

Contemporary Legal Issues in Counselling and Psychotherapy



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The Chartered Legal Executive lawyer:

- is able to undertake all work that may be undertaken by a solicitor, under the supervision of a principal;
- tends to specialise in one area of law;
- must adhere to a code of conduct;
- has an annual CPD requirement to continue training throughout the career.

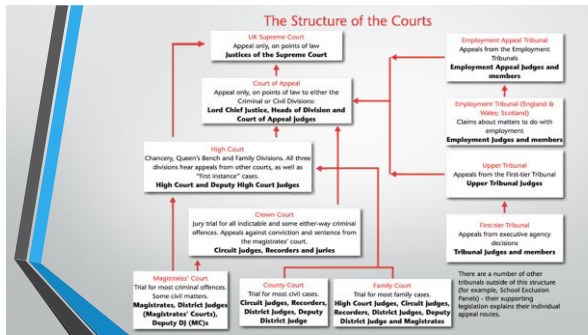


DISCLAIMER

The information contained in this presentation is offered purely for educational purposes, it does not constitute legal advice.

Law of England and Wales:

- Residual Rights (as opposed to the US written Constitution of Rights)
- Common Law (case law); Statutes/legislation - laws passed in parliament; Regulations/Directives etc. from the European Court of Justice (ECJ)
- Human Rights Act 1998 incorporates European Convention on Human Rights - actions go to the European Commission on Human Rights.
- Adversarial system (Crown v Individual; Petitioner v Respondent; Complainant v Defendant)
- Burden of proof in criminal matters - Prosecution to prove guilt of defendant "Beyond a Reasonable Doubt."
- Burden of proof in civil matters - Complainant to prove liability of Defendant on the "Balance of Probabilities."
- Hierarchical Court System



Legal issues across counselling:

- **Private practice:** Professional Indemnity Insurance; Public Liability Insurance; Health and Safety Act 1974; Equality Act 2010; Fiduciary liability eg joint and several with partners.
- Safeguarding
- Expert Witness
- Mackenzie's Friend
- Coroners court
- Therapist providing pre-trial therapy to a vulnerable party
- Individual claimant bringing an action in the small claims court for non-payment by a client.



- Criminal:
- Data Protection - GDPR May 2018
- Civil:
- Contract
- Tort



Criminal Law

Private individual criminal activity could result in sanctions for a breach/misconduct of professional code(s) of conduct.

Compulsory Disclosure:

Section 38B of the Terrorism Act 2000: Duty to disclose information about terrorist activities.

Section 39: offence to fail to disclose information acquired in the course of a profession/employment in support of terrorism (eg fundraising/money laundering)

Section 23 of the Drug Trafficking Act 1994, Proceeds of Crime Act 2000: Offence to fail to disclose information about drug money laundering acquired in employment/profession;

Sections 53 and 58 DTA and section 39 of TA create offence of 'tipping off' a person who is being subject to investigation for drug money laundering, or to act in a way so as to prejudice the investigation.

The Children Act 2004 / FGM Act 2003 / Safeguarding Vulnerable Groups 2006 / Working Together to Safeguard Children 2018

Defensible Disclosure:

W v Egdeell and others (1990) 2WLR 471

Lord Justice Bingham stated that the public interest in the prevention and detection of serious crime is considered by the courts to be greater than in protecting confidences.

Having regard to immediacy and impact of intended actions.

Data Protection

- General Data Protection Regulations (GDPR) - May 25th 2018 - overhaul of current Data Protection Act 1998 requiring more proactive management of data.
- Document all information held
- Privacy notices
- Individual's rights
- Access requests
- Identify lawful basis for holding information; document it and update privacy notice
- Consent - documented and refreshed, if necessary
- Verification of ages - systems for obtaining parental/guardian's consent
- Procedures to detect and report a data breach
- Privacy impact Assessments
- Data protection officers
- A single set of rules applicable to the whole of the EU.
- Maximum fines increased to 10-20 Million Euro or 4% of global turnover.

Contract:

- Invitation to treat v offer:
- Carlill v Carbolic Smoke Company:
- <https://www.youtube.com/watch?v=DxIVciF8WSQ>

Remedies in Contract:

- Order for specific performance
- Restitution
- Award of damages:
- Hadley v Baxendale has been interpreted to mean that only loss which is within the reasonable contemplation of the parties may be recovered (The Heron II [1969] 1 AC 350).
- Damages for disappointment or mental distress are not generally awarded (Addis v Gramophone Co. Ltd [1909] AC 413) unless the contract is, for example, a holiday contract (Jarvis v Swans Tours Ltd [1972] 1 QB 233).
- 6 year period in which to bring claim in contract - Limitation Act 1980

Tort

- Breach of confidentiality and alleged 'harm' to X's mental health caused by therapist's treatment may be actionable in Tort:
- The neighbour principle, duty of care in negligence
- Donoghue V Stephenson:
- <https://www.youtube.com/watch?v=evDCHCMRAtc>

To establish a tort:

- Prove the existence of a duty of care between the parties
- Evidence a breach of that duty
- Foreseeable or actual harm caused by the breach
- Limitation Act 1980: 6 year period in which to bring claim.

Breach of confidentiality:

- Slawson's (1989) American Psychiatric Association review of 700 closed cases revealed that breach of confidentiality was the 7th category of complaint, in the 'top half' of the list of types of complaint, and involved in 6.4% of cases brought.
- Grabois (1997) p.65



Werner v Landau (1961) AC

"... duty to exercise ordinary skill and care according to the ordinary and reasonable standards of those who practice in the same field."
 "Dr Werner ... made a most tragic mistake by introducing social contact... this was negligence on... (his)... part."
 Times Law Report 08/03/1961

Mr Justice Mustill:
 "The duty is not to prevent suicide but to take reasonable care to that end - and the word reasonable is not perfect."
 Bradley (1989)

"Learner-driver principle"



Trainee practitioners have to provide the same duty of care as experienced therapists.

Nettleship v Western (1971); Wilsher v Essex AHA (1988)

Mental Health Act 1983:

S39: Medical practitioners and other professionals are afforded protection against claims for negligence alleged in the course of their duties, unless their actions/omissions were committed in bad faith or without reasonable care.

Does/will this extend to counsellors/ therapists?

Mullins v Oliphant (1993):

No damages payable for normal feelings of grief, anxiety, depression, nothing falling short of a recognised psychiatric illness.

Lack of caselaw:

- 60% of claims against therapists abandoned
- 34% settled out of court
- 5% made it to court
- 80% of the 5% of cases making it to court were 'won' by the defendant.

(The Pearson Commission, 1978)



Scenario

C is a newly-qualified, self-employed counsellor who contracted with client X for twelve sessions of therapy, to address anxiety and depression.

Without any warning, X failed to turn up for session 8, and despite making a phone call and leaving a voice mail message, C did not hear further from X.

Three months later, C received a 'phone call from a woman, S, claiming to be X's sister. She explained that her sister had become very unwell and had been admitted to a hospital. S further explained that it would be very useful for her to have a copy of her sister's notes for the hospital consultant, to assist in his on-going treatment of X.

Concerned to find out how her client was progressing, and eager to help, C agreed to meet with S, to discuss X's case, but did not hand over a copy of her file.

Two months later C received a letter from X demanding a sum of money to pay towards X's private hospital costs, alleging that C had been chosen as a therapist due to the promises on her website to "alleviate suffering" through therapy, and to "make a noticeable difference" in the client's life, whereas the therapy had caused the worsening of her condition and led directly to her hospitalisation. C did not reply.

Two weeks later, C received a letter before action from X's solicitor stating that X intended to issue a court claim for damages for C's breach of contract and negligence in her treatment of X and informing C that she had 21 days in which to respond.

If you were C, how would you respond in this situation?

If you were X what would you be trying to prove?

References

- Bond, T and Sandhu, A. (2005) *Therapists in Court*. London: Sage
- Grabois, E. (1997) The Liability of Psychotherapists for Breach of Confidentiality. *Journal of Law & Health* Vol. 1, 22 pp: 39- 84.
- Jenkins, P. (2011) *Counselling, Psychotherapy and the Law*. London: Sage
- Mitchell, B. and Bond, T. (2010) *Essential Law for Counsellors and Psychotherapists*. London: Sage
- Mitchell, B. and Bond, T. (2011) *Legal Issues Across Counselling & Psychotherapy Settings*. London: Sage
- <https://www.bacp.co.uk/news/2018/04/10/2018-ethical-framework-review/>
- <https://www.bacp.co.uk/media/1303/bacp-ethical-framework-for-the-counselling-professions-2018.pdf>
- https://www.bacp.co.uk/media/1303/bacp-ethical-modelfulness_within_supervision_training_clinical_reflections_for_practice_gawells.pdf
- <https://www.bacp.co.uk/about-us/protecting-the-public/professional-conduct/>
- <https://www.clinic.org.uk/membership>
- https://eur-ropa.eu/european-union/eu-law/legal-acts_en
- https://www.echr.coe.int/Documents/Convention_ENG.pdf
- <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/>
- <https://ico.org.uk/media/616244/2019preparing-for-the-gdpr-12-steps.pdf>
- <https://www.judiciary.gov.uk/about-the-judiciary/the-judicial-system/court-structure/>