

# Mental Health Law Online

## Monthly Update, May 2013

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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\\_2013\\_update](http://www.mentalhealthlaw.co.uk/May_2013_update) It is a snapshot of the online page – the online page will be automatically updated when case and legislation pages are updated.

### Events

- **Philosophy Workshop.** The Essex Autonomy Project's Advanced Philosophy Workshop will be held on Wednesday **5/6/13** at University of Essex, Colchester

Campus. The three sessions are: (1) Philosophical Theories of Autonomy; (2) Understanding Others: Introduction to Critical Hermeneutic Phenomenology; and (3) Recognition-Theory. Cost: £85 per person, including lunch. For details and registration form, see [EAP website](#). See [Events](#)

- **Autonomy Summer School.** The Essex Autonomy Project's Autonomy Summer School will be held from Thursday **4/7/13** to Saturday **6/7/13** inclusive. The aim is 'to equip practitioners and researchers with an understanding of the philosophical ideal of individual autonomy and to provide a forum for the discussion of the dilemmas surrounding its' practical application'. Cost: £650 (residential places), £495 (non-residential places). For details, see [EAP website](#). See [Events](#)
- **MHLA panel course.** 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 London on Monday **10/6/13** and Tuesday **11/6/13** and in Nottingham on Monday **17/6/13** and Tuesday **18/6/13**. 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.
- **New 'Events' box on home page.** Contact jonathan at mentalhealthlaw.co.uk if you have an event you would like to publicise. See [Events](#)

## Book

- **New book on Mental Health Tribunals.** Fennell, Letts and Wilson, *Mental Health Tribunals: Law, Policy and Practice* (Law Society, April 2013). The blurb on the back cover states: 'This practical book provides all professionals, particularly legal representatives, with an accessible and up-to-date guide to Mental Health Tribunals.' The [Foreword](#) by Lucy Scott-Moncrieff can be read online. As one of the authors I heartily recommend this book! Purchase from [Amazon](#) (you can order even when listed as 'out of stock' as it will be replenished shortly by the Law Society). See [Books](#)
- **MHT book discount.** Fennell, Letts and Wilson, *Mental Health Tribunals: Law, Policy and Practice* (Law Society, April 2013) is available directly from the Law Society, who are offering a 20% discount to existing and prospective members of the Mental Health Accreditation Scheme (full details should be available on 29/5/13). Contact the Law Society if you have not received your discount code. See [Law Society bookshop](#)

## Cases

### Mental Health Act cases

- **Extra-statutory recommendations case.** [EC v Birmingham and Solihull Mental Health NHS Trust \(2013\) MHLO 47 \(CA\)](#) — *The appellant restricted patients had sought [extra-statutory recommendations](#), in relation to leave and transfer, but the First-tier Tribunal had refused, without hearing evidence, to make recommendations. (1) The parliamentary answer in relation to extra-statutory recommendations given by a Home Office minister on 28/10/87, and the fact that recommendations had been*

*made and considered in the past, did not give rise to a legitimate expectation that the tribunal would entertain submissions that a recommendation should be made. (2) If the FTT had been faced with the contention that leave or transfer were necessary or available parts of the patient's treatment (in relation to the test in s72(1)(b)(iia)) it would have had to consider it, but in these cases it had not been.* [Summary based on Lawtel and All ER (D) reports.]

- **Miscellaneous case.** [Coombs v North Dorset NHS PCT \(2013\) EWCA Civ 471, \(2013\) MHLO 35](#) — "Can an involuntary patient detained in a mental hospital under the provisions of the Mental Health Act 1983 pay for his care or treatment, or is such a possibility denied the patient (or his family on his behalf) by the provisions of that Act (the "MHA 1983") and/or public policy? ... In these circumstances, it seems to me that there is nothing inherent in the structure or wording of the MHA 1983 or the 2006 Act, and nothing by way of public policy, to exclude absolutely the possibilities of detained patients (or their family or others holding responsibility for looking after their assets) paying for or contributing in part to the cost of their treatment or care. Presumably, private patients detained in a private hospital do exactly that. Detained patients who are being looked after by an NHS authority will have most, if not all, of their costs funded by the state: but even in their case, it may be possible, as in the case of any patient within the NHS system, to purchase private accommodation or other top-up care facilities available within the applicable Guidance. Of course, it will not be possible to provide for care or treatment which is in conflict with the recommendations of the responsible clinician. Nor may it always or perhaps even often be possible within the NHS system to purchase additional care or treatment facilities without running into the principle of free provision and the limitations upon the exceptions to that principle. However, the cases cited above show that responsible clinicians may recommend treatment or care which the NHS is not under a duty to provide, because it goes beyond its statutory duty. There seems to me no reason in statute or public policy why there should be an absolute bar on the provision of facilities, recommended by or consistent with the recommendations of the responsible clinician, which may be available at a price, within or without the NHS system. Ms Richards submits, as she did below, that private payment may create difficulties of a practical nature, as where private funding previously available breaks down. However, as the judge said, such difficulties of funding may always raise their head, and do not create public policy bars of their own. It seems likely that the same answer is applicable whether the detained patient has a claim against a tortfeasor or whether it is simply a matter of a personal choice to pay. Similarly, it seems also quite possible that even detained patients under Part III have to be assimilated for these, as for other purposes, with detained patients under Part II. However, it is not necessary in this case to determine those matters. It is sufficient to say, in the case of this claimant, who is a detained patient within Part II of the MHA 1983 and has a claim against admitted tortfeasors, that the answer to the issue posed, namely whether there is anything in public policy or otherwise which prevents him paying for his own care or treatment, is No." [Summary required; external summary available.]

## Financial capacity cases

- **Financial case.** Summary added. [Pitt v Holt \(2011\) EWCA Civ 197](#) — *As receiver under the MHA 1983 (old equivalent to deputy under the MCA 2005) for her husband, Mrs Pitt set up a settlement trust which overlooked the impact of inheritance tax;*

*Futter's case did not involve the mental capacity. (1) The court considered the Hastings-Bass rule, including the distinction that an act in the exercise of a dispositive discretion is (a) void if done by trustees outside the scope of the relevant power, but may be (b) voidable if done within the terms of their power but in breach of a fiduciary duty (the same principles apply to others in a fiduciary position, including receivers). (2) Mrs Pitt's acts were within the terms of the power conferred by the Court of Protection, so were not void. They were not voidable either, as she had taken professional advice (albeit inadequate advice) from a proper source as to the advantages and disadvantages of the various courses open to her. (3) For a voluntary disposition to be set aside on the basis of mistake: (a) the donor must be mistaken, at the time of the disposition, as to its legal effect or as to an existing fact which is basic to the transaction; and (b) the mistake must be of sufficient gravity to satisfy the *Ogilvie v Littleboy* test (which provides protection to the recipient against too ready an ability of the donor to seek to recall his gift). (4) Mrs Pitt was under a mistake (she believed that the transaction would not have any tax disadvantages) which met the *Ogilvie v Littleboy* test, but unforeseen fiscal liabilities are a consequence, not a legal 'effect', so the disposition would not be set aside.*

- **Financial case.** [Pitt v Holt \(2013\) UKSC 26, \(2013\) MHLO 46](#) — As receiver under the MHA 1983 (old equivalent to deputy under the MCA 2005) for her husband, Mrs Pitt set up a settlement trust which overlooked the impact of inheritance tax; *Futter's case* did not involve the mental capacity. (1) The court considered the Hastings-Bass rule, and dismissed Mrs Pitt's appeal on this point (she had not breached her fiduciary duty so the settlement would not be set aside on this basis). (2) The court considered the test for setting aside a voluntary disposition on the ground of mistake, and allowed Mrs Pitt's appeal on this point.
  - **Youtube, 'UK Supreme Court Judgments 9th May 2013 - Part 1' (9/5/13).** Video of Lord Neuberger summarising the *Pitt v Holt* judgment. See [Pitt v Holt \(2013\) UKSC 26, \(2013\) MHLO 46](#)
  - **Mark Herbert, 'Initial reaction to Pitt v Holt judgment' (5 Stone Buildings, 9/5/13).** See [Pitt v Holt \(2013\) UKSC 26, \(2013\) MHLO 46](#)
- **Financial deputyship case.** [Re GM: MJ and JM v The Public Guardian \(2013\) MHLO 44 \(COP\)](#) — "The applicants ... have applied to the court for the retrospective approval of a number of gifts they have made from GM's funds to themselves, their families, some friends and several charities, and also for the court to agree what they have described as their deputyship expenses. ... I have no hesitation in revoking their appointment as deputies. GM's finances are in disarray because of their conduct, and it is in her best interests that someone with experience of cases of unjust enrichment and restitution, such as a panel deputy, is appointed to manage her affairs in their place." [Summary required.]
- **Will case.** [Greaves v Stolkin \(2013\) EWHC 1140 \(Ch\), \(2013\) MHLO 36](#) — "Mr Leslie Stolkin ..., some seven weeks before his death, executed a codicil. This case concerns the validity of that document. ...[O]ne of the deceased's sons, Mr Gary Stolkin ... disputes the validity of the Disputed Codicil on two grounds: (i) Want of testamentary capacity; and (ii) Want of knowledge and approval. ... In my judgment,

the Disputed Codicil is valid, and it should be admitted to probate." [Summary required.]

## Welfare capacity cases

- **Best interests case.** [PS v LP \(2013\) EWHC 1106 \(COP\), \(2013\) MHLO 43](#) — (1) *It was in LP's best interests not to see her estranged family: before losing capacity due to a cerebral aneurism, she had taken the decision that her future was with her new partner and that she wished to break with the past.* (2) *Contact should only commence in future if LP becomes capable of expressing a view to that effect, and the family should be kept informed in relation to this approximately every six months.*
- **Best interests case.** [Stoke City Council v Maddocks \(2013\) EWHC 1137 \(COP\), \(2013\) MHLO 38](#) — (1) *As a result of his Alzheimer's Disease and vascular dementia, JM lacked capacity to litigate, or make decisions as to his residence, care plan, contact with his family, or dealing with his property and financial affairs.* (2) *It was in JM's best interests to remain at the AH care home; it was not in his best interests to be cared for by his daughter WM, either in the UK or Turkey, in particular because of her psychological profile and failure to provide a detailed proposed care plan.* (3) *In light of a recent development (JM had been taken out of the care home in breach of an injunction), contact by family members could be suspended, and reinstated at the discretion of the local authority.* (4) *A local authority deputy was appointed to sell the home and administer the finances, because if WM were deputy she would refuse to meet the local authority's fees.* (5) *JM's passport could not be returned to the family and would remain with the Official Solicitor until further review.* (6) *Any attempt to publicise the case would be a cruelty to JM.* (7) *The case would be reviewed on the first available date after 3 months, or earlier if a committal application is made by the local authority.*
  - **Andy McSmith, 'Justice Secretary asks for review of Court of Protection's powers' (Independent, 2/5/13).** See [Stoke City Council v Maddocks \(2012\) EWHC B31 \(COP\), \(2012\) MHLO 111](#)
  - **Lucy Series, 'Human Rights will be in touch' (The Small Places Blog, 24/4/13).** See [Stoke City Council v Maddocks \(2012\) EWHC B31 \(COP\), \(2012\) MHLO 111](#)
  - **Andy Dolan, 'Agony of woman locked up for six weeks by secret court just for trying to get her Dad out of care home: The terrifying moment police descended to "cart me off to jail"' (Daily Mail, 24/4/13).** See [Stoke City Council v Maddocks \(2012\) EWHC B31 \(COP\), \(2012\) MHLO 111](#)
  - **Steve Doughty, 'Jailed in secret - for trying to rescue her father from care home where she believed he would die' (Daily Mail, 23/4/13).** See [Stoke City Council v Maddocks \(2012\) EWHC B31 \(COP\), \(2012\) MHLO 111](#)

## Litigation capacity case

- **Litigation capacity case.** Transcript and neutral citation now available. [Baker Tilley \(A Firm\) v Makar \(2013\) EWHC 759 \(QB\), \(2013\) MHLO 33](#) — *During a detailed*

*assessment costs hearing M became tearful and distressed and lay on the floor screaming. M refused to grant access to her medical files and at a further hearing, in the absence of medical evidence, the master decided that M was a protected person for the purposes of [CPR Part 21](#), and stayed proceedings pending the appointment of a litigation friend. Held: The master put more weight on the incident than necessary, and should have taken account of M's ability to take part in other litigation. In the absence of medical evidence the court should be cautious before concluding that a litigant is suffering from a disturbance of the mind. [Summary based on Lawtel/Westlaw summary.]*

## Community care case

- **Community care case.** [SL v Westminster City Council \(2013\) UKSC 27, \(2013\) MHLO 45](#) — "The short issue raised by this appeal is whether the respondent (SL), a failed asylum-seeker, was at the relevant time in need of 'care and attention', requiring the provision of accommodation by the local authority under section 21(1)(a) of the National Assistance Act 1948. Burnett J decided that he was not, but that decision was reversed by the Court of Appeal ... I consider that Burnett J reached the right result for substantially the right reasons." [Summary required.]
  - **Youtube, 'UK Supreme Court Judgments 9th May 2013 - Part 2' (9/5/13).** Video of Lord Carnwath summarising the SL judgment. See [SL v Westminster City Council \(2013\) UKSC 27, \(2013\) MHLO 45](#)

## Criminal and extradition cases

- **Criminal law case.** [R v Dixon \(2013\) EWCA Crim 465, \(2013\) MHLO 42](#) — (1) *Despite the appellant's intellect and condition the judge was entitled to permit the jury to draw an adverse inference from his failure to give evidence.* (2) *The appellant argued that fresh medical evidence showed the judge's decision was wrong, but this evidence was not admitted.* (3) *The appellant had been able meaningfully to participate in his trial, which was fair, and the conviction was safe.* (4) *The minimum term of the appellant's detention at Her Majesty's pleasure was reduced from 14 to 13 years.*
- **Diminished responsibility case.** [R v Foye \(2013\) EWCA Crim 475, \(2013\) MHLO 40](#) — *The rule in s2(2) [Homicide Act 1957](#) that the burden of establishing diminished responsibility lies on the defendant, on the balance of probabilities, is not incompatible with the presumption of innocence contained in [Article 6\(2\)](#).*
- **Sentence appeal case.** [R v AJR \(2013\) EWCA Crim 591, \(2013\) MHLO 37](#) — *The appellant had been found not guilty by reason of insanity and sentenced to a supervision order for 2 years under s5 [CPIA 1964](#) and made the subject of a restraining order under s5A [Protection from Harassment Act 1997](#) for 5 years. He appealed against the restraining order.* (1) *An finding of 'not guilty by reason of insanity' is an acquittal for the purposes of the 1997 Act so a restraining order may be lawfully imposed.* (2) *On the facts, there was no evidence that the defendant was likely to 'pursue a course of conduct which amounts to harassment', so the restraining order was quashed.* (3) *In any event, the restraining order had been drafted very widely and for a long duration, and concerns as to the children's welfare would more properly be*

addressed by agreement between mother and local authority, or by the family courts under the [Children Act 1989](#).

- **Extradition case.** [Bialek v Circuit Court in Warsaw Poland \(2013\) EWHC 930 \(Admin\), \(2013\) MHLO 39](#) — Extradition case with psychiatric element. [Summary required.]

## Legal Aid case

- **Legal Aid case.** [R \(T\) v LSC \(2013\) EWHC 960 \(Admin\), \(2013\) MHLO 41](#) — *The LSC's decision in care proceedings to agree prior authority for a multi-disciplinary assessment at a lower amount than that sought was unlawful because of the lack of reasons given, and was quashed.*
  - **Eleanor Battie, 'LAA must give reasons about funding expert assessments in care proceedings' (UK Human Rights Blog, 2/5/13).** See [R \(T\) v LSC \(2013\) EWHC 960 \(Admin\), \(2013\) MHLO 41](#)

## Legal Aid

- **Ministry of Justice, 'Transforming legal aid: delivering a more credible and efficient system' (consultation paper CP14/2013, 9/4/13).** This consultation, running from 9/4/13 to 4/6/13, sets out the Government's proposals for further reform of the legal aid system in England and Wales. See [Consultations#Legal Aid](#)

## Court of Protection

- **Practice Guidance.** [Practice Guidance: Committal for Contempt of Court \(2013\) EWHC B4 \(COP\)](#) — *Applications for committal for contempt, including in the Court of Protection and Family Division, should be heard and decided in public. The discretion to hear such an application in private (in the COP or, in proceedings relating to a child, the Family Division) should be exercised only in exceptional cases where it is necessary in the interests of justice, and in all such cases the court must state in public: (a) the name of that person; (b) in general terms the nature of the contempt of court in respect of which the committal order or suspended committal order is being made; and (c) the punishment being imposed. Committal applications should at the outset be listed and heard in public and a public judgment must be given setting out reasons if the court decides to sit in private. Committal applications in the Court of Protection or the Family Division should at the outset be listed and heard in public. Whenever the court decides to exercise its discretion to sit in private the judge should, before continuing the hearing in private, give a judgment in public setting out the reasons for doing so. Every such statement or judgment must be transcribed at public expense and published on Bailii.*
- **External link added.** MOJ website: Court of Protection daily cause list. See [Court of Protection](#)
- **Chris Green, 'The blind pianist who led our reporter to a closed courtroom' (Independent, 2/5/13).** See [Court of Protection#Other links](#)

- Sue Reid, 'Neil has an IQ of 125 and runs his own business. So why won't a secret court let him spend his own money?' (Daily Mail, 28/4/13). See [Court of Protection#Other links](#)

## Newsletters

- **New page on website.** [Newsletters](#) — This page lists newsletters (and other similar resources) which relate to mental health and capacity law.
- **Mind, 'Legal Newsletter' (Issue 13, April 2013).** This newsletter contains the following. (1) Articles: (a) Systemic failings of mental health care in immigration detention; (b) Community Treatment Orders and the Octet Study; (c) Mind Crisis Care Campaign; (d) Care and Support Bill and section 117 of the Mental Health Act 1983. (2) Case reports: (a) R (Chatting) v Viridian Housing (2012) EWHC 3595 (Admin), (2012) MHLO 177; (b) Bures v the Czech Republic [2012] ECHR 1819; (c) ZH v Commissioner of Police for the Metropolis (2013) EWCA Civ 69, (2013) MHLO 9; (d) RCW v A Local Authority [2013] EWHC 235 (Fam). (3) Mental health and human rights update: (a) UN Special Rapporteur on Torture: No More Treatment without Consent; (b) Disability Rights Watch evidence gathering for the UN Committee on the Rights of Persons with Disabilities; (c) Equality and Human Rights Commission report on human rights and business; (d) Independent Advisory Panel on Deaths in Custody bulletin; (e) Thematic inspection on section 136 police cells as places of safety. (4) Legal Aid update. (5) News: (a) The Fifth Year of the Independent Mental Capacity Advocacy Service 2011/2012; (b) Winterbourne View: The final Department of Health report; (c) Disability Hate Crime; (d) Care Quality Commission Reports; (e) Mental Health Discrimination Act 2013; (f) Update on the review of the Public Sector Equality Duty; (g) Public Law Project helpline on civil legal aid and exceptional funding project; (h) Implementing a ban on age discrimination in the NHS. See [Mind \(Charity\)](#)
- **39 Essex Street, 'Court of Protection Newsletter' (issue 33, May 2013).** The cases mentioned in this issue are: PC and NC v City of York Council [2013] EWCA Civ 478 — Baker Tilly v Makar [2013] EWHC 759 (QB) — A County Council v E (2012) EWHC 4161 (COP), (2012) MHLO 176 — Day & others v Royal College of Music & Harris [2013] EWCA Civ 191 — Re GM (unreported, case no.11843118) — NT v FS (2013) EWHC 684 (COP), (2013) MHLO 18 — DO v LBH (2012) EWHC 4044 (Admin), (2012) MHLO 165 — ET, BT and CT v Islington LBC [2013] EWCA Civ 323. There is also information under the following headings: (a) Managing a bank or building society account on behalf of someone else; (b) Care Quality Commission - Annual DOLS Report; (c) Court of Protection Practitioners Association - London meeting. See [39 Essex Street COP Newsletter#May 2013](#)
- **Ben Troke, 'View from the Coalface' (May 2013).** Notes from East Midlands MCA/DOLS Forum meetings. See [39 Essex Street COP Newsletter#May 2013](#)
- **Browne Jacobson, 'MCA and DOLS Update Webinar' (April 2013).** This webinar covers balancing best interest decisions with allocation of limited resources, looks at 3 MCA cases (on marriage, sterilisation and medical futility), and reviews the latest law on what a deprivation of liberty is. See [Newsletters](#)

## Wales

- **Welsh Government, 'The Duty to Review: Inception Report: Post-Legislative Assessment of the Mental Health (Wales) Measure 2010' (8/4/13).** This report describes the proposed review of the Measure; an interim evaluation report will be published by 31/3/14 and a final report before January 2016. Suggestions are sought for additional or complimentary evidence to inform these reports. See [Mental Health \(Wales\) Measure 2010](#)

## Website and CPD

- **MHLO books.** The Mental Health Law Online [Annual Review 2012](#) has been published in [paperback](#) and [Kindle](#) format, and is now available on Amazon. The Annual Review 2012 contains all news items, arranged thematically, which were added to the website during 2012. The [Annual Review 2011](#) is also now available in [paperback](#) and [Kindle](#) formats. See [Books](#)
- **CPD scheme.** The questionnaires for February-March 2013 and March 2013 are now available. Obtain 12 accredited CPD points online for £60 by subscribing today. See [CPD scheme](#)
- **Donations.** Mental Health Law Online is free to use and maintained on a voluntary basis. If you or your organisation find this website useful, please consider making a donation to contribute to its upkeep. See [Donations](#)
- **Cases.** On 31/5/13 Mental Health Law Online contained [1368 categorised cases](#)
- **Chronology.** See [April 2013 chronology](#) for this month's changes to the website in date order