

Legal aspects of medical practice

Dr S Martindale, Specialist Registrar, United Bristol Healthcare Trust

The twenty-first century picture of medical practice is one of rapidly advancing technology effected in a strongly research orientated environment which exists within an increasingly demanding and well-informed society. The law, however, moves more slowly than either medicine or public awareness. As Lord Browne-Wilkinson in *Bland* declared: 'Existing law may not provide an acceptable answer to the new legal questions.' As a result, doctors frequently find themselves operating in an atmosphere of legal uncertainty, which promotes confrontation. It cannot be denied that this is an unsatisfactory state of affairs, which self-perpetuates as new attitudes and new techniques evolve.

The course

Two years ago, I embarked on a Master's degree course (LLM) at Cardiff Law School in Legal Aspects of Medical Practice. My primary motivation for doing so was simply one of interest and a certain knowledge that such experience would stand me in good stead in my future career. Medical law is still a comparatively young subject. It has emerged in English law over the last two decades or so as a distinct subject. This course would enable me to study and gain understanding of the interaction between law and medicine and hopefully to develop a critical approach to the operation of these rules in society. However, the decision to enrol was not straightforward, with existing work and family commitments to be considered. As I approach the final stages I am extremely glad I took such an opportunity.

The degree consists of two parts. Part one is course work based, and involves detailed analysis of a number of legal issues and problems, presented in an essay format. Part two takes the form of a dissertation, and should be an innovative piece of legal research. Having attended the programme of lectures and completed the assessed essays, I am in the midst of writing my dissertation that will be submitted by the end of this year.

What is medical law?

The practice of medicine must operate within broadly stated legal rules which thus require some degree of flexibility to allow for technological advances. However, in contrast to most European countries, the law of England is not to be found neatly encapsulated in any Code. The law relating to

medical practice is to be discovered from a variety of sources. Much of the law is judge-made (i.e. case law), although increasingly statutory regulation has been put into place by Parliament, e.g. the Human Organ Transplants Act 1989 and the Human Fertilisation and Embryology Act 1990.

However, beyond what might be thought of as 'formal law', medical law is regulated by a plethora of quasi-legislative measures emanating from the Government. Examples include the complaints procedures which exist for patients who are dissatisfied with the care they have received from a doctor, a hospital or elsewhere within the NHS. Equally there are an abundance of 'dictats' issued by the Department of Health and NHS Executive, which operate effectively as law within the NHS system. Some of these are actually binding. For instance Directions issued under the National Health Service Act 1977 and the National Health Service and Community Care Act 1990. Others such as HSGs, HSCs and ELs are merely 'directory'. In practice however, they act as strong indicators of what should be done at a policy or, indeed individual level, with internal and external legal consequences if they are not considered and acted upon.

Certainly, it can be confidently predicted that in the future the importance of public law regulation of health care provisions is going to come to the fore. Decisions are more and more falling within the scope of discretionary decision-making by a public body. The development of the new clinical standards body, NICE and its remit to produce clinical guidelines is an important example of this. The decisions made by this body will have a direct impact upon the standard of care expected of a doctor; they will in effect be seen as setting the 'bench-mark' of care for individual patients. Thus the standard of care will be transparent and a patient will have an opportunity to challenge any departure in advance by judicial review or subsequently in a negligence action if an injury results. It became apparent to me that as further changes are made, the need for a closer understanding of their legal implications will become imperative for healthcare professionals. It is important that we as doctors realise how these changes will affect the way we work.

Medical law is essentially concerned with the relationship between healthcare professionals and patients, and both negligence and the law of battery have played important roles in the legal regulation of this. The law of negligence imposes a duty of care not to unreasonably injure the patient when diagnosing, giving advice or treatment to them. The tort of battery has been used by the courts to allow them to recognise a patient's 'right of self-determination', which in turn gave the patient a legally enforceable right to decide about medical treatment (including the right to refuse it) however much others might consider it desirable for him.

Although the law of tort is a central part of medical law and much of the course was indeed devoted to this, it is only part of the subject, as I was to discover. It also encompasses criminal law (murder and gross negligence manslaughter, euthanasia and assisted suicide); family law (the law relating to human reproduction); public law (relating to the structure of the NHS, resource allocation, regulating health care, professional discipline and accountability); employment law (disability and discrimination, health and safety); occupational and public health law; and regulation of medicines and medical devices (consumer protection). The list is not exhaustive and it would be wrong to see medical law as being confined to the discrete and conventional categories of the law with which we are familiar. Its composition borrows and reflects other areas of the law.

As I learnt more about the law it became apparent that there are common issues which permeate all the problems which arise in medical law: respect for autonomy, consent, honesty, confidentiality, respect for persons, respect for dignity and respect for justice. The unifying legal theme is that of human rights.

The Human Rights Act 1998 has deep significance for medical law and during the course we considered its applications in this context. I found this particularly interesting and relevant to many aspects of my practice and this led me to the subject for my dissertation which concerns the implications of the Human Rights Act on the legality of 'Do not Resuscitate' decisions.

Ethics

Whilst the course is primarily concerned with medical law, it coexists with the equally intricate and important field of medical ethics, a complex subject in itself. It is evident that when determining questions of medical law, questions of medical ethics cannot be avoided. Although the morality of a particular course of conduct may help to inform us of how the law should respond, it may not always be so. Importantly, not everything that is immoral need or should be illegal. Defining when the immoral should be transformed into the illegal is an issue that is the subject of much debate and surfaced regularly throughout the course in areas such as regulation of infertility treatments and embryo research, withdrawal and withholding of treatment, euthanasia and assisted suicide, organ donation and the retention and use of human tissue.

The whole area of medical ethics is highly topical at present and is becoming an important area of undergraduate learning. I believe it has particular applications in anaesthesia because of our involvement in intensive care and the emergency room setting.

The future

Overall I have gained knowledge in an area which I believe will have considerable relevance in my future role as a consultant anaesthetist in the NHS. In practical terms, both the Lord Chancellor's Department and the Department of Health regard it as important for healthcare professionals, including risk and claims managers in healthcare, to be educated in aspects of Medical Law. The Pre-action Protocol for the Resolution of Clinical Negligence Disputes that accompanies the Civil Procedure Rules clearly states that: *'Healthcare providers should ensure that key staff, including claims and litigation managers, are appropriately trained and have knowledge of healthcare law, and of complaints procedures and civil litigation and practice.'*

Generally the course has heightened my awareness of legal issues and hopefully improved my ability to present accurate, relevant, rational and well-ordered arguments on many issues. As a result I am a better-informed individual than previously and by keeping up to date with current developments in the law, better prepared to approach the next thirty years as a clinician equipped to meet any challenges posed by new legislation.

Acknowledgement

I would like to thank the Royal College of Anaesthetists for the Stanley Rowbotham Educational Fund which I was able to put towards the costs of undertaking this degree course.

Abbreviations

EL (Executive Letter), HSG (Health Service Guidance), HSC (Health Service Circular), NHS (National Health Service), NICE (National Institute for Clinical Excellence)