

History of Mental Health Law

by Rod Campbell-Taylor

While at their best law and medicine are mutually supportive disciplines, their relationship, particularly in the realm of the restraint and treatment of those considered mentally ill has been far from harmonious. Most modern day psychiatrists would probably argue that while patient's rights are worthy of some consideration their job is to get people well and if this means taking away their liberty and forcing them to submit to treatment this can all be justified in the name of enlightened paternalism. But can it? Contemporary debates can be better understood in the context of the history and evolution of mental health legislation and reform.

One of the earliest recorded private madhouses was located just down the road from my office in Dalston at Hoxton House [1695]. Others such as Fisher House, situated on what is now Essex Road was where James Boswell's daughter Euphemia was confined and later sued by her doctor for the costs of her board and "medical attendances." The writer Iain Sinclair has described how Hackney, because of its distance from the city, became a place ideal for hiding people away. Large mansions were turned into Hogarthian asylums; one such, Balmes House, located in the De Beauvoir area of Dalston was reputed to have given the world the word "barmy". A century later Joseph Conrad spent time recuperating from mental exhaustion at the German Hospital, another legendary Dalston medical institution (where incidentally Karl Marx had his appendix removed).

It is only with eighteenth century legislation such as the 1774 Madhouses Act we see the beginnings of modern day due process. The Act prevented persons being admitted into a licensed home without an order "in writing under the hand or seal of some physician, surgeon or apothecary." Section 21 of the Madhouses Act 1774 requiring some form of medical certification before admission can be seen as the original forerunner of the current day sections 2 or 3. In practice it appears many such licensed establishments roundly abused the system and accepted "all persons who were brought" by their families as an inconvenience of one sort or another provided they could pay for their board.

The Commission of the Royal College of Physicians (a kind of early Care Quality Commission) in theory had the power to prosecute breaches where houses were operating without or in breach of their licences, however they had no power to discharge patients, a right vested in the high court following an application for habeas corpus or through the intervention of a Justice of the Peace.

In one notorious case from 1762 a young woman [Mrs Hawley] disappeared after dining with a friend who suspected her family had confined her in a madhouse in Chelsea. The friend applied to the high court for a writ of habeas corpus, which the court initially refused because he was not a relative but ordered a doctor to be sent to investigate. The doctor was refused entry but managed to speak to Mrs Hawley

through a window and the writ was then granted. An investigation revealed that the house was used purely for purposes of general [unlawful] confinement and “..no lunatics were admitted”.

Nearly a century later the debate between law and medicine, due process and humane treatment was boiling up in the context of the Licensed Lunatic Asylums Bill of 1842. On the one hand Lord Granville Somerset the bill's sponsor laid stress on the need for effective licensing and inspection of houses to ensure that confinement was in accordance with the minimum level of due process. Thomas Wakely, founder of the Lancet magazine and proselytiser of reform argued that the whole system was both morally derelict and deeply anti-therapeutic. His 1840 manifesto in the Lancet had advocated “humane treatment” as the best for both the unhappy patient and society. Somerset maintained that a regime of more stringent procedural safeguards combined with inspection visits was the better approach. Such visits, he maintained, were better carried out by lawyers than physicians.

Lord Ashley took an even more rights-based approach that focussed on the question of liberty rather than cure, observing that the system was completely incapable of protecting individuals from arbitrary confinement and providing little means for reclaiming their liberty. This dialectic culminated in the Lunacy Inquiry Act 1842, which incorporated arguments from both perspectives and put in place an extensive statutory system of inquiry involving both doctors and lawyers into all aspects of the management, treatment and general well being of those confined.

Within three years the 1845 Lunacy Act was enacted which established the Lunacy Commission charged with monitoring of asylums including the admission and discharge of patients and the conditions of confinement. However it was not until the 1890 Lunacy Act that a judicial element - the written order of a JP or Magistrate - was introduced in relation to the admission of all patients. In reality many of the provisions of the 1890 Act were only repealed by the 1959 Mental Health Act.

It was only in the period between the end of the Second World War and the introduction of 1959 Mental Health Act that the civil liberties agenda made any real impact. Between 1947 and 1951 the newly formed National Council for Civil Liberties released reports that detailed the unlawful detention of upwards of 200 patients including those who had never been lawfully certified in the first place. If patient rights sometimes seem remote today, the position in 1950 was striking. In 1956 the NCCL highlighted the case of a woman who had been discharged from Rampton Hospital on a licence under which she was barred from having a boyfriend or going to a cinema or dancehall.

In subsequent years the driver for change has been largely the rulings of the European Court of Human Rights. Most notably the case of X v. UK [1981] in which the Court ruled that the 1959 breached article 5 of the European Convention insofar as mental health review tribunals had no direct powers of discharge in respect of so called “restricted patients”. This represented a major change enacted in the 1983 Mental Health Act. More recently the enactment of the Human Rights Act [1998]

has delivered the implementation of further improvements and safeguards, particularly in relation to people with learning disabilities or dementia living in conditions of control and restriction without formal safeguards.

While it would be a distortion to argue that the primary function of mental health law is to regulate the excesses of psychiatrists any more than it would be reasonable to hold that criminal law is there to regulate the police. The history shows us that the trend has been towards ever-greater scrutiny of the powers invested in the therapeutic professions.

For further reading see Andrew Roberts' excellent resource at <http://studymore.org.uk> and the late Roy Porter's extraordinary works, not least "Madman: a Social History of Mad-Houses, Mad-doctors and Lunatics" [2006]