

Mental Health Law Online

Monthly Update, December 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/November_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

Tribunal

- **Ian Brady public hearing.** [Re Ian Brady \(2012\) MHLO 145 \(FTT\)](#) — *The tribunal's decision is as follows: "The hearing in public of the application by Mr Ian Brady has been re-listed for Monday 17/6/13. The arrangements for the hearing will be the same*

as those made for the hearing which had to be adjourned last July namely that the Tribunal will hear the case at Ashworth Hospital and it will be relayed to the Civil Justice Centre Manchester for members of the public and press to watch the proceedings. The precise details of those arrangements will be published as soon as possible."

- **Upper Tribunal case.** [SH v Cornwall Partnership NHS Trust \(2012\) UKUT 290 \(AAC\), \(2012\) MHLO 143](#) — *The appellant was subject to a CTO. When he attended for his depot injection, he said that he did not consent to it but nonetheless he submitted to receive it without resistance. He argued that his lack of consent meant that the 'appropriate medical treatment is available for him' test was not met, but the tribunal did not discharge. The UT held that the issue of consent is outside the jurisdiction of the tribunal: (a) the tribunal can only consider the statutory criteria (consent does not arise until the decision to treat has been made, whereas appropriateness and availability are issues that arise prior to that decision); (b) it is the courts which provide judicial oversight of treatment under the Act.*
- **Upper Tribunal case.** [AM v West London MH NHS Trust \(2012\) UKUT 382 \(AAC\), \(2012\) MHLO 139](#) — "The issue in this case is when a tribunal is under a duty to adjourn to obtain information on possible aftercare available to a patient. ... The social work evidence before the tribunal may have been incomplete, even inadequate, but that did not affect the tribunal's ability to give Mr M a fair hearing and to deal with his case fairly and justly. On the tribunal's findings, Mr M had not yet progressed to the point where the issue of aftercare that was actually available would arise. Without some acceptance or insight, Mr M could not progress to the point where his management in the community could even be tested by unescorted leave, let alone where he could be conditionally discharged." [Summary required.]
- **Upper Tribunal case.** [LN v Surrey NHS Primary Care Trust \(2011\) UKUT 76 \(AAC\)](#) — "This is an interlocutory appeal against a decision of the First-tier Tribunal (Health, Education and Social Care Chamber), whereby the First-tier Tribunal declined to exclude evidence. ... the issue for the First-tier Tribunal is not whether evidence is admissible, i.e., whether it can be admitted, but is whether it should be admitted. Relevance is a key consideration. Irrelevant evidence should not be admitted. However, relevance is not the only consideration. The First-tier Tribunal is also entitled to consider the weight of evidence when deciding whether to admit it. ... It is wholly inconsistent for the primary care trust to say that it is confining its case to ten specific incidents and for it then to adduce evidence of complaints or other allegations relating to other incidents in order to show that those ten specific incidents are not isolated. ... In my judgment, the First-tier Tribunal erred in not considering whether any specific evidence should be excluded or redacted at the beginning of the hearing or whether there needed to be a clearer ruling as to the potential relevance of the evidence. It erred in law because it failed to rule that there was an inconsistency in the way the Respondent presented its case and it failed to require the Respondent to give the Appellant adequate notice of the inference it wished the First-tier Tribunal to draw from evidence of uninvestigated complaints and allegations that was not being admitted to prove the contents of the complaints and allegations." [Not an MHT case. Summary required.]

Best interests and capacity

- **Best interests case (medical).** [Re L; The NHS Trust v L \(2012\) EWHC 2741 \(COP\), \(2012\) MHLO 159](#) — *The Trust sought a declaration that it was not in the best interests of L to be the subject of forcible feeding or medical treatment notwithstanding that in the absence of such nutrition and treatment she would inevitably die. The court declared (to paraphrase) that: (1) L lacked capacity to litigate and to make decisions in relation to the serious medical treatment at issue, specifically, (a) nutrition and hydration, and (b) dextrose for hypoglycaemic episodes. (2) L had capacity to make decisions as to anti-biotic treatment, analgesia and treatment of her pressure sores. (3) In L's best interests, the clinicians were permitted: (a) to provide nutrition and hydration and medical treatment where L complies; (b) to administer dextrose solution to L despite her objections where immediately necessary to save life; (c) not to provide L with nutrition and hydration with which she does not comply (all reasonable steps to gain L's co-operation having been taken); (d) to provide palliative care in the terminal stage of L's illness.*
- **Best interests case.** [A Local Health Board v J \(2012\) MHLO 158 \(COP\)](#) — *(1) The court made the following declaration and orders as sought by the Health Board: (a) J lacked capacity to make decisions regarding her medical treatment including decisions regarding the withdrawal of ANH and other life-sustaining treatment; (b) J was in a permanent vegetative state and had no prospect of recovery; (c) there were no further investigations/treatment which should be undertaken; (d) it was in J's best interests for ANH to be withheld; (e) ANH might be withdrawn lawfully by the applicant, or responsible attending medical practitioners or nursing staff; and (f) it was in her best interests to receive such treatment and nursing care as was appropriate to ensure that she retained the greatest dignity until her life came to an end. (2) In relation to the second declaration, the court considered evidence that J had said 'die' several times, and concluded that this had been (misinterpreted) 'vocalisation' (a moan or groan often repeated, and often seen in PVS) rather than 'verbalisation' (which would be consistent with a minimally-conscious state). [Summary based on All ER (D) report of ex tempore judgment.]*
- **Best interests case.** [NHS Trust v K \(2012\) EWHC 2922 \(COP\), \(2012\) MHLO 150](#) — *The Trust proposed to carry out surgery on K which could potentially cure her of cancer but which itself (given her co-morbidities including her 20-stone weight) raised a considerable risk of death. (1) K lacked capacity due to her chronic mental illness, and in particular her delusional belief that she did not have cancer, to make informed decisions about major medical treatment. (2) Orders were made that certain specified treatment would be lawful, subject to powers of veto given to specified people.*
- **Best interests case.** [Re KH \(A child\); An NHS Trust v Mr and Mrs H \(2012\) EWHC B18 \(Fam\), \(2012\) MHLO 142](#) — *"This is an application by an NHS Trust for declarations in relation to the best interests of a boy known in the proceedings as KH. The Trust seeks approval of a medical treatment plan which comes before the court because there are some matters that are not agreed and because the treatment plan involves the withholding of life-sustaining treatment in the event of a serious deterioration in KH's condition." [Summary required.]*

- **Best interests case.** [An NHS Trust v DJ \(2012\) EWHC 3524 \(COP\), \(2012\) MHLO 138](#) — "As a result of his illness, DJ does not have the capacity to make decisions about his medical treatment. The trust has brought the proceedings because there is longstanding disagreement between the family and the doctors about what treatment should be given. This requires the court to make an assessment of DJ's best interests within the framework of the Mental Capacity Act 2005. If that assessment supports the view taken by the doctors, a declaration may be granted endorsing the lawfulness of their approach." [Summary required.]
- **Capacity case.** [J Council v GU \(2012\) EWHC 3531 \(COP\), \(2012\) MHLO 137](#) — "Happily, all parties have agreed a final order which they invite me to approve. I am satisfied that it is a proper order to make and its terms and provisions are fully in the interests of George. However the case has given rise to interesting questions about [Article 8](#) of the European Convention on Human Rights and what the scope of the safeguards should be to ensure compliance with it for the future. I have been exhorted to give a judgment which states unambiguously that the arrangements which I approve are compliant with Article 8. It is said that this judgment is likely to be looked at in any case presenting similar facts." [Detailed summary available.]
- **COP costs case.** [Re CP; WBC v CP \(2012\) EWHC 1944 \(COP\), \(2012\) MHLO 144](#) — *LPM, the brother of CP (called C in the 'blue room' judgment) sought a costs order against the local authority. (1) The court should follow the general rule in welfare cases (that there be no order as to costs: rule 157) where it is appropriate, and it is only local authorities who have broken the law, or who are guilty of misconduct (that falls within rule 159) that have reason to fear a costs order (G v E). (2) The questions to be addressed are (a) is the departure from the general rule justified in all the circumstances, including the conduct of the parties, the outcome of the case and the role of the Applicant as a public body?; and (b) if so, what order should be made? (Neary). (3) The judge concluded that (a) the local authority's actions were tainted with illegality, (b) the local authority's decision making was impoverished and disorganised, (c) the local authority was responsible for the delay in referring CP's circumstances to the Court of Protection and/or the High Court in its children and inherent jurisdictions, and (d) the local authority could have arrived at the position concluded by the court many months earlier. (4) The local authority was ordered to pay LPM's costs to be assessed if not agreed.*
- **Capacity case.** [Calvert v Clydesdale Bank Plc \(2012\) EWCA Civ 962, \(2012\) MHLO 131](#) — *There is no requirement for a mortgagor to give consent or to be capable of giving consent at the time when the security is enforced. Accordingly, the bank were entitled to enforce their mortgage (by the appointment of receivers who sold the property) despite the mortgagor's lack of capacity.*

Criminal

- **Capacity case.** [R v Ligaya Nursing \(2012\) EWCA Crim 2521, \(2012\) MHLO 134](#) — "This is an appeal against conviction by Ligaya Nursing who, on 15 May 2012 in the Crown Court at Southampton, before His Honour Judge Ralls and a jury, was convicted of neglect of a person who lacked capacity, contrary to [s.44](#) of the Mental Capacity Act 2005." [Detailed summary available.]

- **Hybrid order case.** [R v Jenkin \(2012\) EWCA Crim 2557, \(2012\) MHLO 141](#) — *Having pleaded guilty to GBH with intent (for gouging his girlfriend's eyes out), the appellant was sentenced to life imprisonment with a six-year minimum term, combined with a hospital direction and limitation direction under s45A MHA 1983. He appealed against sentence, arguing for a restricted hospital order or alternatively an IPP sentence. (1) A hospital order means that 'release is dependent on the responsible authority being satisfied that the defendant no longer presents any danger which arises from his medical condition': this would be inadequate as, irrespective of his delusional disorder, the appellant posed a significant risk of serious harm to the public. (2) A life sentence should be reserved for those cases where the culpability of the offender is particularly high or the offence itself particularly grave (R v Kehoe): both those limbs were met in this case. (3) The s45A hybrid order was appropriate as the criteria were met and the disorder was treatable, but when treatment is no longer necessary the risk to the public required that he be released from hospital to prison and for the Parole Board to make the release decision.*
- **Criminal appeal.** [R v B \(2012\) EWCA Crim 1799, \(2012\) MHLO 119](#) — *The trial judge found the appellant unfit to plead. The appellant had admitted the act charged during an interview under caution, and the judge refused to exclude that evidence. On the basis of that evidence, the jury found that the appellant had done the act charged. (1) Given that the appellant's mental state was the same during interview as when found unfit to plead, the Court of Appeal found it impossible to understand how the interview could have been admitted: the finding that he had done the act was therefore set aside. (2) The Court of Appeal would have ordered a retrial but has no power to do; the court noted that it was 'high time that Parliament remedied this most unfortunate error in the law'.*
- **Criminal law capacity case.** [G v DPP \(2012\) EWHC 3174 \(Admin\), \(2012\) MHLO 140](#) — *At the Youth Court it had been argued that the case should be stayed since it would be an abuse of the court's process to proceed to an adjudication when the appellant was unfit to plead, to participate in his trial and to instruct his defence. Having heard medical evidence from both sides, the District Judge declined to stay the proceedings, arranged for the appointment of an intermediary and accepted the intermediary's advice as to the way in which the appellant should be assisted during the course of the hearing; he found the charge proved. This was an appeal by way of case stated in relation to the appellant's conviction at the Youth Court. (1) The High Court set out the rules for appeals and commented that the way in which the appeal had been prepared is was lamentable. (2) The District Judge had correctly followed the guidance (from DPP v P) for proceedings in the Youth Court in which capacity is relevant. (3) The defence expert confused the propriety of a prosecution with the ability to understand the nature of proceedings and communicate instructions and the District Judge was entitled to disagree with her.*
- **Sentence appeal case.** [AG's reference \(no 60 of 2012\) sub nom R v Edwards \(2012\) EWCA Crim 2746, \(2012\) MHLO 135](#) — *"This is a case which presented to the judge an intractable but by no means unknown sentencing problem. ... The intractable difficulty presented by this defendant and by, sadly, a number of others is this: he has a variety of personality disorders, but the doctors all report that there is no medical treatment available." [Summary required.]*

- **Sentence appeal case.** [R v Channer \(2012\) EWCA Crim 1667, \(2012\) MHLO 157](#) — *IPP sentence with minimum term of 23 months quashed and restricted hospital order substituted in its place.*
- **Sentence appeal case.** [R v Searles \(2012\) EWCA Crim 2685, \(2012\) MHLO 156](#) — *Custodial sentence of two years' detention in a young offender institution quashed and unrestricted hospital order substituted in its place.*
- **Sentence appeal case.** [R v Searles \(2012\) EWCA Crim 1839, \(2012\) MHLO 155](#) — *Criminal appeal adjourned for second medical report in relation to the making of a hospital order.*
- **Criminal appeal.** [R v Tudor \(2012\) EWCA Crim 1507, \(2012\) MHLO 127](#) — *Following receipt of a psychiatric report which did not recommend a hospital order, the trial judge was entitled to impose an IPP sentence without adjourning for a second psychiatrist's report.*

After-care and community care

- **After-care case.** [R \(BA\) v LB Hillingdon \(2012\) EWHC 3050 \(Admin\), \(2012\) MHLO 148](#) — "This is a claim for interim relief brought on behalf of BA by his litigation friend, the official solicitor, against the London Borough of Hillingdon and Hillingdon National Health Service Primary Care Trust. The relief sought is first, an order that the claimant be provided with community care services under [section 117](#) of the Mental Health Act 1983 against both defendants and/or section 21 of the National Assistance Act 1948 against the first defendant, and secondly an order that the defendants jointly carry out assessments of his need of community care services under section 47 of the National Health Service and Community Care Act 1990."
- **LGO s117 decision.** [Avon and Wiltshire MH Partnership NHS Trust and Wiltshire Council 09 005 439 \(2012\) MHLO 147 \(LGO\)](#) — "Citing section 117 of the Mental Health Act, which makes provision for patients who have been compulsorily detained under the Act to receive free aftercare, Miss M complained it was wrong for Mrs M to have funded her own care during the five years she spent as a resident of the care home. The Ombudsmen did not uphold any of Miss M's complaints. Although they found there was no doubt Mrs M had had a severe and enduring mental illness over many years, they could not conclude that her period of residence in a care home, in the last years of her life, was linked to aftercare arising from compulsory detention in hospital some 15 years earlier. Because Mrs M's general deterioration could not be definitely attributed to her mental health problems, the Ombudsmen could not therefore conclude that the care home's fees should have been met from public funds. They also found that, despite some procedural failings, Mrs M did not fail to receive the medical or social care services that she needed from the trust or the council." [Summary required.]
- **Community care case.** [R \(Okil\) v LB Southwark \(2012\) EWHC 1202 \(Admin\), \(2012\) MHLO 122](#) — Community care case with immigration and mental health background. [Summary required.]

Powers of attorney

- **EPA case.** [Re Johnston \(2012\) MHLO 130 \(EPA\)](#) — *The donor appointed two attorneys to act jointly and severally. The donor included the following restriction: "The property at [address] shall not be disposed of without the agreement of A, B and C, as children of [the donor] in addition to the attorneys." On the attorneys' application the restriction was severed as being ineffective as part of an EPA. [OPG summary - EPA case.]*
- **LPA case.** [Re Edmonds \(2012\) MHLO 129 \(LPA\)](#) — *The donor appointed a sole attorney and then two replacements, the latter to act jointly for some decisions and jointly and severally for others. She then directed as follows: "I would like my replacement attorneys to act jointly as much as possible and always where any transaction is valued at more than £5,000." On the application of the Public Guardian the words "as much as possible and always" were severed on the ground that they were uncertain and incompatible with the appointment type. [OPG summary - LPA case.]*

ECHR

- **ECHR case.** [X v Finland 34806/04 \(2012\) ECHR 1371, \(2012\) MHLO 128](#) — *"The applicant alleged, in particular, under [Article 6](#) of the Convention that she did not receive a fair hearing in the criminal proceedings against her in that she was not given an opportunity to be heard at an oral hearing on the need to appoint a trustee for her for the purpose of those proceedings and that she was not given an opportunity to examine witnesses on her behalf. She also alleged under [Articles 5](#) and [8](#) of the Convention that she was unnecessarily and unlawfully subjected to involuntary care in a mental institution and to forced administration of medication. She further claimed under [Article 13](#) of the Convention that she did not have an effective remedy to challenge the forced administration of medication." [Detailed summary available via external link.]*
- **ECHR case.** [Dordevic v Croatia 41526/10 \(2012\) ECHR 1640, \(2012\) MHLO 136](#) — *Harassment led to breaches of [Article 3](#) and [8](#). [Detailed summary available via external link.]*

Immigration

- **Immigration case.** [R \(D\) v SSHD \(2012\) EWHC 2501 \(Admin\), \(2012\) MHLO 153](#) — *Immigration case with mental health background. (1) D was entitled to damages for unlawful detention for breach of paragraph 55.10 of the [Enforcement Instructions](#) and s149 [Equality Act 2010](#), or alternatively for breach of the Hardial Singh principles. (2) Nominal damages for the period during which, had regard been paid to the relevant matters, he would still have been detained. (3) Breaches of [Article 3](#) and [8](#).*
- **Deportation case.** [JO \(qualified person - hospital order - effect\) Slovakia \(2012\) UKUT 237 \(IAC\), \(2012\) MHLO 132](#) — *The respondent had been charged with attempted murder, found not guilty by reason of insanity, and made subject to a restricted hospital order. The Secretary of State made a deportation order under the*

Immigration (European Economic Area) Regulations 2006. Under those regulations, (a) a 'qualified person' (jobseeker or worker) is entitled to reside in the UK while he remains a qualified person, (b) after five years of such residence he is entitled to reside in the UK permanently, (c) a worker or self-employed person's periods of inactivity due to illness or accident are treated as if they were periods of activity. (1) The term 'illness' should not be given a narrow or restricted meaning, either in terms of the type of illness (to exclude mental illness) or the period of incapacity (to exclude long-term illnesses). (2) Although a prison sentence does not count towards the qualifying period for permanent residence, time spent subject to a hospital order does: 'The distinction is that a prison sentence follows the choice of an individual to act in a criminal manner, whereas a Hospital Order results from a finding that the individual suffers from a mental disorder and is not therefore criminally responsible for their otherwise culpable behaviour.' [This distinction is fallacious, as it is mental state at sentencing that is relevant and most hospital orders follow a criminal conviction.] (3) The Secretary of State's challenges in relation to the respondent's 'integration' and work history were rejected as (respectively) integration was not relevant because the respondent fell within the regulations, and the FTT were entitled to reach the view it did as to work history.

- **Immigration case.** [R \(Lamari\) v SSHD \(2012\) EWHC 1630 \(Admin\), \(2012\) MHLO 126](#) — Immigration case with mental health background. [Summary required.]
- **Immigration case.** [R \(O\) v SSHD \(2012\) EWHC 2899 \(Admin\), \(2012\) MHLO 149](#) — Another immigration case with mental health background. [Summary required.]
- **Immigration case.** [C v SSHD \(2012\) EWHC 1543 \(Admin\), \(2012\) MHLO 125](#) — Immigration case with mental health background: "In essence, the claimant's case is that the length of the detention, the unlikely prospect of removal, the deterioration in the mental health of the claimant together with independent evidence of torture, were all factors which would lead to a conclusion that the claimant's detention was unlawful, even taking account of an absconding risk which, when properly examined, was not of the highest." [Summary required.]
- **Deportation case.** [R \(LE \(Jamaica\)\) v SSHD \(2012\) EWCA Civ 597, \(2012\) MHLO 124](#) — Deportation case with mental health background. [Summary required.]
- **Extradition case.** [Lacki v Poland \(2012\) EWHC 1747 \(Admin\), \(2012\) MHLO 120](#) — Extradition and mental health. [Summary required.]
- **Immigration case.** [R \(C\) v SSHD \(2012\) EWHC 801 \(Admin\), \(2012\) MHLO 118](#) — Mental health and immigration. [Summary required.]

Miscellaneous

- **Negligence case.** [Selwood v Durham CC \(2012\) EWCA Civ 979, \(2012\) MHLO 160](#) — "This is an appeal from a striking-out order of HH Judge Walton sitting in the Newcastle upon Tyne County Court on 25 February 2011. The claimant, the appellant in this court, had brought an action for personal injuries against Durham County Council, (her employer) and two NHS trusts with whom she collaborated in the course of her work. She alleged that all three defendants had been negligent and that,

as a result, she had been exposed to danger, in the course of her employment, from a man to whom I shall refer as GB who was mentally disturbed and had threatened to harm her. In the event, GB attacked her with a long-bladed knife and caused very serious injuries. The two NHS trusts (the respondents in this court) applied to strike out the action contending, successfully, that they did not owe her any duty of care in respect of the action of a third party. The appellant appeals against that decision with the permission of Macduff J. The appeal therefore raises the question of whether it is reasonably arguable that such a duty was owed in the circumstances of the case. The claimant had also pleaded that there had been a breach by the second and third defendants of her right under article 2 of the European Convention of Human Rights. The judge also struck out those claims and that issue is raised in this appeal." Appeal allowed and all issues sent for trial. [Detailed summary available.]

- **Negligence claim.** [Buck v Norfolk and Waveney MH NHS Foundation Trust \(2012\) MHLO 123 \(CC\)](#) — *The defendant Trust granted unescorted leave to a detained patient who then ran in front of a bus. The claimant bus driver suffered PTSD and sued the Trust. The court held that a custody authority responsible for the negligent release of a patient did not owe a duty to a victim unless that victim had been identifiable: the Trust therefore owed no duty of care to the driver.*
- **Housing case.** [Southend-on-Sea BC v Armour \(2012\) EWHC 3361 \(QB\), \(2012\) MHLO 152](#) — *The recorder's decision to refuse to grant a possession order (on the basis that by the time of the delayed hearing possession was no longer appropriate because there had been full compliance with the terms of the tenancy for the 12 months prior to the hearing) was upheld on appeal.*
- **Housing case.** [Southend-on-Sea BC v AR \(2012\) EW Misc 25 \(CC\), \(2012\) MHLO 151](#) — *The claimant local authority sought possession of an introductory tenancy on the basis of the defendant's antisocial behaviour. (1) The procedure was followed properly so there was no defence to the claim under the [Housing Act 1996](#). (2) The original decision to seek possession was a necessary and proportionate interference with the defendant's [Article 8](#) rights: in particular, the diagnosis of Aspergers and depression (which led to lack of litigation capacity and appointment of a litigation friend) did not explain the defendant's conduct and was properly considered by the claimant. (3) However, there had been full compliance with the terms of the tenancy for the 12 months prior to the delayed final hearing, so possession was no longer proportionate. (4) No order for costs (despite the claimant seeking costs).*
- **Scottish case.** [RM v Scottish Ministers \(2012\) UKSC 58, \(2012\) MHLO 133](#) — "This appeal raises a question as to the effect of a commencement provision in a statute which provides that provisions "shall come into force" on a specified date, and a consequential question as to the effect of a provision conferring upon Ministers the power to make regulations, where the provisions which are subject to the commencement provision cannot come into effective operation unless such regulations have been made. ... These questions arise in relation to the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"). The relevant substantive provisions are contained in Chapter 3 of Part 17, comprising sections 264 to 273. That Chapter is concerned with the detention of patients in conditions of excessive security." [Detailed summary available.]

- **Miscellaneous (limitation) case.** [RAR v GGC \(2012\) EWHC 2338 \(QB\), \(2012\) MHLO 154](#) — (1) *In relation to limitation the court held as follows: 'I am satisfied that it would be fair and just to invoke the discretion afforded to the court by section 33 of the 1980 Act and permit this trial to proceed. I do so for the following reasons: (i) Having read the lengthy report of Dr Roychowdhury, it is clear that as a result of the abuse perpetrated upon her, the mental health of the claimant has been adversely affected. It has fluctuated over the years, at its worst, it has entailed compulsory hospitalisation. I find that the mental health of the claimant played a real part in the delay which has occurred in the bringing of the civil claim. I accept that the nature of the matters to be explored in this case are of themselves a deterrent for a person in the position of the claimant in bringing such a claim. (ii) In 1977/1978 the defendant had cause to consider allegations of sexual assault upon the claimant by reason of the criminal proceedings. That he did so, and that his memory remains to this day, is evidenced by the detailed witness statement which the defendant has filed in these proceedings. (iii) This case depends upon the evidence of two people, the claimant and the defendant. Although the claimant will find it distressing to give evidence, the detail contained in her witness statement demonstrates that she is able to remember and articulate her memories, however unpleasant. There is nothing in the witness statement of the defendant which demonstrates any difficulty on his part remembering the detail of relevant periods. The evidence of both parties remains sufficiently cogent to enable a fair trial to take place. (2) The other issues considered were: (ii) What was the nature and extent of the alleged assaults perpetrated by the defendant upon the claimant? (iii) What is the nature and extent of any resultant personal injury and loss? (iv) What is the appropriate level of damages?*
- **Disability discrimination case.** [Lalli v Spirita Housing Ltd \(2012\) EWCA Civ 497, \(2012\) MHLO 121](#) — Disability discrimination case. [Summary required.]
- **Miscellaneous case.** [R \(Tracey\) v Cambridge University Hospital NHS Foundation \(2012\) EWHC 3670 \(Admin\), \(2012\) MHLO 146](#) — "This is a claim for judicial review and a claim pursuant to section 7 Human Rights Act 1998 in respect of: (i) the failure by the first defendant to treat the claimant's late wife, Janet Tracey lawfully; (ii) the failure by the first defendant to treat Janet Tracey in a manner that respected her rights under Articles 2, 3 and 8 ECHR, and in a manner that respected the claimant's rights under Article 8 ECHR; and (iii) the failure by the first defendant to have in place and to operate lawfully an appropriate policy on the use of Do Not Attempt Cardio-Pulmonary Resuscitation orders; (iv) the failure by the second defendant effectively to promulgate any clear policy or guidance on the use of DNACPRs, which is accessible to patients and their families, and which properly informs them of their rights and legitimate expectations in respect of the use of DNACPRs by hospitals such as that operated by the first defendant." [Summary required.]
- **Supreme Court, 'Permission to Appeal results - June 2012' (4/7/12).** Leave to appeal in Modaresi case was granted on 13/6/12. See [R \(Modaresi\) v SSH \(2011\) EWCA Civ 1359](#)

Legislation

- **Draft legislation.** [Mental Health \(Discrimination\) \(No. 2\) Bill 2012](#) — The [Mental Health \(Discrimination\) Bill 2010](#) ran out of Parliamentary time so was reintroduced in 2012. The 2012 Bill has been approved by the House of Commons and will have its Second Reading in the House of Lords on 18/1/13. As with the previous Bill, if enacted it would: (1) Repeal s141 MHA 1983 so that the seat of an MP is no longer vacated upon long-term detention under the Act; (2) amend the Juries Act 1974 so that (in addition to the existing category of those lacking capacity) only those liable to be detained under the MHA are excluded from jury service (see jury service page for current provisions); (3) amend the Companies (Model Articles) Regulations 2008 so that a person no longer ceases to be a director when 'by reason of that person's mental health, a court makes an order which wholly or partly prevents that person from personally exercising any powers or rights which that person would otherwise have'; (4) amend the School Governance (Constitution) (England) Regulations 2007 so it is no longer the case that '[a] person is disqualified from holding or from continuing to hold office as a governor of a school at any time when he is detained under the Mental Health Act 1983'.
- **Legislation.** [High Security Psychiatric Services \(Arrangements for Safety and Security at Ashworth, Broadmoor and Rampton Hospitals\) Amendment Directions 2012](#) — These Directions amend the [High Security Psychiatric Services \(Arrangements for Safety and Security at Ashworth, Broadmoor and Rampton Hospitals\) Directions 2011](#) with effect from 18/6/12.
- **Welsh legislation.** [Mental Health \(Hospital, Guardianship, Community Treatment and Consent to Treatment\) \(Wales\) \(Amendment\) Regulations 2012](#) — These Regulations amend the [Mental Health \(Hospital, Guardianship, Community Treatment and Consent to Treatment\) \(Wales\) Regulations 2008](#) by adding a new form form CO 8 entitled 'Mental Health Act 1983 Part 4A — certificate of consent to treatment for community patient (Approved Clinician Part 4A certificate)'. This form will be for the Responsible Clinician to fill in, when the requirement for a SOAD certificate in these circumstances is removed by s299 [Health and Social Care Act 2012](#).
- **Welsh legislation.** [Mental Health \(Primary Care Referrals and Eligibility to Conduct Primary Mental Health Assessments\) \(Wales\) Regulations 2012](#) — In force 1/10/12.
- **Welsh legislation.** [Mental Health \(Regional Provision\) \(Wales\) Regulations 2012](#) — In force dates: 8/5/12 and 6/6/12.
- **Welsh legislation.** [Mental Health \(Secondary Mental Health Services\) \(Wales\) Order 2012](#) — In force 6/6/12.
- **Welsh legislation.** [Mental Health \(Wales\) Measure 2010 \(Commencement No.3\) Order 2012](#) — This Order lists certain provisions which came into force on 1/10/12.
- **Welsh legislation.** [Mental Health \(Wales\) Measure 2010 \(Commencement No.2\) Order 2012](#) — This Order lists provisions which come into force on 6/6/12.

- **Welsh legislation.** [Mental Health \(Wales\) Measure 2010 \(Commencement No.1 and Transitional Provision\) Order 2011](#) — This order sets out provisions which come into force on 3/1/12, 2/4/12, and 8/5/12.
- **Legislation (from 2008).** [Mental Health \(Absconding Patients from Other Jurisdictions\) \(Scotland\) Regulations 2008](#) — In force 1/10/08.
- **Legislation (from 2008).** [Mental Health \(Cross-border Visits\) \(Scotland\) Regulations 2008](#) — "These Regulations make provision in connection with escorted mental health patients who visit Scotland whilst on leave of absence under the law of England and Wales, Northern Ireland, the Isle of Man or any of the Channel Islands." In force 6/5/08.

Articles

Life and death

- **Daily Telegraph, 'Family fight to keep father alive in court battle' (7/12/12).** See [An NHS Trust v DJ \(2012\) EWHC 3524 \(COP\), \(2012\) MHLO 138](#)
- **John Aston, 'Brain damaged woman allowed to "die with dignity", judge rules' (Independent, 13/11/12).** This article sets out some further details of the evidence which do not appear in the All ER (D) report of the ex tempore judgment. See [A Local Health Board v J \(2012\) MHLO 158 \(COP\)](#)
- **Terri Judd, 'Family "devastated" as court orders life saving treatment is to be withheld if the condition of their severely ill father deteriorates significantly' (Independent, 8/10/12).** Although L was in a minimally-conscious state rather than a vegetative state (as originally asserted by the Trust), Moylan J held that it would be in L's best interests to withhold life saving treatment if his condition deteriorated significantly. See [Settled cases and forthcoming judgments](#)
- **Jane Dreaper, 'Down's syndrome patient challenges resuscitation order' (BBC, 13/9/12).** The basis of the claim is that a do-not-resuscitate order was placed on the patient's file (on account of 'Down's syndrome, unable to swallow (Peg [percutaneous endoscopic gastrostomy] fed), bed bound, learning difficulties') without consulting or informing him or his family and without provision for review. See [Settled cases and forthcoming judgments#Re AWA \(do not resuscitate\)](#)
- **BBC, 'Anorexic woman not to be force-fed, judge rules' (24/8/12).** See [Re L; The NHS Trust v L \(2012\) EWHC 2741 \(COP\), \(2012\) MHLO 159](#)
- **Cathy Gordon, 'NHS trust wins intervention ruling over man's life-prolonging treatment' (9/8/12).** The judge decided that '[i]t would be not only inappropriate, it would be distressing for him to be subjected to any aggressive forms of treatment of a kind that may result in some short prolongation of what has to be seen as a distressing life.' See [Settled cases and forthcoming judgments#Re HH \(needle phobia etc, Pauffley J\)](#)

Other

- **Mental Health and Mental Capacity Law Blog, 'X v Finland – Are we in trouble?' (18/7/12).** This article argues that '[i]t is at best highly doubtful that the approach in the Mental Health Act 1983, where compulsory treatment flows from detention automatically and with limited distinct procedural and substantive safeguards, is consistent with Article 8 of the ECHR'. See [X v Finland 34806/04 \(2012\) ECHR 1371, \(2012\) MHLO 128](#)
- **What Do They Know website, 'Cost to HBC of legal proceedings in Neary v Hillingdon' (FOI request made 27/7/12).** The FOI reply, dated 24/8/12, states that the costs to LB Hillingdon were: (1) solicitor costs 464.35 in-house hours (£32,318.31 at notional charge-out rate of approx £69.60ph); (2) counsel £32182; (3) expert reports £5231.65; (4) compensation £35,000; (5) court costs ordered and future costs not known at time of reply. See [Re Steven Neary; LB Hillingdon v Steven Neary \(2011\) EWHC 3522 \(COP\)](#)
- **Michael Kennedy and Bilkiss Bashir, 'Short Changed' (Private Client Adviser, February 2012).** This article concludes: 'For now, the argument as to the legality and power for a local authority to charge someone deprived of their liberty and compelled to live in a care home remains open to lively debate.' See [DM v Doncaster MBC \(2011\) EWHC 3652 \(Admin\)](#)
- **Martin Beckford, 'Judge attacks forced marriage that put disabled woman "at risk"' (Telegraph, 16/8/12).** See [XCC v AA \(2012\) EWHC 2183 \(COP\), \(2012\) MHLO 80](#)
- **Neil Munro, 'Dordevic v Croatia' (Mental Health and Mental Capacity Law Blog, 26/7/12).** See [Dordevic v Croatia 41526/10 \(2012\) ECHR 1640, \(2012\) MHLO 136](#)
- **Alison Easton, 'WBC v CP & Ors' (Family Law Week, 30/10/12).** See [Re CP; WBC v CP \(2012\) EWHC 1944 \(COP\), \(2012\) MHLO 144](#)
- **Alison Easton, 'J Council v GU & Ors' (Family Law Week, 13/12/12).** See [J Council v GU \(2012\) EWHC 3531 \(COP\), \(2012\) MHLO 137](#)
- **Disability discrimination.** (1) Christopher Williams, 'Nominet rocked by disability discrimination ruling' (16/8/12); (2) That.co.uk website, 'Nominet files' (19/10/12) (this document contains extracts from the tribunal judgment). See [Settled cases and forthcoming judgments#Emily Taylor \(Nominet\)](#)
- **Nearly Legal Blog, 'Proportionality – between claim and hearing' (21/10/12).** See [Southend-on-Sea BC v Armour \(2012\) EWHC 3361 \(QB\), \(2012\) MHLO 152](#)

Website

- **Redesigned home page now online, including donation button.** 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 [Main Page](#)

- **Discussion list.** 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](#)
- **Cases.** On 31/13/12 Mental Health Law Online contained [1300 categorised cases](#)
- **Chronology.** See [December 2012 chronology](#) for this month's changes to the website in date order
- **CPD tests for October and November 2012.** These CPD tests have been uploaded and are available to subscribers. Obtain 12 CPD points online for £60. See [CPD scheme](#)
- **New page. [Wales](#)** — This page sets out some of the documents which are different for Wales.
- **New resources page. [Enforcement Instructions](#)** — This Home Office/UK Border Agency manual contains guidance and information for officers dealing with enforcement immigration matters within the United Kingdom. Chapter 55 is entitled 'Detention and temporary release.' Paragraph 55.10 states: 'The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons: ... those suffering from serious mental illness which cannot be satisfactorily managed within detention (in CCD cases, please contact the specialist Mentally Disordered Offender Team). In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act ...'
- **Merry Christmas and Happy New Year!**