

Mental Health Law Online

Monthly Update, January 2012

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Introduction

Starting in January 2012, each month's legal update will be available in hyperlinked PDF format for printing. January's monthly update document is based on the web page at www.mentalhealthlaw.co.uk/January_2012_update. Note that the content of this document will not be updated, whereas the web page will automatically change if a case or legislation summary page changes.

Case summaries

- [DM v Doncaster MBC \(2011\) EWHC 3652 \(Admin\)](#) — *DM sought to avoid the care home fees for her husband FM who was subject to the deprivation of liberty safeguards: the main argument was that the s22 [National Assistance Act 1948](#) charging provision did not apply because the DOLS created a duty to accommodate within the meaning of s21(8). The court held that: (1) the [MCA 2005](#) did not create either a duty or power to accommodate FM; (2) FM fell within the terms of s21 NAA and was not excluded from its scope by the operation of s21(8); (3) s3 [HRA 1998](#) gave no reason to read down s21(8) to reach any other conclusion; (4) FM's accommodation had thus to be paid for by him or on his behalf, in accordance with s22 and regulations made under it; (5) this is not discriminatory upon an application*

of [Article 14](#) read with Article 1 of Protocol 1 (FM was not materially in the same position as those who receive after-care under [s117 MHA](#) and the State would in any event have offered sufficient justification for the result); (6) domestic legislation required this result and it was not suggested that the legislation was incompatible with European obligations.

- [R v Clinton \(2012\) EWCA Crim 2, \(2012\) MHLO 2](#) — In the new 'loss of control' partial defence to murder, which replaces the provocation defence, when determining whether a loss of self-control had a 'qualifying trigger' (as set out in [s55\(3\)](#) and (4) [Coroners and Justice Act 2009](#)) 'the fact that a thing done or said constituted sexual infidelity is to be disregarded' ([s55\(6\)\(c\)](#)). The Court of Appeal held that where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of subsections [55\(3\)](#) and (4), the prohibition in section [55\(6\)\(c\)](#) does not operate to exclude it.
- [Stanev v Bulgaria 36760/06 \(2012\) ECHR 46, \(2012\) MHLO 1](#) — (1) The applicant's placement in a social care home for people with mental disorders and his inability to obtain permission to leave the home led to breaches of [Article 5\(1\)](#), (4) and (5). (2) The living conditions in the home led to breaches of [Article 3](#), and of [Article 13](#) in conjunction with Article 3. (3) The lack of access to a court to seek release from partial guardianship breached [Article 6\(1\)](#). (4) No separate issue arose under [Article 8](#) so it was unnecessary to examine that complaint. (5) Compensation of €15,000 was awarded.
- [Re AH \(Costs\); AH v Hertfordshire Partnership NHS Foundation Trust \(2011\) EWHC 3524 \(COP\)](#) — The relevant respondents were ordered to pay the costs of the nine applicants in this welfare case: (1) half the costs between issue of proceedings and settlement or final hearing, and (2) full costs of the costs application. The judge concluded: 'The conclusion I have reached in this case represents a partial departure from the general rule that there should be no order for costs. It is a case where there has been no bad faith or flagrant misconduct, but there has been substandard practice and a failure by the public bodies to recognise the weakness of their own cases and the strength of the cases against them. In such circumstances they cannot invoke Rule 157 at the expense of others.'
- [Re Tucker \(2011\) COP 9/12/11](#) — The donor appointed one attorney and one replacement attorney and then directed as follows: "My replacement attorney shall only act if my attorney is unable to act by virtue of:- (a) the power to the attorney is revoked by me; or (b) the power is terminated by reason of the death, disclaimer or other incapacity of my attorney to act as my attorney; whichever shall first occur. For the avoidance of doubt my replacement attorney shall act alone if my attorney is not able to act." On the application of the Public Guardian the words "by virtue of:- (a) the power to the attorney is revoked by me; or (b) the power is terminated" were severed because revocation of the attorney's appointment is not one of the events

listed in section 13(6)(a)-(d) of the MCA that trigger the activation of the appointment of a replacement attorney. [OPG summary - LPA case.]

- [Re Evans \(2011\) COP 24/11/11](#) — The donor appointed A (his wife) and B as attorneys, to act jointly and severally, and C as replacement attorney. He then directed as follows: "My replacement attorney will replace both my attorneys and act alone if and when my wife becomes unable or unwilling to carry out her duties as my attorney." On the application of the Public Guardian the direction was severed because the donor was attempting to provide for attorney B to be replaced even though one of the triggering events for his replacement listed in section 13(6)(a)-(d) of the MCA had not occurred. [OPG summary - LPA case.]
- [Re Steven Neary; LB Hillingdon v Steven Neary \(2011\) EWHC 3522 \(COP\)](#) — (1) Each application for costs must be considered on its own merit: the previous cases were illustrative only and provided no guidance on the Rules. (2) The judge departed from the general rule in welfare cases (that each party bears his own costs) as this was not a typical case: Hillingdon's actions were significantly unreasonable in relation to the illegality of its actions, its disorganised decision-making, the lack of a proper best interests assessment, its uncooperative attitude to Stephen's father, its delay in referring the matter to the court (thereby increasing costs), and its attempt to defend its actions to the end, both in court and in the media. (3) Hillingdon were ordered to pay the OS's costs from the date of issue to the conclusion of the main hearing in May 2011 but not (a) costs in relation to the press issue, which raised issues of general public importance, or (b) costs following the main hearing, during which Hillingdon adopted a cooperative stance. (4) The application for indemnity costs was respectable, but an award on the standard basis was sufficient.
- [DP v Hywel DDA Health Board \(2011\) UKUT 381 \(AAC\)](#) — WP's order for his son DP's discharge was barred by the Responsible Clinician; WP was then advised by the responsible authority that he was not the nearest relative, and that therefore his order and the barring report were of no effect; on this basis the Tribunal rejected WP's subsequent application. DP appealed. (1) The judge treated the barring report as having been withdrawn (rather than never having been valid): because there was no report, the Tribunal had no jurisdiction, so it had been correct to reject the application. (2) If the barring report had not been withdrawn, the question would have been whether a nearest-relative application made by a non-nearest-relative can be rejected: this was left undecided (despite the clear wording of [s66](#)).
- [Re VW; NK v VW \(2011\) COP 27/10/10 11744555](#) — NK sought (a) to have his mother VW removed from a care home (where she was detained under a DOLS authorisation) and placed in one more local to him, and consequently (b) to have more frequent contact than permitted by the current DOLS authorisation and (c) to be appointed welfare and financial deputy. He was refused permission to make his applications, because of medical evidence that to move VW would be detrimental to her welfare.

- [Re C; C v Blackburn and Darwen Borough Council \(2011\) EWHC 3321 \(COP\)](#) — *C was subject both to guardianship and the DOLS regime at a care home: (1) he was not ineligible for DOLS; (2) he was not deprived of his liberty, so the authorisation was set aside; (3) the authorisation had been lawful albeit perfunctory; (4) the restrictions were necessary; (5) the COP cannot decide on residence when a guardianship residence requirement remains in effect; (6) even if it could, it would only do so in exceptional circumstances; (7) the local authority was invited to reconsider the appropriateness of guardianship.* [Detailed summary available on case page.]
- [The People \(at the suit of the Director of Public Prosecutions\) v McMahon \(2011\) IECCA 94](#) — *The Southern Irish DPP appealed an 11.5-year sentence and invited the Criminal Court of Appeal to impose a life sentence as a form of preventive detention (akin to the English IPP sentence). The court held: 'The protection of the public is an appropriate factor in the exercise of the sentencing function, but it cannot be extracted from that function to create a self-standing judicially created jurisdiction to impose a form of preventive detention. Whether sentencing courts should have the power to order the detention of individuals deemed to pose an immediate threat to the public, over and beyond any appropriate sentence for the crime committed, is a matter which should be addressed in the first place by detailed legislation by the Oireachtas after appropriate research and debate, and subject to Constitutional and Convention review if appropriate.'*
- Transcript added and summary updated. [Cardiff Council v Peggy Ross \(2011\) COP 28/10/11 12063905](#) — *Cardiff Council used the Deprivation of Liberty Safeguards to prevent an elderly couple going on holiday cruise; the court decided that it was in the respondent's best interests to go on the cruise, and gave permission for ITV Wales to report that decision and broadcast interviews; later the court decided that the respondent herself had capacity to decide whether or not to go.*

Case transcripts

- [Re JDS; Kevin Smyth v JDS \(2012\) COP 19334473 19/1/12, \(2012\) MHLO 4](#) — "This is an application for a gift to be made to the parents of a young man who has been awarded damages for clinical negligence. The purpose of the gift is to reduce the amount of Inheritance Tax that they may have to pay on his death." [Summary to follow.]
- [Re H; A Local Authority v H \(2012\) EWHC 49 \(COP\), \(2012\) MHLO 3](#) — "On 15 December 2011 I made an order declaring H's incapacity in many respects and making best interests declarations as to her future care. In particular I made an order declaring that H lacked capacity to consent to sexual relations and a consequential order to protect her best interests which was very restrictive and undoubtedly amounts to the deprivation of liberty. In those circumstances I reserved my reasons for making

these orders with a view to handing them down without the need for attendance of any party. This I now do." [Summary to follow.]

Legislation

- [Mental Health \(Wales\) Measure 2010 \(Commencement No. 1 and Transitional Provision\) Order 2011](#) — Welsh legislation. In force 3/1/12 and 2/4/12.
- [Mental Health \(Care Co-ordination and Care and Treatment Planning\) \(Wales\) Regulations 2011](#) — 'These Regulations contain provisions about care co-ordination and care and treatment planning for patients using secondary mental health services... They also contain provision about the identification of relevant mental health service providers, and transitional provisions for patients who are already in secondary mental health services at the coming into force date of these Regulations' (extract from Explanatory Note). Made 6/12/11. In force 6/6/12.

Mental Health Tribunal

- Link to current MHT victim policy added. [Practice Guidance on Procedures Concerning Handling Representations from Victims in the First-tier Tribunal \(Mental Health\)](#) — This guidance sets out the procedures for handling representations from victims. In force 1/7/11.

Legal Services Commission

- LSC, 'Civil forms preview - February 2012' (5/1/12). A new CW1&2(MH) form becomes mandatory on 1/2/12. Other changed civil/family forms are: CW1, CW2(IMM), CLSMEANS1 & CK3, CLSAPP3, CLSAPP5, CLSAPP8, CLSAPP8A, CLSCLAIM1A Guidance & CLSCLAIM5A Guidance. Old versions signed and dated on or before 1/2/12 will be accepted until 29/2/12. See [Legal Aid News](#)

Articles

- Martin Beckford, 'Elderly couple forced to go to court over council holiday ban' (Telegraph, 20/1/12). See [Cardiff Council v Peggy Ross \(2011\) COP 28/10/11 12063905](#)
- Antal Szerletics and Tom O'Shea, 'The Deprivation of Liberty Safeguards' (Essex Autonomy Project Briefing, December 2011). See [DOLS#Academic articles](#)
- Jonathan Rayner, 'Judge slams quality of mental health advocacy' (Law Society Gazette, 19/1/12). See [Law Society](#)
- European Court of Human Rights, 'Bulgaria breached human rights of man forced to live for years in inhuman conditions in psychiatric institution' (press release, 17/1/12); Lucy Series, 'Mr Stanev's fine achievement' (The Small Places Blog, 20/1/12); Mental

Disability Advocacy Center, 'Europe's highest human rights court issues landmark disability rights ruling' (17/1/12); Neil Munro, 'Stanev v Bulgaria' (commentary) (Mental Health and Mental Capacity Law Blog, 19/1/12). See [Stanev v Bulgaria 36760/06 \(2012\) ECHR 46, \(2012\) MHLO 1](#)

- Julian Mason et al, 'Compulsion under the Mental Health Act 1983: audit of the quality of medical recommendations' (2012) 36 The Psychiatrist 11 (subscription required). See [RCPsych](#)
- Jerome Taylor, 'Appeals soar after secret courts are opened to public' (Independent, 2/1/12). See [DOLS#Other_links](#)

Newsletters

- 39 Essex Street, 'Court of Protection Newsletter' (issue 17, January 2012). The cases mentioned in this issue are: Re RK; RK v BCC [2011] EWCA Civ 1305, SSJ v RB [2011] EWCA Civ 1608, Re AB; AB v LCC (A Local Authority) [2011] EWHC 3151 (COP), Re C; C v Blackburn and Darwen Borough Council [2011] EWHC 3321 (COP), Cardiff Council v Peggy Ross (2011) COP 28/10/11 12063905, Re HM; SM v HM [2011] COP 11875043 4/11/11, Re VW; NK v VW (2011) COP 27/10/10 11744555, LB Tower Hamlets v BB [2011] EWHC 2853 (Fam), Re AH; AH v Hertfordshire Partnership NHS Foundation Trust [2011] EWHC 276 (COP), Re Steven Neary; LB Hillingdon v Steven Neary [2011] EWHC 3522 (COP). See [39 Essex Street COP Newsletter](#)
- Jonathan Butler, 'C (by his litigation friend, the Official Solicitor) v Blackburn with Darwen Borough Council & A Care Home & Blackburn with Darwen Teaching Care Trust' (commentary) (11/1/12). See [Re C; C v Blackburn and Darwen Borough Council \(2011\) EWHC 3321 \(COP\)](#)
- John O'Donnell, 'Cheshire West and Chester Council v P' (commentary) (O'Donnells Solicitors information sheet, January 2012, no 2). This article is critical of recent case law on what constitutes a deprivation of liberty. See [Cheshire West and Chester Council v P \(2011\) EWCA Civ 1257#External_links](#)
- Morgan Cole Solicitors, 'Deprivation of Liberty case update' (January 2012). The 'Action required' conclusion of this briefing states: 'The guidance contained in this judgment should be disseminated to those who work with patients and service users who lack capacity and are responsible for care planning. The case clarifies that where there is no evidence to show that an individual's living arrangements in a hospital or care home are significantly different from the kind of life that anyone with their disability could normally expect wherever and in whatever setting they were living, the provision of their care and treatment will not, of itself, amount to a deprivation of liberty.' See [Cheshire West and Chester Council v P \(2011\) EWCA Civ 1257#External_links](#)

Wales

- Text of 16/1/12 Welsh circular email added: 'Further to the emails below, please find attached Welsh and English language versions of the Care and Treatment Plan template which was agreed by the National Assembly for Wales in December 2011. From 6 June 2012 mental health services in Wales will be required to deliver the care coordination and care and treatment planning provisions of Part 2 of the Mental Health (Wales) Measure 2010 and the Mental Health (Care Coordination and Care and Treatment Planning) (Wales) Regulations 2011. The Care and Treatment Plan templates attached here meet the requirements of this legislation.' See [Mental Health \(Wales\) Measure 2010#Update emails](#)

Scotland

- Scottish Government, 'Multi Agency Public Protection Arrangements (MAPPA) National Guidance 2012 Version 1 and Covering Justice and Communities Circular JD/01/2012' (12/1/12). See [MAPPA](#)

Website

- On 31/1/12 Mental Health Law Online contained [1128 categorised cases](#)
- Thanks to the following for providing transcripts which were unpublished elsewhere:
 - Alex Ruck Keene of 39 Essex Street Chambers for [Re H; A Local Authority v H \(2012\) EWHC 49 \(COP\)](#), [\(2012\) MHLO 3](#), [Re JDS; Kevin Smyth v JDS \(2012\) COP 19334473 19/1/12](#), [\(2012\) MHLO 4](#), [Re VW; NK v VW \(2011\) COP 27/10/10 11744555](#) and [Cardiff Council v Peggy Ross \(2011\) COP 28/10/11 12063905](#)
 - Victoria Butler-Cole of 39 Essex Street Chambers for [Re C; C v Blackburn and Darwen Borough Council \(2011\) EWHC 3321 \(COP\)](#)
 - Sophy Miles of Miles & Partners LLP for [Re Steven Neary; LB Hillingdon v Steven Neary \(2011\) EWHC 3522 \(COP\)](#)
- The 'Criminal law cases' category has been split in to the following sub-categories: Criminal law capacity cases, Diminished responsibility cases, Hospital order cases, Hybrid order cases, Life sentence cases, Prison law cases, Restriction order cases, Sentence appeal cases, Unfitness and insanity cases, and Other criminal law cases. See [Category:Criminal law cases](#)
- New category added for Court of Protection costs judgments. [Category:COP costs cases](#)
- See [January 2012 chronology](#) for this month's changes to the website in date order