



Introduction

This is not a law book in the usual sense, but a book *about* the law for therapists, written *by* a therapist. The starting point for the first edition of this book was my growing puzzlement as to why so little had been written on the relationship of therapy to the law in the UK. My previous training as a social worker had emphasised the legal framework which enveloped practice and gave it a foundation for making decisions. This approach seemed very alien to counselling, as I soon discovered when I became involved in working as a part-time counsellor, in training on counselling courses, and in undertaking my own professional development. Counsellors whom I met seemed either to dismiss the law as irrelevant, or to see it as a threat of some kind, or to be rather unnecessarily in awe of it as a omnipotent. These responses appeared to gather force as lawsuits about false memory cases in the USA started to surface, and a more general concern about therapists' vulnerability to legal action seemed to take root.

In a sense, the book is a response to a speaker at one conference on therapy and the law, who expressed the view that 'there is no case law on counselling in the UK'. This may be true in a strict sense, but this book is an attempt to describe the case law concerning counselling as far as it can be divined by looking at a broad range of related fields, such as medicine. Based on the example of medical case law, this is an attempt to read the main characteristics of the law as applied to therapy, in the absence, so far, of extensive case law. Hopefully, therapists may be able to avoid actually featuring in future case law by following some of the suggested guidelines included here.

If any lawyers read this book, they may be somewhat frustrated that it does not follow the format of a conventional law book. In addition, general statements are made about the application of the law which a trained legal eye will recognise as often containing exceptions which are hinted at, rather than fully explored. For every general legal principle, there seems to be an exception. The existence of exceptions to almost every general rule in law provides one of the reasons why this book cannot be taken as a definitive guide to the law, but is, rather, a general outline of the terrain. Advice to therapists is, in most cases, to stick to established paths. Therapists needing more detailed guidance on specific cases should seek legal advice, as the law is frequently changing, and no coverage of the law can be comprehensive in every respect.

Whilst on the topic of advice, therapists are often asked by clients what they should do, to which the classic response is for the therapist to turn the question round for the client to find their own preferred solution. However, when it comes to legal questions, it often seems that therapists become frustrated with the lack of certainty in the face of complicated and difficult legal issues. Responding to questions about what a

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therapist *may do*, or *may not do* or *must do* or *must not do* frequently depends upon the *context* in which they work, the nature of the *client group* and the *type of issue of concern*. This is especially true of therapists working with children and young people, for example. Therapists may prefer certainty in the form of a straight answer, but often the legal position provides less than absolute certainty, and simply sets out the parameters within which decisions can be made. The paradox seems to be that, as therapists, we encourage our clients to learn to work with ambiguity and uncertainty in their own lives, but we seem to prefer absolute certainty for ourselves, when encountering complex and difficult legal issues.

On the issue of therapists seeking an element of clarity about legal issues, it is perhaps worth pointing out the differences between *liability* and *risk*. Any lawyer is trained to identify liability in any transaction or responsibility. However, liability and risk may not necessarily belong to the same family of concepts. The liability of people being struck by lightning in the UK may be evenly spread across the population, but the actual *risk* incurred may be much more narrowly focused on a small proportion of people. In theory, therapists may be liable for a whole range of activities. In reality, the risks that they actually run in doing their work may be quite small. Few therapists are currently sued, and even fewer are successfully sued by clients. This may well change in the future, but the present culture both of therapy and the law would have to change to make this a more likely possibility.

There is, it seems, a fairly widespread perception of the law as a vague external threat to therapists, either in the form of unknown requirements concerning breaches of confidentiality, or for compliance with court-ordered demands for access to client information, along with the ever-present spectre of being sued by angry clients. This seems to have given way more recently to another, more optimistic construction of the relationship of therapy to the law. In some spheres of counselling and psychotherapy, the perception is emerging and gaining strength that therapy's relationship with the law is an opportunity to be grasped and explored in full. The recognition linked to this point is that therapists need to be better informed of their rights and responsibilities under the law as a starting point.

In recent years therapists have developed a major preoccupation as a profession with ethical issues related to their therapeutic work. This is exemplified by the production of the BACP *Ethical Framework for Good Practice in Counselling and Psychotherapy* in 2001, and by the successive conferences on ethics held by the UKCP. This book explores the crucial relationship between ethics and the law at a number of different levels, firstly, by illustrating the diversity of ethical models which influence legal decision-making. Secondly, it suggests the ways in which ethical principles, such as autonomy, find clear recognition and expression in legal concepts, such as informed consent and contract. My own view is that *ethics*, rather than *the law*, should drive therapeutic practice. However, therapists also need to take an active part in the developing dialogue on ethical principles and legal duties, in order to be fully informed about the options open to them and to their clients.

A note on how to use this book

In writing this book, I have tried to combine a theoretical discussion of the law affecting therapy with more practical information for therapists facing legal issues involving

their work. Thus the general outline of the law includes detailed reference to original sources, and to the relevant case law. Hopefully, these references will be useful for readers wanting to check original and more detailed sources, and will not break the 'flow' of the book for other readers. Frequent case studies, taken from therapy or from case law, are included, to illustrate some of the key issues being explored in each chapter. Legal references are written in a style which is probably unfamiliar to non-lawyers, so this style is briefly described at the beginning of the Table of Cases at the end of the book. The same section also contains an index of case law for the USA and UK, and Acts of Parliament referred to in the text, again for readers with a more specialist interest. The Glossary contains professional terms for which lawyers, therapists or clients may want brief definition or explanation.

For practitioners who may simply want to check the legal situation regarding a topic, such as defamation, or contract, for example, key points are displayed in summary boxes, together with sets of guidelines for professional practice for quick reference. Part of the therapist's role may be in passing on information to clients, or in gaining access to recent public documents, publications or legal advice. The Resources section at the end of the book contains a comprehensive list of organisations which can be contacted for further information by therapists or clients. For trainers and students, suggested questions are included at the end of each chapter, which identify key points for discussion.

In terms of its structure, the book begins with an outline of key terms relating to the law, and a survey of the relationship between ethics and the law, noting the perhaps surprising diversity of ethical approaches to be found at work within the law. The following chapter provides a broad overview of the law, its content and structure, with particular reference to civil law. The chapter on the courts describes the structure of the courts system, provides information for therapists facing involvement in legal proceedings, and explores issues of compensation, particularly regarding psychological damages.

Concerns about professional negligence are then explored in the fourth chapter, which looks at the closely related fields of medical and psychiatric case law. In the next chapter, the limits to confidentiality are identified, with the focus on the therapist's role as custodian of sensitive client information. This is distinguished from the legal pressures to grant access to this information to outside agencies, such as the courts, which is the subject of the following chapter, together with an outline of data protection requirements. In the following chapter, therapy with children and young people is examined as a specialist area in its own right, albeit one with implications for other therapists as well. The final chapter describes the development of statutory recognition of therapy, in terms of adoption counselling and infertility counselling. This is followed by a brief history of moves towards the statutory regulation of therapy in the UK.

The overall theme of this book is that the law is dynamic, fluid and rapidly changing, rather than being fixed for all time. Therapists need to be alert to all issues which have an impact on a broad spectrum of their work with clients. Hopefully, this book will be of assistance in this process.