

**BOOK REVIEW****MEDICAL LAW AND ETHICS, 6<sup>TH</sup> EDITION***Jonathan Herring*

Oxford: Oxford University Press, 2016. 720 pp. ISBN 978-0-19-874765-9. £34.

Lucky is the intellectually intrepid medical law and ethics scholar in the UK today. Multiple textbooks abound (including from the same publisher),<sup>1</sup> and in such a buyer's market, one wonders how authors can readily distinguish their book from others. Indeed, all these textbooks focus on the "classic" issues in the field, in varying arrangement of and emphasis on: consent to medical treatment; medical malpractice; incapable adults and children; confidentiality and data protection; assisted reproduction; abortion; organ transplantation; euthanasia; mental health; and research. Jonathan Herring, Professor of Law at Exeter College, University of Oxford, provides a clue to his approach in the preface to the sixth edition of his *Medical Law and Ethics*, where he explains that his book "is designed to provide readers with coverage not only of medical law, but also of the context, philosophical, social, and political, within which the law operates. It attempts to take the 'ethics' part of a Medical Law and Ethics course as seriously as the 'law' part." That is good and fair, but other textbooks do this as well. And arguably, medical law, more than any other discipline within law, takes ethics seriously. It must, for the issues within it get at the heart of what it means to be human and a member of a community. I believe Herring differentiates his book from the others through his relatively lively writing style and keen interest in the philosophical dimensions of the field.

As with many textbooks today, and due to the demands of textbook publishers, updates are now frequent – every two years in Herring's case. What is new to this edition is, in part, recent case law on end-of-life issues, the Supreme Court decision in *Montgomery*<sup>2</sup> (which Herring says "radically changes the approach to clinical negligence"), discussion of the interesting Human Transplantation (Wales) Act 2013,<sup>3</sup> and judicial and academic analysis of the status of the foetus. The textbook is introduced with only a one-page preface, and is spread over 11 chapters. There are useful features in the textbook to help think through the issues raised, including: a "key case" icon that provides key facts of the most important cases;

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<sup>1</sup> See e.g. G Laurie, S Harmon and G Porter, *Mason and McCall Smith's Law and Medical Ethics*, 10th ed (Oxford: OUP, 2016); J Laing et al (eds), *Principles of Medical Law*, 4th ed (Oxford: OUP, 2017); E Jackson, *Medical Law: Text, Cases, and Materials*, 4th ed (Oxford: OUP, 2016); J Samanta and A Samanta, *Medical Law*, 2nd ed (Palgrave Macmillan, 2015); S Pattinson, *Medical Law and Ethics*, 4th ed (London: Sweet & Maxwell, 2014); N Hoppe and J Miola, *Medical Law and Medical Ethics* (Cambridge: CUP, 2014); M Stauch and K Wheat, *Text, Cases and Materials on Medical Law and Ethics*, 4th ed (Abingdon: Routledge, 2012); J Montgomery, *Health Care Law*, 2nd ed (Oxford: OUP, 2002).

<sup>2</sup> *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

<sup>3</sup> The Human Transplantation (Wales) Act 2013, which came into effect in 2015, permits an "opt-out" system of organ donation, whereby hospitals may presume that people aged 18 or over, who have been resident in Wales for over 12 months, want to donate their organs at their death, unless they have objected ("opted out") specifically.

“European angles” outlining EU legislation, regulations, and perspectives on key topics; “feminist perspectives” to highlight some of the many opinions within the umbrella term of “feminist”; “a view from above” to highlight theological perspectives; “reality check” to provide current official statistics and context of the situations law seeks to regulate; “public opinion” to present survey and opinion poll results on various matters; “a shock to the system” to explore “eye-opening” accounts of issues in medical law; and “to ponder” to pose interesting questions for reflection and debate in light of current legal provisions.

I very much enjoyed Herring’s opening chapter on ethics and medical law, which provides the framework for the rest of the textbook – exploring what medical law is, the link between law and ethics, the notion of rights, and various ethical frameworks (e.g. principlism, casuistry, care ethics, feminist medical ethics). Herring highlights the shift in medical practice from paternalism to shared decision making between doctors and patients, and which in some eyes is also now more akin to a supplier-customer relationship, where patients are like consumers exercising choices and holding rights. Herring mentions also the changing nature of health professionals, where the nursing profession is increasingly carrying out a range of tasks, and the growth of patient access to healthcare information, especially through the internet. All of these changes, he points out, have significant impact on the legal and ethical approaches to medicine. While Herring does not define medical law himself, partly to stay above the fray of contentious definitions, he explains that it “is made up of bits from a large number of different branches of law: criminal law; human rights law; tort law; contract law; property law; family law; and public law” (p. 2). I appreciated the section where Herring justifies why he thinks it is important to include theological discussion in his textbook. One simple but non-trivial reason is that many people regard themselves as religious. “If medical law and ethics are to reflect the attitudes of society, then arguably something spiritual needs to be part of that” (p. 40).

A small criticism of Chapter 1 is that Herring too often provides only a whistle-stop tour of particular topics, devoting one paragraph to deeply complex areas such as rights versus obligations; positive and negative rights; and critiques of rights. It would be better, I think, for Herring to focus on a few topics and go more deeply into them than to attempt to cover all terrain superficially. Another slight criticism of Chapter 1 is that Herring includes in his list of the most important rights in medical law the “right of autonomy”; it is hard to say how it qualifies as a “right” rather than a cherished value. However, later in his chapter, Herring seems to step back from the rights language, calling autonomy a “principle” or the “premier” principle in medical ethics (p. 27). This is more accurate, though perhaps equally controversial!

Chapter 3 explores the significant subject of medical negligence and medical malpractice. Herring rightly starts his chapter by qualifying the somewhat rare world of medical negligence: only a tiny proportion of adverse incidents in the NHS reach the court. It simply happens that sometimes, accidents happen. The question is when should, and how, the law attribute blame for that accident (or, in the extremely rare instance, deliberately malicious act or grossly negligent act). I appreciated this chapter for not only providing an overview of the

law, but also for the critical discussion of the faults of the tort system. Herring provides deep debate regarding why people sue, the crucial aspect of legal costs in litigation, whether there is a litigation crisis, the possibility of defensive medicine, and the ramifications of apologising for when things go wrong.

Herring tackles the equally weighty subject of consent to treatment in Chapter 4. As he pronounces: “It is a fundamental principle of medical law and ethics that, before treating a competent patient, a medical professional should get the patient’s consent. Gone are the days when a ‘Trust me, I’m a doctor’ approach justified imposing treatment on a patient” (p. 155). Of course, that a patient says, “I trust you, doctor” is in itself no bad thing<sup>4</sup> – and this is not necessarily “delegated” consent, either. As Herring further comments, “what counts as consent for the purposes of law does not necessarily reflect how consent would be understood by philosophers and others” (p. 161). Indeed, consent is heavily debated in the medical law and ethics literature. Herring provides a good overview of the ground-breaking *Montgomery* case from 2015 (pp. 174-176) in the context of “how much information must be provided?” and legal actions in negligence based on a failure to provide sufficient information to a patient. Herring notes that there has been a steady shift from a professional practice standard to a hybrid reasonable/subjective patient standard, allowing the patient to exercise a choice based on disclosure of material risks involved in any recommended treatment (unless a therapeutic privilege exception exists or it is an emergency situation). Chapter 4 also covers the philosophically deep topic of “ethics and autonomy”; Herring is an expert in this area, and writes beautifully on challenges to the pre-eminence of autonomy in medical law and ethics. In this section, Herring discusses relational autonomy, which promotes an understanding of autonomy centred on connections and responsibilities to others. “In the medical context,” he writes “this means that we should not regard decisions as simply decisions for the patient, but consider the impact of the decision on those with whom they are in relationships” (p. 213).

In the remainder of his textbook, Herring covers: the structure of the National Health Service (NHS) in England, the rationing of healthcare, and public health (Chapter 2); confidentiality (Chapter 5); contraception, abortion, and pregnancy (Chapter 6); reproduction (Chapter 7); organ donation and the ownership of body parts (Chapter 8); dying and death (Chapter 9); mental health law (Chapter 10); and finally, research (Chapter 11). Space does not permit me to summarise and comment on each chapter. However, Herring clearly demonstrates his passion and knowledge in certain topics (the chapters on reproduction and death and dying are excellent), while others (e.g. research) suffer. Indeed, if I may show my own bias to the field of health research, his last chapter rather frustrated me. At 37 pages, it is both too short and outdated. He fails to note, for instance, that the Declaration of Helsinki was last updated in 2013, that bifurcated “local” and “multi-centre” research ethics committees have long ceased to exist, and bizarrely includes in his section on “research that is outlawed on the grounds of public policy” both challenge studies and placebos – two areas of research that certainly are not outlawed. Herring is right that “The tension running through this topic is

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<sup>4</sup> L Rosenbaum, “The Paternalism Preference — Choosing Unshared Decision Making” (2015) 373 *New England Journal of Medicine* 589-592.

between the wish to promote medical advances only achievable through research and the wish to protect participants” (p. 615), but he never goes on to plunge the depths of this tension. As the last chapter, and one that purports to cover an area of supreme importance (indeed, some might say health research is one of the two main branches of medical law, the other being the physician-patient treatment context), I was left wanting more – especially since Herring’s other chapters are so philosophically rich.

Still, the intellectual contributions of Herring’s book far outweigh its limits. The main downsides to me are the lack of balance in the chapters and the absence of a disclaimer that the textbook is really intended only for those in England and Wales: there is no discussion of the context in Scotland and Northern Ireland. Nonetheless, I found *Medical Law and Ethics* very enjoyable to read – particularly for a textbook – and encourage both students and academics to consult it in the course of their studies and research, as I am sure I will repeatedly. This textbook is a fine piece of scholarship, and, it must be said approvingly and refreshingly, available at an affordable price. As with all textbooks in different legal fields, we can only wonder with some trepidation what the impact of “Brexit” will be. In medical law, it may affect everything from data protection to clinical trials. Professor Herring has a supremely complex but crucial issue to explore in the seventh edition.

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