1. Introduction

Scotland, as elsewhere has seen an enormously heightened interest in health care generally and in the law relating to medical responsibility in particular in the last decade, and more particularly in the last five years. An academic speciality in medical law has consolidated itself and expanded. Litigation, has increased. The background in the administrative structures for the provision of healthcare has developed and there are some important changes in it. Scottish courts and writers rely very heavily on English material, and the latter to some extent on material from the British Commonwealth, although isolated examples in the area of medical law more widely of looking, at least additionally, to a continental jurisdiction can be found.

2. The Background

The Size and Distribution of the Health Care System

It is necessary to understand fully the context of developments in the law of medical responsibility to be aware of the changing scale and nature of work going on in the health care system. It is important to note the relatively small size of the population of Scotland. It is only one tenth the size of the English population (5,120,200:48,741,000). This figure is static. Scotland has generally a worse health picture than has England on a variety of indicators, in particular on smoking related disease. In 1992 34% of both the male and female population of Scotland smoked cigarettes, whereas the figure for English males was 29% and for English females it was 27%. A significant figure is that the percentage of Scottish females smoking has barely fallen since 1986, whereas in England it has fallen by four percentage points. This is now linked to the higher incidence of relative economic deprivation
amongst the population of Scotland. However, it is also the case that Scotland has continued to have a somewhat higher number of doctors per member of the population. This probably reflects a long history of several hundred years of medical training at the highest international levels in several Scottish Universities.

There are some remarkable differences in the extent of usage of health services in Scotland when compared with England. In Scotland the number of patients consulting a general practitioner in the year is the same in England at 12%. On the other hand the average number of times someone in Scotland visits a general practitioner in a year is lower than the Great Britain average, at 4 visits per year as opposed to a Great Britain average of 5 for males and 6 for females. The usage by those over 65 years of age is considerably higher, particularly for females (24% as opposed to 19%). The other most significant difference is that Scottish hospitals treat 14% more of the population in any year. This is done with a smaller number of beds in relation to the population while at the same time having a larger number of beds available on a daily basis. There is therefore some evidence that Scotland has a more efficient healthcare provision.

The number of patients treated has continued to rise. Measured in terms of discharges from hospital the figure rose by nearly 20% in the period from 1985 to 1993/94. The rise has been continuous at least since 1970 and amounted to 65% in the period between that year and 1993/94. There are problems with waiting lists. This has improved somewhat, if the statistics are to be believed (some suggest that part at least of the improvement has come about by removing patients from the waiting list without treating them!). In any event 5.4% of patients in 1992 had waited between one and two years to be treated. (No information is available on those who have waited more than two years).

The System of Medical Care

As ten years ago the system of medical care in both England and Scotland consists largely of state provided medical care that is free at the point of use. In Scotland the proportion of healthcare delivered by the state and free at the point of use is in excess of 90%, the figure estimated for England. The number of acute beds in the private sector in Scotland is only 680 which is 6% of the number for England and Wales whereas on a population comparison one would expect a figure of around 10%. There is, however, no doubt that the provision of private health care is rising in both countries. In the last 15 years it has risen by 75%. The trend in Scotland may in fact be to catch up with