

Legal Aspects of Pain Management

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 Pain Management

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Contents

Foreword by <i>Professor Baroness Finlay of Llandaff</i>	vii
Preface	viii
Preface to the First Edition	ix
Acknowledgements	x
Chapter 1 The legal system	1
Chapter 2 Human rights	7
Chapter 3 Criminal law	13
Chapter 4 Negligence	19
Chapter 5 Professional registration	25
Chapter 6 Consent: Adults	31
Chapter 7 Consent: Children	37
Chapter 8 Consent: Mentally incapacitated adults	41
Chapter 9 Living wills/Advance decisions	49
Chapter 10 Giving Information	57
Chapter 11 Letting die, killing and suicide	63
Chapter 12 Confidentiality	79
Chapter 13 Medicines	85
Chapter 14 Complementary therapies	95
Chapter 15 Scope of professional practice	101
Chapter 16 Health and safety and consumer protection	107
Chapter 17 Standards and organisational issues	113
Chapter 18 Complaints and patient representation	119
Chapter 19 Record keeping	127
Chapter 20 Research	133
Chapter 21 Social security and other financial provisions	143
Chapter 22 Conclusions	149
Index of cases	151
Index of statutes	155
Abbreviations	159
Glossary	161
Appendix 1: Schedule 1 to the Human Rights Act 1998	165
Websites	171
Further reading	177
Index	183

Foreword

Ilora G. Finlay Finlay, FRCP FRCGP

Pain is perhaps the most feared of all the sensations. It generates fear and despair, breaks the victim in its wake and tortures the onlooker, be that family or friend. Old fears of morphine as a potent and potentially lethal drug gave way in the 1970s to a realisation that the drug was an effective analgesic. When administered orally and titrated up to achieve analgesia, it provides pain relief without shortening life. Yet the abuses became evident in society with addiction, tales of ‘double effect’ and the murderous intent of Shipman.

Lessons from other countries are important. The legalisation of euthanasia in Holland, until recently not legalised but simply not prosecuted when administered within guidelines, has resulted in a swing back amongst professionals. Awareness of the need for palliative care education and training has increased and doctors are realising that every single patient needs to be able to access good symptom control. As Robert Twycross so often said, ‘You do not need to kill the patient to kill the pain.’

The law can seem a blunt instrument when a clinician confronts the myriad of clinical issues in any one patient and tries, sometimes without success, to come to a sound decision in the patient’s best interest. We can all learn from the precedents that have made case law. European law is now supplementing this legal framework in England and Wales; it is increasingly shaping the attitudes of society to clinical decision-making processes. Yet lawyers often seem terrifying to clinicians, as if they are ready to pounce on any error to make capital out of it, ignorant of the difficulties and uncertainties the clinician faces, as the law appears to set absolutes that may be open to misinterpretation. Patient autonomy is a phrase much bandied about. Often forgotten is the irrefutable principle that each person is autonomous and the autonomy of one cannot override the autonomy of another within the principles of bio-medical ethics.

The contextual legal framework, within which care is delivered to those who are suffering, highlights why failure to respect the duty of care has severe consequences in law. This book sensitively takes the clinical scenario and explores it, providing references and teaching challenges for discussion. For the next generation of healthcare professionals decisions will become harder, not easier. The internet with its information explosion creates new challenges as patients and their families can access vast mounts of unclassified information; some is based on sound scientific enquiry, some is based on validated human experience. But amongst the ‘information’ of ‘pseudo- information’ is much that is simply whim or exploitation of the vulnerable. It is through this minefield that the clinician must steer the person in distress. And as increasingly difficult decisions are taken, ignorance of the law is no defence.

Preface

I welcomed the opportunity to bring this small book up to date. Much has happened in both statute and common law since the First Edition. In particular the Mental Capacity Act 2005 has at long last filled the gap which existed in statute law on decision making on behalf of those incapable of making their own decisions. The aims of the book remain the same: to bring an understanding of the law relating to the management of pain to the many health and social care professionals, including their managers and their tutors in an easy to read succinct way. I also hope that the book will be useful to patients and patient representatives and their organisations. If practitioners have confidence in the law which applies to their practice, then they can concentrate on their work of caring for the patient. If patients understand the law which applies to their situation and their legal rights, then their dialogue with their health and social care professionals can be constructive and meaningful.

Bridgit Dimond

Preface to the First Edition

In 1987 I was seconded from the then Polytechnic of Wales (now the University of Glamorgan) to work with South Glamorgan Health Authority and during that time acted as patient's representative at the Cardiff Royal Infirmary. During my work there we set up several multidisciplinary brainstorming groups to resolve intractable problems in the hospital. One of these was the difficulties of patients who had come to the Accident and Emergency Department with injuries or conditions which required the examination by doctors from other specialities in the hospital, such as paediatrics, orthopaedics, etc. It was the policy that pain relief should not be administered by the Accident and Emergency staff until the patient had been seen by the specialist doctor. Unfortunately this could involve seriously long waiting times for the patients and the situation was clearly unacceptable. One of the members of the brainstorming group was Ann Taylor, a nurse from the Intensive Care Unit. Subsequently, she developed an interest in pain management and moved from the Cardiff Royal Infirmary to the University Hospital of Wales, where she now works in the Department of Anaesthetics and Intensive Care. She initiated an international course for multidisciplinary health professionals in pain management and this has since been developed to Masters degree status with other lecturers involved. Ann's work in this field was subsequently recognised when she was appointed as Welsh Woman of the Year in 1999.

It has been my privilege to give the legal input to the course and it has always been evident to me that a book covering the legal aspects of pain management would be a useful adjunct not only to those on the pain management course and other similar courses, but to all those many health professional from a wide range of specialities who have to deal with many complex legal issues relating to pain management. It should also be of benefit to patient groups and relatives and others involved in palliative care. This book is written for all such people. Because of the variety of their disciplines, the generic term (pain) practitioner will be used, and because the majority are female 'she' and 'her' will be used to denote an individual. Many readers may not be acquainted with basic facts of the legal system and so these are briefly set out in early chapters. It is hoped that the book 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. In recognition of the origins of these writings and her significant work in pain management, the book is dedicated to Ann Taylor.

Bridgit Dimond

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Many people have assisted me in the preparation of this book, particularly those who have participated in the Diploma and Masters Courses in Pain Management run by the Welsh National School of Medicine, with their many questions and concerns about legal issues.

In addition, I am considerably indebted to the help of Ann Taylor and her colleagues, to Elizabeth Holden, Carys Evans and Joanne Larkman with their assistance on benefits available to those receiving palliative care, and to Pat Simpson for her many ideas. As always I am grateful to the constant support and encouragement of Bette Griffiths who once again prepared the indexes.

To Ann

The legal system

Box 1.1: Situation

June was suffering from multiple sclerosis (MS) and experiencing considerable pain. She learnt from an MS support group that fellow sufferers had successfully used cannabis to control the pain. She was given information about how she could obtain it, but was warned that it was contrary to the law and that she could face imprisonment. She decided to take the risk. Unfortunately, she was caught while making the purchase and she and the drug dealer were arrested. June feels that there should not be a law making it illegal for her to have pain relief and is worried about whether she could be sent to gaol. What is the situation?

What is ‘law’?

How was any law created to make an MS sufferer taking cannabis a criminal?

Our laws derive from two principal sources: Acts of Parliament/Statutory Instruments (known as statute or legislation) and decided cases. (See Glossary for further explanations of legal terms). For further information on all aspects of law covered in the book readers are referred to the author’s book (Dimond, 2008) and the other works cited in the further reading section on p. 177.

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 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 this is known as secondary legislation. Statutory Instruments that are quoted in the text are an example of this secondary legislation. Referring to the situation in *Box 1.1*, it is as a result of legislation, in particular the Misuse of Drugs Act 1971, that the use of cannabis is at the time of writing a criminal offence. There are however proposals that private personal use of the drug should not be an offence. The Liberal Democratic party adopted this as a resolution at its Spring conference in 2002. If a Bill is introduced into Parliament and has sufficient support, then there could be amendments to the Misuse of Drugs Act which legalises the use of cannabis in specified situations, but possibly still retaining the criminal offence of dealing. Following approval by both the House of Commons and the House of Lords and the Queen's signature, the Bill would become an Act and could be brought into force by Statutory Instrument on a specified date.

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 with the highest court in this country being the Supreme Court (replacing the judicial House of Lords in October 2009). If the Supreme Court sets down a specific principle, known as a precedent, then this is binding on all courts in the country, except itself (i.e. the Supreme Court does not have to follow its own precedents). Following the Hillsborough football disaster, the House of Lords (as it was then) had to rule on whether it was lawful to withdraw artificial feeding from a patient in a persistent vegetative state (*Airedale NHS Trust v Bland [1993]*). It held that artificial feeding for Tony Bland could cease, on the basis that that was in his best interests. (This is considered in *Chapter 11*.)

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. For example, in the Diane Pretty case, which is considered in *Chapter 2*, the House of Lords could not overrule the Suicide Act which made it a criminal offence for her husband to assist her to die. Had it thought that the Suicide Act was contrary to the European Convention on Human Rights (see below), then it could have referred it back to Parliament. It did not do this. Parliament can enact legislation which would overrule a principle established in the courts. If Jane (*Box 1.1*) were to be convicted for the offence of possession of cannabis, the judge would have considerable discretion over her punishment, from an absolute discharge to imprisonment. The court could not, however, overrule the Act of Parliament which made the possession of cannabis illegal.