

**University of Nottingham
School of Law
Mental Health Law and Policy
2010**

Reading list

Contains:
Required reading and preparatory questions for seminars 4-10

4. Current trends in mental health service provision: care, control and treatment in the community

Required Reading

Bartlett and Sandland, chapter 9
Social Exclusion Unit (2004). Mental health and social exclusion. London, Office of the Deputy Prime Minister pp.3-11 and 85-93. Available online at <http://www.socialinclusion.org.uk/publications/SEU.pdf>

Access to care in the community

Mental Health Act 1983 (as amended by the MHA 2007) s. 117,
National Health Service and Community Care Act 1990 Part III, in particular ss.46-50

R v Gloucestershire County Council and another, Ex Parte Barry [1997] 2 ALL ER 1 (HL)
R v Manchester City Council ex parte S and others [2002] UKHL 34, [2002] 2 A.C. 1127, [2002] 3 W.L.R. 584, [2002] 4 All E.R. 124

Supervised community treatment (SCT)

Mental Health Act 1983 (as amended by the MHA 2007), ss. 7, 8, 17-20, 62-64,127(2)

Mental Health Act Code of Practice, chapters 25 – 29. You only need to skim these in order to support your understanding of the relevant sections of the Act, you should not need to make extensive notes upon this material.

Bartlett and Sandland, pp.354-362

Lawton-Smith, S., T. Burns, et al. (2008). "Community treatment orders are not a good thing." British Journal of Psychiatry **193**: 96-100.

MHAC. Coercion and Consent: Thirteenth Biennial Report. (Nottingham: MHAC, 2009) pp. 107-117 and pp. 168-174. This report is available online at:

http://www.cqc.org.uk/db/documents/MHAC_Biennial_Report_0709_final.pdf.

Pp. 168-174 of this report discuss the role of the second opinion appointed doctor (SOAD) in approving applications for SCT. In the absence of any centrally collated statistics on the use of S.17A MHA 1983, these figures can be used as a proxy to help us find out just how widely SCT is being used. The SOAD's role as a safeguard in preventing excessive use of coerced treatment under Part 4A MHA 1983 will be discussed further in seminar 8 on treatment. Do not worry too much about this now.

The future...

Department of Health (1999). National service framework for mental health: modern standards and service model, NHS Executive pp.41-69

The National Service Framework for mental health was only intended to last for 10 years. In 2009 the Department of Health published a consultation document on improving standards in mental health care over the next 10 years. You can read the executive summary for this consultation document online at: <http://www.newhorizons.dh.gov.uk/>.

Bonnie, R. J. and J. Monahan (2005). "From coercion to contract: reframing the debate on mandated community treatment for people with mental disorders." Law and Human Behavior **29**(4): 485-503. This was also set as required reading for seminar 3 so you only need to review your notes on it.

Questions

1. 'The needs of the individual can only be assessed in the context of the needs of the community as a whole. Local authorities are right to allocate resources on the basis of the need of the entire population they serve, and should not be automatically expected to deliver expensive care packages to those with complex needs if others with less complex needs will suffer as a result.' Discuss.
2. Uptake of supervised Community Treatment Orders under s.17A MHA 1983 has been far higher than expected. The MHAC found that at least 1,772 applications for SOADs to review SCT orders were made in the first five months after the new legal provisions came into force. The DH had originally estimated that no more than 500 applications would be made in the first year. Why do you think CTOs have proven so popular?
3. Are services for people with mental health needs likely to make more or less use of formal coercion in the future?

5. Competency and Guardianship

Required Reading

Bartlett and Sandland, chapters 10 and 11.

Mental Capacity Act 2005, including the amendments introduced by the Mental Health Act 2007. You should focus on part I and s 62 at this time. Part II should be read in outline only. You are further not responsible for the detail of the schedules to the Act for this seminar.

A Primary Care Trust v P, AH, A Local Authority [2008] EWHC 1403 (Fam)

In the Matter of MM (An Adult); Local Authority X v MM and KM [2007] EWHC 2003 (Fam)

A Local Authority v Ma, Na, Sa (by her children's guardian LJ), [2005] EWHC 2942 (Fam).

Hart v O'Connor [1985] 3 WLR 214, [1985] AC 1000 [JCPC]

R v C [2009] UKHL 42; [2009] 1 W.L.R. 1786; [2009] 4 All E.R. 1033; [2010] 1 Cr. App. R. 7

Further Reading

Bartlett. *Blackstone's Guide to the Mental Capacity Act 2005*. (2nd ed. Oxford: OUP, 2008).

Bartlett. 'Capacity, Best Interests and Sex', [2008] *Journal of Mental Health Law* 80

Law Commission, (1995) *Mental Incapacity*, Law Com No 231, (London: HMSO). [final report, for which the following are the consultation papers]

Law Commission. "Mentally Incapacitated Adults and Decision-Making". 4 vols.,
"An overview": consultation paper 119.
"A new Jurisdiction": consultation paper 128
"Medical Treatment and Research": consultation Paper 129
"Public Law Protection": consultation paper 130.

Bartlett. "The Consequences of Incapacity". 4 *Web Journal of Current Legal Issues*, (1997).

D. Carson [1993] 'Disabling Progress' *J.S.W.F.L.* 304

City of Sunderland v PS (by her litigation friend the Official Solicitor) [2007] EWHC 623 (Fam)

Re GJ NJ, BJ (Incapacitated Adults), Salford City Council v GJ, NJ, BJ (by their respective litigation friends) [2008] EWHC 1097 (Fam)

Questions

i. In what ways has the Mental Capacity Act 2005 (without the 2007 amendments) altered the common law?

ii. 'The Mental Capacity Act 2005 does not alter the common law tests of capacity. Rather, it creates a set of procedures to allow decisions to be made for people who are found to lack capacity according to its definitions.' Do you agree? Does it matter? In your view, how will the courts deal with any resulting difficulties?

iii. How will the Mental Capacity Act 2005 (as amended by the Mental Health Act 2007) interact with the Mental Health Act 1983 (also as amended by the Mental Health Act 2007)?

iv. Does the Mental Capacity Act 2005 (both in its original form, and as amended by the 2007 Act) contain sufficient safeguards for the protection from exploitation of people lacking capacity?

6. Admission to hospital

Required Reading

Bartlett and Sandland, chapters 4 and 5.
Winterwerp v The Netherlands (1979) 2 EHRR 387

Mental Health Act Admissions
Mental Health Act 1983, s. 1, 2, 3, 4, 5, 11, 12, 17-17E,
Re F (Mental Health Act: Guardianship) [2000] 1 FLR 192, CA.

'Appropriate' Medical Treatment
R (JB) v Haddock [2006] EWCA Civ 961 and the trial decision, [2005] EWHC 921 (Admin).
MD v Nottinghamshire HC NHS Trust [2010] UKUT 59 (AAC),
R (DK) v SS Justice [2010] EWHC 82 (Admin)
R (SP) v SS Justice [2010] EWHC 1124 (Admin).

Regarding people lacking capacity
Mental Capacity Act 2005, part I and schedules 1A and A1.
HL v UK, appl. 4508/99 (5 October 2004), (ECtHR).
Bartlett, *Blackstone's Guide to the Mental Capacity Act 2005*, 2nd ed, (Oxford: OUP, 2008), chapter 4. (A copy is available on WebCT)
GJ v Foundation Trust [2009] EWHC 2972 (Fam).

Additional Reading

R (M) v Homerton University London [2008] EWCA Civ 197
M v Queen Mary's Hospital Managers [2008] EWCA Civ 1112
D v Hospital Managers of the Edgeware Community Hospital [2008] EWHC 3572 (Admin)
BB v Cygnet Healthcare [2008] EWHC 1259 (Admin)

Questions

- i. What are the criteria for compulsory admission to psychiatric facilities under part II of the Mental Health Act 1983? In your view, are these criteria legally sufficient and ethically appropriate?
- ii. What are the strengths and weaknesses of the courts' decisions in *HL* and in *Bournewood*? Are the legal structures used appropriate for the situation of persons lacking capacity to decide on admission to a psychiatric or related institution?
- iii. In your view, is the response of the Government to the problem in *HL* as contained in the Mental Health Act 2007 appropriate and sufficient?
- iv. Should nearest relatives or similar persons have a role in the admission of people to psychiatric and related facilities? If so, how should it be defined?

7. Criminal Behaviour, Mental Health and State Responses

Required Reading

Bartlett and Sandland, chapter 6
Pt III, Mental Health Act 1983

Fitness to stand trial

Criminal Procedure (Insanity) Act 1964 as amended by ss.22 and 24 of the Domestic Violence Crime and Victims Act 2004.

R v M, K and H [2001] EWCA Crim 2024, [2002] 1 WLR 824 (CA)

R v H and Secretary of State for the Home Department [2003] UKHL 1 (HL)

R v Antoine [2000] UKHL 20

Hospital and restriction orders

R v Birch (1989) 11 Cr App R(S) 202 (CA) (there are regular appeals against the making of s.37 and or 41 orders; seek them out on Westlaw. For examples of successful appeals, see R v Kearney [2002] EWCA Crim 2772 [2003] 2 Cr. App. R. (S.) 17, 2002 WL 31599741)

R. v Acharya (Jaikishen) [2005] EWCA Crim 772, 2005 WL 828197,

Narey v Customs and Excise Commissioners [2005] EWHC 784, [2005] A.C.D. 85, 2005 WL 871043 (for an example of unsuccessful appeals, see R. v Cowan (Adrian) [2004] EWCA Crim 3081 [2004 WL 2932914](#) 2004 WL 2932914 and Jones v Isleworth Crown Court [2005] EWHC 662)

Sentencing and diversion

[Readings to be confirmed]

Additional reading

Articles 12 and 14 UN Convention on the Rights of Persons with Disabilities

Questions

1. Is it desirable to divert offenders with mental disorders out of the criminal justice system as early as possible? What are the arguments for and against?
2. In conducting a 'trial of the facts' is it possible for the court to successfully identify whether or not an individual had committed the relevant *actus reus* if they are unable to identify whether she also had the necessary *mens rea* at the relevant time?
3. What is the appropriate level of risk an individual should pose to the public before the courts impose a hospital order with restrictions under s.37/41? What kind of evidence should the court take into consideration?
4. What role can and should mental health services play in protecting the public from criminal behavior?

8. Compulsory treatment in hospital and the community

Required Reading

Bartlett and Sandland, chs 3.4, 7

MHA 1983, Part 4 and Part 4A

MHA Code of Practice chapters 23-25 (you should have already read Chapter 25 in preparation for seminar 5)

Please also review your notes on Supervised Community Treatment from Seminar 5.

On the right to challenge treatment decisions

Herczegfalvy v Austria (1992) 15 EHRR 437

R (on the application of Wilkinson) v Responsible Medical Officer Broadmoor Hospital and another [2001] EWCA Civ 1545.

R v Dr M and others, ex parte N [2002] EWCA Civ 1789, [2003] 1 WLR 562, para 16-20.

Brenda Hale (2005) 'What can the Human Rights Act 1998 do for my mental health?'

C.F.L.Q. 17(3), 295-305

On the definition of treatment

B v Croydon HA [1995] 1 ALL ER 683 (CA)

S v Airedale NHS Trust [2002] All ER (D) 79, pp.99-100 only (Available from Lexis database).

On classification as a safeguard

R v Ashworth Hospital, ex parte B [2005] UKHL 20, [2005] 2 A.C. 278, [2005] 2 W.L.R. 695, [2005] 2 All E.R. 289

R (JB) v Haddock [2006] EWCA Civ 961 and the trial decision, [2005] EWHC 921 (Admin). [You will have already read these cases for seminar 6.]

Additional reading

R v Feggetter and MHAC, ex parte J W [2002] Case No: C/2000/3655 [2002] EWCA Civ 554 [2002] 3 W.L.R. 591

Nell Munro, 'Treatment in Hospital', in L. Gostin et al. (eds), Principles of Mental Health Law and Policy (Oxford: OUP, forthcoming 2010). This isn't published yet but I have placed a copy on WebCT, it provides another overview of the law on compulsory treatment.

Keyword, K. (2003). "Rethinking the anorexic body: how English law and psychiatry 'think'." International Journal of Law and Psychiatry **26**: 599-616.

Questions

1. What kinds of treatment do people with mental health needs receive?
2. Can we meaningfully distinguish between treatment for a mental disorder and behavior management? Does the law distinguish between treatment and behavior management currently?
3. 'The distinction introduced in the Mental Health Act 1959 between treatments requiring special safeguards and treatments which do not is not meaningful to patients. The safeguards the current legislation offers against the imposition of unwanted and unnecessary treatment are hollow.' Discuss.
4. *You might also want to plan a skeleton answer to the following question:*

Patrick is a 24 year old man with a diagnosis of schizophrenia. He has also been a heroin user. He is currently a patient in a special hospital where he is detained under s.37/41 MHA 1983. He has been an in-patient for three years, and was admitted after committing GBH, for which he was found not guilty by reason of insanity.

Patrick's mental health remains very volatile, and he is frequently violent towards staff and other patients in the hospital. The hospital has attempted to control his psychotic symptoms with a wide range of anti-psychotic medications, none of which has proven particularly successful. Initially Patrick was willing to comply with treatment, but after a particularly bad reaction to one drug, which left him experiencing acute breathlessness, he has refused all subsequent drug treatment. Since then his RC has had to rely on SOAD approval before administering medication. On each occasion when SOAD approval has been sought the SOAD has confirmed that Patrick is capable of competently refusing treatment but that nonetheless it would be in his best interests to receive it.

Since nothing has worked to date Patrick's RC is now interested in administering the (fictitious) drug Thorizadol to him. Thorizadol has been available since the early 1970's for the treatment of severe psychosis. However, soon after it came on the US market it was withdrawn because of the risk it carried of causing heart failure, which was fatal in some cases. It is was subsequently licensed for prescription in England and Wales, but the guidelines on prescribing it make clear it should only be administered as a drug of last resort. It is usually administered in tablet form.

Patrick's RC knows that Patrick will refuse to take the tablets. However, the company which manufactures Thorizadol has recently been licensed to sell a depot injection form of Thorizadol. This would be much easier to administer to Patrick because it would mean that nursing staff would only need to use sedation to ensure his compliance once a fortnight, instead of three times a day as would be the case with the administration of tablets. The depot injection of Thorizadol has been trialled on a small number of patients who were volunteering to participate in the trial.

A SOAD has agreed that it would be appropriate to administer Thorizadol as a depot injection to Patrick.

Patrick has refused the treatment and wishes to challenge the lawfulness of the decision to administer it to him compulsorily.

Advise Patrick.

9. Leaving hospital

Required Reading

Bartlett and Sandland, chapter 8 and chapter 5.5
MHA ss. 17, 23, 25, 42, 66, 67, 68, 69, 70, 71, 72, 73, 74, 78, 132(1)(b), Sched 2
MHRT Rules 1983 (these and the 2008 Rules below can be found at <http://www.mhrt.org.uk>, the Tribunals Service website for mental health act cases)
The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, Parts IV and V
A, D and R v Scottish Ministers [2001] UKPC D5, [2002] UKHRR 1
RM v St Andrews [2010] UKUT 119 (AAC)
R v Secretary of State for the Home Department and Secretary of State for Health, ex parte IH [2003] UKHL 59 (HL)
R v East London and the City Mental Health NHS Trust and another (Respondents) ex parte von Brandenburg (aka Hanley) [2003] UKHL 58

Additional Reading

Reid v Secretary of State for Scotland [1999] 1 All ER 481

Peay, J (1981) 'Mental Health Review Tribunals: Just or Efficacious Safeguards?' Law and Human Behaviour 5, 2/3, 161-186

Peay, J (1989) Tribunals on Trial: A Study of Decision-Making under the Mental Health Act 1983 Oxford: Clarendon

Perkins, E. (2000) Decision-making in Mental Health Review Tribunals, London: Department of Health.

Richardson, G., and Machin, D. (2000) 'Judicial review and tribunal decision making: a study of the mental health review tribunal', Autumn Public Law, 494-514.

Richardson, G., and Machin, D. (2000a) 'Doctors on tribunals: A confusion of roles', 176 British Journal of Psychiatry, 110-115.

Questions

1. Who decides if a detained patient may be discharged from the detaining order?
2. To what extent do tribunals hearing applications from persons detained under the MHA 1983 apply legal rules?
3. Is there a 'new fact rule' in England and Wales?

10. Madness and social control

Required Reading

Foucault, M. History of Madness. (London: Routledge, 2006) pp. 463-511. Copies of this excerpt will be available on WebCT.

The History of Madness is a complete translation of Foucault's book 'Folie et déraison'. This full translation was only made available in English for the first time in 2006. An earlier abridged version had also been published in English under the title 'Madness and Civilisation' but this does not contain all of the material set here. We realise this is a lengthy and challenging reading to set. However, Foucault's theories are worthy of your attention and we will be discussing this at length in the seminar. Feel free to come prepared with questions on this text.

Ingleby. "Mental Health and Social Control". In Stanley Cohen and Andrew Scull, eds., Social Control and the State, (Oxford: Blackwell, 1985) This excerpt will also be available on WebCT.

For this seminar it is **essential** that you read some of the following further reading...

Additional reading

Bartlett and Sandland, chapter 9, this was already set for seminar 5 so you only need to skim read it to refresh your memories of it.

Foucault, M. History of Madness. (London: Routledge, 2006) pp.44-107

On social control in general

Garland, D. (2004). "Beyond the culture of control." Critical Review of International Social and Political Philosophy **7**(2): 160-189.

Janowitz, M. (1975). "Sociological theory and social control." American Journal of Sociology **81**(1): 82-108.

Rose, N. (2000). "Government and control." British Journal of Criminology **40**(2): 321-339.

On social control and mental health

Goffman, E. 'The insanity of place' in Relations in Public., Goffman E. (London: Allen Lane, 1971)

Scull, A. (2004). "The insanity of place." History of Psychiatry **15**(4): 417-436.

Lincoln, A. (2005). "Psychiatric emergency room decision making, social control and the 'undeserving sick'." Sociology of Health and Illness **28**(1): 54-75.

Foucault, M. Abnormal: lectures at the College de France 1974-1975. (London: Verso, 2003)

Foucault, M. Psychiatric power: Lectures at the College de France 1973-1974. (Basingstoke: Palgrave Macmillan, 2006)

On mental health and race

Littlewood and Lipsedge. Aliens and Alienists. 3rd ed. London: Routledge, 1997. A

classic text on mental illness and race.

Report of the independent inquiry into the death of David (Rocky) Bennett (2003)
available online at:

<http://image.guardian.co.uk/sys-files/Society/documents/2004/02/12/Bennett.pdf> (or just Google 'David Bennett Inquiry')

Questions

1. What does social control mean?
2. What formal mechanisms of social control govern the lives of people with mental health needs?
3. What informal mechanisms of social control govern the lives of people with mental health needs?
4. Is Foucault really a theorist of social control?
5. Are people with mental health needs subject to more or less social control than other members of deviant groups?
6. Who controls the controllers?