DEPRIVATION OF LIBERTY AND THE CHESHIRE WEST CASE

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Overview

• Background: How did we get here?
• DoL authorisation: DoLS regime or Court?
• Definition of ‘deprivation of liberty’: the Cheshire West judgment
• Implications for clients with damages claims
What is a ‘deprivation of liberty’?

European Convention on Human Rights - 1953

*Article 5 – Right to liberty and security*

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

   … e. the lawful detention … of persons of unsound mind…

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
Layers of increased domestic legislation

• Human Rights Act 1998
• Mental Capacity Act 2005 + Code of Practice; safeguards for those lacking capacity and the “best interests” test.
• ‘Bournewood case’ – leads to:
  • Mental Health Act 2007, which contains:
  • Deprivation of Liberty Safeguards
Mental Capacity Act 2005

• Legal framework governing decision making for people who lack capacity to make decisions
• Not a general test – capacity is time and issue specific
• Therefore generally wrong to just say ‘P lacks capacity’
• Better to say ‘P currently lacks capacity to make decisions about X’
• Presumption of mental capacity unless proven otherwise
• All practical steps should be taken to help P reach their own decision before they are to be treated as incapable
• Right to make an eccentric or unwise decision
MCA 2005 – best interests

• In context of deprivation of liberty, the relevant issue is whether P can consent to DoL or to their residence and care arrangements generally

• Any acts done for a person lacking mental capacity should be done in their “best interests”

• Consideration should be given as to whether the desired outcome can be achieved in a less restrictive way
Contrast with Mental Health Act 1983

- Principally concerned with admission of patients to hospital for assessment and treatment for their mental disorder
- Patients detained and treated when “sectioned”
- Review and appeals system, mental health tribunals
Interface between MCA and MHA

• Great swathes of people who lack capacity will not come within definition under Mental Health Act 1983 and therefore will not be treated under that Act
• For example, people with learning disabilities cannot consent to residential care, treatment
• Need protection and safeguards
Introduction of the deprivation of liberty safeguards

- **HL v UK** – “the Bournewood case”
- European Court of Human Rights case
- Autistic man living in community
- Readmitted to Bournewood hospital and not sectioned under the Mental Health Act 1983 as did not resist admission
- Dispute about his care and treatment between hospital and carers
Introduction of the deprivation of liberty safeguards

- Deprived of his liberty not in accordance with law – no procedure, no opportunity to review conditions of his detention
- No compliance with Article 5(4) as no procedure to seek a review
Introduction of deprivation of liberty safeguards

• No formal procedures for:
  – Who could authorise detention
  – Reasons for admission
  – Need for continuing clinical assessment and review
  – No one to represent patient and seek a review
    – e.g. as in MHA tribunals – for lawfulness of detention
Mental Health Act 2007

• Therefore, the deprivation of liberty safeguards were introduced - new scheme
• Sets out procedure for authorising deprivations of liberty for those lacking capacity to make decisions if MHA does not apply
• Provides safeguards and protection for some of most vulnerable in society
Provisions of the Code of Practice

• “The deprivation of a person’s liberty is a very serious matter and **should not happen unless absolutely necessary**, and in the best interests of the person concerned. That is why the safeguards have been created: to ensure that any decision … is made following defined processes and in consultation with specific authorities”
DOLS procedure

• When do DOLS apply?
• The safeguards only apply if the deprivation is in a hospital or care home (CQC registered)
• If deprivation is in a community setting then it can only be authorised by way of an order from the Court of Protection
Deprivation of Liberty safeguards requirements

• Provide a safeguard for vulnerable people who “best cared for” in a residential care home or hospital

• The following requirements must apply:
  – Person must be aged 18 or over (age requirement)
  – Person must lack capacity to make their own decision (mental capacity requirement)
  – Person must be suffering from a mental disorder within the meaning of MHA 1983 (mental health requirement)
  – Person does not require treatment under the Mental Health Act procedures (eligibility requirement)
Deprivation of liberty safeguards requirements

- Proposed deprivation is in their best interests (best interests requirement)

- No less restrictive means of meeting their best interests. The detention is only justified *when less severe measures have been considered to be insufficient to safeguard the individual or public interest which might require the person concerned to be detained.*

- Must not be a valid and effective advance decision refusing the treatment in question (no refusals requirement)
Application of the rules – DOLs procedure

• Admission to a care home (CQC) or hospital
• Managing authority (e.g. care home) requests urgent or standard authorisation from supervisory body (local authority)
• Mental health assessment
• Best interests assessment – assess:
  1. Whether deprivation of liberty
  2. If so, whether justified and in best interests
Application of the rules - DOLs procedure

- Best interests assessor has duty to consult the managing authority, views of others with an interest in their welfare
- If no one to speak on person’s behalf then IMCA must be appointed
- If authorisation recommended then can be granted for a maximum period of a year
Application of the rules – DOLs procedure

• **Conditions**
• May be attached to the authorisation
• Could be e.g. minimum amount of hours in the community, allowed to move freely in the placement but alarm on the bedroom door
• Managing authority needs control over conditions
Application of the rules – DOLs procedure

• If the assessments recommend it then the supervisory body – local authority – must give the authorisation, issue in writing, attach conditions, appoint relevant person’s representative
Relevant person’s representative

- Must be appointed for the duration of the standard authorisation.
- Represent person for whom standard authorisation has been issued. They should maintain contact and support that person.
- Could be family member or IMCA.
Relevant person’s representative

- Can request a review of the standard authorisation
- Review could lead to authorisation being terminated, change in recorded reasons or conditions attached to the authorisation
Relevant person’s representative

- Can refer the matter to the Court of Protection under section 21A Mental Capacity Act 2005 to challenge or review the standard authorisation
- Guidance suggests can act as litigation friend in the proceedings
Process overview

1. Identification of the need for an authorisation
2. Application for authorisation
3. Initial consideration by the supervising authority
4. Assessment – BI assessor, consult
5. Assessment outcome, appoint RPR
6. Review – NB can also be reviewed by the Court of Protection
Summary of checks and balances

• Supervisory body (local authority) may review the standard authorisation
• Deprivation of liberty assessed again on expiry of authorisation
• RPR can request review
• Can be referred to Court of Protection to review
• Care homes and hospitals must notify the CQC about any application to deprive a person of their liberty
Review process if DOLS do not apply

• If DOL in supported/community placement then needs to be authorisation by the court
• Apply to the Court of Protection
• Guidance on court based reviews of the DOL given in the case of *Re GJ, NJ and BJ (Incapacitated Adults)* [2008]
• Can be court based or paper review
Contrast with court review of DOL

• Arguably more cumbersome method of reviewing the deprivation of liberty

• Reviewed by a judge of the Court of Protection in court on the papers or at an attended hearing

• If DoLS apply then they are the preferred way of reviewing the DOL
DOL and Cheshire West

- *P v Cheshire West and Chester Council*
- Previous case law established 3 elements of test for deprivation of liberty:
  - P is “objectively” deprived of their liberty
  - P has not consented to DoL
  - DoL is “imputable to the state”
- In Cheshire West case, second and third elements not in dispute. Arguments centred on the first element.
DOL and Cheshire West

- Facts: P an adult with cerebral palsy and Down’s syndrome required 24 hour care to meet personal care needs. Placed in local authority community placement – bungalow shared with 2 other residents
- Court of Protection said this was a DoL
- Court of Appeal overturned CoP ruling and said not a DoL
- P through the Official Solicitor appealed to the Supreme Court
- Supreme Court judgment handed down on 19 March 2014
- Provides much needed clarity on the law in relation to deprivation of liberty
DOL and Cheshire West

• Dispute as to whether his placement amounted to a deprivation of liberty

• Local authority said no, P through Official Solicitor, and mother, said yes

• Importance of the DoLS regime at the forefront of the arguments raised by mother’s representatives
DOL and Cheshire West

- Argued on behalf of mother of P that DoLS and court reviews ensure some of most vulnerable in society afforded protection without having to rely on own ability or family’s ability to challenge lawfulness of their detention
- If relative comparator/normality part of definition of DOL then fewer will enjoy procedural safeguards of DOLS
- Danger of widening the Bournewood gap
Cheshire West – ‘the acid test’

• Is P:
  a. under continuous supervision and control; and
  b. not free to leave?
• P subject to a DOL needs a “regular independent periodic check”
• Lady Hale said that DOLS could be simplified and extended to placements outside hospitals and care homes
Not relevant to the application of the test:

- the person’s compliance or lack of objection;
- the relative normality of the placement (whatever the comparison made); and
- the reason or purpose behind a particular placement ("a gilded cage is still a cage…")
Baroness Hale at para 57 of the Judgment:

“Because of the extreme vulnerability of people like P, MIG and MEG, I believe that we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case”
Deprivation of liberty – the implications

- Large numbers of people will now be considered to be deprived of their liberty who were not previously.

- For example, if someone is vulnerable to exploitation and they require someone to accompany them at all times when outside, these measures may be in the person’s best interests, but may still amount to a deprivation of liberty and will require authorisation.

- This is even if the person appears content or does not express any objections to the arrangements.

- Purpose of the authorisation is to ensure that independent reviews carried out to make sure protective care arrangements are in the person’s best interests and not overly restrictive.
Scenarios where DoL may be an issue

DoL authorisation likely to be required where client lacks capacity, is ‘not free to leave’ and:

• Where any element of statutory funding, eg where some or all care funded through direct payments from local authority, NHS Continuing Healthcare or s117 mental health funding.

Specialist advice will be needed:

• Where funds administered by deputy, and deputy making arrangements for the client’s care – court supervision of deputy may amount to “imputable to the state”.

• Where council or NHS involvement re safeguarding issues in respect of client, impacting on care regime.
Re X – “Post-Cheshire West”

- Munby LJ judgment setting out procedure for making Court application to authorise DoL:
  - Applications to be front loaded with all evidence, to include:
    1. Draft Order
    2. Proof that P is 16 years old and not ineligible to be DOL-ed
    3. Evidence of unsound mind
    4. Nature of care arrangements, treatment plan, and why this will amount to a DOL
    5. Basis upon which P is said to lack capacity to consent
    6. Basis upon which these arrangements are imputable to the state.
    7. Best interest evidence and any less restrictive options?
    8. Steps taken to notify P and all other relevant people
    9. Wishes and feelings of P
    10. Details of any relevant advance decision or LPA
    11. Whether P eligible for legal aid
    12. Identification of P’s lit friend or potential lit friend
    13. Any reasons for particular urgency.
    14. Any other factors to be brought to the court's attention.
Re X – “Post-Cheshire West”

- DOL can be authorised on the papers as long as there are no triggers e.g. no dispute on best interests/no evidential concerns. Where this occurs, there must be a right to request a speedy review at an oral hearing if required. If any 'triggers' are present then an oral hearing is required.
- The reviews of the DOL are then the same as suggested in BJ and NJ.
- Where P is a party, he must have a lit friend.
- Makes recommendations for committees to review practice directions, forms, etc, to make the process more streamlined and to set out what evidence must be provided on the forms.
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