



**UNIVERSITY OF NOTTINGHAM
SCHOOL OF LAW**

LEGAL ISSUES IN HEALTH CARE A

SEMESTER ONE, 2010-11

**SEMINAR SHEET PACKAGE
PART I**

NB Part II (Seminars IV-IX) will be available on the intranet and in hard copy in the week commencing Thursday 7 October 2010

Logistics

This module is taught solely by way of seminar. The teachers are Professor Peter Bartlett (Peter.Bartlett@nottingham.ac.uk) and Ralph Sandland (Ralph.Sandland@nottingham.ac.uk). Ralph is the module convenor so any problems, such as obtaining readings, should be addressed to him in the first instance. This package contains the first three seminar sheets for the module. The remaining sheets will be made available in the week starting Thursday 7th October. Each sheet contains readings and suggested questions for discussion in Seminars. **Essential Seminar reading** is in **bold** type. There is no essential set text for this module, but if you would like to buy a book J. Herring *Medical Law and Ethics* (OUP, 3rd ed, 2010) tackles most, but not all, of the topics that we will cover. Other worthy texts include E. Jackson *Medical Law: Text, Cases and Materials* (OUP, 2nd ed, 2009), M. Stauch, K. Wheat, and J Tingle, *Text, Cases and Materials on Medical Law*, (Cavendish, 3rd ed, 2006) and J.K. Mason and G.T. Laurie (McCall Smith having found a more lucrative form of writing) *Mason and McCall Smith's Law and Medical Ethics* (OUP, 10th ed, 2010). J. Montgomery *Health Care Law* (OUP, 3rd ed, 2010) is one of our preferred texts but the new edition is not yet published and the 2nd ed is now significantly out of date (the new edition should, however, appear any day now). There are a further number of healthcare law or medical law texts in the library. Browse and use what you find useful. The Medical Law Review contains case notes on leading cases. But be aware that our readings go beyond what you will find in any single text: and texts tend to be more 'black letter' in their approach than that taken on this module. **At the back of this document you will find the module's general reading list. You should aim to read from this list throughout the module.**

In addition, please note that on all Seminar sheets, items marked with an asterisk are available on the internet. For cases, this is generally through Westlaw UK. For articles, it is generally through the electronic journals link in the library web page. For government documents, it is generally through the Department of Health web site. European documents are available at the relevant website; we provide an address wherever possible. NGO documents are also generally available on the website of the NGO in question. Again, wherever possible, we give you the address. This has taken some hard work on our part, and as such **complaints about unavailability of these items will be given very short shrift.** Complaints about the unavailability of other items should be brought to the attention of either of us, and the staff of the relevant library, as soon as possible, and will be given slightly longer shrift. Finally, note the status of these reading lists. They contain reading we judge to be essential for the Seminars. They also contain suggestions for further reading. **They do not pretend to be an exhaustive list of relevant materials.** If you search in the libraries, or electronic resources such as Westlaw, you will find lots of other relevant primary and secondary source materials. **The readings cover both 'theoretical' and 'black letter' materials: we expect you to demonstrate knowledge of both, and of their interrelationship.** As usual, Seminars are mandatory. As required by policies imposed by QAA, attendance will be taken, and absentees reported. Please attend, **prepared to contribute.**

You are generally studying four subjects at a time. Consistent with this, we would expect that you would spend a minimum of nine hours in preparation for each Seminar. You are expected to have a reasonable grasp of the required reading for the Seminar, but **you are further encouraged to move beyond the readings on the Seminar sheets.**

You are expected to prepare the questions on the Seminar sheet, but these are **preparation** for the Seminar, they are **not** an **agenda** for the Seminar. Seminars will commence with you being asked what you wish to focus on. That can be one or more specific questions on the Seminar sheet, but **the onus is on you** to decide which one(s). Alternatively, we can spend the Seminar discussing an issue or set of issues that you would like clarified, or that you found particularly interesting. **You should arrive at Seminars with ideas as to how you would like the time used.** Feel free to chat with others in the Seminar in advance on this, if you'd like. It is likely to be a lot more helpful and interesting if you arrive with points you would like clarified, or directions you want to explore, **as long as you have done at least the essential reading.**

| Module Timetable | |
|-------------------------------|---|
| Week starting Thursday | Topic |
| 23/09/10 | Introduction: Perspectives and Tensions |
| 30/09/10 | Informed Consent and the Right to Refuse Treatment: Case Study in the Construction of Bodily Autonomy by Law |
| 7/10/10 | Capacity: The Gateway to Autonomy |
| 14/10/10 | A Right To Treatment? |
| 21/10/10 | Health and Surveillance I: Patients' Rights, Information, and Control |
| 28/10/10 | Health and Surveillance II: Public Health |
| 4/11/10 | Pharmaceuticals, Regulation and Research I |
| 11/11/10 | Pharmaceuticals, Regulation and Research II |
| 18/11/10 | Patients' Rights in the Internal Market |

Peter Bartlett's seminars take place from 10-11.50 Fridays in D136, Portland, commencing Friday 24th September.

Ralph Sandland's seminars take place from 9-10.50 Wednesdays in D136, Portland, commencing Wednesday 29th September.

Introduction to the Health Care A Module

The focus of this module is '**the rights of patients**'. This will also entail consideration of

- the duties of healthcare professionals
- the management of the NHS, specifically as far as this module is concerned the management of patient data, and the regulation and availability of treatments
- the broader role of government in securing the rights of patients or, as representatives of the general public interest, in limiting the existence or enforceability of those rights
- the European element to UK law, in terms both of human rights and the decisions of the ECJ.

We are also interested in relevant theoretical questions, in particular we are interested in the role of the law in

- the construction of the body
- the protection of the privacy of the citizen from the state

The syllabus is divided into nine topics, with a seminar on each. The seminar topics are as follows.

Seminar One: Introduction: Perspectives and Tensions

Through a number of case studies we shall consider the possibility that what counts as good healthcare law is to large extent a question of perspective. For example, the best law on medical negligence from the perspective of a doctor may well not be the same as that which would be preferred from the perspective of the patient. The perspective of the drug company may be different again. And because there are differences of perspective there are some inherent tensions in healthcare law. The first Seminar will identify some of the most important of these tensions. It will also place them in both a national and international context, to get us thinking about the interface of different types of law. It will also begin to situate these different tensions and perspectives, and levels of law, within some sort of theoretical framework.

Seminar Two: Informed Consent: Case Study in the Construction of Bodily Autonomy by Law

In the second seminar we will look at the law on informed consent and the right to refuse treatment. Again, we will be interested in both domestic and European law, and with the theoretical question of the relation between the law and embodiment. What other factors – such as class, gender, education, or professional status affect the way in which bodies and their inhabitants are constructed by law. The law here seems to be in transition, but what exactly is at stake?

Seminar Three: Capacity: The Gateway to Autonomy

The rule that there can be no treatment without consent cannot always function as intended. In particular, some individuals may not have the mental capacity to make their own treatment decisions. For a decade and a half, the courts struggled to construct a jurisdiction for dealing with cases where capacity is an issue. Over the same period, successive Parliaments threatened to legislate on the issue. Finally, the Mental Capacity Act 2005 received the Royal Assent in April 2005 and came into

force in 2007. Has it improved the situation? What does the way in which the law deals with vulnerable adults tell us about law and the construction of the subject?

Seminar Four: A Right to Treatment?

For sixty years the Secretary of State for Health has had a duty, these days to be found in the NHS Act 2006, to provide a national health service. Does this duty entail a right to medical treatment for citizens? This question has been raised recently in a number of high profile cases, some involving adults and some involving children. Our analysis of this case law will enable us to develop a fairly sophisticated understanding of the concept of a duty and a right. Indeed, as we shall see, there are various types of right and duty, some of which are more enforceable than others.

Seminar Five: Health and Surveillance I: Patients' Rights, Information, and Control

This seminar focuses on the right to confidentiality of medical information. Since Hippocrates this has largely been a matter left to the good conscience of doctors, but in the 21st century the question is too controversial to be left to individual professionals. Patient care these days is in any case the province of multi-disciplinary teams, rather than individuals, and a significant amount of information is extracted by different actors, for different reasons, from encounters with patients. It is then held electronically in databanks and databases. How safe is this information? How should confidentiality be preserved? What ulterior uses of medical information must be guarded against and how? And is this done effectively? There is also the underpinning substantive issue: how do we define information as 'confidential'? These are the sort of questions that we will ask here.

Seminar Six: Health and Surveillance II: Public Health

This seminar begins by returning to some of the issues raised in seminar five. The legal duties to maintain confidentiality of medical data are in tension with the various productive uses of that information, for example in the treatment of other patients, preventative measures, epidemiology, and responding to outbreaks of disease. How is the balance struck between the right to privacy and the public interest? What uses (some overt, some less so) of medical information are there? What should be guarded against and how? And is this done effectively? What is the appropriate legal response to an individual who poses a public health risk?

Seminars Seven and Eight: Pharmaceuticals, Regulation and Research

These seminars look at the somewhat fluid world of pharmaceutical regulation, including the use of pharmaceuticals on approved and unapproved bases. Patient trust is based in part on the notion that the effects of drugs are known, and prescription will only occur in the context of a robust and reliable system of regulation. These seminars will examine the degree to which these assumptions are well-founded. In addition, we will examine the law relating to the conduct of research and clinical trials.

Seminar Nine: Patients' Rights in the Internal Market

The final seminar will look at an issue of great topicality and ever-increasing importance: the role of the EU, and in particular the caselaw of the ECJ, concerning the free movement of patients and medical goods and services, against the backdrop of the EU policy on health, to be found in Art.152 EC and elsewhere. We shall consider the role of the ECJ in developing and extending

patients' rights in the EU and consider implications for the future, both for patients and for national governments' abilities to control national health services. Some want 'A European Union for Health' with strong powers. Others do not. In which direction is the ECJ headed? And, can it be stopped?

SEMINAR 1 - FUNDAMENTALS: PERSPECTIVES AND TENSIONS

This Seminar aims to set the scene for the remainder of the module. It introduces our key themes and explores some of the major tensions that beset contemporary healthcare law. The key themes for the module - all designed to help us understand more fully what is at stake when we talk about 'rights' - are:

- To analyse the constructive power of law and the bodies that are thereby produced, in terms of the implications for healthcare (law)
- To explore the tension between autonomy (individual freedom) and beneficence/benevolence (the duty to help others), which can show up in the form of an opposition between patients' rights and professional duties, or in the form of an opposition between the rights of the one and of the many
- To understand and analyse the tension between or compatibility of different levels or types of law, in particular that between the law of England and Wales on the one hand and European law and the ECHR on the other, in relation to the provision of healthcare services, and to form a preliminary view on the preferability of various possible future developments

In this Seminar we *begin* this project, which we shall do by way of a number of case studies. We do not aim for comprehensive legal coverage. The aim, instead, is to get a feel for the issues.

Reading

1. The tension between the rights of patients and the duties of healthcare professionals: the case of Ms. B

Re B (Consent to Treatment: Capacity), sub.nom. B (Adult: Refusal of Medical Treatment), Re B v NHS Hospital Trust* [2002] EWHC 429, [2002] 2 All E.R. 449, [2002] 1 F.L.R. 1090, 2002 WL 347038

World Medical Association International Code of Medical Ethics, 1949 (as amended)*

World Medical Association Declaration of Geneva, 1948 (as amended)*

World Medical Association Declaration of Helsinki, 1981 (as amended)*

WMA Resolution on the Inclusion of Medical Ethics and Human Rights in the Curriculum of Medical Schools World-Wide, 1999*

(WMA documents are available at www.wma.net/e)

GMC (1999) Seeking Patients' Consent: The Ethical Considerations*

Richard Stein & Frances Swaine (2002) 'Ms B v An NHS Trust: the patient's right to choose' 152 (7029) N.L.J., 642-643*

Gillian Douglas (2002) 'Medical Treatment' 32 Fam. Law, 423-426 (June)*

Hazel Biggs (2003) 'A pretty fine line: life, death, autonomy and letting it B' 11(3) Feminist Legal Studies, 291-301 (refers also to the *Pretty judgment*)*

Rosalind English (2002) 'Autonomy and the human rights convention' 152 (7034) N.L.J., 852-853 *

B. Mahendra (2002) 'A competent mind can decide for itself' 152 (7029) N.L.J., 618-619*

Andrew Grubb (2002) 'Competent adult patient: right to refuse life-sustaining treatment' 10(2) Medical Law Review 201-204*

Richard Huxtable (2002) 'A right to die or is it right to die?' 14(3) C.F.L.Q. 341-355*

Annabelle James (2002) 'Consent to the withdrawal of medical treatment' 66(5) J. Crim. L. 391-393 (also discusses *Pretty*).

2. The tension between the rights of the individual and the general interest I: the case of Child B

R v Cambridge HA ex parte B* [1995] 1 WLR 898, 1 FLR 1055, 2 All ER 129

Elizabeth Palmer (2000), 'Resource allocation, welfare rights - mapping the boundaries of judicial control in public administrative law' 20(1) OJLS, 63-88*

David O'Sullivan (1998) 'The allocation of scarce resources and the right to life under the European Convention on Human Rights, Public Law, 389-395*

Michael Davies (1996) 'Resource allocation in medicine and professional liability - the final nail?' 12(1) Professional Negligence, 15-20

Richard Mullender (1996) 'Judicial review and the rule of law' 112 L.Q.R., 182-186*

(You may wish to consider the relevance of *R. v. Gloucestershire County Council, ex p. Barry*, [1997] 2 WLR 458, [1997] 2 All ER 1 (HL)*, *Geraets-Smits v Stichting Ziekenfonds and Peerbooms v Stichting CZ Groep Zorgverzekeringen*, C-157/99 (2001), [2002] QB 409, [2002] WLR 154, [2001] ECR I-5473 (ECJ)*, *Barrett v Enfield LBC* [2001] 2 A.C. 550 [1999] 3 W.L.R. 79 [1999] 3 All E.R. 193 [1999] 2 F.L.R. 426 [1999] 1999 WL 477309*, although you do not need to analyse these cases in depth at this stage).

3. The tension between the rights of the individual and the general interest II: the cases of Mrs. Pretty and Ms. Purdy

***Pretty v United Kingdom* (2346/02), [2002] 2 F.L.R. 45; (2002) 35 E.H.R.R. 1; 12 B.H.R.C. 149* (ECHR)**

R. (on the application of Pretty) v DPP [2001] UKHL 61 [2002] 1 A.C. 800 [2001] 3 W.L.R. 1598 [2002] 1 All E.R. 1 [2002] 2 Cr. App. R. 1 [2002] 1 F.L.R. 268 [2002] 1 F.C.R. 1 [2002] H.R.L.R. 10 [2002] U.K.H.R.R. 97 11 (HL)*

Dan Morris (2003) 'Assisted Suicide under the European Convention on Human Rights' E.H.R.L.R. 1, 65-91*

Antje Pedain (2003) 'The human rights dimension of the Diane Pretty case' 62(1) C.L.J. 181-206*

Claire de Than (2002) 'No Convention right to die' 66(4) J. Crim. L. 320-325.

H.J.J. Leenen (2003) 'Assistance to suicide and the European Court of Human Rights: the Pretty case' 9(3) E.J.H.L. 257-279.

Michael Freeman (2002) 'Denying death its dominion: thoughts on the Dianne Pretty case' 10(3) Med. L. Rev. 245-270*

Richard H.S. Tur (2003) 'Legislative Technique and Human Rights: The Sad Case of Assisted Suicide' Crim. L.R. 3-12 (Jan.)*

John Keown (2002) 'No right to assisted suicide' 61(1) C.L.J., 8-10*

B. Mahendra (2002) 'Still no right to die' 152(7031) N.L.J., 693*

***Purdy v DPP* [2009] UKHL 45, [2009] 3 W.L.R. 403* (HL)**

JK Mason (2008) 'Unalike as two peas? R (on the application of Purdy) v DPP' 13(2) Edin L.R., 298-302* (discusses the first instance decision)

http://cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/

Michael Hirst [2009] 'Suicide in Switzerland: Complicity in England?' Crim LR 335*

Hansard (HL Debates) 7 July 2009, cols 595—634 (debating proposed amendment moved by Lord Falconer, to restrict the ambit of the offence of assisting a suicide). Available at

http://www.publications.parliament.uk/pa/ld/lords_past_editions.htm#july09

DPP (2010) Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide

http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html

4. The tension between the rights of the individual and the general interest III: the impact of the EU, Convention Rights, and the cases of Mrs. Blood and Ms. L

R. v Human Fertilisation and Embryology Authority Ex p. Blood*, [1999] Fam. 151, [1997] 2 W.L.R. 807, [1997] 2 All E.R. 687, [1997] 2 C.M.L.R. 591, [1997] Eu. L.R. 370

L v Human Fertilisation and Embryology Authority* [2008] EWHC 2149 (Fam), [2009] Eu. L.R. 107, [2008] 2 F.L.R. 1999

Kirsty Keywood (2000) 'More than a Woman? Embodiment and Sexual Difference in Medical Law' 8(3) Feminist Legal Studies, 319-342, omitting 332-339 if you wish*

Tamara K. Hervey, "Buy Baby: the European Union and regulation of human reproduction" (1998) 18 Oxford Journal of Legal Studies 207-233*

Vanda Kvjatkovski and Melanie Roberts (1997) 'The right to posthumous use of sperm and the free movement of persons under European Community law' 19(4) Journal of Social Welfare and Family Law, 507-513

Sheila A.M. McLean, (1999) 'Creating postmortem pregnancies: a UK perspective' 6 Juridical Review, 323-342

S.J. Treece and Diana Savas (1997) 'More questions than answers?' 3(1) Medical Law International 75-81

Derek Morgan and Robert G. Lee, (1997) 'In the name of the father? Ex parte Blood: dealing with novelty and anomaly', 60(6) Modern Law Review, 840-856*

Margaret E. Rodgers (1997) 'Gametes: storage, consent and treatment', Web Journal of Current Legal Issues <http://webjcli.ncl.ac.uk>

Hazel Biggs, (1997) 'Madonna minus child. Or - wanted: dead or alive! The right to have a dead partner's child' 5(2) Feminist Legal Studies, 225-234*

David P.T. Price, (1997) 'Giving Blood: posthumous fertility treatment and a good old British compromise?' 11(2) International Review of Law Computers & Technology, 299-311

Questions

1. Why did Ms. B's case come to court? What are your views about the comments of the judge in this case? What were the possible outcomes in this case? What is the preferable outcome?
2. What view of the body of Ms. B was held (i) by Ms. B herself (ii) by those treating her?
3. What would be the outcome if Child B's case came to court today? What should be the outcome?
4. Distinguish *Pretty* from *Re B*.
5. In your view, was *Pretty* rightly decided?
6. In your view, was *Purdy* rightly decided?
7. What is the *ratio* of *Blood*?
8. How did the construction of the case in *L* differ from that in *Blood*? Which construction best aided the claimant?
9. Is the idea that the body is a 'discursive construct' compatible with or hostile to the concept of human (patient's) rights? (what is a 'discursive construct'? and what does the idea imply or convey?)

**SEMINAR 2 – INFORMED CONSENT AND REFUSAL OF TREATMENT:
A CASE STUDY IN THE CONSTRUCTION OF BODILY AUTONOMY BY LAW**

We are in the era of human rights, and as such it is no surprise that 'the rights of patients' (and the accompanying duties of health care professionals), is an issue of great topicality. In this Seminar and we shall focus on the most well-known right that patients have: the right to control what happens to one's body – which translates into medico-legal language as the right to give informed consent to medical treatment, and its flipside, the right to refuse treatment.

The requirement that no treatment be given without the informed consent of the patient reflects a predominant concern with ideas of autonomy and privacy, and more generally, respect for human dignity. Of course, as we saw in the first Seminar, such legal rights actively *create* human dignity: (health care) law has a major influence in constructing the reality of the patient experience. In this sense, the body is a legal artifact. Hence we need to ask: does the law that we have get it right?

Moreover, to begin to answer this question we must also be aware of the non-legal framing or construction of the so-called 'doctor-patient relationship'. We have already seen, in our examination of *Re B* in the first Seminar, that there is the potential for tension between the two. Now, we need to push this line of enquiry further. How should we understand the dynamics that prefigure the interactions between those seeking medical assistance and the professionals who deliver it? And what does this have to do with law?

Readings

1. The Law in England and Wales

Arts 8, 3 ECHR

Sidaway v Bethlem Royal Hospital Governors* [1985] AC 871

Re T (Adult: Refusal of Treatment)* [1992] 3 WLR 782 (judgment of Lord Donaldson)

Bolitho (Deceased) v City and Hackney HA [1998] AC 232, [1997] 3 WLR 1151, [1997] 4 All E.R. 771*

***Pearce v United Bristol Healthcare NHS Trust* [1999] PIQR 53 (CA) ***

Alasdair Maclean (2004) 'The doctrine of informed consent: does it exist and has it crossed the Atlantic?' 24(3) Legal Studies 386-413

***Chester v Afshar* [2003] QB 356, [2002] 3 WLR 1195; [2002] 3 ALL ER 552* (CA: essential reading because we are interested in the case for what it tells us about doctor/patient interaction)**

***Chester v Afshar* [2004] UKHL 41, 2004 WL 2289136 (HL), [2005] 1 A.C. 134, [2004] 4 All E.R. 587, [2004] 3 W.L.R. 927* (HL: the House is totally focused on the causation issue, and decide 3/2 in favour of Ms. Chester, effectively creating a duty to warn [of currently uncertain scope]. There is little discussion of the earlier caselaw. Specifically the House seems to have collective**

amnesia about the statements of Lords Bridge and Diplock in *Sidaway*, and the subsequent cases of *Gold* and *Blyth*, which concern the appropriate response to questions asked by the patient)

M. Hogg (2005) 'Duties of care, causation, and the implications of *Chester v Afshar*' 9(1) Edin. L.R. 156-167*

R. Stevens (2005) 'An opportunity to reflect' 121 (Apr) LQR 189-194*

D. Ryan and R. Ryan (2005) 'A cause wrapped up in a duty: causation and informed consent to medical treatment' 27 Dublin University Law Journal 260-283

Al Hamwi v Johnston* 2005 WL 437741, [2005] EWHC 206

J. Miola (2006) 'Autonomy ruled ok?' 14(1) Med. Law. Rev. 108-114*

Glass v United Kingdom* 2004 WL 343842 (ECHR), (2004) 39 EHRR 15, [2004] 1 F.L.R. 1019

Brazier, M, and J. Miola (2000) 'Bye-Bye Bolam: A Medical Litigation Revolution?' 8 Medical Law Review (2000) 85*

S. Sheldon, (1998) 'A Responsible Body of Medical Men Skilled in that Particular Art...' Rethinking the Bolam Test' in S. Sheldon and M. Thomson (eds) Feminist Perspectives on Health Care Law.

E. Wicks 'The Right to Refuse Medical Treatment under the ECHR', (2001) 8 Medical Law Review 17-40*

D.M. Studdert et al (2007) 'Geographic variation in informed consent law: two standards for disclosure of treatment risks' 4(1) Journal of Empirical Studies 103-124

Rob Heywood, Ann Macaskill and Kevin Williams (2007) 'Medical students' perceptions of informed consent: legal reflections on clinical education' 23(2) P.N. 151-164*

Ash Samanta, Michelle M. Mello, Charles Foster, John Tingle and Jo Samanta (2006) 'The role of clinical guidelines in medical negligence litigation: a shift from the Bolam standard' 14(3) Med. L. Rev. 321-366*

Alisdair Maclean (2006) 'Autonomy, consent and persuasion' 13(4) E.J.H.L. 321-338

K. Mason and D. Brodie (2005) 'Bolam, Bolam - wherefore are thou Bolam?' 9(2) Edin. L.R. 298-306*

P. Foster (1998) 'Informed Consent in Practice' in S. Sheldon and M. Thomson (eds) Feminist Perspectives on Health Care Law

M. Jones (1999) 'Informed Consent and other Fairy Stories' 7 Medical Law Review 103*

M. Brazier (2006) 'Do No Harm - Do Patients Have Responsibilities Too?' 65(2) Cambridge Law Journal 397*

Woolf, Lord Chief Justice (2001) 'Are the Courts Excessively Deferential to the Medical Profession?' 9 Medical Law Review 1*

For key Department of Health documents go to <http://www.dh.gov.uk/en/Policyandguidance/Healthandsocialcaretopics/Consent/Consentgeneralinformation/index.htm>

Michael Bury (1997) 'Doctors, patients and interaction in healthcare' in his Health and Illness in a Changing Society

Alasdair Maclean (2009) Autonomy, Informed Consent and Medical Law: A Relational Challenge

Alan Clarke (2001) 'Professionals, patients and healthcare provision' in his The Sociology of Healthcare

2. The European Dimension

ECHR, Arts 2,3,8,9,14

Charter of the Fundamental Rights of the European Union, Art 3

Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, 1997, Arts 3, 5, 8, 9,10.2, <http://conventions.coe.int/Treaty/EN/Treaties/Html/164.htm>

Secretary General of the Council of Europe et al. (1996) Explanatory Report, Convention on Human Rights and Biomedicine, <http://conventions.coe.int/treaty/en/Reports/Html/164.htm>

Henriette D.C. Roscam Abbing (1998) 'The Convention on Human Rights and Biomedicine: An Appraisal of the Council of Europe Convention' 5 European Journal of Health Law, 377-387

Lars H. Fallberg (2003) 'Consequences of the Amsterdam Declaration - a rights revolution in Europe?' 10(1) European Journal of Health Law 5-10

Herman Nys (2002) 'Comparative health law and the harmonization of patients' rights in Europe' 8(4) European Journal of Health Law 317-331.

Convention on the Elimination of All Forms of Discrimination Against Women <http://www.un.org/womenwatch/daw/cedaw/>

AS v Hungary (2007) (2007) 45 E.H.R.R. SE1 (decision of the UN Committee on the Elimination of Discrimination against Women)*

Questions

1. Is the law of England and Wales with regard to the patient's right to information before giving consent to treatment compatible with the European Convention and the Convention on Human Rights and Biomedicine?
2. What is the policy basis of the *Bolam* test in the context of the provision of information to patients? Why did the House of Lords in *Sidaway* reject the doctrine of informed consent? How valid do you find the reasoning of the majority? What are your views on Sheldon's argument?
3. To what extent is *Pearce* a departure from *Sidaway*?
4. To what extent is *Chester* a departure from *Pearce*?
5. Critically evaluate the quality and nature of the interactions between Ms Chester and Mr Afshar in *Chester v Afshar* (paras 3-9 of the Court of Appeal judgment). Which model or models of professional-patient interaction seem most accurately to reflect the interactions in this case?
6. Is the right to refuse treatment absolute?
7. Is informed consent a gender issue?

SEMINAR 3 - CAPACITY: THE GATEWAY TO AUTONOMY

The rules relating to the provision of information to patients assume that the patient needs the information in question to make an informed choice; but this in turn rests on the prior assumption that the patient has the mental capacity to make such a decision. This will not always be the case; sometimes it will be clear that a particular patient 'lacks capacity', other situations will be more difficult to call. The common law established a test of sorts for determining capacity, and also fashioned mechanisms to ensure the legality of the treatment of those lacking it. These mechanisms have always, however, been far from satisfactory. After sixteen years of study, consultation, and governmental prevarication, the Mental Capacity Act 2005 received the Royal Assent in April 2005. The Act in some ways merely clarifies and codifies the pre-existing common law, but also makes substantive changes to the law. The Act came into force on 1 October 2007.

This is still relatively recent history, and how the courts (in particular the new Court of Protection) will interpret its provisions is of necessity a matter of speculation. For healthcare decisions, the Act draws heavily upon the common law test of *Re C (Adult: Refusal of Treatment)*, below, and the degree to which previous common law jurisprudence will guide the interpretation of the Act is a matter of speculation. In this seminar we shall therefore take a comparative approach, looking at both the existing common law and the provisions of the Act.

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) throws a different set of questions into the works, as to whether the sort of decision-making mandated by the 2005 Act is inappropriately discriminatory, and whether the 2005 Act is consistent with international law.

Required Reading

Mental Capacity Act 2005, Parts 1 and 2 (see also the **Explanatory Notes**).^{*} You should read with care, in particular, sections 1 to 6, 9, 11, 15 to 17. The Code of Practice^{*} to the Act may be of assistance, but is not required reading.

Re C (Refusal of Medical Treatment)* [1994] 1 FLR 31; [1994] 1 WLR 290

Re MB (Medical Treatment)* [1997] 2 FLR 426

***Re A (Male Sterilisation)* [2001] Fam 15* [also known as *R-B (A Patient) (By His Mother and Litigation Friend) v The Official Solicitor*]**

HE v A Hospital Trust*, [2003] EWHC 1017 (Fam).

United Nations Convention on the Rights of Persons with Disability,^{*} United Nations General Assembly, A/61/611 (2 December 2006). Articles 1, 12 and 25.

David et al, 'Mentally disordered or lacking capacity? Lessons for managing serious deliberate self harm', 341 *British Medical Journal* (18 September 2010) 587*

Kapur et al, 'Advance Directives and Suicidal Behaviour', 341 *British Medical Journal* (18 September 2010) 590.*

Non-Essential Reading:

Peter Bartlett, Blackstone's Guide to the Mental Capacity Act 2005 (2nd ed., 2008).

P. Bartlett and R. Sandland (2007) Mental Health Law, Policy and Practice (3rd ed), chapters 10 and 11.

P Bartlett, Capacity, Best Interests and Sex: Casenote on *In the Matter of MM: Local Authority X v MM and KM*. [2007] EWHC 2003 (Fam). [2008] Journal of Mental Health Law.

J. Montgomery (1989) 'Rhetoric and "Welfare"' Oxford Journal of Legal Studies 295

J, Fortin (1986) 'Sterilisation, the Mentally Ill, and Consent to Treatment' MLR 634

M. Freeman (1988) 'Sterilising the mentally handicapped' in Freeman (ed) Medicine, Ethics and the Law

A Dhanda 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (2007) 34 *Syracuse J. Int'l L. & Com.* 429, 456-60.

F v West Berkshire HA, [1989] 2 All ER 545*

Norfolk and Norwich Healthcare (NHS) Trust v. W [1996] 2 FLR 613.

Tameside and Glossop Acute Services Trust v. CH [1996] 1 FLR 762.

St. George's NHS Trust v. S [1998] 3 All ER 673.

In Re S (Adult Patient: Sterilisation) [2000] 3 WLR 1288.

R v Doctor M and others ex parte N [2002] EWCA Civ 1789.

Re F (Adult patient). [2000] 3 W.L.R. 1740; [2000] 2 F.L.R. 512.

Re S (Adult's Lack of Capacity: Carer and Residence) [2003] EWHC 1909 (Fam)

Re S [1995] 3 All ER 290 (CA).

Re S (Adult's Lack of Capacity: Carer and Residence) [2003] EWHC 1909,

[2003] 2 F.L.R. 1235, [2003] EWHC 1909, [2003] 2 F.L.R. 1235

A Hospital NHS Trust v S [2003] EWHC 365, 2003 WL 933572

W Healthcare NHS Trust v H [2004] EWCA Civ 1324, [2005] 1 WLR 834, 2004 WL 2458658.

Portsmouth NHS Trust v Wyatt [2005] EWHC 117, 2005 WL 290995.

NHS Trust v T (Adult Patient: Refusal of Medical Treatment) [2004] EWHC 1279, 2004 WL 1174198, [2005] 1 All ER 387*

R v The General Medical Council, ex parte Burke [2004] EWHC 1879, overruled by [2005] EWCA 1003.

The Mental Capacity Act is the result of a process, in which the following were key events:

Lord Chancellor's Department [now Department of Constitutional Affairs], Making Decisions (1999)*

Department of Constitutional Affairs, Draft Mental Incapacity Bill (2003)*

House of Commons and House of Lords Joint Committee (2003) Report on the Draft Mental Incapacity Bill, HL Paper 189-1, HC Paper 1083-1*

Department of Constitutional Affairs (2004) Government Response to the Joint Committee*

Department of Constitutional Affairs, Mental Capacity Bill (2004)*

Questions

1. How easy is the *Re C* test to apply? Do you agree with the outcome of its application in that case? How does this test differ from the test in the Mental Capacity Act 2005, and in your view, is the statutory test an improvement?
2. Critically evaluate the concept of 'best interests' as it is deployed by the courts. How does this differ from the test in the Mental Capacity Act 2005? Which is preferable and why?
3. In a previous seminar, we discussed various sociological models of patient-doctor interaction, and which of these models are embodied in law. Does the incapacity of the patient alter the applicability of these models? Do aspects of the sociological models apply to the relations between doctor and substitute decision-maker, and between substitute decision-maker and patient?
4. To what extent can healthcare law or human rights law offer protection to vulnerable adults (is the law discriminatory)?
5. Will the provisions of the Mental Capacity Act bring about fundamental change? Discuss in the context of the attitudes of the authors of the two articles from the British Medical Journal, above.

MODULE READING LIST: GENERAL READINGS

This list has been designed both for the purposes of coursework and seminar preparation. You are expected to refer to this list throughout the course of the module. This does not mean that you must read everything, but it does mean that we expect to see evidence of wider readings, both in seminar contributions and in your written work.

1. Law and the construction of bodies: theoretical underpinnings

1.A Accessible Readings

Ellen Annandale (1998) 'Shattering the Orthodoxy? Foucault, postmodernism and the Sociology of the Body' in her The Sociology of Health and Medicine: A Critical Introduction

Paul Atkinson (1995) Medical Talk and Medical Work, chapters 3 and 4

Susan Bordo (1993) 'Feminism, Foucault and the politics of the body' in Caroline Ramaznoglou (ed) Up Against Foucault

Donna Dickenson (2007) Property in the Body: Feminist Perspectives chapter 1

J. Bridgeman and S. Millns (1998) (eds) Feminist Perspectives on Law: Law's Engagement with the Female Body, General Introduction

Michel Foucault (1977) Discipline and Punish: The Birth of the Prison, pp. 23-30, 135-141, 167-169 (also to be found at pp. 170-187 of The Foucault Reader (1984) Paul Rabinow (ed))

Michel Foucault (1980) 'Body/Power' in Michel Foucault Power/Knowledge C. Gordon (ed)

Ben Golder and Peter Fitzpatrick (2009) Foucault's Law

Alan Hyde (1997) Bodies of Law Preface, Introductions, chs1-3, and Conclusion

Duncan Ivison (1998) 'The Disciplinary Moment: Foucault, Law and the Reinscription of Rights' in J.Moss (ed) The Later Foucault

E. Kingdom (1995) 'Body Politics and Rights' in J. Bridgeman and S. Millns (1995) (eds) Law and Body Politics

Thomas Laqueur (1990) Making Sex: Body and Gender from the Greeks to Freud

Rosemary Pringle (1998) Sex and Medicine: Gender and Power in the Medical Profession

Sally Sheldon (2002) 'Reproducing the Masculine Body' in M. Evans and E. Lee (eds) Real Bodies: A Sociological Introduction Palgrave, Basingstoke, 14-28

Carol Smart (1989) 'Law, Power and Women's Bodies' in her Feminism and the Power of Law

Carl Stychin (1998) 'Body Talk: Rethinking Autonomy, Commodification and the Embodied Legal Self' in Sally Sheldon and Michael Thomson (eds) Feminist Perspectives on Healthcare Law

Bryan Turner (1992) Regulating Bodies, Introduction and Chapter 1, 'The Body Question'

Simon Williams and Gillian Benelow (1998) 'In search of the 'missing body': pain, suffering and the (post)modern condition' in Graham Scambler and Paul Higgs (eds) Modernity, Medicine and Health: Medical Sociology Towards 2000

1.B More Difficult Readings

Anne Balsamo (1999) Technologies of the Gendered Body, ch.1

Judith Butler (1993) Bodies that Matter: On the Discursive Limits of "Sex" Introduction and ch.1

Elizabeth Grosz (1995) 'Space, Time and Bodies' in her Space, Time and Perversion

William MacNeill (1998) 'Law's Corpus Delicti: The Fantasmatic Body of Rights Discourse' IX(1) Law and Critique, 37-57

2. Interactions between professionals and patients

Paul Atkinson (1995) Medical Talk and Medical Work, chapters 5-8

Michael Bury (1997) 'Doctors, patients and interaction in healthcare' in his Health and Illness in a Changing Society

Alan Clarke (2001) 'Professionals, patients and healthcare provision' in his The Sociology of Healthcare

Rosemary Gillespie (1995) 'The law-professional encounter' in Graham Moon and Rosemary Gillespie (eds) Society and Health: An Introduction to Social Sciences for Health Professionals

Martin Giddey (1995) 'Institutions, individuals and professional power' in Graham Moon and Rosemary Gillespie (eds) Society and Health: An Introduction to Social Sciences for Health Professionals

Joseph Jacob (1999, 2nd ed) Doctors and Rules: A Sociology of Professional Values chapter 5 and pp.168-172 (chapters 3, 4 and 6 are also a good read)

David Robinson (1973) Patients, Practitioners and Medical Care, chapters 3 and 4.

T. Parsons (1951) The Social System

T. Parsons and R. Fox (1952) 'Illness, therapy and the modern American family' 8 Journal of Social Issues 31-44.

David Robinson (1973) Patients, Practitioners and Medical Care, chapters 3 and 4.

N. Fox (1993) Postmodernism, Sociology and Health, chapters 2, 3 and 4 (4 is a difficult read)

Rolf Wynn (1999) Provider-Patient Interaction, especially chapter 9

3. Rights and Duties: Theoretical Perspectives

[This is only a short, and by no stretch of the imagination comprehensive, list. Its main purpose is to remind you that our contextualised and localised discussions of healthcare situations – whether there is a right to treatment, to refuse treatment, to have secrets kept, to impose treatment, to use the bodily parts or fluids of another for one's own purposes, and so on – are underpinned by broader jurisprudential debates about the nature and import of rights and duties. You are encouraged to conduct your own explorations for further materials. Consider also how the materials in this section relate to those in sections 1 and 2 above.]

Wendy Brown (2002) 'Suffering the Paradoxes of Rights' in W. Brown and J. Halley (eds) Left Legalism, Left Critique Duke University Press, Durham

Lord Devlin (1965) The Enforcement of Morals.

Costas Douzinas (2000) The End of Human Rights.

Costas Douzinas C. (2002) Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights 29(3) Journal of Law and Society 379–405

Ronald Dworkin (1978, 2nd impression) Taking Rights Seriously, chapters 6, 10, 12, 13 and Appendix.

Herbert Hart (1964) Law, Liberty and Morality.

Herbert Hart (1967) 35 Univ. Chicago L.R. 1-13.

Elizabeth Kingdom (1990) What's Wrong with Rights? Problems for Feminist Politics of Law.

Kate Nash (2002) 'Human Rights for Women: An Argument for Deconstructive Equality' 31(2) Economy and Society 414–433

Joseph Raz (2001) Value, Respect and Autonomy, chapters 1 and 4.

Joseph Raz 'Duties of Well-Being', in J. Raz (1995) Ethics in the Public Domain.

J. Raz (1989) 'Liberating Duties', 8 Law and Philosophy 3-21.

C. Wellman (2002) Rights and Duties