

# Mental Health Law Online

## Monthly Update, April 2012

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### Introduction

In addition to being available on the Mental Health Law Online website, each month's legal update is available in PDF format for printing, and in Kindle format for e-book reading. This update is based on the content at [http://www.mentalhealthlaw.co.uk/April\\_2012\\_update](http://www.mentalhealthlaw.co.uk/April_2012_update) This document is a snapshot of the online page – the online page will be automatically updated when case and legislation pages are updated.

### Case summaries

- [R v B \(2012\) EWCA Crim 770, \(2012\) MHLO 42](#) — *The appellant, an autistic young man who was prosecuted for voyeurism for looking into a swimming pool cubicle, was found by the judge to be unfit to be tried and by the jury to have committed the act charged against him. Voyeurism consists of, for the purpose of obtaining sexual gratification, observing another person doing a private act, knowing that the other person does not consent to being observed for sexual gratification (s67 [Sexual](#)*

[Offences Act 2003](#)). (1) Contrary to the judge's direction, the 'act' includes 'for the purpose of obtaining sexual gratification' (only the knowledge was part of the state of mind); hence, the jury's determination was unsafe and the appeal would be allowed. (2) The question of whether the jury should have had expert evidence on whether the appellant had committed the act was (although treated with some doubt) left open for argument in a future case. (3) A Sexual Offences Prevention Order could only be made 'for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant'; (obiter) there was no proper basis for making this order. (4) Because of a gap in the legislation, there was no power to order a retrial, even if the court had wanted to: s16(4) [Criminal Appeal Act 1968](#) requires the court, when allowing such an appeal, to quash the finding and direct that a verdict of acquittal be recorded.

- [Re JC; D v JC \(2012\) MHLO 35 \(COP\)](#) — JC's daughter D, who had been adopted out, sought a statutory will giving her an equal share JC's £3.5m estate alongside his other children (A, B and C) who had not been adopted. (1) The criterion now for making statutory wills on behalf of adults who lack testamentary capacity is what is in their best interests rather than substituted judgment; however, best interests contains a strong element of substituted judgment. (2) The value of the 'balance sheet' approach is of doubtful effectiveness in statutory will applications, and in this case it was a struggle to identify benefits or disbenefits, but usually there is at least one factor of 'magnetic importance'. (3) In this case, the idea of being remembered with affection for having done the 'right thing' was of no assistance: 'JC has an appalling track record. He has spent his entire lifetime doing precisely "the wrong thing" in his relationships with others, and his malevolence is such that he would rejoice at being remembered by them with disaffection.' (4) A substituted judgment approach would lead to JC dying intestate, but it was in his best interests to make a will in order to appoint independent professional executors who are familiar with the background and can provide continuity in the administration of his estate before and after his death. (5) JC had poor relationships with his other children, but none at all with D: this factor was of 'magnetic importance' so the statutory will would be in favour of A, B and C only. (6) A, B and C would be allowed to decide the devolution of their shares of the estate if any of them predeceased JC, as it was unlikely that they would want their shares to go to each other. (7) The normal rule on costs (that in property and affairs cases the costs be paid by P) was not departed from. Transcript provided by Barbara Rich of 5 Stone Buildings
- [R \(HA \(Nigeria\)\) v SSHD \(2012\) EWHC 979 \(Admin\), \(2012\) MHLO 41](#) — (1) The claimant's immigration detention (firstly 1/5/10-5/7/10, then 5/11/10-15/12/10) had been unlawful; (2) the time it took to transfer him to hospital (i.e. 1/5/10-5/7/10) was manifestly unreasonable and unlawful; (3) the policy introduced on 26/8/10 in relation to detention of people with mental illness was unlawful in breach of the defendant's duties under s71 Race Relations Act 1976 and s49A [Disability Discrimination Act 1995](#). (4) The circumstances of the claimant's detention breached [Article 3](#) during both periods.
- [Dunhill v Burgin \(2012\) EWCA Civ 397, \(2012\) MHLO 33](#) — (1) In deciding whether the claimant had capacity to settle a claim for £12,500 (at hearing it would have been worth at least £800,000) the question was not whether she had capacity to enter into that settlement but whether she had capacity to litigate. (2) On the facts, she had lacked capacity, and the compromise would never have been approved by the court.

- [R v Ahmed \(2012\) EWCA Crim 708, \(2012\) MHLO 40](#) — *The appellant was found unfit to plead, spent 35 years subject to s37/41, pleaded guilty to diminished responsibility manslaughter, was given an IPP sentence with a 63-month tariff, and was transferred back to hospital under s47/49. (1) The appropriate minimum term was 39 months. (2) The appeal was adjourned to obtain medical evidence and for future consideration of whether a hospital order ought to have been imposed.*
- [R \(Sutton\) v Calderdale Council \(2012\) EWHC 637 \(Admin\), \(2012\) MHLO 39](#) — *Costs judgment in mental health/community care judicial review: no order for costs.*
- [R v Levey \(2012\) EWCA Crim 657, \(2012\) MHLO 34](#) — *Tariff in life sentence for murder reduced from 24 years to 22 years, partly because the sentencing judge made insufficient allowance for the borderline personality disorder which played a significant part in the killing.*
- [Re Drew \(2012\) MHLO 45 \(LPA\)](#) — *The donor of a property and financial affairs LPA included the following guidance: "If my father is still alive then my trustees should continue with my contributions to his care (my records make clear from which account) and assume my role in financial responsibility for him." [The reference to "trustees" should have been to "attorneys".] The court severed the provision on the ground that it contravened [section 12 of the MCA 2005](#). The order recited that the case of [Bloom](#) was distinguishable because in the present case the donor had no common law duty to make provision for her father's maintenance. [OPG summary - LPA case.]*
- [Re Bloom \(2012\) MHLO 44 \(LPA\)](#) — *The donor of a property and financial affairs LPA included the following direction: "I direct my attorneys to use such of my capital and income as they shall at their discretion deem necessary to make provision for my wife's maintenance and benefit." The Public Guardian asked the court to sever either the entire direction or just the words "and benefit". The court severed only the words "and benefit" on the ground that they contravened section 12 of the MCA 2005. The order recited that the donor had a common law duty to make provision for his wife's maintenance. [OPG summary - LPA case.]*
- [Re Batchelor \(2012\) MHLO 43 \(LPA\)](#) — *The donor of a property and financial affairs LPA included the following provision: "I would ask my attorneys to have regard to any separate guidance note which I may make from time to time and place with this Lasting Power of Attorney." On the application of the Public Guardian the provision was severed on the ground that it contravened the requirements of regulation 9 of the [Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007](#), which do not permit additions to be made to an LPA. [OPG summary - LPA case.]*
- [L v Clinical Director of St Patrick's University Hospital \(2012\) IEHC 15, \(2012\) MHLO 36](#) — *Unsuccessful claim for unlawful detention by 'voluntary patient' who was not allowed to leave hospital ward.*

## Case transcripts

- [MM \(Zimbabwe\) v SSHD \(2012\) EWCA Civ 279, \(2012\) MHLO 38](#) — *Immigration case. "In my view, the Upper Tribunal was diverted, by reason of the arguments advanced, from an important aspect of the case, namely, whether it was disproportionate to deport the appellant on the grounds of his previous convictions in the light of the evidence of the prognosis and the relationship between his mental*

illness and his offending. The judge never seems to have reached any clear conclusion based on an assessment of the risk of re-offending despite continued medication and support from his family here. If the correct view is that there is no realistic risk of further offending and the prognosis is excellent then it is difficult to see how it could be proportionate to deport this appellant. He has been in this country for 12 years and he has nothing to go back to save his grandmother and great-aunt, if they are still alive." [Summary required.]

- [Republic of South Africa v Dewani \(2012\) EWHC 842 \(Admin\), \(2012\) MHLO 37](#) — "The appellant appeals against the decision of the Chief Magistrate, Senior District Judge Riddle, dismissing all the grounds on which those acting for him sought to oppose his extradition to South Africa to face the charge of murdering his wife and other related charges. Although we were provided with 80 authorities, the issues are specific to the appellant's mental state and the prison conditions in South Africa which would be applicable to him if extradited." [Summary required.]
- [Re JO'B; HSE v JO'B \(2011\) IEHC 73](#) — "In these proceedings the Health Service Executive ('H.S.E.') seeks declarations that Mr. J. O'B. is a person who lacks capacity to make decisions in relation to his treatment care and welfare; that Mr. O'B. is a person in need of an appropriate and continuous regime of clinical, medical and nursing treatment in an environment of therapeutic security, this being in his best welfare and interest; that the clinical, medical, nursing, therapeutic security, welfare services and treatment at the Central Mental Hospital (C.M.H.), Dundrum, are appropriate to his needs; and for an order directing the H.S.E. to detain Mr. O'B in the C.M.H., as well as seeking various ancillary reliefs. What makes this application very unusual, if indeed not entirely unique, is that it is agreed on all sides that Mr. O'B. is not suffering from a mental illness or mental disorder as that term is defined in s. 3 of the Mental Health Act 2001, and accordingly it is agreed that the provisions of that Act are of no application." [Summary required.]
- [Han v President of the Circuit Court \(2008\) IEHC 160](#) — "In the relatively recent past, the applicant was involuntarily committed to a mental hospital under the Mental Health Act 2001. The detention was reviewed by a Mental Health Tribunal and affirmed as correct. The applicant then appealed to the Circuit Court. Before he could process that appeal, he became well and was discharged from the mental hospital. Deery J, the President of the Circuit Court, struck the matter out from the hearing list as, the applicant then being well, he considered the matter to be moot. The applicant now challenges this decision."
- Transcript and neutral citation now available: [Coombs v Dorset NHS PCT \(2012\) EWHC 521 \(QB\), \(2012\) MHLO 13](#) — *Whether the claimant, who had sustained a serious head injury while a detained patient, should be permitted to fund his future care. (1) The defendant argued that (a) a detained patient could not choose to pay for his treatment, particularly because the RC chose where and how he was treated; (b) allowing payment would create a contract, contrary to the purpose of the MHA to take care and treatment out of patients' hands; (c) there was no significant difference compared with prisoners, whose expenses are met by the government under s51 Prison Act 1952; (d) while the statute did not prohibit payment, it would be contrary to public policy to allow a patient to use his own funds. (2) The claimant argued that (a) there was no reason why a detained patient should not be able to pay if he wishes; (b) while the patient could not choose where or how he was treated, he should be able to top-up payments if he preferred a placement for which the funding authority were*

*unwilling to pay; (c) denying the right to pay would breach Article 5. (3) Held: (a) the relationship between care providers and a detained patient was different to that with ordinary patients, as the RC has the right to decide on appropriate placement and treatment, but if the patient could pay for a particular appropriate placement or treatment there was nothing to prevent this; (b) prisoners and detained patients should not be regarded in the same way: with patients there was no punitive element; patients are not detained for finite periods; the purpose and effect of s51 Prison Act 1952 had no application to patients; (c) Article 5 relates to lawfulness of detention, not conditions of detention (which concerned Article 3); (d) public policy considerations amounted to mere repetition of other arguments; (e) a detained patient is not prevented from paying for his own care or treatment. The defendant was granted permission to appeal. [Based on Lawtel summary.]*

## Legislation

- [Health and Social Care Act 2012](#) — This Act will amend the Mental Health Act 1983 so that the 'certificate requirement' for the treatment of CTO patients who have capacity and consent can be met by the RC filling in a Part 4A certificate rather than requiring a SOAD to do so. It makes various other changes which are summarised on this page. The provisions which affect the MHA will come into force on such day as the Secretary of State may by order appoint.
- [Mental Health \(Hospital, Guardianship and Treatment\) \(England\) \(Amendment\) Regulations 2012](#) — These regulations amend the [Mental Health \(Hospital, Guardianship and Treatment\) \(England\) Regulations 2008](#) by introducing a new form snappily entitled 'Form CTO12 - Regulation 28(1A) - Mental Health Act 1983 section 64C(4A) - certificate that community patient has capacity to consent (or if under 16 is competent to consent) to treatment and has done so (Part 4A consent certificate)'. This form will be for the Responsible Clinician to fill in, when the requirement for a SOAD certificate in these circumstances is removed by s299 [Health and Social Care Act 2012](#). In force immediately after that section comes into force (on such day as the Secretary of State may by order appoint).

## Mental Health Tribunal

- HMCTS, 'Mental Health Tribunal Stakeholder Bulletin April 2012' (17/4/12). The following are the headings: Contacting the Tribunal; Reports Processing Team; Section 2 Cases; Scanned Reports; Password protection; Notification to the Tribunal of Patient Withdrawals and RC Discharges; HQ2 Questionnaire; FTT Mental Health Policy update; Clerking; Facilities for the Hearing impaired; Olympics and Paralympics 2012 and the potential impact; Relist Team; Customer Survey; Feedback. In relation to the new forms: **Form CNL2** ('Case Notification Letter 2'), which from May 2012 will be sent to the representative with the RC's report, demands that the representative complete **Form HQ2** ('Hearing Questionnaire 2'). HQ2 asks the following questions: (1) What is the Patient seeking from the tribunal, and what are the principal areas of dispute? (2) Do you intend to call an independent expert? If so, please give details. (3) What is your hearing time estimate? (4) Would this case benefit from pre-hearing review by a tribunal judge? If so, please say why (e.g. change of status under the Act, or recent hospital transfer). (5) Are there any other matters that you feel that the panel should know in order to dispose of this matter justly, fairly and without delay? (6) Does the patient need an interpreter? If so, please

give details of language and dialect. See [Mental Health Tribunal#Tribunal member and stakeholder email bulletin](#)

- New Practice Direction on reports. [Practice Direction: First-tier Tribunal Health Education and Social Care Chamber: Statements and Reports in Mental Health Cases](#) — This Practice Direction relates to the contents of reports required for mental health cases. It supersedes [Practice Direction: Health Education and Social Care Chamber: Mental Health Cases](#) and reflects changes made by the [Tribunal Procedure \(Amendment\) Rules 2012](#). In force 6/4/12.
- HMCTS, 'T128: Options for your Tribunal Referral Hearing: Community Patients' (April 2012). This is the form which is sent to CTO patients inviting them to cancel their tribunal referral hearings. See [Tribunal Procedure \(Amendment\) Rules 2012](#)
- Updated guidance. HMCTS, 'Room Specification Recommendations for Tribunal Hearings' (March 2012). See [Mental Health Tribunal](#)
- [Guidance Booklet: Reports for Mental Health Tribunals](#) — This booklet contains and expands on [Practice Direction: Health Education and Social Care Chamber: Mental Health Cases](#). It was first published on 7/9/10, and was updated on 4/4/12 to reflect changes made by the [Tribunal Procedure \(Amendment\) Rules 2012](#).
- Mark Hinchliffe, 'Important Notice' (29/3/12). This document describes the changes made by the [Tribunal Procedure \(Amendment\) Rules 2012](#) on 6/4/12. In relation to the tribunal's requirement, in CTO reference cases, for evidence from the RC about the patient's capacity to decide not to attend or be represented, it states: 'We do not see that this should present a difficulty or a conflict of interest. The Responsible Clinician, as an expert witness, has no "interest" one way or the other and, in any event, has a responsibility to assess capacity in many situations...' See [Mental Health Tribunal#Messages from Deputy Chamber President](#)

## Court of Protection

- New COP Practice Direction. [COP Practice Direction: Preparation of Bundles](#) — The draft Practice Direction has been amended and is now *Practice Direction 13B: Court Bundles*. It applies to all Court of Protection hearings from 1/5/12. See [Court of Protection Practice Directions](#) for others.

## Care Quality Commission

- CQC, 'CQC inspector dismissed for gross misconduct' (27/4/12). 'A CQC inspector has been dismissed for gross misconduct after an internal investigation revealed that the impartiality of their regulatory judgements had been seriously compromised. This came to light as a result of whistle-blowing information to the CQC. No additional detail can be provided as CQC has now referred this matter to the police.' See [CQC](#)

## Legal Services Commission

- The LSC is consulting on their proposal to discontinue funding for the Specialist Support Service, as a result of conceding a judicial review of their decision to do so. The consultation runs until 11/5/12. The specialist support service for mental health is run by Scott Moncrieff Solicitors, and is available from Monday to Friday, 10am to 4pm, on 0844 800 3364. Related articles: Legal Aid Handbook Blog, 'LSC concede

judicial review; specialist support reprieved' (1/3/12); Legal Aid Handbook Blog, 'Weekly round up' (1/4/12). See [Consultations#Legal Services Commission](#)

- LSC, 'New Keycard 48 to be introduced from 9 April' (5/4/12). Keycard 48 reflects an increase in the standard dependants' allowances assessed for a partner or child living within the client's household; the new rates are applicable to new applications or further assessments made on or after 9 April 2012. Eligibility limits are unchanged. See [Legal Aid News](#)

## Newsletters

- 39 Essex Street, 'Court of Protection Newsletter' (issue 20, April 2012). The cases mentioned in this issue are: Austin v UK 39692/09 [2012] ECHR 459, [2012] MHLO 22, DD v Lithuania 13469/06 [2012] ECHR 254, [2012] MHLO 29, DL v A Local Authority [2012] EWCA Civ 253, [2012] MHLO 32, Long v Rodman [2012] EWHC 347 (Ch), [2012] MHLO 12, ZH v Commissioner of Police for the Metropolis [2012] EWHC 604 (QB), [2012] MHLO 25, Seaton v Seddon [2012] EWHC 735 (Ch), [2012] MHLO 28, Coombs v Dorset NHS PCT [2012] EWHC 521 (QB), [2012] MHLO 13. Also mentioned are: CQC report on DOLS; Listing Deprivation of Liberty Safeguarding cases; COP Cases Online and all previous newsletters in one PDF document. See [39 Essex Street COP Newsletter](#)
- Mind, 'Legal enewsletter' (Issue 11, April 2012). This newsletter contains: (1) Articles: (a) Making best interests decisions under the Mental Capacity Act 2005, (b) Listening to experience - Mind's report into acute and crisis mental healthcare, (c) The right to life under Article 2 of the ECHR, (d) The right to independent living - is it working?; (2) Case reports: (a) SSJ v RB (2011) EWCA Civ 1608, (b) Cheshire West and Chester Council v P (2011) EWCA Civ 1257, (c) O'Cathail v Transport for London (2012) EWCA Civ 92; (3) Updates: (a) Discrimination news, (b) Section 117 MHA 1983 and the Health and Social Care Bill 2012, (c) Changes to mental health tribunal rules and procedure, (d) Care Quality Commission, (e) Chartered Institute of Personnel and Development (CIPD) Toolkit, (e) Proposed DVLA changes: fitness to drive, (f) Court of Protection. See [Mind \(Charity\)](#)

## Articles

- Irwin Mitchell Solicitors, 'Mother Proved Right As Son Freed From Padded Room Hell Makes Progress' (29/3/12). 'Court Anonymity Order Lifted Naming Wigan Borough Council As Local Authority Which Locked Up Her Autistic Son.' See [Re C: C v Wigan Borough Council \(2011\) EWHC 1539 \(Admin\)](#)
- Legal Action articles on the required content of social circumstances reports and responsible authority statements, reproduced by kind permission: (1) Christopher Curran, Malcolm Golightley and Phil Fennell, 'Social circumstances reports for mental health tribunals - Part 1' (Legal Action, June 2010); (2) Christopher Curran, Malcolm Golightley and Phil Fennell, 'Social circumstances reports for mental health tribunals - Part 1' (Legal Action, July 2010); (3) Christopher Curran, Phil Fennell and Simon Burrows, 'Responsible authority statements for mental health tribunals' (Legal Action, March 2012). See [Tribunal Rules](#)
- David Hewitt, 'Purpose alone can no longer determine if there is a deprivation of liberty' (Solicitors Journal, 16/4/12). This article argues that the reference in the Court

of Appeal decision in Cheshire West to 'purpose' as being relevant to the objective element of deprivation of liberty is not supported by the subsequent ECtHR decision in Austin. See [Cheshire West and Chester Council v P \(2011\) EWCA Civ 1257](#)

## Events

- The Mental Health Lawyers Association will be running their successful two-day course for membership of the Law Society's Mental Health Accreditation Scheme (formerly the MHRT panel) in Leeds on Monday 18/6/12 and Tuesday 19/6/12. Price: £300 (members); £390 (non-members); £250 (for third and subsequent members in a group). CPD: 12 SRA-accredited hours. See MHLA website for further details and booking form. See [Events](#)

## Jobs

- Turning Point, a health and social care charity, has an opportunity for a part-time Mental Health Act Administrator (22.5 hours) at a new 28-person Independent Hospital in Mastin Moor, Chesterfield. The closing date for applications is 10/5/12. See [Turning Point website](#) for details and to apply. See [Jobs](#)

## Other

- Westminster Hall debate on Litigation Friends (HC Deb, 21 March 2012, c244WH). See [Official Solicitor](#)

## Website

- Mental Health Law Online was six years old on 19/4/12! Many thanks to all readers, contributors and subscribers.
- On 30/4/12 Mental Health Law Online contained [1175 categorised cases](#)
- The April 2012 CPD questionnaire is now online. Obtain 12 accredited CPD points for £60. See [CPD scheme](#)
- Please subscribe to Mental Health Law Online's new discussion list. This is separate from the email updates list, which remains unchanged. The discussion list will cover all aspects of mental health law in England and Wales, from the Mental Health Act 1983 and the Mental Health Tribunal, to the Mental Capacity Act 2005 and the Court of Protection. See [Discussion](#)
- Thanks to Barbara Rich of 5 Stone Buildings for the transcript for [Re JC; D v JC \(2012\) MHLO 35 \(COP\)](#)
- The following was asked on a discussion page on 2/4/12 (before the discussion list began). 'Does anyone know: if a CTO inadvertently lapses (i.e. is not renewed by accident) does the original section 3 which the CTO was suspending come back into being? I know if you discharge someone from the CTO that discharges from the section 3. If you revoke the CTO then the Section 3 will come back into being. But if the CTO just lapses does that also mean that the Section 3 that was suspended has lapsed by default as well? I don't know the answer but if anyone does that would be really helpful. Thanks'. The answer is that when the CTO expires the s3 ceases to have effect: see [s20B](#).

- The government have announced that from 1 April 2012, following the Court of Appeal decision in [Cheshire West and Chester Council v P \(2011\) EWCA Civ 1257](#) and the subsequent High Court decision in [Re C; C v Blackburn and Darwen Borough Council \(2011\) EWHC 3321 \(COP\)](#), the entire Mental Health Act 1983 will be repealed. The government spokesman, Avril Poisson, said: “Those subject to the Act lack capacity, as demonstrated by their inability to comply with voluntary inpatient treatment, and they should be treated equally to others who lack capacity. Recent case law on deprivation of liberty has shown that the relevant contrast when assessing ‘relative normality’ is not ‘the ordinary adult going about the kind of life which the able-bodied man or woman on the Clapham omnibus would normally expect to lead’ but rather ‘the kind of lives that people like X would normally expect to lead’ (Cheshire West, para 102). Periods of hospital inpatient treatment are normal, as an inevitable corollary of psychiatric disabilities: during those periods there are no realistic alternatives and no deprivation of liberty within the meaning of [Article 5](#) of the European Convention.” She said that the 29-year-old Act would be abolished with immediate effect because it is no longer fit for purpose, and that the “so-called” deprivation of liberty safeguards would also come under scrutiny. “When I use a word,” she said, in rather a scornful tone, “it means just what I choose it to mean – neither more nor less.” **[Hope you enjoyed the April Fools' Day joke!]**
- You can now receive monthly updates delivered automatically to your Kindle e-reader. See [Kindle updates](#)
- New caselaw category. See [Category:Statutory will cases](#)
- See [April 2012 chronology](#) for this month's changes to the website in date order