

Making Ethical Decisions in a Legal World

Dr José Miola
Senior Lecturer in Medical Law
School of Law, University of Leicester

Law, Ethics and Morals

- Law - compulsory. No choice but to follow
- Ethics - the ‘corporate morality’ / standards of the profession
- Morals - the individual may choose

Appropriate Categorisation

- Decisions are legal when the law states that they are/takes control (*Ms B* case)
- Decisions are ‘ethical’ when they involve technical skill (within reason - *Bolitho*) or medical expertise
- Decisions are moral when the individual doctor may choose (Abortion Act 1967 and conscientious objection)

The Problem: A Dysfunctional Relationship

- *Gillick v. West Norfolk and Wisbech Area Health Authority* [1985] 3 All E.R. 402
- *Re R (A Minor) (Wardship: Medical Treatment)* [1991] 4 All E.R. 177

Re W (A Minor) (Medical Treatment: Court's Jurisdiction) [1992] 4 All E.R. 627:

“Hair-raising possibilities were canvassed of abortions being carried out by doctors in reliance upon the consent of the parents and despite the refusal of consent by 16 or 17 year olds. *Whilst this may be possible as a matter of law, I do not see any likelihood, taking account of medical ethics [that it should be allowed to occur].*”

GMC, 0-18 Years: Guidance for All Doctors (GMC, 2007):

“you can rely on parental consent when a child lacks the capacity to consent ... the law on parents overriding young people’s competent refusal is complex. You should seek legal advice if you think treatment is in the best interests of a competent young person who refuses” (para 31)

BMA, Children and Young People Toolkit, Card 4:

“a competent refusal can be overruled by a court or by a person with parental responsibility. Health professionals faced with an informed refusal of a treatment they believe to be beneficial should take legal advice – for example a refusal of lifesaving treatment or treatment that would prevent permanent injury.”



BMA, Consent, Rights and Choices in Health Care for Children and Young People (BMA Books, 2001)

“a person with parental responsibility can *legally* consent to her undergoing the termination. In all cases, the patient’s views must be heard and considered. If an incompetent minor refuses to permit parental involvement, expert legal advice should be sought. This should clarify whether the parents should be informed against her wishes” (at page 172)



BMA, *Consent, Rights and Choices in Health Care for Children and Young People* (BMA Books, 2001)

“the medical procedures that are least essential to ... [the minor’s] ... wellbeing are generally the most amenable to informed refusal. *Where the law permits*, those [medical procedures] that are immediately life-prolonging or essential to maintain the young patient’s health are least likely to be withheld simply on the basis of the child’s refusal. In the latter case, questions arise about the child’s *competence and moral authority* to make such a grave decision. Ultimately, the matter may need to be referred to the courts” (pp 18-19).

Blimey - Surely There's a Law Against That?

- No, there isn't
- 'Medical ethics' does not always do what law suggests/thinks that it does
- *Re Guardianship of Mary Moe* [2012]
(http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z-pdf-archive/120119_mary_moe.pdf)

The Law and Ethical Decisions

Lord Woolf, “Are the Courts Excessively
Deferential to the Medical Profession?” (2001) 9
Medical Law Review 1

The Law and Ethical Decisions

- *Chester v Afshar* [2004]
- Mental Capacity Act 2005/*F v West Berks HA* [1990]

Even Negligence Not Immune

Bolitho v City and Hackney HA [1998] AC 232:

“the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis ... [I]f, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.”

Even Negligence Not Immune

- *Penney v East Kent Health Authority [2000] Lloyds Rep Med 41*
- *Reynolds v North Tyneside HA [2002] Lloyds Rep Med 459*
- *AB v Leeds Teaching Hospital NHS Trust [2004] EWHC 644*
- *Richards v Swansea NHS Trust [2007] EWHC 487*

Even Negligence Not Immune

R. Mulheron, "Trumping *Bolam*: A Critical Analysis of *Bolitho*'s 'Gloss'" (2010) *C.L.J.* 609

1. 'Whether', not 'how'
2. Cost/benefit analysis undertaken

Is This To Be Welcomed?

- It is entirely reasonable and appropriate for the law to intervene in ‘ethical’ matters
- If the problem is structural, the law’s intervention may serve to resolve the structural issues
- BUT law should only intervene if it is capable of improving what medical ethics can achieve without intervention

Structuring Medical Law and Ethics

Law

Ethics

Morals

Informed Consent: Sound on Structure ...

- J. Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Oxford, Hart, 2007)
- GMC, *Consent: Patients and Doctors Making Decisions Together* (GMC, 2008)

... Less Sound on Content

- *Al Hamwi v Johnson and Another* [2005] EWHC 206
- J. Coggon and J. Miola, “Autonomy, Liberty and Medical Decision-Making” (2011) *Cambridge Law Journal* 523



So, When Might Law Appropriately

Intervene?

- If the issue at hand is non-technical in nature
- When formal guidance lacking (ie NOT HTA/HFEA)
- When the issue one that is so important that of at least symbolic significance to have law in charge (informed consent) - perhaps ECHR issues? (R. Ashcroft, “Could Human Rights Supersede Bioethics?” (2010) *Human Rights Law Review* 639)

But - Is Use of the Law Itself Any

Improvement in Structural Terms?

- Are we replacing one flawed concept with another?
- Are we ‘throwing out the baby with the bathwater’?

- J. Montgomery, “Law and the Demoralisation of Medicine”

- Is there no place for medical ethics, or should it become ‘law-lite’?

(A Tentative) Conclusion

- Law is in itself not a panacea
- There are potential disadvantages in simply dispensing with medical ethics
- If problems exist in both form and substance, then both must be addressed