DEANS COURT CHAMBERS

FAMILY & COURT OF PROTECTION NEWSLETTER

Summer 2019

From the Deans Court Chambers Family & Court of Protection Teams

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IN THIS EDITION…

For more detailed information on all counsel, their full CVs and experience can be found on our website at Deanscourt.co.uk

If there are any topics you are interested in, anything you would like to discuss, or if you have any comments or feedback please feel free to contact our Family & Court of Protection Clerks on 0161 214 6000 or via email:

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DEANS COURT CHAMBERS

Editorial

By Julia Cheetham QC

I am delighted to be able to introduce the first of our News Letter from the Family and Court of Protection team at Deans Court Chambers. Our aim is to bring you interesting, practical and up to date articles about recent cases which affect our areas of work.

In this edition Adrian Francis looks at the Article 5 issues which arise in respect of adults who have been unlawfully deprived of their liberty in care homes, a necessary and timely analysis in light of the recent report of Local Government and Social Care Ombudsman in the Staffordshire case where the local authority was found to have had a backlog of 3,000 cases at June 2018.

Michael Jones provides the first legal update dealing with the most recent cases relating to finding of fact hearings, the approach to be taken where there is an allegation of a failure to protect by a non-perpetrating parent in serious cases and how to approach threshold hearings.

In his article Patrick Gilmore analyses the recent case of ***Lancashire County Council v TP & Ors (Permission to Withdraw Care Proceedings) [2019] EWFC 30 (09 May 2019)*** a timely reminder by Mr Justice Williams of the fact that current research in relation to transgender issues and children is developing. Patrick provides a practical framework for the analysis of the evidence in such cases.

I hope that you find the newsletter informative and useful, please let me have your feedback, in particular whether there are any particular cases or areas of law which you would like us to address in the next edition which will come out in December.

Julia Cheetham QC

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DEANS COURT CHAMBERS

Gender Identity & the Family Courts

By Patrick Gilmore

1. Those involved in the family justice legal system are familiar with the following quote from Dame Butler-Sloss *"The judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research would throw a light into corners that are at present dark."* That has been a clear message to advocates to be mindful that medical science develops and that there is a need to be reflective and open minded in cases.

2. The family justice legal system has developed in line with medical science. The complexity of the medical evidence in family cases has progressively increased over recent years with lawyers and judges being required to understand and assimilate evidence relating to non-accidental head injury, factitious illness and bone density to name but a few specialist fields. The family courts are hugely reliant on medical experts to assist in ensuring that the decisions reached are fair and take account of the most recent research and understanding in many different fields.

3. One of the areas of medical science in which huge advances are being made is that of gender identity, transgender and gender dysphoria. This article will consider whether the family justice system is keeping pace with current thinking.

4. Mr Justice Williams recently considered such a case in the matter of ***Lancashire County Council v TP & Ors (Permission to Withdraw Care Proceedings) [2019] EWFC 30 (09 May 2019)***.

5. The Local Authority brought public law proceedings initially seeking to remove the biological and foster children of the parents who were registered foster carers and were also caring for some of the children pursuant to special guardianship orders.

6. The threshold sought within that case can be summarised as follows:

- That the parents have frequently sought referrals/diagnoses for the children in their care, for medical conditions not witnessed by other professionals. Resulting in unnecessary investigation.
- That the parents had pursued mental health diagnoses for the children. Which were not supported by others professionals involved with the children.
- That both parents had acted in a precipitate manner in relation to perceived gender dysphoria in children in their care
- That the parents were resistant to any potential disadvantages to two of the children being identified as transgender prematurely and the impact upon their emotional, physical and sexual development. The parents being unable to provide balanced support.
- One of the children had four A&E attendance due to a lack of appropriate supervision.
- The parents failing to prioritise the needs of the children in their care.
- The application was listed for a contested removal hearing. Due to insufficient time the hearing could not proceed and was adjourned.

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7. The Court authorised the instruction of three experts within the case:

    a. Dr Hellin, a consultant adult psychologist
    b. Dr Ward, a consultant paediatrician
    c. Dr Pasterski, a consultant psychologist specialising in gender identity.

8. It was only after receipt of those experts reports that the Local Authority reflected upon their case, re-evaluated the evidence and came to the conclusion that they would not seek care or supervision orders in respect of the children. The Local Authority therefore sought to withdraw the proceedings, on the basis that they could have established threshold had the case proceeded. That position was opposed by the parents on the basis that having reviewed the entirety of the documentary evidence (which was substantial) and the expert evidence the Court could not have found that threshold was crossed within this case.

9. The Judge summarised the conundrum he was facing at paragraph 8 of his judgment:

    '…….Although no party at the IRH was opposing the local authority's application for permission to withdraw, there was a dispute on the issue of whether I should approach it on the basis that it was obvious that the local authority could not now establish threshold (Type I) or whether there was a possibility that threshold might still be established (Type II). Apart from the fact that in a type II case the court might refuse to grant permission to withdraw and might insist on the case proceeding to fact-finding and thus potentially beyond, TP and CP and to an extent the Guardian identified another issue of concern. Put at its simplest, they were concerned that were the court to identify the case as Type II that TP and CP would be left with a cloud of suspicion over their heads arising from the 'fact' that the court had concluded that threshold might be crossed but in the exercise of its discretion the court had determined not to adjudicate upon the threshold possibilities. Whilst they acknowledged that as a consequence of the binary approach of the law that the absence of any finding equated to no adverse facts having been found against them and thus a clean bill of health forensically speaking, they were concerned about the possibility of the contents of the threshold being either recycled or subconsciously or consciously held against them in some areas on the basis that the court had not explicitly cleared them. On the other hand, were the court to have concluded that it was obvious that the threshold could not be established this would dispel any lingering doubt or cloud of suspicion that might attached to them. It was thus not a distinction without a difference.'

10. The Local Authority submitted that the threshold could possibly be met and set out far more limited grounds than those previously sought by them. In addition the Local Authority set out an analysis of the discretionary exercise the Court must undertake in deciding whether threshold could be crossed, or not. Those points

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focussed upon the lack of necessity for an investigation, the fact that it would not alter the care plan for the children, the cost to the public purse, the time that investigation would take and the consensus view that it was in the children's interests to remain in the care of the parents.

11. The position expressed on behalf of the parents was that after reading what the judge described as a 'huge volume of evidence' including the extensive arguments and expert reports, that the threshold could not be established at all. The evidence was that the family had engaged fully with the appropriate services both medically and in respect of gender issues.

12. The Guardian was also circumspect as to whether or not the threshold could be established.

Gender Identity/Gender Dysphoria

13. On behalf of the parents specific reference was made to the family's engagement with the Tavistock centre and the Court was provided with correspondence detailing the regular meetings with the professionals within that service. Dr Pasterski herself approved of the engagement with that as an appropriate service.

14. The guardian acknowledged that although she had concerns about a name change of the parents' biological child all of the experts had formed the view that the parents had acted appropriately in other respects. The Guardian was more focussed upon the 'longer term impact of current ideology in relation to transgender issues'. The Guardian did however acknowledge that the evidence before the Court was 'overwhelming that there are no concerns regarding TP and CP's ability to meet the needs of their children including those under the SGOs'. (As per para 25 of the Judgment).

15. Mr Justice Williams noted with interest how the area of gender identity issues have developed, as per paragraph 58 of his judgment:

> *'Dr Pasterski is a chartered psychologist and gender specialist with 23 years of experience in conducting gender identity assessments in children and adolescents. In her report she identifies that there have been recent changes to the diagnostic criteria for gender dysphoria and that research on mental health and transgender children have shed light onto critical historical misunderstandings related to clinical presentation in gender dysphoria. Firstly, that children who present with gender dysphoria are likely to desist in their cross-gender identification and secondly that gender dysphoria is inherently associated with high rates of*

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comorbid psychopathology. She notes both have been shown to be false. She identifies that these misunderstandings arise from two particular factors. Firstly earlier studies which showed that up to 80% of children desist in gender dysphoria included children who presented with gender incongruent behaviour but did not necessarily state the wish to be or that they were the other gender. Thus children displaying gender variance may have been wrongly diagnosed with gender dysphoria. As a result of this treatment protocols previously incorporated a watch and wait approach which had prevented truly dysphoric children from transitioning which had likely resulted in increased rates of depression and anxiety. As Dr Pasterski puts it 'Put simply, many who have shown to desist were likely not dysphoric and psychopathology in those who persisted was likely due to forbidden expression of their true gender identity.' Current guidance suggests that supporting a child who clearly and consistently states that they wish to be the other gender in their preferred gender role is associated with improved mental health and well-being.'

16. Dr Paserski further emphasised how the child had been consistent throughout her notes in respect of developmental history and appeared to be well supported by her parents. Her presentation was consistent with the diagnosis of gender dysphoria.

17. Dr Pasterski also noted that the *'she was under the care of the NHS GID Service. Allowing the child to present as authentic and according to her preference, whilst providing appropriate levels of support is consistent with best clinical guidance'.*

18. This aspect of the child's wishes was a key factor within the case. Professionals who had worked with the family previously, including at the strategy meeting had focussed upon the parents having a *'preoccupation'* and *'encouragement'* with gender dysphoria in 3 children. Dr Pasterki's opinion as detailed within the judgment took an alternative perspective emphasising how the parents had engaged with the appropriate specialist services (GIDs at the Tavistock Centre) and that they had been supported to follow the child's lead in expressing her gender. Mr Justice Williams clearly noted the views of Dr Pasterski within his judgment:

> *'59. v) With respect to potential influence of fabricated or induced illness in either CP or TP in so far as it relates to gender dysphoria, ASD or ADHD Dr Pasterski thought this would be impossible. Each have a basis in neurological or biological functioning which cannot be affected by interpersonal*

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> *influence or environmental interference. In her opinion CP and TP had engaged with diagnostic health support services in a manner consistent with the children's needs.'*

19. The same approach was commented upon by Dr Pasterski in respect of child H. There had not yet been any involvement with GIDs but it was noted that H was approaching the age in which GIDs may be needed in the future. It was noted within the judgement that:

> *'59 …… Dr Pasterski had no concerns regarding CP and TP's management of H's unique presentation and needs. She is coming up to the age where CP and TP may wish to engage with the NHS support services. Prior to this, H has been content in living as a girl. There is no indication that she has recently been in need of support services. Indeed, there is a risk of harm from overexposure to unnecessary gender related investigations and assessments. Allowing H to present as authentic and according to her preferences, while providing appropriate levels of support is consistent with best clinical guidance. CP and TP may wish to ask their GP for a referral to start the process within the NHS by age 7.'*

20. Concern has been noted by professionals that two children within the same household were now expressing gender identity difficulties and both may have gender dysphoria. Dr Pasterski did not express that same level of concern:

> *'59 vii) She noted the concern that one would not expect to see 2 children with gender dysphoria in the same family but was of the opinion that it is certainly possible and that she had observed similar instances in her work with nearly 2000 transgender individuals over the previous 10 years.'*

21. Purely by way of observation that must indeed be correct. Observing one child to have already expressed openly, and with support, their true gender, would provide the reassurance to any other child that they could do the same, if that was their own wish. In essence providing what was noted within the judgment that the *'children were free to be themselves'*.

Outcome to the case:

22. The Court concluded that the Local Authority could not have established threshold. Noting that the totality of the evidence established parents 'who are child focussed, who provide a high quality of care and who seek appropriate referrals and are open to advice from professionals.'

23. Mr Justice Williams recognised that this was a developing area of the law and that there was a huge lag between those at the

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cutting edge and others including the judge who were not as up to speed on those developments. Concluding at para 81:

> *'I observed during the course of the hearing that issues relating to gender identity and the medical understanding of such issues is complex and developing and that inevitably there is some lag between those professionals at the cutting edge such as Dr Pasterski and others (in which I include myself), which might have played some role in how these proceedings came about.'*

Conclusion:

24. The judgment of Mr Justice Williams provides some key guidance for those working within the family justice system and are representing those in cases involving aspects of gender identity. It provides a marker to how previous misconceptions about gender identity should be set aside and the importance of listening to the experts.

25. I would suggest that the following is key when approaching any case such as this:

    a) A full overview of the case should be undertaken by the Local Authority at the earliest opportunity. That should include a full historical review of all of the agencies the family have worked with. Identifying at an early stage which of those agencies have the specialist knowledge and expertise to work with the family.

    b. The importance of utilising specialists with expertise in gender identity cannot be overlooked. Their expertise in this cutting edge area of medical science is essential. Early identification of the correct support can assist in avoiding any emotional harm or anxiety for the child in the future.

    c. Any misconceptions or views held about gender dysphoria should be set aside. This is a developing area and all professionals should be guided by those with the necessary expertise and the voice of the child.

    d. A key message to take from that opinion of Dr Pasterski, as a leading expert in gender identity issues, over 23 years' experience is that gender dysphoria has a basis in neurological, or biological functioning which cannot be affected by interpersonal influence or environmental interference. Therefore serious consideration must be given by Local Authorities before they link fabricated or induced illness and gender dysphoria.

    e. It would be sensible to have an overview of the family's involvement with appropriate medics and services, to understand the child's own wishes and to then consider what role if any remains for the Local Authority at that time, and if that require statutory intervention or a more supportive role.

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f. Listening to the child is vital. Their wishes and their understanding of their gender is key in early identification of the support they require

g. Parents, schools and professionals, including social workers, all of which are not specially trained in gender, may not themselves know the best route forward. They will require the support of the experts whilst allowing the child to be themselves.

26. The case concluded with no findings against the parents. The threshold could not be established and the judgment gave a welcome overview of a developing area. Practitioners in family law should be eager to ensure, in my view, that an appropriate review is undertaken of all local authority involvement before proceedings are issued. That any decision making is based on specialist intervention and that early involvement of services such as GIDs at the Tavistock Centre is vitally important to support the child's wishes.

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Legal Update (Children): the s.31(2) Threshold Criteria

By Michael Jones

In each of the Deans Court newsletters, I am going to provide what can best be termed as a 'legal update' in relation to the area of children. Rather than list a number of cases of importance in different areas, I am going to focus on a particular topic area, in this case, the s.31(2) threshold criteria. The Court of Appeal has considered the s.31(2) threshold in a number of recent decisions, which are referred to below. Threshold documents are not necessarily easy to draft and many of us see both excellently drafted pleadings and pleading which are… not so excellently drafted. The important point is that the threshold must evidence a clear nexus between the fact in issues (the allegation) and the child or children suffering or being likely to suffer significant harm. The cases I am going to deal with below relate to findings of a failure to protect on the part of a non-perpetrator and cases in which a finding is sought against a 'pool' of potential perpetrators.

Those of us who represent parents within public law proceedings are well familiar with cases where there is a purported 'failure to protect' on the part of a parent. A failure to protect often constitutes a factor which contributes to the s.31(2) threshold criteria being crossed, however the term 'failure to protect' can incorporate countless possible scenarios and I believe, is actually quite unhelpful as a 'generic' term. The Court of Appeal has recently considered findings of a failure to protect made against a parent in two cases; **G-L-T (Children)** [2019] EWCA Civ 717 and **L-W (Children)** [2019] EWCA Civ 159. In both cases an appeal against findings of a failure to protect made against a parent was allowed.

L-W (Children) makes for essential reading. It involves successful appeal, made on the part of a mother, with the Court finding that there had been a failure to evidence a causative link between the facts found by the judge at first instance and the alleged risk to the child arising out of the same. The case related to 3 children, one of which suffered extensive bruising as a result of inflicted injury; the Court at first instance found that the mother's partner, GL, was responsible for inflicting the injuries. No finding was made against the mother in this respect. The local authority failed to prove its allegation that any non-perpetrator in the home had 'failed to seek medical attention at the earliest opportunity' (the mother had clearly acted appropriately in this respect on the facts of the case). The 'global' allegation of failure to protect sought was as follows; '*the non-perpetrating carer knew or ought to have known that the bruising had been/would be inflicted and failed to protect L and any other children in their care*'. On appeal, the local authority accepted there was no basis for finding the mother had known that the bruising had been inflicted, thereby leaving only the allegation that she knew or ought to have known it would have been inflicted, based upon her GL's previous behaviours.

The finding made against the mother by the judge at first instance was of a failure to protect and the basis for that finding was as follows;

'(a) and (b) - The mother failed to ask GL what had happened when she was at work and failed to listen to her mother when L was frightened of GL. In relation to the first matter, this predates the relevant date although it post-dates the infliction of the injuries. The second matter post-dates the relevant date, but this is relevant (as is the first matter) to the failure to protect finding for the following reason: it shows the mother's state of mind; she closed her mind to the possibility that GL could have caused the injuries and continued

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the relationship; she was aware of GL's history of violence and aggression.'

The Court of Appeal reminded practitioners of the need to be alive to the fact that the local authority must demonstrate a necessary link between the facts relied upon and its case for threshold. In the present case, the mother had been aware of GL's controlling personality traits, but this did not prevent her from acting quickly and appropriately when her child was injured. Whilst it was the case that GL had demonstrated aggression on two occasions over a number of years towards adult men outside the home, the Court was not satisfied that this in any way established a causative link to the harm suffered by the children; in other words, simply because the father acted violently towards adult males outside the home, this did not necessarily mean that the mother ought to have known that GL presented a risk of physical abuse towards a child.

Lady Justice King made the following, important observations;

'Failure to protect comes in innumerable guises. It often relates to a mother who has covered up for a partner who has physically or sexually abused her child or, one who has failed to get medical help for her child in order to protect a partner, sometimes with tragic results. It is also a finding made in cases where continuing to live with a person (often in a toxic atmosphere, frequently marked with domestic violence) is having a serious and obvious deleterious effect on the children in the household. The harm, emotional rather than physical, can be equally significant and damaging to a child.

Such findings where made in respect of a carer, often the mother, are of the utmost importance when it comes to assessments and future welfare considerations. A finding of failing to protect can lead a Court to conclude that the children's best interests will not be served by remaining with, or returning to, the care of that parent, even though that parent may have been wholly exonerated from having caused any physical injuries.

Any Court conducting a Finding of Fact Hearing should be alert to the danger of such a serious finding becoming 'a bolt on' to the central issue of perpetration or of falling into the trap of assuming too easily that, if a person was living in the same household as the perpetrator, such a finding is almost inevitable. As Aikens LJ observed in Re J, "nearly all parents will be imperfect in some way or another". Many households operate under considerable stress and men go to prison for serious crimes, including crimes of violence, and are allowed to return home by their long-suffering partners upon their release. That does not mean that for that reason alone, that parent has failed to protect her children in allowing her errant partner home, unless, by reason of one of the facts connected with his offending, or some other relevant behaviour on his part, those children are put at risk of suffering significant harm.'

The observations relating to a finding of a failure to protect as a 'bolt on' to the central issue of perpetration is a point of note and it may be necessary in some cases to remind both the local authority and the Court that simply because a person has lived in the same household as a perpetrator of a child's injuries, this does not mean, 'as night follows day', that they have failed to protect that child.

G-L-T (Children) is an interesting case. It involved serious findings made against a mother of fabricating and inducing illness in her child, J

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(the findings were at the high end of the scale of fabricated and induced illness cases). The judgment at first instance was described as exemplary in many respects, however the judge had unfortunately erred in making a finding that the father had failed to protect his son. The basis of the finding against the father was that he knew that J had not suffered seizures after the family had moved home (the mother had fabricated an account of alleged seizures in the child) and had failed to make professionals aware of this. After scrutinising the evidence and the relevant parts of the judgment, the Court of Appeal was satisfied that the finding was 'unsupportable' on the basis that it was not made out by the evidence; the father's evidence was that he had not seen any seizures in the child following the move, with the judge then translating this into the inaccurate finding that the father had stated that J had had no seizures . The mother was responsible for the majority of J's care and again, this case acts as a reminder to practitioners that it is not the case that a parent jointly caring for a child or cohabiting with a partner who is responsible for infliction of significant harm to that child, is automatically culpable of a failure to protect. Lady Justice King, again giving the lead judgment, cited her comments from L-W (Children), set out above, and found that this was a case where the finding of failure to protect had effectively been a 'bolt on' to the central findings made against the mother. She said;

'I repeat my exhortation for courts and Local Authorities to approach allegations of 'failure to protect' with assiduous care and to keep to the forefront of their collective minds that this is a threshold finding that may have important consequences for subsequent assessments and decisions.

Unhappily, the courts will inevitably have before them numerous cases where there has undoubtedly been a failure to protect and there will be, as a consequence, complex welfare issues to consider. There is, however, a danger that significant welfare issues, which need to be teased out and analysed by assessment, are inappropriately elevated to findings of failure to protect capable of satisfying the section 31 criteria.

It should not be thought that that the absence of a finding of failure to protect against a non-perpetrating parent creates some sort of a presumption or starting point that the child/children in question can or should be returned to the care of the non-perpetrating parent. At the welfare stage, the court's absolute focus (subject to the Convention rights of the parents) is in relation to the welfare interests of the child or children.

By reference to the present case, I know not, but it may be that upon assessment at the welfare stage of the proceedings the Local Authority identifies a myriad of welfare reasons why it would not be in the best interest for any of the children to live with the father. Conversely, the Local Authority may conclude that, whilst rather weak and gullible, the father, once removed from the mother's sphere of influence, can once again be a loving and "good enough" parent to, at least, L. But these are welfare issues and not threshold issues and care must be taken not to confuse the two. It is anyhow no part of this court's role to speculate as to the likely outcome of the welfare hearing.

The latter comments regarding the importance of separating welfare issues from threshold issues

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is particularly helpful, as in many cases the two sets of issues can become conflated.

B (Children) [2019] EWCA Civ 575 is another Court of Appeal decision relating to the s.31(2) threshold criteria. This is a judgment on an appeal made against a finding that a father was in the 'pool' of potential perpetrators. The subject children had been found to have contracted gonorrhoea, with the judge at first instance finding that although he could not be satisfied the father was responsible for infecting the children, he was not able to exclude him as there '*must remain a real possibility of him having caused the infection in some way'*. He therefore found the father to be within the potential pool of perpetrators, a pool which included other unknown males who may have had access to the children, including two young men who had had been present in the family home during the relevant period.

The judgment is lengthy and repeats sections of the well known previous authorities relating to uncertain perpetrator cases, reminding us that the test to be applied as to whether an individual is in the pool, is whether there is a 'likelihood' or a 'real possibility' that an individual with access to a child may have caused injuries to them. Giving the lead judgment, Peter Jackson LJ eloquently summarised the legal position in relation to 'pool findings' as follows;

'it can be seen that the concept of a pool of perpetrators seeks to strike a fair balance between the rights of the individual, including those of the child, and the importance of child protection. It is a means of satisfying the attributable threshold condition that only arises where the court is satisfied that there has been significant harm arising from (in shorthand) ill-treatment and where the only 'unknown' is which of a number of persons is responsible. So, to state the obvious, the concept of the pool does not arise at all in the normal run of cases where the relevant allegation can be proved to the civil standard against an individual or individuals in the normal way. Nor does it arise where only one person could possibly be responsible. In that event, the allegation is either proved or it is not. There is no room for a finding of fact on the basis of 'real possibility', still less on the basis of suspicion. There is no such thing as a pool of one.

It should also be emphasised that a decision to place a person within the pool of perpetrators is not a finding of fact in the conventional sense. As is made clear in Lancashire at [19], O and N at [27-28] and S-B at [43], the person is not a proven perpetrator but a possible perpetrator. That conclusion is then carried forward to the welfare stage, when the court will, as was said in S-B, "consider the strength of the possibility" that the person was involved as part of the overall circumstances of the case. At the same time it will, as Lord Nicholls put it in Lancashire, "keep firmly in mind that the parents have not been shown to be responsible for the child's injuries." In saying this, he recognised that a conclusion of this kind presents the court with a particularly difficult problem. Experience bears this out, particularly where a child has suffered very grave harm from someone within a pool of perpetrators.

The concept of the pool of perpetrators should therefore, as was said in Lancashire, encroach

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Legal Update (Children): the s.31(2) Threshold Criteria

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only to the minimum extent necessary upon the general principles underpinning s.31(2). Centrally, it does not alter the general rule on the burden of proof. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did. No one can be placed into the pool unless that has been shown. This is why it is always misleading to refer to 'exclusion from the pool': see Re S-B at [43]. Approaching matters in that way risks, as Baroness Hale said, reversing the burden of proof.'

In the present case, the judge had erred by applying the wrong approach; instead of 'not straining to identify' a perpetrator, her had adopted an approach of 'not straining to exclude' the father from the pool. He had also placed two young men within the pool of perpetrators without allowing them the opportunity for any involvement in the case, thereby depriving the father of an opportunity to make any arguments in relation to other possible perpetrators and inadvertently placing him in a pool of one. There were additional failures by the judge in the form of inconsistencies within the judgement, particularly in making no adverse findings regarding the father's credibility yet then going on to disbelieve him on a number of crucial points.

Peter Jackson LJ suggested that 'pool' cases be approached on the following basis;

'I would suggest that a change of language may be helpful. The court should first consider whether there is a 'list' of people who had the opportunity to cause the injury. It should then consider whether it can identify the actual perpetrator on balance of probability and should seek, but not strain, to do so: Re D (Children) (2009) EWCA Civ 472 at [12]. Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" Only if there is should A or B or C be placed into the 'pool'.

Likewise, it can be seen that the concept of a pool of perpetrators as a permissible means of satisfying the threshold was forged in cases concerning individuals who were 'carers'. In Lancashire, the condition was interpreted to include non-parent carers. It was somewhat widened in North Yorkshire at [26] to include 'people with access to the child' who might have caused injury. If that was an extension, it was a principled one. But at all events, the extension does not stretch to "anyone who had even a fleeting contact with the child in circumstances where there was the opportunity to cause injuries": North Yorkshire at [25]. Nor does it extend to harm caused by someone outside the home or family unless it would have been reasonable to expect a parent to have prevented it: S-B at [40]. It should also be noted that in the leading cases there were two, three or four known individuals from whom any risk to the child must have come. The position of each individual was then investigated and compared. That is as it should be. To assess the likelihood of harm having been caused by A or B or C, one needs as much information as possible about each of them in order to make the decision about which if any of them should be placed in the pool. So, where there is an imbalance of information about some individuals in comparison to others, particular care may need to be taken to ensure that the imbalance does not distort the assessment of the possibilities. The same may be said where the list of individuals has been whittled down to a pool of

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one named individual alongside others who are not similarly identified. This may be unlikely, but the present case shows that it is not impossible. Here it must be shown that there genuinely is a pool of perpetrators and not just a pool of one by default.

Lastly, as part of the court's normal case-management responsibilities it should at the outset of proceedings of this kind ensure (i) that a list of possible perpetrators is created, and (ii) that directions are given for the local authority to gather (either itself or through other agencies) all relevant information about and from those individuals, and (iii) that those against whom allegations are made are given the opportunity to be heard. By these means some of the complications that can arise in these difficult cases may be avoided.'

I would suggest that the approach advocated above should be noted and followed in every such case; no doubt many of us have experience of cases in which there is a 'pool' finding sought by a local authority and where there has been inadequate thought afforded to the evidence necessary in order to support the local authority's case in this respect.

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Claims for Damages for unlawful deprivation of liberty and breach of a care home resident's Article 5 European Convention Human Rights – *Tip of the iceberg…*

By Adrian Francis

This is still a pressing and large scale issue for local authorities up and down the country. It could be said that whilst the anticipated avalanche of claims against councils by care home residents who are unlawfully deprived of their liberty has yet to begin. This is in all likelihood a delay as opposed to a reprieve for local authorities. It should also be noted that the much awaited replacement for the DOLS i.e. Liberty Protection Safeguards due to arrive in 2020 will not prevent claims being issued either. The delay to date has largely been due to funding issues with any claims, notably the imposition of the statutory charge upon any successful claim brought by a publicly funded claimant. In the event of a successful damages claim the statutory charge converts any legal aid received into a loan. The result being that a claimant could end up recovering damages from one public body such as a local authority only to have to repay these in legal costs to another i.e. the Legal Aid Agency.

This issue now appears to be settling in the event that any breach of Article 5 ECHR claim is brought separately to any other litigation in the Court of Protection. This would result in any statutory charge only applying to the publicly funded legal costs of any claim for damages as opposed to any prior litigation. Such an approach should allow the claimant to keep the bulk of any damages awarded. Claims can of course also be brought by way of a conditional fee arrangement ("CFA"). As is the common method of funding claims for damages for personal injury.

By way of an illustration as to the size of this problem for local authorities there are nearly half a million adults now residing in care in England & Wales. A great many of whom are deprived of their liberty in accordance with the well known *acid test* as per the Supreme Court's judgment in *Cheshire West* back in 2014.

This article will seek to explain the financial risk to local authorities of not seeking the necessary authorisation under the statutory DOLS regime when so required. Further the circumstances when a claim for damages can be brought in the event a care home resident is unlawfully deprived of their liberty.

<u>3,000 care home residents unlawfully deprived of their liberty in a single local authority's area</u>

In Staffordshire, the Local Government and Social Care Ombudsman has recently published a report reference no (18 004 809) on this issue. This report details how Staffordshire Council made a decision which led to it not completing the DOLS authorisation process for over 3,000 care or nursing home residents who had been referred for a DOLS authorisation. These care home residents were accordingly unlawfully deprived of their liberty, without recourse to the correct legal framework to ascertain whether this was in their best interests or not.

The facts being that in 2016 at an informal council cabinet meeting Staffordshire Council decided not to carry out assessments of low and medium priority applications for any DOLS authorisations it received from care homes. The council instead preferring to create its own priority system. This decision was taken due to the local authority's financial position. High priority requests for a standard authorisation under the DOLS usually proceeded in accordance with the mandatory 21 day timescale. Whilst high priority requests for an authorisation were routinely completed such a decision not to carry out assessments for low and medium priority applications may well prove to be

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Continued…

shortsighted. The ombudsman commented in its report reference number (18 004 809) that:

"It is possible that some of the people stuck in the backlog for years should never have been deprived of their liberty,"

The ombudsman specifically having found that the council had failed to comply with the relevant legislation and statutory guidance namely the Mental Capacity Act 2005 and DOLS Code of Practice. The ombudsman went on to say in its report that:

"Without an authorisation in place, the people that are the subject of these applications are being unlawfully deprived of their liberty,"

"Because the council does not assess the majority of incoming requests, we simply do not know whether there are people waiting in the backlog who are wrongly being deprived of liberty when they actually have capacity or when less restrictive options are available."

The ombudsman went on to recommend that Staffordshire should produce an action plan as to how it will deal with all further requests for a DOLS authorisation in addition to this backlog of unassessed requests for a DOLS authorisation.

The Council has since sought to defend the policy by saying:

"…No-one has complained about the policy of prioritisation since its introduction, no individual has suffered injustice and no-one's life or health has been put risk…."

Notwithstanding the inherent difficulties with the current DOLS statutory regime and ADASS guidance for dealing and prioritising requests for DOLS authorisations. In addition whilst being sympathetic to the current financial position of most local authorities. I for one find the comment that no one has suffered an i*njustice* with such a policy difficult to fathom. As over 3,000 persons were unlawfully deprived of their liberty many of whom may well have been able to live in less restrictive environments some of whom may even have been able to return to their homes and families.

In addition there is arguably a failure in such a policy such as Staffordshire's to protect the financial position of the local authority. As by unlawfully depriving a person of their liberty which results in a substantive breach of a care or nursing home resident's Article 5 European Convention Human Rights. It is possible that a claim for significant damages can be brought.

<u>How to claim for an unlawful deprivation of liberty & substantive breach of a care home resident's Article 5 ECHR</u>

Any breach of a person's Articles 5 Convention Rights can result in damages being payable with any claim brought under the relevant domestic legislation i.e. Human Rights Act 1998. Any claim needs to be brought within one year as per section 7(5) of the said legislation.

Section 8(3)(4) which permits damages to be awarded under the Human Rights Act 1998 states:

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

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(b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

Local Authorities will often seek to assert that any breach of a person's Article 5 Convention Rights is merely a technical or procedural breach and accordingly will only result in nominal damages.

Bostridge Defence

In the case of *Bostridge v Oxleas NHS Foundation Trust [2015] EWCA Civ 79*, the Court of Appeal considered whether only nominal damages should be awarded for a technical breach of Article 5 ECHR in the context of an unlawful detention. This case followed Mr Bostridge's detention under section 3 Mental Health Act 1983 in July 2008 and his discharge under a Community Treatment Order ("CTO"). Mr Bostridge was subsequently re-admitted under the Mental Health Act ("MHA") and it transpired in November 2010 that errors in the process in April 2009, at the time the CTO was put in place, resulted in the subsequent detentions being unlawful.

The parties were in agreement that had the procedural errors not occurred that the claimant Mr Bostridge would still have been placed on a CTO and subsequently re-admitted under the MHA. The claimant would have received the same treatment and care in any event and would have been subject to the same levels of distress which he suffered. The Judge at first instance held that in these circumstances the claimant Mr Bosridge was entitled only to nominal damages and a figure of £1 was suggested by the defendant.

The claimant subsequently appealed on the grounds that previous case law mandated that nominal damages were only appropriate when the defendant itself not any third party could and would anyway have detained the claimant under a lawful power had the illegality come to light. In this instance it was purported by the claimant that the defendant NHS Trust was relying on the actions of third parties namely two clinicians, the AMHP and nearest relative. The Court of Appeal rejected this argument with the leading judgment handed down by Vos LJ who held that:

20… [t]he tort of false imprisonment is compensated in the same way as other torts such as to put the claimant in the position he would have been in had the tort not been committed. Thus if the position is that, had the tort not been committed, the claimant would in fact have been in exactly the same position, he will not normally be entitled to anything more than nominal damages. The identity of the route by which this same result might have been achieved is unlikely to be significant

[…]

23.As I have said, the principle dictates that the

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court, in assessing damages for the tort of false imprisonment, will seek to put the claimant in the position he would have been in had the tort not been committed. To do that, the court must ask what would have happened in fact if the tort had not been committed. In each of Lumba and Kambadzi, the answer was obvious. Had the torts of false imprisonment not been committed, the Secretary of State would have applied the published policy or undertaken the appropriate custody reviews. In both cases, the claimants would still have been detained. They sustained no compensatable loss. The majority of the Supreme Court determined, in addition, that vindicatory damages were not available in these circumstances (see paragraph 74 of Baroness Hale in Kambadzi).”

[…]

30 … it was also not suggested with any force that the judge ought to have made a greater than nominal award under section 6 of the Human Rights Act 1998 by way of "just satisfaction" for a breach of article 5 of the Convention. In my judgment, once it is clear that the appellant sustained no loss, because he would in fact have been lawfully detained anyway whether or not the breach had occurred, it is hard to see how an award of anything more than nominal damages could be justified, whether as compensatory damages or as a just satisfaction. For this reason, I do not think that the damages ought to have been more than nominal either to reflect the loss of liberty or the loss of the procedural and substantive protections afforded by a lawful detention….

No distinction was required where the power to detain is held by third parties, as the Claimant had asserted. Further even in the event that the technical breaches had not occurred when the claimant was discharged on the CTO he would have been detained in any event and had suffered no real loss therefore obviating the requirement to award substantial damages.

The Court of Appeal having considered the case in the context of the tort of false imprisonment. The law of tort seeks to put the claimant in the position he would have been in had the tort (in this case, false imprisonment), not been committed.

<u>What happens in the event that a care or nursing home resident could have resided elsewhere had they not be unlawfully deprived of their liberty?</u>

Not following the requirements of the Mental Capacity Act 2005 can amount to false imprisonment giving rise to damages. As occurred in the recently decided case of *Dr Esegbona (on behalf of the estate of Christina Esegbona, deceased) -v- King’s College Hospital NHS Foundation Trust [2019] EWHC 77 (QB*). In this case the court held that failing to fully assess the patient’s capacity, hold best interest meetings and issue a Court of Protection application to resolve disputed matters resulted in Mrs Esegbona (deceased) suffering loss and accordingly the estate should receive substantive damages.

In this matter Mrs Esegbona had fluctuating and deteriorating capacity having also had a tracheostomy and wished to be discharged home but was instead discharged to a nursing home. The discharge took place without a full best interest analysis having been completed and with only one day’s notice of the discharge being provided to her family. Sadly Mrs Esegbona

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passed away only a week or so after being discharged to the nursing home having removed her tracheostomy tube. A claim in negligence and false imprisonment was subsequently brought on behalf of Mrs Esegnbona's estate against the King's College Hospital NHS Foundation Trust.

HHJ Coe QC held that the defendant Trust had been negligent in not informing the nursing home that Mrs Esegbona ("E") had wished to remove her tracheostomy tube once she had been discharged. E was unhappy with the tracheostomy tube and had removed this previously whilst in hospital. In the event that the nursing home had been informed fully as to E's desire to remove the said tube she would it was held have been more closely monitored.

The Court determined that E had been falsely imprisoned in the hospital and nursing home for a total of 119 days. Further when assessing damages for false imprisonment, HHJ Coe QC soundly rejected the Trusts argument that this was akin to *Bostridge v Oxleas NHS Foundation Trust [2015] EWCA Civ 79*. There should have been an urgent and comprehensive assessment of capacity which resulted in an application to the Court of Protection as HHJ Coe QC held at paragraphs 214-215 of the judgement that:

214. The defendant not only failed to comply with its duties but specifically overrode the statutory process.

215. I accept the evidence of Lynne Phair to the effect that from no later than early February, when Mrs Esegbona was saying she wanted to go home until the date of her discharge there was no proper and ongoing capacity assessment, best interests meetings or as became necessary, referral to the Court of Protection.

216. I agree that the notes from about May onwards show an "appalling" disregard for the Mrs Esegbona and her family's rights, let alone their wishes and feelings.

HHJ Coe QC made an award of £130 per day amounting to £15.470 for 119 days and £3,500 for the pain and suffering caused in the manner of E's death. In addition a further award for aggravated damages in a sum of £5,000 was made for excluding the family from the decision making process.

This case highlights the reasons that commissioning public bodies should ensure that they fully comply with the Mental Capacity Act 2005 in terms of completing capacity assessments, best interest decision-making and authorising any unlawful deprivation of liberty. Further that they should not delay in making the necessary application to the Court of Protection when there is a fundamental dispute as to a person ("P")'s place of care and residence. As in such circumstances failure to do so could give rise to a claim for false imprisonment with damages awarded at a rate of over £4,000 per month.

<u>Limitation period for claims for breach of P's Article 5 ECHR</u>

Claims for the tort of false imprisonment for a breach of Article 5 ECHR have the advantage to any claimant of a much longer limitation period of 6 years. The standard 1 year limitation period applying to all claims brought under the Human Rights Act 1998. The 1 year limitation period

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applies even when a claimant lacks litigation capacity as was confirmed in *AP v Tameside MBC [2017] EWHC 65 (QB)*. In this case Tameside Council successfully defended a large six figure claim for an unlawful deprivation of liberty on the grounds it was brought some 18 months out of time.

A successful claim for an unlawful deprivation of liberty & substantive breach of Article 5 ECHR can result in local authorities being ordered to pay over £1,000 a week in damages

This is now clearly a possible outcome of any successful claim for a substantive breach of a person's Article 5 Convention Rights. The basis of which was confirmed in the decision of *Essex Council v RF & Ors [2015] EWCOP 1*. The facts of the case were that the subject of the proceedings ("P") was 91 years of age and a World War 2 veteran having served with the RAF during the war. P was known as a kind hearted and generous man who often helped others financially. P whilst residing at home had dementia with difficulty in mobilising, delirium and a kidney injury caused by dehydration. Essex County Council removed P from his home in May 2013 and subsequently placed him in a locked nursing home. It was not certain that P lacked capacity at the time that he was removed from his home against his wishes and placed in care. This placement having been made without any order from the Court of Protection authorising such a move. In addition there were no DOLS authorisation in place with P having been unlawfully deprived of his liberty for just over a year. District Judge Mort having observed at paragraphs 72 & 73 of the court's judgement that:

72. Procedural breaches occur where the authority's failure to secure authorisation for the deprivation of liberty or provide a review of the detention would have made no difference to P's living or care arrangements.

73.Substantive breaches occur where P would not have been detained if the authority had acted lawfully. Such breaches have more serious consequences for P.

This was clearly a substantive breach as P would have continued to live at home in accordance with his wishes were it not for his unlawful removal by the local authority.

Calculating the award of damages payable by the local authority to P for a substantive breach of Article 5 ECHR

District Judge Mort took into account the award of damages of £35,000 made for a period of 12 months unlawful deprivation of liberty in *London Borough of Hillingdon v Neary [2011] EWHC 3522 (COP)*. This being the starting point for an award of damages for depriving a person of their liberty for a year in Judge Mort's view. He then went on to approve a settlement of £60,000 in damages for P.

District Judge Mort indicating that a rate of £3,000 to £4,000 per month was the applicable rate of damages for an incapacitated person who was unlawfully deprived of their liberty.

This settlement was approved on the basis that the local authority in this case also agreed:

(i) a declaration that it had unlawfully deprived P of his liberty for a period of approximately 13 months;
(ii) to reimburse any care fees payable by P to the care home in which he was detained

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(iii) for the period of his detention (around £25,000);

(iv) to exclude P's damages award from means testing, to ensure that the award would not mean that P would be required to pay a greater contribution to his community care costs now that he was at home as a result of the award;

(v) and to pay all P's costs.

Liability of the Local Authority not limited to damages alone

Accordingly the liability of the local authority in the event of a successful claim for a substantive breach of a person's unlawful deprivation of liberty and breach of Article 5 ECHR is likely to consist of

(i) Damages payable at a rate of £3,000 to £4,000 for each month a person is unlawfully deprived of their liberty

(ii) Reimbursement of care home fees for any self funders - likely to be £3000 a month +

(iii) In addition any legal costs for P

An estimate would therefore put the total financial exposure of any local authority to a successful claim for a substantive breach of a self funding care home resident's Article 5 ECHR at over £10,000 a month. Claims can be brought in the County Court, High Court or Court of Protection.

A clear reason in itself for local authorities to ensure that authorisations are accordingly obtained for all those person's in care who are deprived of their liberty.

By next October any authorisation will need to be granted pursuant to the Liberty Protection Safeguards but for now the DOLS are alive and well and all authorisations should be sought as and when required to avoid any costly claims.

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