

Legal aspects of health and safety

2nd Edition

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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 Health and Safety

2nd Edition

by

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Foreword to the 1st Edition

Since the late 1990s, a systematic drive to improve the quality and safety of National Health Service care has been based, at its core, upon the concepts of risk management and clinical governance.

This book is a clear and comprehensive resource for healthcare professionals, setting out the relevant laws around these and a wide range of related issues.

Sir Liam Donaldson
Chief Medical Officer Department of Health
November, 2004

Preface to the 1st Edition

Like the other books in this series, this text follows the publication of a series of articles in the *British Journal of Nursing* on health and safety law in health care. Those articles, revisited and updated, form the basis of a concise publication covering the main concerns which arise in the law relating to health and safety in the National Health Service.

This book is intended for all health professionals, health service managers, professional associations and trade unions, patient groups and their representatives. Each chapter uses a situation to illustrate the relevant laws so that the law can be explained in a practical jargon-free way. The basic facts of the legal system are briefly set out in the first chapter. The book does not pretend to be encyclopaedic in its coverage, rather it is intended to introduce readers to the basic principles which apply and the sources of law, so that they can, by following up the further reading and websites provided, add to their knowledge. Writing about health and safety law is like painting the bridge over the river Forth: it is never finished. Changes in the statutory provisions and new cases require some amendments, but hopefully this book will provide a baseline on which readers can develop their knowledge and understanding.

Bridgit Dimond
November, 2004

Preface to the 2nd Edition

Seven years is a long time in legal history and it is not surprising that this second edition contains many changes from the first. Not only is there the usual updating of statutes and statutory instruments including the first prosecution under the Corporate Manslaughter and Homicide Act and new cases amending rulings set in previous cases, but there are new NHS organisations such as the Care Quality Commission. In addition the Coalition Government is taking a fundamental review of health and safety legislation in the light of the Young Report *Common Sense Common Safety* 2010. The Health and Safety Commission merged with the Health and Safety Executive into a single body and further changes are taking place with the abolition of many quangos including the National Patient Safety Agency. New guidance has been given in many of the specific areas covered including health surveillance, COSHH regulations, manual handling, violence, bullying and stress.

It is hoped that this concise book will continue to provide a foundation for an understanding of the laws relating to health and safety within the context of health and social care.

Bridgit Dimond
June 2011

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Introduction to the law

Scenario I.1. Situation of ignorance

'The law says:...'

Amanda, a clinical nurse practitioner in the Accident and Emergency (A&E) Department is surprised one day when she is told by a staff nurse, that the law says that all patients in A&E Departments should be seen by a doctor before they leave the Department. Amanda questions this statement but does not know how to find the answer.

Introduction

This chapter provides an introduction to the main sources of law and the legal system. The following topics will be covered:

- Sources of law
- Human Rights Act
- Other international charters relating to health and safety
- Civil and criminal law
- Civil and criminal courts
- Public and private law
- Legal personnel
- Procedure in the civil courts
- Procedure in the criminal courts
- Accusatorial system
- Law and ethics
- Rules of Professional Conduct

Sources of law

Law derives from two main sources: statute law and the common law.

Statute law

Statute law is based on legislation passed through the agreed constitutional process. Legislation in the UK is formed by the introduction of a bill into either the House of Lords or House of Commons, sometimes by the Government, sometimes by a private member and follows through a recognised procedure by way of hearings, committee stages and report stage and, eventually, following agreement by both Houses and the signature of the Queen, becomes an Act of Parliament. The actual date it comes into force will either be set out in the Act itself or will be determined at a later date by statutory instrument (known as secondary legislation). The Act of Parliament may provide for powers to be delegated to Ministers and others to enacting detailed rules to supplement the Acts of Parliament. These are known as Statutory Instruments. They must be placed before Parliament before coming into effect. Since devolution, the Scottish Parliament has the right to enact legislation, within specified parameters; the Welsh Assembly has more powers since the Referendum held in 2011. The main legislation on health and safety is the Health and Safety at Work Act 1974 under which many regulations have been made in the form of statutory instruments. Some of the regulations result from European Community Directives.

As a consequence of its signing of the Treaty of Rome, and becoming a member of the European Community (EC), the United Kingdom is bound by the legislation of the EC. The EC Regulations have direct application to member states, unlike the EC Directives which must be incorporated into UK law to be effective. (This does not apply to their application to State authorities, where they are automatically binding.)

Common law

Decisions by judges in courts create what is known as the common law, case law or judge-made law. A recognised hierarchy of the courts determines which previous decisions are binding on courts hearing similar cases. The European Court of Justice, which is held in Luxembourg, can hear cases between member states on European laws, or applications by the domestic courts for a ruling on a point of law. A recognised system of reporting of judges' decisions ensures certainty over what was stated and the facts of the cases. The main principles that are set out in a case are known as the *ratio decidendi* (reasons for the decision). Other parts of a judge's speech, which are not considered to be part of the *ratio decidendi*, are known as *obiter dicta* (things said by the way). Only

the *ratio decidendi* is directly binding on lower courts, but the *obiter dicta* may influence the decision of judges in later court cases. It may be possible for judges to ‘distinguish’ previous cases and not follow them on the grounds that the facts are significantly different. For example, before the Occupier’s Liability Act 1984 was passed, which defined the liability of the occupier towards trespassers, the liability of the occupier to trespassers was based on decisions made by judges in disputes. Cases which involved harm to children where the occupier had been held liable, were held not to be binding on judges hearing cases involving adults, so that the occupier was held not to be liable to an adult trespasser. The earlier cases relating to children were ‘distinguished’. Subsequently, legislation relating to the occupier’s liability for trespassers was enacted in the Occupiers’ Liability Act 1984 (*Chapter 9*).

Judges are, however, bound by statutes and if the result is an unsatisfactory situation, then this may be remedied by new amending legislation. If disputes in relation to the interpretation of the legislation arise, and the dispute is brought to court, then the specific section of the statute or paragraph of a statutory instrument has to be interpreted by the judge who will make a ruling. The decision may be appealed against by the party who has lost the case and eventually the Supreme Court may be called upon to make a decision. These decisions of the courts are known as precedents. Thus, law develops through a mix of statutory promulgation and common law decision making. The Human Rights Act 1998 (see below) takes precedence over other legislation, since a judge can make a declaration of incompatibility and can refer back to Parliament for reconsideration statutes which appear to infringe the articles set out in the European Convention of Human Rights.

Procedure for judicial review

The decisions of judicial and administrative bodies can be challenged by an application to the Queen’s Bench Division for the decision or adjudication to be reviewed.

The Human Rights Act 1998

The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides protection for the fundamental rights and freedoms of all people. The UK was a signatory as were many European Countries which are not members of the European Community. Norway is a signatory to the European Commission on Human Rights but not a member of the European Community.

It is enforced through the European Commission and the European Court on Human Rights which meets in Strasbourg. However, following the passing of the Human Rights Act 1998 most of the articles are directly enforceable in the UK courts in relation to public authorities or organisations exercising functions of a public nature. Several articles of the European Convention relate to health and safety issues and they will be considered later in this book. For example, it has been alleged by some with disabilities that hoisting is contrary to their human rights under Article 3 and 14 (*Chapter 9*). In one case an employer argued that Section 40 of the Health and Safety at Work Act 1974, which placed a burden on an employer to show on a balance of probabilities that it had taken all reasonable precautions in fulfilling its statutory duties, was contrary to the presumption of innocence, and article 6(2) of the Convention (*Davies v. Health and Safety Executive* 2002). However, this argument was not accepted by the Court of Appeal which held that the 1974 Act was motivated by the need to protect public safety and the Act's regulatory nature meant that those operating within it had to conform to certain standards. In the field of health and safety it was acceptable to impose absolute duties on employers and it did not follow that a reverse burden on proof, within reasonable limits, would infringe article 6(2) (*Chapter 7*).

Other international charters relating to health

This country is also a signatory to, or has recognised, many other international charters which recognise rights in a variety of fields. These include: UN Convention on the Rights of the Child, the UN Convention on the Elimination of All Forms of Discrimination against Women, the Universal Declaration of Human Rights, the Declaration of Helsinki developed by the World Health Organization in 1964, recently amended in 2000 (relating to research practice). These Charters are not directly enforceable in this country, although some of their principles may be contained in statutes or common law, and reflected in guidance provided by the Department of Health and professional bodies and organisations.

Civil and criminal law

The civil law covers the law which governs disputes between citizens (including corporate bodies) or between citizens and the State. Contract law and the law of torts (civil wrongs excluding breach of contract), rights over property, marital disputes, wrongful exercise of power by a statutory authority, all come under the

civil law. The sources of civil law are both statutory and the common law. Thus, the Occupiers' Liability Act 1957 is statutory law, whereas the principle that the employer must take reasonable care of the health and safety of the employee is common law: a principle laid down by the House of Lords in the case *Wilsons and Clyde Coal Co Ltd v. English* [1937] (Chapter 5).

Criminal law relates to actions that can be followed by criminal proceedings in which an accused is prosecuted. Like civil law the sources of criminal law are both statutory and the common law: thus the definition of murder derives from a decision of the courts in the 17th century; whereas the employer's duty to take reasonable care of the employee is not only defined by the common law as part of civil law, but also set out in the Health and Safety at Work Act 1974 and enforced through the criminal courts. Both criminal proceedings and civil proceedings could thus arise from the same set of facts or incidents.

For example, a patient alleged that an unregistered physiotherapist had raped and indecently assaulted her, but the Crown Prosecution Service decided not to prosecute. However, the patient brought a civil action for assault and obtained compensation of over £25000, including an amount representing aggravated damages because the defendant put her through a harrowing ordeal by having to appear in court (*Miles v. Cain* 1988).

Criminal hearings

A prosecution is brought in relation to a charge of a criminal offence and heard in the criminal courts where the standard of proof is beyond reasonable doubt. Summary offences are heard in the Magistrates Court and indictable offences (the more serious offences) in the Crown Court. Many offences are triable either way and the accused can opt for trial by jury. In the Magistrates Court, the magistrates (see below) decide if, on the facts, guilt has been established and, if so, sentence the accused. They also have the power to remit the accused to the Crown Court for sentencing by the Crown Court judge. In the Crown Court, the jury decide if the accused is guilty and, if so, the judge sentences the person convicted.

Criminal negligence

Gross negligence in professional practice may amount to the crime of manslaughter. For example, an anaesthetist failed to realise that during an operation a tube had become disconnected as a result of which the patient

died. He was prosecuted in the criminal courts and convicted of manslaughter (*R v. Adomako* 1994) (see *Chapter 4*, p. 36). There would also be liability on his employers in the civil courts for his negligence in causing the death of the patient. The Law Commission (1994) had recommended that the law should be changed to enable it to be made easier for corporations and statutory bodies to be prosecuted for manslaughter. As a result the Corporate Manslaughter and Homicide Act was enacted. Under this the chief executives and chairmen of boards can be found criminally guilty of the offence of corporate manslaughter. (For further details of this Act see *Chapter 4*)

Civil hearings

An action is brought in the civil courts in relation to an alleged civil wrong by a claimant who sues a defendant. The claimant has to satisfy a burden of proving liability on a balance or preponderance of probabilities. There are many kinds of civil action which can be brought: in this book we are principally concerned with the law relating to negligence, breach of the contract of employment and breach of statutory duty.

Public and private law

Another distinction in the classification of laws is that of public and private law. Public law relates to a matter which is a subject of public concern. Thus, the Health and Safety at Work Act is a public law act. Private law relates to matters arising between individuals and/or organisations: thus, a contract of employment places duties upon both employer and employee in relation to health and safety and obeying instructions. An employee could sue the employer for compensation for injuries which have resulted from the employer's failure to take reasonable care of the employee's safety. Public law deals with those areas of law where society intervenes in the actions of individuals. In contrast, private law is concerned with the behaviour of individuals or corporate bodies to each other.

Scotland and Northern Ireland

This book describes the law which applies to England and Wales. For the most part this also applies to Scotland and Northern Ireland, but there are some differences, which are increasing as a result of devolution.

Legal personnel

If a person believes that she has a claim for compensation because of the actions or omissions of health professionals, after possibly seeking advice from the Citizen's Advice Bureau, she would ask a solicitor to take her case. A solicitor is a professionally qualified person (usually possessing a law degree or the Part 1 Common Professional Examinations followed by completion of the Law Society's professional examinations and completion of a set time in supervised practice) who tends to have direct contact with the client. The solicitor may seek the opinion of a barrister (known as counsel) on liability and the amount of compensation. A barrister will usually have a law degree (or have taken the Part I Common Professional Examinations) and must complete the examinations set by the Council for Legal Education. The barrister must be a member of an Inn of Court and complete a term of apprenticeship known as pupillage. Traditionally, the barrister has had the role of conducting the case in court and preparing the documents which are exchanged between the parties in the run up to the court hearing (known as the pleadings). However, recent changes enable either of the professions to represent clients in court, subject only to their having the requisite training.

Procedure in civil courts

Following Lord Woolf's (1996) inquiry, significant changes have been made to civil procedure to simplify and speed up the process. The overriding objective of the civil procedures is to enable the court to deal with cases justly. The emphasis is on attempting to secure a reconciliation of the parties through mediation or alternative dispute resolutions, rather than pursue the case in court. The courts have the responsibility of overseeing cases by what is known as 'case management'.

For personal injury claims under £1000 and other civil claims under £3000, the claim would normally be heard in the Small Claims Court through a process of arbitration. Above these amounts and for claims up to £50000, the claim could be heard in the County Court. Above £50000, the claim would usually be heard in the High Court (divided into three divisions: Chancery, Family and Queen's Bench Division).

Procedure in criminal courts

The magistrates, who are either lay people known as justices of the peace (JPs) and who tend to sit in threes (the bench) or legally qualified persons known as

stipendiary magistrates, can only hear charges that relate to offences known as summary offences or offences which can be heard either as summary offences or on indictment (these latter are known as triable either way). Only the Crown Court (with judge and jury) can hear charges of offences which can only be made on indictment (i.e. indictable only offences). Such offences are the most serious, e.g. murder, manslaughter, rape, grievous bodily harm, and other offences against the person, and these can only be heard on indictment in the Crown Court. The magistrates used to have a gate-keeping role in relation to these offences, and oversaw committal proceedings where they decided if there was a case to answer, and if the case should therefore be committed to the Crown Court for the trial to take place. Now a hearing in the Magistrates for arrangements for a plea and case management hearing will take place and the case proceed automatically to the crown court for the trial to take place. In criminal cases, the Crown Prosecution Service (CPS) has the responsibility for preparing the case, including statements, witnesses, etc. for the prosecution in criminal cases.

Accusatorial system

A feature of the legal system in this country is that it consists of one side with the responsibility of proving that the other side is at fault or guilty, or liable, of the wrong or crime alleged. This is known as an accusatorial system and it applies to both civil and criminal proceedings. In criminal cases, the prosecution attempts to show beyond all reasonable doubt that the accused is guilty of the offence with which he is charged. The magistrates, or the jury in the Crown Court, determine whether the prosecution has succeeded in establishing the guilt of the accused, who is presumed innocent until proved guilty.

In civil proceedings, the claimant (originally known as the plaintiff), i.e. the person bringing the action, has to establish on a balance of probability that there is negligence, breach of contract, breach of a statutory duty or whatever civil wrong is alleged. In civil cases (apart from defamation), there is no jury and the judge has the responsibility of determining whether the claimant has succeeded in establishing the civil wrong and, if so, the compensation which should be paid or other remedy. The role of the judge or magistrate is to chair the proceedings, intervening where necessary in the interests of justice, and advising on points of law and procedure.

The accusatorial system contrasts with a system of law which is known as inquisitorial where the judge plays a far more active role in determining the outcome. An example of an inquisitorial system in this country is the Coroner's

Court. Here, the coroner is responsible for deciding which witnesses would be relevant to the answers to the questions which are placed before him by statute (i.e. the identity of the deceased, how, when and where he came to die), and he asks the witnesses questions in court and decides who else can ask questions and what they can ask. As a result of this 'inquisition', he or a jury, if one is used, determine the cause of death. Significant changes to the role and jurisdiction of the coroner are being made following the Shipman Inquiry (Shipman Inquiry Third Report 2003).

Law and ethics

Law is both wider and narrower than the field of ethics. On the one hand, the law covers areas of practice which may not be considered to give rise to any ethical issue, other than the one as to whether the law should be obeyed. For example, to park in a no-parking area would not appear to raise many ethical issues other than the decision to obey or to ignore the law. On the other hand, there are major areas of health care which raise significant ethical questions where there appears to be little law. At any time, of course, a practice which is considered to be contrary to ethical principles can be challenged in court and the judge will make a determination, on the basis of any existing statute law or decided cases, on what the legal position is and thus create a legal precedent.

Situations may arise where a health professional considers the law to be wrong and contrary to her ethical principles. In such a case, she has to decide personally what action to take in full awareness that she could face the effects of the criminal law, civil action, disciplinary procedure by her employer and professional proceedings by the registration body. In certain cases the law itself provides for conscientious objection. Thus, no one can be compelled to participate in a termination of pregnancy unless it is an emergency situation to prevent serious harm to the mother (Abortion Act 1967). Similar provisions apply to activities in relation to human fertilisation and embryology where the Human Fertilisation and Embryology Act 1990 provides a statutory protection clause.

Rules of professional conduct

Professional Associations such as the Society of Radiographers, the Royal College of Nursing, the Royal College of Midwives, the Chartered Society of Physiotherapists and the British Association of Occupational Therapists have issued guidance governing professional practice. Health professional regulation

bodies such as the Nursing and Midwifery Council, the Health Professions Council and the General Medical Council have also issued codes of ethics and professional practice. These codes are not in themselves directly enforceable in a court of law, but could be used as evidence in civil or criminal proceedings that their reasonable professional standards of practice have not been followed. An allegation of a breach of the Code of Practice could also be used as a basis for fitness to practise proceedings, for which the ultimate sanction is removal from the Register. Most of the codes of ethics and professional conduct include clauses which relate to health and safety issues.

The new code of professional conduct for nurses and midwives

In June 2008, the Nursing and Midwifery Council (NMC) published its new Standards of conduct, performance and ethics for nurses and midwives (NMC, 2008).

Under the heading Manage Risk, it states:

- You must act without delay if you believe that you, a colleague or anyone else may be putting someone at risk
- You must inform someone in authority if you experience problems that prevent you working within this Code or other nationally agreed standards
- You must report your concerns in writing if problems in the environment of care are putting people at risk

This is a wide-ranging duty and parallels both the statutory duty of the employee under section 7 of the Health and Safety at Work Act 1974 to co-operate with the employer in obeying health and safety regulations and to take care of him/herself and his/her colleagues (*Chapter 2*), and also the duty of the practitioner as an employee under the contract of employment to obey reasonable instructions and to act with reasonable care in carrying out his/her work (*Chapter 5*).

This paragraph recognizes the responsibility to raise concerns about health and safety issues.

Failure by the practitioner to observe the Code could result in the practitioner facing fitness to practise proceedings brought by the NMC. The practitioner could also face disciplinary proceedings brought by his/her employer and, in serious cases, could be personally prosecuted in the criminal courts for a health and safety offence.

Other guidance

Many other organisations and public bodies issue guidance for professional conduct and procedures for the provision of health care. The National Health Service Executive and Department of Health issue circulars and executive letters providing advice for health and social services organisations and staff. These do not have the direct force of law, but the Department of Health would expect them to be followed. Directions issued by the Secretary of State under statutory powers are directly enforceable against health service bodies through the default mechanisms provided for in the legislation.

Application of the law of Scenario 1.1

Amanda could first see if the staff nurse has any basis for her claim that all patients in A&E departments must be seen by a doctor, by asking her if she is quoting an Act of Parliament of statutory instrument or perhaps directives/regulations from the European Community or is she quoting a ruling by a judge (known as the common law, judge-made law, or case law). The chances are that the staff nurse will have no such authority. In fact, there is no such law in this country whether by statute or common law. Common law does require that every person is entitled to receive a reasonable standard of care when they are treated in hospital, but if this reasonable standard can be delivered by a nurse in the A&E department, there is no requirement that a doctor should also see the patient.

Conclusions

The variety of sources of law and perplexity as to what constitutes a law can be very confusing, but it is helpful for professionals that if they are confronted with a statement that ‘the law says...’, they seek an explanation as to whether the basis for the assertion is a statute or the decision of a court or is derived from a charter or professional code of practice (which usually do not have the force of law) or, as often may be the case, a pronouncement which is totally incorrect because there is no such law.

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