

# **Legal aspects of midwifery**

**4th Edition**



**Other titles in the series include**

*Legal Aspects of Health and Safety* 2nd Edition

*Legal Aspects of Medicines* 2nd Edition

*Legal Aspects of Patient Confidentiality* 2nd Edition

*Legal Aspects of Pain Management* 2nd Edition

*Legal Aspects of Consent* 2nd Edition

*Legal Aspects of Death*

**Note**

*Healthcare practice and knowledge are constantly changing and developing as new research and treatments, changes in procedures, drugs and equipment become available.*

*The author and publishers have, as far as is possible, taken care to confirm that the information complies with the latest standards of practice and legislation.*

# **Legal aspects of midwifery**

**4th Edition**

*by*

**Bridgit Dimond**

Quay Books Division, MA Healthcare Ltd, St Jude's Church, Dulwich Road,  
London SE24 0PB

British Library Cataloguing-in-Publication Data  
A catalogue record is available for this book

© MA Healthcare Limited 2013

ISBN-10: 1-85642-504-5  
ISBN-13: 978-1-85642-504-9

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior permission from the publishers

Edited by Jessica Anderson

Printed by Mimeo, Huntingdon, Cambridgeshire

# Contents

<i>Foreword</i>		<i>vii</i>
<i>Preface</i>		<i>viii</i>
<i>Acknowledgements</i>		<i>ix</i>
<i>Dedication</i>		
<b>Section A Introduction</b>		
<i>Chapter 1</i>	The legal system and the accountability of the midwife	3
<b>Section B Client's rights</b>		
<i>Chapter 2</i>	Woman-centred care	15
<i>Chapter 3</i>	Consent	37
<i>Chapter 4</i>	Confidentiality, access to records and freedom of information	55
<i>Chapter 5</i>	Complaints	75
<i>Chapter 6</i>	Teenage pregnancies	91
<i>Chapter 7</i>	Status and rights of the unborn child	105
<b>Section C Litigation and accountability</b>		
<i>Chapter 8</i>	Negligence	117
<i>Chapter 9</i>	Record keeping, statements and report writing	145
<i>Chapter 10</i>	Health and safety	163
<i>Chapter 11</i>	Medication	191
<b>Section D Statutory provisions</b>		
<i>Chapter 12</i>	Criminal law and confinements	215
<i>Chapter 13</i>	Termination of pregnancy	241
<i>Chapter 14</i>	Legal issues relating to fertilisation, embryology and genetics	261
<i>Chapter 15</i>	Compensation for vaccine and other damage	285
<i>Chapter 16</i>	Public health	295

**Section E Specialist areas**

<i>Chapter 17</i> Child protection	313
<i>Chapter 18</i> Mental disorder	335
<i>Chapter 19</i> The future	353
<i>Further Reading</i>	373
<i>Websites</i>	381
<i>Glossary</i>	385
<i>Table of Cases</i>	391
<i>Table of Statutes</i>	399
<i>Index</i>	405

# Foreword

I am pleased that we now have this updated, concise and eminently readable text to guide midwives through the complexities of the law, as applied to their practice. The law is always close to midwifery and the key is to understand and be aware of it without it stifling the midwife's role and her decision making. As midwives work with their clients, they need to understand the balance between their professional skills and advice and responding to the views and wishes of the women for whom they provide care. This balanced relationship has legal, professional and ethical under-pinnings.

It is a measure of Bridgit's skilful explanations and direct relevance to practice that this text, now in its 4th edition, is well established as a must-have for midwives. A glance at the contents in my well-thumbed first edition shows how, in the intervening period, the balance of application of the law has changed. Child protection and safeguarding is a daily issue for many midwives as is the whole area of freedom of information and access to records. The advent of electronic methods of communication and data storage has not changed the law but has, as is well explained, served to remind midwives of their obligations whatever record format they are using.

I trust that this latest edition will become as much of a support and guide for today's midwives as previous editions have been.

*Louise Silvertown*  
Director for Midwifery, Royal College of Midwives

# Preface

This is an updated but more concise version of the third edition of this book which was published by Elsevier in 2005. This new edition concentrates on aspects of the law relevant to the student and practitioner of midwifery, leaving those areas relevant to midwifery management to a later volume.

Account has been taken of other books published by Quay Books, including those relating to legal aspects, and reference is made to those publications rather than repeating the information in this work. Note has also been taken of the fact that in the 20 years that have elapsed since I started writing, the world of communications has been revolutionised. Almost without exception, students have immediate access to the internet and can download with ease original documents, reports, memoranda, guidance from professional bodies and a great variety of other forms of information. Increasingly, information from official bodies is published online and not in printed format. Michele Klein (2011) sets out very clearly the advantages to midwives in engaging with this new technology (see also an article by Suzanne Wedlake, 2010, on midwives' perceptions of using e-learning for continuing professional development). There is much to be said for not repeating this information in this book, but rather referring the reader to the relevant websites and providing some advice on accessing the sources. However, there is also merit in ensuring that this is a stand alone book, which, certainly to the practising midwife, will assist in a speedier answer to some of the legal questions she may face in her time-pressured work. The compromise adopted here is to set out the basic legal principles for each of the topics covered and also cite the relevant statutory provisions and detail the appropriate cases. In addition, guidance is provided on the relevant websites, setting down exercises for those wishing to access the appropriate internet information. Perhaps a later edition of the book may put more emphasis on internet access.

It is a challenging time for midwives and other health professionals. It is hoped that this book will help lay the foundations of an understanding of the law and how it impacts upon practice

Klein M (2011) Informed choice: web-based midwifery. *MIDIRS Midwifery Digest* **21**(2): 172–5

Wedlake S (2010) Examining midwives' perceptions of using e-learning for continuing professional development. *MIDIRS Midwifery Digest* **20**(2): 143–50



# Acknowledgements

Hundreds of midwives have assisted me over this years in developing a content and style appropriate for a student or practising midwife who wishes to develop an understanding of the relevant law, and I give my thanks to them all.

I would like to give particular thanks to Joy James at the University of Glamorgan who has provided invaluable advice on which areas of the law are of particular significance thus assisting me in producing a more concise book.

As usual I pay tribute to the support which I receive from my family and especially to Bette to whom I am particularly indebted for her help in checking the proofs and preparing the indexes and to whom this book is dedicated.

# Dedication

To Bette

# **Section A**

## **Introduction**

In this Section, we explore how laws are formed and the structure of the legal system in the UK.



# The legal system and the accountability of the midwife

## What is the law?

“It is against the law” is a powerful statement, and anyone making it should be able to declare the source of the law to which reference is being made. If the statement is accurate then either an Act of Parliament/Statutory Instrument/directive of the European Union (known as a statute or “legislation”) or a decided case would be cited. (See Glossary for further explanations of legal terms.)

## Legislation

Legislation consists of both Acts of Parliament (with approval by the Houses of Commons and Lords, and the Queen’s signature), and directives and regulations emanating from Parliament or the European Community (EC), which we, as a member state, are required to implement and obey.

Legislation can be primary or secondary. Primary legislation consists of Acts of Parliament, known as statutes, which come into force at a date set either in the initial Act of Parliament or subsequently fixed by order of a Minister (i.e. by Statutory Instrument). The date of enforcement is often later than the date the Act is passed by the two Houses of Parliament and signed by the Crown.

A statute sometimes gives power to a Minister to enact more detailed laws, and this is known as secondary legislation. Some regulations have to be laid before the Houses of Parliament and in certain circumstances have to receive express approval. Statutory Instruments are an example of this secondary legislation.

Legislation, both statute and Statutory Instruments, can be accessed on the legislation website ([www.legislation.gov.uk](http://www.legislation.gov.uk)). EC legislation can be accessed on the bailii website ([www.bailii.org/](http://www.bailii.org/)). EUR-Lex also provides free access to EU law ([eur-lex.europa.eu/en/index.htm](http://eur-lex.europa.eu/en/index.htm)).

Increasingly, the devolved assemblies of the UK are enacting their own legislation and this can be accessed on the following websites:

- Wales: [www.wales.gov.uk/topics/health](http://www.wales.gov.uk/topics/health)
- Scotland: [www.scotland.gov.uk/Topics/health](http://www.scotland.gov.uk/Topics/health)
- Northern Ireland: [www.northernireland.gov.uk](http://www.northernireland.gov.uk)

This book will be predominantly concerned with the law relating to England, but reference to the relevant websites of the devolved legislative assemblies will be given where appropriate.

## **Decided cases**

The other main source of law is the decisions of the courts. This source is known as case law, judge-made law, or the common law. The courts form a hierarchy and the highest court in this country is the Supreme Court of Justice (formerly the House of Lords). If the Supreme Court of Justice sets out a specific rule, then this is binding on all courts in the country, except itself. A principle set out by a senior court is known as a precedent. Judges decide cases that may involve interpretation of Acts of Parliament, or situations where there does not appear to have been any enacted law or relevant case.

Each decision of the courts is reported, so that lawyers and judges can refer to the case, and the principles it established (known as the *ratio decidendi*) can be applied to any matters in dispute. If there is a dispute between a case and a statute, the latter would take priority: judges have to follow an Act of Parliament. Parliament can enact legislation which would overrule a principle established in the courts.

Appeals in cases based on European law can be made to the European Court of Justice in Luxembourg which gives interpretations of European laws. Its decisions are binding on the courts of member states.

Cases can be accessed on line on the British and Irish Legal Information Institute website ([www.bailii.org/](http://www.bailii.org/)). If the name of the case is known, a case search can be carried out, otherwise there can be a search by subject matter.

## **The Human Rights Act 1998**

This country was a signatory of the European Convention on Human Rights in 1950 and accepted the articles on human rights. However, the Convention was not incorporated into our law at that time. If a person considered his or her rights had been infringed then he or she had to take the case to Strasbourg, to the European Court of Human Rights, to argue the case there. The Human Rights Act 1998 gave

legislative force to most of the articles of the European Convention on Human Rights in the UK. It is considered in *Chapter 2*.

The Act and the articles of the European Convention on Human Rights, set out in Schedule 1 to the Human Rights Act 1998, can be found on the legislation website ([www.legislation.gov.uk](http://www.legislation.gov.uk)). The Convention can be accessed on its website ([www.echr.coe.int/ECHR/EN](http://www.echr.coe.int/ECHR/EN)).

The articles that are most relevant to the midwife are discussed in *Chapter 2*.

## **Effect of the European Community**

Since the United Kingdom signed the Treaty of Rome in 1972, it has become one of the member states of the European Community. The effect of this is that the UK is now subject to the laws made by the Council of Ministers and the European Commission. In addition, secondary legislation of the European Community in the form of regulations is binding on the member states. Directives of the Community must be incorporated by Act of Parliament into the law of each member state. See, for example, the European Directive 80/155/EEC Article 4, which sets out the definition of the activities of a midwife. This has now been incorporated into Article 42 of EEC directive 2005/36/EC which sets out the pursuit of the professional activities of a midwife and can be seen in *Box 1.1*.

### **Box 1.1. Professional activities of the midwife (Article 42 of EEC directive 2005/36/EC )**

1. The provisions of this Section shall apply to the activities of midwives as defined by each Member State, without prejudice to Paragraph 2, and pursued under professional titles set out in Annex V, point 5.5.2.
2. The Member States shall ensure that midwives are able to gain access to and pursue at least the following activities:
  - (a) Provision of sound family planning information and advice.
  - (b) Diagnosis of pregnancies and monitoring normal pregnancies, carrying out the examinations necessary for the monitoring of the development of normal pregnancies.
  - (c) Prescribing or advising on the examinations necessary for the earliest possible diagnosis of pregnancies at risk.
  - (d) Provision of programmes of parenthood preparation and complete preparation for childbirth including advice on hygiene and nutrition.

*Box 1.1/cont*

- (e) Caring for and assisting the mother during labour and monitoring the condition of the fetus in utero by the appropriate clinical and technical means.
- (f) Conducting spontaneous deliveries including, where required, episiotomies and, in urgent cases, breech deliveries.
- (g) Recognising the warning signs of abnormality in the mother or infant which necessitate referral to a doctor and assisting the latter where appropriate; taking the necessary emergency measures in the doctor's absence, in particular the manual removal of the placenta, possibly followed by the manual examination of the uterus.
- (h) Examining and caring for the newborn infant; taking all initiatives which are necessary in case of need and carrying out where necessary immediate resuscitation.
- (i) Caring for and monitoring the progress of the mother in the postnatal period and giving all necessary advice to the mother on infant care to enable her to ensure the optimum progress of the newborn infant.
- (j) Carrying out treatment prescribed by doctors.
- (k) Drawing up the necessary written reports.

The International Conference of Midwives set out a definition on 15 June 2011 which can be accessed on its website ([www.internationalmidwives.org/Portals/5/2011/Definition](http://www.internationalmidwives.org/Portals/5/2011/Definition)). It is due to be reviewed in 2017. The World Health Organization has also prepared information for Accession countries on the European Union Standards for Nursing and Midwifery. The second edition prepared by Thomas Keighley can be accessed on the internet ([www.euro.who.int/\\_data/assets/pdf\\_file/0005/10220](http://www.euro.who.int/_data/assets/pdf_file/0005/10220)).

## **Criminal laws and civil laws**

A major distinction in the law of the UK is that between criminal and civil laws.

### ***Criminal laws***

These laws, mostly derived from statutes, create offences which can be followed by criminal proceedings in the form of a prosecution. An example of a statutory provision giving rise to criminal proceedings is Article 45 of the Nurses, Midwives and Health Visitors Order, which makes it a criminal offence for a person other



than a registered midwife or doctor, or student of either, to attend a woman in childbirth, except in an emergency (see *Chapter 12*).

An example of case law which gives rise to criminal proceedings is the definition of murder which was set out in a case in the 17th century. Most of our criminal laws are enforced by prosecutions brought by the Crown Prosecution Service, which was created in 1985. Other bodies also have powers to prosecute in specific cases, e.g. the Health and Safety Executive, the National Society for the Prevention of Cruelty to Children, and environmental health officers.

There are other criminal laws, such as those created by local authority powers, known as by-laws, which create local offences. There is also a right of an individual to bring a private prosecution, but this can be costly and of uncertain benefit. (See *Chapter 12* for the criminal laws.)

### **Civil laws**

These are laws (both statutory and case law) which enable citizens to claim remedies against other citizens or organisations as a result of a civil wrong. A large group of civil wrongs are known as torts, of which negligence is the main one, but the group also includes action for breach of statutory duty, nuisance and defamation. Actions for breach of contract are not included in the definition of tort (see *Chapter 8*).

An example of a statute that can give rise to civil action is the Congenital Disabilities (Civil Liability) Act 1976, which gives a child who is born alive the right to sue in respect of negligence which led to him or her suffering from a congenital defect (see *Chapter 7*).

An example of a case which applies to civil proceedings is that of *Whitehouse v Jordan*, in which an obstetrician was sued for negligence on the grounds that he had allegedly pulled too long and too hard in a trial of forceps. The House of Lords (the predecessor of the Supreme Court of Justice) held that an error of clinical judgement may or may not be evidence of negligence, and that it had not been established that Dr Jordan failed to follow the reasonable standard of care required in the circumstances, based on the approved standard of practice at the time (see *Chapter 8*).

Some Acts may be actionable as both a criminal offence and a civil wrong. For example, in *Chapter 3*, the action for trespass to the person is discussed. This action can be brought where treatment is given without the consent of the individual and in the absence of other factors that would be a defence to the

action (e.g. acting with consent or under the Mental Capacity Act 2005 where the individual lacks the capacity to give consent). A trespass may, however, also be a criminal act of assault, and there could be a prosecution in the criminal courts. It can be seen from this that there is not necessarily a moral difference between a crime and a civil wrong.

## **The accountability of the midwife**

The midwife can be called to account for herself in four different legal settings: the civil and criminal courts, the Nursing and Midwifery Council (NMC) professional conduct hearings, and disciplinary proceedings before an employer (followed possibly by an employment tribunal hearing). Sometimes all four kinds of hearings may take place on the same set of facts, but they may have different outcomes. For example, if a baby has died, the parents may allege that the midwife is to blame. They may bring civil proceedings against the midwife or her employer for its vicarious liability for the negligent actions of the midwife (see *Chapter 8*). The police may investigate the circumstances and the Crown Prosecution Service might decide to bring criminal proceedings against the midwife for manslaughter and/or against the midwife's employer under the Corporate Manslaughter and Corporate Homicide Act 2007 (see *Chapter 12*). In these circumstances the midwife would also face fitness to practise proceedings before the NMC. Finally the midwife's employer would have to consider whether disciplinary proceedings should be brought against the midwife. It might, after reasonable investigation, decide to dismiss the midwife, in which case the midwife might consider making an application for unfair dismissal to an employment tribunal.

The results of these different proceedings may not be the same. The criminal courts might find the midwife not guilty of murder or manslaughter, yet the parents may succeed in their civil action against the employer. The employment tribunal might find that the midwife has been unfairly dismissed (for example the employer may not have followed the appropriate procedures in dismissing the midwife) but the NMC committee may find that the midwife was not fit to practise and she could be struck off the register. Clearly if that were to happen the midwife could no longer be employed as a registered midwife and would lose her job.

In this book, we consider the criminal law (see *Chapter 12*) and the civil law (see *Chapter 8*). Professional conduct proceedings of the NMC are considered in *Statutory supervision of midwives: A resource for midwives and mothers* (Osbourne, 2007). The professional conduct cases involving midwives can be accessed on the NMC website ([www.nmc-org.uk](http://www.nmc-org.uk)). For example, on 6 March 2009 it was reported

that a midwife had been struck off following a number of incidents including failure to diagnose a breech presentation, despite having been on supported practice for previous undetected breech. A spokesperson for the NMC stated that

*...her actions had the potential to cause very serious patient harm, she had no insight into her failings and no rehabilitative or corrective steps have been taken.*

New rules and standards published by the Nursing and Midwifery Council came into force on 1 January 2013. These are more concise than those published previously. They do not repeat legal principles that are found in other NMC guidance such as record keeping and medicines. The Midwives' Rules have legal force, the standards are guidance by the NMC which will be taken into account in any hearing before the NMC. They will be referred to constantly throughout this book and can be downloaded from the NMC website ([www.nmc-uk.org](http://www.nmc-uk.org)). From 14 January 2013 the NMC has introduced a process of voluntary removal from the register by which a registrant who is subject to fitness to practise proceedings and who does not intend to continue practising can apply to be removed from the register.

## **What about ethics?**

Some civil and criminal wrongs may also be ethically wrong. Some may not be considered as ethical issues. For example, failure to register the birth of a baby may not give rise to ethical issues if it has occurred simply from absent-mindedness. It would however be a criminal offence.

In this book we are concerned with the law and therefore there is little discussion of ethical issues. However, the reader is referred to the Further Reading list for sources on ethics in midwifery. Codes of practice and conduct are not in themselves “laws”. They do, however, provide guidance for professional practice, and could be used in evidence in civil or professional conduct proceedings to demonstrate that reasonable practice has not been followed. This is discussed further in *Chapter 8*.

## **Legal personnel**

Lawyers in this country are trained as solicitors or barristers. The former, in the past, have had direct dealings with clients and arranged with barristers (known as Counsel) for the paperwork to be drafted and for representation of

the client in court. Now, increasingly, solicitors are being trained for advocacy and have rights of presenting a case in court, and barristers may have direct contact with clients.

It is impossible in a work of this size to deal adequately with the complexities of the legal system and the procedures that are followed. The interested reader is therefore referred to the works in the list of Further Reading.

## **Conclusions**

An understanding of the different sources of law and how laws can impact on practice is essential for the midwife. The aim of this book is to introduce the midwife to the basic principles and language of law, indicating where further information can be obtained online, so that gradually knowledge and confidence can develop. Details of websites are given where possible to enable further information to be obtained.

## **Questions and exercises**

1. Look at the Glossary and identify the words and terms with which you are not familiar. Use your internet links to access further information on these terms.
2. Try and arrange a visit to a court of law, and make notes of the procedure which is followed, the language used, the level of formality followed (e.g. in clothes that are worn), and the purpose of the proceedings. What preparations would you need to make if you were required to give evidence?
3. Access the legislation website ([www.legislation.gov.uk](http://www.legislation.gov.uk)) and look up Schedule 1 to the Human Rights Act 1999. Consider those Articles in Schedule 1 that would appear to be relevant to the practice of midwifery and the rights of the woman, and discuss with colleagues what action needs to be taken to implement them. (Compare your answer with the Articles discussed in *Chapter 2*.)
4. The husband of a client attacks a midwife by grabbing her arm. She is contemplating bringing proceedings against him. What is the difference between a civil action and a criminal prosecution in this context? (See also *Chapters 8 and 12*.)
5. A client dies following an unsuccessful Caesarean operation. What factors would lead to a prosecution being brought against the staff involved or the hospital management? (See also *Chapter 12*.)

6. A community midwife has not insured her car for use in transporting clients. She takes a pregnant woman to hospital in an emergency situation. What are the likely repercussions? (Consider the insurance issues as well as issues of reasonable professional practice.)
7. In what circumstances would a midwife be entitled to receive compensation from the Criminal Injury Compensation Scheme? (See *Chapter 12*.)

## **References**

Osbourne A, Wallace V, Moorhead C, Jones D (2007) *Statutory supervision of midwives: A resource for midwives and mothers*. Quay Books, Dinton

The Nursing and Midwifery Order 2001. SI 2002 No 253

*Whitehouse v Jordan* [1981] 1 All ER 267