



KINGS
CHAMBERS

HUMAN RIGHTS APPROACH TO RESTRICTIVE PRACTICES :

*Human rights, legislation and case
law*



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Overview

- Me?
- Part 1: Background: How did we get here to the Mental Capacity Act?
- DoL authorisation: DoLS regime/Court
- Definition of 'deprivation of liberty': the Cheshire West judgment
- Implications for clients with damages claims
- Part 2: Book



Genesis

European Convention on Human Rights - 1953

*Article 5 – Right to liberty and security:
(qualified not absolute and applies to all)*

“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.”



Resulting in a decade of change....
Better late than never...

- Human Rights Act 1998: ECHR
- 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 the Deprivation of Liberty (DOL) Safeguards (DOLS)



The most significant development being... *the 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: ‘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 – the twofold fundamentals

- 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 that 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



The historical lacuna: pre MCA

- What happened to those people who lacked capacity but did not come within definition under Mental Health Act 1983?
- For example, people with learning disabilities cannot consent to residential care, treatment
- Surely they needed protection and safeguards!



Result:

Introduction of the deprivation of liberty safeguards

- *HL v UK – “the Bournemouth case”*
- European Court of Human Rights case
- Autistic man living in community
- Readmitted to Bournemouth 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



Result:

Mental Health Act 2007

- Therefore, the deprivation of liberty safeguards were introduced - new scheme
- Set 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



How did the MCA Code of Practice refer to a DOL

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 overview

- 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

- 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)
- Proposed deprivation is in their best interests (best interests requirement)
- No less restrictive means of meeting their best interests.
- Must not be a valid and effective advance decision refusing the treatment in question (no refusals requirement)



Definition of what amounts to a DOL: *Cheshire West & 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



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”**



DOL – new law

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...”*)
- As good as it gets phenomena
- MIG & MEG: higher level of incapacity by reason of disability, harder it was to deprive somebody of their liberty !



DOL – new law

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”



Consequence (1)

- 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.



Consequence (2)

- Cheshire West puts into stark contrast the importance of ensuring lawfulness of restrictive practices
- *UN Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2013)* concluded that where relevant:



- .. both prolonged seclusion and restraint may constitute torture and ill-treatment.... The Special Rapporteur has addressed the issue of solitary confinement and stated that its imposition, of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment. Page 14
- Matter of law that restraint on people with mental disabilities for even a short period of time may constitute torture and ill-treatment, see *Bures v. Czech Republic*, Application No. 37679/08 ECHR (2012).
- Bear in mind also the *UN Convention on the Rights of Persons with Disabilities*: Article 16, which states that member states must enact laws to guarantee freedom from exploitation, violence and abuse



A human rights perspective on reducing restrictive practices in intellectual disability

- Significance of the above came to ahead in the case of CP, the notorious blue room case
- My introduction to Sharon, who was an expert in that case
- And the origins of this book!



- In C & A local authority and an Organisation [2011] EWHC 1539 (Admin), Ryder J (as he then was)
- CP: diagnosis of severe autism and severe learning disabilities and exhibits extreme, challenging behaviours including severe anxiety, sensory impairment, aggressive and destructive traits, significant self harm and harm to his carers.
- It is common ground that C has become habituated to the use of the blue room. It is not only a room where he is secluded and/or confined, but also a room to which he has been encouraged to go and indicate that he wishes to go as a safe place. There are real issues about the appropriateness of the room for these disparate purposes. Despite its use, C continues to self harm including in the room and his social activities are significantly curtailed.
- One of the aspects of his behaviour is that he has increasingly found it necessary to remove all of his clothes.



- What the book does is:
 - Specifically provides an unique insight of the ethical reasons and legal underpinnings of such practices
 - Whilst it deprived from the case of CP, it is a proactive study, not arising from for instance Winterbourne View
 - Importantly, it provides a comparative study (England & Wales, USA, Australia) of differing jurisdictions on the practices of seclusion and restraints in an attempts to develop 9 fold good practice



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