Community Care and the Law, by Luke Clements, Second Edition

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In Luke Clements' Introduction to this revised second edition he describes the state of community care law as a "mess" and a "hotchpotch" of conflicting statutes which have been enacted over a period of 50 years with no unifying principles underlying them. It is, he says, "crying out for codification". That cry for reform seems no closer to being answered than it was four years ago when the first edition was published. However the cries of those trying to study, teach and apply community care law have been responded to with the publication of this book.

The aim is to state the law as of April 2000 though some later developments are also mentioned. The author is to some extent the victim of his own success because the first edition (and other books by Gordon and Mackintosh[1] and Mandelstam[2]) played a vital part in "opening up" community care law and in encouraging service users and their advisers to bring legal challenges. In the four years since the first edition of the book the pace of change in community care law has accelerated enormously making it inevitable that the most recent developments cannot be included. For example in the discussion of the Immigration and Asylum Act 1999 no reference is made to the important case of *ex p.* O[3] in which the Court of Appeal all but refused on policy grounds to give statutory wording its natural and obvious meaning. Neither has it been possible to include a discussion of the Court of Appeal's decision in the second *Re F* case on the inherent jurisdiction of the High Court concerning mentally incapacitated persons[4]. Clements, with good reason, refers to the interface between health and social care as a "minefield". Here again the rapid pace of change has meant that the book does not quite keep up with the very latest developments such as the details of partnership arrangements under the Health Act 1999, the NHS National Plan and proposals for social care trusts.

The basic structure of the work is retained, with introductory chapters on the sources of community care law and the duties to plan and assess, followed by chapters dealing with specific subject areas such as residential accommodation, NHS responsibilities for community care services, charging and the interplay between housing and community care. The last chapter in the book deals with remedies including judicial review and the Human Rights Act. There is a clear account of the grounds for, and the procedures of, judicial review before the coming into force of the Human Rights Act and the introduction of new rules setting up the Administrative Court. However the text does not attempt to discuss to what extent, after the Human Rights Act, the Administrative Court will be prepared to go beyond the "anxious scrutiny" of decisions touching on human rights issues, and review directly the merits of decisions before it. It is also somewhat surprising, given the expertise of the author in the human rights field, that his discussion of human rights issues is largely confined to the remedies chapter rather than more closely integrated into the main body of the text.

1 *Gordon and Mackintosh "Community Care Assessments - A Practical Legal Framework" Sweet and Maxwell 2nd edition 1996*

2 *Mandelstam "Community Care and the Law" Jessica Kingsley Publishers 2nd edition 1999*

3 *"O" v London Borough of Wandsworth, R. v. Leicester City Council ex p. Bhikha, CA Times 18th July 2000*

4 *Re. F (Adult: Court's jurisdiction) CA Times July 25th, [2000] 3 FCR 30*

Turning to the treatment of some specific issues of interest to mental health lawyers the new edition deals with a number of cases dealing with the housing rights of the mentally disordered. These include the decision of the Court of Appeal in *Croydon LBC v. Moody*[5] that in considering the reasonableness of a possession order on the grounds of nuisance, the fact that the tenant had agreed to treatment for his treatable personality disorder should be taken into account, and the important decision of Scott Baker J. in *ex p. Penfold*[6] that "ordinary" accommodation might have to be provided under s.21 of the National Assistance Act 1948 even when a local authority's homelessness duty had been discharged. Also referred to is the Court of Appeal decision in *ex p Kujtim*[7] on the circumstances in which a s.21 duty may treated as discharged by a local authority. That case raises a number of questions about the extent of continuing obligations of health and social services towards clients who are reluctant, or refuse to engage with services offered to them - especially when their reluctance or inability to accept help has itself been identified as a facet of their need.

Section 117 Mental Health Act 1983 duties inevitably loom large, though Clements properly reminds us that the majority of the mentally ill and formerly mentally ill do not qualify under s.117. Curiously, although he draws attention to the backbench origins of other important community care provisions, he does not mention the origin of section 117 as being a backbench amendment to the Mental Health (Amendment) Act 1982 brought by Baroness Masham. Depending on one's point of view, a reading of the relevant Hansard debates demonstrates either the danger that when legislating in this manner a legislative provision will be passed by Parliament which will prove to have far-reaching and completely unintended consequences, or the vital and positive role of the backbencher in effecting social change.

In connection with the perennial problems in securing compliance with s.117 care planning duties, Clements refers to the decisions in the *Hall* case[8] and guidance,[9] though not the National Service Framework.[10] The decision in the case of *ex p. K*[11], in which Burton J. took a robust and controversial view that there was no absolute duty on a health authority to comply with s.117 duties when individual clinicians were unwilling to provide clinical supervision, came too late for inclusion. Clements points out that as s.117 places no restriction on the services that might be provided, s.117 services are virtually unlimited in nature including where appropriate the provision of accommodation. Questions still remains about the extent of the duty - for example would it extend to purchasing a house for an allegedly "difficult" person such as Mr. Hall if there is no other way of meeting his needs? Following the case of *ex p. Watson*[12], Clements now states clearly that s.117 services may not be charged for, and more cautiously suggests there might be a human rights challenge to charges made for accommodation to those subject to guardianship who do not

5 *(1999) 2 CCLR 92*

6 *[1998] 1 CCLR 315, also see R. v. Wigan MBC ex p. Tammage [1998] 1 CCLR 582*

7 *[1999] 2 CCLR 340*

8 *(1999) 2 CCLR 361, (1999) 2 CCLR 383*

9 *In Hall the Court of Appeal said that the wording of the current Code of Practice suggested that a care plan "at least in embryo" should be available .Building Bridges - A Guide to Arrangements for Inter Agency Working for the Care and Protection of Severely Mentally Ill People" (Department of Health 1995), Effective Care Co-ordination in Mental Health Services: Modernising the Care Programme Approach (Department of Health 1999).*

10 *National Service Framework for Mental Health (Department of Health 1999).*

11 *9th June 2000. The Court of Appeal has given leave to appeal.*

12 *In which the Court of Appeal on the 27th July 2000 upheld the decision of Sullivan J (1999) 2 CCLR 402 A petition has been submitted to the House of Lords by the unsuccessful local authorities.*

qualify under s.117. However he does not deal in any detail with the massive problems posed to social services authorities by the possibility that large numbers of service users might now have restitutionary claims to charges already paid, nor with the stark unfairness to those now paying for services because they happen not to qualify under s.117, which others in no greater actual need receive free of charge.

The Legal Action Group are to be congratulated for keeping the price down to such a reasonable level, and for the improvements to the layout of the book. In particular the marginal indexing and flow charts now included, make the book far easier to use. A useful selection of the essential statutory provisions and guidance can be found at the end of the book, and while the coverage of guidance is not extensive, this is a minor quibble given the availability of this material on the internet and the quality of the text. In its first edition, this book established itself as an essential guide to the complex area of community care law. Until the arrival of a third edition (surely sooner than four years from now) it remains an essential purchase for everybody working within this area of law.

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