Law and ethics in medicine

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Abstract

Law regulates many areas of medicine, so doctors should understand the legal framework within which they must work ethically. The UK Parliaments considers ethical principles when legislating on issues such as organ donation and abortion, and judges frequently consider ethical dilemmas in medicine. A new ethical perspective permeates medical law, illustrated by changed attitudes in Parliament and the courts, departing from assumptions based on paternalism and the view that the medical profession 'knows best', to recognizing the importance of patients' autonomy. This is notable in areas such as consent, treatment of patients lacking capacity, allocation of scarce resources, confidentiality, negligence, deprivation of liberty, organ donation, medical research, reproductive technologies and abortion. The new development was summed up by Lord Steyn, a senior judge: 'In modern law, medical paternalism no longer rules'. Thus, the law now requires doctors seeking consent to provide sufficient information to enable patients to agree to proposed treatment with appropriate knowledge of risks, adverse effects and possible alternatives. Central to this changed culture is the importance of good communication. This overview concentrates on describing legal process and reasoning in the context of medical practice, referring to cases where fundamental ethical values have guided legal decision-makers. More comprehensive guidance can be found in Further reading.

Keywords Law and ethics; legal reasoning; legislation; precedent; sources of law

Key points

- Legal rules apply to many aspects of medical practice
- The main sources of UK medical law are legislation, case law and the human rights framework
- In the absence of a statutory provision on a particular point, a legal ruling by a judge has the same authority as legislation
- UK judges have developed a more patient-centred approach in medical law cases
- Many illustrations of judges dealing with ethical dilemmas can be found in case law
- The doctrine of judicial precedent allows for both flexibility and certainty in the law

Legal terminology

Lawyers have developed specialist professional terminology, making the law difficult for non-lawyers to access and use. Rules of evidence and procedure are used in the courts, adding to non-lawyers' difficulties. Although the most common legal terms and basic legal concepts are explained here, the use of a good online legal dictionary is recommended. Table 1 sets out the basic differences between civil and criminal law.

Sources of UK law

There are several sources of UK law but no single document such as a code containing a statement of the whole of the law, and this reflects the complexity of the context in which medical law has developed. The main sources of UK law outlined here are legislation, case law and human rights law.

Legislation[2]

Statutes are passed by the Westminster Parliament, devolved Scottish Parliament, National Assembly for Wales, and Northern Ireland Assembly, and these have the highest legal authority, as do rules made under statutes (subordinate legislation). Examples of medical law statutes are the 19th-century Public Health Acts, Mental Health Acts 1983 and 2007, Mental Capacity Act 2005 and Human Transplantation (Wales) Act 2013. Certain areas of law contain a large volume of statutory regulation, some of it the result of EU Directives — for example, Health and Safety Law and the framework created by the Human Tissue Act 2004.

If there is no statute or subordinate legislation covering a particular matter, the relevant legal rules are found in the decisions of the courts. By the operation of the doctrine of judicial precedent, these judge-made rules are of equal force to legislation, being equally binding and authoritative, but in the event of a conflict legislation prevails. UK judges are expected to develop the law responsibly, and the operation of judicial precedent facilitates flexibility in decision-making, enabling the law to adapt to meet changes in social attitudes, scientific advances and economic factors. Judges also have the task of ruling on the way in which various statutory provisions are interpreted, and in so doing, follow guidance that has been developed to assist them.

Case law

Large areas of UK common law, for example much of the law of negligence and the law governing access to scarce resources, have been created and developed by judges, and much of what is loosely called 'medical law' has its roots in mainstream legal practice such as criminal law, tort and family law.

Human rights

As human rights law[3] is incorporated into UK law, there has been an overarching human rights framework applicable to medical

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Civil versus criminal law[1]

Civil law	Criminal law
Provides remedies for wrongs suffered by the claimant. The decision to claim lies with the individual or organization affected	Prosecutions are brought on behalf of the Crown following an investigation of alleged criminal activity. The Crown Prosecution Service decides whether to prosecute
The standard of proof is 51% based on 'the balance of probabilities'	There is a high standard of proof — judge or jury must be sure of the guilt of the accused
Terminology is fairly neutral: Claimant v. Defendant e.g. *Bolam* v. *Friern Hospital Management Committee*	Terminology suggests a criminal situation: the Crown or Prosecution v. Accused e.g. *R* v. *Adomako*
The result is a finding that the claim has been successful or has not been proved. If it is successful, the judge awards damages (compensation) or an order granting an equitable remedy	The result is an acquittal or a conviction followed by one of a range of sentences if the accused is convicted
Cases are heard in civil courts	Prosecutions are heard in criminal courts
The main objective is usually compensation but equitable remedies are sometimes sought	The objective is the punishment of wrongdoers. Compensation orders are sometimes available

Table 1

law since the year 2000. Section 3 of the Human Rights Act 1998 states that primary legislation and subordinate legislation must, as far as possible, be read and given effect in a way that is compatible with the rights described in the European Convention on Human Rights and Fundamental Freedoms 1950.

Public authorities, including courts and the NHS, must act in accordance with the Convention, and the Convention rights clearly have a strong basis in ethics. Several articles of the European Convention on Human Rights are relevant in medical law and are taken into account in legal argument, for example Article 2 (right to life), Article 3 (right not to be subject to inhuman and degrading treatment and torture), Article 5 (right to liberty and security), Article 8 (right to privacy and family life) and Article 12 (right to marry and found a family). Many of these rights are not absolute and are subject to exceptions. Article 8, for example, envisages exceptions to the right to privacy (including confidentiality) in the interests of national security, public safety or the country's economic well-being, for the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others.

Legal reasoning and the role of judges

Legal rules develop through the system of 'judicial precedent', by which courts are bound by earlier decisions of their own or of higher courts on the same or a closely related point. This doctrine operates within the hierarchy of courts, as set out below by the Ministry of Justice (Figure 1).

The higher the court within the hierarchy, the more authoritative its decisions as they 'bind' all lower courts. A binding precedent is one that a later court is obliged to follow. Thus, decisions of the Supreme Court bind all lower courts in cases in which there are facts similar to a previous decision of its own.

The most important part of a case is called the *ratio decidendi* (reason for the decision). This consists of the material facts of a case and the decision made on them. It is this *ratio decidendi* that binds lower courts.

Aspects of a case that are not vital to the decision are called *obiter dicta* (statements made in passing) and usually have little significance in later cases, although they may have some persuasive force. 'Persuasive' precedents are those which a court might choose to follow. Examples include statements made *obiter* in an earlier case and the decisions of foreign courts or lower courts.

An example of a highly persuasive *obiter* statement is a hypothetical example given by Lord Templeman in *Re B* in 1981, a case in which the court decided to sanction life-saving surgery for a baby with Down's syndrome. Lord Templeman said:

> There may be cases, I know not, of severe proved damage where the future is so certain and where the life of the child is so bound to be full of pain and suffering that the court might be driven to a different conclusion.

That very situation arose in *Re J* in 1990. The Court of Appeal was referred to the statement made by Lord Templeman and was strongly persuaded by it when deciding not to sanction treatment.

A judge in later cases hears the arguments of lawyers and decides whether a decision of the same or a higher court is binding in the current case, or whether it can be distinguished on the facts because it is different in some material way. Judges are frequently called upon to interpret legislation, and precedents have also been established relating to the meaning of words in statutes.

Although certainty is important in law, especially in the medical context, the Supreme Court can depart from an earlier decision of its own 'when it appears right to do so', following a statement by the Lord Chancellor in 1966. A press release clarified that this might happen when a previous House of Lords decision was no longer in line with social attitudes, or circumstances had altered since the previous decision had been made. (The House of Lords exercised the functions of the Supreme Court until 2009.)

Medical law provides illustration of this process. In 1957 the High Court established the Bolam defence in *Bolam v Friern Hospital Management Committee*, by which a doctor escaped liability for negligence by proving that s/he acted in accordance with a practice accepted as proper by a responsible body of opinion within the same specialty. A judge could not choose between two conflicting expert opinions.

Bolam was a decision of a High Court judge, so originally it was not considered very authoritative and, until the ruling was confirmed by the House of Lords in 1980, did not bind higher courts. The rule was modified by the House of Lords in line with changed social attitudes in 1997, and judges can now choose between conflicting expert opinions and reject one if it appears to be 'logically indefensible'[4].