

COMMUNITY CARE

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Supreme Court Clarifies Deprivation of Liberty



What does the recent Supreme Court decision in the Cheshire West case mean for care homes?

"The whole point about human rights is their universal character. The rights set out in the European Convention are to be guaranteed to "everyone" (article 1). They are premised on the inherent dignity of all human beings whatever their frailty or flaws."

These words of Lady Hale in her recent leading judgement in the Supreme Court cases of *P v Cheshire West* and *P & Q v Surrey County Council* will spark a fundamental reappraisal of the action which care homes and local authorities need to take regarding deprivations of liberty.

The judgement clarifies the test by which it is determined that a care home resident is deprived of their liberty.

The test is now that if the person concerned is "under continuous supervision and control and is not free to leave", they are deprived of their liberty.

The Deprivation of Liberty Provisions

The term "deprivation of liberty" derives from article 5(1) European Convention on Human Rights and has the same meaning in English law as is applied to the article itself.

As is relevant to this piece, article 5 European Convention on Human Rights states that:

Right to liberty and security

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:

(a)-(d) & (f) omitted here

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

The Mental Capacity Act 2005 (MCA) contains procedures that must be followed where a person is to be deprived of their liberty. These are known collectively as the Deprivation of Liberty Safeguards (DOLS).

These provisions apply specifically to care homes and hospitals.

With respect to care homes, the person with primary responsibility is

the person required to be registered under part 2 of the Care Standards Act 2000. That person is called the "managing authority." In a company, that role will be delegated to an individual.

If it considers that a resident may be deprived of their liberty, the managing authority must report the matter to the local authority requesting a "standard authorisation." The DOLS Code of Practice indicates that this should be done in advance of any deprivation taking place. Such applications and their outcome must be reported to the Care Quality Commission.

The local authority will then obtain a series of assessments which determine whether DOLS is the appropriate process and if so appoint a best interests assessor (BIA). The assessments are submitted to the local authority supervisory body which may then make the authorisation.

If there is an immediate risk to the resident which requires them to be deprived of their liberty, the managing authority may issue an urgent authorisation applicable for up to 7 days.

The Supreme Court judgement is relevant to the question of when a person is deprived of their liberty.

CASE STUDY: John

John suffers from dementia.

He is accommodated in a care home further to an assessment by the local authority.

A risk assessment notes that he has a tendency to wander and if he left the care home, there is a real risk that he would not be able to find his way back.

The assessment provides that John is unable to assess the risks of such free movement and therefore lacks capacity in this respect. To protect him from risk he may not leave the care home on his own but must always be accompanied.

John's social work assessment determined that he lacked capacity to determine his residential arrangements. It determined that it is in his

best interests to live at the care home. He would be unsafe were he to live other than in properly supervised care home type accommodation. In particular he cannot live in his own accommodation because the care requirement would be too expensive. He has never expressed any desire to live elsewhere. If he were to ask to live other than in a care home, a further best interest consultation would almost certainly prevent that.

The case law draws a distinction between a deprivation of liberty and a restraint of liberty which is not a deprivation.

It is clear that there is no category difference between a restraint and a deprivation. The matters to be considered when determining whether an action amounts to a deprivation include the type, duration, effects and manner of implementation of the measures in question.

Is John deprived of his liberty?

In the light of the new test, it is clear that John is deprived of his liberty simply on the basis that he is not free to determine his own living arrangements and that a care home is an environment where he is subjected to continuous supervision and control.

In the case law, a number of factors have from time to time appeared to influence judicial decision making on the matter of deprivation. These include:-

- Whether the resident objects to their continuing stay or has expressed a wish to be elsewhere.
- The purpose of the deprivation, in particular whether this is benign.
- The "relative normality" of the care arrangements for this particular individual.

It was the view of the court of appeal in P & Q that if in the light of the resident's condition, there would be no other way in which they could actually live, persisting with such arrangements cannot be a deprivation. This approach required that in order to determine whether a person was deprived of their liberty, the comparator was a person with similar disabilities. It was this approach to which Lady Hale addressed the comment that appears at the top of this article.

The Supreme Court has determined that none of these considerations are relevant.



The Court approved the approach of Munby J in the case of JE v DE [2006] EWHC 3459 (Fam) where he noted that:

"... the crucial question in this case, as it seems to me, is not so much whether (and, if so, to what extent) DE's freedom or liberty was or is curtailed within the institutional setting. The fundamental issue in this case, in my judgment, is whether DE was deprived of his liberty to leave the X home and whether DE has been and is deprived of his liberty to leave the Y home. And when I refer to leaving the X home and the Y home, I do not mean leaving for the purpose of some trip or outing approved by SCC or by those managing the institution; I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses, specifically removing himself to live at home with JE."

It is also worth emphasising that in this case, Munby J stated that:-

"A person can be "deprived of his liberty", indeed detained in the fullest

and most complete sense of the word, even though his departure from the place of detention is not prevented by a locked door or by any other physical barrier."

It is the simple fact that, being accommodated subject to a social services assessment in a care home where he is under continuous supervision for his own safety, and not being free to choose to live elsewhere, that causes John to be deprived of his liberty.

From this, it can be seen that the fact that he may also be prevented from leaving the home should he want to go into town unaccompanied, is only a secondary issue. This is even though John has never expressed a wish to live elsewhere, but has been stopped when he has tried to go out on his own. Some may find this a little counter-intuitive.

In reality, many residents suffering this form of restriction upon their liberty, would not have capacity to decide their wider residence arrangements. So in consequence of the court judgement, it will often not be necessary to focus on the detail of day to day restrictions when deciding whether to refer, albeit that such restrictions are important matters in their own right to bring to the local authority's attention when completing the referral form since these should also form part of the assessment.

The consequences of this for care homes will need to sink in quickly if they wish to comply with the law and avoid the possibility that they are detaining a resident unlawfully.

In reality, a great many residents suffer from dementia, lack capacity to determine their residential arrangements and are placed in a care home further to a social services assessment. In practice they may only live elsewhere with local authority approval. No active expression of a desire to leave is required. Their apparent consent, whether directly expressed or indirectly expressed through their general happiness with their arrangements, is not relevant.

This may not always be the case. It is possible that a resident with dementia may have periods when they could engage in an effective discussion of their residence arrangements but that on other occasions, they may need to be prevented from leaving the home because at that particular time they appear to be at risk.

In that event, the type, duration, effects and manner of implementation of this restraint would need to be considered in order to determine whether this action amounted to a deprivation of liberty within the meaning of article 5(1) or was the lesser form of restraint, being a restriction of liberty.

The difference is important. A deprivation of liberty must be justifiable under Article 5(1), otherwise it is a breach of the resident's human rights. The Mental Capacity Act does not permit deprivations of liberty unless they are authorised either by a court or in accordance with the deprivation of liberty provisions of the MCA.

By contrast, a restriction of liberty which does not amount to a deprivation under article 5(1) may be justified under section 1(5) MCA (best interests) and section 5 (care and treatment).

Section 6 MCA provides that a carer may restrain the resident if the carer reasonably believes the restraint is necessary to prevent harm to the resident and that the restraint is a proportionate response to the likelihood of the resident suffering harm and the seriousness of that harm. As one would expect, in law, a restraint occurs if the carer uses or threatens to use force to secure the doing of an act which the resident resists. But importantly, a carer also restrains the resident if he restricts the resident's liberty of movement even if the resident does not resist.

John is also deprived of his liberty by virtue of the attempt to prevent his wandering. This is because the assessment provides for a complete restriction on his freedom to go out unaccompanied. He lives in an environment providing continuous supervision and control and is not free to leave.

If the policy of the assessment were different, such that it may only occasionally prove necessary to prevent John from going out because at the time he appeared to lack capacity and was at significant risk, the restraint may not amount to a deprivation of liberty.

Self Funders

It may occur that a resident has not been subject to a social services assessment because they are self funding and entered the home of their own volition. They may deteriorate whilst they are in the home to the point where the home itself would in practice restrict their liberty should they try to leave.

European Convention articles are rights against the state. They are not applicable as between private individuals, including generally, between companies and individuals.

A care home may impose restraints upon a resident lacking capacity using section 5 MCA as justification. However, section 6 MCA confirms that the DOLS provisions apply also where the home deprives the resident of their liberty whether or not a public authority is involved. Therefore conduct that may amount to a deprivation of liberty by a care home must always be referred to the local authority, failing which the home may be acting unlawfully.



Disclaimer: This article represents an interpretation of the law and is provided in good faith for the general education of readers. The case of John is fictional. Neither are intended as legal advice to be used in a particular case and Wrigleys Solicitors LLP does not accept any duty of care to users of this information. Readers dealing with real cases are advised to obtain their own legal advice.

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