Thoughts on *P v Cheshire West; P & Q v Surrey County Council*[1]

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Sometimes I think that my practice over the last 20 years or so has been framed by incapacity. By that, I should not be taken as necessarily conceding a lack of legal ability – though some may think it an apt word to use in that context – but, rather, as intending to refer to my experience of cases involving often difficult and always sensitive issues over capacity.

My first encounter with these issues was in the case of *Re C (Adult, Refusal of Treatment)* [1994] 1 All ER 819. It was there that the formulation of capacity that would ultimately find its way into the Mental Capacity Act 2005 was drawn up (literally) on the back of an envelope by our forensic psychiatrist witness Dr Nigel Eastman.

It was the strangest of cases. Mr C who wanted to die with two legs rather than have one gangrenous leg amputated but live managed both to have his cake and to eat it. He was found to possess legal capacity by reference to Dr Eastman's test but, as it happened, also lived to tell the tale – a rare but perhaps telling illustration of the maxim that it is the exception that proves the rule (the rule here being *'doctor knows best'*).

But, undoubtedly, the two most significant capacity cases that I have had to argue raised similar issues relating to what constitutes deprivation of liberty for a person lacking requisite capacity to choose where to live. They are *HL v United Kingdom*[2] and, most recently, *P v Cheshire West and Chester Council; P and Q v Surrey County Council*.[3] These decisions have many features in common. Each of them reached the top court in the United Kingdom. Each of them involved what may come to be seen as significant, if not elementary, errors of analysis by some of the domestic courts. In each case there was an implied subtext of limited resources.

Most important of all, in each of the cases most of the judges hearing them took a view of what it means in law to be a person lacking capacity that managed with a curious insensateness to hit at one and the same time the twin dud notes of crass and patronising paternalism and lack of effective protection.

Worse still (and it has happened after each of the cases) – despite the definitive rulings of the Strasbourg Court in *HL* and the Supreme Court in *Cheshire* and *P and Q,* judges in the cases that followed each of them refused to accept these definitive rulings twisting and turning the facts of subsequent cases to suit their instinctive view that a person lacking capacity to choose where to live is not usually being *deprived* of liberty or, indeed, *deprived* of anything at all; rather, they are – in a benevolent hospital or care home regime – actually being *given* something in their best interests.

These judges might (had they *'but world enough and time'*) have paused to think of the parallel Mental Health Act compulsory detention regime where a similar

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2 App No 45508/99, [2004] ECHR 471, (2004) 7 CCLR 498.

3 [2014] UKSC 19, (2014) 17 CCLR 5.

argument could have been advanced. No one doubts that persons – whether or not they possess legal capacity – who are compelled to live in a hospital under the provisions of the Mental Health Act are deprived of their liberty. The very safeguards built into the Mental Health Act 1983 including those required by the European Court of Human Rights under Article 5 of the Convention as long ago as *X v United Kingdom*[4] demonstrate unequivocally the reality of deprivation of liberty in that statutory context.

The curiousness of HL's position is that he was treated by the domestic courts as not being deprived of his liberty because he was only informally admitted under the Mental Health Act and was in the fairy tale lexicon of the majority speeches in the House of Lords *'free to leave'* despite the reality of his incapacity. So, with the *'one bound he was free'* logic of the House of Lords HL was, in the real world, deprived of all the statutory safeguards of the Mental Health Act that existed for detained patients even though only in the unreal world of the English judicial imagination was he *'free to leave'*.

Following *HL* it might have been supposed that the domestic courts would 'get a grip' on the reality of the interior world of a person lacking capacity. But this did not happen. Although the Mental Capacity Act 2005 had to be amended to take account of the Strasbourg ruling in *HL* the resultant deprivation of liberty safeguards only took account of a limited class of persons lacking relevant capacity. In particular, it omitted consideration of persons without capacity who were under 18 or who were not placed in care homes as defined under the statutory machinery but were detained by order of the court under section 16 of the Act.

Importantly, too, the omission of persons outside the statutory safeguards would come to have a knock on effect on the legal content of the protections afforded by the safeguards. This is because there is a necessary relationship between the so-called deprivation of liberty safeguards that were provided under the Schedule A1 scheme and court rulings on what constituted deprivation of liberty under s. 16. The one necessarily affected the other because, on any view, deprivation of liberty had to have a consistent legal meaning throughout the statute.

So it was that the cases of *P and Q* and *Cheshire* had, inevitably, to reach the Supreme Court. It was, in retrospect, too high an expectation that the lower courts might respect the definitive ruling of Strasbourg in *HL*. It is both instructive and depressing to read the judgments of the respective Courts of Appeal in each of the later cases and to track through their respective attempts to distinguish HL on irrelevant points of syntax. It was, I can tell you, even more instructive and depressing to argue these cases in the Court of Appeal and to view the sea of judicial faces merging into one analysis with concepts such as *'relative normality'* and *'relevant comparator'*.

The simple but profound fallacy running through the analyses was that the liberty available to a person without capacity is, somehow, different to a normal person with capacity. They should (though of course it is not put that way in the judgments) thank their lucky stars for having a nice care home with attendant staff. It is the supposed difference of the liberty of incapacitated persons to the liberty available to so-called 'normal' persons that led Munby LJ in *Cheshire* to adopt the notion of a relevant comparator being a person with the same incapacity rather than a person with full autonomy. It is the same supposed difference of

[4] [1981] ECHR 6.

A the liberty available to those lacking capacity that led the Court of Appeal in *P and Q* to construct the notion of 'relative normality' (fully formed but from nowhere) that if a person without capacity was placed in a benevolent regime so that their life was 'relatively normal' they were not deprived of their liberty.

B Yet a moment's thought shows why the person without relevant capacity can only, sensibly, be compared to a person with full capacity. We do not doubt that a person with full capacity would be deprived of their liberty if they were placed in a care home or at home but were not free to leave. Freedom to leave is a function of one's essential dignity as a human being. It is an objective component of being human. To discriminate between them is to offer those without capacity a different liberty
C to those who are normal.

If we deny a person without capacity the argument that however beneficial it may be for them to live in (say) a care home they are, nonetheless, deprived of their liberty just as a 'normal' person would be we deny them: (i) their essential dignity
D as possessing the same liberty available to everybody else, whilst (ii) at the same time denying them the enhanced protection that they require precisely because – like HL – they cannot in practice make a meaningful decision in law to leave. If we deny a person without capacity the right to be treated in the same way as any person as far as the content of their liberty is concerned, it also removes all State
E responsibility under the Convention for reviewing their (for want of a better word) placement.

That, at any rate, was the central argument that we put to the Supreme Court and that was the central argument that the majority of the Court accepted.

F Even now, cases subsequent to *Cheshire* and *P and Q* are attempting to pull back on these landmark cases. The most recent decision is that of Mostyn J in *Rochdale MBC v KW, PPK, MW*[5]. In that case an adult in her fifties lacking capacity was not permitted to leave her home whenever she wanted. If she tried to leave by herself she would be brought back. You may think it not without relevance that both
G barristers agreed before the judge that she was, in the light of *Cheshire*, deprived of her liberty.

Without going into the detail of that case or the judge's conclusion on deprivation of liberty, you may just get a 'feel' for the current judicial response to *Cheshire* from this small extract from paragraph 19:
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> *The opinions of the majority [in* Cheshire*] are binding on me and I must loyally follow them even if I personally agree with the view of Parker J and the Court of Appeal in* MIG and MEG*; with the Court of Appeal in* Cheshire West*; and with the minority in the Supreme Court.*

I As befits an occasion such as this, I will end with a multiple choice question. Did the judge:

> (i) voluntarily find that KW was deprived of her liberty, (ii) find that KW was deprived of her liberty but only because he was bound by *Cheshire* or (iii) find
J that KW was *not* deprived of her liberty?

Sadly, there are no prizes for guessing correctly. The organisers would not be able to afford it. Nor would I.

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[5] [2014] EWCOP 45