

VERSÃO ORIGINAL

HUMAN RIGHTS AND HEALTHCARE

*By Elizabeth Wicks,
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Elizabeth Wicks adopts the view, firstly advocated in England by Kennedy and Grubb, that medical law “is a subset of human rights law”. (at 2) Human rights are supposed to provide the “conceptual unity”, i. e. the “internal coherence” that is necessary for medical law to consolidate its claim to emancipation into a distinct subject of law rather than remain the “academic version of the cuckoo”, i.e. borrowing from many other branches of law without having an identity of its own. Given that prominent medical law academics are not persuaded by this view (e.g. *Mason and Laurie, Mason and McCall Smith’s Law and Medical Ethics*, OUP, 2006), the author’s aim is to substantiate it by “cataloguing the myriad of influences introduced into medical law from the sphere of human rights law in recent years and by arguing in favour of the prioritisation of individual autonomy and rights as an underlying value in English medical law”. (at 3)

These statements of the introduction of the book seem to raise at least three different types of questions about the potential relationship between human rights and healthcare. One, more *descriptive*, is whether the incorporation of the European Convention on Human Rights by the Human Rights Act 1998 has had a significant influence in medical law. Another, more *conceptual*, is if human rights do really provide a conceptual unity for the subject of medical law. The third one, more *prescriptive*, is whether human rights *should* constitute the underlying value pervading all issues of medical law.

The two latter issues could well have been the subject of autonomous and more general chapters, but the author chooses to deal with them in the course of the discussion of specific topics. In eleven comprehensive chapters covering the main topics of medical law such as medical negligence (Chapter 3), consent to treatment (Chapter 4), confidentiality (Chapter 6), abortion (Chapter 9) and euthanasia (Chapters 11 and 12), the author presents a descriptive account and critical analysis of the current state of medical law and how human rights have (or have not in some cases) featured as a consideration in the decision of courts.

Particularly interesting are the chapters on consent to medical treatment (chapter 4) and the right to life at the end of life (Chapter 11), where human rights issues are more uncontroversially engaged and have to a great extent featured in medical law (although through the language of medical ethics) way before the enactment of the Human Rights Act. On the issue of consent, the author corroborates the view that its requirement is based on the right to autonomy (or self-determination) of the patient, quoting provisions of the ECHR and the less well known European Convention on Human Rights and Biomedicine (ECHRb) in support of her position. She also argues, forcefully, that “the patient’s autonomy ... will have been infringed regardless of whether any injury results from the treatment” when relevant information necessary for the patient to make a choice (informed consent) is omitted by the doctor. (at 81) She criticises, thus, the need that damages materialise so that the patient can make use of the legal remedy of negligence as not sufficiently protective of the right to autonomy. Although I would agree that autonomy is infringed regardless of physical damages occurring, I think that the author perhaps overly relies on negligence as the appropriate remedy to protect autonomy. Why, one might ask, should compensation be the adequate legal response to a breach of the patient’s autonomy?

In chapter 11, after displaying great command of the scientific issues surrounding death and showing the intricate problems this presents for ethics and law, the author thoroughly discusses the famous *Bland* case ([1993] 1 All ER 831), “perhaps the landmark case in English medical law” (at 227), in which the House of Lords authorised doctors to withdraw life sustaining artificial hydration and nutrition (ANH) and thus bring about a slow death to the patient, through starvation. Although the case was judged before the Human

Rights Act came into force, the courts continued applying its principle afterwards, for instance in the *NHS Trust case* ([2001] 2 WLR 942. Wick's appropriately questions "how can the withdrawal of essential life-sustaining treatment such as ANH be consistent with the state's duty to protect the right to life of all persons, including those in PVS"? (at 245) As she rightly notes, the decision in the *NHS Trust case* deals unsatisfactorily with this important issue.

Less cogently argued, in my view, are chapters 2 and 3, perhaps due to their less obvious or uncontroversial connection with human rights. In Chapter 3, the author discusses the field of medical negligence. The tone of the chapter is that the current system is overly reliant on professional opinion in the determination of the standard of care (the infamous *Bolam* test) and that this is detrimental to patient's rights. The same is said of the stringent test of causation, and an isolated case in which this test has been loosened (*Chester v Ashfar*) is hailed as "*encouraging from a human rights perspective*". (at 50) But this claim is not much further developed in the chapter. Why and how are the rules of causation and standard of care in English law in conflict with the human rights of patients? What exact human rights are involved here? The author seems to assume that compensation for harm derived from medical care is a human right and, therefore, any difficulties posed by the traditional rules of tort law are in conflict with that right. This might be the case, but, in my view, it needs much more argument to be substantiated than is provided in the book.

Chapter 2 discusses the important question, and perhaps most controversial in terms of human rights, of whether there is a positive right (an entitlement) to medical treatment and the intractable issue of fairness in resource allocation (at 23-27) that this inevitably raises. The author properly acknowledges the importance of the issue by placing it at the very beginning of the book and calling it "a preliminary issue" (at 17), saying that "the entirety of [the protection of other human rights engaged in health] presupposes that the patient has access to the necessary medical treatment." (ibid.) A long and interesting criticism of the famous QALYs (Quality Adjusted Life Years) metric follows, but little is said about the arguments in favour of this methodology and other so-called cost-effectiveness analysis (CEA) metrics, such as for example DALYs (Disability Adjusted Life Years), which has been proposed as an advance over QALYs and has been adopted in a wide range of countries (for a good volume of essays on this issue see Anand, Peter and Sen (eds), *Public Health, Ethics and Equity*, OUP, 2004). The author's own solution to the problem of allocation of scarce resources in health, which she calls the principle of *therapeutic merit* ("the patient in greatest clinical need must receive the treatment", at 26), could also perhaps have been further developed and defended given its complexity and potential controversy. In any case, the author finishes the chapter by conceding not only that "a right to treatment is the most controversial of all the healthcare rights" (at 36) but also that such a right would be "simply unrealistic" (ibid), which makes one wonder how

damaging this is for her claim that human rights should be the underlying value of all medical law.

In other chapters which I cannot discuss here for reasons of space the case for human rights as the main and unifying value in medical law seems more persuasive, for instance in the treatment of incompetent and vulnerable patients (Chapter 5), the confidentiality of medical information (Chapter 6), the control over one's own body and body parts during and after life (Chapter 7), abortion (Chapter 9) and euthanasia (Chapter 12). But the difficulties that arise for the establishment of a persuasive connection between medical law and human rights in the two topics above discussed (negligence and the patient's entitlement to treatment), which together represent a significant part of medical law, cast doubt on the conceptual and prescriptive aims of the project. If there is no human right to treatment, as many argue and the author concedes as we saw, and medical negligence is not a matter of human rights but simply a private tort's issue, as some would maintain, the claim that human rights provide the conceptual unity of medical law and should be its underlying value in all areas seems unsubstantiated, or at least overstated. Perhaps it would be more plausible to claim simply that human rights have a significant impact in medical law, but that would be equally true of most areas of law, such as labour law, criminal law, constitutional and administrative law etc.

Although not entirely convincing on the conceptual and prescriptive questions about the relationship between human rights and medical law, Wick's book provides a comprehensive and thorough account and analysis of the main topics of medical law in light of their actual and potential implications in terms of human rights. It is a good resource, therefore, for anyone interested in those intricate and important questions.