# Inquest juries, DOLS and the law of unintended consequences

written by Bridget Dolan QC | 31 January 2017

***R (Ferreira) v HM Senior Coroner South London* [2017] EWCA Civ 31**

Reading about the 1888 Victorian Railway Commissioners case when studying for the bar I always wondered what it might look like if the 'floodgates' so fiercely guarded by judges in those old judgments were actually prised open. Well now I know.

The combination of the Mental Capacity Act '*Deprivation of Liberty Safeguards*' and the Supreme Court's 2014 *Cheshire West*[1] decision have produced a legal tsunami that has deluged the Court of Protection. This has been followed very closely by a smaller but equally damaging tidal wave that inundated Coroners' Courts once holding an inquest into the death of any person who was the subject of a MCA DOLS authorisation was deemed mandatory.

If the appellant had won this present case, and a death in a NHS hospital due to the physical illness of someone lacking capacity had amounted to a death when deprived of liberty (so in state detention), and therefore required a jury inquest, then the already swamped Coroners Courts might have finally submerged.

Happily, however, the watery metaphors can now dry up, as a combination of the Policing and Crime Bill (soon to be given Royal Assent) and the Court of Appeal's most recent common sense judgment in the *Ferreira* case have firmly rebuilt the levee around the Coroners' Courts, handing a few sandbags to the Court of Protection at the same time.

Maria Ferreira had a severe mental impairment and so lacked capacity to consent to necessary medical treatment. When she became physically ill she was admitted to hospital. After a few days her condition deteriorated, she was moved to the intensive care unit (ICU) where she sadly died.

The Senior Coroner was satisfied that the clinical circumstances meant that there had to be an inquest into Maria's death, but he saw no requirement for a jury. However, if there is reason to suspect that a person died when "in state detention" a jury inquest is mandatory under s.7(2)(a) CJA 2009. Maria's sister contended that the hospital admission and treatment of Maria, particularly the period when she was sedated in ICU, amounted to Maria being in "state detention" when she died.

Most ordinary people of course would not consider that the doctors treating them in ICU were "detaining" them. They would, one hopes, just be extremely glad that the good doctors and nurses were giving them a bed and doing their very best to save their lives. However the *Cheshire West* judgment has opened the way for some extraordinary legal arguments.

The appellant's principal argument was that "state detention" under CJA 2009 included situations where there was effectively a deprivation of liberty for the purposes of Art. 5(1) ECHR, and therefore the meaning given to 'deprivation of liberty' for those purposes by the Supreme Court in the *Cheshire West* case applied.

In October 2015, the Divisional Court had roundly dismissed the appellant's initial application for judicial review, although each of the two judges gave very different reasons for doing so. Happily, most readers of this blog will no longer have to grapple with the 161 paragraphs of jurisprudential

analysis by Gross LJ and Charles J, as the Court of Appeal decision, whilst agreeing with that outcome, has now provided a much simpler analysis of why the appellant is wrong.

Put simply the Court of Appeal judgment comes down to this:

> *"Get a grip! Art 5 ECHR was never meant to cover doctors saving peoples nd anyway, there is no Convention right to a jury inquest, and it is helping no-one and hindering NHS care to be quite so pedantically silly."*[2]

To explain less simply: the court reminded itself that not every interference with a person's liberty of movement involves a potential violation of Art.5. What the Supreme Court was considering in *Cheshire West* was the living arrangements put in place by the state for three people who, due to their learning difficulties, were of unsound mind and who were under continuous supervision and control in residential placements which they were not free to leave.

In contrast Maria was being treated for a physical illness in a hospital. Like the vast majority of ICU patients she was physically unable to leave because of her condition, not because anyone prevented her leaving or wished to control her. *Cheshire West* could be distinguished as it was a case dealing with the exception to Article 5(1)(e), which applied to those detained *because of* their 'unsound mind'. Importantly Maria's ICU treatment was not *because of* her unsound mind or lack of capacity. A person who did not have her mental impairments would have been treated in the same way. She was physically restricted in her movements by her physical infirmities and by the treatment (sedation) she received; but the root cause of any loss of liberty was her physical condition, not any restrictions imposed on her by the State in the guise of the hospital staff.

So the Court of Appeal found it was not bound to apply the meaning of deprivation of liberty for which *Cheshire West*, was authority. The court concluded unanimously that there was no basis on which it could be said that there was a deprivation of liberty in Maria's case, and thus there was no reason to suspect "state detention" for the purposes of the CJA 2009 requiring a jury inquest. There had been no error in the Senior Coroner's decision.

Making sure she had covered all the bases, Lady Justice Arden also pointed out that even if she was wrong about that, and the Court of Appeal did have to apply the *Cheshire West* "acid test" for identifying a DoL to Maria's situation, the outcome would still be the same. Although the first aspect under the acid test (was Maria "under continuous supervision and control" in ICU?) might well be met, the second part of the test, namely was Maria "not free to leave"? was not satisfied. There was no evidence that the doctors would have gone so far as to prevent Maria from leaving if there was a lawful decision that she should do so. In Maria's case, as she required ICU care, it was unlikely that there could have been a lawful decision by her sister to remove her. It was not enough that her sister *perceived* that she would be unable to take Maria away from the ICU, unless this was truly the position.

In the case of a patient in intensive care, the true cause of their not being free to leave was their underlying illness, a matter for which (in the absence of special circumstances) the state was not responsible.

***So the cause of any lack of freedom to leave was not***

## *as a matter of law attributable to the state for Article 5 purposes.*

Furthermore, there is no jurisprudence of the Strasbourg Court which has concluded that medical treatment could constitute the deprivation of a person's liberty for Art.5 purposes. The ECtHR in the police 'kettling' case of *Austin v UK* had specifically excepted from Art.5(1) the category of interference described as "commonly occurring restrictions on movement". In the Court of Appeal's judgment, any deprivation of liberty resulting from the administration of life-saving treatment in hospital fell within that category, so long as it was rendered unavoidable as a result of circumstances beyond the control of the authorities and was necessary to avert a real risk of serious injury or damage, and was kept to the minimum required for that purpose.

A hospital deprivation of liberty might still exist if the acute condition of the patient was the result of action which the state had wrongly chosen to inflict on the person, or if the treatment being administered was such that could or should not be given according to proper medical standards. But there was generally no need, in the case of physical illness, for a person who lacked capacity to consent to the treatment to have the benefit of any safeguards against a deprivation of liberty where the physical treatment was given in good faith and was materially the same treatment as would be given to a person of sound mind with the same physical illness.

The court noted that there was support for the correctness of this conclusion in that the applicant could offer "no semblance of a policy reason" why Parliament would have thought that the death of a person in intensive care of itself should result in an inquest with a jury. Whilst pragmatism or policy, without more is insufficient basis for making a legal decision, not only is a jury inquest costly in terms of both human and financial resources, but to require doctors to seek authorisation of the deprivation of a patient's liberty in a normal ICU case would involve a significant dilution and distraction of clinical resource, time and attention. This would inevitably risk jeopardising the outcome for all ICU patients, for no apparent policy reason.

The Court noted that of course whether a deprivation of liberty does or does not exist is dependant upon the concrete circumstances at the material time and not on whether a DOLS authorisation had or had not been given. To that extent paragraph 66 of the *Chief Coroner's Guidance* on DOLS, which suggests otherwise, is incorrect. That guidance will, in any event, require wholesale review once the Policing and Crime Bill is brought into force ensuring that the DOLS floodgates are firmly closed, at least in the Coronial Jurisdiction.

**Footnotes**

[1] *Surrey County Council v P, Cheshire West and Chester Council v P* [2014] UKSC 19, [2014] AC 896

[2] Actually using far more eloquent and understated language what Arden LJ actually said was that "***the view that it is a deprivation of liberty would appear to be unrealistic***" §12.