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Albion Chambers COURT OF PROTECTION

Cheshire West

One year on

The formulation of the 'acid test' in Cheshire West prompted a sea change in cases involving deprivation of liberty. Sources predicted an 800% increase in the number of DOL authorisations sought (from 10,000 per annum to 90,000 per annum) and it is hard to find a case on the ground which has not been touched by it in some way. Care regimes which have been in place for years (often consensually) are suddenly the focus of scrutiny, and the resource implications for social workers, Local Authorities, and courts alike, both in terms of time and finance, are astonishing. Far worse, the upset and anxiety for P and their families as hitherto settled placements are re-assessed and re-considered must be daunting and confusing.

Ever the practical sort, Munby P quickly turned his mind to the procedural fall-out and summoned a cast of thousands (well, 22 advocates on my count) to begin the process of implementing a 'streamlined' approach for the deluge of cases which was anticipated. In *Re X and others* (Deprivation of Liberty) [2014] EWCOP 25 he noted "I am not here concerned to analyse the Supreme Court's decision, nor to explore its implications as a matter of substantive law. I am concerned solely with a narrower but more pressing issue; the practical and procedural implications for the Court of Protection of what all informed opinion agrees is the large increase in its case-load which will follow in consequence of the Supreme Court's decision". He might have confined himself to the latter issue but, as ever, Mostyn J couldn't resist the invitation of the former, more about which later.

Munby's objective was to devise a streamlined and standardised procedure to deal with DOL cases. This would be no small feat requiring, ultimately, amendments to 7 rules, 1 section, and 5 practice directions just to give effect to the Cheshire West decision, not to mention a whole new set of forms which he intends to base on the new family court forms.

His emphasis, as he has done with the family court, is to front-load a case so that by the time it reaches a court it can be dealt with swiftly, possibly even on paper. Applications are expected to include certain key points of information (see para 35 of the judgment for a comprehensive list) including a draft order, details of P's medical condition and treatment plan, their wishes and feelings (and those of their family), and a copy of the best interests assessment. He also reminds applicants of the duty of full and frank disclosure, essentially relying on the Local Authority to indicate in its application whether there are issues which might necessitate an oral hearing, such as inconsistent evidence about P's best interests or a less restrictive option to the current plan. Assuming that the application is compliant with those requirements, and that there is no objection by P, he could well envisage such applications proceeding on paper.

He also turned his mind to P's status within proceedings, noting that there is no requirement for P to be joined. He reiterated that P must be given the opportunity to be joined and must be given support to express their views and participate to the extent they wished, describing it as a "demanding standard" to meet, but acknowledged that such was more than capable of being achieved without P necessarily being a party or having a litigation friend. He did confirm that once P was joined as a party, a litigation friend must be appointed.

Lastly he opined that reviews of Court authorisations should typically occur annually and, whilst a judicial, not administrative, function, could also be a paper-exercise.

Thus the procedural implications of the Cheshire West decision were tackled by Munby. As to the substantive issues, Mostyn J decided to have his say.

Rochdale MBC v KW and others [2014] EWCOP 45 concerned a 52-year-old lady, Katherine, who had suffered brain damage during an operation nearly 20 years previously. She was left with cognitive and mental health problems, epilepsy, and physical disability. She could barely walk and was trapped in the past, her delusions frequently causing her to wander off in search of her young children who were now all adults. She lived in a rented housing association property with 24/7 carers provided by the Local Authority and NHS, who would bring her back if she tried to wander. It was that feature of her care which caused the case to come before the court for consideration of her DOL status. Both Katherine and Rochdale agreed that, pursuant to Cheshire West, she was deprived of her liberty. Mostyn had other ideas.

It is a typically Mostyn judgment and well worth a read. As well as a brief summary of European history and the "bestial abuses perpetrated by Nazi Germany", Mostyn also meanders through some 19th century philosophy (John Stuart Mill's essay 'On Liberty') and considers the case of a bed-ridden, comatose, loner with no family as he expresses his dismay at what he sees as the Supreme Court having totally missed the point. Ultimately he cannot reconcile the care package which Katherine, and so many others, has with the notion of liberty being deprived. "For me, it is simply impossible to see how such protective measures can linguistically be characterised as a 'deprivation of liberty'".

His conclusion is that Katherine's liberty

is not deprived because she is not physically or mentally capable of exercising freedom to leave and therefore is not being constrained from so doing by the state. He also wrangles with the stupidity of a decision which means that had Katherine's family paid privately for the same arrangements there could be no question about Article 5 being engaged.

He spends 1/6 of the judgment trying to decide whether he can legitimately send the case directly to the Supreme Court for them to have a rethink of the whole issue, but with Rochdale decidedly uneasy about such a course he instead gives permission to Katherine to appeal in the hope that the Court of Appeal will simply send it upwards. Time will tell whether it does and whether the Supreme Court takes heed of his concerns. Influential though he may be, it might be rather more than the Supreme Court is willing to do to have a wholesale change of heart on his say so. In the meantime we will all have to start adopting Munby's streamlined process!

Hannah Wiltshire

Capacity to consent to sexual relations

The courts have seen a flurry of action in relation to capacity to consent to sexual relations over the past five years. Grappling with the complex moral and legal issues, they have been at odds as to how best to approach the question of capacity when it comes to a person suffering from an abnormality of the mind. Up until the disability rights movement in the 1970s, people with intellectual disabilities and mental health issues were considered 'unfit' to reproduce and parent. Decisions around 'sexual relations' were tainted with this underlying principle. Thankfully, time has moved on and those with disabilities are being given more autonomy to make decisions regarding sex. It is now a question that carers, health and social care professionals and lawyers are having to deal with on a regular basis.

Wider implications

The courts have warned of an extremely cautious approach to be taken when assessing capacity to conduct sexual relations. Unlike other decisions, if a person is deemed to lack capacity to conduct sexual relations, no one else can make that decision on their behalf, it being an excluded decision under section 27(1) of MCA. As soon as they are deemed not to have the capacity, if they engage in any form of sexual activity with another, they are a victim of crime. Organisations and persons providing care for such people will have a higher duty of care to ensure that they do not engage in such activity resulting in a higher level of supervision that would otherwise be expected. Such an impingement can amount to a deprivation of liberty *D Borough Council v AB* [2011] EWHC 101 (COP). Such a declaration of incapacity will impinge on a person's ability to move with freedom and to conduct relationships without close scrutiny from those responsible for them, the close scrutiny of course being under the auspices of protection.

There is also the fundamental human element, such a declaration of incapacity means that the person will be unable to enjoy the pleasures of human contact and sexual relations. Something that is innate in all human beings.

Legal Test: Act Specific v Person Specific

Much debate has centred on exactly how capacity to engage in sexual relations should be assessed. Baroness Hale in *R v Cooper* [2009] UKHL 42. Para 27 "it is difficult to think of an activity which is more person- and situation-specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place". In other words, capacity to consent to sex is person specific, i.e. does P have the capacity to consent to sex with this particular person. However this was a criminal case and the judges sitting in the Court of Protection held a very different view. In several cases (many decided by Munby J, as he then was), it was held that the test was act specific and therefore capacity should be assessed generally, i.e. does P have the capacity to make decisions regarding sex. In particular in *D v AB* [2011] EWCA 101 COP para 42, Mr Justice Mostyn held that capacity to consent to sex remains act-specific and requires an understanding and awareness of:

- The mechanics of the act;
- That there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections;
- That sex between a man and a woman may result in the woman becoming pregnant.

However, in the case of *A Local Authority v TZ* [2013] EWCOP 2322 Baker J concluded at para 31 that in the case of a person clearly established to be homosexual it is ordinarily unnecessary to establish that he or she has an understanding or awareness that sexual activity between a man and a woman may result in pregnancy.

The Court of Protection continued to follow the act specific scenario and eventually the Court of Appeal got to have their say in *IM v LM and others* [2014] EWCA Civ 37, Sir Brian Leveson, giving judgment:

"The judges of the Court of Protection had been correct in drawing a distinction between the general capacity to give or withhold consent to sexual relations, which is the necessary forward looking focus of the Court of Protection, and the person-specific, time and place specific, occasion when that capacity is actually deployed and consent is either given or withheld which is the focus of the criminal law

[...]

the fact that a person either does or does not consent to sexual activity with a particular person at a fixed point in time, or does or does not have capacity to give such consent, does not mean that it is impossible, or legally impermissible, for a court assessing capacity to make a general evaluation which is not tied down to a particular partner, time and place (paras. 75 & 76)."

The Court of Appeal entirely agreed that it would be "totally unworkable" for health and social care workers and the court to consider P's capacity via assessment each time an adult wanted to have sex and found that "on a pragmatic basis, if for no other reason, capacity to consent to future sexual relations can only be assessed on a general and non-specific basis".

Another interesting case which was considered in *IM v LM* is the case of *A Local Authority v TZ* [2013] EWHC 2322 (COP). In this particular case the expert psychiatrist had opined that P did not have capacity to engage in sexual relations. This was mainly due to his condition which caused him to trust people too easily, making him more vulnerable to abuse. They rejected the evidence of the psychiatrist, concluding that the threshold had been set too high. Having heard evidence from P, he was satisfied that he had capacity to engage in sexual relations. This case brought to light the grey area where the distinction between

capacity and best interest becomes blurred. A declaration of incapacity cannot be made, in someone's best interests, the two are very distinct, but when individuals are vulnerable and those tasked with their care are concerned as to how the can be protected, the distinctions can become rather muddied.

Weighing up

In reality, decisions made about sex by capacious people are very often fuelled by emotion. They are irrational, not in their best interests and take very little weighing up before the decisions is made. It is therefore extremely important to allow the same realism to cascade onto those who suffer an abnormality of mind and not expect them to make rational decisions about sex after weighing up the information particular to the decision. Baker J in the case of TZ at para 53 highlighted this point: *"choices in sexual relations are generally made rather more by emotional drive and instinct than by rational choice. Impulsivity is a component in most sexual behaviour. Human society would be very different if such choices were made the morning after rather than the night before. As s1(4) of the MCA reminds us, a person is not to be treated as unable to make a decision merely because he makes an unwise one."*

The recent case of *London Borough of Tower Hamlets v TB and others* [2014] EWCOP 53 was a decision by Mostyn J where he found that P did not have the capacity to consent to sexual relations with her husband as she had "barely an inkling" of the health risks involved and was not aware that she could refuse sex. He took the opportunity to commend himself "with all due humility" for the "merit of simplicity" in the test that he had developed in *DA v B*.

Emily Brazenall

DOLS and inquests

The ripples of Cheshire West are still being felt in many different areas of law and practice. One of the unforeseen effects of the Cheshire West decision, which may be felt by Coroners as more of a tidal wave than a ripple, is a new requirement to hold inquests into many deaths which occur in care homes.

Before Cheshire West, the death of a care home resident would only trigger the inquest procedure in the rare case where the Coroner had reason to suspect that the person died a violent or unnatural death, or the cause of death was unknown.

Practitioners will be familiar with the new two-limb test in *P v Cheshire West and Cheshire Council*; P and *Q v Surrey County Council* [2014] UKSC 19 where the Supreme Court decided (by a majority) that deprivation of liberty arose when the person concerned 'was under continuous supervision control and was not free to leave'.

The import of this decision to Coroners lies in the enhanced status given in coronial law to deaths in state detention. A Coroner is obliged under sections 1 and 2 of the Coroners and Justice Act 2009 ('the Act') to conduct an investigation into any death in state detention as soon as practicable. In relation to most deaths the Coroner has a discretion to discontinue an investigation before an inquest (under s4) where a post mortem shows that the death was natural and not suspicious. This discretion does not apply to deaths in state detention, with the result that an inquest is compulsory for all deaths in state detention (subject only to the caveat that if an individual is prosecuted in relation to the death then an inquest need not be held if it serves no purpose).

Is an inquest required then, into the death of every care home resident subject to DOLS, even when the death was clearly a natural one? Local Authorities, who fund inquests, hoped that the answer was 'no'. The Chief Coroner's view, set out in guidance (CC's Guidance No 16) is 'yes': the death of any person subject to a DOL is a death which occurred in state detention, given its definition in section 48(2) CJA 2009 as being 'compulsorily detained by a public authority within the meaning of section 6 of the Human Rights Act 1998.' Care homes in state ownership are clearly public authorities. Those in private ownership are generally deemed to be by Section 145 of the Health and Social Care Act 2008. Thus, in the Chief Coroner's view, an inquest is required (i) where the death occurs in a care home and the deceased was detained under DOLS and (ii) where a person detained under DOLS is taken from a care home to a hospital and dies there or in transit (on the assumption that the DOLS continues on the grounds of medical necessity).

If an inquest is required, then, what form should it take? There are two features which have the most impact on the length of an inquest; whether there is a jury, and whether it is a standard or an 'Article 2' inquest. Most DOLS inquests will not require a jury, and can be determined by a coroner sitting alone; there will only be a jury required if the death was violent or unnatural or of unknown cause (s7(2) of the 2009 Act).

An Article 2 inquest is in broad terms one where the state has arguably had some hand in the death, and is therefore required to investigate the death with more thoroughness than would otherwise be the case, including investigation of any systemic failings which may have contributed to the death. Thus, a standard inquest may well be a 'paper' inquest, where evidence is read out and witnesses are not questioned. An Article 2 inquest is highly likely to require the calling of witnesses to enable their evidence to be challenged by the bereaved family; such inquests are almost inevitably longer and more detailed.

The Chief Coroner's guidance holds that *'the mere fact that the inquest will be concerned with a death in state detention does not mean that it will necessarily be an Article 2 inquest'. In some cases it may be. But in many cases, particularly those where the death is from natural causes, there will be no arguable breach of the state's general duty to protect life.'*

There is a contrary view, which is that any death in state detention triggers an Article 2 inquest, regardless of the cause of death. This view is based on case law in *Smith* [2011] 1 AC 1 (para 98) and, in recent months, *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin). One view of these decisions is that they embed in our case law the automatic application of Article 2 procedural requirements in certain categories of deaths, including those in state

detention, as there are policy reasons to assume the possibility of state complicity in the death. This approach makes a great deal of sense where the death has been in prison; where a family may be starved of information, may not have seen their relative for many months, or may have concerns about how they were treated in the prison hospital wing. The only way to allay such concerns, or discover whether there is any truth in them, may be to declare every prison inquest an 'Article 2' inquest. The same policy reasons do not apply at first blush to every death in a care home.

Local Authorities, dismayed at having to fund care home inquests, would be more dismayed still if each became an Article 2 inquest; in that sense, at least, the Chief Coroner's Guidance will stem the flood. This area of case law requires more clarification still, and further decisions by the higher courts are anticipated.

Kate Brunner QC

Editorial

Welcome to the spring newsletter. I am delighted to have taken the helm of our very capable and energetic Court of Protection team following Claire Wills-Goldingham's departure for pastures new.

It's a particularly exciting time to be taking over with plans afoot for Bristol to be a regional centre for the Court, allowing applications to be issued and properly managed locally. More widely, Munby P's desire to align rules and procedure between the Family Court and Court of Protection brings the promise of a 'necessity' requirement for expert evidence, and a set of case management provisions akin to care proceedings for children.

In the meantime Judges continue to grapple with the lack of parity; only recently Newton J had to get to grips with differences in press anonymity in *A Healthcare NHS Trust v P & Q* [2015] EWCOP15, and the Court of Appeal drew many parallels between the two courts in considering resources and care planning in *MN (Adult)* [2015] EWCA Civ 411.

I am also delighted to announce that Kate Brunner QC joins our team. Kate's interest in Court of Protection matters was sparked by her inquest practice and a growing awareness of the implications of DOL and capacity issues in her existing healthcare practice. She has represented the CQC, care homes, and Trusts at inquests and the Health and Social Care Tribunal, and has a considerable understanding of issues of mental health and capacity from her training in psychology, representing vulnerable clients in court, and dealing with psychiatric defences.

Court of Protection work is a natural addition to Kate's practice and she is known for her approachability, careful case preparation, and effective advocacy. She will be an excellent addition to our team.

Hannah Wiltshire

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