

Legal Aspects of Consent

Note

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

The authors, editor 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 Consent

Second edition

BJN monograph
Legal Aspects of Health Care series

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Foreword to the first edition

We lawyers are unpopular people and that is not surprising. We come along after the event and tell people what they should have done (or not done). This is particularly annoying for conscientious professionals who have to take sensitive and difficult decisions – about what to tell a patient, whether the patient is able to agree to or refuse treatment, whether he or she has in fact done so – in the heat of the moment. Much better if they have a clear idea of the legal principles and sensible guidance about how to apply them in advance. That is what Bridgit Dimond has set out to give you in this book.

But it goes further than that. The health care professions, the Department of Health and the NHS service providers are developing models of ‘good professional practice’ in this area. If there is clear professional guidance about what is good practice on a particular point, then a professional may have to justify departing from it in an individual case. It is harder to say that it was regarded as acceptable by a ‘responsible body of medical opinion’ (in the well known test laid down in *Bolam v. Friern Hospital Management Committee* [1957]). So the responsible professional needs to know what the guidance says as well as what the law says.

And on top of all that is the Human Rights Act 1998. The very essence of the European Convention on Human Rights is respect for human dignity and human freedom, as the European Court of Human Rights said in the case of Diane Pretty (the motor neurone disease sufferer who wanted her husband to be allowed to help her to commit suicide). The court also said that the notion of personal autonomy is an important principle underlying the right to respect for private life in Article 8. This does not mean that the patient’s wishes always prevail. But you need a book like this to tell you when they do and when they don’t.

Brenda Hale
December 2002

Preface to the first edition

Like the first book in this series, the law relating to patient confidentiality, this monograph follows the publication of a series of articles in the *British Journal of Nursing* on consent. The advantages of a book for health professionals setting out the law and practice on consent led to Quay Books agreeing that the articles, updated and revised, could form the basis of a concise publication covering the main concerns which arise in respecting the law relating to consent. Like the other books in this series, this is intended for all health professionals, health service managers and patient groups and their representatives. It aims to use a style which avoids legal jargon and by the use of illustrating situations or cases provides an easy guide to the law relating to consent. Since by far the majority of health professionals are women, *she* rather than *he* and *her* rather than *his* has been used for the registered practitioners whose role is considered in the following pages.

Many readers may not be acquainted with basic facts of the legal system and so these are briefly set out in the first chapter. It is hoped that this book, like the others in this series, will provide a succinct, useful basis from which practitioners and others can extend their knowledge of the law for the protection of their patients, their colleagues and themselves.

Bridgit Dimond
October 2002

Preface to the second edition

Since 2002, when the first edition of this book was published, there have been significant changes in the law relating to consent. The most important is the enactment and implementation of the Mental Capacity Act 2005, which provided a statutory framework for decision making on behalf of those adults lacking the requisite mental capacity to make specific decisions. This Act, along with other statutory changes, decided cases and new guidance from the DH and professional bodies, has led to major amendments to the first edition. It is hoped that this new edition will continue to provide a useful foundation on which health professionals can build their understanding of the laws relating to consent.

*Bridgit Dimond
May 2009*

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CHAPTER I

Sources of law and guidance

Introduction

This first chapter sets out the legal basis from which our laws of consent derive, and it also explains the provisions of the Human Rights Act 1998 and the legal system of the UK. The information is of necessity brief and readers may be interested in reading more detailed works set out in Further reading on page 267.

Source of law

Our laws derive from two principal sources: Acts of Parliament/statutory instruments (known as a statute or legislation) and decided cases. (See the Glossary – page 269 – for further explanations of legal terms.)

Legislation

Legislation, as well as consisting of Acts of Parliament (approval by the Houses of Commons and Lords and the Queen's signature) would also include directives and regulations emanating from the European Community, which the UK as a member state is required to implement and obey (see below).

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 a date subsequently fixed by order of a Minister (i.e. by Statutory Instrument). The date of enforcement is often later than the date on which it is passed by the two Houses of Parliament and signed by the Crown. The statute sometimes gives power to a Minister to enact more detailed laws, and these regulations are known as secondary legislation. Statu-

tory Instruments which are quoted in the text are an example of this secondary legislation. Devolution has given to the different parts of the UK (Scotland, Wales and Northern Ireland) varying powers of lawmaking, and increasingly different statutory provisions are coming into force in these parts of the UK.

Common law, judge made law, case law

The other main source of law is the decisions of the courts. This source is known as case law, or judge made law or the common law. The courts form a hierarchy and the highest court in this country is the House of Lords. The courts lay down principles which must be followed by courts below that level, unless the decision can be distinguished on the basis that it is not relevant to the case before it. Thus if the House of Lords sets out a specific principle, known as a precedent, then this is binding on all courts in the country except itself (i.e. the House of Lords does not have to follow its own precedents).

In the case of Diane Pretty (*R. (On the application of Pretty) v. DPP* [2001]), the House of Lords decided that her application (that her husband should be given an advanced immunity against any possible proceedings under the Suicide Act 1961 if he were to aid and abet her suicide), could not be granted. They did not find that her human rights as set out in the European Convention on Human Rights (see below) were breached by the Suicide Act 1961. She then applied to the European Court of Human Rights alleging a breach of her human rights but failed in her application (*Pretty v. United Kingdom* (2002)). (The case is discussed further in Chapter 19.)

The decisions of the courts are reported so that lawyers and judges can refer to a specific case and the principles established by it. These principles are known as the *ratio decidendi* and can be applied to any matters in dispute. Judges might also make statements about wider matters that are not directly the subject of the case before them, and these statements are known as *obiter dicta*. These may be of persuasive authority and interest in subsequent cases, but they are not binding as precedents. If there is a dispute between a case and a statute the latter would take priority: judges have to follow an Act of Parliament. Thus in the Diane Pretty case, had the House of Lords thought that the Suicide Act 1961 was contrary to the European Convention on Human Rights (see below), then it could have referred this statute back to Parliament for review. (In practice, however, the House of Lords did not consider that there was any clash between the Suicide Act 1961 and the articles in the European Convention on Human Rights.) Parliament can enact legislation which would overrule a principle established in the courts.

Human Rights Act 1998

This came into force in England, Wales and Northern Ireland on 2 October 2000 and on devolution in Scotland. It incorporates the articles of the European Convention on Human Rights (contained in Schedule 1 to the Act) into the UK's laws. (Schedule 1 can be found in Appendix 1 to this book.) The Act:

- requires all public authorities to implement the articles of the European Convention on Human Rights,
- gives a right to anyone who alleges that a public authority has failed to respect those rights to bring an action in the courts of this country and
- enables judges who consider that legislation is incompatible with the Articles of the Convention to refer that legislation back to Parliament.

Whilst there are no specific articles which expressly consider the law on consent, Article 2 on the right to life, Article 3 on the right not to be subjected to torture or to inhuman or degrading treatment or punishment, Article 5 on the right to liberty and security of person and Article 8 on the right to respect for privacy, family and correspondence all relate to some of the issues which arise in the laws on consent and will be considered in subsequent chapters. In a case concerning Siamese twins, the Court of Appeal had to decide if it was lawful to allow an operation to proceed which would automatically lead to the death of the one child who was dependent upon her sister's heart and lungs for survival. There was evidence that the dependent child Mary was killing her sister Jodie. Whilst both children had a right to life under Article 2 of the European Convention on Human Rights, the Court of Appeal held that the best interests of the twin who had the heart and lungs should prevail over the other and that the operation should go ahead. (*In re A (Minors) 2000*.)

Effect of the European Community

Since the UK signed the Treaty of Rome in 1972 it has been 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. Appeals from UK courts on EC laws can be made to the European Court