The Approved Mental Health Professional's Guide to Mental Health Law

ROBERT BROWN

4th Edition

Updated to include new case law on accountability of the AMHP and the nearest relative, as well as the Supreme Court decisions in the Cheshire West cases.

Series Editor
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st-Qualifying Social Work Practice

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About the author

Rob Brown is a social worker and trainer. He was a founding director of Edge Training and Consultancy Ltd. He runs refresher courses for approved mental health professionals (AMHPs) and teaches s12 doctors and approved clinicians in England and Wales. He provides consultation and supervision for the AMHPs/BIAs in the Deprivation of Liberty Team in Cornwall. He also provides consultation for lead AMHPs in Hampshire, West Berkshire and Lambeth. He was a Mental Health Act Commissioner from 1993 to 2010. Rob is a Visiting Fellow at Bournemouth University. He has published widely in the field of mental health and mental capacity law.

Foreword from the Series Editor

This new edition of *The Approved Mental Health Professional's Guide to Mental Health Law* has been expertly produced by Rob Brown. Those of us who have been fortunate to know Rob personally know him to be a person of great wisdom and insight in this area and of course we are all aware of his wit and humour. The sector really has benefited from his expertise over the years and his contribution to mental health care and services has been simply remarkable.

The role of the approved mental health professional (AMHP) is very similar to that of its predecessor, the approved social worker (ASW), but it may now be undertaken by nurses, occupational therapists and psychologists, as well as social workers. The training is now overseen and quality-assured by the Health and Care Professions Council but otherwise currently remains the same as per the previous outcomes specified by the General Social Care Council.

Of note has been the fact that the number of assessments being carried out by AMHPs has increased considerably in the past few years, making this guide's various checklists even more useful when AMHPs are under such pressure.

I warmly recommend this text to all budding AMHPs as well as others who are interested in the operation of the Mental Health Act 1983. It sits alongside other texts in the Post-Qualifying Social Work Practice series such as *The Approved Mental Health Professional's Guide to Psychiatry and Medication* and *The Mental Capacity Act 2005: A Guide for Mental Health Professionals.* Readers will also find this book useful to read in conjunction with another Sage/Learning Matters text – *Mental Health Law in England and Wales* – as this contains the full text of the Mental Health Act 1983 as well as relevant regulations.

Professor Keith Brown
Series Editor
Director of the National Centre for Post-Qualifying
Social Work, Bournemouth University

Preface to the 2016 edition

Welcome to *The Approved Mental Health Professional's Guide to Mental Health Law.* This has been designed primarily for mental health professionals who are on an AMHP course or for those helping to provide placement opportunities for such an AMHP trainee. The book should also be useful for practising AMHPs, other mental health professionals, service users, carers and others interested in the field of mental health law. The law covered here is that which covers England and Wales. Note that mental health law is significantly different in Scotland, Northern Ireland, the Isle of Man, Guernsey and Jersey. References to the Code of Practice to the Mental Health Act are for the English Code (Department of Health, 2015). Unfortunately at the time of going to print the new Welsh Code was only available in draft form. Any use of the Act in Wales needs to be compliant with the Welsh Code.

The companion volume *Mental Health Law in England and Wales* will provide readers with a copy of the Mental Health Act 1983 itself (as amended by the 2007 Act) together with relevant Regulations. The specific competences required of approved mental health professionals are set out in separate Regulations for England and for Wales. These are included in this text at Appendices 4A and 4B respectively. There are minor differences between the English and Welsh versions. This book cross-refers to these competences at the beginning of each chapter (using the English numbering system). Typical assignment questions are also included at the end of each chapter, together with a number of multiple choice questions to aid learning.

The assessment examples are based on the Bournemouth University Postgraduate Diploma in Advanced Mental Health Practice, a course delivered in partnership with a number of local authorities. The course meets the Health and Care Professions Council (HPC) standards and requirements for the role of approved mental health professional and the Department of Health requirements for the role of best interests assessor (BIA) (Mental Capacity Act 2005). The course is at Master's level and many students will continue with their studies to complete an MA in Advanced Mental Health Practice. Not all AMHP courses in England or Wales will be linked so directly to the BIA role. This role is part of the Deprivation of Liberty Safeguards (DOLS) and even AMHPs who do not complete BIA training will need to be aware of how these safeguards operate. More detailed information is included in the companion volume *The Mental Capacity Act 2005: A Guide for Mental Health Professionals.*

Mental health law has been changing rapidly in recent years. Apart from the statutory changes, there have been several important developments in case law. This book

is up to date as at the beginning of April 2016. Readers may wish to check that there has been no major recent case law which alters the position as stated here. A good source is **www.mentalhealthlaw.co.uk**. There is also mental health material on the Department of Health's website **www.dh.gov.uk**, which covers England, and on the Welsh Government website at **www.wales.gov.uk**, which covers the position in Wales.

Recent changes which are covered in this book include:

- the revised English Code of Practice to the Mental Health Act;
- the revised Reference Guide to the Mental Health Act;
- a number of cases concerning the nearest relative;
- clarification on personal accountability of the AMHP;
- revisions to the tribunal report requirements in England;
- the impact of the *Cheshire West* case decisions in the Supreme Court.

The number of assessments requiring AMHPs has increased greatly in the last few years. In the first full year of operation of the amended Act (2009–10) in England there were 44,343 applications for detention under section 2 or 3 or where there was a revocation of a CTO. In 2014–15 this number had risen to 66,921. These figures do not include assessments where detention was not the outcome and they also exclude the use of section 4 as well as cases where an application was made after a patient had been taken to hospital under section 135. Community treatment orders also require an AMHP assessment. Completed CTOs have been running at about 4000 per year for the last five years. At the same time the number of AMHPs has fallen and availability of beds has become a considerable problem. Pressure on AMHPs has never been so high.

This guide should be read in conjunction with the Mental Health Act 1983, as amended, and the relevant Code of Practice for England or Wales. These are issued to most trainee AMHPs. The Code referred to in this text is the English version. Many trainees also find the *Reference Guide to the Mental Health Act* helpful as it is written in accessible English.

Readers may note that, in terms of personal pronouns, 'he' is used rather than 'he/she'. This is consistent with the approach taken in Acts of Parliament and is used in a non-gender-specific way. Occasionally the Code of Practice uses 'they' in the singular sense, though this has been known to confuse judges.

Inevitably, there will be changes to the law during the life of this volume but we hope it will help in keeping you reasonably well informed on current mental health law. There is a list of legal references at the end of the guide.

I would like to thank Neil Allen, Paul Barber, Anthony Harbour and Debbie Martin who have all made helpful comments on this new edition. Their views, based on their experience and knowledge of how the law operates in practice, have been very helpful. However, I accept responsibility for any inaccuracies which remain within the text.

Finally I would like to thank my wife Pamela who once again has supported me in producing this fourth edition, and who encouraged me to persevere when I was struggling with the implications of the Supreme Court decision and some of the changes in the revised English Code of Practice. Her support has been invaluable.

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Contents

List of abbreviations

AA	Appropriate Adult
AC	Approved Clinician
AMHP	Approved Mental Health Professional
ASW	Approved Social Worker
AWOL	Absent Without Leave
BIA	Best Interests Assessor
CCfW	Care Council for Wales
CCG	Clinical Commissioning Group
CPA	Care Programme Approach
CPN	Community Psychiatric Nurse
CQC	Care Quality Commission
CTO	Community Treatment Order
DH	Department of Health
DHSS	Department of Health and Social Security
DoLS	Deprivation of Liberty Safeguards
DRO	Disablement Resettlement Officer
ECHR	European Convention on Human Rights
ECT	Electro-Convulsive Therapy
ECtHR	European Court of Human Rights
GSCC	General Social Care Council
HA	Health Authority
HPC	Health and Care Professions Council
IMCA	Independent Mental Capacity Advocate
IMHA	Independent Mental Health Advocate
LA	Local Authority
LPA	Lasting Power of Attorney
LSSA	Local Social Services Authority
MCA	Mental Capacity Act 2005
MHA	Mental Health Act 1983
MHRT	Mental Health Review Tribunal
MHT	Mental Health Tribunal
NHS	National Health Service
NIMHE	National Institute for Mental Health in England
NR	Nearest Relative
PACE	Police and Criminal Evidence Act 1984
PCT	Primary Care Trust
RC	Responsible Clinician

RMO	Responsible Medical Officer
SCT	Supervised Community Treatment
SI	Statutory Instrument
SOAD	Second Opinion Appointed Doctor
SSD	Social Services Department

Chapter 1

Introduction and definitions of mental disorder

BECOMING AN APPROVED MENTAL HEALTH PROFESSIONAL

This chapter should help candidates to achieve the following competences:

Application of knowledge: the legal and policy framework

Applied knowledge of:

2(1)(a)(i) mental health legislation, related codes of practice, national and local policy guidance.

Application of knowledge: mental disorder

Critical understanding of:

3(a) a range of models of mental disorder, including the contribution of social, physical and developmental factors;

3(b) the social perspective on mental disorder and mental health needs in working with patients, their relatives, carers and other professionals;

3(c) the implications of mental disorder for patients, their relatives and carers.

Common law

Although the role of the approved mental health professional (AMHP) is rooted firmly in statute there are sometimes overlaps with the common law. The *Oxford Dictionary of Law* (Law, 2015, p122) gives three basic definitions of common law:

1. *The part of English law based on rules developed by the royal courts during the first three centuries after the Norman Conquest (1066) as a system applicable to the whole country, as opposed to local customs . . .*
2. *Rules of law developed by the courts as opposed to those created by statute.*
3. *A general system of law deriving exclusively from court decisions.*

Montgomery (2002, p7) has described common law as:

> *The rules which are extrapolated from the practice of the judges in deciding cases. Judges should take a consistent approach to recurring issues and are obliged to follow the decisions of earlier cases, at least when they have been given by the higher courts. Once a matter has been resolved by a judge it therefore sets a precedent which enshrines the legal rule.*

Some practitioners have referred to this as 'common sense under a wig'.

An example of an area covered by common law rather than statute is intervention in an emergency for an informal patient. Even if the patient lacks capacity they may be an immediate risk to others and relying on the Mental Capacity Act may not be possible in terms of treatment or restraint. See Chapter 6 for a more detailed discussion of this area of law.

Civil liberties vs welfarism

Before considering models and definitions of mental disorder in depth it is important to think of the consequences which might flow from being seen as mentally disordered. This depends to some extent on the prevailing ideology as reflected in law and practice. One way of looking at the effects of different ideologies on mental health law is to contrast the views of those with 'civil libertarian' leanings such as Thomas Szasz with those of a more 'welfarist' persuasion represented by the Zito Trust until its closure in 2009. If one were to adopt Szasz's views (disputing the notion of 'mental illness' but, if conceding that it might exist, adopting the view that people should make their own decisions about their treatment, as with physical illness), then presumably there would be no need for mental health law at all. There might be a case to consider law relating to mental incapacity linked to brain injury, dementia, demonstrable learning disability, etc., but this would not allow for the detention of people who psychiatrists consider to be suffering from schizophrenia, depression, etc.

A welfarist approach might make an assumption that mental illness is linked to a degree of mental incapacity (as in the term 'lack of insight') but whether or not this is the case, a welfarist view would be that it is sometimes necessary to intervene against someone's will to protect a person from themselves or for the protection of others. The rapid growth in the numbers of community treatment orders could be seen as a victory for welfarism, especially as there is no reduction in the number of detained patients.

The contrast between these competing ideologies is illustrated in Figure 1.1. The Mental Health Act 1983 can be seen as positioned somewhere in the middle of the upper continuum illustrated. AMHPs, doctors, tribunals and courts are left to make decisions as to when the circumstances justify intervention. With the exception of ECT treatment, however, mental capacity is not the relevant test used in the Mental Health Act. The criteria needed are a mental disorder of a nature or degree to warrant intervention plus an appropriate level of risk.

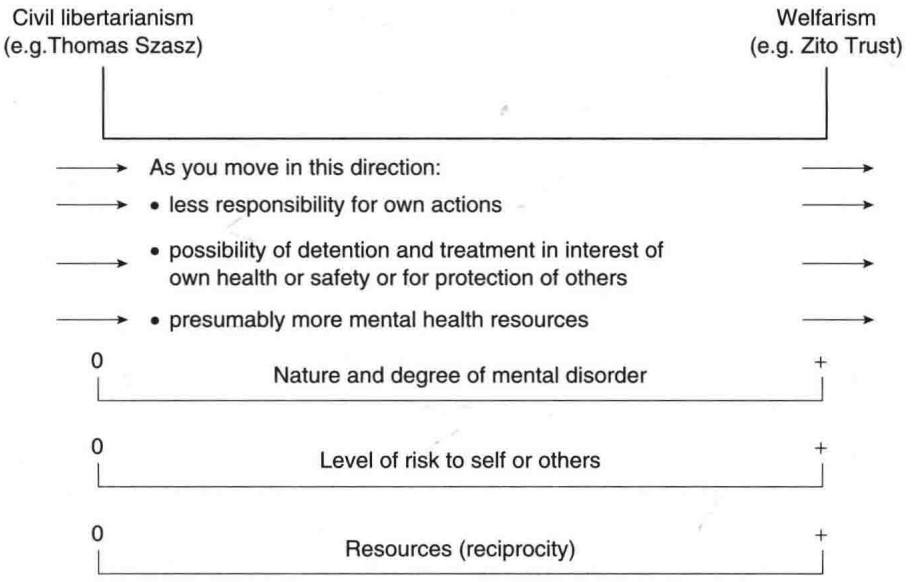

Figure 1.1 Different perspectives on mental health law

Gostin (1975) made the ethical point that, if you deprive someone of liberty, you should have a duty to provide a good quality service. One part of the Mental Health Act which addresses this issue is section 117 relating to after-care. Consistent guidance that section 117 services should not incur charges could be seen to reflect the link between the positive end of the resource continuum with the welfarist intervention point. Similarly the Richardson Committee on the Reform of the Mental Health Act considered the principle of 'reciprocity'. Free after-care services have been retained in the reformed Mental Health Act despite the controversy on this subject. The same is not true, however, for the new Deprivation of Liberty Safeguards (DoLS) or indeed where guardianship is used.

Another way of using Figure 1.1 is to imagine a point in the middle of the upper continuum where detention would be justified if there was:

- mental disorder of a nature or degree to justify this;
- a level of risk to self or others which also justified detention.

Mental health terminology and the law

Common law distinguished 'idiots' from 'lunatics' before the first of the Acts. These terms correspond with the distinction between people with a learning disability and those who are mentally ill. Historically, the groups have sometimes been dealt with in separate legislation and sometimes together, as in the Mental Health Act 1983.

1713/44 Vagrancy Acts allowed detention of 'Lunaticks or mad persons'.

1774 Act for regulating private madhouses.