

Mason
& McCall Smith

LAW AND MEDICAL ETHICS



butterworths

Law and Medical Ethics

J K Mason CBE MD FRCPath DMJ

Regius Professor of Forensic Medicine
at the University of Edinburgh

R A McCall Smith LLB PhD

Lecturer in Civil Law
at the University of Edinburgh

London
Butterworths
1983

England	Butterworth & Co (Publishers) Ltd 88 Kingsway, London WC2B 6AB
Australia	Butterworth Pty Ltd 271-273 Lane Cove Road, North Ryde, NSW 2113 Also at Melbourne, Brisbane, Adelaide and Perth
Canada	Butterworth & Co (Canada) Ltd 2265 Midland Avenue, Scarborough, Ont M1P 4S1 Butterworth & Co (Western Canada) Ltd 409 Granville Street, Ste 856, Vancouver, BC V6C 1T2
New Zealand	Butterworths of New Zealand Ltd 33-35 Cumberland Place, Wellington
Singapore	Butterworth & Co (Asia) Pte Ltd Crawford Post Office Box 770 Singapore 9119
South Africa	Butterworth & Co (Pty) Ltd Box No 792 Durban
United States of America	Mason Publishing Company Finch Building, 366 Wacouta Street, St Paul, Minn 55101 Butterworth (Legal Publishers) Inc 15014 NE 40th, Suite 205, Redmond, Wash 98109 Butterworth (Legal Publishers) Inc 381 Elliot Street, Newton, Upper Falls, Mass 02164

© Butterworth & Co (Publishers) Ltd 1983

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, including photocopying and recording, without the written permission of the copyright holder, application for which should be addressed to the publisher. Such written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

This book is sold subject to the Standard Conditions of Sale of Net Books and may not be re-sold in the UK below the net price fixed by Butterworths for the book in our current catalogue.

ISBN Hardcover 0 406 40015 6
Softcover 0 406 40016 4

Typeset in 'Monophoto' Times New Roman by Cotswold Typesetting Ltd, Gloucester and Printed in Great Britain by Billings Bookplan, Worcester.

‘It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation’

LORD CHIEF JUSTICE COLERIDGE
in *R v Instan* [1893] 1 QB at 453

*This book is dedicated to
two Elizabeths*

Preface

Medical jurisprudence is something of a growth industry. The ethical issues raised by new medical techniques, fanned by rapidly changing public values, are matched in interest by the intense legal problems they provoke. The whole basis of medicine and medical practice is being questioned, patients' rights are increasingly being regarded as paramount and the scope of litigation is widening. At the same time, philosophers, doctors and lawyers have become deeply concerned as to the morality of medical progress; Departments of Bioethics have sprung up in the United States and there are few British Universities with medical schools which do not also have flourishing 'Medical Groups' concerned with medical ethics.

Not surprisingly, there is a growing body of literature on the subject, particularly in the United States. Much of this is, however, concerned with what *ought* to happen rather than with what *does* happen if a certain course of action is followed. We have tried in this book to avoid excessive involvement in philosophical debate, although we hope that the ethical implications of the subject are adequately explored. We have concentrated on what the law is in these matters; the ultimate test of a set of values is, for practical purposes, whether they will or will not be acceptable when subjected to legal scrutiny – for the law effectively represents the public conscience.

The book is designed primarily for lawyers but we hope it will be of equal interest to philosophers, doctors, politicians and, indeed, all those concerned with the provision of health care. We have concentrated on English law but we have taken account of Scots law and of legal decisions from other parts of the Commonwealth, notably from Australia and Canada where the medical profession and the courts have been active in this field. We do not attempt to discuss in detail the complexities of United States case law, although we do refer to American decisions when they are useful in illustrating a particular legal option. The United States experience in medico-legal matters has been different in many respects from that in Britain yet there can be no doubt that important lessons can be

learned from what has happened there. Moreover, there is a strong American influence on public attitudes in Britain.

A major problem is, however, that there *is* no definitive law in many of the areas covered and, where this is so, it is possible only to appraise the present situation and to predict the future. Our own views in controversial areas will be apparent from the text and no doubt they have been influenced by our religious backgrounds – one in the Roman Catholic and the other in the Protestant tradition. We hope, though, that this has not affected an objective presentation of the core subject which is the interaction of the law and medical ethics.

We have received great help and encouragement from members of the Faculties of Law and of Medicine in the University of Edinburgh and we thank them all – anonymously because to do otherwise would be invidious to some and might also imply agreement with views which, we hasten to add, are our responsibility alone. The United Kingdom law is, we believe, correct as of September 1982. Our very special thanks go to Mrs E A MacDonald who has never flinched at an awesome secretarial task and we would like to acknowledge the unfailing courtesy and helpfulness of our publishers. Finally, it would be appropriate to thank our students in the Honours Class in Medical Jurisprudence who have kept us up to scratch in a way peculiar to groups of interested and involved young lawyers-to-be.

JKM

RAMcS

Edinburgh 1982

Table of statutes

References in this Table to Statutes are to Halsbury's Statutes of England (Third Edition) showing the volume and page at which the annotated text of the Act will be found.

	PAGE		PAGE
Abortion Act 1967 (8 <i>Statutes</i>		Criminal Justice (Scotland) Act 1980	
682)	41, 44, 53, 56, 65, 217	s 80	18, 24
s 1(1)(a), (b)	26	Criminal Law Act 1967 (47 <i>Statutes</i>	
(3)	58	142)	
4.	63, 90	s 5(5)	98
5(1)	58	Criminal Law Amendment Act	
Accident Compensation Act 1972		1885	19
(New Zealand)	204	Criminal Procedure (Insanity) Act	
Administration of Justice Act 1970		1964 (8 <i>Statutes</i> 526)	233
(40 <i>Statutes</i> 1098)		Dentists Act 1956 (21 <i>Statutes</i>	
s 31, 32	106	623)	7
Administration of Justice (Scotland)		Domestic Violence and Matrimonial	
Act 1972		Proceedings Act 1976 (46 <i>Stat-</i>	
s 1.	106	<i>utes</i> 713)	100
Adoption Act 1976 (46 <i>Statutes</i>		Evidence Amendment Act 1980	
718)		(New Zealand)	
s 57	43	s 31-33	96
Anatomy Act 1832 (21 <i>Statutes</i>		Factories Act 1961 (13 <i>Statutes</i>	
553)	173	400)	
California Natural Death Act		s 82	105
1976	188	Family Law Reform Act 1969 (17	
Children Act 1975 (45 <i>Statutes</i> 669)		<i>Statutes</i> 792) ¹	36
s 85(2)	43	s 8.	169, 210
Children and Young Persons Act		(1)	115
1933 (17 <i>Statutes</i> 435)		Homicide Act 1957 (8 <i>Statutes</i>	
s 1.	83	457)	233
Civil Evidence Act 1972 (42 <i>Stat-</i>		s 2(1)	240, 241
<i>utes</i> 347)		Human Tissue Act 1961 (21 <i>Stat-</i>	
s 2.	106	<i>utes</i> 817)	173, 216
Congenital Disabilities (Civil Liab-		s 1(1), (2)	172, 175
ility) Act 1976 (46 <i>Statutes</i>		(5), (9)	172
1837)	61, 71, 78	Human Tissue Gift Act 1971	
s 1(4)	40, 76	(Ontario)	
(5)	40	s 10	176
4(5)	78	Incest Act 1567	18, 26
Contempt of Court Act 1981 (51		Indecency with Children Act 1960	
<i>Statutes</i> 495)		(8 <i>Statutes</i> 486)	18
s 10	107		

xiv *Table of statutes*

	PAGE		PAGE
Infant Life (Preservation) Act 1929 (8 <i>Statutes</i> 304)	57, 58, 81	Offences against the Person Act 1861 (8 <i>Statutes</i> 147)	57
s 1.	214	s 58	41, 56, 61, 214
(1)	57	59	56
Infanticide Act 1938 (8 <i>Statutes</i> 334)	81	Prevention of Terrorism (Tempor- ary Provisions) Act 1976 (46 <i>Statutes</i> 266)	
Law Reform (Miscellaneous Pro- visions) (Scotland) Act 1968	36	s 11	105
Matrimonial Homes (Family Pro- tection) (Scotland) Act 1981	100	Protection of Children Act 1978 (48 <i>Statutes</i> 317)	18
Medical Act (1858) (21 <i>Statutes</i> 561)	7, 96	Road Traffic Act 1972 (42 <i>Statutes</i> 1633)	
Medical Act 1978 (48 <i>Statutes</i> 898)	8, 96	s 168	105
Medicines Act 1968 (21 <i>Statutes</i> 981)	193	Sexual Offences Act 1956 (8 <i>Statutes</i> 415)	
Mental Health Act 1959 (25 <i>Statutes</i> 42)		s 6.	19, 20
s 25, 26, 29.	226	10, 11	18, 25
Mental Health (Amendment) Act 1982	227	44	19
s 43	231	Sexual Offences Act 1967 (8 <i>Statutes</i> 577)	24
(3)	231	s 1.	18
48	228	Sexual Offences (Amendment) Act 1976 (46 <i>Statutes</i> 321)	
Mental Health (Scotland) Act 1960 (25 <i>Statutes</i> 193)	227	s 1(1).	21
s 23	226	Sexual Offences (Scotland) Act 1976	
National Health Service Act 1977 (47 <i>Statutes</i> 794)	98	s 4.	19
s 3.	147	5.	18
National Health Service (Family Planning) Amendment Act 1972 (42 <i>Statutes</i> 1354)	49	Supreme Court Act 1981 (51 <i>Stat-</i> <i>utes</i> 590)	
		s 33, 34	106
		Trade Union and Labour Relations Act 1974 (44 <i>Statutes</i> 1766)	7
		Trial of Lunatics Act 1883 (8 <i>Stat-</i> <i>utes</i> 225)	233

List of cases

	PAGE
A v C (1978)	43, 44
AB v CD (1851).	108
AB v CD 1904	107, 108
Allan v New Mount Sinai Hos- pital (1980).	119
Argyll (Duchess) v Duke of Argyll (1967)	107
B, Re (1981)	84, 85, 89, 90
Barbour v HM Advocate 1982.	22
Becker v Schwartz (1978).	74
Bell v Devon and Cornwall Police Authority (1978).	24
Bellotti v Baird (1979).	102
Bolam v Friern Hospital Manage- ment Committee (1957)	122, 131, 132, 203
Bratty v A-G for Northern Ireland (1963)	236, 245
Bravery v Bravery (1954).	48, 104
C v C (1946)	97
C and D, Re (1979)	29, 30
Canterbury v Spence (1972).	122
Carpenter v Blake (1871).	196
Carraher v HM Advocate 1946	242
Casey v Grossman (1949)	55
Cassidy v Ministry of Health (1951)	139
Cataford v Moreau (1978)	49
Chatterton v Gerson (1981).	118, 120, 122, 124
Collins v Hertfordshire County Council (1947)	135
Cooper v R (1980)	237
Corbett v Corbett (1971).	30
Crawford v Board of Governors of Charing Cross Hospital (1953)	132
Crinon v Barnet Group Hospital Management Committee (1959): 133	133

	PAGE
Curlender v Bio-Science Labora- tories (1980)	77
D v National Society for the Pre- vention of Cruelty to Children (1978)	101
D (a minor), Re (1976)	49, 52, 69
Davidson v Lloyd Aircraft Services Ltd (1974)	106
Davis v Edinburgh Magistrates 1953	233
Dehler v Ottawa Civic Hospital (1979)	214
Deistung v South Western Metro- politan Regional Hospital Board (1975)	106
Doe v Bolton (1973)	60
Doe v Kelley (1980)	43
Doiron v Orr (1978)	49, 50
Dumer v St Michael's Hospital (1975)	77
Dunning v United Liverpool Hospitals Board of Governors (1973)	106
Durham v United States (1954)	239
Duval v Seguin (1973).	75
Eichner v Dillon (1981)	189
Erickson v Dilgard (1962)	188
Eve, Re (1981)	53
Faulkner v Talbot (1981).	19
Finlayson v HM Advocate 1978	164, 187
Forrester v HM Advocate 1952	104
Froom v Butcher (1976)	156
G v G 1961	33
Garner v Garner (1920)	107

	PAGE		PAGE
General Medical Council v Browne (1971)	103	Lanphier v Phipos (1838).	130
Gleitman v Cosgrove (1967).	76	Lazevnick v General Hospital of Monro County Inc (1980).	76
Gold v Essex County Council (1942)	129	Macdonald v Glasgow Western Hospitals Board of Management 1954	129
Grady, Re (1979)	51	MacDonald v York County Hos- pital Corpn (1972)	139
Gray v Mid-Herts Hospital Man- agement Committee (1974)	135	McGinley v Burke (1973).	106
HL v Matheson (1981)	60, 102	McIvor v Southern Health and Social Services Board (1978)	106
HM Advocate v D 1982	21, 23	McKay v The Essex Area Health Authority (1982)	65, 77
HM Advocate v Dingwall 1867	240	M'Laughlan v Boyd 1934	18
HM Advocate v Kidd 1960	239	MacLennan v MacLennan 1958.	33
Hale v Manion (1962).	214	McLoughlin v O'Brian (1982)	138
Halushka v University of Saskat- chewan (1965).	202	M'Naghten (Daniel) (1843)	236, 237, 238, 239
Harris v McRae (1980)	60	Mahon v Osborne (1939)	136, 139
Hayward v Board of Management of The Royal Infirmary of Edin- burgh 1954.	129	Marshall v Curry (1933)	113, 114
Higgins v Burton 1968	107	Morgan v DPP (1975)	22
Higgins v North West Metro- politan Regional Hospital Board (1954)	129	Mulloy v Hop Sang	118
Hillyer v Governors of St Bartholo- mew's Hospital (1909)	129	Murray v McMurchy (1949)	114
Hopp v Lepp (1980)	123	Nottingham County Council v Bowly (1978).	24
Humphrys v Polak (1901)	44	Orford v Orford (1921).	33
Hunter v Hanley 1955.	131	Palm Springs General Hospital Inc v Martinez (1971)	188
Hunter v Mann (1974)	106	Paton v British Pregnancy Advisory Service Trustees (1979)	64, 103
Hyde v Tameside Area Health Authority (1981)	138	Paton v United Kingdom (1980)	64
Johnston v Wellesley Hospital (1970)	116	People v Lyons (1974).	164, 187
Jones v Manchester Corporation (1952)	137	Phillip B, Re (1979)	87
Junor v Inverness Hospitals Board of Management and McNicol (1959)	137	Planned Parenthood of Missouri v Danforth (1976)	64, 103
Kaimowitz v Michigan Department of Mental Health (1973)	230	Quinlan, Re (1976)	186
Kenny v Lockwood (1932)	123	R v Adams (1981)	182
Kerrigan v Hall (1901)	44	R v Arthur (1981)	84, 85, 87, 179
Kitson v Playfair (1896)	99	R v Bateman (1925)	130
L v L (1949)	33	R v Bourne (1939)	57
Langley v Campbell (1975)	134	R v Byrne (1960)	241

	PAGE		PAGE
R v Charlson (1955)	244	S v S (1972)	170
R v Clarke (1949)	21	Schwartz v R (1976)	237
R v Coney (1882)	48	Schweizer v Central Hospital (1974)	119
R v Dobinson (1977)	83	Scuriagi v Powell (1979)	50
R v Dudley and Stephens (1884)	153	Seager v Copydex Ltd (No 2) (1969)	107
R v Foy (1960)	245	Selfe v Ilford and District Hospital Management Committee (1970)	138
R v Gattschalk (1974)	246	Smith v Auckland Hospital Board (1964)	122, 123
R v Gibbins and Proctor (1918)	83	Smith v Brennan (1960)	40
R v Hare (1934)	18	Stapleton v R (1952)	238
R v Instan (1893)	95	Stewart v Long Island College Hospital (1968)	77
R v Isitt (1977)	246	Storax, Re (1981)	189
R v K (1971)	246	Strangeways-Lesmere v Clayton (1936)	135
R v Kemp (1957)	236, 244	Strunk v Strunk (1969)	170
R v Lupien (1970)	232	SY v SY (1963)	30
R v MacKenney (1981)	232		
R v MacMillan (1966)	238	Tarasoff v Regents of the University of California (1976)	222
R v Malcherek (1981)	164, 187	Taylor v R (1978)	233
R v Marsden (1891)	19	Terrell v Garcia (1973)	50
R v Matheson (1958)	233	Thorne v Northern Group Hospital Management Committee (1964)	138
R v Meddings (1966)	245	Toohy v Metropolitan Police Comr (1965)	232
R v Nicholls (1847)	19	Troppe v Scarf (1971)	50
R v O'Brien (1965)	245	Truman v Thomas (1980)	125
R v Olugboja (1982)	22	Tucker v Lower (1972)	187
R v Paddison (1973)	244, 245	Tuffil v East Surrey Area Health Authority (1978)	134
R v Pigg (1982)	22	Turpin v Sortini (1982)	77
R v Potter (1963)	187		
R v Quick (1973)	244, 245	US v Brawner (1972)	239
R v Roberts (1977)	20	US v Holmes (1841)	153
R v Sang (1980)	205	Urry v Bierer (1955)	136
R v Secretary of State for Social Services, ex p Hincks (1979)	147		
R v Senior (1899)	87, 117	W v Official Solicitor (1972)	170
R v Simons (1977)	20	Watson v McEwan (1905)	107
R v Smith (1974)	59	Watt v Rama (1972)	75
R v Steel (1981)	164, 187	White v Turner (1981)	124
R v Steele (1976)	21	Whiteford v Hunter (1950)	134
R v Stone (1977)	83	Whitehouse v Jordan (1980)	11, 80
R v Taylor (1977)	20	Whitehouse v Jordan (1981)	134
R v Weise (1969)	235	Wray v R (1973)	205
R v Windle (1952)	237		
Rabey v R (1981)	246	X Petitioner 1957	30
Razzel v Snowball (1954)	129		
Reibl v Hughes (1980)	118, 120, 124		
Rice v Connolly (1966)	99		
Roe v Minister of Health, Woolley v Minister of Health (1954)	129		
Roe v Wade (1973)	60, 64, 89, 102		
Royal College of Nursing of the United Kingdom v Department of Health and Social Security (1981)	64		

Contents

Preface	vii
Table of statutes	xiii
List of cases	xv

INTRODUCTION

1 Evolution of medical ethics	3
The progress of medicine	3
The organisation of modern medicine	7
Modern medical technology and the law	9

REPRODUCTIVE MEDICINE

2 A reform of sex law?	17
Consent to sexual intercourse	18
Homosexuality	24
Incest	25
Transsexualism	28
3 Modern reproductive technology	32
Artificial insemination	32
The infertile wife	38
4 The control of fertility	47
Sterilisation	47
Other forms of contraception	54
5 Abortion	56
The evolution of the law on abortion	56
The rights of the fetus	60
Other people's rights	63
6 Prenatal screening and wrongful life	66
Types of genetic disease	66
Genetic counselling	67
Counselling and negligence	74

7 Neonaticide 81

Sanctity or quality of life? 82

The legal position 83

Neonaticide as a separate issue 86

MEDICAL PRACTICE

8 Medical confidentiality 95

The legal and moral bases of confidentiality 95

Relaxation of the rule 96

The patient's remedies 107

9 Consent to treatment 111

Non-consensual treatment 112

Informed consent—What needs to be disclosed? 120

10 Medical negligence 126

The basis of medical liability 128

What constitutes negligence? 130

Injuries caused by drugs 140

11 Health resources and dilemmas in treatment 143

Global distribution of resources 144

The allocation of national resources 145

Treatment of the individual 148

DEATH

12 The diagnosis of death 159

Brain function as a measure of death 160

The legal effect of applying brain stem death criteria 163

13 The donation of organs and transplantation 167

The living donor 168

Cadaver donations 172

14 Euthanasia 178

Allowing the patient to die 179

RESEARCH AND EXPERIMENTATION

15 Biomedical human experimentation 193

Ethical codes in human biomedical experimentation 193

Potential experimental subjects 194

The design of experiments 196

Random sample testing 204

16 Research on children and fetal experimentation 206

Non-therapeutic research on children 206

Fetal experimentation 212

PSYCHIATRY AND THE LAW

17 Human rights, psychiatry and the law 221

The basis of involuntary treatment 222

The patient's rights 225

18 Psychiatry and the criminal law 232

The insanity plea 233

Diminished responsibility 240

APPENDICES

Appendix A The Hippocratic Oath 251

Appendix B Declaration of Geneva 252

Appendix C International Code of Medical Ethics 253

Appendix D Declaration of Tokyo 255

Appendix E Declaration of Oslo 257

Appendix F Declaration of Helsinki 258

Index 263

Introduction

