities. P’s disabilities, inherently restricted the kind of life he could lead wherever he may be living, whether at home with his family or in the home of a friend or at the house. There was “nothing to show that the life P is living at Z House is significantly different from the kind of life for anyone with his concatenation of difficulties could normally expect to lead, wherever and in whatever kind setting they were living”.

Lord Justice Munby recognised that P could not go anywhere or do anything without support and assistance from staff at Z House but that that was a reality inherent in, and dictated by, his disabilities rather than something that was imposed on him by Z House. P would require the same kind of “support and assistance” wherever he was living and in whatever kind of setting. He concluded that although a degree a restraint may be required in relation to these interventions that degree of restraint was far removed from a deprivation of liberty. He therefore concluded that the care plan for P (whether the various interventions were viewed separately or together) did not tip the balance and amount to a deprivation of liberty. At Z House and outside, P was living a life which was as normal as it could be for someone in his situation.

Action required

The guidance contained in this judgment should be disseminated to those who work with patients and service users who lack capacity and are responsible for care planning. The case clarifies that where there is no evidence to show that an individual’s living arrangements in a hospital or care home are significantly different from the kind of life that anyone with their disability could normally expect wherever and in whatever setting they were living, the provision of their care and treatment will not, of itself, amount to a deprivation of liberty.

More information to discuss your individual requirements, please contact:



Eve Piffaretti, Partner
T: 029 2038 5917
E: eve.piffaretti@morgan-cole.com



Richard Jones, Consultant
T: 029 2030 7471
E: richard.jones2@morgan-cole.com