Fourth Edition

NURSING LAW AND ETHICS

Edited by

John Tingle
and Alan Cribb

WILEY Blackwell

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John Tingle

Reader in Health Law, Head of International Development,
Nottingham Law School, Nottingham Trent University, Nottingham, UK

and

Alan Cribb

Director, Centre for Public Policy Research,
King's College London, London, UK

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Notes on Contributors

Richard E. Ashcroft Professor of Bioethics, School of Law, Queen Mary, University of London, London

Robert Campbell Pro Vice Chancellor (Academic), University of Bolton, Greater Manchester

Alan Cribb Director, Centre for Public Policy Research, King's College London, London

Fiona Culley Independent Consultant, formerly Professional Adviser, Nursing and Midwifery Council, UK

Michael Dunn Lecturer in Health and Social Care Ethics, The Ethox Centre, Department of Public Health, University of Oxford, Oxford

Tracey Elliott Lecturer in Health Care Law, School of Law, University of Leicester, Leicester

Bobbie Farsides Professor of Clinical and Biomedical Ethics, Brighton and Sussex Medical School, University of Sussex, Brighton

Charles Foster Barrister, Outer Temple Chambers, London, and Fellow of Green Templeton College, University of Oxford, Oxford

Lucy Frith Senior Lecturer in Bioethics and Social Science, Department of Health Services Research, University of Liverpool, Liverpool

Natasha Hammond-Browning Lecturer in Law, Southampton Law School, University of Southampton, Southampton

Jonathan Herring Fellow in Law, Exeter College, University of Oxford, Oxford, and Professor in Law, Director of Undergraduate Studies, Faculty of Law, University of Oxford, Oxford

John Hodgson Reader in Legal Education, Nottingham Law School, Nottingham Trent University, Nottingham

Harry Lesser Honorary Research Fellow in Philosophy, Centre for Philosophy, University of Manchester, Manchester

Vanessa L. Mayatt Director, Mayatt Risk Consulting Ltd, Cheshire

Jean McHale Professor of Health Care Law, Director of the Centre for Health Law, Science and Policy, Birmingham Law School, University of Birmingham, Birmingham

Leon McRae Lecturer in Law, Birmingham Law School, University of Birmingham, Birmingham

Jo Samanta Principal Lecturer in Law, Leicester De Montfort Law School, De Montfort University, Leicester

David Seedhouse CEO of VIDe Ltd, and Visiting Professor, University of Cumbria

Anupama Thompson Head of the Regulatory Legal Team, Nursing and Midwifery Council, UK

John Tingle Reader in Health Law, Head of International Development, Nottingham Law School, Nottingham Trent University, Nottingham

Peter Walsh Chief Executive, Action against Medical Accidents (AvMA)

Preface to the Fourth Edition

Once again we are very pleased to have been given the chance to update and revise this book into a fourth edition. Health care legal and ethical issues continue to dominate social and political agendas and the courts, as they have done in the periods covered by all the previous editions of our book. Litigation in health care is now a fairly constant feature of the NHS health care environment. Not a week seems to pass without a case being sent to court. The popular media in recent times have abounded with stories of things going wrong in hospitals and elsewhere, where patients have been caused avoidable injury and sometimes death. Nurses feature along with doctors in litigation and claims; and nurses play a key role in making health care safe. Along with lots of other legal and ethical issues and topics covered in this book, we consider the ways the Government and the NHS have tried to grapple with the rising tide of health litigation, and the risk management and patient safety strategies that have been put into place to deal with this.

It is worth highlighting a couple of basic but important truths here:

Errors in health care are inevitable

We are dealing with human beings who sometimes make mistakes. None of us is infallible. Add to this complex medical technology, the busy nature of a health care setting, and you have the recipe for problems. The best we can try to do is to minimise the risk of errors and adverse events occurring, through the proper application of clinical risk management and patient safety strategies. What is more worrying, however, is that the same errors are often

repeated and we don't always seem to learn from the errors of the past.

A lot of errors made are simple ones and involve failures of communication

When health care errors are looked at in totality, it seems that a lot could have been easily avoided if doctors, nurses and other health carers properly communicated with each other and with patients. When surveys and error reports are analysed, many involve simple communication errors such as wrongly noting a patient's name or drug or missing out and failing to convey other key information. Again, this seems to be an area where, sadly, we do not appear to be learning sufficiently from past mistakes. It is easy to feel as an observer that record-keeping is seen as a chore by health carers, when it should be regarded as a key duty and skill.

On the other hand, the NHS has much to be proud about in this area. The NHS is arguably getting better at ensuring good-quality and safe health care. Our patient safety, health quality infrastructure is copied in many parts of the world and is very highly regarded. But it is important to keep the momentum of improvement, and there are considerable challenges to doing so. Since the last edition of this book, the NHS has been in an almost constant state of reform and, as we said in the previous edition's preface, this unstable platform brings about its own problems, as NHS organisations struggle to implement government health quality, risk and patient safety policies and at the same time manage root-and-branch change.

We repeat here the warning about health law changes that we made in previous editions. Health care law is always in a state of flux, and it is simply impossible, for practical reasons, to represent all the legal changes that took place before this book went to press. We have tried to regularly

capture the changes to the law as this book's production has progressed, particularly up to September 2012.

For this fourth edition we have been able to retain many of the authors who contributed to earlier editions but a number have now retired. We wish them well in their retirement and extend our deepest gratitude for the contributions they have made. A number of new contributors have joined us for the fourth edition and to them we extend a warm welcome. We, once again, very much hope that this new edition of the book will prove to be of practical benefit – and theoretical interest – to the nursing community.

John Tingle and Alan Cribb

Nottingham and London

January 2013

Preface to the Third Edition

We are pleased to have been given the chance to update and revise this book into a third edition. Health care legal and ethical issues continue to dominate social and political agendas and the courts. Since the last edition a myriad of ethical and legal dilemmas have flowed through the media and the courts, and we have tried to reflect many of these in this new edition. Such dilemmas arise in the context of an NHS that appears to be in a constant state of reform and subject to a number of increasingly contentious and competing political agendas. This unstable platform brings about its own problems, as NHS organisations struggle to implement government health quality, risk and patient safety policies, and at the same time manage root-and-branch change. Nursing law and ethics, as an academic discipline, continues to develop and is now often seen to sit alongside these patient safety, quality and risk topics. The focus now, practically speaking, is the practical and holistic integration of these topics (the Government, for example, currently puts all this under the umbrella of 'Integrated Governance'). We suggest that nursing law and ethics, to be understood properly, should be seen in this broader context, which includes the wider policy context of the NHS. The nursing law and ethics student cannot ignore the work of NHS organisations such as the NPSA, NHSLA and Healthcare Commission and the related governance agendas. An understanding of these broader institutional and policy frameworks is essential for a fully informed discussion, and we hope this book helps to support such a discussion, as well as to properly represent the more focused and disciplinary demands of law and ethics.

The preface to the first edition set out the rationale for, and the structure of, the book. We hold true to this for the third edition as we did for the second. There have been changes, particularly to the law, and we have tried to capture these up to August 2006. That health care law is in a fairly constant state of flux is a self-evident truth, and it is simply impossible, for practical reasons, to represent all the legal changes that took place before the book went to press. We would note, however, that the NHS Redress Act 2006 was eventually passed into law. Positive changes were made to it as it progressed through Parliament, and it now has the potential to make a real difference to patients who have been harmed through lack of care in the NHS.

We, once again, very much hope that this new edition of the book will prove to be of practical benefit – and theoretical interest – to the nursing community.

Alan Cribb and John Tingle

London and Nottingham

Preface to the Second Edition

We are, of course, pleased that the first edition of this book was so well received; and we are delighted to have had the chance to update and revise it. There is comparatively little to add to the preface produced for the first edition; this set out the rationale for, and the structure of, the book, and these remain the same. But there are many changes to the content of the book. The last six years have seen an extraordinary amount of change in many aspects of health care law and ethics, in the regulation and management of health services, and in conceptions of health professional accountability. The contributors to this new edition have sought to reflect and illuminate these changes and also to provide clear overviews of their subject matter.

There is a new chapter in the first part of the book which summarises the changing policy context and legal environment of nursing; and in the second part there is a new 'pair' of chapters on clinical governance. We are grateful to all the authors who have updated their work and/or written material for the first time in this edition.We very much hope that this new edition will prove to be of practical benefit – and theoretical interest – to the nursing community.

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Alan Cribb and John Tingle

Preface to the First Edition

One of the key indicators of the maturation of nursing as a profession and as a discipline is the growing importance of nursing law and ethics. A profession which seeks not only to maintain, and improve on, high standards but also to hold e chof its individual members accountable for an increasing range of responsibilities is inevitably concerned with legal and ethical matters. It is not surprising that these matters have come to prominence in nurse education, and to enjoy a central place along with clinical and social sciences in the disciplinary bases of nursing. There is now a substantial body of literature devoted to nursing law and to nursing ethics.

This book is distinctive because it is about both law *and* ethics. We believe it is of practical benefit, and academic value, to consider these two subjects together. Put simply, we need to be able to discuss ‘what the law requires’ and ‘what is right’, and to decide, among other things, whether these two are always the same.

The book is divided into two parts. The first part is designed to be an overview of the whole subject and includes introductions to the legal, ethical and professional dimensions of nursing, as well as a special chapter on patient complaints. The second part looks at a selection of issues in greater depth. These chapters contain two parts or perspectives – one legal and one ethical. The legal perspectives take the lead – the authors were invited to introduce the law relating to the subject at hand. The ethics authors were invited to write a complementary (and typically shorter) piece in which they took up some of the issues but then went on to make any points they wished. Thus the terms of invitation for the ethics authors were

different, and more flexible, than those for the lawyers. This difference in treatment of the two perspectives is quite deliberate.

The essential difference is this: it makes good sense to ask lawyers for an authoritative account of the law, but it is not sensible to ask authors for an authoritative account of what is good or right – which is the subject matter of ethics. An account of the law will not simply be factual; it will inevitably include some discussion of the complexity and uncertainties involved in identifying and interpreting the implications of the law. But it is in the nature of the law that lawyers should be able to give expert guidance about legal judgments. There are no equivalent authorities on ethical judgement. Instead some nurses with an interest in ethics and some philosophers with an interest in nursing ethics were invited to discuss some of the issues and/or cases raised in the first part of the chapter. Clearly, these responses are of different styles and are written from different standpoints. Each author is responsible for his or her piece and any of the views or opinions expressed within them. This difference between the two sets of perspectives is indicated (indeed, rather exaggerated) by giving the former the definite, and the latter an indefinite, article – 'The Legal Perspective' but 'An Ethical Perspective'!

These differences in presentation reflect deeper differences between the two subjects. In short, law and ethics are concerned with two contrasting kinds of 'finality' – in principle, ethics is final but, in practice, law is final. It is important to appreciate the need for both open-ended debate and for practical closure. When it comes to making judgements about what is right and wrong, acceptable or unacceptable, the law is not the end of the matter. Although it is reasonable to expect a considerable convergence of the legal and the ethical, it is perfectly possible to criticise laws or legal judgments as unethical (this is the central impetus

behind legal reform). On the other hand, society cannot organise itself as if it were a never-ending philosophy seminar. There are many situations in which we need some authoritative system for decision-making, and mechanisms for closing debate and implementing decisions – this is the role of the law. Any such system will be less than perfect, but a society without such a system will be less perfect still.

Of course there are also areas in which there is little or no role for the law. The way in which nurses routinely talk to their patients raises ethical issues, and may also raise legal issues (e.g. informed consent, negligence), but unless some significant harm is involved, these ethical issues can fall outside the scope of the law. For example, it is a reasonable ideal for a nurse to aim to empathise with someone she is advising or counselling; she might even feel guilty for failing to meet this ideal, but she could hardly be held legally guilty. Laws which cannot be enforced, or which are unnecessary, could be harmful in a number of ways. They could detract from respect for the law and its legitimate role, and they could create an oppressive and inflexible climate in which no one benefitted. So even if we are clear that a certain practice is ethically unacceptable, it does not follow that it should be made illegal. However, the opposite can also be true. The overall consequences of legalising something which many people regard as ethically acceptable (e.g. voluntary euthanasia) may be judged, *by these same people*, to be unacceptable – as raising too many serious ethical and legal complications. Both lawyers and ethicists have to consider the proper boundaries of the law.

Even these few examples show that the relationship between the law and ethics is complicated. Professional values, such as those represented in the UKCC Code of Conduct, act as a half-way house between the two. They provide a means of enabling public discussion of public

standards. They address the individual conscience but, where necessary, they are enforceable by disciplinary measures. We hope that this book will illustrate the importance of considering all of these matters together, and will help to provide nurses with insight into what is expected of them, and the skills to reflect on what they expect of themselves.

Alan Cribb and John Tingle

Part One: The Dimensions

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The Legal Dimension: Legal System and Method

John Hodgson

Reader in Legal Education, Nottingham Law School, Nottingham Trent University, Nottingham

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 England[2] and at some of the methods used by judges when they have to interpret and apply the law.[3]

1.1.1 Statute law