

Chapter 1

Introduction to law in nursing



NMC Standards for Pre-registration Nursing Education

This chapter will address the following competencies:

Domain 1: Professional values

1. All nurses must practise with confidence according to *The Code: Standards of conduct, performance and ethics for nurses and midwives* (NMC 2008), and within other recognised ethical and legal codes frameworks.

Chapter aims

By the end of this chapter you will be able to:

- define the term law;
- identify primary and secondary sources of legal material;
- outline the role of Acts of Parliament;
- state the role of precedent at common law;
- list the key features of a published Act, Statutory Instrument and Case Report;
- describe the relevance of law to healthcare.

Introduction

This chapter examines how the law influences nursing. It begins by highlighting that the Nursing and Midwifery Council's *Code*, which sets out the standard for professional practice, is underpinned by the law. The chapter then defines the term 'law' and considers how laws are made by looking at the role of Parliament and the courts. You are then introduced to the published forms of law and are encouraged to become familiar with the main features of an Act of Parliament, a Statutory Instrument and a Case Report. Finally, the chapter highlights the benefits of legal awareness to a student nurse.

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A book on law and professional issues in nursing may seem an unusual collection of topics for a course of study that will largely focus on meeting the needs of individuals with various health problems. Why is it necessary for you to study law and ethics when you want to devote your time to the study of nursing and caring for patients?

The reality is that law is now fundamental to the study of nursing and underpins your relationship with the profession and with your patients. The law informs nursing at every stage and it is essential that you understand and are able to critically reflect on the legal issues relevant to nursing practice.

The accountable practitioner

Case study 1.1 Accountability in action

In April 2013, a children's nurse who stole insulin and injected herself when she was meant to be looking after sick babies was struck off the Nursing and Midwifery Council's Register.

The nurse fell so ill after taking the insulin that she had to be treated at the casualty department and was kept overnight for observation.

She later admitted stealing the diabetes drug, needle and a syringe before starting a night shift.

(Insulin nurse is barred. Scottish Star, 18 April 2013.)

As a registered nurse you will be legally and professionally accountable for your actions, irrespective of whether you are following the instruction of another or using your own initiative. Healthcare litigation is growing and patients are increasingly prepared to assert their legal rights. Compensation payments in the National Health Service (NHS) are currently running at some £1.09 billion a year (NHS Litigation Authority, 2012).

It is perhaps little wonder, therefore, that the NMC insists that student nurses are able to practise in accordance with an ethical and legal framework that ensures the primacy of patient and client interest (NMC, 2004c).

A thorough and critical appreciation of the legal, ethical and professional issues affecting nursing practice is essential if you are to develop the professional awareness necessary to satisfy the NMC that you are an accountable practitioner, competent to practise as a registered nurse.

Activity 1.1**Evidence-based practice and research**

The standards imposed on registered nurses by the Nursing and Midwifery Council are contained in *The Code: Standards of conduct, performance and ethics for nurses and midwives* (NMC, 2008).

Read *The Code*, which can be downloaded from the NMC website at www.nmc-uk.org, and identify the standards that apply to:

- your relationship with patients;
- your relationship with colleagues;
- your relationship with the profession;
- your relationship with society generally.

The Code highlights how the law and legal system applies to the nursing profession. Keep it with you as you work through this book.

Defining law

Activity 1.2**Reflection**

Before reading on, think about the laws you are aware of and what their role is; then write down what you believe the term law means.

Now read the following for further guidance.

A typical dictionary would define law as:

a rule enacted or customary in a community and recognised as commanding or forbidding certain actions;

or

a body of such rules.

A key characteristic of law is that it is perceived as binding upon the community. The English word 'law' is derived from the Old Norse *lagu* meaning 'laid down' or 'fixed'. The definition suggests that law is made up of rules, but is it the case that all rules have legal force?

Activity 1.3**Reflection**

Consider the following rules – which of these rules do you think are laws?

- Honour your mother and father.
- Do not steal.
- Be truthful in all circumstances.

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continued ...

- Do not kill other people.
- Rescue your neighbour's drowning child.
- Register a child's birth.
- Do not park on double yellow lines.

See below for an explanation of the rules.

Positive rules

Positive rules impose a legal obligation to do or refrain from doing something. If a positive rule is breached, a sanction may be imposed for breaking the law.

Normative rules

Normative rules set out what a person should do, or what they should refrain from doing. Note the word *should* – the individual is not compelled to abide by normative rules, they simply ought to. Normative rules are based on values that highlight a desired form of conduct but they do not carry legal force.

In the last activity the positive rules were:

- Do not kill other people – it is a common law offence to kill other people; that is the offence of murder.
- Do not park on double yellow lines – parking on double yellow lines constitutes a road traffic offence.
- Do not steal – stealing is an offence under the Theft Act 1968.
- Register a child's birth – an example of the law requiring a particular action, in this case under the Birth and Deaths Registration Act 1875.

The normative rules were:

- Honour your mother and father – this is established through religious teachings and reflects the fifth commandment of the Ten Commandments. It is not a requirement of the law in the UK.
- Be truthful in all circumstances – veracity is a moral or ethical issue. The need to be truthful in law occurs in specific circumstances such as when giving evidence under oath.
- Rescue your neighbour's drowning child – there is generally no duty of simple rescue in the UK. If you had a professional duty such as being a lifeguard at a swimming pool, you would be legally obliged to rescue the child.

In some cases the law requires that a person take action, for example the requirement that a child's birth be registered. However, in most cases the law requires a person to refrain from doing something, for example from killing others, parking on double yellow lines or stealing.

Relevance to healthcare

In healthcare we see a drawing together of normative and positive rules. The law imposes a minimum standard of acceptable care and behaviour on you as a registered nurse. Patients, however, deserve the highest possible standard of care and behaviour, so the health and social care organisation where you work and the profession, through *The Code* (2008), will require a standard that is higher than the law expects.

The Code is underpinned by a shared set of values common to all United Kingdom (UK) healthcare regulatory bodies. In a clear drawing together of both normative and positive rules, it requires that as a registered nurse you:

- respect the patient or client as an individual;
- obtain consent before you give any treatment or care;
- protect confidential information;
- cooperate with others in the team;
- maintain your professional knowledge and competence;
- be trustworthy;
- act to identify and minimise risk to patients and clients.

During your training as a student nurse you will be expected to live up to the standards of the Nursing and Midwifery Council's *Code* and the law and professional issues that underpin them. Higher Education institutions have Fitness to Practise panels where students who are accused of falling below the standards required of them are held to account. The decisions of the panels are based on the fitness to practise guidance espoused by *The Code*.

Criminal and civil law

The same unlawful action can be dealt with in different ways by the law. For example, touching a person without permission – that is, without consent – can be both a crime and a *tort* – a civil wrong.

The crime would be charged under the Offences Against the Person Act 1861. This very old statute is still very much in force today and forbids many forms of unlawful touching, such as actual bodily harm (section 47), wounding (sections 18 and 20), or even procuring a miscarriage (section 58). A crime is an act that is capable of being followed by criminal proceedings and with an outcome, an acquittal or a conviction that is criminal in nature.

Unlawful touching can also be pursued through the civil courts as the tort of trespass to the person. The law of tort is primarily concerned with providing a remedy, by way of compensation, to persons who have been harmed by the conduct of others.

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The nature of law

From our discussion of the law we can define law as:

A rule of human conduct imposed upon and enforced among the members of a given state.

Two ideas underpin this notion of the law:

- **order**, in the sense that there is a method or legal system that underpins the creation and implementation of the law; and
- **compulsion**, or the enforcement of obedience to the rules that are laid down by the law.

Sources of legal material

In your study of the law as it applies to healthcare and nursing, you will use a range of primary and secondary sources of law to inform your practice and your studies. Figure 1.1 highlights the typical sources of primary and secondary legal material that you can use in your studies.

Sources of primary legal material

Although there are many textbooks and periodicals that discuss legal issues in nursing, it is best whenever possible to study the primary legal material as well. This will give you a detailed understanding of the law as it relates to nursing.

There are three major sources of primary legal material, as follows.

1 Legislation

- Acts of Parliament that may also be referred to as statute law or *lex scripta* (written law).
- Secondary legislation:
 - Statutory Instruments, which are also known as delegated legislation and subordinate legislation.

2 Judicial decisions

These are decisions from cases decided in court, and are also known as the common law or *lex non scripta* (unwritten law from judges).

3 European Community and human rights law

Parliament has allowed these areas to be sources of law by incorporating them through Acts of Parliament (The European Community Act 1972 and the Human Rights Act 1998).

Other sources of law and influences on judges are as follows:

Royal Prerogative

The Royal Prerogative used to be the main source of law before the development of the parliamentary system in the UK. It now describes the powers, handed down direct from monarchs to

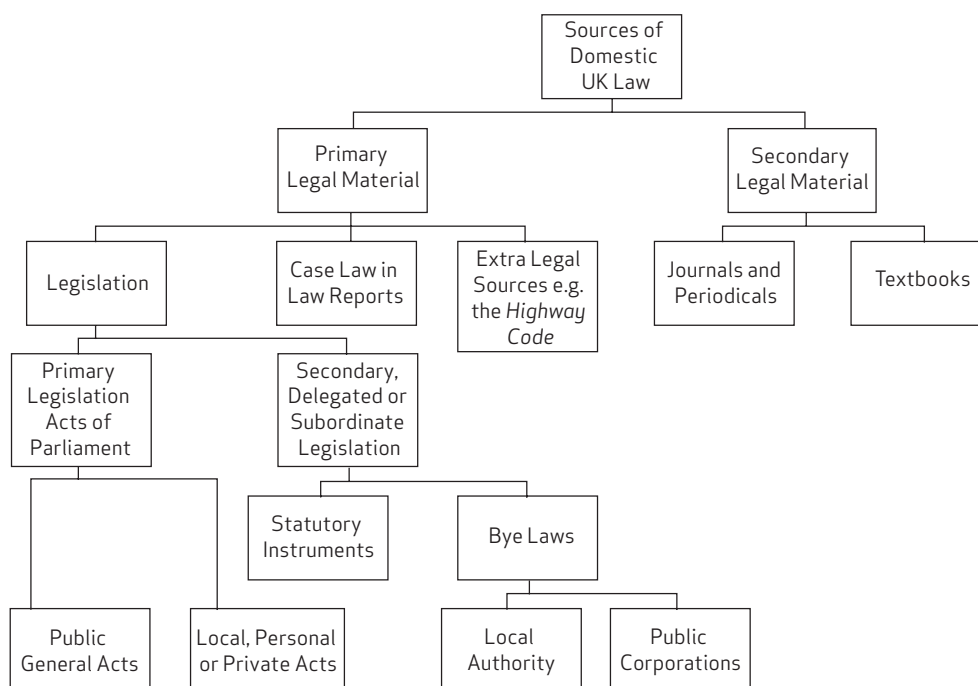


Figure 1.1: Sources of legal material.

ministers over many years, that allow governments, among other things, to go to war, regulate the Civil Service, issue passports and grant honours, all without any need for approval from Parliament. As these powers have been handed down over many centuries new powers cannot be created.

When having to consider a novel dispute or how to apply an ancient law to a modern situation, judges may take account of extra legal sources to assist them.

Received wisdom

- **Legal writers:** The law is extensively analysed and tested by academics and practitioners, and judges often resort to such analysis to assist them when having to decide a novel or complex case.
- **Public opinion:** In *Gillick v West Norfolk and Wisbech AHA* [1986], a case concerning the lawfulness of giving contraceptive treatment to girls under the age of 16, the House of Lords heard an appeal from the Court of Appeal, which had made a decision relying on a seventeenth-century precedent. Lord Scarman, in his opinion, said that part of the court's function was to reflect public opinion and to bring the law kicking and screaming into the twentieth century.

Codes and best practice

Judges will also refer to extra legal sources of law that bring together normative and positive rules and signal best practice in a particular area. For example, where a judge has to decide if a nurse's conduct is acceptable, then he or she will refer to the NMC's *Code* (2008). In a road traffic case the judge will refer to the *Highway Code*. These sources are only ever persuasive on a judge, who is not bound by them.

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Case Study 1.2 The definition of a patient

In R (Phillips) v NMC [2008], a nurse who had been struck off for an inappropriate relationship with a client argued that, once a personal relationship had begun to form, he arranged for a colleague to take on the woman's case and so she was no longer a client of his.

In its consideration of the definition of a patient in this case the court relied on the best practice guidance issued by the United Kingdom Central Council for Nursing and Midwifery in a booklet entitled Practitioner-client relationships and the prevention of abuse (NMC, 2002a). This stated that the term 'client' was used throughout the document and referred to all groups and individuals who have direct or indirect contact with registered nurses, midwives or health visitors in a professional capacity.

From this definition the court was satisfied that the woman remained a client as she was being cared for by the same team and so had indirect contact with the nurse. The court upheld the striking off order.

Laws from other countries

Where an issue arises that has never been considered by the courts, then judges may consider how the matter was dealt with in other legal systems. The laws and cases of other jurisdictions can be considered by the court, but again they can only be a source of persuasion and are never binding on the court.

Case Study 1.3 English court persuaded by the outcome of a case in Canada

In Wilsher v Essex Health Authority [1988], the court was considering the standard of care that applied in emergency situations. As no similar case had been heard by an English court they were referred to the case of Wilson v Swanson (1956), in the Supreme Court of Canada, that held that there was no negligence when a surgeon had to make an immediate emergency decision whether to operate, when the operation was subsequently found to have been unnecessary.

Lord Justice Mustill in the Wilsher case was persuaded by that case and accepted that the standard of care may be lower in emergency situations. He commented that an emergency may overburden the available resources, and, if an individual is forced by circumstances to do too many things at once, the fact that he does one of them incorrectly should not lightly be taken as negligence.

Legislation

The UK is a parliamentary democracy and the laws of the country are created and amended through the Queen in Parliament. That is, a new law or bill is considered, debated and scrutinised by the elected House of Commons and appointed House of Lords before receiving Royal Assent and becoming an Act of Parliament.

The Acts you are concerned with in your studies are *public general Acts*. These apply to classes or sub-classes of people. For example, the Mental Health Act 1983 (as amended) concerns the care and treatment of people with mental disorder; the Children Act 1989 concerns the welfare of children.

You will not be concerned with *private Acts*, which have a much narrower application and concern local issues and persons. For example, a private Act of Parliament, the Valerie Mary Hill and Alan Monk (Marriage Enabling) Act 1985, had to be passed to allow a man to marry his ex-wife's mother (his mother-in-law) – an action generally forbidden by the Marriage Act 1960.

The function of Acts

Acts of Parliament are generally created to fulfil one of five main purposes.

Revision of substantive rules of law

The laws of the UK need to be kept up to date and Acts are created to modernise existing law in order to bring it into line with modern society. A body known as the Law Commission keeps law under review and makes suggestions for reform. These are not always acted upon in a timely manner, however. For example, a Law Commission report (Law Commission, 1993) into decision making for incapable adults, submitted in 1993, eventually resulted in the Mental Capacity Act 2005.

Consolidation of Acts

Laws build up in a piecemeal fashion over many years and there is often a need to consolidate different parts of a law into one Act of Parliament. For example, the Health and Safety at Work etc. Act 1974 consolidated several other Acts concerning safety in the workplace, including the Mines and Quarries Act 1954, the Agriculture (Safety, Health and Welfare Provisions) Act 1956, the Factories Act 1961, the Offices, Shops and Railway Premises Act 1963, The Nuclear Installations Act 1965 and the Mines and Quarries (Tips) Act 1969.

Codification

Codification means putting a rule of the common law into statute law. Where a decision in a case is considered fundamental or very important, Parliament will codify it by making the rule part of an Act. For example, in *R v Bourne* [1939], a surgeon was acquitted of procuring a miscarriage by abortion when a jury decided that doing so to preserve the mental and physical health of the mother was lawful. When the Abortion Act 1967 was enacted, Parliament codified that decision under section 1(1) of the 1967 Act.

Collection of revenue

Taxation is a function of Acts. Each year the Government presents its budget to Parliament, which allows the raising of revenue through taxation.

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Social legislation

This is a broad category that covers the many facets of running the country. It is the main area of party political differences and the main source of debate in Parliament.

How a bill becomes an Act of Parliament

There are many stages that a bill has to go through before it can become an Act of Parliament (see Figure 1.2).

Manifesto

All political parties have a manifesto, which is their promise to the electorate of the actions they will take and the laws they will pass if they become the Government. It is these promises that persuade us to vote for a party.

Not all such promises become law, because when a party takes office they are supplied with detailed information by senior civil servants and may discover that the reforms are not realistic, or are too expensive.

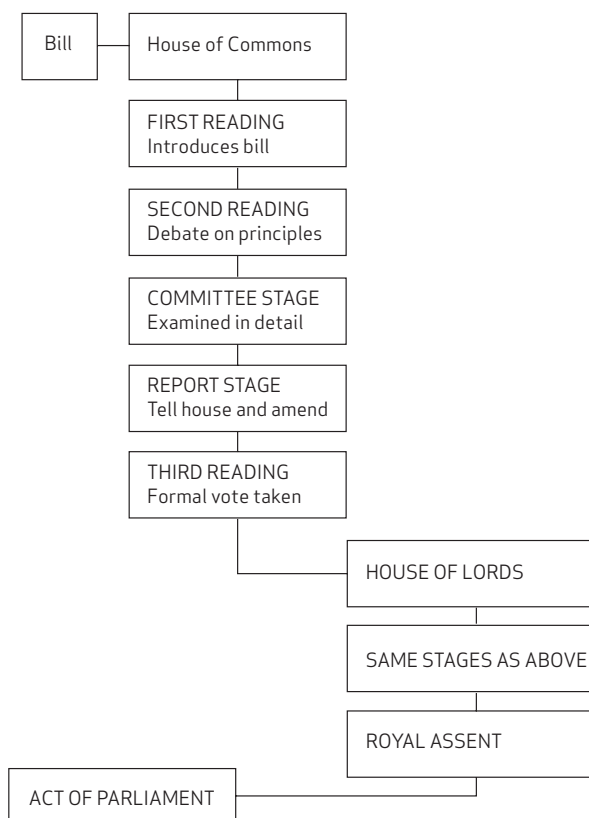


Figure 1.2: Stages of a bill.

Other laws enacted during a Government's term of office will be a reaction to an event, such as a war, or a ruling by the courts. In 2005, a man argued that having to ask for a private Act to be allowed to marry his mother-in-law was a violation of his human rights and the Government was forced to change the law to bring it into line with the Human Rights Act 1998 (*B v United Kingdom* (36536/02) [2005]).

Queen's Speech

The Queen's Speech at the State Opening of Parliament in November announces the main bills constituting the Government's legislative programme. The Government actually writes the speech for the Queen to read.

Green Papers and White Papers

Green Papers are consultation papers that seek comments from the public. The importance of consultation was seen when Tony Blair attempted to abolish the role of the Lord Chancellor without first consulting anyone. He then discovered that this could not happen without first changing over 500 statutes that referred to the functions of the Lord Chancellor.

Following the Green Paper, the Government will present to Parliament a White Paper, which is a statement of policy and contains definite proposals for legislation.

After consultation, Parliamentary Counsel (Draftsmen) will draft a bill into the form of words necessary for a bill.

Bills

In order to become an Act of Parliament, a bill must be passed by both Houses of Parliament and receive Royal Assent (collectively known as 'the Queen in Parliament').

First reading

The first reading of a bill involves a member reading the title of the bill. The first reading takes place without debate and is essentially an announcement that the bill has been introduced, after which copies of the bill are made available for members to read and are placed on the Parliament website.

Second reading

The second reading provides the first occasion for debate on the general principles of a bill, and then detailed discussion takes place during the committee stage.

Committee stage

When a bill has passed its second reading in the House of Commons, it is then referred to a General Committee. The Committee examines the clauses of the bill line by line, word by word, and detailed amendments are considered.

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Report stage

Any amendments made during the committee stage must be approved or rejected by the whole House during the report stage, which is a detailed debate where further amendments may be moved.

Third reading

The third reading of a bill often follows on immediately after the report stage. The bill is reviewed in its final form, including amendments made at earlier stages. Then the final version of the bill is approved and passed by hand – bound in green ribbon – to the Lords. When the Lords return the bill it is bound in red ribbon.

In the House of Lords, broadly the same procedure is followed.

Once all stages have been completed the bill receives Royal Assent and becomes an Act (see Figure 1.3). The date of Royal Assent is not necessarily the date the Act comes into force. Many

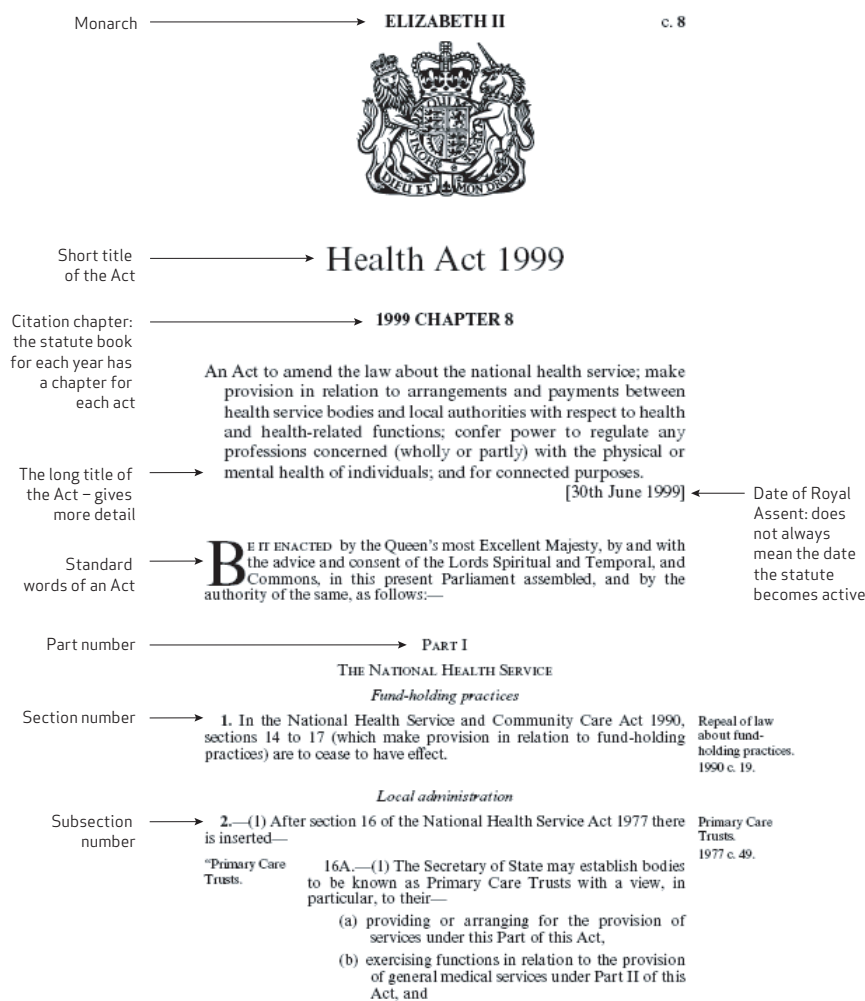


Figure 1.3: The first page of a public general Act, with its constituent parts labelled.

Acts begin at a later date with the issuing of a commencement order. For example, the part of the NHS and Community Care Act 1990 that introduced the notion of the NHS Trust did not commence until 1993. The Easter Act 1928, which sets Easter on a specific date, has never come into force.

Secondary legislation

With the rigorous scrutiny that bills must undergo, only some 50 Acts are passed by Parliament each year. It is therefore not uncommon for an Act to give powers to government ministers and other public bodies to introduce secondary legislation that enables general updating of the law. Secondary legislation, also sometimes called subordinate legislation, is generally in the form of a *Statutory Instrument* and includes regulations and orders. For example, the Medicines for Human Use (Clinical Trials) Regulations 2004 set the requirements for testing new medicines, while the Medicines for Human Use (Prescribing) (Miscellaneous Amendments) Order 2006 introduced independent and supplementary prescribing of medicines by nurses and other health professionals.

Some 5,000 Statutory Instruments are approved by Parliament each year. An important Statutory Instrument affecting nursing is the Nursing and Midwifery Order 2001, which established the NMC. The order was created under powers given by section 60 of the Health Act 1999. Where a minister or public body acts contrary to the powers bestowed by an Act, their decision can be challenged as *ultra vires*. For example, in *London and Westcliff Properties v Minister of Housing and Local Government* [1961], a council compulsorily purchased a property, then sold it to a company at a reduced cost. The court held that this was *ultra vires*, as the Housing Act 1957 required councils to obtain the best possible price for a property.

The annotated first page of the 2001 Order is shown in Figure 1.4.

Devolution in Scotland, Wales and Northern Ireland

Devolution is the granting of powers from the central United Kingdom government to the governments of Scotland, England and Wales. Devolved governments were created following referenda in Wales and Scotland in 1997, and the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly were established a year later.

The Scottish Parliament has powers to make primary legislation in certain devolved areas of policy that includes health policy. Law and policy relating to health in Scotland is now for the Scottish Parliament to decide and legislate, and there are many examples of how health policy in Scotland differs from the rest of the United Kingdom. For example, the law concerning adults who lack the ability to make decisions comes under the Adults with Incapacity (Scotland) Act 2000 in Scotland but is dealt with under the provisions of the Mental Capacity Act 2005 in England and Wales.

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The powers of the Northern Ireland Assembly are not as wide-ranging as those of Scotland and Wales. In Wales, following a referendum in 2011, the Assembly can now make primary legislation in twenty devolved areas, including health, social welfare and education. The Assembly also has the power to make secondary legislation relating to Wales.

It is essential that you ensure that the policies and laws you apply in your nursing practice relate to the country you work in.

Activity 1.4

Research

Mental Health Law in England Scotland Wales and Northern Ireland

Using your university library and learning resource centre, list the laws that regulate the care and treatment of people with mental health problems in England, Scotland, Wales and Northern Ireland

An outline answer is given at the end of the chapter.

Judicial interpretation of statutes

Once an Act has completed its parliamentary stages and becomes law, the authoritative and compelling interpretation of that statute is for judges and no one else. When it comes to a dispute only the judges' views count. Governance in the UK is structured to prevent tyranny by attempting to ensure that no one person or body has an over-dominant role. The system sees three components of governance come together but as separate entities, with different roles as illustrated in Figure 1.5.

Judicial function

The role of the courts is to give force to the intention of Parliament as expressed in the words of the Act, and to make decisions between disputing parties. The courts cannot question statutes as Parliament is supreme and an Act of Parliament is our supreme source of law. Judges must apply the statute to the particular facts before them and to do this they need to interpret the words in an Act.

Parliament makes law, judges interpret and apply the law, and they have a great deal of discretion in how they do this.

Judicial decisions, the common law

The common law consists of laws that arise from cases decided by the courts. It works on a system of precedent and is often referred to in Latin as *stare decisis* or 'let the decision stand'. When a judge decides a case, he or she must refer to decisions in previous similar cases in the higher courts and keep to the rulings in those cases. If the previous case was about a similar set of facts and the same legal rules, then the current case has to be decided in the same way.

Activity 1.5

Critical thinking

Precedent in action: the case of the snail in the ginger beer

In *Donoghue v Stevenson* [1932] two friends have a drink in a Paisley café. Mrs Donoghue has a ginger beer, which she gradually pours and drinks from an earthenware bottle from the bottom of which comes a green sludge, the remains of a decomposing snail. This causes her gastroenteritis and nervous shock, so she sues the manufacturer and the court awards her damages. The court finds that the manufacturer owes her a duty of care, which they have breached, causing her harm, because through their carelessness a snail entered the bottle in the manufacturing process.

Does precedent apply? Consider the following situations and decide whether the judge in the cases would be bound by the precedent set in the *Donoghue v Stevenson* [1932] case.

1. A woman buys a bottle of lemonade from a supermarket. Before she opens it she sees that it contains a dead wasp. Can she sue in negligence?
2. Utilities contractors dig a hole in a pavement and mark it with an upturned sledge hammer. Most people see the hazard and avoid it but a blind man falls in and breaks a leg. Can he sue in negligence?
3. A child is eating fish fingers for school dinner when he chokes on a one-inch piece of bone that needs surgery to remove. His mother sues the manufacturers, who say they are not to blame as there is a warning on the package. Are they right?
4. A woman has a sterilisation but it is poorly done and she has a healthy child. Can she sue in negligence?

An outline answer is given at the end of the chapter.

The structure of the courts

The use of precedent is seen as:

- giving certainty to the law;
- preventing arbitrary decisions;
- maintaining equality;
- providing a rational basis for decision making.

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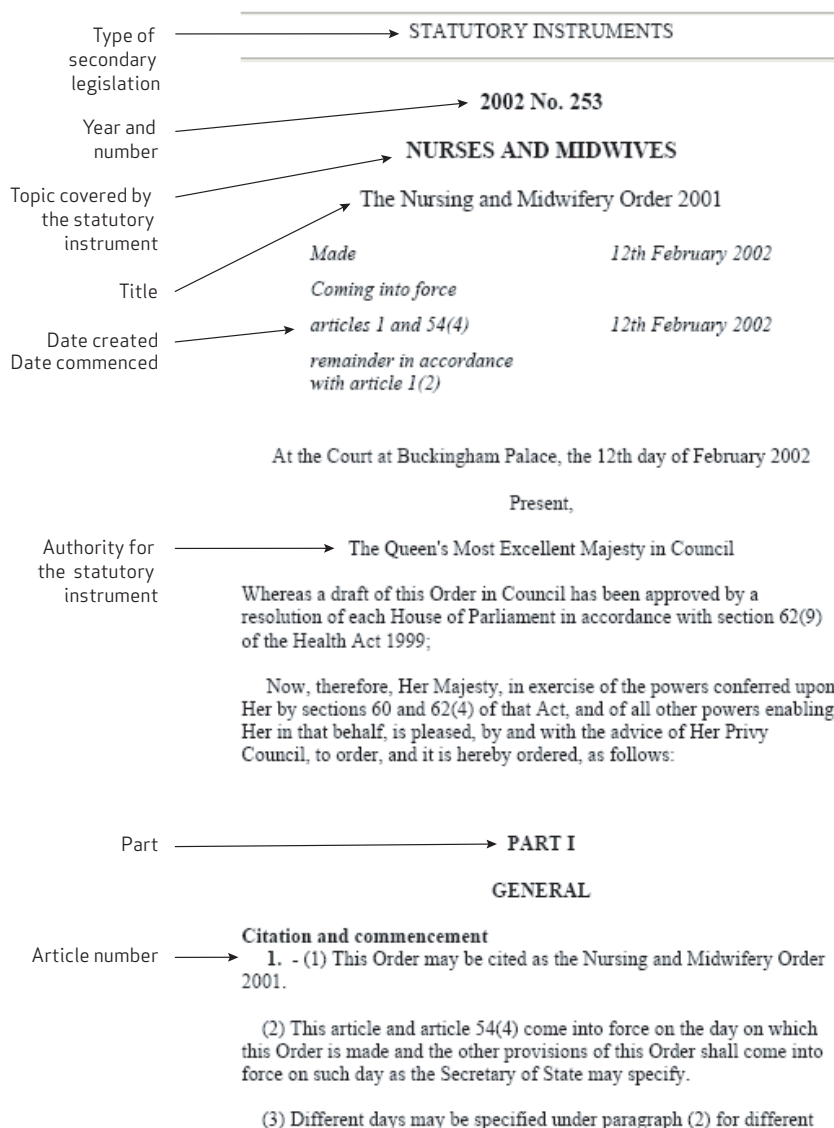


Figure 1.4: First page of the Nursing and Midwifery Order 2001, with its constituent parts labelled.

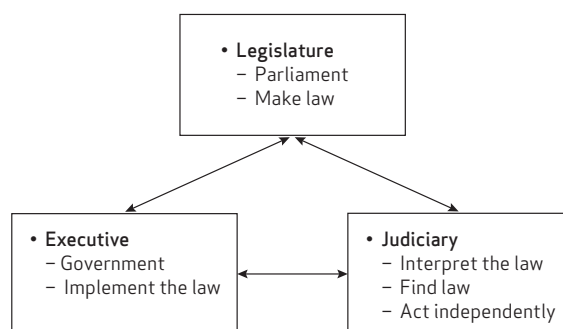


Figure 1.5: Three components of governance.

A court is bound by precedent where the decision of a higher court is materially similar to a case being considered in a lower court. Senior judges ensure this rule is rigidly enforced.

The courts are structured on a hierarchical system (see Figure 1.6) that allows a series of appeals in the same case.

It is essential in your study of law and nursing to look carefully at which courts the case has been heard in and inform your practice by reference to the decision in the most senior court. For

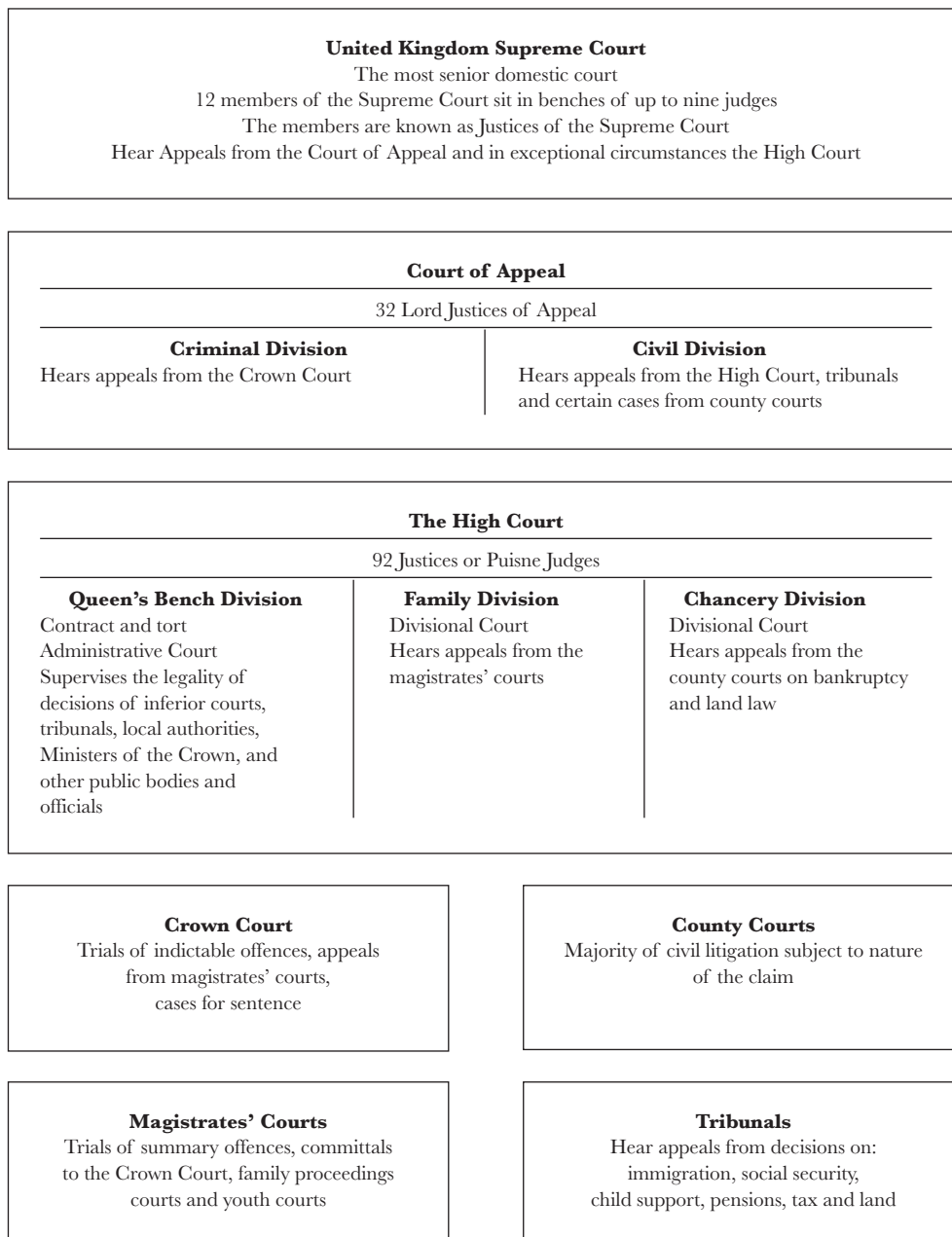


Figure 1.6: The structure of the courts.

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example, in *Gillick v West Norfolk and Wisbech AHA* [1986], the case began in the High Court, which decided that advice to doctors that girls under the age of 16 could be given contraceptive advice and treatment without parental consent, was lawful if the girl was sufficiently mature and intelligent to make the decision herself. The Court of Appeal overruled the decision of the High Court and declared the advice unlawful. In the House of Lords the decision of the Court of Appeal was reversed and the advice was declared lawful.

The House of Lords was replaced by the Supreme Court in October 2009. As the most senior court, the justices of the Supreme Court now set out guidance that, in their opinion, will bind future cases. Opinions in cases from the House of Lords and the newly established Supreme Court can be reliably used to inform your practice as a nurse.

To assist with the application of the system of precedent, significant decisions of judges in cases are set out in law reports, which lawyers and those studying the law can use to inform their practice. There is a large number of commercial law reports available and some cases are even reported in the broadsheet newspapers. Case Reports contain a lot of detail about the facts and law of a case. Many are now freely available from the websites of organisations such as the British and Irish Legal Information Institute (www.bailii.org) and they are an excellent source of primary law. Your university law library will have a wide range of law reports with cases relevant to nursing and healthcare, many of which will be mentioned in this book. Figure 1.7 shows the layout of a typical law report.

Case law is a particularly relevant source of law in healthcare as the sensitive nature of the disputes inevitably gives rise to decisions that have an impact on how you conduct your nursing practice.

Law report citation

[1994] 1 All ER 819

Title of the case	→ Re C (adult: refusal of medical treatment)
Name of the court	→ FAMILY DIVISION
Name of the judge	→ THORPE J
Dates of the hearing	→ 8, 11, 14 OCTOBER 1993
Catchwords	→ <i>Medical treatment - Adult patient - Consent to treatment - Right to refuse consent - Mentally ill patient contracting gangrene in leg - Hospital proposing amputation of leg - Patient refusing to consent to amputation - Patient applying for injunction to restrain hospital from amputating leg without his written consent - Whether patient's refusal impaired by mental illness - Whether court should grant injunction - Whether court having jurisdiction to grant injunction restraining future treatment.</i>
Headnote: a summary of the facts and the law in the case	→ C, a 68-year-old patient suffering from paranoid schizophrenia, developed gangrene in a foot during his confinement in a secure hospital while serving a seven-year term of imprisonment. He was removed to a general hospital, where the consultant surgeon diagnosed that he was likely to die imminently if the leg was not amputated below the knee. The prognosis was that he had a 15% chance of survival without amputation. C refused to consider amputation. The hospital authorities considered whether the operation could be performed without C's consent and made arrangements for a solicitor to see him concerning his competence to give a reasoned decision. In the meantime, treatment with antibiotics and conservative surgery averted the immediate threat of imminent death but the hospital refused to give an undertaking to the solicitor that in recognition of his repeated refusals it would not amputate in any future circumstances. There was a possibility that C would develop gangrene again. An application was made on C's behalf to the court for an injunction restraining the hospital from carrying out an amputation without his express written consent. On behalf of the hospital it was contended that C's capacity to give a definitive decision had been impaired by his mental illness and that he had failed to appreciate the risk of death if the operation was not performed.
Decision of the court	→ Held - The High Court, exercising its inherent jurisdiction, could direct by way of an injunction or declaration that an individual was capable of refusing or consenting to medical treatment, including future medical treatment. However, in determining whether that person had sufficient capacity to refuse treatment, the question to be decided was whether it had been established that his capacity had been so reduced by his chronic mental illness that he did not sufficiently understand the nature, purpose and effects of the proffered medical treatment. That in turn depended on whether he had comprehended and retained information as to the proposed treatment, had believed it and had weighed it in the balance when making a choice. Although C's general capacity to make a decision had been impaired by schizophrenia, the evidence failed to establish that he lacked sufficient understanding of the nature, purpose and effects of the proposed treatment, but instead showed that he had understood and retained the relevant treatment information, believed it and had arrived at a clear choice. It followed that the presumption in favour of his right to self-determination had not been displaced. A declaration would be made accordingly (see p 822 <i>a</i> and p 824 <i>f</i> to p 825 <i>a d</i> to <i>f</i> , post).

Figure 1.7: Annotated law report.

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Re T (Adult: Refusal of Medical Treatment) [1992] 4 All ER 649 and *Airedale NHS Trust v Bland* [1993] 1 All ER 821 applied.

Notes

For consent to medical treatment, see 30 *Halsbury's Laws* (4th edn reissue) para 39, and for cases on the subject, see 33 *Digest* (Reissue) 273-275, 2242-2246.

Cases referred to in judgment

Airedale NHS Trust v Bland [1993] 1 All ER 821, [1993] AC 789, [1993] 2 WLR 316, HL. ← Law cases discussed in the judgment

T (adult: refusal of medical treatment), Re [1992] 4 All ER 649, [1993] Fam 95, [1992] 3 WLR 782, CA.

Originating summons

By an originating summons issued on 4 October 1993, C, a patient confined to Broadmoor Hospital, sought an injunction restraining the defendants, Heatherwood Hospital, Ascot, from amputating his right leg in the present and future without his express written consent. The summons was heard in chambers but judgment was given by Thrope J in open court. The facts are set out in the judgment. ← The lawyers arguing the case

Richard Gordon and Craig Barlow (instructed by Scott-Moncrieff & Harbour, Brighton) for the plaintiff.

Adrian Hopkins (instructed by J Tickle & Co) for the defendants.
P A B Jackson (instructed by the Official Solicitor) as amicus curiae.

THORPE J.

This originating summons was issued on 4 October 1993 by C. It seeks under the court's inherent jurisdiction an injunction restraining Heatherwood Hospital, Ascot from amputating his right leg without his express written consent.

The plaintiff is 68 and of Jamaican origin. He came to England in 1956, his passage being paid by the woman with whom he had lived since 1949. In 1961 she left him, and in 1962 he accosted her at work and after an altercation stabbed her. He was sentenced at the Old Bailey to seven years' imprisonment. While serving that sentence he was diagnosed as mentally ill and transferred from Brixton to Broadmoor. On admission he was diagnosed as suffering from chronic paranoid schizophrenia. He was treated both with drugs and ECT. Over the years he has mellowed and has been accommodated for the past six years on an open ward of the parole house. He is described as neat and tidy, becoming more sociable with staff and other patients in the past two years. ← The judgement of the court in detail

Figure 1.7 (continued): Annotated law report.

Table 1.1: The advantages of legal awareness to a student nurse**The legally aware student nurse:**

- **Realises that many aspects of daily life are governed by law**

Most aspects of life are regulated by law. Legal awareness helps you appreciate the importance of the legal framework which supports the structure of society. It also allows you to appreciate that personal and social problems may have a legal dimension.

- **Knowingly acts in accordance with certain legal principles**

Many parts of the law are necessarily complex and difficult to understand. However, the underlying principles are quite simple. These affect everyone on a day-to-day basis and therefore an understanding of them is important. Indeed, ignorance of the law can bring very serious consequences.

- **Understands the key elements of the legal system**

Knowledge of the law is of limited value unless you understand the various ways in which the legal system works to enforce the law. It is important to understand the role of those agencies that have powers to enforce the law and of the mechanisms by which you can seek legal help and advice.

- **Knows when and where to seek appropriate advice**

The law is vast and constantly changing. You need to develop a sense of:

- when the law can help or hinder;
- what you can find out for yourself and where;
- when you should seek expert help;
- how to get the appropriate help or advice.

- **Understands the nature of law**

Even though many day-to-day situations have a legal dimension, there are some problems that the law can do little about, even when in theory this should not be the case.

Chapter summary

- A thorough and critical appreciation of the legal and professional issues affecting nursing practice is essential if you are to develop the professional awareness necessary to become a registered nurse.
- Positive rules impose a legal obligation to do or refrain from doing something. If a positive rule is breached a sanction may be imposed for breaking the law.
- Normative rules set out what a person should do.
- Healthcare sees a drawing together of normative and positive rules.
- Law is defined as a rule of human conduct imposed upon and enforced among, the members of a given state.
- The United Kingdom is a parliamentary democracy and the laws of the country are created and amended through the Queen in Parliament.

Chapter 1

continued ...

- Once an Act has completed its parliamentary stages and becomes law, the authoritative and compelling interpretation of that statute is for judges and no one else.
- An Act of Parliament is our supreme source of law.
- The common law is derived from decided cases and works through a system of precedent that ensures that materially similar cases are decided in the same way, creating a degree of certainty in the law.

Activities: Brief outline answers

Activity 1.4: Research (page 18)

Mental Health law is a good example of how the devolved administrations in England, Scotland, Wales and Northern Ireland have introduced laws that specifically apply to their areas.

The Mental Health Act 1983 (as amended) regulates the care and treatment of people with mental disorder in England.

The Mental Health Act 1983 (as amended) also regulates the care and treatment of people with mental disorder in Wales but the Welsh Government have passed the Mental Health (Wales) Measure 2010 that extends the rights of patients to access mental health services, advocacy services and statutory care and treatment planning.

The Mental Health (Care and Treatment) (Scotland) Act 2003 (as amended) sets out the powers for the admission, treatment and aftercare of people with mental disorder in Scotland.

The Mental Health (Northern Ireland) Order 1986 regulates the care and treatment of people with mental disorder in Northern Ireland

Activity 1.5: Critical thinking (page 19)

1. The woman in the first case cannot sue in negligence as she has not suffered a personal injury. She discovered the wasp before drinking the lemonade.
2. Although the facts in this case seem very different, the case is still materially similar to the *Donoghue v Stevenson* [1932] case. The contractor owes a duty of care to other users of the footpath. They have failed to take adequate precautions to prevent a fall. It is reasonably foreseeable that a person with a visual impairment might come along the road. Harm has been caused by the contractor breaching its duty of care and so a claim in negligence is possible.
3. The facts and rules in this example appear similar but the manufacturer is arguing that the warning absolves them of their duty of care. You might argue, however, that as the fillet fish fingers are marketed towards children the manufacturer should take greater care. Should consumers be expected to mash each finger to check for bones? This case was settled out of court with a compensation payment.
4. At first glance this again appears to be a case of carelessness, but to be actionable, as in *Donoghue v Stevenson* [1932], there must be harm to the individual. The courts consider a healthy child as an economic loss not a personal injury. Mrs Donoghue would not have been able to sue in negligence if her bottle had contained water instead of a snail. Similarly, no claim for negligence would succeed for carelessness that resulted in the birth of a healthy baby.

Further reading

To understand the law and how it applies it is essential to have some knowledge of legal method. One of the following will help.

Hanson, S (2009) *Legal Method, Skills and Reasoning*, 3rd edn. London: Routledge-Cavendish.

Holland, J and Webb, J (2006) *Learning Legal Rules: A student's guide to legal method and reasoning*. London: Blackstone Press.

To understand health law in context it is useful to have an understanding of health policy and the following can be recommended.

Crinson, I (2008) *Health Policy: A critical perspective*. London: Sage.

Ham, C (2009) *Health Policy in Britain*, 6th edn. London: Palgrave Macmillan.

Useful websites

To keep up to date with changes in health law we recommend the following.

www.bailii.org The British and Irish Legal Information Institute provides free access to law reports from the UK courts.

www.dh.gov.uk Outlines government policy on health in England.

www.justice.gov.uk/government/news/welcome-to-the-new-home-on-the-web-for-the-ministry-of-justice Ministry of Justice information and updates.

www.opsi.gov.uk/legislation/uk.htm Full text of legislation and Statutory Instruments.

www.parliament.uk/about/how UK Parliament website, where you can find information about how a Bill becomes Law.

www.scotland.gov.uk/Topics/Health Scottish Government health policy and publications.

www.wales.gov.uk/topics/health/ Welsh Assembly health policy and documents.