

# mental health focus

## Capacity to consent to sexual relations: a review of recent Court of Protection case law

The level of mental capacity required to consent to sexual activity?



The case of [D Borough Council -v- AB](#) [2011] EWHC 101 was brought by a local council who sought an order from the Court of Protection (COP) that a 41 year old gay man with moderate learning disabilities, A, did not have the mental capacity to consent to sexual relations and should be banned from sexual activity.

A was having a sexual relationship with another man and it had been alleged

that A had also made sexual gestures towards children on two separate occasions.

Interim declarations were made and A was submitted to close supervision to restrict contact between A and his partner and prevent him having further sexual relations.

### The test

The judge decided that the test of capacity to marry, which requires a very low level of understanding, was closely

related to the test to consent for sexual relations.

The judge held that the capacity to consent to sexual relations required an understanding and awareness of:

- the mechanics of the act;
- that there are health risks involved; and
- that sex between a man and a woman may result in a woman becoming pregnant.

### The findings

The judge found that A lacked the capacity to consent to sexual relations because, although he understood the mechanics of the act, he had a very limited understanding of sexually transmitted infections.

It was agreed that A would be supervised and prevented from sexual activity for 9 months whilst he underwent sex education lessons, in the hope that he would develop the capacity to make the decision for himself. The case is to be reviewed in nine months.

Rebecca Fitzpatrick  
rebecca.fitzpatrick@hilldickinson.com

### WINNER

National law firm of the year  
Legal Business Awards 2010

[www.hilldickinson.com](http://www.hilldickinson.com)



Deprivation of Liberty Safeguards  
Page 3



Important costs decision in the Court of Protection  
Page 8



Policing respect for the vulnerable  
Page 11

## Contents

Capacity to consent to sexual relations and forced sterilisation: a review of recent Court of Protection case law	1
Deprivation of liberty safeguards update – three new court decisions	3
Death of a man refused admission to hospital – What lessons can we learn?	6
TTM -v- London Borough of Hackney and Others – the Appeal decision	7
Important costs decision in the Court of Protection	8
No health without mental health	9
CTOs and referrals to the tribunal	10
First prosecutions under the Mental Capacity Act	11
Meet the team	12

## Stop press

The Coalition Government's new mental health strategy will be discussed at this year's NHS Confederation Conference. Hill Dickinson's mental health team will be on hand both before and after the sessions to help with any legal queries you may have.

Wednesday 6 July (session 12:15-13:35) and  
Thursday 7 July (session 14:25-15:45)

If you are attending the event, please do not hesitate to come and see us or contact:  
Sophie West [sophie.west@hilldickinson.com](mailto:sophie.west@hilldickinson.com)  
to arrange an informal meeting.

## Welcome

Welcome to the third edition of our mental health focus. This newsletter provides advice and information on issues which affect those working in, or commissioning, mental health and social care, providing practical tips to help you follow the law.

The Deprivation of Liberty Safeguards is a rapidly developing area of law, and in this edition, we bring you some of the most important recent decisions. We also include some recent cases dealing with the Mental Health Act, as well as some other interesting Court of Protection cases. The first prosecutions under the Mental Health Act, make interesting reading, as do a number of recent decisions about capacity to consent to sexual relations and contraception.

Earlier this year, the Public Services Ombudsman for Wales published a report following the death of a man who had been refused admission to the local mental health hospital. We consider what lessons can be learnt from that case.

It is impossible to include all recent mental health cases in this edition, but we have tried to select those which are most relevant to practice.

If you would like to receive further information, or have any feedback, please contact the mental health and social care team:

**Rebecca Fitzpatrick** (Manchester)  
[rebecca.fitzpatrick@hilldickinson.com](mailto:rebecca.fitzpatrick@hilldickinson.com)  
+44 (0)161 817 7296

**Sharon Thomas** (Liverpool)  
[sharon.thomas@hilldickinson.com](mailto:sharon.thomas@hilldickinson.com)  
+44 (0)151 600 8249

If you wish to learn more about receiving any of our free health email updates including the daily newspaper summary, weekly health@lert and newsletters please email [healthnews@hilldickinson.com](mailto:healthnews@hilldickinson.com)

### Recent sterilisation case: **Mrs P -v- P (By her litigation friend the official solicitor)**

You may be aware of this case due to recent media reports. The mother of a 21-year-old with learning difficulties has asked the Court of Protection to give doctors permission to sterilise her daughter (P) on the grounds that she lacks the capacity to make decisions about contraception, and sterilisation is in her best interests. P already has one child, that her mother cares for, and the concern is that P's mother cannot take care of any more children, and that they would have to be removed by the local authority.

Mrs P wanted her daughter to be sterilised at the same time that her second child was delivered by caesarean section, but the Court of Protection was not ready to make a decision. We understand that the hearing was adjourned on 15 February 2011 as P was due to give birth to her baby. However, given the turn of events, Mrs P has now withdrawn the application. Any decisions about non-therapeutic sterilisation of a person lacking capacity must be made by the Court of Protection. This is to ensure that the fundamental human rights of those lacking capacity are safeguarded.

# Mind your Ps and Qs – welcome guidance on deprivation of liberty

Two young women with learning difficulties have been the subject of recent legal proceedings. In issue 2 of mental health focus we examined the first instance decision. An appeal has since been heard, as Joanna Crichton explains.

The sisters were known as MIG and MEG in the Court of Protection proceedings. The case was appealed to the Court of Appeal where the court preferred to refer to them as P and Q. P and Q were in the care of their local authority, Surrey County Council. The Council originally sought orders from the Court of Protection to declare that the arrangements for caring for the young women were in their best interests, in particular because contact with their family was somewhat restricted. The official solicitor, appointed to act on behalf of P and Q, argued that the arrangements for their care amounted to a deprivation of liberty and would need the authorisation of the court in order to be lawful.

## The decision

In the first instance the Court of Protection held that the arrangements for caring for P and Q did not amount to a deprivation of their liberty. This was upheld by the Court of Appeal who agreed<sup>1</sup>.

Factors relevant to the case of P and Q were:

- a. They were not free to leave their respective accommodation
- b. They did not object to the arrangements for them and did not seek to leave – and therefore did not have to be restrained from leaving – their accommodation

- c. Their daily care needs were met by virtue of supervision and control
- d. They had their own bedrooms
- e. They were not under close confinement within their accommodation
- f. They were taken out each day to a further education centre
- g. They were taken on other outings
- h. They had good outside contact with family members
- i. The elements of confinement supervision and control in their lives were likely to be permanent

Additional factors relevant to the case of Q were that:

- a. She was not living in a family home
- b. She was living in a home in which she was one of only four residents
- c. Her outbursts, though becoming less frequent sometimes precipitated the need for physical restraint
- d. She was in receipt of medication for control of her anxiety but not to restrain her
- e. Her social life was fuller than that of her sister

The court held that the following criteria were important when determining whether or not there is a deprivation of liberty:

- Whether there was any objection to the arrangements
- The use of drugs which might suppress the expression of objections
- The normality of the living arrangements (e.g. a family home versus a hospital placement)
- The opportunities for leaving the place of residence for the purpose of recreation, education and social contact

The court was struck by the fact that P and Q had been removed from an abusive and neglectful family background and provided with care in



an effort to give them as normal a life as possible. The two young women had contact with each other and with other family members, they attended a local educational unit and had a fairly active social life. Looking at the situation of P and Q in the round, the court found that P and Q had not been deprived of their liberty in any meaningful sense.

## Comment

This case provides useful guidance and demonstrates a balanced, common-sense approach to determining whether or not a deprivation of liberty is taking place. Case law in this area is still developing, but the case of P and Q, is a helpful example of a case when the line between restrictions on, and deprivation of liberty had not be crossed. As we get to grips with the deprivation of liberty safeguards there may be a tendency to be overcautious. This decision is reassuring, as it demonstrates that arrangements for caring for a person involving a number of restrictions do not necessarily amount to a deprivation of liberty.

Joanna Crichton

joanna.crichton@hilldickinson.com

<sup>1</sup> P (otherwise known as MIG) and Q (otherwise known as MEG) v Surrey County Council and CA and LA [2011] EWCA Civ 190

# The case of MB<sup>1</sup>

This case concerned the legality of the deprivation of MB's liberty between the expiry of a standard authorisation given under Schedule A1 MCA 2005 (the Deprivation of Liberty Safeguards) (DoLS), and the making of an order by the court under section 16 MCA, which authorised her deprivation of liberty at the residential home.

On 22 February 2010, the home, or the 'managing authority' for the purposes of the statutory regime, issued an urgent authorisation, and MB was admitted to the residential home. The relevant assessments pursuant to MCA Schedule A1 were subsequently carried out and a standard authorisation commenced on 1 March 2010. The standard authorisation was to remain in force until 29 March 2010, as directed by the best interests assessor.

On 16 March 2010, the managing authority requested a further standard authorisation pursuant to paragraph 29 of MCA Schedule A1. Upon second assessment, the best interests assessor concluded that the best interests requirement was not met. Thus, no further standard authorisation could be issued by the supervisory body. In response, the managers of the home issued a second urgent authorisation to cover MB's continued residence at the home. Alongside this, on 6 April it made an application to the Court of Protection for an order authorising the deprivation of liberty.

The judge held that the course taken by the applicant (the managers of the home) of giving and extending a further urgent authorisation was not in accordance with the statutory DoLS regime. In relation to each episode of deprivation of liberty, there can only be one urgent authorisation issued. After the expiry of the first urgent authorisation, deprivation of liberty could only be authorised by either (a) a standard authorisation, or (b) a court order.

The applicant also tried to rely on section 4B MCA to authorise MB's deprivation of liberty for this period of time. The court rejected the argument that section 4B could be relied on retrospectively, because the test set by 4B MCA (requiring reasonable

belief that the deprivation of liberty was necessary to prevent a serious deterioration in MB's condition) was a separate test from the best interests assessment and had not been expressly considered at the time.

## Guidance from the court

The court was critical of the applicant's actions and highlighted the alternatives available under MCA 2005 and its Schedules. The judge went on to set out the alternatives available in circumstances where the best interests assessor did not approve further standard authorisation:

- A court order authorising MB's deprivation of liberty should have been sought.
- Pending this court decision, the Applicant could have expressly relied on section 4B, and in doing so, applied the specific test set out and recorded its reasoning.
- Alternatively, the applicant could have urgently sought an interim court order under sections 4A, 16, 47 and 48 MCA 2005 to authorise continuation of existing detention.
- Another alternative (not open to the applicant) would have been for the best interests assessor to consider whether, given the choices practicably available, it would be in the best interests of the person to remain detained in the short term pursuant to a standard authorisation of limited duration.

The judge emphasised that all those involved should be mindful of the relevant periods of time in relation to authorisations and the steps required to deal with any problems before the authorisation expires.

The judge stated that the court was the appropriate forum for resolving:

- i. a breakdown of the authorisation

of a deprivation of liberty by the authorisation process under Schedule A; and

- ii. whether a person could lawfully be deprived of his liberty if an authorisation, or further authorisation, cannot be granted.

Applications in respect of these matters could be brought urgently. Supervisory bodies and managing authorities should take steps to ensure that decision makers know of current methods for contacting the Court of Protection and the DoLS team at the court, and the Family Division of the High Court for the purpose of making urgent applications.

## Article 5

Although the judge considered that the applicant acted conscientiously, in what they considered to be MB's best interests and with reasonable speed, they did not act in accordance with the procedures prescribed by the MCA 2005 and its schedules (and thus domestic law). Thus it was held that the unauthorised deprivation of MB's liberty constituted a breach of her Article 5 rights.

## Comment

This case provides useful guidance on the approach that should be taken by managing authorities and supervisory bodies to authorise deprivations of liberty in accordance with the MCA. In the event that authorisation is disputed or cannot be given, a court order should be sought. This case highlights the importance of the correct course of action being taken before authorisations are allowed to lapse. This is particularly so in light of the fact that failure to follow procedures under the MCA could amount to a breach of Article 5 and thus lead to liability for damages.

Sharon Thomas  
sharon.thomas@hilldickinson.com

# Who cares?

*Parental consent to restrictions of liberty makes a deprivation of liberty unlikely.*

Re RK; YB -v- BCC (2010) EWHC 3355 (COP)

## The issue to be determined in this case was whether RK's placement at a care home constituted a deprivation of her liberty.

RK was a 17-year-old female suffering from autism, ADHD, minor learning disabilities and epilepsy, with severe behavioural problems, including aggressive and self-harming behaviours. She had a mental age of about two years old. RK was assessed as being unable to make decisions as to contact and residence. Her family reached the point at which they could no longer care for her and she was moved to a care home under a section 20 Children Act 1989 agreement made with the local authority.

Mr Justice Mostyn held that, given the terms of section 20(8) of the Children Act 1989 (that any person who has parental responsibility for a child may at any time remove the child from accommodation provided by the local authority), the provision of accommodation to a child, whether aged 17 or 7 under section 20(1), (3), (4) or (5) will not ever give rise to a deprivation of liberty, within the terms of Article 5 ECHR.

It was submitted on behalf of RK's parents that this legal right of removal was effectively meaningless, because they simply could not afford the costs of an expensive care package at home to provide care for their daughter, and the local authority were not prepared to provide this. Notwithstanding this argument, Mostyn J was persuaded that section 20(8) made the confinement at the care home truly voluntary, and that the parents' means could not inform the answer to the question of whether a

child's liberty was being deprived.

Mostyn J also held that RK's placement was at the behest of her parents and could not be imputed to the state. The state was not responsible for RK's confinement as her parents could withdraw their consent at any time. Aside from section 20(8), Mostyn J considered both objective and subjective tests in determining whether the placement amounted to a deprivation of liberty, in accordance with the decision in A Local Authority -v- A (A Child) & Anor<sup>[1]</sup>.

The features of RK's placement were considered. RK stayed at home with her parents from Friday evenings to Sunday evenings. During the week, she was at school. At all other times, RK was at the care home, closely supervised in order to prevent her harming herself or others. She was compliant with all her prescribed medicines, and no force was necessary. She had not been subject to restraint, other than on a few occasions to prevent her from attacking others. If RK behaved badly, minor sanctions would be imposed, such as not allowing her to eat a takeaway meal or stopping her listening to music. RK's parents could visit at any time and the door to the care home was not locked to prevent her leaving, although she would have been brought back by staff if she sought to leave.

Mostyn J concluded that none of these elements of her care, whether taken individually or collectively, came remotely close to crossing the line marked "deprivation of liberty", and therefore the objective element was not satisfied.

Mostyn J relied on the decision of the European Court of Human Rights in

Nielsen -v- Denmark<sup>[2]</sup> that a parent may give valid consent on behalf of a child where the child is incapable of giving consent. Based on this reasoning, he concluded that the subjective element was satisfied by RK's parents consenting to her placement.

### Comment

It is likely that an influential factor in the decision was that, since RK was under the age of 18, the local authority could not obtain a standard authorisation under Schedule 1 of the MCA, in accordance with the Deprivation of Liberty Safeguards.

*Mostyn J was persuaded by the argument on behalf of the local authority that, unless he gave guidance, "in each case, these local authorities will have to apply to the Court of Protection for a decision as to whether or not there is a deprivation of liberty and to seek a declaration that any deprivation of liberty is lawful".*

This would lead to an increase in applications in respect of all young adults under the age of 18 in similar placements, who lack capacity to make decisions as to their living arrangements. It would have the knock-on effect that the number of assessments of capacity required would also increase.

The Official Solicitor has indicated an intention to appeal this decision. It is hoped that this will provide further guidance on what will amount to a deprivation of liberty and clarify whether Mostyn J's interpretation of Section 20 of the Children Act 1989 is correct.

Louise Wright  
louise.wright@hilldickinson.com



# Death of a man refused admission to hospital – what lessons can we learn?

In January 2011, the Public Services Ombudsman for Wales published a report which criticised Cardiff and Vale University Local Health Board (the UHB) for the care given to a man, known as X, who took his own life after being refused admission to hospital.

In September 2008, X, who had not had any prior contact with mental health services, was referred to the Crisis Resolution Home Treatment Team (the crisis team), with suicidal intent. He was assessed by the crisis team and deemed suitable for treatment in the community. He made a telephone call to the team on 19 September 2008 saying that he wanted to be admitted to hospital. He was visited later that day a nurse from the crisis team but remained in the community. On 22 September 2008, he took an overdose and received treatment at the local general hospital.

Following this attempt on his life, X went on holiday with his mother. He was discharged from the crisis team. Upon his return from holiday, X went immediately to Whitchurch hospital and asked to be admitted, revealing two further attempts on his life when on holiday. He was sent home and advised to see his GP the next day. Over the course of the next few days there were a number of telephone calls between X's GP practice and the crisis team, as X continued to threaten self harm/suicide. He was seen by a psychiatrist on 21 October 2008. He was given advice and information about telephone help lines.

On 23 October 2008, X was found dead on a railway line near his home.

The inquest into X's death concluded that he had taken his own life whilst suffering deep anxiety "probably masked by his gregarious personality".

The ombudsman found that the initial decision to treat X in the community was not unreasonable, given how he reportedly presented. For example, X was talking about future events he had planned and was still working.

However, the ombudsman criticised the trust's approach, in that X was not treated as posing any different risk when he attended hospital following his holiday and reported two further suicide attempts. The ombudsman's medical advisors considered that there appeared to be a somewhat rigid, possibly inflexible, view that X could be treated in the community and once this view had been formed, it remained – even though there was no apparent proper assessment of what had happened whilst X was on holiday and why.

X's mother had complained that pressure on beds led to her son's refusal of admission. This was not upheld, although the ombudsman considered that the threshold for hospital admission was too high and there was a lack of guidance for staff on what was a "severe case" warranting admission:

*"Admission is reserved for the "severe cases" although there is no obvious definition anywhere that I can see as to what a severe case is. I share the view of my Advisers that the impression is one of a degree of inflexibility in this instance; the point at which bed need is assessed as met appears to be a very high threshold indeed."*

Despite his criticism, the ombudsman acknowledged that hospital admission is not the answer for everyone, and that

he could not say that hospital admission would have saved X's life.

## Comment

In cases where patients take their own life soon after discharge from hospital, or after being refused admission to hospital, clinical decisions will be put under very close scrutiny. The patient's death will lead to an inquest during which the coroner will normally investigate why the patient was not admitted to hospital. Family members and the general public, understandably, find it very hard to accept that suicidal patients can be treated in the community, often believing that hospital admission is the only answer. In addition staff may be 'soul searching' about whether they could have done more to prevent a death.

Decisions about appropriateness of hospital versus home treatment are based on clinical judgement. This is not an exact science as one cannot predict how another human being will act. However, decisions to discharge or refuse admission should be based on clear risk assessments which are fully documented (as lawyers like to say "if it isn't written down it hasn't been done") to ensure that the clinical judgement stands up to scrutiny. Risk assessments should be updated when a fresh decision has been made and when there has been a change in circumstances. Trusts should have clear policies on admission which make it clear when admission is appropriate, at the same time allowing staff flexibility to use their own clinical judgment and experience in deciding whether a person should be admitted in the particular circumstances.

Joanna Crichton

joanna.crichton@hilldickinson.com

# TTM -v- London Borough of Hackney and Others<sup>1</sup> - the Appeal decision

In the last edition of our mental health focus, we considered the decision in [TTM -v- London Borough of Hackney<sup>2</sup>](#).

TTM had been detained following an application made by an AMHP, who mistakenly believed that the patient's nearest relative did not object to the application. The High Court held that the detention was unlawful because the patient's nearest relative did, in fact, object. It was not relevant to the validity of the detention that the AMHP reasonably believed that there was no objection.

However, the High Court also held that compensation would only be awarded against the local authority if there was negligence or bad faith, which did not exist in the circumstances. From the hospital's perspective, the decision to admit was valid at the time it was taken and the detention could be regarded as lawful unless and until a defect was identified. According to Section 6(3) of the Mental Health Act 1983 (MHA), the hospital trust was entitled to rely upon the matters stated in the application papers since it appeared to have been duly made.

On appeal, the court held that TTM was unlawfully detained as the AMHP had acted in contravention of section 11(4) of the Mental Health Act (MHA) (provisions about consultation with the nearest relative); however the hospital trust had acted lawfully. Lord Justice Toulson said:

**"It is in the public interest that a hospital trust should act promptly on receipt of an application**

**for admission which appears to be in proper form and that it should not think it necessary for its own legal protection to incur time and expense in checking the accuracy of the various matters which Section 6 (3) entitles it to accept as correct."**

In the appeal hearing, TTM also argued that the detention was unlawful as the two clinicians lacked previous acquaintance with him. As such he argued that this was in breach of Section 12(2) MHA. There had been a difference in opinion between the treating clinicians. As such, the hospital trust had requested further opinions from two independent clinicians and these were relied upon in support of the application - even though one of the treating clinicians did support the application. This argument was unsuccessful. The court held that the word 'practicable' used in the Act needed to be viewed with a degree of flexibility, and that it was reasonable for the AMHP to seek independent recommendations.

## Comment

This case provides welcome reassurance for hospital trusts. When faced with seemingly legitimate application for detention, hospital managers are entitled to rely upon these to admit the patient and do not have to go behind the papers and investigate the information provided. However, if it subsequently appears that the application was unlawful; trusts should take steps to remedy the situation, by re-sectioning the patient if appropriate, as soon as a potential problem comes to light.

Rebecca Livesey  
rebecca.livesey@hilldickinson.com



# Important costs decision in the Court of Protection

## **G -v- E [2010] EWHC 3385 (Fam)**

### Background

E was removed by the local authority from his foster care placement with F to a residential home, Z. The local authority had not sought the consent of F or his sister, G; nor had it taken proceedings in the Court of Protection or otherwise to justify E's removal from F's care.

E's sister began proceedings in the Court of Protection on 13 November 2009. At an interim hearing in December 2009, Ryder J made an order that it was in E's best interests to continue to reside at Z, pending the determination of a number of issues at subsequent hearings. Some of the issues to be determined included whether E lacked capacity; whether it was in his best interests to return to live with F or to be cared for in a residential care home; and whether the local authority had contravened E's rights under the European Convention of Human Rights (ECHR), namely Articles 5 and 8.

On 26 March 2010, Baker J made an order, including declarations that:

- i. E lacked capacity to make decisions about where he should live;
- ii. the local authority had unlawfully deprived E of his liberty and infringed his rights under Article 5 ECHR by moving E to a residential home without seeking authorisation under DoLS, or by an order of the Court of Protection; and
- iii. the local authority had infringed E's rights under Article 8 ECHR by removing him from F's care without proper authorisation, failing to give any, or any adequate consideration to his family life with

F, failing adequately to involve F in the decision-making process, and restricting contact between E and F for several months after his removal.

Baker J directed the local authority to carry out a risk assessment of the proposal that E should return to F's care and held that E should continue to live at Z in the interim. At a subsequent hearing, on 6 May 2010, it was decided that E should return to live with F, based on the findings of a psychiatric report.

Subsequent hearings followed to establish further issues in the case. On 30 July 2010, Baker J concluded that it was appropriate to identify the local authority in this case as Manchester City Council.

### Costs

On 21 December 2010, Baker J revisited this case to consider the issue of costs of the first stage in the proceedings, ie up to and including the hearing on 6 May 2010. In light of Manchester City Council's conduct, he considered that departure from the general rule set out in Rule 157 of the Court of Protection Rules was justified.

Rule 157 relates to personal welfare and provides that:

"Where the proceedings concern P's personal welfare, the general rule is that there will be no order as to the costs of the proceedings or of that part of the proceedings that concerns P's personal welfare."

However, Rule 159 outlines a list of circumstances to which the court is to have regard in deciding whether to justify departure from the general rule, including the conduct of the parties.



It was argued on behalf of G and F that Manchester City Council's conduct in removing E from F's care was unlawful, and sufficient to justify not only departing from the general rule, but also an order for costs on the indemnity basis. Baker J accepted this reasoning, concluding:

"I am entirely satisfied that the local authority's blatant disregard of the processes of the MCA and their obligation to respect E's rights under the ECHR amount to misconduct which justifies departing from the general rule."

Baker J also held that the local authority's conduct amounted to a "significant degree of unreasonableness", so as to give rise to a liability for costs on the indemnity basis for some of the costs.

Baker J rejected the defence advanced by the local authority that public bodies, including Manchester City Council, had trouble coming to terms with the highly complex provisions of the MCA, and that it would be harsh to expect the local authority to be fully 'au fait' with the principles and provisions. Baker J responded to this point, remarking:

"Given the enormous responsibilities put upon local authorities under the MCA, it was surely incumbent on the management team to ensure that their staff were fully trained and properly informed about the new provisions. If a local authority is uncertain whether its proposed actions amount to a deprivation of liberty, it must apply to the court."

We understand that this case has now been referred to the Court of Appeal in relation to the issue of costs.

>>>

&gt;&gt;&gt;

## Comment

This decision highlights the potentially serious financial implications for public bodies in failing to interpret and apply the MCA provisions correctly. If restrictions are placed on a person's liberty which are not authorised under the MCA or another legal provision, or if there is any doubt about the legal position, we would recommend the trust seek urgent legal advice about the possible need for a Court of Protection claim.

This case also underlines the importance of local authority and NHS employees receiving appropriate training, such that they understand the legal provisions and are confident as to how the legal provisions should be implemented, in practical terms. Hill Dickinson offer clear and concise legal training packages, including relevant case studies, at a competitive price.

If you would like any advice about whether a proposed action amounts to a deprivation of liberty, or further details of our legal training packages, please contact one of our mental health and social care team, who will be happy to assist

[Louise Wright](#)

[louise.wright@hilldickinson.com](mailto:louise.wright@hilldickinson.com)

# No health without mental health

**Following a decade of investment, the NHS now needs to make £15-20 billion in efficiency savings by 2013/2014. The focus will be on redesigning services to improve quality and productivity, encouraging innovation and preventative interventions.**

Mental health represents the single largest cause of disability and NHS social and informal care cost £22.5 billion in England in 2007. The wider costs to the national economy in terms of welfare benefits, lost productivity at work etc, amount to £77 billion a year.

The Government strategy, 'No health without mental health', was launched on 2 February 2011, and aims to mainstream mental health in England with the hope that mental health becomes as important as physical health.

Andrew Lansley said:

"... too often in the past mental health issues have been marginalised and this cross government strategy will place good mental health at the heart of everything we do".

The strategy intends not to focus on treatment alone, but to intervene in mental health problems at the earliest years in life and so reduce the annual cost of mental ill health to the economy.

The plans include an additional investment of around £400 million to improve access to psychological therapies such as cognitive behavioural therapy, counselling for depression and interpersonal psychotherapy, couple's therapy and dynamic interpersonal psychotherapy.

The strategy hopes to ensure that by 2014:

- more people will have good mental health;
- more people with mental health problems will recover;
- more people with mental health problems will have good physical health;
- more people with mental health problems will have a positive experience of care and support;
- fewer people will suffer avoidable harm; and
- fewer people will experience stigma and discrimination.

We will have to wait to see if the investment in psychological therapies reduces the current lengthy wait for those who want psychological help. Furthermore, there is very little evidence, for those who suffer from a major mental illness, that the course of their illness can be changed dramatically. In light of this, it will be interesting to see if this strategy can really make a difference to those with the most serious mental health issues.

[Sharon Thomas](#)

[sharon.thomas@hilldickinson.com](mailto:sharon.thomas@hilldickinson.com)

# CTOs and referrals to the tribunal

## **The recent case of PS and Camden -v- Islington NHS Foundation Trust [2011] UKU 143 (AAC) highlights a decision of the appeals chamber of the tribunal service.**

The circumstances of the case are that the patient was detained under section 3 MHA on 23 March 2010. A CTO was made on 20 May 2010 but the patient was recalled to hospital on 10 August 2010 and the order was revoked on 11 August 2010. The hospital managers referred the patient's case to the first tier tribunal on 23 August 2010. However on 10 September 2010 a new CTO was made and the patient returned to live in the community.

On 7 October 2010 the tribunal wrote to the patient's solicitors setting out its policy that it treated such a referral as having lapsed if, before the hearing, the patient was again discharged from hospital back onto a CTO. The patient's solicitors responded to the tribunal disputing the position. Although the tribunal maintained its stance, it treated the solicitor's letter as a fresh application for consideration of the new CTO.

The appeals chamber held that the trigger for the reference was the recall to hospital or the revocation of the CTO. However the reference to the tribunal was not a review of the recall to hospital or revocation of the order but for the tribunal to exercise its powers

under section 72 MHA to consider whether or not the patient should be discharged. As such, the subject matter of the reference did not cease to exist when a new order was made and the tribunal's approach was incorrect.

In relation to treating the letter as an application, the appeals chamber held that this was a useful power and could be utilised by the tribunal for the applicant's advantage, but not for their detriment.

The judge commented that, had the hospital managers been represented at the hearing he would have wanted to know why it took 12 days for them to complete the simple referral form. CTO revocation cases can be difficult for both hospital trusts and the tribunal service to manage and it is important for all parties to co-operate with each other and the tribunal to ensure that they cases are managed effectively. The Tribunal Procedure Committee will be consulting on rule changes to make it easier to handle these cases in future. Hospital managers may wish to respond to the consultation with their views.

Rebecca Fitzpatrick  
rebecca.fitzpatrick@hilldickinson.com





## Policing respect for the vulnerable - the first prosecutions under Section 44 of the Mental Capacity Act 2005

From 1 April 2007, a person commits an offence under section 44 of the Mental Capacity Act 2005 (MCA) if he or she ill-treats or wilfully neglects a person who lacks mental capacity. The offence carries a maximum penalty on indictment of five years' imprisonment and/or a fine. The recent cases described below demonstrate that breaches of this provision will be taken seriously by the courts.

### The Old Rectory

On 6 January 2011, two care home workers received suspended prison sentences for bullying elderly women at the care home where they worked. Cardiff Crown Court heard how Helen Males and Eleni Saunders ill-treated two women aged 87 and 91 years old at The Old Rectory care home, which cares for elderly patients suffering from Alzheimer's disease and dementia.

The care workers were charged with three counts of ill-treatment or neglect of a person without capacity, contrary to section 44 of the MCA.

The court heard how the defendants ridiculed and frightened the patients. On one occasion, Males used a green goblin puppet, thrusting it towards one of their victims, making a growling sound. Saunders had held the victim's hands in her lap so that she couldn't fight back. Both defendants were witnessed laughing during the incident. The defendants also amused themselves by flicking the ears of patients.

Judge Philip Richards said: "I have to sentence each of you for offences which were quite disgraceful. You were employed to look after people in the last years of their lives. You were employed to care for them, provide

for them and to ensure they were safe. Instead of that you ridiculed them, you frightened them and you caused them distress - not only on an isolated occasion but, sadly, on repeated occasions."

Males received a custodial sentence, was suspended for 12 months, and was ordered to complete 250 hours of unpaid work, whilst Saunders received a custodial sentence, suspended for nine months, and was ordered to complete 200 hours of unpaid work. The judge imposed a 12-hour curfew for six months with the requirement that Saunders and Males be electronically tagged. Both women were banned from working in the care profession indefinitely.

### The Dales

The case of Males and Saunders comes hot on the heels of the case of three care workers who were jailed in December 2010, after abusing two elderly patients at The Dales nursing home in Bradford and filming the abuse on a mobile phone. The footage showed the defendants taunting, bullying and attacking the two victims, an 86-year-old man and a 99-year-old woman with advanced Alzheimer's disease.

Jolene Hullah, Tanzeela Safdar and Paul Poole all pleaded guilty at Bradford Crown Court in October 2010 to two offences of ill-treatment of a person who lacks capacity. Video footage was played to the court at their sentencing hearing on 14 December 2010. It showed Hullah striking out at one victim, and other victims being grabbed and poked and taunted. It also showed a female elderly patient sitting on the floor and calling out for help. Safdar and another care worker were heard

laughing and the phone was thrust into her face.

Safdar was sentenced to 21 months' imprisonment, while Hullah and Poole received prison sentences of 18 months and 12 months respectively. All three are banned from working in the care profession for life.

The judge, Recorder Richard Mansell QC, told them: "Your job was to provide them with a dignified level of care in the last years of their lives. With these despicable acts, you stripped [the victims] of their dignity for your own amusement and gratification. Of those who sat in court today and watched the video footage, nobody could have failed to be appalled by your sick conduct."

### Comment

It is important that care homes have adequate training in place to ensure that employees responsible for persons lacking capacity comply with the MCA, and are aware of their specific duties under the MCA. It is particularly important that vulnerable patients are treated with respect and dignity at all times. Aside from the distressing and despicable treatment suffered by the victims, these cases attract considerable media attention, not just for the perpetrators of the offence, but also for the care home organisation involved.

If you would like any assistance with developing or improving training in this area, please contact a member of the Hill Dickinson mental health and social care team, to discuss your needs.

Louise Wright  
louise.wright@hilldickinson.com

## Meet the team

# Mental health and social care team



**Rebecca Fitzpatrick**  
Partner  
+44 (0)161 817 7296  
[rebecca.fitzpatrick@hilldickinson.com](mailto:rebecca.fitzpatrick@hilldickinson.com)



**Sharon Thomas**  
Partner  
+44 (0)151 600 8249  
[sharon.thomas@hilldickinson.com](mailto:sharon.thomas@hilldickinson.com)



**Louise Wright**  
Associate  
+44 (0)151 600 8112  
[louise.wright@hilldickinson.com](mailto:louise.wright@hilldickinson.com)



**Joanna Crichton**  
Solicitor  
+44 (0)151 600 8171  
[joanna.crichton@hilldickinson.com](mailto:joanna.crichton@hilldickinson.com)



**Rebecca Livesey**  
Paralegal  
+44 (0)161 817 7219  
[joanna.crichton@hilldickinson.com](mailto:joanna.crichton@hilldickinson.com)

**Simone Barry**  
Legal Administration  
Assistant  
+44 (0)151 600 8630  
[simone.barry@hilldickinson.com](mailto:simone.barry@hilldickinson.com)

**Gay Ingham**  
Secretary  
+44 (0)161 817 7273  
[gay.ingham@hilldickinson.com](mailto:gay.ingham@hilldickinson.com)

Hill Dickinson can offer training packages to meet your organisation's needs, including:

- Mental capacity
- Inquests
- Corporate manslaughter
- Safeguarding children and adults
- Detailed training for Mental Health Act administrators

Should you require further information please contact [Rebecca Fitzpatrick](#) or [Sharon Thomas](#) (details above).

## About Hill Dickinson

The Hill Dickinson Group offers a comprehensive range of legal services from offices in Liverpool, Manchester, London, Chester, Sheffield, Piraeus and Singapore. Collectively the firms have more than 1,300 people including 190 partners.

The information and any commentary contained in this newsletter are for general purposes only and do not constitute legal or any other type of professional advice. We do not accept and, to the extent permitted by law, exclude liability to any person for any loss which may arise from relying upon or otherwise using the information contained in this newsletter. Whilst every effort has been made when producing this newsletter, no liability is accepted for any error or omission. If you have a particular query or issue, we would strongly advise you to contact a member of the mental health team, who will be happy to provide specific advice, rather than relying on the information or comments in this newsletter.