Health Care Law


For some time now staple fare for the medical/health care law student or academic has been either the weighty *Medical Law Text with Materials* by Professors Kennedy and Grubb or the distinctive contributions of Professors Mason and McCall Smith with *Medical Law and Ethics*, and Professor Brazier with *Medicine, Patients and the Law*. Now however, a credible alternative exists. *Health Care Law* by Jonathan Montgomery has much to recommend it. It is a comprehensive account of the law relating to health care in its broadest sense. From the outset, Montgomery sets his face against a narrow construction of his task; as he recognises, health care law is so much more than the “law relating to what doctors do” as he acknowledges that today health care is delivered by a range of professionals working within a radically re-structured National Health Service (NHS). He is also conscious that the individual patient is increasingly aware of her responsibilities for her own health, and that public-health and rationing concerns expand the scope of the law’s influence beyond the individual into the common. Montgomery insists on this same breadth in his exposition of the forces that influence health care decision-making. While the common law and legislation play their part, he recognises the role that professional discipline and less formal obligations play in regulating the behaviour of all health care professionals.

In part one of the text, Health and the law, he considers public health law, rights to care, the contemporary structure of the National Health Service, and the detail of NHS complaints procedures. As a non-executive director of a community trust he is well placed to outline the nuts and bolts of organisational structure in clear and concise terms. A discussion of the beefed-up NHS complaints procedure provides a useful prelude to the discussion in the subsequent section of malpractice litigation. It is well known that many patients require explanation rather than compensation when an untoward incident has occurred and that recourse to legal redress is often symptomatic of a failure to achieve satisfaction through alternative means.

In part two attention turns to the law’s relationship with health care practice, and in particular the world of malpractice litigation, professional discipline, and the regulation of medicines. The constitution of the General Medical Council (GMC) and the United Kingdom Central Committee for Nursing and Health Visiting (UKCC), as well as of other professions allied to medicine, are set out and assessed. Whether the Medical (Professional Performance) Act 1995 brings more than a change of emphasis in the manner in which doctors’ behaviour is scrutinised is a question which will no doubt occupy the author in subsequent editions.

Usefully the following sections on malpractice litigation, the law in theory and the law in practice, enable a reader fresh to the subject to become familiar with the relevant legal principles ahead of the debates and discussions which follow from scrutiny of the tort model in operation. Suitably acquainted with the ubiquitous Bolam standard, the reader is appraised of the mechanics of “making a claim”, and introduced to the perennial “defensive medicine” fact or fiction debate. Some scholars may be disappointed to find that discussion of a no-fault compensation scheme is reduced to barely four paragraphs. To be fair to the author, argument in support of this option has been as common as hen’s teeth of late. A perfectly straightforward discussion of medicines and the law concludes this section.

Part three adopts a patient-oriented perspective, examining in detail the relevance of notions of consent and confidentiality, and considering the particular difficulties that arise when the patient is a child, or suffering from a mental illness. The extent to which the law prohibits, protects, and permits treatment and/or research to take place in alternative contexts is outlined simply and accessibly.

The final section of the analysis, part four, entitled health care law and ethics, focuses on the controversial areas of reproduction, decision making at the end of life and organ donation and disposal. The author sustains his avowed commitment to a neutral perspective throughout. However, whereas in previous sections this has made for a clear and uncomplicated exposé of the issues, in this final section, when the subject matter sparks fundamental controversy on a worldwide scale, the text is somewhat lifeless. It may be unfair to criticise an author who does so much justice to a huge subject in 450 pages, particularly when he adopts a non-partisan approach and is honest about his limited scope from the outset. However, in the final analysis without a clearer appreciation of the alternative ethical frameworks which predominate on these issues, in particular—utilitarianism, deontology, feminism—the reader is left without much appreciation of why the law is as it is, and with few footholds to critique the present regime or take a view upon any future one. Don’t misunderstand me, this book will properly appeal to many of my students, and will be a ready resource for me. In other places Jonathan Montgomery has written some of the most important and interesting legal analysis of medical law as a discipline. Within the limits of his, or his publisher’s, ambition he has done a great job. With continued structural reform of the NHS, increasing recognition on the part of health care professionals of their moral obligations, and the science of genetics, cloning and
xenotransplantation upon us, perhaps the next volume, necessarily extended, will propose some what ifs, maybes and shoulds. For now compliments on a job well done.

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Ethics in Reproductive and Perinatal Medicine: a New Framework


This is an excellent book. It covers most of the important ethical issues that the reproductive technologies have raised and it is written in an admirably clear, level-headed and even-handed way.

One might complain that it is not exactly obvious what Strong's intended audience is: on the one hand it is a little too philosophical for practising obstetricians and gynaecologists, on the other hand it is not philosophical enough for professional ethicists (like the author himself) working in the field. However, the book will be a valuable book of reference and resource for both physicians and ethicists concerned with the thorny problems that infertility treatment raises.

Basically, Strong is an autonomist in that he sees the value of patient autonomy as central: as far as possible women and couples should be able to determine their own reproductive choices and modes of family formation for themselves. I agree with the author that this is the best perspective for dealing with the ethical problems in reproductive medicine, but over the last few years there has been a sustained critique of the idea of autonomy and Strong might have spent more time defending that idea against the various contemporary attacks.

Strong claims that his own approach is a methodologically novel one, but I must say that it seems to me to be a fairly traditional liberal position. It is also rather parochial in that it is for the most part more or less exclusively concerned with the North American scene and seems unconcerned with the lively debate about reproductive technologies in Europe, the United Kingdom and Australia. The work of the Human Fertilisation and Embryology Authority in the UK and the reports of the Nuffield Council on Bioethics are not mentioned at all. Again, very little is said about the methodological “crisis” in bioethics - the questioning of traditional “deductive” approaches relying on absolute “principles”, and the search for a new model for bioethics. Strong briefly discusses a “casuistic” approach but more discussion is needed here. For example, the approach in common law cases (like the UK cases on the treatment of gravely disabled children) where a precedent is gradually extended in its application in order to cover unfamiliar situations, would repay further study. Again, there has been a revival of Aristotle’s idea of “practical wisdom”, that is the kind of knowledge involved in deciding how we should act in particular here and now situations and where the emphasis is on a kind of quasi-intuitive “good judgment”. One of Aristotle’s favourite comparisons is with navigation: some rules and norms are necessary but there has to be continual adjustment and readjustment to changing circumstances. For Aristotle navigation is the “art of the possible”, requiring a great deal of creative imagination and it cannot be reduced to a mechanical application of rules. So also with ethical decision making, whether it be in medicine or any other area.

However, despite these reservations, Strong’s book will be a very great help to all of those - physicians, nurses, ethicists and patients - involved in reproductive and perinatal medicine. I might say that the book has been handsomely produced and is a pleasure to read.

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Duty and Healing: Foundations of a Jewish Bioethic

Benjamin Freedman, 1996.
http://www.mcgill.ca/CTRG/bfreed
approx. 1.4 MB.

This (electronic) book, written by a clinical bioethicist of great experience who was also well-versed in the Jewish tradition, exemplifies dialogue between two traditions at its best.

Duty and Healing is grounded in the author’s practice of ethical consultation in medicine, and contains several reports of actual consultations as recorded by him over the years. But these reports, though sensitive and compelling in themselves, are included mainly for the service they perform—namely, facilitating a profound exploration of the basic suppositions and values of the practice, and thereby in effect of contemporary bioethical discourse.

Freedman argues that the basic idiom in Judaic discourse is one of duty; this he juxtaposes to the idiom of rights, which he sees as central to contemporary secular bioethics. He shows how the very process of an ethical consultation, as well as the substance of several issues it commonly addresses, suffers from a pervasive emphasis on “rights”. For example, the purpose of a physician seeking advice on how to proceed in a difficult case is normally misperceived when she is taken to be asking: “What are my rights vis-a-vis this patient?”, or even: “What are the rights of this patient [against me or others]?” Rather, the physician is wondering how best to discharge her duty towards the person under her care.

Similarly, members of the patient’s family are not primarily concerned with exercising “rights” over the patient and his care. Freedman recognises that if it should come to a court of law, an issue of “who should decide” would appropriately be discussed in terms of rights; but he argues that it is deeply misconceived to import this legal orientation into ethical discourse in medical practice. Instead, we should realise the primacy here of duty: for example, the duty of children towards their parents. Drawing on both empirical studies and philosophical analysis, Freedman offers a critique of the common justifications for granting family members the power to make medical decisions for incompetent patients. He offers, instead, to ground such authority in the primacy of their duty of caring for their relative. I found this one of the most compelling parts of the book (Family—section one of the book’s four, the other three being Consent, Competency and Risk).

In the section on family the Judaic perspective furnishes, then, a proposed corrective to the common secular model of rights. In the section on consent, by contrast, the recognition of genuine ambiguity in medical choices—central to contemporary bioethics—is employed in a critique of standard rabbinic pronouncements. As Freedman shows, rabbinic writers in this field have mostly asserted a “duty to be healed”, leaving little
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