

## **INTRODUCTION: FROM THE JOURNAL OF MENTAL HEALTH LAW TO THE INTERNATIONAL JOURNAL OF MENTAL HEALTH AND CAPACITY LAW**

Few areas of law and policy are as vibrant as that which surrounds the empowering and disempowering of those who are diagnosed as having some form of mental disorder or as having a compromised capacity to make choices that would otherwise be respected. This vibrancy is almost certainly due to the fact that the normative framework of human rights standards has emerged as a transnational constitutional backdrop for how societies deal with vulnerable people, and also – and probably more importantly – the development of understanding what this human rights framework entails. As a result, changes in mental health law and policy have been a significant feature of recent decades. There has been a steady stream of judgments from courts, including from international courts such as the European Court of Human Rights, as to what a rights framework requires. This developing jurisprudence has played a role in the regularly changing legislation in most common law jurisdictions. Statutes governing matters of mental health law have been updated, and statutes regulating mental capacity issues have been introduced to replace common law approaches. Calls that were made for statutes that combine mental health and mental capacity principles are now becoming more prominent.

These developments are the positive side of an unhappy story. The needs of people affected by such legislation – both to exercise their freedoms on an equal basis and for support – have been breached. The need for and regular success of litigation reflects a failure by the other branches of the state to secure the relevant rights without court intervention. The systemic nature of this problem is reflected in the need for the Convention on the Rights of Persons with Disabilities 2006 (CRPD) and its indication as to what the rights framework requires in the context of those who are viewed as having disabilities, including on the grounds of mental health considerations. Unfortunately, there seems to be no shortage of ongoing concerns that require intervention.

The prevalence of the interface between law and mental health has been reflected by numerous texts dedicated to the area, rather than it being merely a sub-part of broader medico-legal texts, and by the introduction of dedicated academic programmes. The introduction of one such programme at the University of Northumbria was particularly important for a number of reasons, one of which was that the presence of legal academics who were committed to teaching and research in mental health law provided the critical mass that allowed the production of the Journal of Mental Health Law (JMHL).

Writing the foreword to the first edition, published in February 1999 by the University of Northumbria Press, Charlotte Emmett noted her hope as editor that the JMHL would be “readable and relevant”.<sup>1</sup> Relevance was assured from the outset; the first substantive article being a review of judicial review decisions in England and Wales written jointly by a legal academic and a sociology academic. They concluded that social protection was invariably favoured over patient autonomy but added that the

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<sup>1</sup> Emmett, C, Foreword, (1999) 1 JMHL 2.

incorporation of human rights standards from the introduction of the Human Rights Act 1998 (UK) might provide a spur towards a different approach.<sup>2</sup>

The wide range of issues dealt with in the first edition included commentary about the domestic proceedings in the case that gave rise to what was known as the “Bournewood Gap”,<sup>3</sup> which in turn led to the European Court of Human Rights determining in 2004, in *HL v UK*,<sup>4</sup> that it was important for protection against the risk of arbitrary detention that there be better safeguards for people with restricted capacity. This case led to legislative change in England and formed the bedrock of a series of cases in the European Court of Human Rights that provided a basis for the better protection in various jurisdictions of people whose mental capacity was compromised but whose capacity to have rights was undiminished, as is made clear by Article 12 of the CRPD.

Charlotte Emmett passed on the editorship of the JMHL to John Horne, also then an academic member of staff at the University of Northumbria. Now retired, he provided the following reflections to me on hearing confirmation that the JMHL was to become the International Journal of Mental Health and Capacity Law (IJMHCL):

There were twenty-one issues of the JMHL in its life of twelve years. It was my former colleague, Charlotte Emmett, who had the vision, commitment and enthusiasm to launch the journal. She acted as a highly skilful and efficient editor for the first eleven issues, and a huge debt of gratitude is owed to her for establishing the JMHL firstly as a greatly respected platform for consideration and debate about a very wide range of topics, and secondly a source of rich material for citing in various forums by practising lawyers, judges, mental health professionals, academics and students. Both Charlotte and I received considerable support from the Editorial Board (many of the ‘great and the good’ of the mental health law world). Not only did they encourage and advise but also they acted as conscientious referees of submissions we received for consideration for publication. Latterly Dr David Hewitt (Visiting Fellow at Northumbria University) and Mat Kinton (Care Quality Commission) generously fulfilled the invaluable role of Assistant Editors.

When I embarked on this letter, I had an aim, in addition to that of wishing the new journal well, of highlighting some of the articles, shorter ‘comments’, case reviews and book reviews which were published in the JMHL over the years. However on going through past issues, I have found the task of selecting a few to be completely impossible, and have concluded that it would also be somewhat invidious to single out some personal ‘favourites’. I have been reminded of the consistently high quality of the material we published. Each issue was very ‘full’ and ‘a good read’, with the range of subjects covered such as to ensure that each subscriber would have found something of interest and importance to them. Naturally some of the JMHL contents will

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<sup>2</sup> Richardson, G, and Machin, D ‘A Clash of Values? Mental Health Review Tribunals and Judicial Review’ (1999) 1 JMHL 3.

<sup>3</sup> *R v Bournewood Community and Mental Health NHS Trust ex p L* [1999] 1 AC 458: the House of Lords determined that an adult man without the capacity to decide where to live and who was compliant with the desire of his psychiatrist that he remain in hospital in his best interests was not detained; but that if he was detained, the common law doctrine allowing what would otherwise be a false imprisonment to be defended on the basis of necessity so long as the situation involved action taken in the best interests of a person without capacity. The House overturned the decision of the Court of Appeal, which had been that detention on the basis of concern about mental health had to be pursuant to the Mental Health Act 1983. Lord Steyn, whose view was that there was detention but that it was protected by the doctrine of necessity, expressed his concern that this conclusion left a gap in the protection of a vulnerable group in society: hence the Bournewood gap in protection.

<sup>4</sup> (2005) 40 EHRR 32, [2004] MHLR 236.

now be not much more than of historic interest, but so much will still be of relevance to debates and discussion being held now, and no doubt in the future, within many jurisdictions.

Having admitted defeat in attempting to highlight particular articles etc, I do think one particular past issue of the JMHL needs to be expressly referred to. It was the JMHL's penultimate issue (no. 20), published in 2010. I shared responsibility for the editing of this 'Special Issue' with Professor Genevra Richardson (King's College, London), who had chaired the Expert Committee established in 1998 by the then UK Government to advise on reform of mental health law. A different structure to that we usually employed was devised to accommodate the task we set ourselves. That task was to consider (what we called) '*The Proposal*', namely '*A model law fusing incapacity and mental health legislation*', which was put forward by Professor George Szmukler (Institute of Psychiatry, King's College, London), Dr Rowena Daw (Royal College of Psychiatrists, London) and Professor John Dawson (University of Otago, Dunedin, New Zealand). We published in an Appendix their '*Outline of the Model Law*' (in effect a draft statute), but began the issue with a detailed article by them explaining the fusion idea. The next section contained thoughtful and critical '*Commentaries*' by a number of experts (from America, England, Scotland, Northern Ireland, and New Zealand) on specific aspects of the proposal. We then gave the proposers an opportunity to respond, and in so doing not only did they address matters raised by the commentators but also they submitted an addendum to their draft statute. The issue concluded with an overview of the law reform debate to date. A great deal of effort by many people was put into this JMHL special issue. I do commend its contents to your readers and subscribers. The subject-matter deserves ongoing respect, debate and consideration.

This brief outline of the JMHL reveals the pedigree to which the IJMHL will aspire. As is made clear in this letter, a focus on English mental health law was supported by regular coverage of the law relating to capacity and the law of other jurisdictions. The new name reflects an express desire to make that wider coverage clear, particularly as it is informed by the backdrop of transnational human rights standards, and to ensure that there is a proper focus on the growing importance of the law in providing protection for people whose mental capacity is compromised. This leads me to the one point of difference I have with John Horne. The JMHL did not come to an end with its 21<sup>st</sup> issue: rather, it entered a period of hiatus, from which it has now emerged! The IJMHL is not a new journal, it is a successor journal. For that reason, our archive includes past editions of the JMHL.

Significantly, during this period of hiatus, the University of Northumbria has decided to put into practice a policy of making sure that research is promulgated by making the IJMHL an open access journal rather than one for which a subscription is required. This change has also happened in relation to other journals associated with the Law School there.

Aside from this change in access to the Journal and the express recognition of its wider scope, other matters will follow very much the same formula as marked the value of the JMHL. The editorial board will operate a double blind peer review process to ensure quality; we encourage academic articles from a wide variety of perspectives - legal, medical, social work and service user perspectives, and from cross-disciplinary teams of authors; and we also encourage the submission of case notes and practical writings that inform good practice in this important area of law. Our aim remains the same as that set out by Charlotte Emmett in 1999: a journal that is "readable and relevant".

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