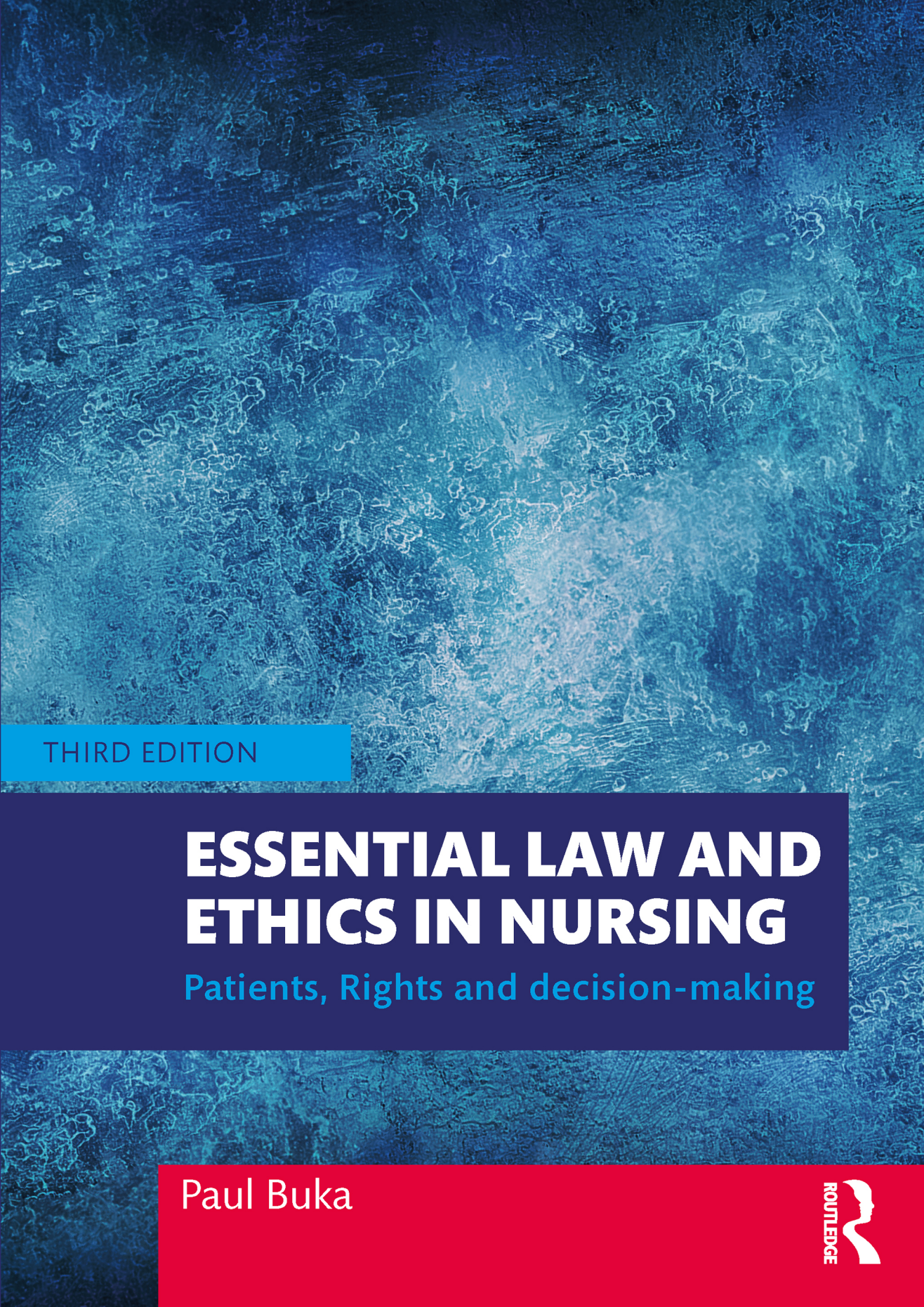
THIRD EDITION
ESSENTIAL LAW AND ETHICS IN NURSING
Patients, Rights and decision-making
Paul Buka
ROUTLEDGE

ESSENTIAL LAW AND ETHICS IN NURSING

This thoroughly updated third edition lays a solid foundation for understanding the intersection of law, ethics and the rights of the patient in the context of everyday nursing and health care practice.

Outlining the key legal and ethical principles relevant to nurses, *Essential Law and Ethics In Nursing: Patients, Rights and Decision-Making*, previously entitled *Patients' Rights: Law and Ethics for Nurses,* uses an easy-to-read style that conveys key principles in an accessible way. It:

- provides a clear understanding not only of basic legal provisions in health care but also of wider issues relating to human rights;
- covers topics such as ethical decision-making, the regulation of nursing, confidentiality, laws concerning human rights, safe practice, vulnerable people, elder abuse and employment regulations; and
- includes thinking points, case studies and relevant case law to help link theory with practice.

This is essential reading for nurses and an important reference for midwives and allied health professionals.

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ESSENTIAL LAW AND ETHICS IN NURSING

Patients, Rights and Decision-Making

Third Edition

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To Carol, my wife, my family; Alannah and Sandy (Mummy and Daddy), George; Joshua and Hana, our delightful grandchildren and my extended family. Thank you for putting up with me and for all your support in the development of this project.

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Foreword

It is a great honour to have been invited to write the foreword for the third edition of the book titled *Essential Law and Ethics In Nursing: Patients, Rights and Decision-Making.*

Every single nurse needs to ensure that their practice is safe, accountable and based on the most up-to-date evidence. This entails having a sound grasp of the ethical theories, principles and frameworks used within our legislative and professional frameworks. These are necessary to protect and uphold our human rights as citizens and professionals, safeguarding us from unnecessary harm or violation of our rights and dignity. Possessing this legal and ethical knowledge is imperative because we are living and working in a world that is exceptionally busy, fast-moving and evolving almost daily.

Globalization, commercialization and consumerism are affecting every sphere of health care, and nursing is not immune or impervious to these challenges and forces. The net effect is that each of us as members of the public and potential users of health care has high expectations with regard to the quality and outcome of our encounters with healthcare providers and professionals.

Needless to say, the delivery of health care is complex and multifaceted, and it is delivered within a range of settings, such as home, hospital and urban and rural environments. Nursing as a profession is integral and fundamental to the provision of compassionate, person-centred health care. At the heart of all nursing is ensuring we support the essential, holistic needs of our patients (physical, psychological, social, spiritual), who come from diverse cultures and ethnic backgrounds. Each person possesses their own unique worldview, which will undoubtedly have been nurtured through beliefs, values, attitudes and practices, some of which may have been passed down across many generations or acquired through distinct and sometimes difficult life experiences or situations.

When I reflect upon the nurse of today, they are very different from the nurse of yesterday; the landscape of nursing and our societies have changed significantly. There is greater emphasis placed on interdisciplinary and partnership working. Some of the skills, tasks and duties once performed by doctors have been devolved and undertaken by nurses in a variety of clinical settings. While this role explanation is welcome it does pose a greater risk to the nurse because of the potential for a blurring of boundaries. This means that the nurse needs to be more informed, ensuring that they practise within acceptable protocols and frameworks: for example, a nurse prescriber adhering to the correct formulary.

Similarly, when one reflects upon the patient of today, their needs have become far more complex and acute, requiring intense support and interventions. For example,

babies who are born prematurely have an increased chance of survival, and their lives are sustained and preserved through new technologies. Meanwhile life expectancy has increased significantly for many of us, necessitating nurses caring for and supporting many 'extreme' older people with advanced frailty, multiple co-morbidities and complex needs. Nurses are confronted with far more complex ethical challenges and decisions around life and death, placing greater emphasis on the need to have sound knowledge to ensure that they always act in the best interest of their patients while not compromising their own ethical values and position.

Furthermore, nursing education in many countries is now provided within Higher Education Institutions, reinforcing the fact that a greater emphasis is placed on knowledge, skills and attitudes in order to practice competently and safely. There is greater awareness of the need for inclusion and equality in order to prevent any form of discrimination or abuse.

Interestingly, while the roles and responsibilities of nursing have changed the essentials of nursing have remained constant: for example, ensuring that everyone is treated with dignity and respect across the lifespan continuum. Contemporary nursing and health care have certainly evolved, and the public's expectations of what is acceptable has heightened. This may be in part due to greater and rapid access to information through the internet and social media. The outcome is that members of the public are far more informed today about their own human and legal rights and are very proactive in ensuring that these are met and upheld. Rightly so! We all want the best and highest standards of care for ourselves and family members.

Therefore, I wholeheartedly endorse and recommend this updated third edition, which considers new case law and legal frameworks. The text provides a valuable and accessible introduction into some of the key, often-complex aspects of legal and ethical issues. This has been achieved successfully through a combination of reflection and interactive exercises. The use of scenarios and cases helps to illustrate different case law, raising awareness of key ethical and legal principles for nurses supporting their learning. The outcome is a very useful text that will enable the nurse of today and tomorrow to practice safely and crucially in accordance with the standards and Codes of Professional Regulatory bodies. The text gives the reader a step-by-step navigation through the changing landscape of legal, ethical issues while informing them about the human and legal rights of their patients and the professional obligations that this involves.

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Preface

Service users of today should be able to feel empowered and informed about their care. This third edition will also focus on informing the nurse as a healthcare provider on rights in a caring context. Service users and lay carers may also find it useful.

With improved technology and quality of healthcare provision, more people are living. The European Convention on Human Rights Act 1950 was enacted (in the United Kingdom) by passing the Human Rights Act 1998. This clearly defined human rights within a patient-centred relationship. Nurses are also becoming more autonomous and accountable. Expectations of safe provision of health care are inevitable, with increased complaints and litigation. Nurses owe service users, a duty of care in ethics and law, and should recognize this, safeguarding those who are at risk. Aspects of current policy are engaged, and ethical principles are the basis for professional conduct as they are linked to every patient's fundamental rights; the law should take precedence.

This book does not purport to have all the answers. This should be the domain of a standard comprehensive legal textbook. Rather, it aims to provide an introduction and application of a bioethical and legal framework within which care should be delivered. It could be argued that ethics informs the law and regulates the conduct of citizens and healthcare professionals. Key aspects of the law herein are based on United Kingdom law, though they are applicable to comparable systems. The author recognizes that, wherever possible, every effort will be made to highlight key distinctions between English and Scots law, with occasionally limited application to Northern Ireland. Due to the nature and size of this book, a comprehensive and detailed analysis would not be practical.

In healthcare provision, 'formal' codes of professional conduct have been drawn based on law and bioethics. Gone are the days when the nurse would hope to evade prosecution or litigation based on paternalism or the grounds that they were following 'the doctor's orders'. With an advanced scope of practice comes a higher level of accountability. It is hoped that by challenging nurses to raise awareness of the legal and ethical implications of their decisions and actions, the quality of care they provide can be improved. Knowledge and application of legal and ethical principles is necessary for understanding and defining patients' rights putting them at the centre of clinical decision-making.

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To Jim Sumpter and Ed Holt, both lecturers at the University of Essex (UoE); Cheyne Truman, a final-year BSc Adult Nursing student at UoE; Laura Carlin, staff nurse at the Royal Victoria Hospital, Dundee, Scotland; and last, but not least, Rob Clark, nurse practitioner in rheumatology at Kings College University Hospital, London, and a post-registration student at UoE – thank you all very much for your patience and for the painstaking chapter reviews while trying to make sense of drafts. All your suggestions were constructive and invaluable. This is much appreciated.

Not forgetting all my wonderful colleagues in the team for the School of Health and Social Care (University of Essex), who I have not named, for the kindness and valued support you showed during a traumatic and personally difficult time for me in the past few months. I am especially indebted to the adult nursing team, the mental health nursing team and the administrative staff at the Southend Campus.

Finally, a big thank you to all the students I am privileged to have worked with over the years; for all the informal feedback on previous publications. I do not forget the most important people, those we cared for, who were service users. As healthcare professionals, we are honoured to have been privy to their individual patient journeys.

CHAPTER

1 Introducing ethics in health care

Chapter outline

Introduction and overview

The aim of this chapter is to introduce the key concepts of ethics while applying them to health care. Ethical principles emerged from a variety of systems of moral principles which influenced thinking and decision-making for moral philosophers or ethicists. These principles may apply to a range of aspects or situations in people's lives, from the beginning of life to the end. Ethics or moral philosophy attempts to define norms of how people should live while providing a forum on what these standards should be. There are many variations of ethics theories, and they serve as guiding principles in a variety of settings and help decision-makers in distinguishing right from wrong. The question remains how to determine the most appropriate interventions for supporting decision-making in a given healthcare setting. There are many theories which attempt to provide some answers. Due to the nature and complexity of treatment decisions, application of ethical principles presents a challenge when competing interests may emerge, and tensions of human conflict may be exposed. Ethics may lend a hand in providing some answers. Ethical values may be at variance with other principles such as those based on law, for example, in the interpretation of statutes as informed by case law. In the provision of care, the service-user should be at the centre of decision-making (NHS Constitution, 2015). Within the wider society, applied ethical standards may regulate the conduct of groups of non-healthcare professionals such as architects, lawyers, tradesmen and other professionals. Nurses and midwives also fall into this category via the Nursing and Midwifery Council (NMC). Ethics is concerned with decisions affecting individuals and how the impact of family, friends and society. Ethics is often described as a branch of philosophy: namely 'moral philosophy'. The discipline has

evolved from a variety of sources with factors in any given society and includes the following moral choices on:

- how to live a good life
- our rights and responsibilities
- the language of right and wrong
- moral decisions – what is good and bad?

(http://www.bbc.co.uk/ethics/introduction/intro_1.shtml)

The word 'ethics' ('ɛθɪks) originates from the Greek 'ethos'. The branch of moral philosophy, ethics or sometimes loosely termed 'morals', may develop from societal norms of human conduct, which have shaped specific standards of conduct to which various professions of various disciplines subscribe. The Greek philosophers who were credited with developing moral philosophy were Socrates (c. 470–399 BCE), Plato (429?–347 BCE) and Aristotle (384–322 BC).

Stoicism

The 'Stoics' followed a prominent school founded by Zeno of Citium in Cyprus (344–262 BCE) and were responsible for the revival of Plato and Aristotle's 'Virtue Ethics'.

They built philosophy of life based on positive aspects and maximizing positive emotions based on practical ways to help improve a person's strength of character. They also focussed on a person's morals, character or the individual's integrity. Some examples are very broad, and they include honesty, courage, fairness and compassion. Could this be part of a person's individual integrity or 'conscience', both of which can be described as innate or rather as acquired later in life as the individual chooses to act in the way they do? The Stoics also identified *wisdom*, *justice*, *fortitude* and *temperance* as the 'four cardinal virtues'; these are found within Plato's *Republic*.

Moral philosophy or ethics classification may also be sub-divided into four approaches or sub- topics:

- Meta-ethics aims to understand the nature of ethical evaluations, the origin of ethical principles and the meanings of terms used but is value-free.
- Descriptive ethics involves, for example, determining what proportion of the population or a certain group considers that something is right or wrong.
- Normative ethics, sometimes referred to as moral theory, focusses on how moral values are determined, what makes things right or wrong and what should be done.
- Applied ethics examines controversial issues (such as euthanasia, abortion and capital punishment) and applies ethical theories to real-life situations. Applied ethical issues are those which are clearly moral issues and for which there are significant groups of people who are either for or against.

(https://www.alzheimer-europe.org/Ethics/Definitions-and-approaches/What-is-meant-by-the-term-ethics)

The discipline of applied ethics is relevant to healthcare practice when it comes to clinical decision-making.

Key ethical theories

The issue is, whether a claim that those universal ethical principles with common ground for morals which are acceptable to the majority of a given society can be justifiable. What should happen when a conflict of morals arises, and whose morality is it, anyway? Norms vary, from society to society, groups to groups or between individuals. Ethics usually revolves around distinguishing good from bad or right from wrong. Ethical dilemmas may arise in health care, and ethical principles may be invoked in support of viewpoints during decision-making, thus resolving disputes. The relation to the law will be demonstrated. It is possible that in one society it may be difficult to guarantee individual rights to choose where treatment decisions arise. Where decision-making involves several stakeholders, it may be difficult to have a consensus on a given ethical theory as morals or by norms for distinguishing right from wrong. It could be argued that ethical norms are relative to nations or individuals, depending on the society in which they have been brought up. It may be possible to hold that individuals born and bred within the same family, who are brought up within the same environment and under the same conditions, such as circle of friends, religion, schooling and neighbourhood, may later in life hold divergent ethical values. There are exceptions to the rule of morals when 'unethical' conduct may be acceptable in some sub-cultures such as those found in criminal fraternities. Hence the question remains whether there can ever be a consensus of universally accepted norms of ethics. Alongside other branches of philosophy, ethics or moral philosophy has evolved over centuries. Many ethical theories have both similarities and divergent ideas on the interpretation of what is ethical, that is, distinguishing right from wrong.

Although ethics can be described as a system of moral principles or rules, it is not quite an accurate reflection of ethics as there are different approaches to defining ethics. There are, however, some core ethical principles which are universally accepted. The development of ethical values may be linked to religion, culture and customs, while others have developed international treaties. There is no simplistic answer as to what is or is not acceptable, and this goes beyond responses to the dilemma between good and bad. The two main categories of ethical theories are consequentialism and non-consequentialism.

Virtue ethics

Greek moral philosophers are credited with originating ethical theories. The 'triumvirate' of moral philosophy in ancient Greece society was Socrates (470/469–399 BC), Plato (428–347 BC) and Aristotle (384–322 BC), who were largely accredited with developing moral philosophy or ethics as a discipline.

Socrates (470/469–399 BC) was hailed as not only the father of democracy but also the founder of virtue ethics which was followed by the Stoics. This was based on his questioning method. Virtue ethics was based on character traits or moral character rather than ethical duties, responsibility including the most basic of ethics, beneficence, non-maleficence and autonomy. Bioethical ethics developed from these principles (below).

Consequentialism

Consequentialism is concerned with outcomes or results of any action as a justification such as the greatest good for the greatest number. Teleology, which is a branch of consequentialism, may judge actions to be 'right 'or 'wrong' based on their consequences.

Another branch of consequentialism is utilitarianism, which judges the morality of actions based on their utility or usefulness. The more prominent proponents of utilitarianism were Jeremy Bentham (1748–1832) and John Stuart Mill (1806–73). They broadly agreed that actions are morally right when they produce the most good (greatest happiness) for the majority of people (for the greatest number).

They were hedonistic in their approach, though against an egocentric (individual-focussed approach. This is maximization of benefits of a majoritarian theory which may have a problem in justifying overriding the rights of minorities, for example in respect of older people with multiple conditions, or whether seeking treatment for a small number of people with rare conditions. Consider whether the outcome or greater good be the deciding factor in allocation of resources. This could also mean excluding life-changing treatment for a small number of people who require substantial amounts of resources. The so-called Postcode Lottery has also been linked to consequentialism and unequal distribution of resources.

There are two branches: act utilitarianism and rule utilitarianism.

a. *Act utilitarianism* – An act is considered right if it results in a positive and good outcome. Alternative for the greatest number.
b. *Rule utilitarianism* – An act is right if and only if it is determined by a rule which belongs to a set of rules; these would lead to a greater good for society, the best possible option.

Both branches of utilitarianism judge the ethics of rightfulness of an act based on its consequences for the greatest number. The limitation of utilitarianism is that one cannot necessarily predict the outcome or consequences of any action; hence, the anticipated consequence may be wrong and therefore not a valid basis for decision-making. Such a reason-based approach to determine decision-making could not be justified.

Non-consequentialism (the main branch is deontology)

There were several ethicists who followed this school of thought, though it had many versions. The most famous branch is deontology, introduced by Immanuel Kant (1724–1804), one of the philosophers who developed the 'categorical imperative', which was based on an internal sense of 'duty' requiring an individual to act. The actor must 'obey', and this is based on reason. One example is that it would be wrong to tell a lie for saving a friend from a murderer. Individuals have a duty to do the right thing (such as tell the truth) regardless of consequences. The difficulty with this theory is that the sense of 'duty' may be relative to individuals and subjective, without fully explaining where the sense of duty comes from. The premise of the argument for an innate sense of duty is weak. Again, one fundamental problem with both these moral schools of thought is that their basis for the justification of their decision-making appears to be flawed.

The emergence of a bioethical theory

Patients are likely to be vulnerable due to illness. The human interaction presents the challenge of a relationship between the patient and a clinician, which is based on trust, a fiduciary relationship. There is an imbalance. Ethical issues may arise as this

caring relationship is unequal and based on trust which may be exploited. The medical model empowered doctors and nurses while potentially compromising patients' human rights by making decisions about their treatment. Bioethics emerged in due course as applied ethics associated with medicine was adopted by allied healthcare professions. Ethical principles were integrated into their own codes of conduct and professional ethics. At times when treatment decisions are made, a dilemma or conflict of interest related to morality or different options may arise in decision-making. In ethical decision-making, there may be room for deliberation and compromise (Beauchamp and Childress, 2013).

A patient-centred care focus, NHS Constitution (2015), should be based on ethical values. This means that healthcare models are expected to plan and deliver care, with values such as principlism (the four principles) including patient autonomy. This becomes even more significant because patients are now more empowered and informed about their human rights.

Early medicine was guided by the development of the Hippocratic Oath, though taking this is no longer a requirement for medical practitioners. The ethical perspective is clear towards the end of the oath.

> The Hippocratic Oath, (Ορκος)
>
> … So long as I maintain this Oath faithfully and without corruption, may it be granted to me to partake of life fully and the practice of my art, gaining the respect of all men for all time. However, should I transgress this Oath and violate it, may the opposite be my fate.
>
> (Translated by Michael North, National Library of Medicine, 2002)

The Oath of Hippocrates (400 BC) is probably the most famous code of ethics, in ancient medicine. Since the emergence of medicine as a discipline, bioethical principles developed alongside moral philosophy with universal variations. These have common values for many professional medical or healthcare cultures. These were subsequently adopted by professional codes of conduct for medical professions in different countries, over time. With regard to the question 'Who does bioethics (sometimes called biomedical ethics) apply to?' this suggests that it is not only doctors but all allied healthcare professionals, including nurses. Such professionals are expected to be guided by bioethics which are integrated into their professional codes which regulate professional conduct. Professional bodies are bound by their own professional codes of conduct, and these have been drawn up, incorporating the key ethical principles.

Ancient history has shown that medical ethics was developed from or alongside classical ethical theories, from the early days of medicine as a profession. It is clearly the case that as far back as the '3rd Dynasty' in Egypt practising surgery for eyes and teeth considered the relevance of applied ethics. A surgeon looking after a patient was required to treat but recognize the limitations of their knowledge and skills, and what was ethical conduct.

> A. "Until he recovers."
> B. "Until the period of his injury passes by."
> C. "Until thou knowest that he has reached decisive point."
>
> (Third Dynasty [Egypt, 2700 BCE])