# *A Tendency to Laugh and Sing: Some Notes on Mental Health Law*

**David Hewitt (Northumbria Law Press, 2008) £24.99**

Dr David Hewitt probably needs no introduction, but he deserves one anyway as an old friend of this Journal, both in his capacity as Assistant Editor and as a prolific contributor. He is a partner in Weightmans LLP, a visiting Fellow of Northumbria and Lincoln Universities and a judge in the First-Tier Tribunal (Health, Education & Social Care Chamber) (Mental Health) – in other words, a mental health tribunal. He is also an assiduous and highly-regarded commentator in the professional press on issues in mental health law. One wonders how he finds the time.

The present volume is a collection of Dr Hewitt's writings for the legal and professional press over the past few years, together with the transcripts of a couple of lectures. Two were co-written with Kristina Stern, the remainder are pure Hewitt. The earliest article dates from 1995, the most recent from (I think) 2007. Some, particularly those written for this Journal, are detailed and can run to a dozen pages; some of them focus on a single topic, such as the nearest relative, and are a couple of pages long. Most are concerned with the great controversies of their day, but a couple explore unexpected byways and come to surprising conclusions. Together the articles offer a close analysis of the most significant developments in mental health law, both cases and legislation, during the period.

The book is divided into five chapters, based on themes: "The European Convention on Human Rights", "Cases", "Bournewood and After", "Amending the Mental Health Act" and "Miscellaneous Matters". The pieces in each chapter are arranged chronologically (almost – see later). As Dr Hewitt says in his introduction, this gives a sense of how a line of case law or a set of legislative proposals developed, but it can also have the effect of dividing up articles into different chapters which connect with each other. On the whole, though, the divisions work.

The first chapter is, to this reader at least, the most wholly successful. Dr Hewitt has a keen understanding of both the European Convention and of Strasbourg jurisprudence, and these articles are both erudite and informative. They are also gently sceptical about the Convention's potential for altering the mental health landscape, by contrast with the naïve excitement that some of us felt at the time. Well, he was right and we were wrong.

To some extent this first chapter works so well because the interpretation of the Convention continues to exercise us today. The second chapter, which deals equally thoughtfully with significant issues in the caselaw of the period, makes an interesting historical record but – since the matters are now all settled law – is rather less relevant to current practice. It is also a harder read. A number of the articles deal with the same topic, which can be repetitious. There are, for example, four articles on re-sectioning following discharge, which analyse just two cases – *von Brandenberg*[1] and *H v Ashworth*[2]. They make very good points – particularly with regard to the second of these cases – but several times over; two of the articles would have been enough I think. (It doesn't help that article 13 is out of chronological order.)

There is also the problem that a collection of articles does not always give the whole picture. For example,

1 *R v East London & the City Mental Health NHS Trust and another, ex parte von Brandenberg [2001] EWCA Civ 239; [2003] UKHL 58*

2 *R v Ashworth Health Authority and others, ex parte H [2002] EWCA Civ 923*

Dr Hewitt includes a characteristically careful analysis of the *MH* case in the Court of Appeal[3] – and repeats his comments later in the context of the Bournewood articles – but the fact that the judgment was reversed in the House of Lords the following year[4] appears only in a small footnote, which this reader missed first time round. Maybe he never wrote about the Lords' decision (he is entitled to the occasional weekend off, after all), but without a fuller note – in the introduction to the chapter, perhaps – to explain how matters subsequently developed, a reader who is unfamiliar with the case would be misled as to the present state of the law.

These are probably minor niggles. None of the chapter 2 articles is less than informative, and some are positively illuminating. I particularly enjoyed articles 18 and 19, on the bar in section 139 MHA on bringing legal proceedings against mental health professionals without permission of the court, even though they overlap to some extent. And a couple of these pieces are as relevant today as when they were written: see for example Article 21, which deals with the case of DR, whose s.3 detention was renewed although she was spending no time as an inpatient. Dr Hewitt and his co-author, Kristina Stern, set out the implications with admirable clarity.

The third chapter is called "Bournewood and after", and covers the development of the law relating to the control of incapacitated but compliant adults, from the 1999 House of Lords decision in that case, via the European Court of Human Rights hearing in 2004, to the Deprivation of Liberty Safeguards which came into force in April this year. To a large extent these pieces simply set out the law at each stage. However one article, on the case of *Re F*[5], looks very hard at the whole notion of protecting "vulnerable adults", and concludes that the case widened the so-called "Bournewood gap", rather than narrowing it. And on the way Dr Hewitt points out a problem which I confess I had not spotted before[6]: if the DOLS safeguards apply to someone who is "detained in circumstances which amount to deprivation of his liberty[7]", it must follow that someone can be detained *without* being deprived of their liberty (and maybe vice versa) – so what is the distinction between the two?[8] It may be a matter of purely academic interest, or it may be a gap that will one day have to be adjudicated upon. Either way, I am glad that it has been pointed out.

Chapter 4 details the various proposals to reform the Mental Health Act 1983: the 2000 White Paper, the draft Bills of 2002 and 2004, and the Bill which, with modifications, was finally enacted in 2007. To those of us who tried to understand these plans at the time they will be oh, so familiar, and yet oh, so long ago. It will, I am sure, be of value to researchers and academics to read Dr Hewitt's comments on each of these proposals at the time they were published, as they are models of clarity and insight. I found Article 41, which argues that in view of contemporary practice there was little need to reform the MHA at all, the most interesting. I wonder, though, how relevant most of this chapter will be to current practitioners of mental health law.

The fifth chapter is, as the author cheerfully admits, "a ragbag of articles that I could not fit in anywhere else". To my mind some of these pieces are among the most engaging in the book – particularly the texts of two lectures, on the role and value of Mental Health Act Managers, in which – at last – Dr Hewitt breaks away from his role as scholarly analyst and becomes an advocate, and a polemical one at that. It is as if a batsman who has been carefully and neatly nudging the ball around the infield is suddenly

3 *R (MH) v Secretary of State for Health [2004] EWCA Civ 1690*

4 *MH v Secretary of State for Health [2005] UKHL 60*

5 *In Re F (Adult: Court's Jurisdiction) [2000] 1 FLR 192*

6 *See Article 31 at page 165 ff*

7 *MCA 2005, Schedule 1, Paragraph 1(2)*

8 *Since this volume of essays was published, the House of Lords has of course considered this issue in Austin v Commissioner of Police for the Metropolis [2009] UKHL 5. In an article entitled 'Whose Liberty?' (Solicitors' Journal 17/2/09), Dr. Hewitt analysed their conclusions.*

revealed as Freddie Flintoff: thwack! to the Government, Tory and Labour alike; wallop! to the abolition plans in the Draft Bill. I know Dr Hewitt has a reputation to maintain as a serious and level-headed lawyer, but a bit more of this would have been welcome.

So, what to make of the book as a whole? It is, as the author says, a collection of "notes" on mental health law, rather than a coherent whole. As such it is not designed to be read straight through, and I would not recommend doing so. The grouping of articles on the same broad theme has its strengths – particularly for anyone carrying out an historical analysis – but it does make for considerable repetition. This is a pity, as an incisive comment in one article loses some if its force when it is repeated in the next, written in the same period for a different publication. (I particularly regret the fact that an excellent joke on page 195 reappears in a footnote to the subsequent article, just four pages later.)

As I have indicated, I find the value of the individual articles somewhat variable, especially where their subject-matter is no longer under debate. Some do no more than summarise the effect of a case, or legislative proposals, though they are invariably clear and concise, and Dr Hewitt writes well. Occasionally I think he labours his point: the final article, on the interpretation which must now be given to "hospital", could to my mind be cut by a third. (This may betray my own study habits.) However, the single-topic pieces are invariably illuminating; and the long articles, such as those written for this Journal, give him the space for what he does supremely well: a painstaking analysis of the relevant caselaw and guidance, fully referenced, which leads the reader step by step to the inevitability of his conclusion.

This is particularly effective where the conclusion challenges the current orthodoxy. For example, in Article 24, which considers an unsuccessful challenge to a medical member of a tribunal being employed by the detaining authority[9], he dissects to devastating effect the tendentious – and, I am now persuaded, wrong – interpretation given by the Court of Appeal to the expression "officer of … a National Health Service Trust" in rule 8(2) of the former 1983 Mental Health Review Tribunal Rules. Hewitt does not rail against the decision, but merely points out the implications: if an "officer" means someone with managerial responsibilities, as the Court ruled, then the "officer" required to receive the detention papers would likewise have to be a manager, a manager would have to scrutinise the documents, and so on. This is fine advocacy.

(Incidentally, the above article is titled "Officer Class." Dr Hewitt's titles are always worth noting. I particularly like the piece on the DOL safeguards headed "Bournewouldn't".)

In summary: this is a collection of informative, well-presented, well-researched and occasionally provocative articles on substantial topics in mental health law. I am just left wondering who its natural readership will be. Journalism, however erudite or forceful when it was written, tends to go out of date once the controversy that inspired it has receded into history. Perhaps its enduring value will be in its very contemporaneous nature: "I was there".

In a rare exception to an otherwise becomingly modest assessment of his own work, Dr Hewitt tells us that Lord Carlisle of Berriew, QC, chairing the Joint Committee on the 2004 Draft Bill, congratulated him on his articles for New Law Journal, "one of which I have circulated to the Committee because of the clarity of the picture it presents and the explanations." Amen to that.

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9 *R (PD) v West Midlands and North West Mental Health Review Tribunal & Mersey Care NHS Trust [2004] EWCA Civ 311*