

Decisions and Dilemmas – Working with Mental Health Law, by Jill Peay

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In her foreword, Lady Justice Hale (as she then was) describes this book as “fascinating” and “a stimulating read”. This reviewer unreservedly agrees.

Its publication is also very timely. Not only is this (as all readers of this Journal will be all too aware) a time of “ferment in mental health law” (to quote from the book’s back cover), but also the surge of caselaw activity in the area which has occurred since the coming into effect of the *Human Rights Act 1998*, shows no sign of abating. Consider the attention recently given by the courts to Part IV of the *Mental Health Act 1983*, as witnessed in cases such as *Wilkinson*¹, *N*² and *PS*³ – a level of scrutiny which, incidentally, clearly has by no means yet run its course. Those cases well illustrate the range of issues which must now be addressed by those responsible for determining whether or not treatment is to be imposed on a non-consenting detained patient. No longer is it acceptable for Responsible Medical Officers (RMOs) and Second Opinion Appointed Doctors (SOADs) to simply (not that it was ever ‘simple’) apply the statutory provisions set out in particular in sections 63 and 58, but now they must also consider a myriad of other matters in deciding whether or not a proposed treatment is ‘medically necessary’ and ‘in best interests’. Dyson L.J.⁴ and Silber J.⁵ have sought to assist with their lists of relevant lines of enquiry, and in so doing they have highlighted not only the complexity of the issues to be considered but also the standard of decision-making now (rightly) expected. As its title suggests, this book is about how key players such as RMOs and SOADs, make such decisions, many of which are of course of the utmost gravity for those affected.

The informative explanatory preface is essential reading. Like all good prefaces it tells the reader both the context in which the book has been written and what to expect in the following 177 pages of main text (three appendices, a bibliography and an index add a further 40 pages – more on them later). Perhaps more unusually, but rather charmingly, it also contains the author’s own assessment of the outcome of her efforts: thus rather disparagingly she describes the book as “odd” (“For many it will fall between two stools, having neither the methodological rigour of a research report nor the analytical rigour of a scholarly legal text”) and a “smorgasbord” (Concise Oxford Dictionary definition: “Buffet meal with variety of dishes”). By her own high standards, she may be right, but neither criticism (if indeed they can be truly be described as such) in any way detract from what is really, to adopt the BBC Radio 4 accolade, a ‘[very] good read’.

Although not specifically delineated as such, the book is really in two parts. The first part describes and analyses research carried out in 1998/9 by the author, a reader in law at the London School of Economics, and Professor Nigel Eastman, a forensic psychiatrist at St. George’s Hospital Medical School, London. The second part considers the research study firstly alongside other relevant research and literature, and secondly in the context of ongoing legal and policy developments.

Dr. Peay and Professor Eastman are both well-known and respected commentators on, and

1 *R (on the application of Wilkinson) v Broadmoor Special Hospital Authority and others* [2001] EWCA Civ 1545

2 *R (on the application of N) v Dr. M and others* [2002] EWCA Civ 1789

3 *R (on the application of PS) v Dr. G and others* [2003] EWHC 2335 (Admin) – reviewed by Peter Bartlett in this issue of the JMHL.

4 See the case of *N* (footnote 2 above)

5 See the case of *PS* (footnote 3 above)

contributors to, the development of mental health law⁶. The research which forms the backbone to the book was funded by the Department of Health and formed part of the Department's programme of research investigating the operation of the 1983 Act. The Department's stated intention was to acquire a better understanding of how the Act works in practice, an aim surely assisted by this research. The author succinctly summarises the research study as follows:

"Taking part in the original study were psychiatrists approved under section 12(2) of the 1983 Act as having 'special experience in the diagnosis or treatment of mental disorder', approved social workers (ASWs) and a second group of psychiatrists who also held the formal position of second opinion appointed doctor (SOADs). In total, 106 such practitioners participated. Each was required to make decisions alone and as a member of a professional pair, with psychiatrists being paired with approved social workers or with other psychiatrists, namely, the second opinion appointed doctors.

The individual and paired decisions required of them related to three commonplace scenarios. First, the decision to admit a patient to hospital under compulsion; second, the decision to discharge a detained patient from hospital; and finally, the decision to give medical treatment to a patient on a compulsory basis. Three hypothetical but entirely fictitious cases were devised which addressed these scenarios. In making the decisions, both alone and in their professional pairs, practitioners had access to extensive case materials and video evidence; their decisions were also subject to interrogation and deconstruction as part of the research exercise.

In studying decision-making in this way, the focus of the research was not so much on establishing what decisions the practitioners reached, but on how those decisions were reached. Given that there were very divergent outcomes, what were the justifications and reasoning processes adopted? Thus, the book strives to identify the range of strategies employed by real-life practitioners to resolve these three cases, and in so doing explores the ethical, legal and clinical conflicts posed by 'everyday' dilemmas in mental health practice."

Both the quality and quantity of the information provided to the participants about Robert Draper ('A case for Admission?' – chapter 1), Clive Wright ('A case for Discharge?' – chapter 2), and Hazel Robinson ('A case for Treatment?' – chapter 3) make the scenarios very realistic, and it is no surprise that the participants appear to have thrown themselves fully into the roles required of them, an essential pre-requisite for the research to be meaningful. In total 52 psychiatrists, 14 SOADs (all psychiatrists of consultant status) and 40 ASWs took part. Given the fact that participation inevitably meant a not inconsiderable demand on the time of busy professionals, this is an impressive number, and is no doubt indicative of professional respect for the researchers, a desire to learn ("some were tortured souls whose own doubts about their facility with the Act led them to participate in the hope that they might learn something"), a commitment to contribute in a small way to the process of legal change (the initial 'invitation' letter made it clear the importance of the study for law reform) and/or an 'against-the-odds' hope of securing the 'mystery' incentive prize (subsequently revealed to be a weekend for two in a Heritage hotel).

The three opening chapters of the book are absorbing. The author's hope that she might "recapture the sense of anxiety, excitement, curiosity and discovery experienced by those participating in the research" has, in the judgment of this reviewer, been realised. The excruciatingly difficult dilemmas facing the decision-makers are well exposed⁷. To summarise within this review the outcome of the research, and in particular the author's painstaking and conscientious analysis of it, would be a

6 For example they jointly edited 'Law without enforcement' (Hart Publishing) (1999), an impressive collection of essays about the effectiveness of mental health law, reviewed in JMHL (Feb 1999).

7 The questionable objectivity of assessment of this by the reviewer needs to be acknowledged – he well recalls his own agonising as an inexperienced but 'authorised' social worker attempting to apply the provisions of the Mental Health Act 1959.

disservice to her and her publishers, and no such summary will be attempted. Suffice it to say, issues such as knowledge (or rather lack of knowledge) of the law, the pros and cons of duo-disciplinary decision-making, the significance of one discipline being the statutorily-defined ‘lead’ decision-maker in certain scenarios (e.g. the ASW as the admission-applicant; the R.M.O. as the section-‘renewer’), ‘decision-shyness’ amongst some professionals, the clinical knee-jerk (but often legally inappropriate) ‘best interests’ response, the ‘forceful personality’ problem, and of course the diversity of approaches taken and the inevitable inconsistencies of decisions reached, all receive careful and thoughtful attention.

Before proceeding to make some reference to the remainder of the book, the following extract from appendix 2 (‘Methodology’) needs to be highlighted:

“Finally, many of those taking part commented on the usefulness of the exercises for training. Indeed, the sessions were regarded as much more instructive [the reviewer’s emphasis] than the single profession didactic training these professionals had experienced. Their inter-disciplinary nature, together with the exposure to the other party’s thinking process, was highlighted as an aid to understanding the working perspectives of the respective professions. Moreover, whilst many of the participants were clearly nervous about the exercise, they also said that they had ‘enjoyed’ the necessarily challenging and sometimes apparently persecutory questioning. The benefit seemed to derive from having to articulate and justify their own reasoning processes in a way they had not previously been called upon to do.”

Throughout England and Wales there are numerous induction and refresher training courses for s.12 doctors and ASWs⁸ (with the Mental Health Act Commission holding in-house sessions for their SOADs). As one who is regularly involved in the provision of such training, this reviewer urges that when devising regulations and guidelines for the essential training which will be required on the introduction of new legislation, the powers-that-be take note of this perceptive and highly important observation. Research has shown the limitations of current training⁹. Realistic case-study scenarios, such as those used in the author’s research, with an insistence that course participants come from each of the relevant disciplines (which from the proposals contained in the *Draft Mental Health Bill 2002*, will also include appropriately qualified nurses), would surely have a greater prospect of effectiveness than the closeted ‘one-discipline-at-a-time’ approach adopted so commonly at the present time¹⁰.

The second ‘part’ of the book is as thought-provoking as would be expected from an academic who has devoted so much of her career to a consideration of mental health law generally, and decision-making specifically¹¹. Chapters 4 and 5, and the concluding chapter 6, do not disappoint. In chapter 4 the importance of research is highlighted, as is the fact that when the Department decided in the

8 The contrast (in terms of hours, content and assessment) set out in the requirements both for induction training (and subsequent approval) and for refresher training for these two groups, is great. See Guidance HSG (96)3 ‘Approval of doctors under section 12 Mental Health Act 1983’ (NHS Executive – 1996), and the requirements published in 2001 by the former Central Council of Education & Training in Social Work, ‘Assuring Quality for Mental Health Social Work: Requirements for the training of Approved Social Workers...’ and ‘Maintaining and developing the competence of Approved Social Workers....’. Dr. Martin Humphreys highlighted this contrast in an article ‘Psychiatrists’ Knowledge of Mental Health Legislation’ *JMHL* (October 1999) pp 150–153.

9 For example, see ‘Legal Knowledge of Mental Health Professionals: Report of a National Survey’, Peay, Roberts and Eastman, *JMHL* (June 2001) pp 44–55.

10 For an interesting and timely critique of training of s.12 doctors, see ‘Training for approval under section 12(2) of the Mental Health Act 1983’ Brown and Humphreys *Advances in Psychiatric Treatment* (2003) vol. 9 pp 38–44.

11 The earliest work by the author in this area is revealed by the bibliography of the book to be her unpublished PhD thesis, ‘A study of Individual Approaches to Decision-making under the Mental Health Act 1959’, submitted in 1980.

late 1990s to embark on the (ever-lengthening) road to reform, they faced a dearth of knowledge about the application of the 1983 Act. The chapter then proceeds to an informative exploration of such research as there has been, with the author drawing on work carried out in North America and the Nordic countries to assist her in her task. The chapter concludes with a consideration of the contribution made by the research study (“in short, it provided insights into professionals’ reasoning processes in a quasi-legal decision-making setting”), and a separate brief realistic assessment of the relevance of the research to the actual law reform proposed (with reference to provisions within the *Draft Bill*).

‘Legal and Policy Context’ is the title of chapter 5, and what follows is a look at legal and policy developments since the 1983 Act and a placing of them into a practical context. It is an unashamedly (and overtly acknowledged) biased account, readers being reminded at the outset of the chapter of the author’s membership of the expert advisory group (the ‘Richardson Committee’) established by the Government in 1998 to advise on mental health law reform. It is familiar territory to anyone who has been following the reform saga of the last five years, but the presentation is thoughtful and original and many readers will be in sympathy with the author’s provocative and heartfelt critique.

In the final scholarly chapter, the author, with reference to the research study and the issues arising from multi-disciplinary decision-making, considers conflicts associated with the pursuit of legal certainty and consistency, the difficulties of working in chaotic and complex situations, and the extent to which research can influence law reform, before concluding with comments about the effectiveness and acceptability of the reforms proposed in the *Draft Bill*. She is right to end by restating a central lesson of the research:

“Application of the law is fundamentally an interpretative exercise. It involves the construction of choices and bearing the consequences of the choices made. Given all that has been said here about uncertainty and complexity, it is wise to end on a cautionary note. Legislators should remain vigilant of the law of unintended consequences, for as Heginbotham and Elson¹² have argued, the translation of public policy into practice or law does not always follow the original intentions of those who formulated the proposals.”

Helpful and interesting appendices complete the book. Appendix 1 contains relevant selected sections of the 1983 Act, appendix 2 is a fascinating account of the methodology employed, and appendix 3 (on which this reviewer admits to not lingering) is full of the statistical evidence emerging from the research. The concluding 10 page bibliography bears witness to the enormous industry which lies behind this book, and will serve as an invaluable reference source for all students of mental health law.

In summary, this book deserves to be read and considered by all who care about, and debate, the direction of mental health law, not least of course by those faced with the responsibility of devising the appropriate, ethical and practical legislation of the future. The ‘smorgasbord’ presentation invites ‘dipping’, and all those charged with the responsibility of resolving dilemmas and reaching decisions, could well benefit from reading the very accessible chapters 1,2 and 3. These chapters should be obligatory reading for all those engaged in training such professionals.

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12 ‘Public Policy via Law: Practitioner’s Sword and Politician’s Shield’ Heginbotham and Elson, pp 59-74 in ‘Law without Enforcement’ ed. by Eastman and Peay (Hart Publishing) (1999)