

Mental Health Law Online

Monthly Update, August 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/August_2012_update It is a snapshot of the online page – the online page will be automatically updated when case and legislation pages are updated.

Cases

Mental Health Act

- Ministry of Justice case. [R \(RW\) v SSJ \(2012\) EWHC 2082 \(Admin\), \(2012\) MHLO 87](#) — *The responsible clinician and tribunal were of the view in March 2011 that the patient required continued treatment in detention in hospital, and the tribunal recommended transfer from Broadmoor to a medium secure unit; in June the RC*

sought permission for trial leave to a MSU, with return to prison being the planned consequence if it were unsuccessful; trial leave in September was unsuccessful and, that month, the Secretary of State remitted the patient to prison on the RC's advice. (1) There had been new information since the tribunal which put a different complexion on the case, namely the unsuccessful trial leave, so the Secretary of State was entitled to take at face value the RC's new opinion that the patient did not require treatment in hospital for mental disorder. (2) It was not necessary for the Secretary of State to consider that lack of treatment in prison might breach [Article 3](#) or require almost immediate re-transfer to hospital; the correct approach was to consider the remission request when made, and consider transfer to hospital later if necessary. (3) Permission to amend the grounds to challenge the alleged ongoing failure to transfer under [s47](#) was refused, but the judge directed that if a fresh application were made within six weeks that the permission application be referred to him.

- First-tier Tribunal case. [Re Ian Brady \(2012\) MHLO 76 \(FTT\)](#) — The tribunal hearing was adjourned from 9/7/12, to a date to be fixed, because of the patient's (physical) medical condition.
- First-tier Tribunal case. [Re Ian Brady \(2012\) MHLO 75 \(FTT\)](#) — The media's request for one or more representatives to be present in the tribunal room at Ashworth was refused.
- Sentence appeal case. [R v Fletcher \(2012\) EWCA Crim 1550, \(2012\) MHLO 86](#) — Permission granted to appeal, on fresh evidence, against IPP and argue that restricted hospital order should have been imposed. [Summary required.]

Court of Protection

- COP case. [Re MW; LB Hammersmith and Fulham v MW \(2012\) MHLO 82 \(COP\)](#) — (1) MW lacked capacity to make decisions in relation to contact with his childhood friend JC. (2) It was not in MW's best interests for JC to visit MW's home, so an order was granted restraining JC from doing so; this was endorsed with a penal notice because of previous breaches of an injunction. (3) The local authority and Official Solicitor's requested that MW, who lacked litigation capacity, should not attend the hearing because this would be stressful and not conducive to the maintenance of his good mental health: the court acceded to this application. (4) Sensitive evidence was withheld from JC, at the request of the local authority and Official Solicitor, but the court came to its final decision based on the open evidence.
- COP case. [XCC v AA \(2012\) EWHC 2183 \(COP\), \(2012\) MHLO 80](#) — An arranged marriage took place in Bangladesh between DD, a British citizen with severe learning difficulties, and her cousin purely for immigration purposes. The judge: (1) exercised the inherent jurisdiction of the High Court to declare that the marriage (although valid in Bangladesh) was not recognised as a valid marriage in this jurisdiction; (2) declared that it was in DD's best interests for an application to be made to annul the marriage, with the Official Solicitor as litigation friend; (3) stated that marriage with an incapacitated person who is unable to consent is a forced marriage within the meaning of the Forced Marriage Act 2007; and (4) stated the following guidance: 'in my view it is the duty of a doctor or other health or social work professional who becomes aware that an incapacitated person may undergo a marriage abroad, to

notify the learning disabilities team of Social Services and/or the Forced Marriage Unit if information comes to light that there are plans for an overseas marriage of a patient who has or may lack capacity. The communities where this is likely to happen also need to be told, loud and clear, that if a person, whether male or female, enters into a marriage when they do not have the capacity to understand what marriage is, its nature and duties, or its consequences, or to understand sexual relations, that that marriage may not be recognised, that sexual relations will constitute a criminal offence, and that the courts have the power to intervene.' [Detailed summary available on case page.]

- COP case. [Re BS; SC v BS \(2012\) MHLO 78 \(COP\)](#) — *The jointly-instructed psychiatrist, although an expert in autism, did not have experience of applying the test for capacity in the context of litigation in the Court of Protection, so the court directed that an alternative expert be instructed.*

Power of attorney

- LPA case. [Re Harcourt \(2012\) MHLO 74 \(LPA\)](#) — "This application relates to an investigation by the Office of the Public Guardian into the management of Mrs Harcourt's property and financial affairs by her daughter under a Lasting Power of Attorney. It considers the powers of the OPG and the Court of Protection when an attorney impedes an investigation and the circumstances in which the court may revoke an LPA."
- EPA case. [Re Newman \(2012\) MHLO 73 \(EPA\)](#) — *The donor made an EPA in which, amongst other defects, he failed to select either of the following alternatives: "with general authority to act on my behalf" or "with authority to do the following on my behalf". The court confirmed that this failure did not invalidate the EPA, because it was an immaterial difference from the prescribed form within paragraph 2(4) of Schedule 4 of the MCA. [OPG summary - EPA case.]*
- EPA case. [Re Stapleton \(2012\) MHLO 72 \(EPA\)](#) — *(1) The court directed the Public Guardian to cancel the registration of the EPA, because the attorney's financial abuse made him unsuitable. (2) A panel deputy was appointed instead. (3) D was ordered to pay his own costs (a departure from the general rule in property and affairs cases that P pays) because of D's conduct before and during proceedings.*

Local Government Ombudsman

- LGO decision. [LGO decision: Jones 10 010 739 \(2010\) MHLO 199](#) — "A case where the DoL decision taken was not the 'least restrictive' option." [Summary required.]
- LGO decision. [LGO decision: Dorothy 10 013 715 \(2010\) MHLO 198](#) — "A case where a DoL application was not made promptly and the care home's/council's approach to restrictions placed on the complainant and her mother was flawed." [Summary required.]

Other cases

- Community care case. [Davis v West Sussex County Council \(2012\) EWHC 2152 \(QB\), \(2012\) MHLO 83](#) — *At a safeguarding vulnerable adults case conference the local authority determined that certain allegations of abuse at a care home were substantiated or inconclusive, made recommendations, and decided to refer three members of staff to their professional bodies. The claimants sought judicial review of the decisions (and of a subsequent Default Notice, although this was not pursued). (1) The local authority's procedure was unfair, in breach of the rules of natural justice, its own guidance (based on government guidance), and legitimate expectations - a precis cannot do justice to how disgraceful the procedure was. (2) Two defences, arguing that no public law rights arose, failed: (a) there was no respect in which the duty to protect vulnerable adults conflicted with the less pressing obligation to treat other parties affected in a just manner; (b) there was a sufficient public flavour to make the process of investigation and decision a public function distinct from the contractual relationship. (3) The defendant's arguments that no remedy should follow failed: in particular, because the decisions were unfair, inconsistent with or unsupported by the findings of external bodies, and had a serious continuing impact on the claimants and their residents and staff, and because the defendant showed an inability to recognise, even in hindsight, some basic requirements of fairness.*
- ECHR case. [Munjaz v UK 2913/06 \(2012\) MHLO 79 \(ECHR\)](#) — *The applicant, C. Munjaz, is a British national who was born in 1947. Suffering from mental health problems, he has spent a number of periods in prison and hospital. The case concerned Mr Munjaz's complaint about his placement in seclusion in Ashworth Special hospital (a high security hospital) where he was transferred in March 1994 as a result of his increasingly psychotic, aggressive and violent behaviour. Relying in particular on Article 8 (right to respect for private and family life), he alleged that Ashworth's in-hospital policy on seclusion, which had not complied with the Code of Practice under the Mental Health Act, had adversely affected his right to personal development and to establish and develop relationships with the outside world. Further relying on Article 5 (right to liberty and security), he also claimed that his seclusion had amounted to a further deprivation of his liberty lacking any basis in law and without possibility of bringing an external appeal. No violation of Article 5. No violation of Article 8. [Summary from court press release.]*
- Extradition case. [Turner v Government of the USA \(2012\) EWHC 2426 \(Admin\), \(2012\) MHLO 84](#) — *The appellant was unable to demonstrate that the evidence that was before the High Court was 'decisive' such that if it had been before the District Judge he would have concluded that she had demonstrated that her mental condition was such that it would be oppressive to extradite her to the USA.*
- Mercy killing case. [R \(Nicklinson\) v Ministry of Justice \(2012\) EWHC 2381 \(Admin\), \(2012\) MHLO 77](#) — *(1) Voluntary euthanasia is not a possible defence to murder. (2) The DPP is not under a legal duty to provide further clarification of his policy. (3) Section 2 Suicide Act 1961, in obstructing the claimants from exercising a right in their circumstances to receive assistance to commit suicide, is not incompatible with Article 8. (4) The GMC and the SRA are not under a legal duty to clarify their positions. (5) It was unnecessary in this case to decide whether or not the*

mandatory life sentence for murder, in a case of genuine voluntary euthanasia, is incompatible with the Convention.

- Southern Irish case. [XY v Clinical Director of St Patricks University Hospital \(2012\) IEHC 224, \(2012\) MHLO 85](#) — Consideration of meaning of 'examination' within the meaning of the Southern Irish Mental Health Act 2001. [Summary required.]

Corrections

- Revised transcript now on Bailii (the original having been withdrawn from publication at the Official Solicitor's request). [XCC v AA \(2012\) EWHC 2183 \(COP\), \(2012\) MHLO 80](#) — *An arranged marriage took place in Bangladesh between DD, a British citizen with severe learning difficulties, and her cousin purely for immigration purposes. The judge: (1) exercised the inherent jurisdiction of the High Court to declare that the marriage (although valid in Bangladesh) was not recognised as a valid marriage in this jurisdiction; (2) declared that it was in DD's best interests for an application to be made to annul the marriage, with the Official Solicitor as litigation friend; (3) stated that marriage with an incapacitated person who is unable to consent is a forced marriage within the meaning of the Forced Marriage Act 2007; and (4) stated the following guidance: 'in my view it is the duty of a doctor or other health or social work professional who becomes aware that an incapacitated person may undergo a marriage abroad, to notify the learning disabilities team of Social Services and/or the Forced Marriage Unit if information comes to light that there are plans for an overseas marriage of a patient who has or may lack capacity. The communities where this is likely to happen also need to be told, loud and clear, that if a person, whether male or female, enters into a marriage when they do not have the capacity to understand what marriage is, its nature and duties, or its consequences, or to understand sexual relations, that that marriage may not be recognised, that sexual relations will constitute a criminal offence, and that the courts have the power to intervene.'* [Detailed summary available on case page.]
- Corrected transcript published by OPG. [Re Phillips \(2012\) MHLO 60 \(LPA\)](#) — *The donor appointed three attorneys, A, B and C. She did not name any persons to be notified, and so there were two certificate providers. The Public Guardian refused to register on the ground that one certificate provider, X, was a member of the family of A. He was the unmarried partner of A but did not live at the same address. In his Part B certificate X said: "I am the partner of A and have known the donor for 3 years." The attorney applied to court for a direction to register and the Public Guardian was joined as respondent. The court decided that X was to be treated as a member of the family of A, and so the instrument could not be registered. The judge said: "In my judgment, anyone who describes himself in this context as the attorney's partner is courting trouble and automatically disqualifies himself from being a person who can give an LPA certificate. This applies regardless of whether he describes himself as the attorney's partner intentionally or inadvertently, whether they live at the same address or at separate locations, whether the relationship is intimate or platonic, and whether the statement is true or false." Although it was unnecessary to the decision, the judge added that, even if X were not to be treated as a family member, he was not independent of the attorney, as required by the prescribed LPA form.* [OPG summary - LPA case.]

Legislation

- Draft legislation. [Care and Support Bill](#) — The draft Care and Support Bill would create single law for adult care and support, replacing more than a dozen different pieces of legislation.
- Department of Health, 'Draft Care and Support Bill published' (11/7/12); Robert Long and Tom Powell, 'Draft Care and Support Bill 2012-13 - Commons Library Standard Note' (6/8/12); Law Society, 'Overhaul of social care is long overdue, says Law Society' (press release, 11/7/12). See [Care and Support Bill](#)
- Scottish SI. [Mental Health \(Safety and Security\) \(Scotland\) Amendment Regulations 2012](#) — "These Regulations amend the Mental Health (Safety and Security) (Scotland) Regulations 2005 ('the principal Regulations') to add the Medium Secure Service, Rohallion Clinic, Murray Royal Hospital, Muirhall Road, Perth to the list of institutions specified in regulation 2(2)(a) of those Regulations (regulation 2). The principal Regulations provide for 'specified persons', who may be made subject to measures to protect the safety and security of themselves and others. A person is only a 'specified person' if certain conditions exist, one of which is that the person is detained in a state hospital or other place specified in regulation 2(2)(a) of the principal Regulations. The Mental Health (Safety and Security) (Scotland) Amendment Regulations 2007 are revoked." [Explanatory Note.] In force 1/8/12.

Newsletter and articles

- 39 Essex Street, 'Court of Protection Newsletter' (issue 23, July 2012). The cases mentioned in this issue are: X Primary Care Trust v XB [2012] EWHC 1390 (Fam), [2012] MHLO 54 — Re E (Medical treatment: Anorexia) [2012] EWHC 1639 (COP), [2012] MHLO 55 — Re BS; SC v BS [2012] MHLO 78 (COP) — R (KM) v Cambridgeshire CC [2012] UKSC 23, [2012] MHLO 57 — HSE Ireland v SF (A Minor) [2012] EWHC 1640 (Fam), [2012] MHLO 69 — LGO decision: Dorothy 10 013 715 [2010] MHLO 198 — LGO decision: Jones 10 010 739 [2010] MHLO 199. See [39 Essex Street COP Newsletter](#)
- West Mercia Police, 'Bromsgrove Care Staff Sentenced For Neglect' (28/8/12). The victim, who had not been helped into bed or attended to in the evening, was found in the morning lying on the floor in the corner of his room in Breme House, partly dressed and in a distressed state, suffering from borderline hypothermia and complaining of hip pain. He subsequently needed to spend five weeks in hospital. For the offence of ill treating or wilfully neglecting a person without capacity, under s44 MCA 2005: Glen Walsh, aged 23 (date of birth 18/4/89), of Granary Road, Stoke Heath, Bromsgrove, and Gail Broadway, aged 38 (dob 19/3/74), of Lyttleton Avenue, Bromsgrove were both given four month jail sentences suspended for 12 months, 12 month community orders with supervision and told to carry out 125 hours of unpaid community work; Maxine Turbill, aged 46 (dob 15/9/65), of Grayshott Close, Sidemoor, Bromsgrove, was given a two month jail sentence suspended for 12 months and a 12 month community order with supervision; all three were each told to pay £500 costs and an order was made barring them from working with children under the age of 16 and vulnerable adults. They had denied the offence but were found guilty by a jury following a seven-day trial in July this year. See [MCA 2005 s44](#)

- Simon Edwards, 'Options for a local authority for the management of P's finances' (39 Essex Street COP Note, June 2012). See [39 Essex Street COP Newsletter#July 2012](#)
- Sam Jones and Helen Carter, 'Moors murderer Ian Brady's mental health advocate arrested' (Guardian, 17/8/12). See [Re Ian Brady \(2012\) MHLO 76 \(FTT\)](#)
- Gordon Rayner, 'Ian Brady "right to die" tribunal postponed after seizure' (Telegraph, 6/7/12). See [Re Ian Brady \(2012\) MHLO 76 \(FTT\)](#)

Legal Aid

- Legal Aid information added. [Non-means-tested non-tribunal matters](#) — *The information on this page may be useful to anyone considering appealing an LSC decision to nil assess a non-tribunal matter for lack of means testing, or for anyone considering the proposed Point of Principle in relation to this issue.*

Practice Direction

- [Practice Direction: Citation of Authorities \(2012\)](#) — *This Practice Direction sets out the requirements for the citation of authorities in court proceedings.*

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 10/9/12 and Tuesday 11/9/12. Price: £300 (members); £390 (non-members); £250 (for third and subsequent members in a group). CPD: 12 SRA-accredited hours. See MHLA website for further details and booking form. See [Events](#)

Website

- 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](#)
- On 31/8/12 Mental Health Law Online contained [1223 categorised cases](#)
- See [August 2012 chronology](#) for this month's changes to the website in date order