

Part One: The Dimensions

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The Legal Dimension: Legal System and Method

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We live in a society dominated to an increasing – some would say excessive – extent by legal rules and processes. Many of these apply to all of us – for instance, the rules relating to use of the road as driver, passenger, cyclist or pedestrian, while others apply only to specific groups. In this chapter we will concentrate on the law as it affects the provision of health care. It is easier to do this than to look at the law relating to nurses or nursing, since for many purposes there is no legal distinction between different health care professionals and their contributions to the overall health care system. Before we do this, however, it is necessary to look briefly at the main features of the legal systems in which health care operates. There are four distinct legal systems within the United Kingdom. Northern Ireland has had a substantial measure of legislative and executive devolution since the 1920s, although this was often suspended due to civil unrest. A new devolution settlement for Northern Ireland and first-generation ones for Scotland and Wales were enacted in the 1990s.¹ The Welsh initially sought and obtained more restricted powers, but these have since been extended. The devolved legislatures are not sovereign, they exercise defined powers formally delegated by the Westminster Parliament, although any attempt to curtail or modify either the legislative or executive competence of the devolved provinces would be politically hazardous. The provision of health care through the National Health Service (NHS) was originally established throughout the United Kingdom by legislation of general application, but health is now a devolved matter, therefore in Scotland and Northern Ireland it is under the authority of the Scottish and Northern Irish Ministers, and legislative changes are made by the Scottish Parliament and Northern Ireland Assembly. In Wales the Welsh

Assembly Ministers have had executive authority for over a decade, but the Welsh Assembly has only recently acquired legislative competence in relation to primary legislation. The Westminster Government and Parliament now have direct authority only over the NHS in England.

This chapter will concentrate on the English position. It is also possible to draw valuable illustrations and guidance from other countries outside the United Kingdom, particularly in relation to general legal principles, rather than the detail of legislative provisions, although these are influential rather than decisive.

1.1 The law and its interpretation

In this section we will look briefly at the various sources of law operating in England² and at some of the methods used by judges when they have to interpret and apply the law.³

1.1.1 Statute law

Most English law is in the form of statutes. These are made by the Crown in Parliament. Since 1689, by virtue of the Bill of Rights, the Crown in Parliament has been the supreme legislative body in England, and subsequently in the United Kingdom. A statute, or Act of Parliament, results from a bill or proposal for a statute. The bill may be proposed by the Government or by any individual MP or member of the House of Lords. It is debated and approved, with or without amendment, in both Houses.⁴ Once approved in Parliament by both Houses, the bill receives formal Royal Assent. Statutes have been passed on almost every topic imaginable. Among those of direct relevance to the health care professions are the following:

- The series of statutes establishing the NHS and subsequently modifying its structure and organisation. The National Health Service Act 1946 carried through Nye Bevan's project to secure a national, public, health service. Today the principal Act is the National Health Service Act 1977, but this has been amended and supplemented many times – for example, by the National Health Service and Community Care Act 1990, which introduced NHS Trusts and the internal market; the Health Act 1999, which introduced Primary Care Trusts and the Commission for Health Improvement; the Health and Social Care Act 2001, which made numerous changes to community health provision; the Health and Social Care (Community Health and Standards) Act 2003, which among other things created Foundation Trusts; and the Health Act 2009, which among other things introduced the NHS Constitution. The Health and Social Care Act 2012, which among other things extends GP commissioning and restructures NHS management regulation, recently continued this process of amendment and development.

- The Acts regulating the health care professions, such as the Medical Act 1983 for doctors, and the Nurses, Midwives and Health Visitors Act 1997.⁵

Statutes generally provide the broad framework of rules. Thus section 1(1) of the National Health Service Act 1977, in its latest form after amendment, provides:

It is the Secretary of State's duty to continue the promotion in England and Wales of a comprehensive health service designed to secure improvement – (a) in the physical and mental health of the people of those countries, and (b) in the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with this Act.

This is called 'primary legislation' because it sets out the principal foundational rules. More detailed regulations are contained in statutory instruments, which are made by ministers (or in practice by their civil servants) under powers conferred by a relevant statute. This is referred to as 'secondary legislation' because it deals with matters of detail dependent on the general powers given by primary legislation. So, for instance, the provision of general medical services is governed by sections 28C to 34A of the National Health Service Act 1977, which provide for regulations on a variety of topics, including: the manner in which, and standards to which, services are to be provided; the persons who perform services; the persons to whom services are to be provided; and the adjudication of disputes.

In theory the Crown in Parliament can pass a statute on any subject whatever, and may also repeal any existing legislation. So in theory Parliament can accordingly legislate for the execution of people on some arbitrary ground, such as having red hair. This is subject to three very different qualifications, as follows:

- (1) Parliament can only operate within the scope of what is politically and socially acceptable. This not only means that the Red-haired Persons (Compulsory Slaughter) Act will never see the light of day, but more importantly that legislation on such contentious issues as abortion or euthanasia is not undertaken lightly.
- (2) By virtue of the European Communities Act 1972, Parliament has granted supremacy to the legislation of the European Union (EU) in those areas covered by the Treaty of European Union and the Treaty on the Functioning of the European Union. This can mean that existing parliamentary legislation is found to be incompatible with EU law, although the courts will always try to interpret the two pieces of legislation consistently with each other, and it can even mean that new legislation must be disregarded.⁶ In practice EU law does not really have much specific bearing on medico-legal and ethical issues, although since it does deal with recognition of qualifications and many equal-pay and equal-opportunity issues in employment law, it may have an impact on the professional life of many nurses. EU free trade and competition rules apply to drugs and medicines as they do to any other products, and they feature in much of the case law. The EU also regulates the provision of services, and this includes private medical services

with a cross-border element, as well as public medical services to the extent that they are in competition with private provision.

- (3) The Human Rights Act 1998 came into full effect on 2 October 2000. This Act is designed to give effect in English law to the rights conferred by the European Convention on Human Rights and Fundamental Freedoms (ECHR) ('Convention rights'). This has been in effect since 1954, and was originally binding on the United Kingdom internationally through the European Court of Human Rights and the Council of Europe, but not as part of our own legal system. So even if rules of English law, whether in statutes or otherwise, were inconsistent with the Convention, they prevailed, although the United Kingdom might then be held to be in default by the European Court of Human Rights. This has now changed as follows:
- Each new bill must be certified by the Minister responsible to comply with the Convention rights, or an explanation given as to why it is appropriate to legislate incompatibly.
 - English law must be construed so far as possible to be compatible with the Convention rights. The courts have now made it clear that they will exercise this power robustly, as explained later.
 - If an Act is found by the courts to be incompatible with Convention rights, the judges may make a declaration to that effect and it will be up to the Government to invite Parliament to make the necessary changes.
 - The courts will have regard to decisions of the European Court of Human Rights when interpreting English law.
 - All public bodies must act in accordance with the Convention. This includes the various component parts of the health service.

Judges must interpret all statutes to conform to Convention rights 'so far as it is possible to do so'. Although the full implications of this are still being worked through, the approach of the judges is to first consider what the social or other policy purpose of the legislation is, then whether there is a breach of Convention rights if the legislation is interpreted naturally. If there is, but this was clearly intended because of the overall structure of the Act, or the issues are complex and far-reaching, the judges will be reluctant to impose an alternative interpretation. Where they can work 'with the grain' of the legislation, especially where the incompatibility appears accidental and there is no need to address fundamental policy issues, the courts will 'read down' the actual words used and substitute a form of words that secures respect for Convention rights.⁷ The Convention confers a number of rights on people. Some of them are substantive in nature, such as the right to life and the right to freedom of expression, while others are procedural, such as the guarantee of a fair trial. This applies to disciplinary proceedings and requires that there be an independent and impartial tribunal. This may be problematic for bodies such as the Nursing and Midwifery Council (NMC) which have been responsible for the investigation and adjudication of complaints and have had difficulty in developing systems which provide for the necessary degree of independence.

Some areas of medico-legal significance are likely to be affected by the Act. One example is the detention of mentally impaired people. This is permitted in

principle under Article 5, where it is necessary for the protection of the patient or others and there is the safeguard of an appeal to an independent judicial body independent of the executive government.⁸

In 1998 in the case of *R v. Bournewood NHS Trust, ex parte L* the House of Lords approved under the doctrine of necessity the use of informal measures to keep 'compliant' patients who lacked the capacity to consent in hospital without using the powers under the Mental Health Act 1983. In *HL v. United Kingdom* (2004) the European Court of Human Rights ruled that this did not provide adequate safeguards.⁹ In *R (Sessay) v. South London & Maudsley NHS Trust* (2011) any notion of the use of necessity when dealing with a non-compliant incapacitated patient was rejected; the Mental Health Act 1983 and the Mental Capacity Act 2005 together provide a complete statutory framework regulating compulsory detention, assessment and treatment. The acts both of the police and of the hospital, outside the statutory framework, breached the claimant's right to liberty under Article 5 of the Convention.

The right to life would appear to be of direct concern to the health care community, but in practice it focuses on negative aspects (preventing officially sanctioned killing), rather than positive ones (requiring states to provide resources and facilities to cure the sick).¹⁰ In *D v. United Kingdom* (1997) it was held that, while deporting an HIV-positive prisoner to St Kitts, where treatment was not available, amounted to inhuman and degrading treatment, it was not necessary to consider whether the state was failing to ensure the right to life. Indeed recent decisions of the UK courts have held that deportation of HIV-positive patients will not even amount to inhuman or degrading treatment in the absence of extreme circumstances.¹¹ It is also clear as a result of one of the first cases under the Act that withdrawal of hydration and nutrition from a patient in persistent vegetative state (PVS) does not entail a breach of the right to life (*NHS Trust A v. Mrs M., NHS Trust B v. Mrs H.* (2001)).

Both the UK courts and the European Court of Human Rights have held that the refusal of the state to allow assisted suicide is neither an infringement of the right to life (this was a rather convoluted argument that the right to life included a right to terminate one's own life) nor a failure of proper respect for the privacy and autonomy of the patient. In this latter instance it was held that while there was a right to die, safeguards might be necessary against abuse and coercion, and the existing rules were not disproportionate for achieving this.¹² However, doubts persisted, and it was eventually determined that it was appropriate to require the Director of Public Prosecutions to promulgate a policy on prosecution in cases of assisted suicide.¹³

1.1.2 Common law

The rules of the common law pre-date statute. However, there are now so many statutes in so many areas of law that the common law rules are normally of secondary importance. These rules are legal principles laid down over the centuries by the judges in deciding the cases that came before them. In theory the judges were simply isolating the relevant principles from a body of law that

already existed and which represented the common view of the English people as to what was right and lawful, but in practice the judges were really developing a coherent and technical set of rules based on their own understanding of legal principle. We will look at the techniques the judges currently use later. For the moment it is important to recognise that there are some areas where, despite the rise of statute, the common law remains of considerable importance.

The best example is tort, in particular negligence. This is important to nurses, as this branch of the law deals with whether a patient who has suffered harm while being treated will be able to recover compensation because the treatment he received was inadequate.

The judges also have the task of interpreting statutes and statutory instruments and giving effect to them. They have developed their own techniques and principles for this task, which are themselves part of the common law.

An important function of the judges today is controlling the activity of central and local government and other public bodies by means of judicial review. This is now the responsibility of the Administrative Court, which is part of the High Court. Judicial review is essentially a means of ensuring that decisions and policies are made lawfully and by the correct procedures. The judges themselves have developed the rules on which decisions can be challenged and what grounds of challenge are available.¹⁴ In principle, the judges accept that they have not been given responsibility for making the decisions in question, and so do not consider the merits. In *R v. Central Birmingham Health Authority ex parte Walker* (1987) the court had to consider a failure to provide treatment to a particular patient, as a result of decisions not to allocate funds to this particular aspect of the health authority's operations. It was held that the authority was responsible for planning and delivering health care within a given budget and the resulting decisions on priorities. The court could not substitute its own, inexpert, judgment, particularly as it would only hear detailed arguments about the needs of this one patient and not about the whole range of demands. However, in *R (Coughlan) v. North & East Devon HA*¹⁵ the court did address the question of what constituted health care and what constituted social care, as the financial arrangements for these were different. This was a question of statutory interpretation, not of relative priorities. The issue of health care resources is more fully discussed in Chapter 8.

1.1.3 European Union law

Throughout the post-World War II period, the states of western Europe have been engaged in a complex and long-term project of economic cooperation and integration. The first major stage in this was the Treaty of Rome, which established the European Economic Community in the 1950s. The United Kingdom joined this Community in 1974. The initial objective was the establishment of a common market, an area within which there was to be free movement of the various factors of production of goods and provision of services, namely goods, labour, management and professional skills and capital. Initially this meant the removal of obvious barriers, such as customs duties, immigration controls,

exchange controls on money and other restrictions. Subsequently other objectives, such as environmental protection, have been added, and indeed the entity has been renamed the European Union, although the main impact of the Union is still on economic affairs.

Free movement of workers, guaranteed by Article 45 of the Treaty on the Functioning of the EU (TFEU), implied many additional social policies, as workers would not, in practice, move around the EU unless their social security entitlements were ensured and they were allowed to bring their families with them. Genuine freedom of movement also required a common approach to qualifications, with no discrimination on grounds of nationality, and also equal opportunity, at least between men and women. This has resulted in much legislation and many decisions of the European Court of Justice. Article 53 of the TFEU specifically gives power to regulate mutual recognition of diplomas and qualifications. Directives 77/452 and 80/154 made provision for general nurses and midwives, respectively, but there are now general frameworks for the recognition of degree-level and other vocational qualifications in Directive 2005/36, which deals in detail with many medical, nursing and allied qualifications.

The case of *Marshall v. Southampton and SW Hants AHA* (1986) established that UK law permitting differential retirement ages as between men and women in the health service was incompatible with EU law requiring equal treatment, and as a result the UK law had to be disregarded.

The member states of the EU have agreed, in effect, to transfer to the EU institutions their sovereign rights to make and apply laws in those areas for which the EU is to be responsible. As a result EU law prevails over national law in these areas where they are in conflict. However, there are a number of different mechanisms for securing this, and it is not simply a question of ignoring national legal provisions.

The European Council, which comprises an elected president, the heads of government of the member states and the president of the European Commission, is the principal policy making body for the EU. It meets in regular summits which discuss current economic and international relations issues. The European Council should not be confused with the Council. This is a legislative and administrative body, comprising relevant departmental ministers from each member state. In most cases the legislation is made jointly by the Council and the Parliament, on a proposal from the European Commission. In many cases the Council can act by a majority, and thus legislate against the wishes of one or more member states. The majority is usually a 'qualified' or weighted majority designed to ensure that there is very substantial support for the measure. In practice great efforts are made to ensure a consensus of opinion. The Parliament does not initiate legislation but, as noted above, does have to approve and join in making most important legislation, so it has at least a blocking power and can suggest amendments. The Parliament must also approve the EU budget and the members of the Commission. It may also remove the whole Commission, and although it has never voted to do so, the likelihood of this occurring led to the resignation of the Commission in 1999 as a result of allegations of financial irregularities against one of its members.

The Commission is the administrative arm of the EU. It implements policies and proposes legislation, and can itself make detailed regulations, particularly in relation to the Common Agricultural Policy. It also makes decisions on alleged infringements of EU law – for example, in relation to competition law. It is responsible as ‘guardian of the treaties’ for ensuring that member states comply with their EU obligations.

The European Court of Justice, assisted by the General Court, has the sole responsibility, to the exclusion of the national courts of the member states, for interpreting EU law. It does so by means of rulings on points of law referred by national courts (Article 267 of the TFEU), deciding cases brought against the member states for alleged failure to comply with their obligations under EU law by the Commission (Articles 258 and 260) and by judicial review of the validity of acts of the institutions (decisions on particular cases or secondary legislation) on the application of other institutions, the member states and others directly affected (Article 263).

There are two forms of Act that amount to secondary legislation, namely, Regulations and Directives; both are governed by Article 288 of the TFEU. Regulations, which may be made by the Council, with or without the Parliament, or by the Commission, are directly effective rules of EU law that must be obeyed by all persons and companies within the EU and will be enforced by national courts. Directives, which are normally made by the Council and Parliament, are used where the EU wishes to ensure that national law in all member states achieves the same results, but it is not appropriate to do this by way of regulation. One example is in relation to company law, where the law of the states is very variable in its form and terminology, so regulations would be meaningless.

EU law applies not only to states but also to individuals. This was not clear from the beginning, but the Court of Justice ruled in *van Gend & Loos* (1962) that an individual could rely on a treaty provision which was clear and complete and capable of conferring direct rights (in this case a prohibition on new customs duties) to defeat a claim by a state based on its own incompatible legislation. In *Defrenne v. Sabena* (1976) it was held that a treaty provision meeting these requirements (in this case the right to equal pay for women) could be relied on against a person or company, notwithstanding incompatible national legislation.

The position with regard to directives is more complex. They normally provide for an implementation period; while this is running they have no legal effect (*Pubblico Ministero v. Ratti* (1979)), unless the state passes implementing legislation early, while the period is still running. In that case, the state is bound by the terms of the directive (*Pfeiffer* (2005)).

After the implementation date directives are binding on the state,¹⁶ therefore the state is prevented from relying on its own incompatible law. In addition, the state can be obliged to act in accordance with them (*Marshall v. Southampton and SW Hants AHA* (1986)).

This binding effect applies to the courts, which must interpret national legislation ‘as far as possible’ in accordance with the directive, even in cases involving two private litigants with no state involvement (*Marleasing* (1992)). This applies particularly to rules relating to remedies, which must be effective (*von Colson*

(1986)). However, where the two cannot be reconciled, national law will prevail (*Wagner Miret* (1993)).

A directive cannot be relied on as such against a private individual or company (*Faccini-Dori v. Recreb* (1995)), although the court can be asked to interpret national law, as above.

Where an individual or company suffers loss as the result of the failure of the state to implement a directive properly or at all, as a last resort the state may be held liable in damages (*Francovich* (1993)) provided that the breach is sufficiently grave (*Brasserie du Pêcheur/Factortame* (No. 3) (1996)). In principle this liability extends to a court decision that fails to apply community law (*Köbler* (2004)). Note also that this remedy may be available where the state fails to comply with EU law in other ways, as was the case in *Factortame*.

English courts have been willing to apply very radical interpretative methods to English legislation introduced specifically to give effect to EU requirements, even 'reading them down' to the extent of reversing the apparent meaning of the English legislation. The reasoning behind this is that it was the primary intention of Parliament to comply with the EU requirement, and the words used were believed to achieve this, so any reinterpretation meets that underlying purpose, even if it is not the obvious interpretation of the particular passage (*Pickstone v. Freemans* (1989); *Litster v. Forth Dry Dock* (1990)). After considerable uncertainty it seems that the same will apply to other legislation not passed specifically to meet EC requirements (*R v. Secretary of State for Employment ex parte Equal Opportunities Commission* (1994); *Webb v. EMO Air Cargo* (No. 2) (1995)), although there has been some suggestion that the English courts are happier to see damages claims for non-implementation, rather than radical interpretation (*Kirklees MBC v. Wickes* (1993)).

1.2 The English legal system

The English legal system has developed over many centuries, and although there have been piecemeal reforms, many old procedures and systems remain in place. This applies particularly to titles. Why should the principal judge of the civil side of the Court of Appeal be called the Master of the Rolls? He has nothing to do with either baking or high-end motor cars. What actually happened was that an official responsible for keeping the official records, or rolls, of the Chancery was gradually given a judicial role and by the 19th century, when the Court of Appeal in its modern form was established, he had become a senior judge and was therefore the right person to be appointed to preside over the Court of Appeal.

Effectively there are two court systems in England. The criminal courts concentrate on crime, while the civil courts deal with everything else. There are some exceptions, where specialised tribunals have been set up. The most important of these are probably the Employment Tribunals¹⁷ and the Employment Appeal Tribunal, which deal with most employment-related issues, including equal opportunities, although the various tribunals within the social security system deal with more cases. There are also separate tribunals for income tax and VAT.

1.2.1 Criminal justice system

All cases start with an appearance in the magistrates' court. Usually the case will have been investigated by the police and will be prosecuted by the Crown Prosecution Service, but other government departments and agencies, local authorities and bodies such as the RSPCA also prosecute cases. Private individuals may prosecute, but rarely do. There are a total of some 1,720,000 cases each year,¹⁸ of which 60 per cent are purely summary offences (motoring offences such as speeding, careless driving and defective vehicles, and other minor offences of drunkenness, vandalism, etc.). These must be dealt with in the magistrates' court. The great majority of defendants plead guilty or do not contest the case. The remaining more serious offences fall into two groups. The most serious offences, such as murder, rape and robbery, are actually a small proportion of the total and can only be tried at the Crown court, 'on indictment' – the magistrates' court only deals with bail and legal aid. The others are the middle range of offences (e.g. most assaults, theft, fraud and burglary). These are said to be triable 'either way'. This means that if the defendant admits the charge when it is put to him in the magistrates' court, he is convicted there, although he may be committed to the Crown court for sentence if the magistrates' powers of sentence¹⁹ are inadequate. If the defendant does not admit the offence, the magistrates must decide whether they have power to hear the case, having regard to its seriousness and complexity. If they decline to hear it, the case must go to the Crown court. If they agree to hear the case, the defendant may still elect trial at the Crown court.

Where a case is heard by the magistrates, the defendant may appeal against sentence (and, if he pleaded not guilty, conviction) to the Crown court. These appeals are heard by a judge sitting with magistrates. Although an appeal against conviction is a full rehearing, it will not be before a jury. Both prosecution and defence may appeal to the Queen's Bench Division of the High Court,²⁰ where they consider that the final decision is wrong on a point of law (as opposed to being a wrong decision on the facts). They may also apply to the same court for judicial review of any preliminary decision (e.g. on bail or legal aid).

The Crown court deals with about 130,000 cases a year, of which about 30,000 are contested trials. About 30 per cent of these result in acquittals. These trials are before a judge and jury, with the judge responsible for decisions on matters of law, evidence and procedure, and the jury responsible for matters of fact and the final verdict.

The defendant may appeal to the Court of Appeal (Criminal Division) on the ground that the verdict is unsafe. The Court considers whether the defendant was prejudiced by irregularities at the trial, such as rulings of the judge on law, or the admissibility of evidence, or errors in the judge's summing-up. In effect the Court is asking, 'Can we rely on the jury's verdict, or do we feel that they would have decided otherwise if the irregularity had not occurred?' The prosecution may not appeal against an acquittal, although they may ask the Court of Appeal to consider the point of law involved in an acquittal on a hypothetical basis by an Attorney General's reference. They may also challenge a ruling made by the trial judge which has the effect of terminating the proceedings in favour

of the defendant. The defendant may, with leave, appeal against sentence, and the prosecution may appeal against an unduly lenient sentence. There is an appeal to the Supreme Court, formerly House of Lords, for both prosecutor and defendant from the Court of Appeal where the case raises a point of law of public importance.

Although nurses may commit crimes, there is usually no direct connection with their professional activities. The availability of controlled drugs in a hospital environment may lead nurses into temptation, and there may be cases of deliberate harm to patients, which will be prosecuted as assaults under the Offences Against the Person Act 1861, or in extreme cases as murder, as in the notorious case of Beverley Allitt, a children's nurse at Grantham Hospital, who in the 1990s murdered or seriously harmed a number of children in her care. Nurses have no general privileges in relation to the physical management of patients, but most actions undertaken reasonably and in good faith will be protected by the ordinary law of self-defence, actions taken to prevent crime (restraining one patient to prevent an attack on another) and necessity. Restraint is also specifically authorised in some circumstances under the Mental Health Act. Prosecutions usually result from actions that go well beyond normal practice, for which there is no apparent explanation, and that are clear abuses of the nurse's professional responsibilities. In extreme cases health professionals may find themselves facing criminal charges arising from decisions made and actions taken within normal professional parameters, such as the following:

- Manslaughter by gross negligence. Where one person owes another a duty of care (and a nurse owes this duty to a patient), there may be criminal liability where there is a clear and obvious breach of this duty that obviously exposes the victim to a specific risk of death, and the victim dies (*R v. Adomako* (1994)). In *R v. Misra and Srivastava* (2005) this principle was applied in a case where junior doctors failed to recognise that a post-operative patient was suffering from an iatrogenic infection. Arguments that the offence was incompatible with the ECHR were rejected, as were arguments that negligence, even gross negligence, was inappropriate as a basis for criminal liability.
- 'Mercy killing' or active euthanasia. Any action that results in the shortening of life, and that is undertaken with that intent, is murder. It is irrelevant that the victim is terminally ill and in acute distress or severely disabled, and whether or not the victim or the next of kin consents. Juries are notoriously unwilling to convict in mercy killing cases,²¹ and reliance is often placed on 'double effect', which legitimises the use of strong pain control, even if life is incidentally shortened.

1.2.2 Civil justice system

The general civil court system was, in the late 1990s, significantly reformed by the introduction of new Civil Procedure Rules.²² These create a new overriding objective of dealing with cases justly, having regard to ensuring that the parties are on an equal footing, expense and proportionality to the importance and

complexity of the case. In practice this means that all cases are allocated either to the 'small claims track' for speedy and informal disposal of small-scale disputes, to the 'fast track' for routine cases requiring limited court time, or to a 'multi-track' which allows for more complex cases to be handled as they deserve. Procedural judges take charge of the timetable of the case and the parties have to comply with the standard timetable of the fast track, or the agreed timetable in the multi-track. In the process the distinction between the county court and the High Court has been blurred. Most cases will actually be tried in the county court, including many high-value claims, but High Court judges will continue to hear the most complex cases. A decision of a procedural judge may be appealed to a circuit judge, and an appeal from the decision at a trial may be made to the Court of Appeal. There are special arrangements for family law cases.

Much of the work of the High Court is now judicial review. This is, in effect, a review of the legality and propriety of decisions by government departments and other public bodies while exercising statutory powers. The main grounds of review are: illegality, where the decision is outside the powers given; procedural impropriety, such as a failure to give the applicant notice of the allegations against him; and irrationality, or reaching a decision that no reasonable body, carefully considering all relevant considerations, could have reached.

There is an appeal from the county court or High Court to the Court of Appeal, provided that the leave of either court is obtained. There is an appeal from the Court of Appeal to the Supreme Court, but as in criminal cases there must be an issue of public importance.

One aspect of civil law that impinges directly on the health care profession is negligence. This is dealt with in depth in Chapter 6. At this stage it is important to note that liability for negligence is essentially liability for failure to reach a proper standard of care in dealing with someone to whom a legal duty is owed. In many cases this duty is imposed by the law in general terms, but in others it arises from a prior contractual agreement.

Since the 18th century it has been established that a physician or surgeon (and by extension any health care professional who takes responsibility for a patient) owes a duty to that patient. This general duty covers all NHS patients. It does not extend to practitioners who are 'off duty' and may be required to intervene if, for example, they come upon an accident victim in the street. In private medicine there is a contract between the practitioner and the patient. Ordinarily, this contract will merely require the practitioner to use reasonable care and skill,²³ and this is the same standard as under the general law. However, in some circumstances the patient may have greater rights under the contract. For instance, the contract may specify a particular model of artificial hip, and failure to provide this is a breach. There would be liability to an NHS patient only if the device fitted was one that was not regarded as suitable by a responsible body of opinion. Normally a practitioner undertakes to use proper care and skill, but does not guarantee a cure. However, a contract may include a warranty of a cure, although this would be unusual (*Thake v. Maurice* (1986)).

Another important function is the inherent jurisdiction of the court to protect the interests of the incompetent. This is particularly relevant to 'end of life decisions' but also occurs in relation to consent to treatment. These cases often take

the form of an application for a declaration. However, often the issues at stake are essentially questions of trespass to the person. Touching or restraining a person is normally wrong, but if it is in the best interests of an incompetent person it may be justified by necessity. Examples include the PVS cases of *Bland v. Airedale* (1993) and the 'informal detention' cases of *R v. Bournewood* (1998) and *Sessay* (2011) which we have already met. These issues are dealt with in depth in Chapter 7.

1.3 Legal method

Judges have two roles. First, they are responsible for ensuring that the facts of the particular case are ascertained. They do this directly in civil cases, and supervise the jury in criminal cases. This is an important task, and vital for the parties to the case. It is not, however, the more legally significant of the two roles. The crucial judicial role is in ascertaining the law, so that it can be applied to the facts of the case. The facts are usually quite specific, and affect only the parties,²⁴ but the legal principle is of general application. As indicated above, ascertaining the law may involve a review of existing common law rules or an interpretation of statute, EU law or the ECHR.

In English law, judges have the power to state the law. In this they differ from judges in most Continental European systems who have no status to declare the law but merely a duty to interpret and apply the law that is to be found in the national legal codes. Of course these interpretations are entitled to respect and are usually followed for the sake of consistency and because they reflect a learned opinion on the meaning of the texts. However, if judges can state the law, it is necessary to have rules as to which statements are authoritative and must be followed (whether later judges agree with them or not).

1.3.1 Binding authority

The following statements of law, forming the basis of legal principle on which a case was decided, are binding on later judges:

- Decisions of the European Court of Justice bind all English courts.
- Subject to the above, decisions of the Supreme Court of the United Kingdom (which replaced the Judicial Committee of the House of Lords as the highest court in the United Kingdom in 2009) bind all other English courts. The Supreme Court itself may, if it is persuaded that there is good reason to do so (either because there is a strong case that the earlier decision was wrong, or because the earlier decision is no longer appropriate to modern social and economic conditions) depart from an earlier decision and restate the law.
- Decisions of the Court of Appeal bind the Court of Appeal and all lower courts.
- Decisions of the Divisional Court bind magistrates' courts.

Judges may consider any other material; this will, however, merely be persuasive. It can include *obiter dicta* or comments in a judgment that do not form part of the basis of the decision,²⁵ statements in dissenting judgments,²⁶ statements by more junior judges,²⁷ decisions in other jurisdictions and academic comments. Decisions of the European Court²⁸ of Human Rights come into this category.²⁹ An earlier statement of law will only be binding if the present case raises the same legal issue. It is possible to distinguish cases by explaining how, while similar, they do not raise the same legal issues. It is also possible to cheat by claiming to distinguish cases where the judge does not want to follow the earlier ruling, or vice versa, and it is often difficult to be sure whether judges are using this technique properly or not. Applying the law is an art, not a mechanical process.

In practice judges need to go beyond earlier statements of the law. New issues arise and social and economic conditions change. In the past judges were very coy about admitting that they did make new rules rather than reinterpreting old ones, but they now accept that they do. They are usually very conservative, preferring to go no further than strictly necessary. When in *Airedale NHS Trust v. Bland* (1993) the House of Lords was asked to rule on whether treatment could be withheld from a patient in an irreversible persistent vegetative state, they did so on the narrow basis that there was no justification for intrusive treatment as it did not serve the patient's best interests, and expressly stated that they could not consider general arguments based on the legality or desirability of general rules on euthanasia. That was a matter for Parliament.

1.3.2 Interpreting statutes (and EU Law)

The law has been laid down here by Parliament (or the EU institutions). The judges may or may not approve, but in principle they must apply the law as passed. Unfortunately not all law is clear. There may be inconsistencies or ambiguities, or there may be situations that Parliament did not foresee and therefore did not cover.

Over the years the judges have worked out an approach to interpretation which allows some flexibility but stays as close as possible to the words actually enacted by Parliament. The approach will depend to some extent on the type of legislation. Criminal and tax legislation is always interpreted against the state in cases of doubt, while legislation intended to meet an EU law requirement will be interpreted to achieve that purpose.

The priority is to give effect to the words of the statute if they have a plain and unambiguous meaning. This will be applied even if it is not what Parliament 'meant', as in the case of *Fisher v. Bell* (1961), where Parliament had clearly introduced legislation designed to prohibit trading in flick knives. However, it created an offence of 'offering' such a knife for sale, and when a shopkeeper was prosecuted because he had one on display in the window, the court ruled that since it had already been decided that it was the customer who made an offer for goods on display, he was not guilty of the offence. The words used were clear, and it was wrong to look back at what the underlying intention was as this was a criminal case and the statute had to be interpreted in favour of the defendant.

anyway. Where wording is ambiguous various approaches may be used, as follows:

- Preferring a sensible meaning to an absurd meaning. So the word 'marry' in the definition of the crime of bigamy was interpreted in *R v. Allen* (1872) as 'go through a form of marriage' rather than 'contract a [valid] marriage' which would have made the offence impossible to commit, as someone already married cannot validly marry again.
- Consideration of the underlying intention of the statute. In *Kruhlak v. Kruhlak* (1958) the expression 'single woman' in the context of affiliation proceedings was interpreted to mean any woman not living with her husband or supported by him; that is, it could include a divorcee or widow. The mischief was the need to ensure financial support for illegitimate children, whatever the marital status of the mother. Similarly in *Knowles v. Liverpool Council* (1993) a broad interpretation was given to the expression 'equipment' in the Employers' Liability (Defective Equipment) Act 1969, in order to give effect to the broad aims of the legislation in the light of the known mischief.
- Reference to any authoritative statement in Hansard by the sponsoring minister on the meaning of the particular provision (*Pepper v. Hart* (1993)).

The main danger in interpretation is that the greater the leeway the judges allow themselves, the more likely it is that they will be accused of interpreting to suit their own notions of what is right and proper. As most such cases either involve issues of political controversy or raise contentious ethical issues, and this will increasingly be the case under the Human Rights Act, there is increasing concentration on the judges, and questions are increasingly being asked about their qualifications to adjudicate on these controversial issues, as opposed to technical legal matters, where their expertise is acknowledged.

1.4 The legal context of nursing

Nurses are governed by three separate sets of legal rules,³⁰ quite apart from the law that establishes the framework of the NHS and the general law of the land. There are legal obligations to patients, normally arising in the context of allegations of negligence. There are professional obligations, imposed in the case of nurses by the Nursing and Midwifery Council (NMC), which is responsible for education, registration, professional standards and discipline. The essence of the professional standards established by the NMC in its Code of Practice is that each nurse must:

- Make the care of people your first concern, treating them as individuals and respecting their dignity.
- Work with others to protect and promote the health and wellbeing of those in your care, their families and carers, and the wider community.
- Provide a high standard of practice and care at all times.
- Be open and honest, act with integrity and uphold the reputation of your profession.³¹

Specific obligations in the Code of Practice require the nurse to respect the right of the patient to be involved in the planning of care, to work cooperatively with colleagues and to report anything that adversely affects the standard of care being provided.

The large majority of nurses work as employees in the NHS or the private health sector and thus have a legal employment relationship. Despite the reforms of the 1980s which were intended to create an internal market of independent NHS Trusts, each establishing its own terms and conditions of employment to replace the earlier national Whitley Council arrangements, in practice terms and conditions have remained relatively uniform. The employer is entitled to a professional standard of performance of the duties assigned, and the employee is entitled to be treated properly. Three aspects of employment law appear to be particularly relevant to the nursing profession, as examined below.

1.4.1 Equal opportunity

Equal opportunity, both between the sexes and in relation to ethnicity, has been a major issue for many years. The latter is a purely English matter, regulated by the Race Relations Acts, while the former is regulated by the Equal Pay Act and the Sex Discrimination Act, both supplemented by Community law. Direct discrimination is rare, and most difficulties concern disguised discrimination.

Disadvantageous treatment of part-time workers may amount to indirect discrimination because these part-time workers are predominantly female (*R v. Secretary of State for Employment ex parte Equal Opportunities Commission* (1995)). The salary scale for a particular group may be depressed because the profession or group is largely female, and this may constitute indirect discrimination (*Enderby v. Frenchay Health Authority* (1993)), although it is important that the two groups are actually comparable, and where one is objectively rated as more demanding, the case will fail.³² The law will seek to deal with historical anomalies based on gender-specific recruitment, but cannot resolve complaints about the relative valuation of different jobs.

1.4.2 Psychological and stress-related industrial illness

Employers are increasingly being held liable for psychological and stress-related industrial illness where it arises from the way in which work is organised and allocated. In *Lancaster v. Birmingham City Council* (1999) the employer transferred an administrative employee to a new post in a significantly different area with a promise of training and support that did not materialise. The employer admitted liability for the resultant disabling stress. In *Walker v. Northumberland CC* (1995) the employee, a social work manager, became ill with work-related stress. On his return to work he received no support and his workload increased. The employer was held liable when he suffered a recurrence. In *Johnstone v. Bloomsbury Health Authority* (1990) the Court of Appeal held that a junior doctor had an arguable case that the conditions under which he was obliged to work consti-

tuted a reasonably foreseeable risk to his health. Since much of the work in some areas of the NHS, in particular A&E departments and ICUs, is inherently highly stressful, and other work can easily become so if poorly managed or short-staffed, this is clearly a significant area. The House of Lords has now confirmed that there may be liability in such cases provided that the employer is aware that there is a risk of such harm: *Barber v. Somerset CC* (2004).

1.4.3 'Whistle blowing'

'Whistle blowing' has been problematic. Nurses are under a professional duty to report circumstances that may adversely affect patient care. They may also be under a duty to the patient. Some employers, including NHS Trusts, place great weight on the management of information and resent adverse publicity, whether or not it is justified. Nurses who have publicised matters of concern have in the past attracted considerable attention and suffered serious consequences, like Graham Pink, a nurse at Stepping Hill Hospital, who became frustrated at what he considered to be managerial indifference to his complaints over staffing levels and in the early 1990s drew these to public notice, attracting disciplinary action from his employers as a result. Some protection is now given by the Public Interest Disclosure Act 1998. This protects an employee from dismissal or other retaliatory action if he discloses information relating to circumstances which disclose an apparent breach of legal duties or a threat to the health and safety of any person. The disclosure must be to the individual's employer, to the Secretary of State if the employee is in the public sector (including NHS Trusts, but not GP practices), to a prescribed regulator, which in the health context will generally be the Care Quality Commission, or to the press or public where the employer has not taken action on an earlier report to him and it is reasonable to do so.

Most of the time these three duties do not cut across each other. Most of the time employers and employees have a common interest in promoting the welfare of patients in an efficient and professional manner. There are problems, however. The employee may feel professionally obligated to report deficiencies in the employer's services to patients or may feel that other professionals are not respecting the patient's autonomy, or allowing the nurse to act as an effective patient advocate.⁵

The NMC states:

Make the care of people your first concern, treating them as individuals and respecting their dignity.

Treat people as individuals

1. You must treat people as individuals and respect their dignity. 2. You must not discriminate in any way against those in your care. 3. You must treat people kindly and considerately. 4. You must act as an advocate for those in your care, helping them to access relevant health and social care, information and support.³¹

In these circumstances the law is, at best, an imperfect instrument. Balancing the three duties is difficult, and a legal process that focuses on which of two cases has the better basis in law and in fact is not well adapted to weigh more complex issues.

1.5 Notes

1. Northern Ireland Act 1998, Scotland Act 1998, Government of Wales Acts 1998 and 2006.
2. Despite the changes to the constitutional position of Wales, much of this material still applies there.
3. We only have time for a brief consideration of these matters; for a more detailed treatment, see either Terence Ingman, *The English Legal Process*, 13th edn (Oxford, OUP 2011) or Michael Zander, *The Law-Making Process*, 6th edn (Cambridge, CUP 2004). The actual process of statutory interpretation is not significantly different in the other jurisdictions.
4. A bill may be voted down. This often happens to bills proposed by individuals (private members' bills) but rarely to government bills because the Government can usually guarantee that its MPs will support it. The Lords is less predictable, even after the recent reforms, but cannot block financial and tax bills, will not block bills that are part of the manifesto on which the Government was elected and can in any event only delay bills for one full year: Parliament Acts 1911 and 1949 and the Salisbury/Addison Convention.
5. There are over 1400 references to 'medical practitioner' in statutes, ranging from obvious ones such as the Mental Health Act to others such as the Deregulation and Contracting Out Act and the House of Commons (Disqualification) Act.
6. As occurred in the *Factortame (No. 2)* case [1991] 1 AC 603.
7. See *Ghaidan v. Godin-Menáez* [2004] UKHL 3007.
8. The European Court of Human Rights (ECtHR) case of *X v. UK* (Case 7215/75, judgment 5.11.81) established that the original advisory role of the Mental Health Review Tribunal did not meet this requirement. As a result, the MHRT now makes the decision itself.
9. Measures to provide a review procedure for these patients have been introduced by the Mental Capacity Act 2005.
10. There may be a positive obligation on the police authorities where an individual is under specific threat: *Osman v. United Kingdom* (1998) ECtHR Reports 1998-VIII. In *LCB v. United Kingdom* (1998) ECtHR Reports 1998-III, the court considered 'that the first sentence of Article 2, section 1, enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction', but this was again in the context of non-health-related government action (exposure to radiation during nuclear tests).
11. *N v. Home Office* [2005] UKHL 31.
12. *Pretty v. DPP* [2001] UKHL 61; *Pretty v. UK* 2346/02.
13. *R (Purdy) v. DPP* [2009] UKHL 45.
14. These are, essentially, that the decision was illegal because it was made without power to act, was irrational or was in breach of procedural fairness.
15. [2001] QB 213.

16. Which includes state agencies such as the NHS.
17. Formerly Industrial Tribunals.
18. This excludes fixed penalties for motoring and parking offences. Source: *Criminal Justice Statistics in England and Wales* (2005–2011) <http://www.justice.gov.uk/publications/statistics-and-data/criminal-justice/criminal-justice-statistics.htm>.
19. Up to 6 months' (or in some cases 12 months') custody and usually fines of £5000 per offence.
20. Additionally, this may be done after the defendant has exercised his right of appeal to the Crown court.
21. *R v. Arthur*, *The Times* 5 November 1981, was a case where nutrition was withheld from a severely disabled neonate, who died. There was some evidence of acute ailments other than those initially identified, and which might have led to death. The doctor appeared to have decided, with the parents, that they did not want the child to survive, but was nevertheless acquitted by the jury. In *R v. Cox* [1993] 2 All ER 19 the jury were in tears as they convicted of attempted murder relating to an elderly terminally ill patient who had repeatedly asked for release from her intractable pain.
22. The so-called 'Woolf Reforms', following a report by Lord Woolf.
23. Section 13, Supply of Goods and Services Act 1982.
24. There are of course important cases where the facts affect many different people, such as industrial disease and drug defect claims, but these are in the minority.
25. The so-called 'neighbour principle' expounded by Lord Atkin in *Donoghue v. Stevenson* in 1932 has been extremely influential over the past 30 years in the development of liability for negligence.
26. A dissent by Lord Justice Denning in *Candler v. Crane Christmas* in 1949 ([1951] 2 KB 164) formed the basis of the decision of the House of Lords in *Hedley Byrne v. Heller* in 1964 ([1964] AC 465).
27. The so-called *Bolam* test for medical negligence was laid down by Mr Justice McNair, but has been endorsed by many senior judges in the Court of Appeal and House of Lords.
28. Also decisions of the European Commission on Human Rights and of the Council of Ministers of the Council of Europe, both of which formerly had a role in the application of the European convention.
29. Human Rights Act 1998, section 2.
30. Those working in mental health are also governed by the Mental Health Act, making four in all.
31. See <http://www.nmc-uk.org/Publications-/Standards1/>.
32. As in *Southampton & District HA v. Worsfold* (1999) LTL 15.9.99, where a female speech therapist's work was rated at 55 and a male clinical psychologist's at 56.5.