

The Human Rights Act and the Reshaping of Health Care Law

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A Time of Transformation?

- Trust her, she's a doctor – Medical Law in the 1980s (Bolam rising)
 - Malpractice (*Whitehouse, Maynard*)
 - Informed Consent (*Sidaway*)
 - Life and Death (*Bland*)
 - Incapacity Law & Reproductive Rights (*re F*)
- Give me my rights....
 - To help in dying
 - *Pretty, Purdy and Nicklinson*
 - To control my care?
 - *Burke, Watts, Aintree*
 - Knowledge as power
 - *Montgomery, Tracey, Winspear*

The ideological foundations of Bolam

‘If the unit had not been there, the plaintiff would probably have died. The doctors and nurses worked all kinds of hours to look after her baby. They safely brought it through the perilous shoals of its early life. For all we know, they far surpassed on numerous occasions the standards of reasonable care. Yet it is said that for one lapse they (and not just their employers) are to be found to have committed a breach of duty. Nobody could criticize the mother for doing her best to secure her son’s financial future. But has not the law taken a wrong turning if an action of this kind is to succeed.’

Wilsher v Essex HA [1986] 3 All ER 801, 810

The Paradise We are Losing

- Assumed alignments
 - Patients and Professionals share a therapeutic objective
 - The Inter-Relationship of Professional & Patient 'sickroles'
 - Law and Ethics as an integrated normative system
- Assumptions of expertise
 - (Esoteric) Knowledge and (Indeterminate) Interpretation
 - Tolerance of indeterminacy
 - Moral orientation
 - Altruistic
- Holistic assessments of professional obligations
- A normative order based on Trust

The 'New World' Order

- Re-asserting the Rule of Law
 - *Purdy* and the need for certainty
 - Fallacious uncertainties?
 - Constitutional improprieties?
- Court or Clinic?
 - *Bland* (PVS cases)
 - *Glass v UK*
 - Court of Protection (*Cheshire West*, *Aintree v James*)
- Rule of Law or Rule of Lawyers - The Extension of Judicial Power
 - Law over Democracy – *Nicklinson*
 - Law over Medicine - *Montgomery*

On the integration of therapeutic objectives...

if the optimization of the patient's health is treated as an overriding objective, then it is unsurprising that the disclosure of information to a patient should be regarded as an aspect of medical care, and that the extent to which disclosure is appropriate should therefore be treated as a matter of clinical judgment, the appropriate standards being set by the medical profession.

Montgomery v Lanarkshire [2015] UKSC 11, [74]

On the constraints on clinical freedom

is now understood to depend not only upon their clinical judgment, but upon bureaucratic decisions as to such matters as resource allocation, cost-containment and hospital administration: decisions which are taken by non-medical professionals. Such decisions are generally understood within a framework of institutional rather than personal responsibilities, and are in principle susceptible to challenge under public law rather than, or in addition to, the law of delict or tort.

Montgomery, [75].

Paradise Lost?

- Assumed alignments → Management of conflicts of interests
- Assumptions of expertise →
 - Critical examination of expert knowledge (future for Evidence-Based Medicine?)
 - Moral orientation → Ideological (not patient-centric)
 - Professional values → personal preferences: 'schools of thought' and 'merely... divergent attitudes' (Montgomery [84])
- Holistic assessments of professional obligations → subdivisions
 - 'Purely'/'solely' medical: Bolam
 - Disclosure: Reasonable Patient with subjective adjustments
 - 'Skill and judgment': not Bolam, but what?
- A normative order based on trust → distrust

From Montgomery

- 'the extent to which a doctor may be inclined to discuss risks with a patient is not determined by medical learning or experience'
- 'the guidelines were that a caesarean section should only be offered if the predicted weight was over 4.5 kgs'
- 'the risk involved in an elective caesarean section, for the mother (is) extremely small and for the baby virtually non-existent''

Paradise Regained?

- People not Patients
- People not Professionals?
 - Early impacts of Human Rights Act in relation to protections of professionals in disciplinary proceedings
 - Assertion of 'rights' of conscience (*Doogan*)
- Patients as Citizens
 - Article 8 and 'positive' rights
 - Abortion?
 - End of life

Tracey v Cambridge [2014] - Consultation Rights

- Decisions about terminal care invoke procedural obligations under Article 8 (right to respect for private & family life – autonomy)
- Presumption in favour of patient involvement
- Treatment decisions remain ultimately clinical, but
 - Right to know
 - Opportunity for second opinion
- Rejection of 'process as whole' in favour of step by step

Winspear v City Hospitals Sunderland NHSFT [2015] - Required Treatment?

0300 Sp Reg considers CPR inappropriate - severely deformed spine & contracture in arm 'made effective performance of it impossible'

- Recorded - 'DNACPR. Speak to family in the morning'
- Said wanted to stop nurses being obliged to attempt CPR
 - Source of this obligation?

1138 family contacted at doctor's request

1300 (latest) DNACPR cancelled

The Dark Side of Human Rights? A judicial view on *Montgomery*

... a legal duty to cause potentially greater alarm by discussing all the ways in which a vaginal delivery might go wrong...

as a matter of law, neither reassurance, nor even deferment of a final decision, can qualify as available options for the treating doctor once a patient evinces any generalised anxiety or concern.....

.... a seemingly extravagant proposition

NM v Lanarkshire [2013] at [41]