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To what extent does the English legal system protect the human rights of those with mental illnesses and how well does this correspond with contemporary psychiatric understanding?

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THIS DISSERTATION IS ALL MY OWN WORK. REFERENCE TO, QUOTATION FROM, AND DISCUSSION OF THE WORK OF ANY OTHER PERSON HAS BEEN CORRECTLY ACKNOWLEDGED WITHIN THE WORK.

Abstract:

The aim of this dissertation is to investigate the efficacy of the English legal system in protecting the human rights of those with mental health difficulties. This dissertation sets out to look comprehensively at areas of law in which the impact of mental illness is not often overtly considered. It highlights issues with strict adherence to psychiatric teachings and with application of the medical model. Instead, approaches which favour the mentally vulnerable are presented as more preferable, for the individual, their family and society. Throughout, psychological research is referred to in order to draw comparisons with the law. This dissertation concludes that the current state of the law is ineffective in protecting the human rights of individuals with psychiatric diagnoses. It is also concluded that the English legal system often fails to keep up with psychiatric understanding but that psychiatric understanding in itself cannot be the only consideration. Involvement of service users in decision-making is suggested in order to conquer this as well as more in-depth training for stakeholders in the legal system. It is also suggested that it is down to policy makers to bring about effective change in order to address the institutional discrimination against those with mental illnesses.

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Introduction

Everyone in all legal jurisdictions experience varying degrees of mental health as mental health is a state of being attributable to everyone. For some, their state of mental health is perfectly adaptive to their circumstances and they are well integrated with society. However, life is complex and '[p]eople in good mental health are often sad, unwell, angry or unhappy'.[1] This more comprehensive, variable definition of mental health will be used throughout this dissertation as it recognises that some people may be affected by impairments but remain mentally healthy, discarding culturally-bound ideas of productivity and contribution.[2]

For those with mental health difficulties, their state of being may be less adaptive to their life, or may cause them harm or cause them to alienate themselves. Often, many people with mental illnesses, even severe disorders like schizophrenia, live normal lives and go unnoticed by the legal system. It is a minority of those with mental illnesses that may appear as a wrongdoer themselves or as a victim. In order to have a fully inclusive legal system, the needs of everyone must be respected and wrongful stigma broken down. This complements the social model of disability which maintains that people may have impairments but it is society that makes impairments into disabilities via its inability to adapt and account for people's needs. Where mental illnesses may constitute a disability, terminology consistent with the social model will be used, as this is largely accepted by those with disabilities as it 'rejects assumptions that impairment is pathological or "tragic"'.[3] It is important to use terms that disabled people are most comfortable with as it is their lives that are affected and to best represent their needs and interests.

[1] Silvana Galderisi and others, 'Toward a New Definition of Mental Health' (2015) 14 World Psychiatry 231.
[2] ibid 231–2.
[3] Peter Beresford, 'Thinking about "Mental Health": Towards a Social Model' in Jill Reynolds and others (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009) 55.

Mental health in the law is often discussed in the areas of mental health law powers, mental capacity and criminal law. Mental health law unfortunately represents a hindrance to many of those with mental illnesses as it is characterised by intimidating and forceful powers to remove a person from their family to hospitalise them. Mental capacity law tends to deal with those with more severe learning difficulties and those whose condition may decline, as may be the case with dementia.

This dissertation will focus on areas of law that are not regularly discussed in light of mental health in order to comprehensively compare this to psychiatric understanding and the wider effect on society. This will illustrate how a person's mental illness affects the way they are treated by the law and how sufficiently their fundamental rights are protected by the law. This is because the majority of people with mental illnesses are not hospitalised at any given time, so Mental Health Act powers are less relevant to them. Instead, they may face wrongful conviction, custody battles, issues with their privacy and restrictions to their liberty, just like any other person. Criminal law, discussed in Chapter 1, is perhaps the most damaging area of law for mental health to be mentioned in. All too often the media picks up on a suspect's mental illness, perpetuating negative and harmful schemas by suggesting that it is the mental illness that made them commit the crime and that they are 'highly dangerous'.[4] This casts shadows on those with the same or similar mental illnesses that abide by the law and have a positive impact on their community. Chapter 2 discusses the restrictions on the liberty of people with mental illnesses and in what circumstances the law favours demeaning those with mental health difficulties. Chapter 3 looks at the more complicated issue of when it is right to restrict the right to a private and family life.

[4] William Landes and Richard Posner, *The Economic Structure of Tort Law* (Harvard University Press 1987) 128.

The phrase mental health difficulties is suggested as a more neutral, less medicalised way of seeing mental ill health that reverts away from the need to medicalise and define it. Much reference is made to medical diagnostic manuals, such as the DSM-5 and the ICD-10, by the legal profession.[5] Where possible, contrasts will be made between these diagnostic manuals, the terminology used in legislation and the findings of relevant psychological research. The medical perception of mental illness is based on a deficit model, presuming that there is something wrong about someone's state of mind and that the origin of their problems comes primarily from within them.[6]

As ideas of mental health and ill health change with time and social background, strict adherence to these diagnostic guides is not to be recommended in the interests of justice and fairness. For instance, homosexuality was listed as a mental illness until 1973 and in Nazi Germany psychiatric patients were killed if they met certain diagnostic criteria which purportedly rendered their life not worth living.[7] Adhering to guidelines that are out of date could lead to incorrect legislation being applied to mentally ill individuals, hindering their ability to manage or recover from their illness and resulting in injustices.

This dissertation will conclude that the English legal system does not satisfactorily define concepts such as mental disorder, instead relying on judges and mental health professionals to fill in the gaps. As will be seen, this has led to varying outcomes, causing uncertainty and unfairness in an area of law that should protect vulnerable people. Through comprehensive comparisons to psychiatric knowledge, it will be concluded that the law can be slow to catch up

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[5] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th edn, American Psychiatric Association 2013); World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (World Health Organization 1992).
[6] Beresford (n 3) 54.
[7] Richard D Lyons, 'Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness' *The New York Times* (New York, 16 December 1973); Jack Drescher, 'Out of DSM: Depathologizing Homosexuality' (2015) 5 Behavioral Sciences 565; Richard Bentall, 'Roll over Kraepelin' in Jill Reynolds and others (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009) 16.

and that legal ideas of mental illness are very different from their psychiatric counterparts. Concepts, case law and legislation from other legal jurisdictions will be discussed in order to suggest improvements or adjustments to the current regimen in order to make it fairer and more accessible to those with mental health difficulties. References to the English legal system are intended to refer to both English and Welsh legal systems throughout.

The field of psychology grapples with definitions constantly, as well as the tricky issue of what to call people that are affected by mental illness. Hereafter, these people will be referred to as service users and those with mental health difficulties where appropriate as these terms are widely accepted by these people themselves.[8] It is important that they are not spoken for or erased by terminology that treats them like statistics or like they are inherently less. It is impossible to genuinely discuss mental health issues without including the views of those with personal experience.[9] However, not all those with mental health difficulties agree on the same terminology so a variation of terms will be used.

[8] Diana Rose, 'Terms of Engagement' (2001) 108 Openmind 16.
[9] Peter Campbell, 'The Service User/Survivor Movement' in Jill Reynolds and others (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009) 46.

Fair Treatment in the Criminal Justice System

Fair treatment by the criminal justice system is intrinsic to a democratic society for the prevention of unfair detention of citizens and restriction of the exercise of state power. This right is protected by the Police and Criminal Evidence Act,[10] Article 6 of the European Convention on Human Rights (ECHR),[11] and the Human Rights Act (HRA 1998).[12] There is also extensive and formidable common law protection for access to justice and related rights.[13] Fair treatment in the justice system is particularly important for those with mental health difficulties as they are significantly more likely to be a victim of crime and therefore involved in proceedings as a witness.[14] Additionally, the stigma which suggests that people with mental illnesses are somehow more dangerous means that this right is particularly important for them because of the additional risk of false convictions in cases where they are implicated by their condition.[15] Morally, it is generally acceptable that those who are guilty of a crime may give up certain human rights protections, like protection against restriction of liberty. This does not mean that unbalanced policies are fair for those who are mentally ill.

This right can be adversely affected by the vulnerable status of having a mental health difficulty. Some conditions, like clinical depression and schizophrenia, affect a person's cognitive abilities like concentration, information processing and memory.[16] This means sufferers may be more

[10] Police and Criminal Evidence Act 1984.
[11] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6.
[12] Human Rights Act 1998.
[13] *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB) 585 (Laws J).
[14] Karen Hughes and others, 'Prevalence and Risk of Violence against Adults with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies' (2012) 379 The Lancet 1621; Sarah L Desmarais and others, 'Community Violence Perpetration and Victimization Among Adults With Mental Illnesses' (2014) 104 American Journal of Public Health 2342.
[15] Julie Repper and Rachel Perkins, 'Challenging Discrimination: Promoting Rights and Citizenship' in Jill Reynolds and others (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009) 122.
[16] Raymond W Lam and others, 'Cognitive Dysfunction in Major Depressive Disorder: Effects on Psychosocial Functioning and Implications for Treatment' (2014) 59 Canadian Journal of Psychiatry 649; see also Donald C Goff, Michele Hill and Deanna Barch, 'The Treatment of Cognitive Impairment in Schizophrenia' (2011) 99

susceptible to self-incrimination and manipulation. The public, and therefore juries, are biased against those with mental illnesses partly because of the sensationalist reporting of such cases by the media.[17] Both of these factors can affect the outcome of a case through the sufferer's vulnerability and the bias of juries, pressure groups and involved parties. As people with mental illnesses can be vulnerable, extra support should be available to help overcome the barriers of their symptoms and the prejudice of others.

Unfortunately, mental illness is often wrongly associated by scholars and the media with committing crimes, perpetuating a stigma against mental illnesses where psychological research points to the opposite view.[18] Peterson and colleagues demonstrated that the 'vast majority of people with mental illness are not violent, not criminal and not dangerous',[19] contrary to public belief.[20] Black people with psychiatric diagnoses are subjected to an even stronger false association with violence.[21] It has also been proven that when those with mental illnesses do commit crimes, the vast majority of their crimes are not directly linked to their symptoms, suggesting no significant difference from the general population.[22] Some psychological studies

Pharmacology, biochemistry, and behavior 245 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3114283/> accessed 2 March 2020.

17 Tina Linehan, 'Media Madness' (1996) 92 Nursing Times 30; Annie Borthwick and others, 'The Relevance of Moral Treatment to Contemporary Mental Health Care' in Jill Reynolds and others (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009) 115; Mark Walsh, '(Mis)Representing Mental Distress?' in Jill Reynolds and others (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009) 136–7.

18 Beresford (n 3) 53.

19 'Mental Illness Not Usually Linked to Crime, Research Finds' (*American Psychological Association*, 21 April 2014) <https://www.apa.org/news/press/releases/2014/04/mental-illness-crime> accessed 31 October 2019.

20 Greg Philo and others, 'Media Images of Mental Distress' in Tom Heller and others (eds), *Mental Health Matters* (Macmillan 1996); Greg Philo, *Media Representations of Mental Health/Illness: Audience Reception Study* (Glasgow University Media Group 1994); Walsh (n 17) 138.

21 Deryck Browne, 'Black Communities, Mental Health and the Criminal Justice System' in Tom Heller and others (eds), *Mental Health Matters* (Macmillan 1996) 169; Nacro, *Black People, Mental Health and the Courts: An Explanatory Study into the Psychiatric Remand Process as It Affects Black Defendants at Magistrates' Courts* (Nacro 1990).

22 Jillian K Peterson and others, 'How Often and How Consistently Do Symptoms Directly Precede Criminal Behavior among Offenders with Mental Illness?' (2014) 38 Law and Human Behavior 439.

exacerbate this inaccurate stigma by focusing on the minority of inmates with mental illnesses rather than the general prison population.[23]

The defence of insanity will only be covered briefly as there is already extensive literature in this area, overwhelmingly of the opinion that the defence is unfit for purpose.[24] There are a number of fundamental features of it that undermine the human rights of those entitled to use it. Reform to the 'offensive' name,[25] at the very least, is required to prevent further prejudice against mentally ill people. If a defendant successfully discharges this burden on the balance of probabilities, they are given a special verdict of not guilty by reason of insanity.[26] As insanity is not a term that fits a lot of people eligible for this defence or that is acceptable in today's society, this special verdict is often undesirable. *Sullivan* and *Hennessy* especially illustrate its undesirability as the defendants pleaded guilty to avoid the stigmatising label, which shows that defendants may ultimately prefer falsifying guilt to this derogative defence,[27] as discussed by R.D. Mackay.[28] The House of Lords, in dismissing their separate appeals, missed opportunities to reform the common law notion of insanity which has not kept up with psychiatric developments.[29]

This special verdict does not adequately support modern therapeutic treatment nor promote the rights of the person. This is because a judge can order indefinite detention in a secure psychiatric facility, which is often seen by defendants as a punishment in itself. Modern psychiatry, however, prefers treatment in the community as opposed to exclusion and isolation in a

[23] See Jason C Matejkowski, Phyllis L Solomon and Sara W Cullen, 'Characteristics of Persons With Severe Mental Illness Who Have Been Incarcerated for Murder' (2008) 36 Journal of the American Academy of Psychiatry and the Law 74.
[24] Claire Hogg, 'The Insanity Defence: An Argument for Abolition' (2015) 79 The Journal of Criminal Law 250.
[25] ibid.
[26] *M'Naghten's Case* [1843] ER Rep 229 (HL).
[27] *R v Sullivan* [1984] AC 156 (HL); *R v Hennessy* [1989] 1 WLR 287 (CA).
[28] RD Mackay, 'Fact and Fiction about the Insanity Defence' [1990] Criminal Law Review 247.
[29] Amelia Walker, 'Unfitness to Plead and the Defence of Insanity' (2013) 177 Criminal Law and Justice Weekly 648.

psychiatric institute.[30] Additionally, as the defendant must have been cogent at the time of the trial in order to give evidence, detention in a psychiatric facility is not necessary in most cases, as by this point they are deemed to be fit to stand and therefore not currently 'insane'.

The rules set out in *M'Naghten's Case* in 1843 are still followed today, even though they are incongruent with psychiatric and social understanding, which have both advanced steadily since. It is also concerning that the 1883 Trial of Lunatics Act is still in force as legislative backing for this concept.[31] Although words like madness are sometimes reclaimed by service users and activists as a symbol of identity,[32] 'lunatics' has not been an acceptable way to describe mentally ill people for many decades. This is because it defines the person as different, rather than describing an often temporary experience.

The persistence of the defence of insanity is a failure on the part of the English legal system as its outdated concepts make it worse than prison and academics know it to be problematic. Mackay said that it was 'narrow, outmoded, and deeply stigmatic'.[33] This is because it fails to treat people with mental illnesses as people and has archaic ways of seeing them. The insanity defence also labels them for life and ignores their best interests. The current state of the insanity defence arguably breaches Article 6 and Article 14 rights to a fair trial and to no discrimination respectively.[34] It is also disrespectful to the defendant due to the stigmatising label that is attached to a defence that they are entitled to use.

However, this is still not the worst case scenario as in tort law there is no defence where an episode of mental illness leads to a tortious act.[35] Goudkamp discussed the price-to-pay-in-

[30] Borthwick and others (n 17) 110.
[31] Trial of Lunatics Act 1883, s2(1); *R v Hennessy* (n 27) 292.
[32] Rachel Perkins, 'Madness, Distress and the Language of Inclusion' (1999) 98 Openmind 6.
[33] RD Mackay, 'Diminished Responsibility and Mentally Disordered Killers' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (OUP 2000) 83.
[34] ECHR art 6; ibid art 14.
[35] James Goudkamp, 'Insanity as a Tort Defence' (2011) 31 Oxford Journal of Legal Studies 727, 727.

society argument: that if people want to remain in society, they need to pay for any damages they cause whilst mentally ill,[36] or 'defective'.[37] This argument is repugnant due to the lack of moral culpability of the defendant at the relevant time. The absence of an insanity defence is a worse failure to protect a mentally ill person's human rights than a faulty, undesirable one.

Beyond Insanity

Outside of the wholly inadequate defence of insanity, mentally ill people are often at risk of neglect in court and prison settings. For instance, insufficient evidence in *R v Jordan Shepard* undermined the case of a person with complex mental health difficulties.[38] This meant that the recommended community order was ignored because of a lack of evidence proving that his extensive impairments were severe. A custodial sentence was given, which is counter to best practice for treatment and so could easily have made his situation worse. This case is a clear example of inherent problems within the entire court system as a person with complex needs was imprisoned against his and society's best interests. Instead, a more therapeutic outcome would have been for the court to impose supervision and community orders so that he could remain in society, but with regular monitoring and increased support from care workers. Of course, these orders would have to be carried out correctly to not unlawfully deprive him of his liberty, as happened in *Wakefield Metropolitan District Council.*[39]

In *Edwards*, the criminal justice system failed to protect and monitor mentally ill suspects, leading ultimately to the murder of a mentally ill detainee by another mentally ill detainee.[40]

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[36] ibid 749.
[37] *Restatement (Second) of Torts* (Am Law Inst 1965) 895; Goudkamp (n 35).
[38] *R v Shepard (Jordan)* [2018] EWCA Crim 2436.
[39] *Wakefield Metropolitan District Council and Wakefield Clinical Commissioning Group v DN and MN* [2019] EWHC 2306 (Fam), [2019] All ER (D) 16 (Sep).
[40] *Edwards and another v United Kingdom* App nos 39647/98 and 40461/98 (ECHR, 22 July 2002), [2003] All ER (D) 368 (Jul).

Neither person should reasonably have been held on remand in prison because of their vulnerable states. Both had histories of mental ill health and were exhibiting 'bizarre' behaviours at the time of their arrest. Due to a number of failures by police and magistrates, both were put in the same cell and Edwards was killed by his cellmate. Faulty alarms also failed to effectively protect him from harm. Edwards' parents applied to the European Court of Human Rights (ECtHR), who concluded that there were breaches of Articles 2 and 13 of the ECHR.[41] This was because of the failure to prevent his death, the inadequate inquiry into the death and the failure for the English legal system to provide the family with an effective remedy. This shows that the English legal system failed to properly protect his fundamental rights, including his right to life, because of an inability to properly accommodate the needs of people with mental health difficulties. Of course, the behaviours exhibited in this case are very extreme and very unlikely to recur.

Further, in *R (AP and MP) v HM Coroner for Worcestershire*,[42] a vulnerable adult with Asperger's Syndrome and ADHD made criminal complaints against someone he said was threatening him. This person went on to kill the vulnerable adult but the court found no real and immediate risk to his life so the police and local authority escaped liability. Here, the criminal justice system failed to protect a vulnerable person from harassment and ultimately death. The decision of the court also enables further failures by the justice system by allowing them to not take seriously the concerns of those who apparently lack mental capacity. This effectively ignored his vulnerability by not extending the duty of care of the police.

Alternatively, if a person with mental health difficulties is simply involved in a trial as a witness, special adjustments may be available to them so that they might be able to give a better testimony conducive to a successful prosecution. The Youth Justice and Criminal Evidence Act

[41] ibid [96]-[102].
[42] *R (AP and MP) v HM Coroner for Worcestershire, Worcestershire County Council and Chief Constable of West Mercia* [2011] EWHC 1453 (Admin), [2011] All ER (D) 196 (Jun).

1999 says that witnesses may be entitled to special protections if they have a mental disorder,[43] under the meaning from the Mental Health Act.[44] If the witness comes under this, a party can apply for a special measures direction to ask for: testimony by live link,[45] or the removal of wigs and gowns,[46] or exclusion of the public et cetera.[47] Such measures would help to reduce anxiety in a vulnerable, mentally-ill witness, allowing them to express themselves more freely and avoid a relapse in their condition. This does depend on a party to the proceedings asking for the direction, or the judge considering it independently,[48] so if the witness's health has not been adequately assessed, parties may not realise such a direction is necessary.

Their status as a person with mental health difficulties might affect how trustworthy a jury sees their testimony, because of prejudice fuelled by biased media representations. In addition, in England and Wales, the same special measures are not available to mentally ill defendants, which seems to operate against the Article 6 ECHR presumption that you are innocent until you have been proven guilty by denying the same alterations designed to facilitate better testimony. Under s33A of the 1999 Act, defendants can give evidence by live link. There is also sporadic availability of intermediaries under the common law, meaning that defendants are significantly worse off than vulnerable witnesses.[49] Trials continue under the impression that these adaptations are sufficient for protecting vulnerable defendants, as in *R (TP)*.[50] In this case, the defendant had the intellectual capacity of an 8 year old and was tried in the Youth Court. The

[43] Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999), s 16(2).
[44] Mental Health Act 1983.
[45] YJCEA 1999, s 24.
[46] ibid, s 26.
[47] ibid, s 25.
[48] ibid, s 19(1).
[49] Samantha Fairclough, '"It Doesn't Happen...and I've Never Thought It Was Necessary for It to Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 21 The International Journal of Evidence & Proof 209.
[50] *R (TP) v West London Youth Court, Crown Prosecution Service and Secretary of State for the Home Department* [2005] EWHC 2583 (Admin), [2006] 1 All ER 477.

High Court found that his incapacity and youth would not lead to a breach of his Article 6 rights unless the Court did not sufficiently adapt its procedures.

As Fairclough demonstrated, however, adaptations to procedures for vulnerable defendants are often unused or used unsuitably because of a lack of understanding of the legal profession.[51] Earlier stages in prosecution are no less problematic for mentally ill people, as shown in *R v Paris*.[52] In this case, a vulnerable defendant with signs of a mental disability was badgered into giving a false confession, which was later thrown out and the convictions quashed. Therefore, police are also as important in ensuring that vulnerable suspects are treated without oppression, to also increase the reliability of evidence and resulting convictions.

Psychiatric Understanding

Modern understanding suggests that a number of mental illnesses, like schizophrenia, are characterised by an individual's external locus of control.[53] This means that they feel less in control of their environment, which is often mirrored in media portrayals.[54] This is relevant to the criminal justice system as it is immoral to hold someone liable for something they did when they had no control, as a result of a mental illness. In this way, insanity should be brought closer to automatism and a replacement for insanity could instead be a complete defence rather than a special verdict. This perhaps suggests a need to take a closer look at the specific mental illness and evaluate the impact it had on the defendant's perception of control.

[51] Fairclough (n 49).
[52] *R v Paris* (1993) 97 Cr App Rep 99 (CA).
[53] Sarika Thakral and others, 'A Comparative Study of Health Locus of Control in Patients with Schizophrenia and Their First Degree Relatives' (2014) 7 Asian Journal of Psychiatry 34 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3925311/> accessed 19 March 2020; Martin Harrow, Barry G Hansford and Ellen B Astrachan-Fletcher, 'Locus of Control: Relation to Schizophrenia, to Recovery, and to Depression and Psychosis - A 15-Year Longitudinal Study' (2009) 168 Psychiatry Research 186.
[54] Claire Wilson and others, 'Mental Illness Depictions in Prime-Time Drama: Identifying the Discursive Resources' (1999) 33 Australian and New Zealand Journal of Psychiatry 232; Walsh (n 17) 136–7.

In *Challen*, Sally Challen had wrongly been convicted for murder, mostly because of a lack of psychiatric evidence but also because of a failure of counsel to raise provocation.[55] After years of prolonged abuse from her partner and severe mood swings, she killed her abusive partner with at least twenty blows of a hammer, after having found that he was cheating on her yet again.[56] The first appeal resulted in a reduction of her sentence to 18 years.[57] A subsequent appeal brought new psychiatric evidence suggesting she had bipolar affective disorder and borderline personality disorder but the court ignored the influence of her husband's coercive behaviour.[58] The Crown accepted her guilty plea of diminished responsibility before the ordered retrial and she was sentenced to time already served.[59] This case is a demonstration of how vulnerable defendants can be let down by the defences put in place to protect them and the fact that psychiatry constantly changes, which can leave people in prison for the incorrect offence.

There is no logical reason why a vulnerable defendant and a vulnerable witness would not both benefit from the same protections and adjustments, as there is no psychological basis for the minds of those charged with crimes being any more capable than those who are innocent parties. However, there is a pervasive and incorrect stigma that having a mental illness is linked to a lack of moral fibre and that people should be able to control their anxieties, in the face of all logical or medical reasoning.[60] This is an issue for the criminal justice system as this could lead to juries and judges alike being biased against those with psychiatric diagnoses.

In conclusion, the rights of mentally ill defendants are not promoted as the legal system is susceptible to society's inherent bias against the mentally ill. Sufficient accommodations are

[55] *R v Georgina Sarah Anne Louise Challen* [2019] EWCA Crim 916.
[56] *R v Georgina Sarah Anne Louise Challen* [2011] EWCA Crim 2919 [11].
[57] *Challen* [2011] (n 56).
[58] *Challen* [2019] (n 55) [70].
[59] Tony Storey, 'Coercive Control: An Offence but Not a Defence' (2019) 83(6) Journal of Criminal Law 513, 514.
[60] Robert Kendell, 'The Distinction between Mental and Physical Illness' in Jill Reynolds and others (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009) 43–4.

lacking, meaning that people with psychiatric diagnoses will have a smaller chance of being acquitted because of their mental illness. Additionally, the medicalised understanding of mental illness used in the law often fits poorly with the actual wants and circumstances of the service users, as there is greater desire for constant support as opposed to crisis support.[61] In this way, the English legal system is failing to adequately protect mentally ill people and greater support is needed in order to decrease the likelihood of mistreatment or false conviction.

[61] Beresford (n 3) 55.

Liberty

Article 5 of the ECHR says that everyone has the right to liberty and security of person, subject to some derogations. What 'security of the person' adds to the right is unclear but Lord Walker suggested it may emphasise the personal nature of the liberty in question.[62] Article 5(1)(e) provides a problematic derogation from this right as a person can have their liberty lawfully compromised if they are 'of unsound mind'. This subsection bundles such people together with alcoholics, drugs addicts and vagrants. Article 5(4) and (5) provide protections of this right in the form of legal review and compensation, although these may be more difficult to rely upon due to mental illness. The HRA 1998 domesticated the ECHR so the Convention is directly applicable in England and Wales.

People with mental illnesses may have their right to liberty infringed because of their mental state. This may be to provide mental health care and/or because of a perceived risk to the public or themselves. Article 5 itself does not contain details as to when you can legitimately detain a person of unsound mind, or state whether all detention is legitimate because of their condition. The latter would be undesirable as people's mental health often fluctuates so detention will not always be morally justifiable. In *Winterwerp*, the ECtHR said:

> The Convention does not state what is to be understood by the words 'persons of unsound mind'. This term is not one that can be given a definitive interpretation ... it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread.[63]

[62] *Austin v Commissioner of Police of the Metropolis* (2008) 1 WLR 1376 (HL).
[63] *Winterwerp v The Netherlands* App no 6301/73 (ECHR, 24 October 1979), (1980) 2 EHRR 387 [37].

Affording mentally ill people a lower level of protection for their personal liberty is not fair where it is solely on the basis that they are mentally ill. When legitimate concerns about the safety of themselves and others arise, this can seem more fair and reasonable. However, this also leaves it open for authorities to exploit the liberty of people who have mental illnesses.

Article 5 in England and Wales

The Article 5(1)(e) derogation is too broad as it seems to permit detention of a person 'of unsound mind' with no underlying reason. In *Winterwerp*, the ECtHR said that 'unsound mind' must be given a narrow interpretation.[64] The domestic English law has not adequately elevated the Convention to protect the mentally ill. This is not necessarily the fault of the Council of Europe who ratified this Convention back in 1948. It was inevitable in such a dramatic period of psychological research that a reference to people's mental states would require updating in order to remain relevant. The HRA 1998, however, provided an opportunity for Parliament to add additional protections over and above the ECHR but they failed to seize it. Instead, people with mental illnesses have their rights compared to those of vagrants, alcoholics and drug addicts by their inclusion in the same list in Article 5(1)(e).[65] The current state of the law protecting the fundamental right to liberty does not promote the same right in mentally ill people, by the mere fact of their mental illness.

It is quite common for mental health and human rights to be discussed in the context of the detention of people with mental illnesses, in the auspices of health care, who are thought to be a danger to themselves or others. A power to detain comes from section 3 of the Mental Health Act

[64] *The Government of the United States of America v Roger Giese* [2015] EWHC 2733 (Admin) [60], [2015] All ER (D) 55 (Oct).
[65] Peter Bartlett and Ralph Sandland, *Mental Health Law: Policy and Practice* (Fourth edition, Oxford University Press 2014) 28.

1983 and it is common to refer to the detainee as having been 'sectioned'.[66] Definitions of mental disorder in the Mental Health Act 1983 are very vague and are barely better than that in the ECHR, even though it is much newer. In practice, mental disorder is understood as whether a psychiatrist could identify a diagnosable illness, even though they often have to speculate.[67]

Detention Cases

Winterwerp is a classic ECtHR case which confirms that the Article 5(1)(e) exception has been used to justify the perhaps unnecessary detention of people who are suspected to have mental illnesses.[68] The District Court in this case granted applications for him to be detained without hearing from the detained person himself or hearing expert evidence. In this case, Winterwerp lost the ability to administer his own property after having been moved into the psychiatric unit, which was held to be a breach of his Article 6(1) rights. At [37], the ECtHR found that 'The Convention does not state what is to be understood by the words "persons of unsound mind"'. At [74], they also said that Mr Winterwerp was not given a fair hearing on the question of his civil capacity. The court said that 'mental illness may render legitimate certain limitations upon the exercise of the "right to a court"' but that the total absence of this right is not warranted by a person being of unsound mind.

The High Court in *USA v Roger Giese*[69] went above and beyond to prevent the extradition of a person in the fear that they would then face indeterminate detention which would be against their Article 5 rights. The USA wanted Giese extradited from the UK to put him on trial for 19 alleged

[66] Jeannette Henderson, 'Experiences of "care" in Mental Health' in Jill Reynolds and others (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009).
[67] Melanie Williams, '"A Normal Man ... Hardly Exists": Law, Narrative, the Psyche and the Normal Man' (2009) 62 Current Legal Problems 202, 239.
[68] *Winterwerp v The Netherlands* (n 63).
[69] *The Government of the United States of America v Roger Giese* (n 64).

sexual offences against a minor. The High Court denied this extradition on the basis that the US Government did not adequately assure the court that Giese would not be made subject to a civil commitment order, which he likely would have as a result of being suspected of having a mental health disorder and dangerous. The High Court said this would have been a 'flagrant denial' of his Article 5 rights. The court accepted, at [55], that the meaning of diagnosed mental disorder under Californian law was very broad. The court was told that he could potentially have been diagnosed with 'pedophilic disorder' or hebephilia, referred to in the DSM-5 as 'Other Specified Paraphilic Disorder'.[70] Evidence quoted at [55] was accepted that a diagnosis of a recognised mental disorder merely requires a condition that a person has behaviours that society doesn't like so it can also include people just making the wrong decisions.

This is an exceptional case in which the extradition should have gone ahead due to the severity of the crimes he was accused of. He should have at least been extradited in order to be put on trial and serve any prison sentence attached to it, as the matter of a civil commitment order was only relevant towards the end of any such stint in prison. In the balance between looking after his rights as a person with a mental disorder, the rights of the victim and thinking of the impact on other people with mental disorders, the court definitely favoured his rights over the child victim's. The High Court read too closely into the differences between California and the ECHR so that they forgot to apply the literal reading of such phrases as 'unsound mind' and 'mental disorder', so much so that they kept a dangerous person from having to face up to their crimes. However, when his case returned to the High Court in 2018, they dismissed the Article 5 argument as a result of assurances finally made by the American government that a civil commitment order would not be considered. They ordered his extradition, blocking appeal to the Supreme Court.[71] This was the right outcome but one that could have been achieved in 2015, as

[70] ibid [51].

[71] 'Alleged Paedophile Extradited to US' (*BBC News*, 10 August 2018) <https://www.bbc.com/news/uk-england-hampshire-45146344> accessed 9 January 2020.

a suspected child sex offender was at liberty. This supports the argument that the English legal system is slow to catch up and make developments in cases involving the human rights of people with mental illnesses.

The courts are willing to use powers of detention and often take it to extremes. In *Ex parte Russell Anthony Hall*, vague court orders resulted in Mr Hall being left in limbo after having recovered from his psychiatric illness.[72] In *R (David Grant Juncal)*, a person was found unfit to plead.[73] He was made subject to a hospital order and could be kept there for an unlimited amount of time and this was upheld as lawful. This seems like a disproportionate restriction of his rights as even prisoners have an idea of how long they will be detained before release on licence. To draw a comparison with ECHR jurisprudence, in *Tokic* and *Halilovic*, the respective applicants were detained in the psychiatric unit of a prison after being found not guilty by reason of insanity.[74] The ECtHR held in both cases that this detention was without justification, showing that the English and Welsh case law is inconsistent.

However, the civil standard of proof is used when deciding whether to discharge someone who was under a hospital order,[75] which protects individuals against wrongful continuation of detention more than any reasonable doubt standard could.

Medical Treatment Cases

[72] *R v Mental Health Review Tribunal ex parte Russell Anthony Hall* (1999) 3 ER 132 (QB).
[73] *R (David Grant Juncal) v Secretary of State for the Home Department, East London & The City Mental Health NHS Trust, Scottish Ministers and Secretary of State for Northern Ireland* [2008] EWCA Civ 869, [2008] All ER (D) 340 (Jul).
[74] *Tokić and others v Bosnia and Herzegovina* App nos 12455/04, 14140/05, 12906/06 and 26028/06 (ECHR, 8 July 2008); *Halilović v Bosnia and Herzegovina* App no 23968/05 (ECHR, 24 November 2009).
[75] *R (AN) v Mental Health Review Tribunal and Secretary of State for the Home Department, Mersey Care Mental Health NHS Trust and Mind* [2005] EWCA Civ 1605, [2006] 2 WLR 850.

In the case of *Re B (Wardship: Sterilisation*),[76] the courts demonstrated their willingness to allow the security of a person without mental capacity to be infringed for a non-therapeutic sterilisation procedure. Lord Hailsham, Lord Bridge and Lord Oliver all emphasised that the case was not about eugenics and convenience for her carers, but still continued to make a decision consistent with the aims of eugenics.[77]

From Lord Hailsham's judgement, it appears the only two forms of contraception considered were oral contraceptives and sterilisation, even though monthly injections would have not been permanent and could have been less difficult to administer than daily contraceptives. Reproduction was seen as a basic human right but one only available to those with capacity.[78] Lord Hailsham also said at 202H that as she cannot give informed consent to acts of sexual intercourse, she would be a danger to others, which is a disgusting display of victim-blaming and sympathy for anyone who abuses her.

R (N) v M is another case where the courts were prepared to allow forcible treatment of an individual, where the medical evidence as to its necessity was very divided.[79] There were different opinions as to whether she was suffering from a psychotic illness, a personality disorder or both. Injections of antipsychotics were suggested but she refused so the doctors sought a declaration that they could administer it regardless. One doctor thought she was suffering from a complex personality disorder which was probably untreatable.[80] The trial judge found that the medication was in her best interests so medically necessary. Although there was a prima facie breach of Article 8(1) ECHR, this was apparently justified under Article 8(2). Lord Justice Dyson, who gave judgment for the court, said that the best level of medical necessity had to be

[76] *In Re B (A Minor) (Wardship: Sterilisation)* [1988] AC 199 (HL).
[77] ibid 202D (Lord Hailsham); ibid 204G (Lord Bridge); ibid 212C (Lord Oliver).
[78] *Re B (Wardship: Sterilisation)* (n 76) 204A; *In re D (A Minor) (Wardship: Sterilisation)* (1976) 2 WLR 279 (F) [193] (Heilbron J).
[79] *R (on the application of N) v M* [2002] EWCA Civ 1789, [2002] All ER (D) 75 (Dec).
[80] ibid [6].

convincingly shown for it to succeed. While considering medical necessity, Dyson LJ included a consideration of how serious a risk is posed to others.[81] He rejected the submission that where there is a responsible body of opinion that a patient is not suffering from a treatable condition then it cannot be shown that the treatment proposed is medically necessary. Dyson LJ said at [29] that a responsible body of opinion to the opposite would do nothing more than make them question the best interests. He found that the judge's findings of fact were unassailable because of his reasoning, regardless of the fact that there were more doctors saying that she did not have a psychotic illness than those who did. Surely, this sort of conclusion cannot be in the best interests of the patient compared to a more detailed investigation into her mental state. It is for this reason it appears that this decision was unduly influenced by the fact that finding the treatment to be necessary was a more amenable outcome for the doctors and the courts as she would be essentially sedated and made easier to deal with. Psychiatric drugs are sometimes used as 'chemical coshes' in this way.[82] In addition, the court may have favoured this approach as this outcome resulted in treatment, which aligns with the 'misleading' idea that people with mental illnesses need to be cured.[83] This, of course, is totally against her rights as a patient and the beliefs of the service user movement. The submission that her condition might have been untreatable was treated as unimportant or without very much merit, even though it would make any treatment an unnecessary interference with her personal liberty and security of person.

General Discussion

[81] ibid [19].
[82] Jeremy Laurance, 'Life Stories - Ron Coleman' in Jill Reynolds and others (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009) 212.
[83] Bartlett and Sandland (n 65) 10.

The situations in which deprivations of a person's liberty can occur seem illogical, as in *R(G) v Mental Health Review Tribunal* where the court said there would have been a disproportionate deprivation of his liberty even if he had consented.[84] The idea that consent could not legitimise the situation does not make sense as it suggests instead that the law is ill equipped to understand the needs of service users, preferring instead to adhere to rules that appear somewhat arbitrary in cases of valid consent.

It is difficult to pinpoint the meaning of 'persons of unsound mind', which could lead to inconsistent findings. If it means having a mental illness, this is extremely broad and could unjustly allow detention of those who are of no risk to anyone including themselves. There are also some people that would be covered by the phrase 'of unsound mind' without being mentally ill, as in *A Local Authority v BF* and *G v E, A Local Authority and F*.[85] The vulnerable people in these cases were an infirm elderly person and a person with severe learning difficulties respectively. This lack of definitive meaning, though future-proofing the Convention, means that there is uncertainty for service users and institutions alike.

However, regardless of how the exception to a right to liberty is defined, the existence of a derogation simply where a person has a mental illness needs to be reviewed. There is no psychological evidence that supports the suggestion that mentally ill people are any less deserving of their liberty. In addition, treatment in the community is seen by contemporary psychologists as the best way forward for the vast majority of people.[86] Therefore, in the eyes of a reasonable psychologist or psychiatrist, detention of a person of 'unsound mind' would only be justified where it is necessary for protection of themselves or of others. Such a qualification is

[84] *R (G) v Mental Health Review Tribunal and Secretary of State for the Home Department* [2004] EWHC 2193 (Admin), [2004] All ER (D) 86 (Oct).
[85] *A Local Authority v BF* [2018] EWCA Civ 2962, [2019] COPLR 150; *G v E, A Local Authority and F* [2010] EWCA Civ 822, [2010] 4 All ER 579.
[86] Borthwick (n 17) 110.

lacking here but would serve to better protect the human rights of people in Convention states, such as England and Wales. As previously discussed, this would cover a minority of people with mental illnesses, suggesting that some detentions may occur without significant assistance to the person themselves. Additionally, the derogation from Article 5 that people can be detained to protect themselves or others already exists independent of any mental illness so this may be an unnecessary duplication or evidence of an old bias. Finally, it is easy to see that the courts are open to service users exercising control but only if they make the 'right' decisions.[87]

[87] Helen Spandler, 'From Social Exclusion to Inclusion? A Critique of the Inclusion Imperative in Mental Health' in Jill Reynolds and others (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009) 132.

Family and Private Life

Article 8 of the European Convention on Human Rights provides protection for the right to respect for personal and family life. This chapter will discuss how this right is often ignored or derogated from if a person involved has a mental illness. This chapter will focus mainly on the right to respect for family as privacy ties in very closely with issues of personal liberty which has been discussed in the preceding chapter. Case law will be evaluated for biases against those with mental illnesses and whether the judiciary's caution is well-founded. Specifically, cases will be reviewed in which mothers with Factitious Disorder Imposed on Another (FDIA), commonly known as Munchausen's Syndrome by Proxy,[88] have had their children removed as a direct result of their diagnosis. This is a chronic mental disorder defined in the DSM-5 as manifesting itself in manipulating their child's symptoms to try to get medical attention and procedures that are often totally unnecessary.[89] A similar diagnosis of factitious disorder is given to those that fabricate illnesses in themselves. These cases are useful for illustrating the argument that family life is often disrupted as a direct result of diagnosis of a mental disorder, whether this is overt or covert.

The Article 8 ECHR right to respect for family and private life can be derogated from where it is deemed necessary in a democratic society for national security, public safety, economic well being, prevention of disorder, protection of health or morals and the protection of the rights of others.[90] This chapter will assess how effectively this derogation is used and whether the English legal system has a record of using it in a way to prioritise the mentally ill person or to prioritise so-called public order and other extraneous concerns.

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[88] RM Steel, 'Factitious Disorder (Munchausen's Syndrome)' (2009) 39 The Journal of the Royal College of Physicians of Edinburgh 343.
[89] American Psychiatric Association (n 5); Brenda Bursch, Natacha D Emerson and Mary J Sanders, 'Evaluation and Management of Factitious Disorder Imposed on Another' [2019] Journal of Clinical Psychology in Medical Settings <https://doi.org/10.1007/s10880-019-09668-6> accessed 2 January 2020.
[90] ECHR art 8(2).

This right may be adversely affected by a person having a recognised mental illness. Harmful stereotypes may mean that derogations are made for the wrong reasons. Sometimes, an optimal outcome for all may be that a person cannot see members of their family because of the effects of their mental illness. However, this only applies to those who are violent or lack the ability to care for their family. As discussed in the first chapter, the vast majority of people with mental illnesses are no more violent than the general population.[91] Lots of cases that bring up issues with Article 8 involve parents who are abusive to their children or negligent.

Fairness of derogating from this right is very dependent on the specific context. Not removing a person from a family might be harmful by enabling poor parenting, so the implications spread much further than just the person with a mental illness. As per Baroness Hale, as she then was, in *Re J (Children)*, 'In a free society, it is a serious thing indeed for the state compulsorily to remove a child from his family of birth'.[92] This suggests an awareness that extreme interferences should be avoided where possible because of the needs of the family and the child. Restraining orders offer the courts a route to separate a mentally ill parent from their child, as in *R v R(AJ)* where a father was subject to a five year restraining order preventing him from seeing his daughter.[93] In this case, the question of whether there was an Article 8 breach was ignored as the case was dealt with on other grounds, failing to prevent uncertainty for mentally ill parents.

Additionally, application of a mentally ill person's rights to privacy and family life are inconsistent and artificial,[94] as shown in *PBM v TGT*.[95] Here, a person had the capacity to marry, make a will and enter into a prenuptial agreement but was found to lack capacity to manage his property and affairs. This seems to suggest a very case-by-case basis on which the

[91] Peterson (n 22).
[92] *Re J (Children) (Care Proceedings: Threshold Criteria)* [2013] UKSC 9, [2013] 2 WLR 649 [1].
[93] *R v R (AJ)* [2013] EWCA Crim 591, [2013] 2 Cr App Rep 128.
[94] *Re B (Capacity: Social Media: Care and Contact)* [2019] EWCOP 3 [20], [2019] All ER (D) 125 (Feb).
[95] *PBM v TGT and X Local Authority* [2019] EWCOP 6, [2019] COPLR 427.

courts are deciding mental capacity as this selective approach seems to reflect some form of logic about the person's specific cognitive abilities.

This is also reflected in *Re B (Capacity: Social Media: Care and Contact)*[96] where the courts intervened to protect the privacy of a person with mental illnesses when she was found to be sending intimate photos and information with strangers over the internet, due to her lack of capacity to assess social relationships. Cobbs J paradoxically found that she might have had capacity to consent to sexual relations but not to decide with whom to have such relations. To protect her autonomy, Cobbs J ordered for an educational programme to help her to acquire capacity to assess who presented a risk. This was clearly needed as she had gotten involved with a convicted sex offender who knew she had a mental age of 10 and was still pursuing sexual relations. This case shows a promising effort to allow a person with diminished capacity to retain the decision making capacity they have and a faith of the courts that the person could be taught around her incapacity. This was the best outcome for her as there was no oppressive court order, avoiding unnecessary derogations of her rights. This case is an example of a court making the best decision for a person with mental illnesses and should be celebrated for championing her rights to a private life.

Some cases offer quite extreme examples of when it is right to remove a mentally ill person's right to respect for family and private life. It is important to remember that this is not reflective of the vast majority of people with mental illnesses and the mere presence of a mental illness does not mean that a person is unable to parent effectively.

Factitious Disorder Cases

[96] *Re B (Capacity: Social Media: Care and Contact)* (n 94).

There are several cases where a mother with a factitious disorder has had her children removed from the family home because of harmful behaviours she has engaged in. These cases typically involve mothers as this is a condition much more prevalent in women than men.[97] The removal of the child aims to promote the needs of the child as people with this condition often seek unnecessary medical attention for their child which can cause them distress or harm. In the most extreme cases, their psychopathology can result in the death of the child.[98] Cases such as these often require particular care and caution.[99] Motivations behind fabricating or inducing illnesses in their child could include a desire to be seen as a good parent, to receive attention, to be seen as a martyr or to keep the child at home more.[100] But are courts too willing to remove a child when they hear a psychiatrist's report?

At the heart of *Re B (A Child)*, there is the matter of whether it is down for health professionals to act responsibly or whether the courts need to intervene.[101] Here, a baby had been removed from the mother at birth via an interim care order. The local authority sought a care order with a view to put the baby up for adoption. The mother was diagnosed with somatisation and factitious disorders, although there was some disagreement.[102] There was no evidence that she would impose this upon her child, as highlighted by one of the psychiatrists involved who was concerned about others extrapolating the presence of her factitious disorder to a risk of fabricated or induced illness in her child.[103] One doctor had concerns that the child would not be safe because the mother had remained with an abusive partner for so long, which is nothing short of blaming a victim of domestic abuse for their abuse and using it as an excuse to have a child taken

[97] Fiona McNicholas, Vicky Slonims and Hilary Cass, 'Exaggeration of Symptoms or Psychiatric Munchausen's Syndrome by Proxy?' (2000) 5 Child Psychology and Psychiatry Review 69.
[98] Bursch, Emerson and Sanders (n 89).
[99] *Re X (Emergency Protection Orders)* [2006] EWHC 510 (Fam) [67], [2006] 2 FLR 701.
[100] Bursch, Emerson and Sanders (n 89); David Waller and Leon Eisenberg, 'School Refusal in Childhood. A Paediatric-Psychiatric Perspective.' in Lionel Hersov and Ian Berg (eds), *Out of school: Modern perspectives in truancy and school refusal* (Wiley 1980).
[101] *Re B (A Child) (Care Order: Proportionality: Criterion for Review)* [2013] UKSC 33, [2013] 3 All ER 929.
[102] ibid [148].
[103] ibid [160].

away from them.[104] The Supreme Court majority ultimately agreed with the trial judge that the child should be placed for adoption, with Lady Hale dissenting.

It is Lady Hale's dissenting judgment that would have best, if followed, protected the rights of the mother as a person with mental disorders. This is because she concluded that although the threshold had been crossed in terms of there being a risk of significant harm, a care order would not be a proportionate response to the risk posed by the mother's diagnoses.[105] This is because the child had not suffered any harm, the proposed harm may never occur and there was insufficient investigation into work that could be done to protect the child from harm.[106] There is also a hint in her judgment that putting the child up for adoption could cause her more harm as she had known both her foster carers and biological parents so placing her with strangers seemed to be the least kind option for the child. Lady Hale would have sent the case back to retrial so that the guardian could conduct greater exploration into the viability of measures to help protect the child from any risk posed by the mother's disorders.[107]

Unfortunately, the majority decided that the care order could go ahead, which would result in parental responsibility being transferred to the adoptive parents. This offers little or no room for the biological parents to ever have parental responsibility and is a very dramatic measure because of its finality.[108] This case shows an over-eagerness to accept the report of psychiatrists, even willingness to stretch a condition in order to facilitate the forced adoption of a child. There is also a lack of critical thought about the present medical evidence, even though there were inconsistencies and disagreements. The failure to question the medical professionals is

[104] ibid [159].
[105] ibid [224].
[106] ibid [222-3].
[107] ibid [224] (Lady Hale).
[108] ibid [74] (Lord Neuberger).

unfortunate when considering that Rosenberg found that around 75% of the harm suffered by a child of a parent with FDIA is actually attributable to paediatric care and not the parent.[109]

The Supreme Court judges frequently mentioned that it is not for them to question the original findings of fact unless there was an extreme reason to do so.[110] Although this is helpful to ensure finality, it also means that cases involving psychiatric diagnoses may be decided unfairly because of adhering to the trial judge's findings of fact rather than being able to challenge them.[111] This is particularly pertinent because of the 'devastating consequences' inaccurate diagnosis of FDIA can have for the child, the family and for professionals.[112]

In *P, C and S v UK*,[113] the ECtHR found there to be a breach of Article 6 and 8 rights of a mother with FDIA whose baby was removed at birth. This was because there was no risk of her harming the baby whilst in the hospital as she was barely able to move and was being supervised. Therefore, removal of the baby at that time was not necessary for the protection of any party and there was no reason why she could not have had some supervised contact first. Here, there was a stronger case for removal of the baby than in *Re B* as P had been found guilty of injuring her eldest child by administering him laxatives to induce illness. This quite clearly shows a propensity to impose the factitious disorder on another, increasing the risk of harm to the newborn and providing greater justification for the removal. This case is one in which, had all of the trial proceedings been carried out appropriately, the infringement of the mother's right to a private family life was justified. This is because of the higher probability of significant harm than in *Re B,* where there was uncertainty over diagnosis and no evidence of any harm having been

[109] DA Rosenberg, 'Web of Deceit. A Literature Review of Munchausen's Syndrome by Proxy.' [1987] Child Abuse and Neglect 547.
[110] *Re B (A Child)* (n 101) para [87] (Lord Neuberger).
[111] ibid [94]-[101] (Lord Neuberger).
[112] McNicholas, Slonims and Cass (n 97).
[113] *P, C and S v United Kingdom* App no 56547/00 (ECHR, 16 July 2002), [2002] 2 FLR 631.

caused. However, as the ECtHR argued, an Emergency Protection Order (EPO) may not have been the right way forward as there was no need to remove the child immediately after birth.

General Discussion

Re X (Emergency Protection Order) was a case where social services exaggerated mental illness to bring about the removal of a child.[114] The local authority applied for an EPO and removed the child. The mother had taken the child to hospital saying they were suffering from stomach pains, but there was no evidence of inducing symptoms.[115] McFarlane J, as he then was, held that an EPO would rarely be warranted by allegations of induced or fabricated illness where there was no evidence of an immediate risk of direct physical harm to the child. At [4], he said that there were significant flaws in the way the family justice system had treated the family. He said that failures of this degree are rare but also cited resource limitations and stress upon social services. Social services stated concern because of the father's history of schizo-affective disorder. Social workers ignored evidence from a legal adviser, choosing to go ahead with the EPO application with insufficient evidence in a desperate attempt to persecute the parents.[116] Before magistrates, a senior social worker asserted that the mother had FDIA, without seeking medical evidence to confirm this in any way. She also overexaggerated the father's mental illness, saying that he was suffering from auditory hallucinations, even though his condition was well controlled and the hallucinations were historic.[117] As McFarlane J said at [48], '...every single one of the above elements of the team manager's evidence was misleading or incomplete or wrong' and she gave a 'seriously distorted' representation of the case. The social workers were not qualified to make a

[114] *Re X (Emergency Protection Orders)* (n 99).
[115] ibid [69].
[116] ibid [39].
[117] ibid [47].

medical appraisal and as such the law failed to prevent the unjust removal of the child from the family.[118] McFarlane J applied a sensible approach, favouring the rights of the parents to their family life. However, the social workers involved should not have been allowed to have the power that they did, which should highlight issues of enforcers of the law not adhering to their obligations, ultimately causing emotional harm to all parties involved.

Of course, there remains the issue of accuracy of the legal system's assumptions about parenting where there is a mental illness involved. Birch identified mental illness as one of four difficulties that impact on someone's ability to care for a child, which supports the system's readiness to remove children of mentally ill parents.[119] Robinson confirmed that there is unequivocal evidence of poor mental health outcomes for child victims of parental conflict and abuse, which heightens the need to remove a child from an abusive, mentally ill parent.[120]

Robinson said that whilst it is easy to characterise those with a mental disorder as having less to offer, this is often incorrect when discussing parenting.[121] For instance, having an anxiety disorder might mean they are more empathetic. Therefore, in some situations, having a mental illness could improve the quality of parenting, contrary to the general view of the courts. Robinson also said that it is important not to underestimate or exclude parents on grounds of mental ill health but find safe ways to support and include them.[122] His conclusions do not apply evenly to all mental diagnoses, as some, such as FDIA, necessitate more interventionist approaches. Nonetheless, it is still important not to discount people as parents on the sole basis of their mental illness as instead a more liberal approach would be to see what the law can do to

[118] ibid [67].
[119] Lisa Parkinson, 'Capacity to Change' [2015] Family Law 989; Sarah Birch, 'Factors That Demonstrate Change or Potential Change in Parenting Capacity' in Bryn Williams and others (eds), *Capacity to Change - Understanding and Assessing a Parent's Capacity to Change within the Time-scales of the Child* (Jordan Publishing 2015).
[120] Neil Robinson, 'Conversation Pieces: Reflections in Family Mediation: Part 6: Family Mediation and Mental Health' [2019] Family Law 953.
[121] ibid 958.
[122] ibid.

make it possible for them to parent safely. This could also help to reduce stress to the children involved, as alluded to by Lady Hale in *Re B* and *Re J* respectively.[123]

[123] *Re B (A Child)* (n 101) [222] (Lady Hale); *Re J (Children)* (n 92) [1] (Baroness Hale).

Conclusion

Following the analysis in the previous chapters, it should be obvious that the current regime is insufficient to fairly protect the human rights of those with mental health problems. Reforms will likely be piecemeal and drawn out, as previous reforms have been.[124] After all, anyone could be afflicted by a mental illness at any time in their life, so there is a great social interest to work towards greater equality in the law. It is in the public interest to protect the mentally ill to help them to manage their conditions and live their lives with dignity and autonomy.

Equality for people with psychiatric diagnoses should already exist in the English legal system. This is because disability is a protected characteristic under the Equality Act and lots of mental illnesses fit within the definition of disability as it is very broad.[125] Additionally, if the UK is ever to properly fulfil the obligations of the UN Convention on the Rights of Persons with Disabilities, changes need to be made in order to fulfil Article 12 on equal recognition as the English government has achieved precious little since ratification.[126] Therefore, people with mental illnesses cannot legally be treated differently simply because of their mental health status. Some cases merge the issues that the illness brings and the issues that the person brings which can make justice difficult to obtain.

The above chapters have covered some of the most fundamental rights of humans: right to liberty, right to enjoy a private family life and the right to be treated fairly if accused of a crime. The criminal justice system is especially lacking in understanding of and accommodations for mental illness, as shown by the persistent existence of the defence of insanity and the unequal

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[124] Walker (n 29).

[125] Equality Act 2010, s 4; ibid, s 6(1); 'Definition of Disability under the Equality Act 2010' (*GOV.UK*) <https://www.gov.uk/definition-of-disability-under-equality-act-2010> accessed 22 July 2019.

[126] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) (UNGA A/RES/61/106); Sarah Newton, 'Progress on the UK's Vision to Build a Society Which Is Fully Inclusive of Disabled People: Letter from the Minister for Disabled People, Health and Work' (*GOV.UK*, 3 October 2018) <https://www.gov.uk/government/publications/disabled-peoples-rights-information-following-the-uks-first-periodic-review/progress-on-the-uks-vision-to-build-a-society-which-is-fully-inclusive-of-disabled-people-letter-from-the-minister-for-disabled-people-health-and-w> accessed 4 February 2020.

adjustments for mentally ill defendants. This area requires some of the most urgent reform because of the significant risk that people may be falsely convicted or not given a fair trial, which could result in devastating injustices. Cases dealing with issues of liberty are not much better, however, as the courts are often willing to prefer an outcome that purports to 'cure' the person and treat them as a patient rather than as an autonomous person. Family cases are perhaps some of the most complicated to decide in the context of mental illness, because of the need to look at the welfare of others in the family unit. There is also a need to conduct research into the impact on people who support a partner who experiences mental illness. With a few exceptions, most cases lean towards fearing the person with mental illness and acting extremely to remove their children or restrict their privacy.

It has been argued that these rights are often derogated from under uncertain or unfair circumstances, contributing towards the greater discrimination faced by people with psychiatric diagnoses. The cases considered demonstrate the negative prospects for those caught up in the legal system which adds to the subjective experience of their condition to make their lives much harder. These cases demonstrate a number of situations where parties in society have turned neutral impairments into something negative, confirming the social model of disability. Abuses of power and prejudice are commonplace, even in the face of medical evidence which suggests that mental illness doesn't significantly change the person's ability to function.

There is much scope for further analysis of more nuanced rights in the future. For instance, would a case like *Broadmoor Hospital v R* be decided the same today?[127] Andrew Robinson had schizophrenia and murdered someone at random for fame. Injunctions were issued to prevent him from publishing a book about why he killed his victim. However, they were later discharged and the hospital's appeal was dismissed. This meant that there was nothing stopping him from

[127] *Broadmoor Hospital Authority and another v R* [1999] ER D 1466 (CA).

publishing his book, to the dismay of the victim's parents. He was even granted legal aid.[128] This is a case which highlights how complicated applications of the law may be when violence meets mental disorder but also that issues surrounding mental illness can permeate almost any type of case. It is likely that this case would not be decided the same today as it appears to have been an incorrect result which would have allowed Robinson to profit from the murder he committed.

One of the largest themes to take away from this dissertation is the general unreliability of the information that the legal system accepts as unequivocally true.[129] In *Re B*, the woman's diagnoses formed the main argument behind putting her child up for adoption, even though there was a lack of medical consensus.[130] In *R(N) v M*, doctors were permitted to administer potent antipsychotic drugs which the majority of doctors in the case said were absolutely unnecessary.[131] The courts lean towards the need to 'cure' people of their mental illnesses, or seeing their mental illnesses as making them inherently bad. This actively works against the social models of mental illness and disability, instead favouring the views of the medical profession above the best interests of those with mental disorders. Medical opinion in itself is not infallible and is constantly changing. With the ever-changing nature of psychiatry, the courts should also pay attention to the social needs of the person involved and wider society, in order to come up with fairer results for everyone. The person themselves should be treated as the most important as the needs of wider society are often presented in a way that encourages detainment in hospital unnecessarily or the removal of children without due reason.

Suggestions for Reform

[128] 'Green Light to Killer Author' (*BBC News*, 20 December 1999) <http://news.bbc.co.uk/1/hi/uk/572887.stm> accessed 2 February 2020.
[129] Williams (n 67) 236.
[130] *Re B (A Child)* (n 101).
[131] *R (on the application of N) v M* (n 79).

Changes are necessary to ensure the protection of all people in society, no matter their mental state. Judges and lawyers would benefit from formal training regarding mental illness, not so that they can identify illnesses, but so that they can better evaluate different outcomes in terms of their costs and benefits. The responsibility of providing accurate diagnoses should remain that of trained mental health professionals as although there are many examples of mistakes, they remain the best equipped group to help people to receive the support that they need. However, as part of this formal training, participants in the legal system should be told to treat psychiatric reports with some cynicism as diagnostic criteria are often subject to change and there can be a lack of consensus in any case. This formal training could take the form of a module of legal professional courses for trainee lawyers and Continuing Professional Development for judges. Such training should be continual to reflect the ever-changing nature of psychiatric evaluation and relevant statutes.

In addition, legislative and judicial changes to the way that cases are assessed would be a substantial step in the right direction to help remove barriers to justice. Policy makers need to properly weigh the impact of their actions on people with mental illnesses before taking them, in order to avoid unfairly discriminating against them without even realising it. Acting without proper assessment could lead to unfair treatment of those with mental illnesses and any action taken retrospectively to cover up any issues is likely to be too little too late.

As well as a change in prospective policy-making, there also needs to be a systemic program of reform, addressing all areas of law that mental health affects, in order to limit the damage done by previous administrations that has led to unfairness and suffering. A priority for this reform should be to update court processes involved in hearing expert psychiatric witnesses as this would resolve criticisms of the insanity defence, clarify questionable family disputes and help to determine whether certain medical treatments can be administered against the person’s will. The relationship between the courts and such expert witnesses is a flawed one as the courts often

assume that the expert witnesses' conclusions are infallible. On the other hand, the infrastructure of law, in that separate specialisms often have very different rules, means that implementing this could be very difficult. This does not make such reform any less necessary in order to fulfil the obligations the state owes to mentally ill citizens.

Only if these recommendations are followed can the human rights of people with mental illnesses properly be protected against unnecessary interventions by medical professionals and courts.

Bibliography

—— ‘Alleged Paedophile Extradited to US’ (*BBC News*, 10 August 2018) <https://www.bbc.com/news/uk-england-hampshire-45146344> accessed 9 January 2020.

—— ‘Definition of Disability under the Equality Act 2010’ (*GOV.UK*) <https://www.gov.uk/definition-of-disability-under-equality-act-2010> accessed 22 July 2019.

—— ‘Green Light to Killer Author’ (*BBC News*, 20 December 1999) <http://news.bbc.co.uk/1/hi/uk/572887.stm> accessed 2 February 2020.

—— ‘Mental Illness Not Usually Linked to Crime, Research Finds’ (*American Psychological Association*, 21 April 2014) <https://www.apa.org/news/press/releases/2014/04/mental-illness-crime> accessed 31 October 2019.

—— *Restatement (Second) of Torts* (Am Law Inst 1965).

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th edn, American Psychiatric Association 2013).

Bartlett P and Sandland R, *Mental Health Law: Policy and Practice* (Fourth edition, OUP 2014).

Bentall R, ‘Roll over Kraepelin’ in Reynolds J, Muston R, Heller T, Leach J, McCormick M, Wallcraft J and Walsh M (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009).

Beresford P, ‘Thinking about “Mental Health”: Towards a Social Model’ in Reynolds J, Muston R, Heller T, Leach J, McCormick M, Wallcraft J and Walsh M (eds), *Mental Health*

Still Matters (Palgrave Macmillian and The Open University 2009).

Birch S, 'Factors That Demonstrate Change or Potential Change in Parenting Capacity' in Williams B, Peart E, Young R and Briggs D (eds), *Capacity to Change - Understanding and Assessing a Parent's Capacity to Change within the Time-scales of the Child* (Jordan Publishing 2015).

Borthwick A, Holman C, Kennard D, McFetridge M, Messruther K and Wilkes J, 'The Relevance of Moral Treatment to Contemporary Mental Health Care' in Reynolds J, Muston R, Heller T, Leach J, McCormick M, Wallcraft J and Walsh M (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009).

Browne D, 'Black Communities, Mental Health and the Criminal Justice System' in Heller T, Reynolds J, Gomm R, Muston R and Pattison S (eds), *Mental Health Matters* (Macmillan 1996).

Bursch B, Emerson ND and Sanders MJ, 'Evaluation and Management of Factitious Disorder Imposed on Another' [2019] Journal of Clinical Psychology in Medical Settings <https://doi.org/10.1007/s10880-019-09668-6> accessed 2 January 2020.

Campbell P, 'The Service User/Survivor Movement' in Reynolds J, Muston R, Heller T, Leach J, McCormick M, Wallcraft J and Walsh M (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009).

Desmarais SL, Van Dorn RA, Johnson KL, Grimm KJ, Douglas KS and Swartz MS, 'Community Violence Perpetration and Victimization Among Adults With Mental Illnesses' (2014) 104 American Journal of Public Health 2342.

Drescher J, 'Out of DSM: Depathologizing Homosexuality' (2015) 5 Behavioral Sciences 565.

Fairclough S, '"It Doesn't Happen...and I've Never Thought It Was Necessary for It to Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 21 The International Journal of Evidence & Proof 209.

Galderisi S, Heinz A, Kastrup M, Beezhold J and Sartorius N, 'Toward a New Definition of Mental Health' (2015) 14 World Psychiatry 231.

Goff DC, Hill M and Barch D, 'The Treatment of Cognitive Impairment in Schizophrenia' (2011) 99 Pharmacology, biochemistry, and behavior 245 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3114283/> accessed 2 March 2020.

Goudkamp J, 'Insanity as a Tort Defence' (2011) 31 Oxford Journal of Legal Studies 727.

Harrow M, Hansford BG and Astrachan-Fletcher EB, 'Locus of Control: Relation to Schizophrenia, to Recovery, and to Depression and Psychosis - A 15-Year Longitudinal Study' (2009) 168 Psychiatry Research 186.

Henderson J, 'Experiences of "care" in Mental Health' in Reynolds J, Muston R, Heller T, Leach J, McCormick M, Wallcraft J and Walsh M (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009).

Hogg C, 'The Insanity Defence: An Argument for Abolition' (2015) 79 The Journal of Criminal Law 250.

Hughes K, Bellis MA, Jones L, Wood S, Bates G, Eckley L, McCoy E, Mikton C, Shakespeare T and Officer A, 'Prevalence and Risk of Violence against Adults with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies' (2012) 379 The Lancet 1621.

Kendell R, 'The Distinction between Mental and Physical Illness' in Reynolds J, Muston R,

Heller T, Leach J, McCormick M, Wallcraft J and Walsh M (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009).

Lam RW, Kennedy SH, McIntyre RS and Kullar A, 'Cognitive Dysfunction in Major Depressive Disorder: Effects on Psychosocial Functioning and Implications for Treatment' (2014) 59 Canadian Journal of Psychiatry 649.

Landes W and Posner R, *The Economic Structure of Tort Law* (Harvard University Press 1987).

Laurance J, 'Life Stories - Ron Coleman' in Reynolds J, Muston R, Heller T, Leach J, McCormick M, Wallcraft J and Walsh M (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009).

Linehan T, 'Media Madness' (1996) 92 Nursing Times 30.

Lyons RD, 'Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness' *The New York Times* (New York, 16 December 1973).

Mackay RD, 'Fact and Fiction about the Insanity Defence' [1990] Criminal Law Review 247.

—— 'Diminished Responsibility and Mentally Disordered Killers' in Ashworth A and Mitchell B (eds), *Rethinking English Homicide Law* (OUP 2000).

Matejkowski JC, Solomon PL and Cullen SW, 'Characteristics of Persons With Severe Mental Illness Who Have Been Incarcerated for Murder' (2008) 36 Journal of the American Academy of Psychiatry and the Law 74.

McNicholas F, Slonims V and Cass H, 'Exaggeration of Symptoms or Psychiatric Munchausen's Syndrome by Proxy?' (2000) 5 Child Psychology and Psychiatry Review 69.

Nacro, *Black People, Mental Health and the Courts: An Explanatory Study into the Psychiatric Remand Process as It Affects Black Defendants at Magistrates' Courts* (Nacro 1990).

Newton S, ‘Progress on the UK’s Vision to Build a Society Which Is Fully Inclusive of Disabled People: Letter from the Minister for Disabled People, Health and Work’ (*GOV.UK*, 3 October 2018) <https://www.gov.uk/government/publications/disabled-peoples-rights-information-following-the-uks-first-periodic-review/progress-on-the-uks-vision-to-build-a-society-which-is-fully-inclusive-of-disabled-people-letter-from-the-minister-for-disabled-people-health-and-w> accessed 4 February 2020.

Parkinson L, ‘Capacity to Change’ [2015] Family Law 989.

Peterson JK, Skeem J, Kennealy P, Bray B and Zvonkovic A, ‘How Often and How Consistently Do Symptoms Directly Precede Criminal Behavior among Offenders with Mental Illness?’ (2014) 38 Law and Human Behavior 439.

Philo G, *Media Representations of Mental Health/Illness: Audience Reception Study* (Glasgow University Media Group 1994).

—— ‘Media Images of Mental Distress’ in Heller T, Reynolds J, Gomm R, Muston R and Pattison S (eds), *Mental Health Matters* (Macmillan 1996).

Repper J and Perkins R, ‘Challenging Discrimination: Promoting Rights and Citizenship’ in Reynolds J, Muston R, Heller T, Leach J, McCormick M, Wallcraft J and Walsh M (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009).

Robinson N, ‘Conversation Pieces: Reflections in Family Mediation: Part 6: Family Mediation and Mental Health’ [2019] Family Law 953.

Rose D, ‘Terms of Engagement’ (2001) 108 Openmind 16.

Rosenberg DA, ‘Web of Deceit. A Literature Review of Munchausen’s Syndrome by Proxy.’

[1987] Child Abuse and Neglect 547.

Spandler H, ‘From Social Exclusion to Inclusion? A Critique of the Inclusion Imperative in Mental Health’ in Reynolds J, Muston R, Heller T, Leach J, McCormick M, Wallcraft J and Walsh M (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009).

Steel RM, ‘Factitious Disorder (Munchausen’s Syndrome)’ (2009) 39 The Journal of the Royal College of Physicians of Edinburgh 343.

Storey T, ‘Coercive Control: An Offence but Not a Defence’ (2019) 83(6) Journal of Criminal Law 513.

Thakral S, Bhatia T, Gettig EA, Nimgaonkar VL and Deshpande SN, ‘A Comparative Study of Health Locus of Control in Patients with Schizophrenia and Their First Degree Relatives’ (2014) 7 Asian Journal of Psychiatry 34 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3925311/> accessed 19 March 2020.

Walker A, ‘Unfitness to Plead and the Defence of Insanity’ (2013) 177 Criminal Law and Justice Weekly 648.

Waller D and Eisenberg L, ‘School Refusal in Childhood. A Paediatric-Psychiatric Perspective.’ in Hersov L and Berg I (eds), *Out of school: Modern perspectives in truancy and school refusal* (Wiley 1980).

Walsh M, ‘(Mis)Representing Mental Distress?’ in Reynolds J, Muston R, Heller T, Leach J, McCormick M, Wallcraft J and Walsh M (eds), *Mental Health Still Matters* (Palgrave Macmillian and The Open University 2009).

Williams M, '"A Normal Man … Hardly Exists": Law, Narrative, the Psyche and the Normal Man' (2009) 62 Current Legal Problems 202.

Wilson C and others, 'Mental Illness Depictions in Prime-Time Drama: Identifying the Discursive Resources' (1999) 33 Australian and New Zealand Journal of Psychiatry 232.

World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (World Health Organization 1992).

Table of Cases

English and Welsh cases

Austin v Commissioner of Police of the Metropolis (2008) 1 WLR 1376 (HL).....15

B (A Child) (Care Order: Proportionality: Criterion for Review), Re [2013] UKSC 33…….....27-29, 32, 35

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R (David Grant Juncal) v Secretary of State for the Home Department, East London & The City Mental Health NHS Trust, Scottish Ministers and Secretary of State for Northern Ireland [2008] EWCA Civ 869.....19

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R v Sullivan [1984] AC 156 (HL).....7

Wakefield Metropolitan District Council and Wakefield Clinical Commissioning Group v DN and MN [2019] EWHC 2306 (Fam).....10

X (Emergency Protection Orders), Re [2006] EWHC 510 (Fam).....27, 30-31

European Court of Human Rights cases

Edwards and another v United Kingdom App nos 39647/98 and 40461/98 (ECHR, 22 July 2002), [2003] All ER (D) 368 (Jul).....10

Halilović v Bosnia and Herzegovina App no 23968/05 (ECHR, 24 November 2009).....19-20

P, C and S v United Kingdom App no 56547/00 (ECHR, 16 July 2002).....30

Tokić and others v Bosnia and Herzegovina App nos 12455/04, 14140/05, 12906/06 and 26028/06 (ECHR, 8 July 2008).....19-20

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