

# Mental Health Law Online

## Monthly Update, May 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/May\\_2012\\_update](http://www.mentalhealthlaw.co.uk/May_2012_update) It is a snapshot of the online page – the online page will be automatically updated when case and legislation pages are updated.

### Case summaries

- Upper Tribunal case. [DC v Nottinghamshire Healthcare NHS Trust \(2012\) UKUT 92 \(AAC\), \(2012\) MHLO 53](#) — (1) *The tribunal cannot grant a deferred conditional discharge until (a) it has found, on the balance of probabilities, that the patient should not be detained but should be subject to recall, and (b) it has drafted the conditions for the discharge.* (2) *A deferred conditional discharge is not a device for gathering information on whether a conditional discharge would be possible or what conditions might be appropriate.* (3) *On the facts (where the tribunal had decided that 'with the exception of the availability of suitable after-care for the Patient, none of the criteria for his detention in hospital for treatment are met' but had not drafted conditions) the decision to adjourn was correct.*

- Section 139 case. [DD v Durham County Council \(2012\) EWHC 1053 \(QB\), \(2012\) MHLO 51](#) — *The claimant was gate sectioned at Durham prison and detained under s2, then s3, in a Middlesborough hospital. He had complaints of false imprisonment and breaches of Article 3 and 8 relating to matters such as his being kept in seclusion, the lighting in his room, the number of people supervising his activities and a general lack of privacy. (1) He needed leave under s139 to bring civil proceedings against Durham County Council and Middlesborough City Council. This was refused: there was no realistic prospect of establishing illegality against the AMHPs who made the recommendations for s2 and s3 as AMHPs are (a) not required to choose or investigate the quality of the place of detention, (b) not required to research medical views earlier than those in the statutory recommendations, (c) not responsible for the medical or other regimes to which a detained person is subjected. (2) The AMHP who applied for s3 detention was employed by Middlesborough, so Durham claimed that Middlesborough would be vicariously liable. This was incorrect: Durham would have been liable for any wrongdoing, because vicarious liability arises not as a result of employment law but through the statutory relationship in s13.*
- Criminal appeal. [R v Parkins \(2012\) EWCA Crim 856, \(2012\) MHLO 50](#) — *The sentencing judge had not been wrong to impose a restriction order contrary to the medical recommendations.*
- PI quantum case. [Verlander v Rahman \(2012\) EWHC 1026 \(QB\), \(2012\) MHLO 49](#) — *Personal injury quantum judgment including the following issues: (1) whether and to what extent the claimant's disabilities were due to frontal lobe brain damage (and are now incapable of significant improvement) or due depression or psychological factors (which may well improve over time); (2) whether the claimant had capacity to manage her properties and affairs.*
- OS's costs case. [Re D \(Official Solicitor's costs\); An NHS Trust v D \(2012\) EWHC 886 \(COP\), \(2012\) MHLO 48](#) — *(1) In medical cases in the Court of Protection, an order that the health authority pays half the Official Solicitor's costs is the starting point, from which the court can depart if there is reason to do so (thus the practice under the inherent jurisdiction continues). (2) On the facts, this was the order made. Transcript provided by Alex Ruck Keene of 39 Essex Street Chambers*
- PVS case. [Re D; An NHS Trust v D \(2012\) EWHC 885 \(COP\), \(2012\) MHLO 47](#) — *(1) P was in a permanent vegetative state so continued medical treatment is of no benefit to him because it is futile. (2) His letter refusing life-sustaining treatment did not comply with the MCA requirements for an advance decision so could not have been relied upon; however, had the evidence on PVS not been clear cut, the judge would have given P's previous wishes and feelings great weight. Transcript provided by Alex Ruck Keene of 39 Essex Street Chambers*
- Article 3 case. [MS v UK 24527/08 \(2012\) ECHR 804, \(2012\) MHLO 46](#) — *(1) The conditions of the applicant's detention under s136 in a police cell beyond the 72-hour limit, while waiting for transfer to a medium secure unit, were an affront to human dignity and reached the threshold of degrading treatment for the purposes of Article 3. (2) There was no breach of Article 13 as an appropriate remedy was available in domestic law, notwithstanding the fact that he had been unsuccessful. (3) There was no claim for breach of Article 5. (4) Compensation of €3,000 was awarded.*

## Case transcripts

- Capacity case. [Re G \(2012\) EWCA Civ 431, \(2012\) MHLO 52](#) — The local authority issued proceedings under the court's inherent jurisdiction in relation to a 30-year-old with Downs Syndrome history who was in the exclusive care of her mother. This decision relates to an unsuccessful appeal against case management orders. [Summary required.]
- Best interests case. [LB Haringey v FG \(No. 2\) \(2011\) EWHC 3933 \(COP\)](#) — "There are many issues that have arisen in this case, but now the critical welfare issue is whether or not H should be returned home to live with her mother. This is an outcome sought by the mother, but opposed both by the Local Authority and by the Official Solicitor as litigation friend to H." [Summary required.] Transcript provided by Alex Ruck Keene of 39 Essex Street Chambers
- Capacity case. [LB Haringey v FG \(No. 1\) \(2011\) EWHC 3932 \(COP\)](#) — "In this case there are a number of matters: does H have capacity to conduct litigation; does she have capacity to decide where she should live, or capacity to decide where she should be educated, or capacity to decide on the extent of the contact and relationship she should have with her natural family; capacity to deal with her financial affairs, or to enter into what has been described as a tenancy agreement, and capacity in a sense to judge her own best interests in those respects?" [Summary required.] Transcript provided by Alex Ruck Keene of 39 Essex Street Chambers
- OS's costs case. [B v B \(2010\) EWHC 543 \(Fam\)](#) — "This is an application by the Official Solicitor for an order that Mr B do pay the Official Solicitor's costs, on an indemnity basis, of acting on behalf of Mr B as his guardian ad litem, until the Official Solicitor was discharged by order of 19th August 2009." [Summary required.] Transcript provided by Alex Ruck Keene of 39 Essex Street Chambers

## Newsletter

- 39 Essex Street, 'Court of Protection Newsletter' (issue 21, May 2012). The cases mentioned in this issue are: [B v B \(2010\) EWHC 543 \(Fam\)](#) — [LB Haringey v FG \(No. 1\) \(2011\) EWHC 3932 \(COP\)](#) — [LB Haringey v FG \(No. 2\) \(2011\) EWHC 3933 \(COP\)](#) — [Dunhill v Burgin \(2012\) EWCA Civ 397, \(2012\) MHLO 33](#) — [Re JC; D v JC \(2012\) MHLO 35 \(COP\)](#) — [Re D; An NHS Trust v D \(2012\) EWHC 885 \(COP\), \(2012\) MHLO 47](#) — [Re D \(Official Solicitor's costs\); An NHS Trust v D \(2012\) EWHC 886 \(COP\), \(2012\) MHLO 48](#) — [Verlander v Rahman \(2012\) EWHC 1026 \(QB\), \(2012\) MHLO 49](#). See [39 Essex Street COP Newsletter#May 2012](#)

## Articles

- David Hewitt, 'Deprivation of liberty can never be "normal"' (Solicitors Journal, 21/5/12). Another article critical of the Court of Appeal's decision in Cheshire West. See [Cheshire West and Chester Council v P \(2011\) EWCA Civ 1257](#)

- Martha Spurrier, 'The great safety net' (Solicitors Journal, 2/4/12). Reproduced by kind permission. See [DL v A Local Authority \(2012\) EWCA Civ 253, \(2012\) MHLO 32](#)
- Steve Doughty, 'Father of two with motor neurone disease wins right to die by blinking his eye after judge's landmark ruling' (Daily Mail, 1/5/12). See [Settled cases and forthcoming judgments#Re XB \(advance decision, Theis J\)](#)
- Simon Edwards, 'Capacity and tenancies/licences' (39 Essex Street, 19/4/12). See [39 Essex Street COP Newsletter#May 2012](#)
- Rosalind English, 'Delay in transferring mental health patient for treatment amounted to "inhumane treatment"' (3/5/12). This article concludes: 'This is a prime example of using Article 3 as a social and economic right, not a basic civil right, and thus extended leaves publicly funded authorities to carry out difficult jobs with threats of litigation looming on all sides. The UK courts recognised this claim for what it was, and dismissed it. Strasbourg should have done the same.' See [MS v UK 24527/08 \(2012\) ECHR 804, \(2012\) MHLO 46](#)
- Mental Health Cop Blog, 'MS v UK' (4/5/12). This article is in favour of the MS v UK judgment and makes points in relation to (1) place of safety arguments, (2) accessing psychiatric beds, (3) media coverage, and (4) implications. See [MS v UK 24527/08 \(2012\) ECHR 804, \(2012\) MHLO 46](#)
- ECtHR, 'Prolonged police detention of mentally-ill man without adequate medical care violated his Convention rights' (Press release ref ECHR 195 (2012), 3/5/12). This is the court's summary of the judgment. See [MS v UK 24527/08 \(2012\) ECHR 804, \(2012\) MHLO 46](#)

## Legal Aid

- LSC, 'Legal Aid Bill gets Royal Assent' (1/5/12). The Legal Aid, Sentencing and Punishment of Offenders Act 2012 is due to amend the scope, eligibility and other aspects of the legal aid scheme on 1/4/13. In order to implement the changes, the Legal Services Commission will tender for new contracts for face-to-face advice and/or telephone advice in certain areas of law (not mental health or community care). The Commission will be replaced by the Legal Aid Agency, which will be an Executive Agency of the Ministry of Justice. See [Legal Aid News](#)

## CQC

- CQC, 'Changes to consent to treatment for patients subject to a CTO' (May 2012). This page explains the change to the regulations. See [CQC](#)
- Form CTO12 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). See [Mental Health Act 1983 Statutory Forms](#)

## Scotland

- Scott Blair, 'A Summary of Mental Health Caselaw' (21/3/12). Plagiarism is the copying of someone else's words or ideas without attribution, intentionally or otherwise. In any place where you reproduce anything from this website, please remember to acknowledge the source and provide a link back to the relevant page. Scott Blair, a Scottish Advocate, immigration judge, MHT for Scotland legal convener, and Glasgow University external examiner, spoke on a paper entitled 'A Summary of Mental Health Caselaw' at a seminar on 21/3/12. In three parts it deals with cases from Scotland, England & Wales, and the ECtHR: *all 20 case summaries in the second part, and eight in the third part, incorporate case summaries copied from Mental Health Law Online without any attribution* (see pages 55-60, 62, 65-66, 69, 105-109, and 111). The document ends '© Scott Blair, Advocate' but there is no legal entitlement to claim copyright for material copied from Mental Health Law Online. See [Scotland](#)
- Valerie Mays, 'Mental Health Tribunal for Scotland: Case Digest' (December 2011). See [Scotland](#)

## Wales

- Text of two Welsh Government updates added: 25/4/12 (Mental Health - Primary Care Referrals and Eligibility to Conduct Primary Care Assessments - Wales - Regulations 2012) and 24/4/12 (Laying of the Code of Practice to Parts 2 and 3 of the Mental Health (Wales) Measure 2010). See [Mental Health \(Wales\) Measure 2010](#)
- Consultation on a Separate Legal Jurisdiction for Wales (27/3/12 to 19/6/12). The Welsh Government are consulting on making things even more unnecessarily complicated, by creating an entirely separate legal jurisdiction for Wales. See [Consultations#Wales](#)

## Book

- New book published. The book is written as a guide for criminal lawyers representing those with mental disorder in the criminal justice system, but should be of interest to mental health lawyers also: [Kris Gledhill, \*Defending Mentally Disordered Persons\* \(LAG, 2012\)](#)

## Website

- On 30/4/12 Mental Health Law Online contained [1187 categorised cases](#)
- The May 2012 CPD questionnaire is now online. Obtain 12 accredited CPD points for £60. See [CPD scheme](#)
- Thanks to Alex Ruck Keene of 39 Essex Street Chambers for the transcripts of [Verlander v Rahman \(2012\) EWHC 1026 \(QB\)](#), [\(2012\) MHLO 49](#), [Re D \(Official Solicitor's costs\)](#); [An NHS Trust v D \(2012\) EWHC 886 \(COP\)](#), [\(2012\) MHLO 48](#), [Re D](#); [An NHS Trust v D \(2012\) EWHC 885 \(COP\)](#), [\(2012\) MHLO 47](#), [LB Haringey v FG \(No. 1\) \(2011\) EWHC 3932 \(COP\)](#), [LB Haringey v FG \(No. 2\) \(2011\) EWHC 3933 \(COP\)](#), and [B v B \(2010\) EWHC 543 \(Fam\)](#).

- 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 covers 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](#)
- You can now receive monthly updates delivered automatically to your Kindle e-reader. See [Kindle updates](#)
- See [May 2012 chronology](#) for this month's changes to the website in date order