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Book reviews

Medicine, patients and the law

Margaret Brazier, xxv + 495 pages, Harmondsworth, 1992, Penguin Books, £9.99

Choices and decisions in health care

Edited by Andrew Grubb, x + 248 pages, Chichester, 1993, John Wiley & Sons, £27.50

The difference between an embryologist and a lawyer, it is sometimes said, consists largely in the number of them that it takes to make a human being. It is a salutary reminder of the fact that doctors are held in rather higher regard than lawyers that Margaret Brazier should repeat in the preface to the second edition of her introduction to medical law that criticisms made in the text are not a reflection of any personal care which she and her family have experienced.

There is a similar caveat in Ann Oakley's book, *The Captured Womb*, which prefaces her critique of modern obstetric practice. I have searched in vain for any similar kind of apologia in books written by doctors about legal aspects of their practice. Or anybody else's book. It seems to be a truth universally acknowledged, that the last thing a medical professional in possession of good fortune must be in want of is a lawyer. Much the same used to be said about philosophers and ethicists, although the mood is much changed. There is much contemporary pride in medical ethics; it is for medical law that the prejudice is reserved.

Brazier's survey of medical law is broad but avowedly introductory, seeking to provide '... a guide through the maze of current issues ...' (page x). It discharges this in three parts: Medicine law and society, Medical malpractice, and Matters of life and death. Within the book's 500-page compass, there is a consideration of most matters of contemporary medical law with the exception of mental health law and legal aspects of forensic medicine. It is a blend which works extremely well, and which has found a deservedly popular niche with a wide variety of students of the subject.

The implicit task of Brazier is to examine whether – as I suspect they have not been – the medical and nursing professions have been well served by English law. Her conclusion on this is probably more sanguine than mine would be (although see page 25), but that may turn as much upon a disagreement about the proper role of law as an evaluation of what exists. This question recurs throughout the text as Brazier 'highlight[s] those areas where the law is woefully inadequate' (page x). Thus: '[t]he vagueness of the law may surprise some' (page 45 on confidentiality); 'Sidaway is unlikely to reduce the spate of litigation' (pages 86–87, on informed consent); 'With luck, some of the uncertainties and difficulties in the law may be resolved by legislation. ... Those caring for and treating incompetent patients operate in a legal limbo' (pages 94–95); 'The fault system damages medical care and doctors' relationships with patients' (page 230, on reform of the negligence system); 'This Act [the Congenital Disabilities (Civil Liability) Act 1976] ... is ambitious, complex and now largely irrelevant' (page 235); 'Whether "proper" is defined by reference to professional opinion ... or the patient/donor-centred standard remains undecided' (page 273, on consent in assisted conception practice); 'if, with entirely honest motives, [a doctor] makes a decision out of line with a law which is far from clear, he may be punished as a murderer' (page 328, on treatment decisions for handicapped neonates); 'This particular provision [in the Human Tissue Act 1961] bristles with difficulties and ambiguities ...' (page 404); '[a]lso important, and in need of major clarification, is the extent to which the distinction between omissions and positive acts in medical practice should be legally significant' (pages 461–462); and so on and so on.

Of course, reasonable lawyers, as much as reasonable philosophers (if they exist), ethicists and lay people, will disagree as to the desirability of clarity compared with flexibility. Similarly, they will disagree about what would constitute desirable or acceptable clarification, and the role which law does or should play in this. These questions are considered explicitly in the early chapters of the book (especially pages 9–29 and 39–43), and form a theme which scores the movement of the argument. The strength of Brazier's presentation is that she deploys and analyses the main tenets of opposing arguments neatly, fluently and persuasively without sacrificing the clarity so necessary to a book of this kind. The crisp maturity which she brought in the first edition to this examination of the relationship between medicine, patients and legal regulation has developed into a sure authority for, and of, the subject of medical law.

The volume edited by Andrew Grubb contains a wide spectrum of essays, mainly based upon lectures given at the Centre for Medical Law and Ethics in King's College, London. It is the seventh volume in a series which deliberately illustrates the range and reach of modern medical law and the ethical approaches upon which it relies. I do not share the antipathy which is often reserved for collections of essays; they show the diverse ways in which a subject can be approached and may be developed

and are often the first outlet for a significant or idiosyncratic essay which later enters the mainstream of medico-legal jurisprudence as fashions change or subjects come to acquire greater public visibility. Almost every essay in this book illustrates that point.

Consider the importance which, ten or twenty years ago, would have been attached to, and the attention which would have been received by, the persistent vegetative state (here discussed by Bryan Jennett); geriatric medicine (Margot Jefferys); research ethics committees (Claire Gilbert Foster); mass tort claims (Ken Oliphant) and post traumatic stress disorder (Michael Napier). True, there is an imbalance, an unevenness in the quality of these essays, their contemporaneity, the nature of the discussion and the depth of learning, but that does not detract from the overall richness of the book. The remaining essays, by Abdel Haleem (medical ethics in Islam), Andrew Grubb (treatment decisions: keeping it in the family), Susan Jinnett-Sack (autonomy in the company of others) – each of which brings a refreshing and thoughtful approach to its subjects, and Ludovic Kennedy (euthanasia) – in which he returns to familiar ground – complement the dominant theme of this volume, that of decision-making in medical law.

The one essay which is 'missing' from this valuable collection is one which addresses 'choice' and what this might and does mean in health care. That could have considered the relationship between the fashionable concept in Anglo-American medical law and ethics – autonomy – and the decidedly unfashionable one of paternalism. There is a tantalising reference to this interface in Jinnett-Sack's essay (especially at pages 110–111), but she reserves the burden of her thesis (which assesses the usefulness of rights-based analysis) for people '... who arguably do not fit the rational person model ...' and circumstances when '... issues affect third parties as well as the decision-maker ...' (page 97). And Grubb acknowledges that '[t]his area throws up in stark relief the wider question of patients' rights and the role of others and society in making decisions about their medical care' (page ix). But again, he would confine that analysis to people who are incompetent to make decisions and choices for themselves.

Thus, there is no consideration of the nature of choice in medical and health care, no assessment of paternalism as a form of social insurance, and no examination of whether autonomy can possibly be enhanced by offering choices where one avenue affords no reasonable prospect of a particular outcome. Recall how movingly this was addressed by F G Ingelfinger, the dying former editor of the *New England Journal of Medicine*, in his magisterial essay, 'Arrogance': 'I do not want to be in the position of a shopper at the Casbah who negotiates and haggles with the physician about what is best. I want to believe that my physician is acting under a higher moral principle than a used car dealer. I'll go further than that. A physician who merely spreads an array of vendibles in front of his patient and then says "Go ahead, you choose, it's your life" is guilty of shirking his duty, if not of malpractice' (1).

This is to cavil, however, at an omission which not everyone will bemoan, and which does not detract from the value of this most recent addition to an important series of publications.

Reference

(1) Ingelfinger F G. Arrogance. *New England journal of medicine* 1980; 304: 1507–1511. This is quoted and discussed by John Saunders in a chapter entitled 'Medical futility: CPR' in *Death rites: law and ethics at the end of life*, edited by Robert Lee and Derek Morgan. London: Routledge, 1993.

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Let me decide

William Molloy and Virginia Mepham, 48 pages, London, 1993, Penguin, £3.99

The British Medical Association (BMA) recently recommended us all to complete a signed and witnessed statement of our medical treatment preferences towards the end of life (excluding the choice of positive help to die which remains illegal). Such a document is usually known in this country as an advance directive. Unfortunately they gave us no suggestions about how to do it; at first sight this booklet seems to fill that gap.

The medical procedures that might be used to treat a gravely ill patient are described in some detail and the reader is invited to consider which would be acceptable, and in what circumstances. This is a complex procedure. A printed form is included on which to record the decisions – unfortunately it is only half the size of the pull-out section in the original Canadian edition so not very convenient to use. It is recommended that there should be two witnesses to one's signature, that the family physician (GP) sign it, and also a proxy. This person, chosen by the potential patient, is to speak in support of the advance directive preferences when the person concerned becomes incapable of speaking on his/her own behalf.

An alternative approach is to forego, in specified circumstances, 'any medical intervention aimed at prolonging my life' rather than to attempt to give detailed treatment instructions. This probably accords better with the doctor-patient relationship on this side of the Atlantic and certainly makes the completion of the document a much less formidable undertaking. Such forms have long been available from voluntary euthanasia societies in this and many other countries.

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Teaching ethics: an initiative in cancer and palliative care

Education Department, Marie Curie Cancer Care, 25 pages, London, 1992, Marie Curie Cancer Care, £2.50

The senior, harassed and preoccupied health worker, even in such a sensitive area as palliative care, has tended to react to the traditional teaching of medical ethics with discrete indifference, a sturdy belief in common sense and a devout faith that ethical problems are for other people.

Junior colleagues, whose ethical instruction is intermittent and of variable quality, share this attitude and are not inspired by the message of the Hippocratic Oath which they interpret as 'keep your mouth shut, respect your teachers, at least in public, and do not poach their private patients!'

Now, and not before time, there are signs that this is changing. The ethical