

# Mental Health Law Online

## Monthly Update, March 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/March\\_2012\\_update](http://www.mentalhealthlaw.co.uk/March_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.

### Cases

- [Coombs v Dorset NHS PCT \(2012\) MHLO 13 \(QBD\)](#) — *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 as no transcript available.]

- [Crawford v Suffolk MH Partnership NHS Trust \(2012\) EWCA Civ 138, \(2012\) MHLO 14](#) — *The employees had been dismissed for gross misconduct for restraining a patient on a chair which was tied to a table; they disputed the allegation that they tied the patient to the chair with a sheet. (1) The Employment Tribunal had been entitled to conclude that there had been two procedural errors (in failing to obtain the witness's first statement, and in carrying out a practical experiment on the chair without notification to the appellants) and that they were errors that a reasonable employer would not have made; although the ET went too far in saying no reasonable employer could have preferred the witness's evidence over the employees', this did not invalidate the finding of unfair dismissal. (2) The case was remitted to the ET to consider the Polkey point (reduction in compensation based on chance of dismissal following fair procedure) but the 25% reduction for contributory fault (failure to report the incident) was upheld. (3) (Obiter) The court expressed scepticism about the need for suspension during the disciplinary process, and stated that, as the conduct did not deserve the epithet 'criminal', the police should never have been involved: while the hospital must act transparently it also owes duties to long-serving staff.*
- [DD v Lithuania 13469/06 \(2012\) ECHR 254, \(2012\) MHLO 29](#) — Breach of [Article 5\(4\)](#) and [Article 6\(1\)](#) in relation to involuntary admission to a psychiatric institution. [Detailed summary available on case page.]
- [DL v A Local Authority \(2012\) EWCA Civ 253, \(2012\) MHLO 32](#) — *The local authority brought proceedings under the High Court's inherent jurisdiction to protect his parents from DL; these proceedings could not have been brought under the [MCA](#)*

[2005](#) as the parents did not lack capacity under that Act; DL argued that the MCA, by establishing a comprehensive scheme for adults, had displaced the inherent jurisdiction. (1) The inherent jurisdiction of the High Court in relation to vulnerable adults survives the implementation of the MCA 2005, which only relates to adults who lack capacity as defined in the Act. (2) The absence of any express provision in relation to the inherent jurisdiction implies that it continues to be available, as 'the great safety net', where the Act does not apply; in any event, there is a strong policy justification, the protection of vulnerable adults, for this conclusion. (3) The jurisdiction is in part aimed at enhancing or liberating the autonomy of a vulnerable adult whose autonomy has been compromised by a reason other than mental incapacity because they are (a) under constraint; or (b) subject to coercion or undue influence; or (c) for some other reason deprived of the capacity to make the relevant decision or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.

- [JB v MHTS \(2012\) MHLO 17 \(ScotSC\)](#) — The MHTS declared under section 257 [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#) that JB was no longer to be the named person on the basis that it was inappropriate for her to continue as such. The decision was made by a Convenor (legal member) sitting alone, but should have been made by a full panel: the tribunal was faced with an important substantive decision; there was no emergency; even if there had been extant proceedings, this was not a 'preliminary' or 'interim' decision within the rules. The tribunal was therefore improperly constituted, and the appeal was allowed.
- [R \(Broadway Care Centre Ltd\) v Caerphilly County Borough Council \(2012\) EWHC 37 \(Admin\), \(2012\) MHLO 26](#) — The Claimant unsuccessfully sought permission to challenge the decision of the Defendant local authority to terminate its contract to provide care for elderly dementia sufferers.
- [R \(NM\) v LB Islington \(2012\) EWHC 414 \(Admin\), \(2012\) MHLO 11](#) — Unsuccessful application for judicial review of a decision by the Social Services Department of the council not to conduct a needs assessment under s47 [NHSCCA 1990](#) with a view to provision of accommodation and support services to the claimant if he is released from prison. Includes consideration of whether the [Convention on the Rights of Persons with Disabilities](#) can be relied upon. [Detailed summary available on case page.]
- [R \(W\) v Dr Larkin \(2012\) EWHC 556 \(Admin\), \(2012\) MHLO 23](#) — A warrant for the claimant's transfer to prison was issued on the RC's advice in the context of Broadmoor's DSPD unit being about to close on 29/3/12. (1) It is not unlawful for an RC to tick both the 'no longer requires treatment in hospital for mental disorder' and the 'no effective treatment for his disorder can be given in the hospital to which he has been removed' boxes on the [s50](#) proforma. (2) There was no evidence that the views expressed on the form were not those of the RC or that he had subordinated his clinical judgment to expediency or national strategies. (3) No relief would have been

*granted even had there been unlawfulness: the claimant had to leave Broadmoor, no MSU would then take him, so he had to return to prison in any event.* Transcript provided by Tim Baldwin of Garden Court Chambers

- [R v Chiles \(2012\) EWCA Crim 196, \(2012\) MHLO 10](#) — *The judge should not have should not have taken into account her concerns about the future of the NHS (she had said, 'I cannot be confident in the current fluctuating state of the NHS that the security that the public needs to be protected from you will be ensured unless there is an another government department which has input into the issue of your release and that is what I will achieve by the section 41 order') but there was ample material to justify the conclusion that a restriction order was necessary for the protection of the public from serious harm.*
- [R v Dowds \(2012\) EWCA Crim 281, \(2012\) MHLO 18](#) — *The appellant argued that voluntary acute intoxication (voluntary and uncomplicated by any alcoholism or dependence) is capable of giving rise to the partial defence of diminished responsibility on an indictment for murder under the amended [Homicide Act 1957](#) because it is a 'recognised medical condition'. Held: (1) the presence of a 'recognised medical condition' is a necessary, but not always a sufficient, condition to raise the issue of diminished responsibility; (2) voluntary acute intoxication, whether from alcohol or other substance, is not capable of founding diminished responsibility.*
- [R v Lucas \(2012\) EWCA Crim 182, \(2012\) MHLO 16](#) — *The renewed application for extension of time (the delay being caused by the appellant pondering negative legal advice before deciding to appeal anyway) in which to apply for leave to appeal against restriction order was refused, as there was ample material to justify the restriction order.*
- [Re Forrest \(2012\) MHLO 20 \(LPA\)](#) — *The donor included the following guidance: "I hereby express the wish that my Attorneys will continue to pay my contribution to the school fees of my granddaughters, A and B, as per my previous pattern of contributions." On the application of the Public Guardian the guidance was severed on the ground that it contravened section 12 of the MCA 2005. [OPG summary - LPA case.]*
- [Re H \(2012\) MHLO 21 \(LPA\)](#) — *The donor used the 2007 version of the LPA prescribed form and failed to tick the box to confirm that she had read (or had read to her) the prescribed information on pages 2, 3 and 4. On the attorney's application the court was unable to find on balance of probability that the donor had read (or had read to her) the prescribed information. This was a failure of execution and the court had no discretion to uphold it. [OPG summary - LPA case.]*
- [Re Ian Brady \(2012\) MHLO 19 \(FTT\)](#) — *(1) Ian Brady's Mental Health Tribunal hearing will be held on 9/7/12 with a time estimate of 8 days; (2) the hearing at Ashworth will be broadcast at the Civil Justice Centre Manchester where the public and media can observe; (3) in relation to the hearing itself, the public will not be*

allowed to attend, and the position of the media will be the subject of further directions.

- [Re Lane \(2012\) MHLO 15 \(LPA\)](#) — *The donor made an LPA on 3 May 2011 using the 2007 prescribed form. The transitional provisions of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment Regulations) 2009, which introduced new prescribed forms, provide that an instrument executed by the donor before 1 April 2011 on the 2007 prescribed form is capable of being a valid lasting power of attorney. The Public Guardian made an application to the court for the severance of an invalid restriction, and drew the court's attention to the date of execution, submitting that the 'old' forms were not materially different from the 'new' forms. The court accepted that the 'old' forms differed from the 'new' forms in an immaterial respect and were accordingly within paragraph 3(1) of Schedule 1 of the MCA, which provides that an instrument which differs in an immaterial respect in form or mode of expression from the prescribed form is to be treated by the Public Guardian as sufficient in point of form and expression. [OPG summary - LPA case.]*
- [Re Taylor \(2012\) MHLO 24 \(EPA\)](#) — *(1) In Re Dunningham: The donor appointed two attorneys, A and B, to act jointly and severally. She then imposed the following restriction: "and the said B shall have no authority to act on my behalf unless the said A has died or is incapable of acting as my Attorney". On the application of the attorneys for severance, the court severed the restriction as being inconsistent with a joint and several appointment. (2) In Re Taylor: on similar facts, the court severed the words 'jointly and severally'. [OPG summaries - EPA cases.]*
- [Reynolds v UK 2694/08 \(2012\) ECHR 437, \(2012\) MHLO 30](#) — *(1) A voluntary inpatient killed himself by breaking and jumping out of a sixth-floor window: the court held that there was an arguable claim that an operational duty under [Article 2](#) arose to take reasonable steps to protect him from a real and immediate risk of suicide and that that duty was not fulfilled. (2) There were no domestic civil proceedings available to his mother to establish any liability and compensation due as regards the non-pecuniary damage suffered by her on her son's death, and therefore there was a violation of [Article 13](#) in conjunction with Article 2. In particular: (a) neither the inquest nor the internal inquiry were an effective remedy; (b) the HRA claim under Article 2 was struck out by the county court because of domestic case law at that time which required gross negligence; (c) the mother had no prospect of obtaining adequate compensation for non-pecuniary damage under the Fatal Accidents Act 1976 (she was not a dependent) or the Law Reform (Miscellaneous Provisions) Act 1934 (death was instantaneous); (d) the lack of adequate compensation would itself reduce access to the civil remedy, as the legal aid 'cost/benefit analysis' would not be met and legal fees were unaffordable. (3) It was not necessary to examine the same complaint under Article 2 alone. (4) €7000 compensation was awarded.*

- [Seaton v Seddon \(2012\) EWHC 735 \(Ch\), \(2012\) MHLO 28](#) — Chancery case partly involving, in relation to the fourth claimant, consideration of the effect of mental incapacity on statutory limitation periods. (1) If a claimant is under one disability (minority) when the cause of action accrued, and subsequently under a second overlapping disability (mental incapacity), the limitation period does not run until he is no longer under the second disability. (2) The question of disability for the purpose of limitation should be determined under the law as it stood when the proceedings were commenced (in this case: whether he was 'of unsound mind [meaning that he] by reason of mental disorder within the meaning of the Mental Health Act 1983, is incapable of managing or administering his property and affairs' rather than the new test of whether he 'lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct legal proceedings'. (3) On the facts, the fourth claimant was not 'of unsound mind'; hence he would not meet the new test either.
- [Wirral MBC v Salisbury Independent Living Ltd \(2012\) EWCA Civ 84, \(2012\) MHLO 27](#) — In Housing Benefit cases, a landlord cannot exercise an independent right of appeal to the First Tier Tribunal against a decision of the Local Authority other than in the cases for which specific provision is made by the subordinate legislation.
- [X v MHRT for NI \(2012\) NIQB 1, \(2012\) MHLO 31](#) — In previous judicial review proceedings, X had established that in NI where there is a mandatory duty to discharge it cannot lawfully be deferred. He now sought to bring a negligence and false imprisonment claim against the Tribunal and the Trust for his detention during a six-week deferral period. To sue the Tribunal he required leave of the High Court (under Article 133 [Mental Health \(Northern Ireland\) Order 1986](#), the equivalent of [s139](#)): the test is whether on the materials immediately available to the court the complaint deserves fuller investigation. Leave was refused because there had been a difficult question of statutory construction and no bad faith or lack of reasonable care.
- [ZH v Commissioner of Police for the Metropolis \(2012\) EWHC 604 \(QB\), \(2012\) MHLO 25](#) — ZH, a severely autistic, epileptic 19-year-old man, became fixated with the water during a school visit to a swimming pool and would not move from the water's edge: the police were called; when an officer touched him on his back he jumped into the water, fully clothed; the police had him taken out of the pool and restrained him. (1) The police actions constituted assault, battery and false imprisonment. There was no need for the police to be aware of the Mental Capacity Act 2005 for the defence in [ss5-6](#) to be made out, but on the facts it was not. When the MCA applies, the common law defence of necessity has no application, but had it applied it would have failed. (2) There was a breach of the [DDA 1995](#) duty to make reasonable adjustments to the normal practice, policy or procedure, and the defence of justification failed. (3) The inhuman or degrading treatment breached [Article 3](#). (4) Even treating purpose and intention as relevant, there was a breach of [Article 5](#). (5) The interference with ZH's private life under [Article 8](#) was not in accordance with

*the law or proportionate. (6) Quantum: PTSD £10,000; exacerbation of epilepsy £12,500; DDA £5,000; trespass to the person (loss of liberty £500, pain and distress from assault £250); total £28,250; no aggravated or exemplary damages; no additional HRA damages.*

- Transcript only: [A London Borough v VT \(2011\) EWHC 3806 \(COP\)](#) — "The primary matters on which decisions need to be made by the court are: (1) Should ST live at L (or possibly some other care home type accommodation in London) or in his property at X, Nigeria; (2) If ST remains at L, is he being deprived of his liberty and, if he is being so deprived, does that remain appropriate; (3) Should ST's property and affairs deputy be AT or Mr G, the current interim independent professional deputy?" [Summary required.]
- Transcript only: [Austin v UK 39692/09 \(2012\) ECHR 459, \(2012\) MHLO 22](#) — Kettling did not breach [Article 5](#). [Summary required.]
- Transcript only: [EB v RC \(2011\) EWHC 3805 \(COP\)](#) — "This is an application by the applicant, IB, for the removal of the respondent as his mother's deputy for property and affairs. There is also a counter-application by the respondent, RC, for orders that the applicant sign letters of authority in relation to two bank accounts that are held in the joint names of EB and the applicant." [Summary required.]
- Transcript only: [Re JDS; KGS v JDS \(2012\) EWHC 302 \(COP\), \(2012\) 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.]

## Mental Health Tribunal

- Senior President of Tribunals, 'Senior President of Tribunals' Annual Report' (February 2012). This report contains the following in relation to the mental health jurisdiction: (1) A periodic digest of common errors, arising in 'review' decisions (First-tier appeals on points of law), is issued so that members can 'learn from the experience of colleagues who are faced with difficult legal questions': this digest is available to legal, medical and lay members, but surprisingly not to patients, their representatives or the public. (2) There was a 3% increase in receipt of cases from 2009-10 to 2010-11, mostly due to CTOs, changes in status, and increased use of s2. (3) The 'continuing improvement' and 'excellent progress' by the secretariat, and the duty judge scheme, has led to improved case management and reduced the adjournment rate within two years from 20% to 7%. (4) The AH case on publicity and the RB case on discharge conditions are noted as interesting cases. (5) Use of secure email will be encouraged. (6) Twelve salaried tribunal judges were appointed to the Restricted Patients Panel in 2011. See [Mental Health Tribunal](#)

- The text of the Tribunal Procedure Rules have been amended to reflect the changes which take effect on 6/4/12. See [Tribunal Procedure \(First-tier Tribunal\) \(Health, Education and Social Care Chamber\) Rules 2008](#)
- [Tribunal Procedure \(Amendment\) Rules 2012](#) — By amending Tribunal Rules [32](#) and [35](#), these rules: (1) add 'date of birth' to the items which an application must, if possible, include; (2) remove a reference to after-care under supervision; (3) prescribe information which a reference must, if possible, include; (4) amend the rules for reports following recall of s37/41 patients (rather than the Secretary of State being required to submit reports within 6 weeks, he must immediately provide details of the RC and social supervisor who are then given 3 weeks to provide reports); (5) amend the rules for section 2 cases (the responsible authority must now provide the documents specified in the Practice Direction, rather than that which 'can reasonably be provided in the time available'); (6) clarify the wording in relation to other cases (explicitly stating that if the responsible authority made the reference then the 3 weeks runs from the date of the reference); (7) prescribe the information required from the Secretary of State (summary of index offence, record of previous convictions, full details of liability to detention since restrictions were imposed, any further relevant information); (8) clarify that a case may be struck out without a hearing for want of jurisdiction under r8(3); (9) allow a s68 CTO reference to be disposed of without a hearing if the patient is 18 or over and either (a) the patient states in writing he does not wish to attend or be represented and the tribunal is satisfied he has the capacity to decide whether or not to make that decision (it is assumed this is intended to mean the capacity to make the decision) or (b) the representative states in writing that the patient does not want to attend or be represented. Worryingly, the consultation response states that the decision on capacity will be based on the responsible clinician's opinion and the reports. In force 6/4/12.
- Tribunal Procedure Committee, 'Response to consultation on proposed amendments to the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699) (1 June 2011 – 29 August 2011)' (February 2012). See [Consultations#Mental Health Tribunal](#)

## **Court of Protection**

- Court of Protection, 'Listing Deprivation of Liberty Safeguarding cases' (15/3/12). From 15/3/12, it is no longer necessary for DOLS cases to be heard by High Court judges. The full text is as follows: 'The President and the Judge in Charge of the Court of Protection have determined that it is no longer necessary for all cases where the issue of Deprivation of Liberty Safeguarding is raised to be heard by a High Court Judge. The judges at the issuing court based in the Thomas More building of the Royal Courts of Justice will consider whether the issues raised in the case appear to require the consideration of a High Court Judge and allocate the case to the appropriate level of judge accordingly. The question of allocation may be reconsidered if and when further information relevant to the issue arises. If the judges

at Thomas More, or their colleagues in any court on reconsideration of the appropriate level of judge to hear the case, are unclear on whether the case should be heard by a High Court judge, they should seek guidance from the Family Division Liaison Judge for the circuit which will be hearing the case. This change regarding the listing of Deprivation of Liberty Safeguarding cases has immediate effect.' See [Court of Protection](#)

- HMCTS, 'Court of Protection: Listing Policy - information for court users' (September 2011). See [Court of Protection](#)
- Official Solicitor, 'Official Solicitor: Court of Protection: Acceptance of Appointment as Litigation Friend' (21/2/12). This document sets out the OS's general acceptance criteria (evidence of lack of capacity, no-one else suitable and willing to act, funding available) and the new dispensation in relation to health and welfare cases (refusal to act 'in any except the most urgent cases, namely serious medical treatment cases and section 21A appeals, other than those brought by the relevant person's representative' and a waiting list for cases to be accepted). In relation to the OS's reaching 'the limit of his resources' in regard to health and welfare cases, a distinction is drawn between money (which has not reached the limit) and staffing levels (which have). See [Official Solicitor](#)
- Updated guidance. [Court of Protection Guidance: Applications to the Court of Protection in relation to tenancy agreements](#) — This document provides guidance on when and how to make applications in relation to signing or terminating tenancy agreements on behalf of adults who lack the mental capacity to understand or sign the agreement themselves. It sets out a 'streamlined' process for receiving applications relating to more than one person. Published 22/6/11 and updated in February 2012.

## Care Quality Commission

- CQC, 'The operation of the Deprivation of Liberty Safeguards in England, 2010/11' (March 2012). Key findings: '(1) 8,982 applications to deprive a person of their liberty were processed, of which 50 per cent were authorised. (2) Many services have developed good practice on the use of the safeguards, especially in involving people and their families in the decision-making process, but some were confused as to when restraints or restrictions on a person amounted to a deprivation of liberty. (3) Between a third and a quarter of care homes had not provided their staff with training on the safeguards, and in some cases only the manager had received training. (4) Most hospitals had held some training, but the proportion of staff involved ranged between 20-100 per cent.' See also: CQC, 'Summary: The operation of the Deprivation of Liberty Safeguards in England, 2010/11' (March 2012); Lucy Series, 'CQC's second monitoring report on the deprivation of liberty safeguards' (Small Places blog, 27/3/12). See [CQC](#)

- Department of Health, 'Performance and Capability Review - Care Quality Commission' (gateway ref 17277, 23/2/12). See [CQC](#)

## Legal Services Commission

- LSC, 'Accreditation contribution scheme update' (28/3/12). From 2/4/12 the LSC will reduce the amount it contributes to the costs of mental health panel membership by 50% to £73.44; from 1/4/13 there will be no contribution at all. In recent weeks the Law Society's accreditation fees doubled to £500 plus VAT. See [Legal Aid News](#)
- LSC, 'Headline intentions for future tenders' (February 2012). The main points are: (1) To implement scope changes in April 2013, the LSC plans to tender for face-to-face contracts over the next year in the following areas: Family; Asylum (including residual non-asylum work); Housing and Debt; Housing Possession Court Duty Schemes. (2) Existing contracts will amended, not terminated, in the following areas: Community Care; Mental Health; Actions Against the Police; Public Law. (3) Contracts for categories being removed from scope will be terminated. (4) Crime contracts will not be re-tendered before 2015. (5) A tender exercise for mediation work will be carried out to increase provision. (6) The telephone gateway (operator service and specialist telephone advice) plans, which are set out in detail, apply to community care but not mental health. (7) All supervisors in Public Law Children work may have to be Children Panel members, but there are no other changes to accreditation planned. (8) All providers must hold either SQM or Lexcel. See [Legal Aid News](#)
- Sir Bill Callaghan, LSC Chairman, 'The Future of Legal Aid' (Speech to Liverpool Law Society, 8/2/12). This speech suggested that the matter-start system will be abolished in the next contract: 'The ongoing administration of new matter start allocations is now attracting particular attention because it takes a great deal of effort for both providers and LSC staff. The removal of a fixed allocation of new matter starts is one idea that has been put to us by representative bodies. Fixed allocations mean that more popular providers often run out of work and are refused an increase while other providers in the area have unused matter starts. A more open competition at client level would be one way of dealing with this issue and we think it should improve the quality of provision and client care. What we're talking about here is licensing civil contract work rather than simply allocating a fixed number of new matter starts. There is still a lot discussion to be had about the detail of how this will work. But we envisage introducing this approach in April 2013 at the same time as the LSC is abolished and the new Executive Agency takes over.' See [Legal Aid News](#)
- Legal Aid Handbook, 'LSC concede judicial review; specialist support reprieved' (1/3/12). The LSC conceded a JR claim brought by the Public Law Project of the decision, made without consultation, to abolish the specialist support service. Instead of the contracts expiring in March 2012 they will be extended until 30/6/12 pending a consultation process. The mental health specialist support service, run by Scott

Moncrieff Solicitors, can be called on 0844 800 3364 from Monday to Friday 10am to 4pm. See [Legal Aid News](#)

## Newsletters

- 39 Essex Street, 'Court of Protection Newsletter' (issue 18, February 2012). The cases mentioned in this issue are: *Re L*; *K v LBX* [2012] EWCA Civ 79, [2012] MHLO 7, *Wychavon District Council v EM (HB)* [2012] UKUT 12 (AAC), [2012] MHLO 5, *Crawford v Suffolk MH Partnership NHS Trust* [2012] EWCA Civ 138, *Broadway Care v Caerphilly CBC* [2012] EWHC 37 (Admin), *Salisbury Independent Living Ltd v Wirral MBC* [2012] EWCA Civ 84. See [39 Essex Street COP Newsletter](#)
- Bevan Brittan, 'Patient privacy and the use of mobile phones in hospitals' (15/2/12). See [Article 8](#)
- Anthony Collins Solicitors, 'Tenants lacking mental capacity signing tenancy agreements' (23/2/12). This briefing summarises the *Wychavon* case and sets out the consequences for housing providers. See [Wychavon District Council v EM \(HB\) \(2012\) UKUT 12 \(AAC\), \(2012\) MHLO 5](#)

## Articles

- Sarah Cassidy, 'Foster parents told to stay away from "autistic" man' (Independent, 11/2/12). See [Settled cases and forthcoming judgments](#) (Re GR)
- Anna Raccoon, 'Rotten Borough? - the Vicious Borough of Hillingdon' (20/3/12). Mark Neary's application for occasional respite care in the form of a carer staying overnight was rejected: respite care is only available at the Positive Behaviour Unit (at which his son was unlawfully deprived of his liberty for a year). See [Re Steven Neary; LB Hillingdon v Steven Neary \(2011\) EWHC 1377 \(COP\)](#)
- Owen Bowcott, 'Autistic teenager wins damages from police after being restrained' (Guardian, 14/3/12). See [ZH v Commissioner of Police for the Metropolis \(2012\) EWHC 604 \(QB\), \(2012\) MHLO 25](#)
- Neil Munro, 'Rabone v Pennine Care NHS Trust – some scattered reflections' (Mental Health and Mental Capacity Law Blog, 7/3/12). This article concludes: 'If risk averse mental health services take Rabone to heart we may be looking at a situation where all patients regardless of legal situation are subject to a very high degree of de facto control over their movements in order to avert even a small likelihood that they may leave the hospital and kill themselves.' See [Rabone v Pennine Care NHS Foundation Trust \(2012\) UKSC 2, \(2012\) MHLO 6](#)
- John O'Donnell, 'Defining Liberty' (Solicitors Journal, 14/2/12). See [SSJ v RB \(2011\) EWCA Civ 1608](#)

- David Lock, 'Best Interest decision-making in the Court of Protection' (28/2/12). See [Court of Protection](#)
- Local Government Lawyer, 'Supreme Court decides not to review key 1997 community care resources ruling' (20/2/12). See [R \(KM\) v Cambridgeshire CC \(2011\) EWCA Civ 682](#)
- Owen Bowcott, 'Human rights groups call for end to surgical castration of sex offenders' (Guardian, 22/2/12). This article relates to the European Committee for the Prevention of Torture's call for voluntary surgical castration in Germany to be discontinued. In the UK only voluntary chemical castration is permitted, under s57 MHA 1983. See also: Council of Europe, 'Council of Europe anti-torture Committee publishes report on Germany' (press release, 22/2/12). See [MHA 1983 s57](#)
- Peter Bartlett, 'Sex, Dementia, Capacity and Care Homes' (2010) 31 Liverpool Law Rev 137. Abstract: 'This paper addresses the appropriate legal and policy approach to sexual conduct involving people with dementia in care homes, where the mental capacity of one or both partners is compromised. Such conduct is prohibited by sections 34–42 of the Sexual Offences Act 2003, but this article asks whether this blanket prohibition is necessarily the appropriate response. The article considers a variety of alternative responses, eventually arguing that clearer guidance regarding prosecution should be issued.' See [Capacity to consent to sexual relations](#)
- Wesley Johnson, 'Ian Brady to face mental health tribunal in public' (Independent, 10/3/12). See [Re Ian Brady \(2012\) MHLO 19 \(FTT\)](#)
- Press articles about Supreme Court decision in *Rabone* case: Matthew Hill, 'Rabone and the rights to life of voluntary mental health patients' (UK Human Rights Blog, 12/2/12); Kirsten Sjøvoll, 'Case Comment: Rabone & Anor v Pennine Care NHS Trust (2012) UKSC 2' (UKSC Blog, 15/2/12); Nigel Poole, 'Protecting the vulnerable' (Local Government Lawyer, 15/2/12); BBC News, 'Suicidal woman failed by Stockport mental health trust' (8/2/12). See [Rabone v Pennine Care NHS Foundation Trust \(2012\) UKSC 2, \(2012\) MHLO 6](#)
- Mary Donnelly, '"Voluntary" psychiatric patients need protection' (Irish Times, 9/2/12). This article, following on from a Southern Irish High Court decision that a voluntary patient was not held unlawfully despite making several requests to leave the locked unit, argues that it is highly doubtful that the Southern Irish Mental Health Act 2001 would withstand scrutiny under the ECHR, and that the statute contravenes the CRPD. See [DOLS#Other links](#)
- Thomas Hammarberg, 'Rights-based approach needed in new law on legal capacity' (Irish Times, 1/3/12). This article argues that reform of the Southern Irish Lunacy Act 1871 should comply with the UN Convention on the Rights of Persons with Disabilities. See [CRPD](#)

- Mithran Samuel, 'Many deprived of liberty without safeguards, warn experts' (29/2/12). This article discusses deprivation of liberty in supported living, and the Official Solicitor's view that the Court of Appeal decisions in Cheshire and P & Q meant protections for people 'had gone backwards'. See [DOLS#Other links](#)

## Parole Board

- 19/03/12 (4): [Parole Board Rules 2011](#) — These are the rules which govern the operation of the Parole Board for England and Wales, replacing the [Parole Board Rules 2004](#). In force 3/1/12.

## Statistics

- Ministry of Justice, 'Annual statistics on Multi-agency public protection arrangements (MAPPA) eligible offenders' (16/3/12). Summary: 'This annual publication presents the number of MAPPA eligible offenders in England and Wales, and information related to these offenders, including a summary of the information provided in the MAPPA reports published by each of the areas.' See [MAPPA](#)
- NHSIC, 'Routine Quarterly Mental Health Minimum Dataset Reports, Final Q1 and Provisional Q2 2011/12 summary statistics and related information' (28/2/12). See [Statistics#NHS Information Centre - Other](#)

## Miscellaneous

- LGO, 'Fact Sheet S1: Complaints about adult care services' (updated 1/3/12); LGO, 'Fact Sheet S3: Complaints about councils that arrange and fund residential care placements' (updated 1/3/12). See [Local Government Ombudsman](#)
- Royal College of Psychiatrists, 'CR171: Independent Advocacy for People with Mental Disorder' (February 2012). This document contains the following chapters: (1) Introduction and context; (2) Definition of independent advocacy; (3) Key principles in individual advocacy; (4) How do advocates work?; (5) Different types of advocacy; (6) Statutory advocacy; (7) Advocacy and equality; (8) Advocacy in different clinical areas; (9) Myth busting; (10) Useful contacts. See [RCPsych](#)
- Anna Nilsson, 'Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities' (Council of Europe, CommDH/IssuePaper(2012)2, 20/2/12). This paper sets out the following recommendations: (1) Ratify the UN CRPD and its Optional Protocol. (2) Review existing legislation on legal capacity in the light of current human rights standards and with particular reference to Article 12 CRPD. The review should identify and remedy possible flaws and gaps depriving persons with disabilities of their human rights in relation to legislation concerning, inter alia, guardianship, voting rights and compulsory psychiatric care and treatment. (3) Abolish mechanisms providing for full incapacitation and plenary guardianship. (4) Ensure that persons with disabilities

enjoy the rights to property, including the right to inherit property and to control their own financial affairs, to family life, to consent to or reject medical interventions, to vote, to associate freely and to access justice on an equal basis with others. No one should be automatically deprived of these rights because of an impairment or disability or due to being subjected to guardianship. (5) Review judicial procedures to guarantee that a person who is placed under guardianship has the possibility to take legal proceedings to challenge the guardianship or the way it is administered as long as guardianship regimes still remain valid. (6) End 'voluntary' placements of persons in closed wards and social care homes against the person's will but with the consent of guardians or legal representatives. Placement in closed settings without the consent of the individual concerned should always be considered a deprivation of liberty and subjected to the safeguards established under Article 5 of the European Convention on Human Rights. (7) Develop supported decision-making alternatives for those who want assistance in making decisions or communicating them to others. Such alternatives should be easily accessible for those in need and provided on a voluntary basis. (8) Establish robust safeguards to ensure that any support provided respects the person receiving it and his or her preferences, is free of conflict of interests and is subject to regular judicial review. The individual concerned should have the right to participate in any review proceedings along with the right to adequate legal representation. (9) Create a legal obligation for governmental and local authorities, the judiciary, health care, financial, insurance and other service providers to provide reasonable accommodation to persons with disabilities who wish to access their services. Reasonable accommodation includes the provision of information in plain language and the acceptance of a support person communicating the will of the individual concerned. (10) Involve persons with intellectual and psychosocial disabilities and the organisations representing them actively in the process of reforming legislation on legal capacity and developing supported decision-making alternatives. See [CRPD](#)

- Mind, 'Mind welcomes Health Bill amendment which protects vital aftercare for people who have been sectioned' (1/3/12); Hansard, HL Deb 29/2/12, vol 725 col 1364: transcript of House of Lords debate, in which the government agree to the proposed amendment. The only changes to s117 MHA 1983 to be made by clause 39 Health and Social Care Bill 2010-12 will relate to the change from Primary Care Trusts to clinical commissioning groups. See [Mind \(Charity\)](#)

## Other jurisdictions

### Scotland

- Mental Welfare Commission for Scotland, 'An investigation into the response by statutory services and professionals to concerns raised in respect of Mr and Mrs D' (January 2012). This investigation into alleged abuse of powers of attorney concludes with recommendations for the council, NHS Board, Office of the Public Guardian,

Law Society of Scotland, and the Scottish Government. See [Mental Welfare Commission for Scotland](#).

## Wales

- CSSIW and HIW, 'Deprivation of Liberty Safeguards: Annual Monitoring Report for Health and Social Care' (February 2012). An information brief and table of statistics is also available. For a discussion of this report, see Mithran Samuel, 'Latest on the Deprivation of Liberty Safeguards in Wales' (Community Care Adult Care Blog, 13/2/12). See [DOLS#HIW and CSSIW](#)

## Website

- On 31/3/12 Mental Health Law Online contained [1160 categorised cases](#)
- The March 2012 CPD questionnaire is now online. Obtain 12 accredited CPD points for £60. See [CPD scheme](#)
- You can now receive monthly updates delivered automatically to your Kindle e-reader. See [Kindle updates](#)
- The Mental Health Law Online Annual Review 2011 is now available (a) online, (b) as a PDF download and (c) in Kindle format. It contains all news which appeared in the monthly updates for 2011. See [Annual Review 2011](#)
- The CPD questionnaire for March 2012 is now online. Obtain 12 accredited CPD points from your desk for £60. See [CPD scheme](#)
- See [March 2012 chronology](#) for this month's changes to the website in date order