

LAW AND ETHICS IN NURSING AND HEALTHCARE

2nd
EDITION

AN INTRODUCTION

GRAHAM AVERY

 SAGE

Los Angeles | London | New Delhi
Singapore | Washington DC | Melbourne



Los Angeles | London | New Delhi
Singapore | Washington DC | Melbourne

SAGE Publications Ltd
1 Oliver's Yard
55 City Road
London EC1Y 1SP

SAGE Publications Inc.
2455 Teller Road
Thousand Oaks, California 91320

SAGE Publications India Pvt Ltd
B 1/I 1 Mohan Cooperative Industrial Area
Mathura Road
New Delhi 110 044

SAGE Publications Asia-Pacific Pte Ltd
3 Church Street
#10-04 Samsung Hub
Singapore 049483

Editor: Becky Taylor
Editorial assistant: Charlène Burin
Production editor: Katie Forsythe
Copyeditor: Sarah Bury
Proofreader: Clare Weaver
Marketing manager: Tamara Navaratnam
Cover design: Wendy Scott
Typeset by: C&M Digitals (P) Ltd, Chennai, India
Printed in the UK

© Graham Avery 2017

First edition published 2013.

This 2nd edition first published 2017

Apart from any fair dealing for the purposes of research or private study, or criticism or review, as permitted under the Copyright, Designs and Patents Act, 1988, this publication may be reproduced, stored or transmitted in any form, or by any means, only with the prior permission in writing of the publishers, or in the case of reprographic reproduction, in accordance with the terms of licences issued by the Copyright Licensing Agency. Enquiries concerning reproduction outside those terms should be sent to the publishers.

Library of Congress Control Number: 2016940071

British Library Cataloguing in Publication data

A catalogue record for this book is available from
the British Library

ISBN 978-1-4129-6173-8

ISBN 978-1-4129-6174-5 (pbk)

At SAGE we take sustainability seriously. Most of our products are printed in the UK using FSC papers and boards. When we print overseas we ensure sustainable papers are used as measured by the PREPS grading system. We undertake an annual audit to monitor our sustainability.



1



THE UK LEGAL SYSTEM

Learning Objectives

At the end of this chapter, you will:

- 1 Acknowledge the distinction between the criminal law and the civil law.
- 2 Be aware of the court system.
- 3 Have an understanding of the common law and the doctrine of judicial precedent.
- 4 Be able to locate case law and legislation and understand the system of citation.

1 INTRODUCTION

At his best, man is the noblest of all animals; separated from law and justice he is the worst. (Aristotle, *Politics (Book One: Part II)*)

There are many pleasant fictions of the law in constant operation, but there is not one so pleasant or practically humorous as that which supposes every man to be of equal value in its impartial eye, and the benefits of all laws to be equally attainable by all men, without the smallest reference to the furniture of their pockets. (Charles Dickens, *Nicholas Nickleby*)

These two quotations represent the polarity of opinions concerning the law. The first argues that humankind would quickly degenerate into anarchy without its restraining influences; the second contends that 'justice' within the system is dependent upon one's wealth and status. There are enough examples and anecdotes to support either of these two positions, but most would agree that some form of legal system is necessary

if society is to thrive. This is true of the most primitive of cultures, but the UK legal system has developed over many centuries, and, in the process, has become increasingly sophisticated and complex. My purpose, therefore, in this chapter is not to give a detailed outline of this system, but to illustrate a couple of key distinctions in the hope that the central concepts will be clarified.

We should begin by asking why a book such as this should feel the need to open with a chapter on the legal system. The answer, quite simply, is that what follows will become more intelligible if there is an understanding of the legislative and court process. The position is a little complicated by virtue of the fact that there are technically three legal systems in the UK (England and Wales, Scotland, and Northern Ireland), although there are significant overlaps between the three. The UK Parliament is the primary source of legislation for all three jurisdictions, but the Scotland Act 1998 and the Northern Ireland Act 1998 have granted these two countries powers to create laws that are specific to them. Wales also has some powers of this nature (since 2007), but its legal system is fundamentally the same as that of England. One final point to make before discussing the key distinctions is that, self-evidently, healthcare professionals are bound by the same laws as any other citizen in the land. In addition, however, they are subject to professional codes (see Chapter 3), so that penalties can be imposed for offences that might not be considered by the courts (Montgomery, 2003). One thinks, for example, of healthcare professionals who refuse to care for patients with HIV or who arrive for duty in an intoxicated state. Healthcare professionals are also subject to what is known as quasi-law: most commonly, this refers to health service circulars emanating from the Department of Health and elsewhere, which have no legal force, but which are expected to be followed unless there are good reasons for not doing so. Certainly, they have strong persuasive authority in the courts, for they offer guidance upon what is expected of the reasonable practitioner.

None of this need detain us any further, however, for my hope is that it will become clearer in the following chapters. We must therefore move to discussion of the first of the key distinctions to be drawn within the legal system.

2 THE CRIMINAL LAW AND THE CIVIL LAW

A Definition

The criminal law serves to regulate behaviour that constitutes offences against the public. It is technically possible to initiate a private prosecution (Prosecution of Offences Act 1985, s6 [1]), but this usually requires the permission of the Attorney General or Director of Public Prosecutions, is very expensive, and is consequently very rare. Most prosecutions, therefore, are brought in the name of the State, and are written thus: *R v Danvers [1982]*. Here, 'R' is short for the Latin word *Regina*, meaning Queen (or *Rex* if there is a king on the throne at the time that the case is heard), and is referred to in court as the *Crown*. In this particular example, *Danvers* is the *defendant*, who has been brought to trial to face a criminal prosecution.

The civil law, by contrast, is that which governs the relationship between individuals, and may be written thus: *Donoghue v Stevenson* [1932]. In this example, *Donoghue* is bringing the action and is known as the *claimant* (formerly, the plaintiff). The action is brought against the second-named individual (*Stevenson*), who is known as the *defendant*.

B Types of action

Broadly speaking, the criminal law covers three main areas: offences against the State, against the person, and against property. Thus, offences against the State would include treason and espionage, and are covered by such statutes as the Official Secrets Act 1989 and the Treason Acts of 1351 and 1848. Offences against the Person include murder, grievous and actual bodily harm and sexual assault. There are a range of legislative measures to deal with such matters (e.g. Offences against the Person Act 1861, Sexual Offences Act 2003), but some offences are covered by the common law (of which more later). Offences against property include criminal damage, theft and fraud, and are covered by such laws as the Theft Act 1968. Admittedly, this is a very simplified account of the types of action available in the criminal courts, and some offences (terrorism, for example) could be said to fit into all three of these categories. Nevertheless, it remains helpful in the majority of cases to demarcate offences into one of these three broad headings.

The civil law, however, is less obliging, for the varieties of action are much more extensive. Thus, the list includes Contract law, Property law, Family law, and Company law. This list is by no means exhaustive, but there is one type of action that will recur frequently as this book progresses: that of Tort, meaning civil wrong (or *delict*, as it is known in Scots law). Within Tort, there are a number of sub-categories of action, including Defamation (i.e. libel or slander), Nuisance, Trespass (to land, person, or goods), and False Imprisonment. Again, this list is not exhaustive, but the most important Tort for our purposes is that of Negligence.

C Sanctions

The range of sanctions available to the criminal courts include fines (which are paid to the court, not the victim), imprisonment and community service orders. The last of these was introduced by the Criminal Justice Act 1972, and extended by virtue of the Criminal Justice Acts of 1991 and 2003; and their existence is a recognition that imprisonment neither deters crime effectively nor reduces the incidence of crime (Home Office, 1990). Similar thinking would have been behind the introduction of Anti-Social Behaviour Orders (ASBOs), which first appeared in the Crime and Disorder Act 1998, and whose powers were extended by the Anti-Social Behaviour Act 2003. The terms of the ASBO are open to the discretion of the courts, and can include curfews (where the offender is required to remain in a specified place for a prescribed period of time within any 24-hour period) and exclusion orders (where the offender is barred from entering specified areas).

Until 1965, capital punishment (i.e. execution) would have been available as a penalty for murder, as it still is in some countries. Similarly, corporal punishment remains a sanction in some jurisdictions: in Saudi Arabia, for example, conviction of theft may result in the amputation of a hand. The Isle of Man persisted with the birching of offenders (i.e. being beaten with birch rods) until the case of *Tyrer v United Kingdom [1978]* established that the practice constituted inhuman and degrading treatment, and was thereby in contravention of Article 3 of the European Convention on Human Rights 1950.

The Criminal Justice Act 2003 (s142) outlines the key aims of sentencing, which can be summarised thus:

Summary point 1.1: The aims of sentencing

- 1 To punish offenders.
- 2 To compensate the victim(s), which may be an individual or the State.
- 3 To rehabilitate offenders.
- 4 To protect the public.
- 5 To reduce crime.

Whether any of these aims of sentencing are effective or not is a matter of considerable debate, however, and it might be argued that some are in direct conflict with each other. For example, imprisonment of an offender is extremely expensive, imposing a drain upon the resources of the State and the taxpayer; thus, the second of these aims is sacrificed for the sake of the first. Moreover, it is difficult to accept that sentencing is designed to rehabilitate offenders when the incidence of re-offending is so high. Finally, the ultimate deterrent (the death penalty) had no appreciable impact upon the murder rate in the United Kingdom while it was in place: although the rate increased after abolition, this was smaller than for other violent offences, none of which would have been affected by abolition (Easton and Piper, 2005). The truth, of course, is that the causes of crime are numerous and frequently complex (social deprivation, drug and alcohol abuse, psychological disturbances, etc.), and sentencing alone cannot address these. Thus, the argument that crime will be reduced if there are longer prison sentences, increased fines and even the re-introduction of the death penalty is fundamentally flawed.

Having expanded at some length on the sanctions available to the criminal courts, we should now turn to those available in the civil courts, and the fundamental remedy, of course, is that of compensation (or damages) for the aggrieved party. There are, however, occasions when the claimant is not seeking compensation, but rather hopes for what is known as an equitable remedy. Examples of these equitable remedies include *specific performance*, which is essentially an order of the court to someone in breach of contract to fulfil his/her obligations under that contract. Technically, for example, it

would be possible for a court to order that a football manager who wished to change clubs mid-contract must remain where he is until the contract expires. In such a situation, however, the court would be unable to ensure that the manager did his best for the club at which he was forced to stay. Therefore, this remedy is usually unenforceable by the courts, and is consequently rarely awarded.

A more common equitable remedy is the use of *injunctions*, which are orders of the court to refrain from activity that is damaging to another. Thus, an injunction can be served upon an abusive husband to prevent him from coming into contact with his wife. In recent years, a number of celebrities have served injunctions on those with whom they have had extra-marital affairs, preventing the latter from selling their stories to the press. If an injunction is breached, this would be a contempt of court, which is a criminal offence and which may be punishable by means of imprisonment.

The final remedy is *rescission*, which is a term used in contract law. Essentially, it means that the parties to a contract are returned to the position they were in before the contract ever existed. Thus, if I were to buy a painting by John Constable and I later discovered that it was a forgery, I would simply return the painting and I would get my money back. Such a remedy, of course, would only be available if the painting remained in its original condition, and if there had not been an unreasonable delay in seeking the remedy (Turner, 2005).

D The court system

The criminal court systems of the three jurisdictions can be summarised as shown in Figure 1.1.

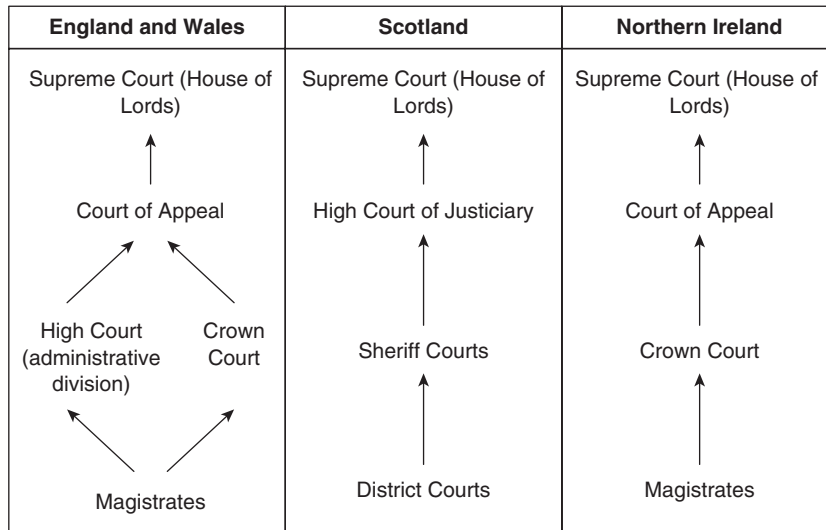


Figure 1.1 The criminal court systems

From this, we can see that the lowest rung of the ladder in England and Wales and Northern Ireland is that of the *magistrates*. It is often argued (with a good deal of justice) that the legal system is very expensive, but it is worth noting that the vast majority of work is done by these people, all of whom are unpaid. Every criminal case brought to court, no matter how serious, must come before the magistrates in the first instance. The vast majority of these cases (98 per cent) can be dealt with directly by the magistrates themselves and are known as *summary offences* (Boylan-Kemp, 2011). Examples of such offences include common assault, motoring offences, and low-level theft, etc. Thus, on the assumption that guilt has been established, they are empowered to impose a fine of up to £5,000, and/or the full range of community service orders, and/or imprisonment for up to 6 months for a single offence (or 12 months for more than one offence). The Criminal Justice Act 2003 has provisions to enable magistrates to sentence an offender to 12 months in prison for a single offence (s154), but this has not come into force to date.

If the accused is charged with an offence which carries a penalty greater than these restrictions allow, this is known as an *indictable offence* and must be referred to the *Crown Court*. It is not the function of the magistrates to establish guilt in such cases, but simply to confirm that there is a case to answer.

There are some offences that fall midway between these two, and are known as hybrid or either-way offences. They include theft and assault causing actual bodily harm, and the venue for the trial is largely down to the accused. If, for example, s/he pleads guilty, the offence is dealt with by the magistrates and they will impose what they consider to be an appropriate sentence. If the plea is not guilty (or if the magistrates feel that the offence merits a punishment greater than they are permitted to enforce), the case is committed to the Crown Court. The advantage for the accused of being tried in the magistrates' court is that it is dealt with quickly and the sentence is likely to be less severe than that of the Crown Court. The advantage of being tried in the Crown Court, however, is that there is a higher chance of acquittal.

The reason why there is a higher chance of acquittal is that cases in the Crown Court are heard by juries. There have been some cases where trial by judge alone has been allowed (for example, the 'Diplock courts' in Northern Ireland, where conviction of terrorists was hampered because of the fear of reprisals for jurors), but, generally speaking, it has been a long-held fundamental principle of UK law that every citizen has the right to be judged by his peers. The difficulties with this system, however, are that jurors are unlikely to have a good knowledge of the law, they may be unable to grasp many of the legal complexities of individual cases, and they may easily be swayed by factors other than the evidence. There are sufficient examples of perverse verdicts (i.e. where the decision of the jury does not accord with either the evidence or the law) to suggest that trial by jury is a flawed system, but alternatives that have been suggested seem equally likely to produce injustice (Boylan-Kemp, 2011).

The Magistrates' Courts Act 1980 (s111) entitles both the prosecution and defence to appeal decisions of the magistrates and Crown Court to the Administrative Division

As Boylan-Kemp (2011) notes, the role has now become one in which the holder no longer needs a legal qualification.

The system in Scotland is somewhat similar, but the courts have different nomenclature. Thus, the *District Courts* are the lowest criminal courts and are presided over by a magistrate. Above this, the *Sheriff Courts* hear summary offences and all but the most serious indictable offences. The latter are heard before the *High Court of Judiciary*, which is the highest Scottish criminal court and which also serves as an appeal court. A number of Commonwealth countries (including Crown dependencies, such as the Channel Islands) are able to appeal criminal cases to the *Privy Council*, whose members are justices of the Supreme Court. Whereas this was once the final court of appeal for *all* Commonwealth countries, most have now abolished this right and the relevance of the Privy Council has correspondingly declined.

By contrast, the civil court system can be summarised as shown in Figure 1.2.

This system is unquestionably more complex than its criminal counterpart, and is largely reflective of the wider variety of possible actions. In England and Wales and Northern Ireland, *magistrates* have some role to play here, especially in relation to family law matters and the licensing of premises to sell alcohol. In addition, specialised *tribunals* (such as employment, immigration and asylum, and social security tribunals) reduce much of the workload of the courts by resolving disputes in a fairly quick, efficient and inexpensive manner. Professional Conduct Committees of the various healthcare disciplines (see Chapter 3) can also be seen to fit within this category. Their work, however, is overseen by the High Court, and appeals against their decisions can be made to the Court of Appeal.

Much of the work of the civil justice system, though, is performed by the *County Courts*. In theory, there are no limits to the value of claims being pursued that can be heard in the County Court, except for those pertaining to personal injury damages (where the upper limit is £50,000). In practice, however, the more complicated cases, and those where higher sums of money are involved, tend to be referred to the *High Court*.

The High Court has three main divisions – Queen’s Bench, Family and Chancery – each of which has specialist functions. Of these, the Family Division is likely to hear the majority of healthcare legal cases; and, sitting within this Division lies the *Court of Protection*, whose central remit is to protect the interests of the incapacitated adult (see Chapter 5). Appeals against decisions of both the County Court and the High Court are generally heard in the Court of Appeal (civil division), although the High Court can occasionally leap-frog directly to the *Supreme Court*.

At one time, of course, the Supreme Court (or House of Lords, as it was previously known) was the highest court in the land, from which there was no right of appeal. Membership of the European Union, however, entails that there is now a higher court even than this: the *European Court of Justice*. An illustration of its power can be seen in the following case:



Case Study 1.1: *Marshall v Southampton and South West Hampshire Area Health Authority [1994]*

Mrs Marshall was a dietician, working in a hospital, who reached the age of 60. Her employers allowed her to work another two years, but then compelled her to retire. She argued that it was very unfair that she should be forced to retire at 60 when her male colleagues had the privilege of being able to carry on working until they were 65. Her attempts to resolve this claim in the courts were destined for frustration as she was bounced from one court to another over a period of 16 years. Eventually, however, the case reached the European Court of Justice, which reached a verdict in her favour. They stated that to discriminate in the workplace on the basis of gender was contrary to principles of European law and was therefore illegal.

Mrs Marshall had evidently long since retired before this verdict was reached, and her only tangible benefit was the compensation that she was awarded. It established an important principle, though, which has subsequently affected the employment conditions of all women. Whether or not she is the most popular member of her gender remains in doubt, but the case identifies one other principle. Any decision made by the High Court, Court of Appeal or the Supreme Court can be overturned in an instant by the European Court of Justice; and this represents a fundamental loss of sovereignty, because it means that control has been largely handed over to a court that consists almost entirely of foreigners (only one of its members is British). The result of the referendum on the European Union suggests that, at least in part, this loss of sovereignty weighed heavily on many people's minds. However, it is worth noting that the UK will remain a member of the Council of Europe even when withdrawal from the European Union is complete: as such, this means that we will continue to be bound by the European Convention on Human Rights. Suffice it to say that the courts (when determining cases) and Parliament (when enacting legislation) must be ever-mindful of the power of the European Court.

In Scotland, the civil court system begins with the *Sheriff Courts*, which are roughly equivalent to County Courts, and there is a right of appeal to the *Sheriff Principal*. The next rung up the ladder is the *Court of Session*: the *Inner House* hears appeals, whereas the *Outer House* hears new cases. Above this is the *Supreme Court*, which is the same court serving England and Wales. Decisions made by the Supreme Court on appeals of Scottish cases are certainly binding upon Scottish law, but it is not entirely clear that Scotland would be bound by decisions made in non-Scottish cases. At the very least, however, they would have strongly persuasive authority.

E The burden of proof

In the criminal legal system, the burden of proof rests with the prosecution, and guilt must be proven *beyond all reasonable doubt*. The old adage that the defendant

is innocent until proven guilty remains true, and any change to this position would represent a considerable shift away from the central principles of justice. In the civil legal system, the burden of proof rests with the claimant (i.e. the person bringing the action), but the case need only be proven on the *balance of probabilities*. If one imagines a set of scales being tipped slightly to one side, this will be the side that wins the case. If the scales are evenly balanced, the claimant will lose. As we explore some of the negligence cases later, it may seem that the burden of proof is significantly more onerous than this, but this remains the stated distinction between the two court systems.

At times, the distinction can produce bizarre results, and perhaps the most well-known of these was the American case of O.J. Simpson (*People of the State of California v Orenthal James Simpson [1995]*). He was first tried in the American equivalent of the Crown Court on a charge of the murder of his wife and her lover. Guilt could not be proven beyond all reasonable doubt, and he was acquitted. His wife's family subsequently took out a civil action in the American equivalent of the High Court (the action being trespass against the person), and there his guilt was established on the balance of probabilities. Thus, he was innocent in one court and guilty in another, all because of a difference in the burden of proof.

In theory, the victim of a criminal assault or damage would have to take out a civil action if compensation was required. However, the establishment of guilt in a criminal court would render it inevitable that the offender would be found guilty in a civil court (because the former requires a higher burden of proof); and this would create an unnecessary burden on both the courts and the protagonists. Thus, the Powers of Criminal

Table 1.1 A summary of the distinction between the criminal law and the civil law

	Criminal Law	Civil Law
<i>Definition</i>	That which regulates behaviour as offences against the public.	The law which governs the relationship between individuals.
<i>Types of action</i>	<ul style="list-style-type: none"> i Offences against the State. ii Offences against the Person. iii Offences against Property. 	<ul style="list-style-type: none"> i Contract. ii Property. iii Family. iv Company. v Torts: <ul style="list-style-type: none"> a Negligence b Defamation c Nuisance d Trespass (to land, person, goods) e False imprisonment.
<i>Sanctions</i>	<ul style="list-style-type: none"> i Fines. ii Imprisonment. iii Community Service orders. 	<ul style="list-style-type: none"> i Damages (i.e. compensation). ii Specific performance. iii Injunctions. iv Rescission.
<i>Burden of proof</i>	Beyond all reasonable doubt.	On the balance of probabilities.

Courts (Sentencing) Act 2000 empowers the criminal courts to award appropriate compensation to the victim (s130). This includes the magistrates, although the maximum that they can award is limited to £5,000 (or £2,500 in Scotland).

3 THE COMMON LAW AND LEGISLATION

The second key distinction to be drawn within the UK legal system is that between the common law and legislation.

A Definition

By legislation we mean the law which is made in Parliament in the form of statutes (e.g. Mental Health Act 1983). Not all cases coming before the courts are covered by legislative provisions, though, and, in such cases, the judge has to make a decision. In doing so, s/he creates a principle of law, which remains binding on all citizens within the realm until or unless Parliament enacts legislation to overturn it. The reality is a little more complicated than this, as we shall see later, but the essential point to take from this is that the *common law* is that law which has been made by judges.

Originally, the common law had a different definition. Prior to the Norman Conquest of 1066, different parts of England had different systems of law, but the Normans sent out itinerant justices, who eventually ensured that a standardised system of law existed across the land (Elliott and Quinn, 2011). This process took almost 200 years, but the end result was a law that was common to all the people of England.

The influence of Parliament on the development of law has increased immeasurably in recent years, to a point that has been described as 'legislative hyperactivity' (Bingham, 2011: 40). The influence of judges has correspondingly decreased, but we owe much of the law of this land to judicial decision-making. Occasionally, common law principles developed over time are collated and codified into statutes, such as the Mental Capacity Act 2005 (see Chapter 5). Some areas, however, are too controversial to be dealt with by means of legislation, for they polarise opinion and can quickly lose a Government votes at the next election. One thinks, for example, of the withdrawal of nutrition and hydration from people in a permanent vegetative state, the sterilisation of women with learning disabilities, and the separation of conjoined twins. There never has been any statute that addresses these issues, and there probably never will be. All of the law that we have on them, therefore, is that which has been made by judges.

So, how do judges do this? The traditional position, and one that existed for almost two centuries largely unchallenged, was that the judge's role was simply to *apply* the law as it existed (Blackstone, 1769). There is enough evidence to suggest that this is not entirely true, and realist theorists hold that the law 'is only a matter of what the judge had for breakfast' (Dworkin, 1986: 36). Something of this, perhaps, could be seen in the infamous *Oz* trial:



Case Study 1.2: *R v Anderson and others [1971]*

The editors of a magazine (*Oz*) were charged with conspiracy to corrupt public morals and publishing an obscene article contrary to s2 of the Obscene Publications Act 1959. Their eventual conviction by a jury and draconian prison sentences owed much to the judge, who appears to have formed an opinion long before the first words were spoken in evidence. His direction to the jury was described as ‘entirely wrong’ by the Court of Appeal, rendering the verdict unsafe.

The judge’s stance on this issue may have been the product of his upbringing: by their nature, the judiciary tend to be drawn from a very narrow section of society (public school-educated, Oxbridge graduates). It would not be unreasonable to suggest that this influences their political views, and it certainly distances them from many of those who come before them (Kairys, 1998). This would do a disservice to the majority of them, though, who acknowledge the importance of their role in seeing that justice is done.

Some (such as the positive theorists) believe that judges should focus on what is morally right in each circumstance, rather than allow themselves to be encumbered by unjust legal principles (Doherty, 2006). For Dworkin (1986), though, it is more important that people know what the law is, and they expect judges to treat everybody equally. This suggests that the judiciary should adopt a cautious approach when making new law, rather than take a cavalier and adventurous approach, which might destabilise the law and produce confusion. Not all judges have accepted this position in the past, but the constraining principle has always been that of *judicial precedent*.

B Judicial precedent

As mentioned earlier, if a case comes before the court and there is no legislation to guide the judge, s/he must make a decision, which then becomes a statement of law. This statement is binding on all lower courts, following the principle of ‘*stare decisis*’ (i.e. let the decision stand). It is a system that was taken to all countries within the British Empire, and those countries have retained the concept of judicial precedent. This contrasts with the civil law system in Europe, which was based upon Roman law, and which gives greater weight to legislation as the source of law.

The statement of law contained within a case is known as the *ratio decidendi* (literally, the reason for the decision). It is not, however, printed in bold capitals within the judgment, and it can sometimes be difficult to locate. Nevertheless, it means that a decision taken by the Court of Appeal (civil decision) will be binding on that court and any other court below it. If, therefore, a similar case comes before one of these courts, it must be decided in exactly the same way. The decision would *not* be binding upon the Supreme Court, because this is a higher court, which could overturn the principle and establish a completely different one. Once established, though, this

becomes binding on all lower courts. Similarly, decisions of the European Court of Justice have binding authority on all English courts.

Since a Practice Statement of 1966, the Supreme Court is able to escape the bonds of precedent, and can depart from previous decisions that it has made (although it is reluctant to do so, and this has only occurred very infrequently). Moreover, the criminal division of the Court of Appeal is given greater licence to depart from precedent, because the defendant's liberty is at issue. Some lawyers, most notably Lord Denning, have argued that the civil division of the Court of Appeal should also have greater freedom of decision-making. In *Davis v Johnson* [1979], Lord Denning took issue with the fact that an unjust principle could only be overturned in the Supreme Court (at the time, the House of Lords), for he argued that this was both expensive and time-consuming. The strength of this argument has not gone unnoticed (Boylan-Kemp, 2011), but it was rejected in the strongest terms by Lord Diplock when the case reached the House of Lords.

Why was this? A number of advantages have been cited for the use of judicial precedent, the most important being that it creates certainty and stability within the law. Thus, if a claimant goes to a solicitor with a problem, that solicitor will generally be able to tell him/her whether or not there is a good chance of success (based upon the decisions of earlier cases). If there is little or no chance of victory, the claimant would be best advised to drop the claim. If there is a good chance of success, the defendant would be best advised to settle the claim out of court (and thereby avoid expensive legal costs). Thus, the courts are not crowded out with similar cases, and only those that raise unique questions tend to be litigated. Lord Denning's plea, however well-meaning, would have created considerable instability to this position if it had been accepted.

Despite this, there are several disadvantages of judicial precedent. We have, for example, already noted that precedents can produce injustice: a number of these legal principles were established in cases of many years ago, and circumstances will have changed considerably over time. Moreover, the importance attached to judicial precedent in court means that lawyers will focus heavily on this, so that cases are longer, more complex, and certainly more expensive as each side seeks and cites cases that may strengthen their arguments. The court attempted to limit the number of citations used by lawyers in *R v Erskine* [2009], but the image of barristers sitting behind tall piles of legal texts remains constant.

There are a number of things that the courts can do to reduce the likelihood of injustice. For example, a higher court can *reverse* the decision of a lower court. It can also *over-rule* a principle established in an earlier case: the decision in that case will remain, but a new precedent will be created. In addition, the court could argue that the precedent is *outdated* and is no longer applicable for modern times. Perhaps, though, the most commonly employed stratagem is that of *distinguishing* between cases. No two cases are exactly the same, and it may be possible to argue that the facts of the case where the precedent was established are significantly different from the case before the court. In such circumstances, the judge will be entitled to hold that the precedent has no applicability in the instant case. An example of this principle in action can be seen in the following case:



Case Study 1.3: 'Wrongful birth' cases

In *McFarlane v Tayside Health Board [2000]*, a couple had four children, and the husband underwent a vasectomy to prevent the arrival of any more. This operation was performed negligently, and the wife subsequently gave birth to a fifth child. She claimed the costs of bringing up this child, but her claim was rejected by the court. She was able to recover loss of earnings for the period of time that she was pregnant, and damages for the inconvenience of pregnancy and the pain of child-birth. However, the birth of a healthy child should be seen as a blessing, rather than a burden (per Lord Mustill), and it was therefore unreasonable to expect to be compensated for this. The logic of this argument has come in for criticism (see Mason and Laurie, 2011), but it established the principle that the birth of a healthy child is not recoverable in terms of compensation, and this principle is binding on all lower courts.

In *Parkinson v St. James and Seacroft University Hospital NHS Trust [2001]*, however, a failed sterilisation resulted in the birth of a *disabled* child. Here, the mother was able to recover the costs associated with the special needs of rearing this child – the decision in *McFarlane* was distinguished because that case had only considered the birth of a *healthy* baby.

In *Rees v Darlington Memorial Hospital NHS Trust [2002]*, a woman gave birth to a healthy child after a negligently performed sterilisation, but she herself had a disability (a severe visual impairment). She was able to recover the costs of child rearing attributable to her disability (e.g. the hiring of a nanny), because *McFarlane* had only considered the position of *able-bodied* parents.

We can see, therefore, that judges have considerable discretionary powers to ensure that justice prevails. The more discretion they use, though, the more unstable the law becomes; and by far the most effective means of avoiding bad precedents is by means of legislation.

C Legislation

As has already been mentioned, legislation is the law made by Parliament in the form of statutes. Because of the sovereignty of Parliament, it has the power to over-rule any principle of common law, even if that principle has existed for many centuries. However, the European Court of Justice has the power to over-rule Acts of Parliament if they are in conflict with the various European treaties, and this has occurred on several occasions (see Chapter 6, where the Mental Health Act 1983 was found to be incompatible with the European Convention on Human Rights and necessitated an amendment to the Mental Capacity Act 2005).

Despite its power, legislation is an extremely slow-moving process (Griffith and Tengnah, 2010), and judge-made law is generally more responsive to the changing

circumstances of society. Ministers have a number of powers to update legislative provisions by a process known as secondary (or delegated) legislation. This enables them to respond fairly quickly to changing situations and needs of society without the necessity for the time-consuming process of enacting new legislation, although these powers are restrained and can be challenged in court (see Chapter 9).

Where the wording of an Act is clear and unequivocal, the judge has no choice but to follow it to the letter, even if the end result appears to be the perpetration of injustice. For example, many judges were criticised for imprisoning those who refused to pay the unpopular Community Charge during the Thatcher administration in the 1980s, but the law made it clear that this was the penalty for the offence and there were to be no exceptions. It is often the case, however, that legislation is very far from being clear: it may be poorly worded and obscure (Bingham, 2011), and those drafting the legislation cannot be expected to foresee every eventuality that presents itself before court (Boylan-Kemp, 2011). The Interpretation Act 1978 has gone some way to clarify the meaning and intention of Parliament, as have the Explanatory Notes that have accompanied Acts since 1999. But there will still be many occasions when judges are called upon to decipher legislation, and they do this by referring to one of the following rules of statutory interpretation:

1. The Literal rule: this rule states that the judge will interpret the words of the Act exactly as they are written, even if this produces an injustice. There are many examples of this rule in operation, but one of the most oft-cited is that of Berriman's case:



Case Study 1.4: *London and North Eastern Railway Company v Berriman* [1946]

The railway company was obliged by law to provide a lookout whenever one of its employees was repairing or relaying the line. Berriman's job was to top up the oil boxes which lubricated the line, but no lookout was provided and a train killed him. His widow sued for damages, but lost the case: Berriman was neither repairing nor relaying the line, but simply *maintaining* it.

This judgment may seem somewhat harsh, and it is the kind of thing people have in mind when they argue that 'the law is an ass' (a phrase attributed to Charles Dickens in *Oliver Twist*, but which is actually much earlier than this). Mindful of the injustice that the literal rule can produce, and of its propensity to weaken public confidence in the law, some judges will resort to the second of the rules of statutory interpretation.

2. The Mischief rule: this rule asks a simple question – 'what mischief was the law designed to correct?' – and is seen at work in the following case:



Case Study 1.5: *Smith v Hughes [1960]*

The Street Offences Act 1959 stated that it was illegal to solicit ‘in a street or public place’. A prostitute was sitting inside her own house, and invited men to procure her services as they passed by her window. A literal interpretation of this case would have resulted in an acquittal, because she was neither soliciting in a street nor in a public place. However, the court held that the Act was designed to correct a specific mischief – namely, that pedestrians should be able to walk along the street without being pestered by prostitutes. The defendant was duly convicted.

The danger with application of the mischief rule, of course, is that it calls upon judges to second-guess the intentions of Parliament, and they may be mistaken. Its use, therefore, is limited, although judges may refer to a hybrid version of the first two rules.

3. The Golden rule: This rule states that judges will interpret the words of an Act as literally as possible until they produce an injustice. Perhaps the case that is most commonly cited as an illustration of this principle is the following:



Case Study 1.6: *R v Allen [1872]*

The Offences against the Person Act 1861 (s57) states that ‘whosoever being married shall marry again’ is guilty of bigamy. Allen argued that he could not ‘marry again’ because such a marriage was necessarily invalid while he remained married to his first wife: in other words, it should be impossible to commit the crime of bigamy! The court applied the golden rule, and held that the phrase ‘marry again’ implied ‘going through a ceremony of marriage’.

It should be clear that the result of a case can depend upon the rule that the judge chooses to employ. Moreover, where more than one judge is involved in a case, there may be huge divergences of opinion. A good example of this in a case pertaining to healthcare is provided by the following:



Case Study 1.7: *Royal College of Nursing v Department of Health and Social Security [1981]*

The Abortion Act 1967 (s1) permits the termination of pregnancy when it is carried out ‘by a registered medical practitioner’. Since this legislation was enacted, however,

the technique of early-term abortions has been refined, and now simply requires the woman to take an oral drug (mifepristone), followed by a vaginal pessary two days later. This technique is usually overseen and managed by a nurse, without the presence of a doctor, so the Royal College of Nursing sought clarification that its members were not breaking the law. In the House of Lords, two Law Lords applied the literal rule: in their view, the Act specifically states that a doctor must be in attendance when a woman is undergoing a termination of pregnancy. By contrast, three Law Lords (and hence the majority) applied the mischief rule: the Act was designed to prevent women from seeking the services of back-street abortionists, because this was unhygienic and unsafe. No such problems arose when the procedure was carried out by a qualified nurse within the clinical environment.

The logic of the majority is difficult to resist, but the minority view here identifies a key point. By interpreting the will of Parliament in this way, the judges have essentially created new law and established a precedent that is binding upon all lower courts. This is not really their job, for it should be left to the elected representatives of the people. Thus, the safer (and more democratic) stance to take would be for the judges to say to Parliament: ‘Your law has created this injustice, and it is up to you to correct it’. In practice, however, we have already seen that amendments to legislation are slow and dependent upon the political will of the Government of the day (Elliott and Quinn, 2011). Mindful of this, most judges will endeavour to effect a delicate balancing act, even though this exposes them to criticism from all quarters.

4 FINDING CASE LAW AND LEGISLATION

Before leaving this chapter on the legal system, it is perhaps worth giving a brief explanation of the methods by which cases are cited. At first glance, the full citation of a case appears very confusing, but it identifies the precise location of where the judgment can be found. Thus, let us take as an example a key case in healthcare law, and which is discussed in Chapter 4:

Bolam v Friern HMC [1957] 2 All ER 118

Here, we can immediately see that *Bolam* is the claimant, because he is the first named, and that *Friern HMC* are the defendants to this action. If we were to look for this case in a library, we would need to find the *All England Law Reports (All ER)*. In a law library, there will be several shelves devoted to this publication, and we would then need to look for the 1957 editions. There may be several volumes for each year, depending upon the number of cases reported; in this instance, we must look for *Volume 2*. Having done this, we now need to turn to *page 118* of this volume, and we will find the speech of the judge who adjudicated this case.

Table 1.2 Citations

1	AC	Appeal Cases
2	All ER	All England Law Reports
3	BMLR	Butterworth's Medical Law Reports
4	EHRR	European Human Rights Reports
5	FCR	Family Court Reporter
6	FLR	Family Law Reports
7	Lloyd's Rep. Med.	Lloyd's Law Reports: Medical
8	Med LR	Medical Law Review
9	QB	Queen's Bench Reports
10	SJ	Solicitors' Journal
11	WLR	Weekly Law Reports

Table 1.3 Neutral citations

1	EWHC	England and Wales High Court
2	EWCA	England and Wales Court of Appeal
3	UKHL	United Kingdom House of Lords
4	UKPC	United Kingdom Privy Council
5	UKSC	United Kingdom Supreme Court

The *All England Law Reports* are but one example of legal publications of cases. The list in Table 1.2 gives the major law reports, along with their appropriate abbreviations.

This list is by no means exhaustive, and does not include citations of cases from America, Canada, Australia or New Zealand. Nevertheless, it features the main ones that will be found in this book. In addition, some cases are reported by electronic means, and these are given what is known as a neutral citation. Thus, in *Campbell v Mirror Group Newspapers Ltd. [2004] UKHL 22*, the case was the 22nd to be heard in the House of Lords during 2004. Other neutral citations are shown in Table 1.3.

Moreover, any abbreviations not listed here can be found on the following very useful websites: www.acronymfinder.com/ and www.library.qmul.ac.uk/subject/law/abbreviations.

Not all cases will follow the same pattern as *Bolam*, and the following is an illustration of another legal device:

Re F [1990] 2 AC 1

Table 1.4 Web-based resources

Name	Website	Content
British and Irish Legal Information Institute	http://www.bailii.org/	Case law judgments and Acts of Parliament
House of Lords	http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm	An archive of House of Lords judgments
Supreme Court	http://supremecourt.gov.uk/decided-cases/index.html	Judgments of the Supreme Court
Office of Public Sector Information	http://www.legislation.gov.uk/ukpga	Acts of Parliament

If this were an American case, it would probably be cited as ‘In the matter of F’, which is more long-winded but which fully encapsulates the meaning of ‘Re’. An initial has been used because anonymity of the subject of the court case is required. This is most commonly because the individual is particularly vulnerable or the material is of a highly sensitive nature. In this case, *F* was a woman with severe learning disabilities, and the court was being asked whether it would be lawful to sterilise her (see Chapter 5).

In Chapter 9, we will come across cases of judicial review, an example of which is cited thus:

R v NW Lancashire Health Authority, ex parte A, D and G [2000] 2 FCR 525

We have already noted that ‘R’ here means ‘The Crown’, and ‘v’ is always expressed as ‘and’ or ‘against’. In this particular case, three protagonists (A, D and G) claimed that their local health authority was failing to provide a service to which they felt entitled (gender reassignment surgery), and asked the court to declare that this omission was illegal. Judicial review cases may also be cited thus: *R (on the application of Burke) v General Medical Council [2004] EWHC 1879*.

On the assumption that not everybody has access to a law library, it is possible to view cases online. Students at universities which run law courses will undoubtedly have access to databases such as Lexis Nexis and Westlaw UK. Although it is possible to access these sites without being a university student, it would be extremely expensive to do so and is not to be recommended. However, there are a number of free resources, which can be located on the websites listed in Table 1.4.

Although these websites contain a lot of useful information, those reporting case law (i.e. the first three) give the neutral citations for the cases. This means that a number of cases will not be present on the sites, and the student will need to look elsewhere. A further advantage of reading material directly from the texts or from Lexis Nexis or Westlaw UK is that the latter frequently contain a shortened version of the case at the beginning. This is known as the headnote and is a summary of the facts of the case, the key legal arguments, the decision, and the reason(s) for that decision. Perhaps this is best illustrated by using an example:



Case Study 1.8: A worked example

[1988] Q.B. 481

[COURT OF APPEAL]

GOLD v. HARINGEY HEALTH AUTHORITY

1987 March 10, 11, 12; April 14

Watkins, Stephen Brown and Lloyd L.JJ.

Medical Practitioner – Negligence – Duty to inform – Sterilisation operation – Failure to give warning of possibility of fertility being restored – Subsequent pregnancy – Claim in negligence for non-disclosure of risk – Body of medical opinion against giving warning as to risk of pregnancy – Whether accepted professional standard test applicable to non-therapeutic advice

During the course of her third pregnancy in 1979, the plaintiff, after indicating that she did not wish to have any more children, was advised to undergo a sterilisation operation at the defendants' hospital after the birth of her child. The operation was duly carried out but the plaintiff later became pregnant and gave birth to a fourth child. She brought an action for damages for negligence against the defendants alleging, *inter alia*, that she had not been warned of the failure rate of female sterilisation operations and that if she had been warned her husband would have undergone a vasectomy instead. Medical evidence was adduced at the trial that there was a substantial body of responsible doctors who would not have given any such warning in 1979. The judge however held that the test whether there existed a substantial body of medical opinion who would have acted as the defendants had done applied only to advice given in a therapeutic context and did not apply to advice given in a contraceptive context. Applying his own view as to what information should have been given, he found that the defendants had been negligent in not warning the plaintiff that the operation might not succeed.

On the defendants' appeal:

Held, allowing the appeal, that for the purposes of ascertaining the test as to the duty of care owed by a doctor to a patient there was no distinction to be made between advice given in a therapeutic context and advice given in a non-therapeutic context; that, accordingly, the judge erred in holding that advice given in a contraceptive context was not to be judged by the contemporary standards of a responsible body of medical opinion; and that, on the evidence, there was a substantial body of responsible doctors who would not in 1979 have warned the plaintiff of the failure rate of female sterilisation operations (post, pp. 489F - 490C, 491B-D, 492C-E).

Bolam v. Friern Hospital Management Committee [1957] 1 W.L.R. 582 and *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] 871, H.L. (E.) applied.

Decision of Schiemann J. reversed.

The first few lines of the headnote tell us that the case was heard in the Court of Appeal before three Lord Justices of Appeal (Watkins, Stephen Brown, and Lloyd) over the course of three days in March 1987. The decision was delivered on 14 April, but the case was not reported until the following year, appearing in the 1988 volume of the Queen's Bench reports on page 481. Immediately below the names of the judges, there are a few key words to illustrate certain facets of the case, and which facilitates cross-referencing between cases.

Following this, the essential facts are outlined, together with the main arguments of both the plaintiff (or claimant) and the defending health authority. Finally, the decision of the court is summarised in the paragraph beginning *Held*. We can see too that the precedents of two earlier cases (*Bolam v Friern Hospital Management Committee [1957]* and *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985]*) have been applied to this case; and, in the process, the decision of the High Court judge (Schiemann, J.) – who had distinguished *Gold* from these cases – has been reversed.

The strength of the legal reasoning behind this decision might be called into question, and it has to be seen in the context of its day. Therefore, whether or not the decision would be the same if the case were heard today is open to question (see Chapter 4). Nevertheless, this headnote offers a concise and accurate synopsis of the case and can be a valuable time-saver. For those who would like more detail than this, the full judgment has to be read, and this follows immediately after the headnote.

CONCLUSION

This chapter has endeavoured to make some sense of the legal system in the UK while acknowledging that more detailed texts will provide a more complete overview. One thing, however, is important to note before we move on: when a case comes before the court, there will be arguments on both sides. This means, in effect, that the decision could go either way. When judges dress in strange clothes, use language that is incomprehensible to many, and engage in rituals that appear to have no modern relevance, they are projecting an image of power and omniscience. The similarities between judges and the witch doctors of primitive tribes have been noted (Mansell, 2015), for both have an almost God-like authority and their judgments are usually accepted without question. They are all human beings, though, and are subject to the same frailties and prejudices as everybody else. The search for justice, therefore, lies not solely in the law, but must consider ethical perspectives. It is to this that we turn our attention in the next chapter.