

## CHAPTER 1

# Introduction to the Legal System

Ingrid Granne<sup>1</sup> and Lorraine Corfield<sup>2</sup>

<sup>1</sup>Clinical Research Fellow and Specialist Registrar, Nuffield Department of Obstetrics and Gynaecology, University of Oxford, UK

<sup>2</sup>Senior Vascular Fellow, Guy's and St Thomas' NHS Trust, London, UK

### OVERVIEW

- The law in the United Kingdom consists of statute and common law.
- Medical law mainly involves civil rather than criminal cases.
- Most medico-legal cases are heard in the High Court but appeals can be made to the Court of Appeal and finally to the House of Lords if the case is considered to be of sufficient public interest.
- Cases that relate to the Human Rights Act may ultimately be appealed to the European Court of Human Rights (ECHR).

You must keep up to date with, and adhere to, the laws and codes of practice relevant to your work.

– GMC: *Good Medical Practice* (2006)

The practice of medicine must take place within the boundaries of the law. The law regulates many aspects of medicine and therefore healthcare professionals must be familiar with the law in the area in which they work. Many healthcare professionals during the course of their career will be required to give written or verbal evidence to a court, either because of involvement with cases brought before the coroner or increasingly frequently because of medical litigation. It is therefore essential to have a clear understanding of how the legal system works.

### Case law

Historically, the legal system within the United Kingdom was based largely on law developed by judges over time. Judges would consider specific cases with reference to how similar points of law had been decided in past cases and apply the law as they found it to the case brought before them. This is known as a 'common law' system, in contrast to law that is made by parliament (which is known as 'statute law').

Each part of the United Kingdom developed its own forms of common law, with Scotland being especially distinct from the other

*ABC of Medical Law*. By Lorraine Corfield, Ingrid Granne and William Latimer-Sayer. Published 2009 by Blackwell Publishing, ISBN 978-1-4501-7628-6

countries of the United Kingdom. This book deals mainly with the law in England and Wales but does highlight some instances where Scottish law differs. On occasion, when there is no relevant domestic case law, judges may look to cases from other countries. Usually these cases are from countries within the Commonwealth (such as Canada and Australia) where the law has been developed in a way similar to that in the United Kingdom.

### The concept of precedent

A pronouncement by a judge regarding a particular issue of law may affect the way future cases are decided. Decisions made by one court in relation to a particular issue can become binding on judges considering the same issue at a later date. This is known as precedent. Such precedents are only set by judges in senior courts (the High Court, the Court of Appeal and the House of Lords) and apply to the courts equal to or below them. Precedent has a very important role in common law. It attempts to ensure consistency in the law while also allowing for the law to develop over time. To understand how precedent works, familiarity with two legal concepts, *ratio decidendi* and *obiter dictum*, is needed.

No two legal cases are identical and thus it may appear difficult to understand how a statement of law made in one case can apply to another. The courts do look back to find cases where the facts of the case are similar, but more importantly they try to see if the reasoning in a case can be applied to a new set of facts. Thus, judges must follow the *ratio decidendi* (meaning 'the reason for deciding') of an earlier judgement if it was made by a higher or equal court.

In many court cases, a judge may make comments that do not relate directly to the case. For example, the judge may state how they would have decided a case if the facts had been different, or make general comments regarding the area of law under scrutiny. This is known as *obiter dictum* (meaning 'a thing said by the way'). These pronouncements are not binding on judges, but may be used when considering similar issues in the future (Box 1.1).

#### Box 1.1 Ratio and obiter explained: the case of *Briody v St Helen's and Knowsley AHA* (2001)

A woman lost her baby during childbirth and required a hysterectomy as a result of negligent treatment. She desperately wanted a family

and was considering surrogacy. The Court of Appeal ruled that it was not appropriate for her to recover the costs of surrogacy (the *ratio decidendi*). Thus this decision binds any Court of Appeal or lower court case of a similar nature.

The judge also stated that in her view the cost of other treatments such as *in vitro* fertilization (IVF) using donor eggs would also not be recoverable as damages in a negligence claim. This statement was *obiter dictum* and is not binding but may be used by lawyers to support their arguments should such a case arise.

### Reporting and documenting case law

As previously stated, many areas of law in the United Kingdom are dominated by case law (Figure 1.1). Thus, it is essential that there is a logical and methodical documentation of important and relevant cases. Since decisions regarding cases will depend on the *ratio* of cases decided previously, both lawyers and judges need access to accurate reports of previous judgements. In this book many real cases are used as examples to illustrate points of law and standard legal citations are used to describe them. For the healthcare professional interested in the basics of medical law, it is sufficient to know that a citation includes the two parties involved (for example, *Airedale NHS Trust v Bland*) and the year in which the case was heard. Other letters may indicate which level of court heard the case (for example, 'CA' refers to the Court of Appeal) or

in which publication the case was reported (for example, 'All ER' refers to the All England Law Reports).

In some cases such as those involving children, or cases regarding sensitive medical decisions, the names of the parties are not disclosed. In these cases, the initials and a very brief description of the main issue are used: for example, *Re B (child) (termination of pregnancy)* (1991).

A case citation is usually given in this format:

*Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] 1 ALL ER 643 (HL).

This shows the names of the two parties involved (Sidaway and the Board of Governors of the Bethlem Royal Hospital), the year the case was heard (1985), the place the case was published (the All England Reports) and that it was heard by the House of Lords (HL).

### Statute law

Since the seventeenth century, new laws and law reforms have increasingly been brought about through Acts of Parliament, usually inspired by policies of the government of the day. These Acts of Parliament will often become law in all parts of the United Kingdom. However, sometimes an Act may become law in part of the United Kingdom such as England and Wales, but not in Scotland.

Statutes are documents that contain laws made by Acts of Parliament (Figure 1.2). Statute law is known as primary legislation. Each statute relates to a particular issue. For example, the Abortion Act 1967 deals specifically with the way in which abortion is regulated, and the Mental Capacity Act 2005 defines capacity and how those who lack capacity should be treated with regard to their healthcare (among other things).

New legislation decided by parliament overrides previous case law. Case law cannot overrule or change statutes. The relationship between case law and statute law reflects the acceptance that parliament is the supreme law-making authority in the land. This is known as the doctrine of parliamentary sovereignty. For example, the decision as to whether a person is competent to accept or refuse treatment has in the past been determined by case law. The Mental Capacity Act 2005 now expressly defines competence in the eyes of the law and this 'overrules' previous case law concerning capacity. However, statutes may be updated or amended. The 1990 Human Fertilisation and Embryology Act amended the 1967 Abortion Act to decrease the legal limit for most abortions from 28 to 24 weeks. In addition to statutes, healthcare professionals must be aware of relevant accompanying legislation and guidelines (Box 1.2).

There are still many areas of medical law where no legislation exists and therefore common law prevails. For example, there are no statutes relating to the ability of children to consent to treatment. The well-known law concerning minors receiving contraception without parental knowledge is still derived from the decision made in the 1986 case of *Gillick v West Norfolk and Wisbech Area Health Authority*.

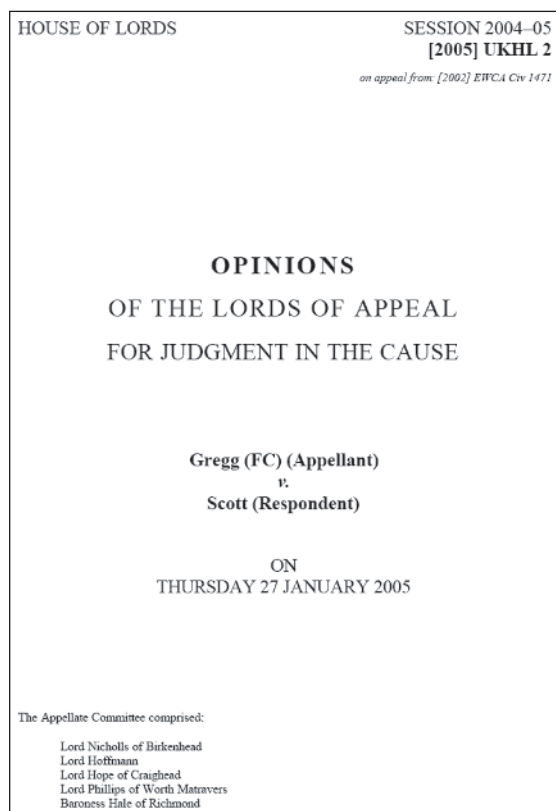
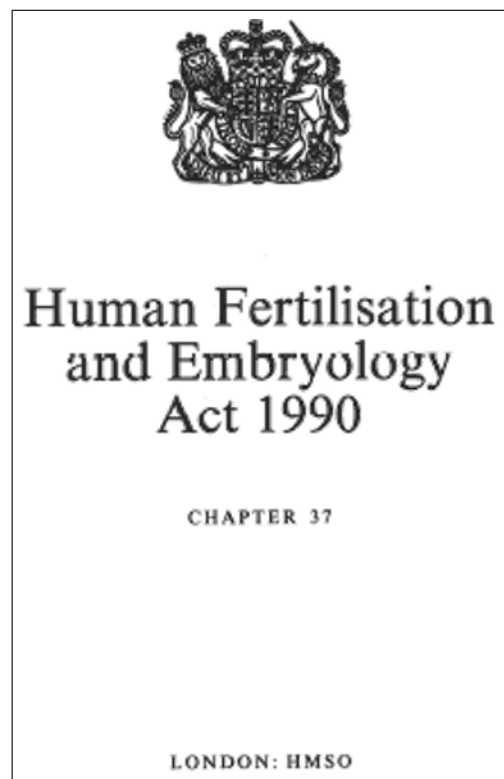


Figure 1.1 Gregg v Scott (2005); an example of case law.



**Figure 1.2** The Human Fertilisation and Embryology Act, 1990. An example of statute law.

#### Box 1.2 Accompanying legislation and guidelines

##### Statutory Instruments

Sometimes Acts of Parliament provide a way for parliament to delegate law-making powers to another body. The main type of delegated legislation is known as a Statutory Instrument (SI). Whereas Acts of Parliament are primary legislation, SIs are referred to as secondary legislation. Most SIs are not required to be laid before Parliament, and are therefore not subject to any Parliamentary scrutiny. This allows for frequent or rapid changes in the law when necessary.

SIs often consist of an order, regulations or rules. For example, rules pertaining to how the General Medical Council (GMC) deals with allegations of a doctor's fitness to practise are laid down in an SI known as the General Medical Council (Fitness to Practise) Rules Order of Council 2004. This SI was made under the powers conferred by The Medical Act 1983. SIs themselves can be amended: the aforementioned GMC SI was amended in May 2008 to change the standard of proof required in Fitness to Practise cases to that of civil proceedings (see following text).

##### Codes of Practice

Many Acts of Parliament have an accompanying Code of Practice. Codes of Practice are legal documents that guide individuals or officials in the interpretation of an Act of Parliament. However, Codes of Practice are more than just guidance: they are legally enforceable

rules. For example, the Code of Practice for the Mental Capacity Act 2005 provides guidance and information on how the Act will work on a day-to-day basis for anyone who works with or cares for people who lack capacity. Healthcare professionals are legally required to follow the Code when acting or making decisions on behalf of people who lack capacity. Codes of Practice are more readable than the original statute and are therefore often a good place to start when wishing to understand a particular Act of Parliament.

##### Medical Guidelines and the Law

Although guidelines (such as those published by the GMC and the Royal Colleges) and local protocols are not part of the law, it is clear that where no clear law exists with regard to a particular issue the courts will take into consideration such guidelines. Healthcare professionals also have a good practice obligation to abide by guidelines.

### The difference between civil and criminal law

The law consists of civil and criminal law. Criminal law deals with offences that the society has decided to 'outlaw' as crimes, such as



**Figure 1.3** The Royal Courts of Justice, London.

murder, rape or theft. Civil law is largely concerned with areas of the law relating to the legal relationship between people or legal entities such as companies or government. Areas of law such as those that regulate contracts, employment, issues of negligence or libel are all civil law. Many offences may be criminal or civil, and the distinctions between the two types of law can be complex. For example, it is possible for medical negligence to be either criminal or civil. However, most medical law pertains to civil rather than criminal law.

The standard of proof in civil law is that of the balance of probabilities: it has to be shown that there is more than a 50% chance that a civil wrong had occurred. The standard of proof in criminal cases is more stringent: the jury must find the defendant guilty 'beyond reasonable doubt'.

### The court system

Many healthcare professionals' first encounter with the courts is either while giving statements to, or while attending an inquest in a coroner's court. The work of this type of court will be covered in detail in Chapter 11. The Court of Protection (Box 1.3) deals with cases relating to the Mental Capacity Act 2005 (see Chapter 2).

#### Box 1.3 The Court of Protection

The Court of Protection is a new court with a specific role to make decisions in relation to the property, affairs, healthcare and personal welfare of adults (and sometimes children) who lack capacity. The court was created by the Mental Capacity Act 2005. This Act is discussed in more detail in Chapter 2. The court has the same authority in relation to mental capacity matters as the High Court and therefore is able to set precedents.

The Court of Protection has the power to:

- decide whether a person has the capacity to make a particular decision for themselves
- make declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make such decisions
- appoint deputies to make decisions for people lacking capacity to make those decisions.

Most other medico-legal cases are heard initially in the High Court. The High Court sits at the Royal Courts of Justice in London (Figure 1.3), as well as at some major court centres around the

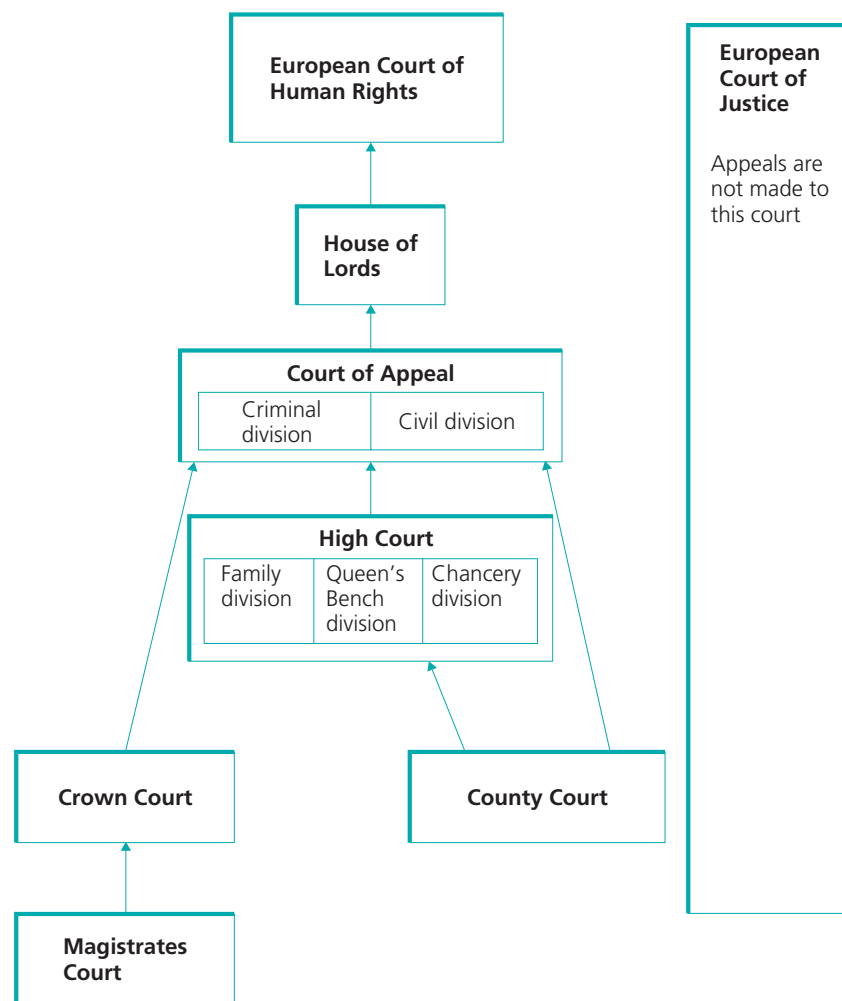


Figure 1.4 The English court hierarchy.

country. There are three divisions within the High Court, each hearing specific types of cases. These are known as the Queen's Bench Division, the Chancery Division and the Family Division. Most negligence claims are brought in the Queen's Bench Division. However, life and death matters such as an application to withdraw life support are usually brought in the Family Division. A decision made by a court may be appealed, provided permission is granted to appeal by the initial trial judge or by the Court of Appeal. Appeals are made to the Court of Appeal, which also sits at the Royal Courts of Justice. Appeals are usually heard by three judges.

The highest court in the English legal system is the House of Lords. It has the final jurisdiction over both civil and criminal cases and deals solely with appeals. Only cases that are considered to be of public importance are heard by the House of Lords. Usually five 'law lords' consider each case, and the verdict is decided by a majority opinion. The House of Lords receives appeals from the courts in England, Wales and Northern Ireland, and civil cases from Scotland. The House of Lords will be replaced by The Supreme Court in October 2009.

For most legal cases, the House of Lords is the final point of appeal. However, in cases relating to Human Rights (such as the right to life and the right to privacy), claimants may be able to appeal to the European Court of Human Rights (ECHR).

The United Kingdom joined the European Community (now the European Union (EU)) in 1973. One consequence of this is the requirement to incorporate European legislation into UK law.

English law must be interpreted in a way that is consistent with European law. This includes not only the ECHR but also the European Court of Justice, which rules on matters of EU law. English courts must recognize the jurisdiction of the European courts (Figure 1.4).

### Further reading

- Database of UK primary legislation at <http://www.statutelaw.gov.uk/> [2008]
- Guide to the judicial system at [http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/Thejudicialsystem/DG\\_4003097](http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/Thejudicialsystem/DG_4003097) [2008]
- Her Majesty's court system website provides information relating to the courts at <http://www.hmcourts-service.gov.uk/index.htm> [2008]
- Holland J, Webb J. *Learning Legal Rules*, 5<sup>th</sup> edn. Oxford University Press, Oxford, 2003.
- UK Acts of Parliament since 1996 are published by the Office of Public Sector Information at <http://www.opsi.gov.uk/acts.htm> [2008]

### General further medical law reading

- Brazier M. *Medicine, Patients and the Law*, 4<sup>th</sup> edn. Penguin, London, 2007.
- Machin V, Levington F, Dean P. *Medicolegal Pocket Book*. Churchill Livingstone, Singapore, 2003.
- Marguand P. *Introduction to Medical Law*. Butterworth Heinemann, Oxford, 2000.
- Mason JK and Laurie GT. *Law and Medical Ethics*, 7<sup>th</sup> edn., Oxford University Press, Oxford, 2006.