

简明法学案例丛书(影印版)

briefcase on
**MEDICAL
LAW**

医疗法简明案例

厄莱斯代尔·麦克林

—Alasdair MacLean



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本书导读

医疗法是一个相对较新的法律领域。它吸纳、涵盖了许多其他的法律领域诸如民法、婚姻法、人权法以及刑法等的诸多内容。除了这些混合的法律基础之处,生物伦理理论贯穿于医疗法的始终。

本书分十六章,通过丰富的案例汇编对医疗法的若干基本问题作了高度的概括和浓缩。第一章为医疗道德理论,作者从医疗道德理论、医疗道德原则、治疗作风、医德、医疗权力、医患关系模式和医疗目标等七个方面进行了阐释。第二章重点在于介绍患者对于治疗的同意表示问题,认为必须是有行为能力的患者在理解了治疗行为的性质和意义之后自愿作出的同意表示才是有效的;医生有义务提供信息,以便患者作出是否同意治疗的决定。第三章讨论了有关无行为能力的患者及其同意表示的效力问题。第四章专门介绍了儿童及其同意表示的效力问题,并且分不同的年龄阶段对儿童及其父母的同意效力予以阐述。第五章讲述的是有关患者对于治疗有拒绝权利的问题。第六、七、八章论及与生物伦理道德联系相对紧密的有关医疗法上的问题,分别讨论了医学死亡与安乐死、器官移植以及流产和生育法等。第九章着眼于精神疾病患者问题而述及精神健康法。第十章是关于医疗机密和患者查阅病历的权利问题。第十一章从人权法案入手论述患者的人权保障。第十二章介绍医疗过失问题,阐释了医疗方的义务和违反义务所应承担的责任,患者的辩护理由以及医疗事故诉讼的起诉期限等相关问题。第十三章专门考察医疗瑕疵产品的责任问题。第十四章论述医疗不正当行为的刑事责任。第十五章考察传染性疾病的控制与治疗。最后一章则论述医生的职业规章。

在本书的具体论述中,作者采用了以判例和相关资料来充实理论写作手法。作者用简洁的语言对与相关理论对应的判例和资料予以介绍、评析,不仅充实了内容,而且有助于读者更好、更容易理解相关理论问题。散置于书中的思考点将有助于检测学生的理解力,并有利于引导他们更好地理解一些重要的有争议的法规。

本书将向学习者提供一个了解医疗法领域中重要判例的快捷途径。它

不仅适用于法律专业的学生,对于其他相关从业者也不失为一部有较大学术参考价值的资料。

本书有关内容由张阳翻译,如有不当之处,敬请专家、读者指正。

译 者

2004 年 5 月

Preface

Medical law is a relatively new area of law. It draws on, and overlaps with, many other areas of law such as tort, family law, human rights and criminal law. Apart from this hybrid legal basis it is also informed by bioethical theory. This book draws those elements together to form a comprehensible and succinct overview. The cases – and other relevant material – will be linked by short comments that help to explain their legal relevance. A brief introduction to the ethical principles that govern the provision of healthcare will provide a framework for considering the issues that arise in the cases. This ethical framework will include discussion of the principles of autonomy, beneficence, non-maleficence, justice and veracity. Following this, relevant cases and important judicial *dicta* will illustrate the legal rules and principles of each key area of healthcare law. Relevant statutory material will be included as will appropriate extracts from professional bodies' codes of practice. Interspersed with the cases and materials 'think points' will be used to test the student's understanding and guide him/her towards the important and contentious issues.

The primary aim of this book is to provide a rapid and easy access to the important cases within the area of healthcare law. It will provide a valuable adjunct to more substantial texts as well as being an essential revision tool. It will also provide a useful springboard from which a student could dive into the deep waters of research. A secondary aim of the book is to provide a summary of healthcare law to students and practitioners of other disciplines. Doctors, nurses, other healthcare workers and bioethicists will all find the book a ready source of relevant case law and material written in clear English.

The author has made every effort to ensure that the law is correctly stated as of 31 January 2001.

Alasdair Maclean
May 2001

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1 Medical Ethics

1.1 Ethical theories

1.1.1 Teleological theories

These theories are goal orientated or consequentialist. They aim to provide a theory for action based on the consequences of the act. The preferred alternative is the one that produces the most good and least harm. Teleological theories stress that it is the consequences of the act and not the motive behind the act that should be judged. Thus, they separate the moral judgment of the act from the moral judgment of the actor. Utilitarianism is perhaps the foremost example of a teleological theory. It combines two theses: (1) all actions and rules are judged solely by the contribution they make to increase human happiness or decrease human misery; (2) pleasure is the only thing that is inherently good and pain is the only thing that is inherently evil. Notable exponents of utilitarianism include Jeremy Bentham and John Stuart Mill. An important aspect of utilitarianism that Bentham argued for is that every person counts for one and no person for more than one.

Other consequentialists adopt a 'pluralist' approach and believe that things other than pleasure can be inherently good. Ross (1930) argues that at least four things are intrinsically good:

- pleasure;
- knowledge;
- virtue; and
- justice.

Specific medical goods might include: absence of disease; absence of pain or suffering; and a 'trust-filled' professional-patient relationship (Graber (1998)).

Because utilitarianism risks riding roughshod over the individual for the good of society some philosophers have incorporated deontological principles within a utilitarian framework. 'Rule utilitarianism' argues that such principles should be followed if institutionalisation of the principle

maximises welfare. In that case the rule should be followed even though there may be occasions when breaking the rule would maximise welfare. JS Mill, for example, argues that a respect for autonomy will maximise happiness. See, also, Hare (1981).

Think point

Consider whether utilitarianism supports the view that a person with two healthy kidneys should be sacrificed in order to allow two individuals with renal failure to lead normal lives?

1.1.2 Deontological theories

These theories are based on the premise that we owe certain duties to others. These duties may arise from the other person's right, such as a 'right to be informed' or from the idea of 'respect for persons'. Immanuel Kant is the most notable deontologist. Two important principles that Kant described are:

- treat both yourself and other people as ends and never simply as means to an end;
- only base your acts on maxims that you would want to be applicable universally.

The moral duties that derive from these principles act as constraints to the individual's actions that may be performed in pursuit of his goals. Examples of moral duties include: do not lie; do not kill another person; do not harm another person. Some deontologists believe that the most important moral duties are 'absolute' and cannot be overridden. This can lead to problems where moral rules conflict. The rules could be qualified but this weakens their value. Instead, other deontologists argue for *prima facie* duties, which means that where two moral duties conflict, their relative moral weights must be determined in order to give primacy to the more compelling rule. This is necessarily situation dependent. Ross lists seven fundamental *prima facie* duties:

- Fidelity.
- Reparation.
- Gratitude.
- Justice.
- Beneficence.
- Self-improvement.
- Non-maleficence.

In the medical ethics setting, Beauchamp and Childress (1994) lay down four essential principles:

- Autonomy.
- Beneficence.
- Non-maleficence.
- Justice.

Some medical ethicists would add a further principle to this list:

- Veracity.

1.1.3 Religious theories

Each religion has its own views on morality. Although secular ethics has evolved from the religious approach, it is not appropriate to consider them here as this book takes a secular approach. For a consideration of medical ethics from a Christian perspective, see Ramsey (1970).

1.1.4 Contractarian theories

Strictly speaking these theories are political but they are relevant to medical ethics – especially when considering resource allocation and other issues of Justice. Perhaps the most notable contractarian theory is Rawls' *Theory of Justice* (1972). This social theory requires a hypothetical 'veil of ignorance' that prevents the individual from knowing his role in society – whether a leper or politician. From this impartial viewpoint Rawls argues that an individual would choose a system of justice with two main principles:

- (1) each person should have a maximum liberty that is compatible with the same degree of liberty for everyone within the community; and
- (2) an unequal distribution of 'goods' and resources would be unjust unless such a distribution improved the lot of the least advantaged.

1.2 Ethical principles

1.2.1 Autonomy and respect for autonomy

Autonomy literally means self-governance. There is no universal agreement as to its exact meaning and the term is often used interchangeably with self-determination. It is valued because it is through autonomy that our character is shaped. It is the exercise of our autonomy that makes us the person we are and provides us with our dignity.