

# Mental Health Law Online

## Monthly Update, November 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](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.

### Case law

- **Section 117 case.** [R \(Sunderland City Council\) v South Tyneside Council \(2012\) EWCA Civ 1232, \(2012\) MHLO 117](#) — *The chronology in this s117 responsibility dispute was as follows: (a) SF lived at a college hall of residence in Sunderland, (b) she had voluntary admissions to various hospitals, (c) she was voluntarily admitted to a South Tyneside hospital, (d) the college terminated her placement and her licence to remain at the hall of residence, (e) she was detained under s2 then s3 at the South Tyneside hospital. (1) It was common ground that (a) the relevant s117 authority is the relevant LSSA for the area in which a patient is resident when he is detained (Hall), (b) during a period of detention the patient is not 'resident' for s117 purposes in the place of detention (JM); and (c) SF remained resident in Sunderland during the hospital admissions, at least until the Sunderland placement was terminated: therefore the question was where she was resident after that. (2) The High Court judge had decided she remained resident in Sunderland: (a) the South Tyneside placement was 'not compulsory, but it was closely analogous to a compulsory admission' so was to be disregarded, as if it were a place of detention; (b) she was not in hospital 'as part of the regular order of her life for the time being' (applying the test in Shah); (c) the loss of her Sunderland accommodation was not voluntary (as in JM) so did not affect her area of residence. (3) The Court of Appeal overturned that*

*decision: (a) a voluntary period in the same hospital as subsequent detention is not to be treated the same as the period of detention; (b) the judge had wrongly followed the approach in Shah (which related to ordinary residence in a very different statutory context); the approach in Mohamed was more helpful (this included that 'so long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence'); (c) decisively, voluntary and third-party termination of accommodation have the same effect: when the Sunderland accommodation ceased to be available SF was either resident in South Tyneside or not resident anywhere (and the case of 'no residence' is a last resort for extreme and clear circumstances). (4) The court raised two scenarios which it did not need to rule upon: (a) the last place a patient was eating and sleeping might not be his place if residence in some cases: for example if he were in prison, or temporarily away from an established home as a matter of choice (though a hospital stay of more than five years might not be considered temporary); (b) if a patient has a family home which is available upon discharge that might be his residence even if, because of action taken by the family, its location changes during the period of detention.*

- **Lawfulness of transfer decision.** [R \(L\) v West London MH NHS Trust \(2012\) EWHC 3200 \(Admin\), \(2012\) MHLO 114](#) — *The claimant began proceedings to challenge the decision to transfer him from a medium secure unit to Broadmoor high secure hospital. (1) The claimant no longer wished to challenge the transfer decision, but the claims were of general importance and merited review, and were not merely academic, so the judge proceeded to hear the case and set out his reasons at extraordinary length. (2) The potential adverse consequences of a transfer to high security are: (a) the potential for delaying the ultimate date of discharge from detention; and (b) the potential for more restrictive detention conditions. (3) The nature of the decision making process as to whether a patient should be transferred from medium to high security is such as to engage a common law duty of fairness. (4) Subject to the need to protect persons from the risk of harm or some other substantial reason, that duty of fairness requires: (a) the patient and his advisers to be informed of any intention to refer him to high security; (b) the gist of the reasons for referral and any relevant reports to be provided; (c) the gist to be sufficiently detailed to enable meaningful and focussed representations, and reasons to be given if reports are withheld; (d) requests for additional information to be considered; (e) all such information to be communicated in time for the patient to make representations before the earliest possible of (i) the admissions panel meeting, (ii) the high security hospital accepting, (iii) the medium secure hospital deciding to transfer, or (iv) the decision being implemented; (f) all such information to be communicated immediately upon transfer at the latest; (g) reasons for the various decisions to be communicated, and to be sufficiently detailed to enable the patient to decide whether a worthwhile challenge can be made (see para 557-8). (5) In this case, in various ways, the requirements of the common law duty of fairness were not complied with and a declaration to that effect was made. (6) In relation to the Article 6 claim: (a) the transfer decision is not a 'determination' of his 'civil rights', so Article 6 does not apply; (b) but, if it did apply, and if there were a good arguable Article 8 claim, then the judicial review court would be required to exercise a fact-finding function; (c) it was inappropriate in this case for the judge to decide whether (if Article 6 applies and judicial review is inadequate) an independent panel (at least in a case turning on a disputed issue of fact) should decide on transfer; (d) similarly, it was inappropriate to*

decide whether (if Article 6 applies, judicial review is inadequate, and no hospital is empowered to contract out its function to a panel) the lack of provision for an independent panel makes the MHA incompatible with Article 6.

- **Capacity case.** [A, B and C v X, Y and Z \(2012\) EWHC 2400 \(COP\), \(2012\) MHLO 112](#) — The court considered X's capacity to marry, make a will or power of attorney, manage affairs, and litigate. (1) X did not lack capacity to marry. The basis for this assessment was correctly stated in *Sheffield* as follows: (a) it is not enough that someone appreciates that he or she is taking part in a marriage ceremony or understands its words; (ii) he or she must understand the nature of the marriage contract; (c) this means that he or she must be mentally capable of understanding the duties and responsibilities that normally attach to marriage; (d) that said, the contract of marriage is in essence a simple one, which does not require a high degree of intelligence to comprehend, and the contract of marriage can readily be understood by anyone of normal intelligence. (2) The judge did not make a general declaration that X lacked testamentary capacity, but qualified this by saying that (a) there would be increasingly many times when X lacked such capacity, and (b) any will now made, if unaccompanied by contemporary medical evidence asserting capacity, might be seriously open to challenge. (3) The same observations applied to X's capacity to revoke or create lasting or enduring powers of attorney. (4) X lacked capacity to manage his own affairs: although a snapshot of X's condition at certain times would reveal an ability to manage his affairs, the general concept of managing affairs is an ongoing act and relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent. (5) X also lacked capacity to litigate: this required separate consideration because the time frame involved is different to managing affairs on the one hand, or making a will or granting power of attorney on the other. The basis for this assessment was stated in *Masterman-Lister*: 'whether the party to the legal proceedings is capable of understanding, with the assistance of proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings'. (6) No finding was sought in relation to capacity to decide on contact, and the judge thought 'the idea that this distinguished elderly gentleman's life should be circumscribed by contact provisions as though he was a child in a separated family' to be deeply unattractive. (7) There should be (a) a greater emphasis on judicial continuity in the COP, and (b) a pre-hearing review in any case estimated to last three days or more.
- **Capacity case (imprisonment for contempt).** [SCC v JM \(2012\) MHLO 111 \(COP\)](#) — (1) One of JM's children, WM, had breached court orders by, amongst other things, (a) arranging for JM to be taken from the care home to hear judgment delivered, and separately to see a solicitor, (b) discussing the possibility of moving back home with him, (c) harassing her father and employees of the local authority and care home. (2) WM was sentenced to five months' imprisonment for contempt because (a) there had been a considerable number of breaches of court orders, and (b) she had no intention, unless restrained by a severe measure by the court, of obeying the orders herself.
- **Capacity case (deputyship).** [Re AS; SH v LC \(2012\) MHLO 113 \(COP\)](#) — AS's niece objected to a panel solicitor's application to be appointed deputy with specific authority to sell a property. (1) Generally speaking the order of preference for the

appointment of a deputy is: (a) P's spouse or partner; (b) any other relative who takes a personal interest in P's affairs; (c) a close friend; (c) a professional adviser, such as the family's solicitor or accountant; (d) a local authority's Social Services Department; and finally (e) a panel deputy, as deputy of last resort. (2) The court prefers to appoint a family member or close friend because of: (a) familiarity with P's affairs, wishes and communication methods; (b) likely greater ability to consult with P and encourage participation; (c) reasons of economy; (d) the concept of deputyship of last resort. (3) The appointment of a family member will generally be a less restrictive alternative, though the question remains as to whether this will achieve the desired objective as effectively as the appointment of a panel deputy. (4) The court would not appoint a family member in cases involving, for example: (a) financial or other abuse; (b) conflict of interests; (c) an unsatisfactory track record in managing financial affairs; and (d) ongoing friction between various family members. (5) On the facts, the niece was appointed as there was no need for a deputy of last resort. (6) The general rule as to costs (that AS pay) was followed.

- **Family Division case involving capacity.** [Re CA \(A Baby\); Coventry City Council v C \(2012\) EWHC 2190 \(Fam\), \(2012\) MHLO 110](#) — The mother in this case consented to life-sustaining surgery and pain relief during childbirth; on the day of birth she initially refused to consent to the local authority accommodating her daughter under [Children Act 1989 s20](#) but later, after morphine and encouragement, consented. (1) Detailed guidance, approved by the President of the Family Division, was given for social workers in respect of obtaining s20 consent from a parent to the removal of a child immediately or soon after birth, including the following: (a) the social worker is under a personal duty to be satisfied that the person giving consent has capacity; (b) consent must be fully informed; (c) the obtaining of such consent and the subsequent removal must be both fair and proportionate. (2) Capacity is issue- and situation-specific: in this case the fact that the mother could make decisions about surgery and pain relief did not indicate that she could make decisions about the removal of her child; the judge seriously doubted the social worker's assessment that she had such capacity. (3) There was no informed consent because (a) the mother was never told that continued refusal of consent would result in the child staying in hospital with her for another day or two, and (b) she was told that removal was only a temporary arrangement when it was highly unlikely to be anything of the sort. (4) In relation to fairness, the local authority had settled an HRA damages claim, accepting that (a) s20 consent should not have been sought on the day it was, and (b) removal was not a proportionate response to the risks that then existed. (5) The court made the care order and (adoption) placement order which the local authority had sought, as the case for that was overwhelming.
- **Capacity case.** [Dunhill v Burgin \(2012\) EWHC 3163 \(QB\), \(2012\) MHLO 115](#) — The 'compromise rule' in the Civil Procedure Rules provides that where a claim is made by or on behalf of a party who lacks capacity to conduct the proceedings (a child or protected party), no settlement of that claim shall be valid without the approval of the court. (1) The rule applies to a claim settled at the door of the court where at the time of the settlement the claimant was not known to lack capacity. (2) The claimant was a protected party ('a party, or an intended party, who lacks capacity to conduct the proceedings') and the Court of Appeal had decided that she lacked capacity to settle her claim. (3) The compromise in this case was invalid; the judgment based on it must be set aside, and the substantive claim should proceed to a

trial on the merits. (4) The judge granted a certificate under s12 [Administration of Justice Act 1969](#) to enable an application to be made to the Supreme Court for permission to bring a 'leapfrog' appeal from this decision.

- **Capacity case.** Supreme Court permission granted on 23/10/12. [Dunhill v Burgin \(2012\) EWCA Civ 397, \(2012\) MHLO 33](#) — (1) In deciding whether the claimant had capacity to settle a claim for £12,500 (at hearing it would have been worth at least £800,000) the question was not whether she had capacity to enter into that settlement but whether she had capacity to litigate. (2) On the facts, she had lacked capacity, and the compromise would never have been approved by the court.
- **Court Martial.** [Court Martial in the case of Sergeant Nightingale \(2012\) MHLO 116](#) — (1) The accused pleaded guilty of possessing (a) a Glock 9mm pistol and (b) the following live ammunition: 122 x 9mm, 40 x 7.62mm, 50 x 9mm (frangible), 50 x .338 (armour piercing), 2 x .308, 74 x 5.56mm. (2) In mitigation he relied, inter alia, on evidence from a neuropsychologist and a clinical psychologist to the effect that a brain injury had caused memory problems and confabulation. (3) He was sentenced to 18 months for the Glock and 6 months concurrently for the ammunition. [It appears that an appeal against both conviction and sentence will be lodged shortly.]
- **Cheshire West case.** The Supreme Court may hear the Cheshire West case from 22/10/13 to 24/10/13... but the Supreme Court registry say the hearing dates have not been confirmed. See [Cheshire West and Chester Council v P \(2011\) EWCA Civ 1257](#)

## Legislation

- **Legislation.** [Mental Health \(Approval Functions\) Act 2012](#) — This Act states: 'Any person who before the day on which this Act is passed has done anything in the purported exercise of an approval function is to be treated for all purposes as having had the power to do so.' It defines 'approval function' as: '(a) the function of giving an approval for the purposes of section 12 of the Mental Health Act 1983 (practitioners approved to give medical recommendations), or (b) the function of approving a person as an approved clinician for the purposes of that Act.' The Secretary of State's approval functions were lawfully delegated to Strategic Health Authorities on their formation in 2002. This Act was passed with it was discovered that four SHAs had unlawfully delegated these functions to NHS mental health trusts. In force 31/10/12.
- **Legislation.** External links in relation to Mental Health (Approval Functions) Act 2012: (1) [Legislation.gov.uk](#) (text of Act); (2) Parliament website: Mental Health (Approval Functions) Act 2012-13 (progress of the Bill and explanatory notes); (3) Parliament website, 'Lords considers Mental Health (Approval Functions) Bill' (1/11/12); (4) They Work For You: Commons debates on 30/10/12; (5) Dept of Health, 'Action to clarify processes under the Mental Health Act' (press release, 29/10/12); (6) Dept of Health, 'Technical change to the process for approving doctors working under the Mental Health Act' (letter to Local Authority Directors of Adult Social Services, 29/10/12). See [Mental Health \(Approval Functions\) Act 2012](#)
- **Legislation.** [Administration of Justice Act 1969](#) — Part 2 of the Act deals with 'leapfrog' appeals from the High Court directly to the Supreme Court, skipping out the

Court of Appeal: for example, see [Dunhill v Burgin \(2012\) EWHC 3163 \(QB\), \(2012\) MHLO 115](#) in which case a certificate for this was granted by the High Court.

## Articles

- **Rick Dewsbury, 'Social workers took newborn baby from mother by obtaining her consent while she was dosed up with morphine' (Mail, 16/8/12).** See [Re CA \(A Baby\); Coventry City Council v C \(2012\) EWHC 2190 \(Fam\), \(2012\) MHLO 110](#)
- **Neil Allen, 'Court of Protection Note: Restricting or depriving liberty?' (September 2012).** See [39 Essex Street COP Newsletter](#)

## Newsletters

- **39 Essex Street, 'Court of Protection Newsletter' (issue 27, November 2012).** The cases mentioned in this issue are: CYC v PC and NC [2012] MHLO 103 (COP) — A, B and C v X, Y and Z [2012] EWHC 2400 (COP) — An NHS Trust v (1) K and (2) Another Foundation Trust [2012] EWHC 2922 (COP) — An NHS Trust v Mr and Mrs H & Ors [2012] EWHC B18 (Fam) — Re AS (unreported, 7.12.11) — Re Clarke [2012] EWHC 2256 (COP), [2012] MHLO 107, Re Clarke [2012] EWHC 2714 (COP), [2012] MHLO 108, Re Clarke [2012] EWHC 2947 (COP), [2012] MHLO 109 — SCC v JM & Ors (unreported, 31.8.12) — R (Sunderland City Council) v South Tyneside Council [2012] EWCA Civ 1232 — Kedzior v Poland [2012] ECHR 1809, Application No. 45026/07) — Bureš v. the Czech Republic [2012] ECHR 1819 (Application No. 37679/08) — RP v UK 38245/08 [2012] ECHR 1796, [2012] MHLO 102. Further information is given under the following headings: Practice and procedure - liaison with the Home Office; Guide for social workers upon when to consider making an application to the Court of Protection. See [39 Essex Street COP Newsletter](#)
- **39 Essex Street, 'Court of Protection Newsletter' (issue 26, October 2012).** The cases mentioned in this issue are: Re KK; CC v KK [2012] EWHC 2136 (COP), [2012] MHLO 89 — Re J (A Child: Disclosure) [2012] EWCA Civ 1204. Further information is given under the following headings: Amendment of Schedule 3 to the MCA 2005; Serious Case Review into the murder of Martin Hyde; Draft Indian Rights of Persons with Disabilities Bill. See [39 Essex Street COP Newsletter](#)
- **39 Essex Street, 'Court of Protection Newsletter' (issue 25, September 2012).** The cases mentioned in this issue are: Re MW; LB Hammersmith and Fulham v MW [2012] MHLO 82 (COP) — Coventry City Council v C, B, CA and CH [2012] EWHC 2190 (Fam) — Davis v West Sussex County Council [2012] EWHC 2152 (QB), [2012] MHLO 83 — Further information is given under the following headings: Funding; MCA literature review; Consultation on new safeguarding power. See [39 Essex Street COP Newsletter](#)

## Website

- **New website feature.** Recent Twitter 'retweets' appear on website home page. These are often updates that have not yet been added to the website.

- **The CPD questionnaire for September 2012 is now online.** Obtain 12 SRA-accredited CPD points online for £60. See [CPD scheme](#)
- **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 30/11/12 Mental Health Law Online contained [1253 categorised cases](#)
- **Chronology.** See [November 2012 chronology](#) for this month's changes to the website in date order