

Review by Lula, 'José Miola, Medical Ethics and Medical Law – A Symbiotic Relationship' [2009]  
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## José Miola, Medical Ethics and Medical Law – A Symbiotic Relationship

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*Medical Ethics and Medical Law* is a fascinating text authored by Dr José Miola who is currently a Senior Lecturer specialising in Medical Law and Ethics at the Faculty of Law, University of Leicester (UK). He is a member of the editorial board of the journal of 'Clinical Ethics' (Royal Society of Medicine Press) and has published in a wide range of journals including *The Lancet*, *Medical Law International* (AB Academic Publishers) and the *Cambridge Quarterly of Healthcare Ethics* (Cambridge University Press). He completed his undergraduate LLB at Newcastle (UK) and PhD at the University of Manchester (UK). The contents of the text under review is 'loosely based' on his PhD thesis.

The introductory chapter states that the text does not provide a comprehensive analysis of the case law as only a small number of cases were considered and only enough is included to give a representative idea of how courts treated medical ethics. The text cites, in chronological order, 46 cases heard across four countries including the UK, USA, Australia and Canada and considers nine statutes. EU case law was not considered as Dr José Miola was specifically concerned with how English courts treated the UK medical professional ethics. The text examines major cases with an inherent ethical content and the designation was based on three criteria: involvement of traditional ethical principles; that each issue is the subject of ethical guidance from the medical profession and that case decisions were not medical in nature. The early chapters include the 'Historical Perspective of Medical Ethics', 'The Medical Ethics Renaissance' and the later chapter covers

'Medical Ethics in Government Commissioned Reports'. Four areas are discussed, in detail, in four of a total of nine chapters and these include 'Risk Disclosure', 'Consent, Control and Minors', 'Sterilisation' and 'End of Life'. These areas were selected as they contained at least one House of Lords decision on the subject since 1980. A 'Table of Cases and Statutes' appears after the contents page.

The opening chapter highlights the renaissance in medical ethics discourse and questions *whether more is always good?* The text argues that the latter fact has not made medical ethics more effective but created a regulatory vacuum where even the law has not stepped in to restore order. Dr José Miola then reflects on the issues highlighted in the Bristol Inquiry Report (2001) such as 'cultural flaws' and 'excessive professional autonomy' which led to fragmentation of and failure in regulation and consequently identifies similar traits in the application of medical ethics in current clinical practice. Specific issues are raised e.g. the lack of a 'monitoring system' of patient quality of care due to the existence of cultural issues and the lack of precedence in the medical guidelines available to doctors. The fragmentation and lack of coordination between managers and clinicians, between multidisciplinary teams and between professional organisations and regulating bodies led to a vacuum in relation to the enforcement of particular standards. The relationship between medical ethics and medical law is thus seen as a symbiotic one but each detrimental to one another.

Three main categories of ethical discourse are identified: the formal sector (e.g. GMC), the semi-formal sector (e.g. BMA and Royal Colleges) and the unofficial sector (e.g. academics, religious and pressure groups). The later part of the chapter provides an excellent summary of the opinion of judges in the four cases and the influence of the decision in *Bolam v Friern Hospital Management Committee*, the use of the Bolam test and later the Bolitho test. It is noted that the former test has cast a shadow on the major cases discussed in the text. The actions of the courts are divided into three categories, namely overt Bolamisation (e.g. Informed Consent case), covert Bolamisation (e.g. Consent, Control and Minors case) and the widening of Bolam's sphere of influence (e.g. Sterilisation and End of Life cases). A crucial aspect highlighted in this part is the approach taken by the judge in any of these medico-legal cases i.e. normative or descriptive. Though Dr José Miola stated that the courts were 'lacking' in defining the conception of medical ethics, he too does not provide an in-depth explanation of the concept within the text. The introductory chapter closes with great detail on the structure of the medico-legal chapters.

The second chapter provides a historical note on medical ethics beginning with the Hippocratic and Plato models. The former model with beneficence as a central theme is scrutinised by deciphering the famous code, the 'Hippocratic Oath'. It is found that it is in no way concerned with social medicine or ethics. The six basic duties outlined in the Oath are shown to have a similarity to the Christian ethics of the time. Dr José Miola argues that autonomy is a value not recognised by the Hippocratic model and the code does not place the patient centre-stage. The lessons learnt from the Plato model of ethics (drawn from Thomas Szasz's critique) show that the medical profession should not exclusively be allowed to define its own ethics and regulate itself as paternalism does not always lead to beneficence. José Miola discusses the role of medical practitioners in light of the patient and the Platonic ideals especially with regards to paternalism. He also provides a startling comparison of modern medicine's ability to exert social control with that of religion centuries earlier. The author also speaks briefly of the Dark Ages, the slow development of medical ethics, beginnings of social ethics and the influence of the class system. There is a short note on the objectives of the GMC and the BMA and on the creation of BMA's Central Ethics Committee.

The third chapter highlights how the recent growth in literature from the unofficial sector has alienated the semi-formal sector and caused problems and confusion. The Nuremberg Code was shown to establish 'patient self determination' that 'paternalism' does not always lead to 'beneficence' even though society's problems are usually medicalised. It is emphasised that this

‘renaissance’ can only be of practical use if the non-medical discourse is ingested by doctors, directly or indirectly. José Miola argues that the ultimate goal in producing any theory or foundation is to help decide what is morally right. He asserts that no consensual decision is ever possible with critical medical ethics although he does mention that one tool for decision-making would be a hierarchical model and that it would resolve all issues. This may or may not be true until it is tested. Towards the end of the chapter, there is an excellent historical note on the core guidance documents that are available e.g. Good Medical Practice (GMC) and Medical Ethics Today – The BMA’s Handbook of Ethics and Law.

The primary ‘Risk Disclosure’ case discussed in chapter four was *Sideaway v Bethlem Royal Hospital Governors (1985)*. In *Sideaway*, the author points out that although all the judges identified the key ethical principle of ‘self determination’, ‘...it did not necessarily mean medical ethics was engaged ...’. In the Court of Appeal cases, *Blyth v Bloomsbury Health Authority (1993)* and *Gold v Haringey Health Authority (1988)*, it was noted that medical ethics played no part at all, no merit was given to the fundamental human right and the cases were bolamised and medicalised. The next two Court of Appeal cases considered were *Smith v Tunbridge Wells Health Authority (1994)* and *Pearce v United Bristol Healthcare NHS Trust (1999)*. José Miola explains that self determination was actually treated as a legal construct and thus the cases were in a way ‘de-medicalised’. However, José Miola does argue that there was still no real consideration of medical ethics as a concept and no involvement from any sources of medical ethics discourse in any of these cases. The last case was that of *Chester v Afshar (2004)* where José Miola emphasises that although the case was not medicalised, ‘...self-determination was not given primacy over the legal rule...’. It was noted that references to the GMC guidelines would have been more authoritative and influential in this case than using only the BMA guidelines. One important aspect considered here is the distinction between ‘ethical principles’ and ‘medical ethics’. José Miola then outlines how GMC and consequently the BMA guidelines related to ‘consent’ developed after the decisions in the cases considered here. With time, it is seen that both the GMC and the BMA have been seen to raise their bar and set higher standards.

The next chapter was concerned with adolescent autonomy and confidentiality. In the *Gillick v West Norfolk and Wisbech Area Health Authority (1985)* case, José Miola states that the majority of their Lordships ‘...having medicalised the issue, by definition had to have confidence in medical ethics as a regulatory force to police discretion that they gave to the medical profession...’. In the case of *Re R (A Minor) (Wardship: Consent to Treatment) (1991)*, the ‘Gillick Competence’ of the minor was examined in light of the law (via wardship jurisdiction) and medical ethics. José Miola argues that the judgment was, in part, to protect and support the medical profession. However, in response to the judgement in *Re R*, the author quotes the 1991 Guidelines of Ethics Committees (Department of Health), ‘...the giving of consent by a parent or guardian cannot override a refusal of consent by a child who is competent to make that decision...’. The case that follows of *Re W (A Minor) (Medical Treatment: Court’s Jurisdiction) (1992)* explores the purpose of consent to treatment, both in the light of legal and clinical context. It shows the strongest example of the role of medical ethics as a regulatory tool. The last case considered was that of *R (on the Application of Axon) v Secretary of State for Health (2006)*. It was argued that the concept of medical ethics played an insignificant part in the decision and the case was exclusively concentrated on the legal aspects. The author provides a note on the fact that ‘...when judges mention ethics, it is frequently unclear whether they are referring to medical ethics or using the word as a synonym for morality...’. This chapter ends with a very interesting discussion on case law, GMC and the BMA guidance with respect to the decision-making power given to a minor, their guardians and the health care / medical professional on issues of consent, confidentiality and autonomy. The BMA guidance is shown to inform doctors to ‘...act within the law...in cases of doubt, legal advice should be sought...’. José Miola finally states that the law seems to be abrogating decision-making responsibility to medical ethics and the latter seeks to give it back to the courts creating a regulatory vacuum.

Chapter six discusses several cases in the area of sterilisation and best interest. In the first case of *Re B (A Minor) (Wardship: Sterilisation) (1987)*, Dr José Miola argues that wider issues were identified (e.g. eugenics) but ignored and the decisions were not completely justified though there was some mention of medical ethics. In the case of *F v West Berkshire Health Authority (1990)*, it was argued that ‘...there was no legal procedure for dealing with incapable adults...’ and that in all the judgments in the case, ‘...what was essentially an ethical issue was medicalised through an indiscriminate use of the Bolam test...’ and ‘...considered by some to epitomise Bolamisation and medicalisation...’. The author also reflects on the similarities in *Sideaway* (Lord Diplock) to that made in *F* such as the ‘...scant mention of the words ethics or its derivatives...’. In the Court of Appeal case of *Re A (Medical Treatment: Male Sterilisation) (2000)*, Butler-Sloss differentiated ‘best interest’ and ‘best medical interest’. Although these cases demedicalised the issue and acknowledged the previous medicalisation of similar issues as inappropriate, Dr José Miola argues there was still no consideration of medical ethics as a concept. In the last case of *Re SL (Adult Patient: Sterilisation) (2000)* referred to the Court of Appeal, the author notes that ‘medical ethics’ was referred to by the trial judge and ‘ethics’ by Butler-Sloss during their judgments. It is concluded that in the former, ‘...medical ethics was seen to be medical in nature, and this prevented too much judicial interference...’ whereas in the latter, ‘...importance was placed on ethical principles rather than the concept of ethics, thus purporting to re-claim decision-making authority for the court...’. The section on ‘Law Reform’ provides a short historical basis of the ‘Mental Incapacity’ report produced by the Law Commission (1995) that would be used to determine a patient’s ‘best interest’. There is also a note on the ‘Who Decides?’ consultation paper (Making Decisions on Behalf of Mentally Incapacitated Adults, 1997), on the resultant policy document ‘Making Decision’ (1999) as well as the Mental Capacity Act 2005 (2007). Dr José Miola argues that the legislation provides mixed signals and in some cases, the Act provides for others (usually doctors) to make decisions and thus determine the patient’s best interest. In the ‘Ethical Guidance’ section of this chapter, the author goes through the different editions of both GMC and BMA guidelines through the years and argues that neither ‘...support a more recent view of the courts that sterilisation decisions should contain less medical input...’. Moreover, inconsistencies within the BMA guidance (2004) in defining ‘best interest’ are highlighted against an accurate representation of it in the GMC guidelines and the Mental Capacity Act 2005. In the concluding section, Dr José Miola states that the ‘...wording in GMC, BMA and the Mental Capacity Act (2005) is permissive rather than directive thus ‘...does nothing to stop medical professionals acting on the basis of their own consciences, as all the fragments of discourse leave the ultimate decision to the discretion of the decision maker....’.

The area of end of life is covered in chapter seven. In the *Airedale NHS Trust v Bland (1993)* case, Dr José Miola’s view was that although ultimately the judgment was bolamised, at least the ‘sanctity of life’ was defined as a non-medical issue and that both the doctor’s duty to a patient and self determination were qualified in the best interest of the patient. The instinctive confidence in the medical profession was noted and the lack of trust in the judiciary to make such decisions. Dr José Miola further comments on the implications from his Lordships judgment that ‘...ethics should follow the law rather than reverse...’. This, the author writes, shifted the balance on ‘doctors know best’ to a recognition that doctors were not better qualified than others to make non-medical judgements. In the authors view, a wide range of approaches were used by the judges regarding the amount of ethical guidance and some were content on relying on semi-formal guidance documents. It was also argued that the Bolam test did not always encourage ‘good practice’ and thus a recipe for paternalism. In the next case of *Re G (Persistent Vegetative State) (1995)*, Dr José Miola notes that the BMA guidance document (Guidelines for the Treatment of Patients in a Persistent Vegetative State; 1993) was consulted. However, the author felt that the case demonstrated an uncritical confidence in medical ethics. It was argued that medical ethics might allow ethics to subsume law and thus eradicate judicial oversight and that this state of affairs was ‘perplexing’. In

the case of *Ms B v An NHS Hospital Trust (2002)*, the author notes there were competing principles here, one of autonomy and the other of the sanctity of life though the former was preferred. In arriving at this conclusion, Dr José Miola argues that the ‘...ethical aspects to the decision were never actually examined in detail in the judgment...’ though medical ethics was not absent either. In the last case of *R (on the application of Burke) v General Medical Council (2004)*, the author notes that the ethical basis of the law was considered rather than that of medical ethics and thus priority was given to ‘...medical law than formal medical ethics...’. It is at this juncture the author highlights fragmentation in discourse which is at the heart of this text - that the formal sector was inconsistent with the law whereas the semi-formal sector was not. The two questions that were raised by the author were why did not the judge raise awareness of the dangers of this fragmentation that had occurred and which approach do medical professionals follow - the GMC or the BMA? Apparently, a year later, the author notes that the GMC appealed and the Court of Appeal heard the case *R (Burke) v General Medical Council (2005)*. During this time, ‘...the lack of coherence in medical ethics was not addressed...’, ‘...there was absolute refusal to consider wider implications...’ and medical ethics was explicitly defined as belonging to the medical profession and related decision-making powers. In light of this, Dr José Miola argues that ‘...in the wake of Harold Shipman and other medical scandals, not to mention Plato and Nuremburg, such naïveté is scarcely credible...’. In the section of ‘Ethical Guidance’, the author highlights the BMA guidance relevant to the area and states the ‘...language to be reminiscent of the Mental Capacity Act 2005...’. In concluding the chapter, several aspects were highlighted – that ‘...there was no common link between the judges’ conceptualisations of medical ethics from one case to the next...’. Moreover, ‘...words like ‘medical ethics’ and ‘ethics’ were used interchangeably without much thought being given to their meaning...’. A further note by the author suggests that ‘...there was a return to instinctive abrogation of responsibility...’ though also highlighting the primacy of BMA over the GMC.

Chapter eight considers three ‘defining’ reports of its time, namely, the Warnock Committee report on Human Fertilisation and Embryology (1984), the report of the House of Lords Select Committee on Medical Ethics of Euthanasia (1994) and the Joffe Bill Select Committee report on Assisted Dying of the Terminally Ill Bill (2005). The argument presented by Dr José Miola was to see if medical ethics was conceptualised as a consistent concept and how it may interact with the law since all the cases discussed in the previous chapters did not establish this consistency. In designing a legal framework, the author commented that these Committees had greater flexibility (e.g. were not constrained by the law, had less time pressures). In the Warnock Committee report, there was a tendency of displaying confidence in the ability of individual practitioners to regulate their own behaviour for non-research based clinical treatments. Dr José Miola states that the committee preferred to allow society to determine the limits of ‘experimental research’ and thus oversee both legality and good practice. In this report it was argued that ‘ethics’ was used in the wider sense to effectively denote morality and the different functions of medical law and medical ethics would be respected by having such a public body, without the abrogation of responsibility seen in the cases prior to this chapter. In the report of the House of Lords Select Committee on Medical Ethics, it was found that the response was a ‘polar opposite’ of that of the first report in terms of abrogation of responsibility. Moreover, the author states that medical ethics was seen as an effective regulatory tool that the law should not be seen to be interfering with and thus reflects the judgments in the major cases presented in the text. In the report of the Joffe Bill Committee, two approaches were presented, one where medical ethics would change with the law and vice versa. However, neither approach was selected and the report did not engage with the issue ‘...nor did it comment on the notion that medical practitioners were still seeking responsibility for matters that were not medical in nature...’. Dr José Miola comments that ‘...there was a desire on the part of the (medical) profession to maintain its excessive professional autonomy...’ and that there was fragmentation in discourse and regulation and cultural flaws concluding that all three elements existed as it did in the previous chapters.

In conclusion, the existence of a regulatory vacuum was highlighted that has not been identified, the tendency to medicalise ethical issues and leaving ethical decisions to the discretion of individual doctors. It was argued that the medical profession sought and received decision-making authority and marginalised the decision-making role of patients. Dr José Miola provides succinct summaries of the three principle problems arising from the cases, namely cultural flaws, excessive autonomy and fragmentation. He proposes several recommendations to rectify the issue of fragmentation in discourse. First and foremost was the importance of the courts and committees to recognise existing issues such as the significant discretion given to medical ethics as well as the ‘intended’ abrogation of responsibilities to medical ethics and the ‘actual unintended’ abrogation of responsibility to the conscious of the individual practitioner. The second proposal was to recognise that currently there is an absence of hierarchy in ethical discourse and the solution would be that the GMC led the way to categorising ethical discourse. Thirdly, that there should form ‘...a new body with sole power to determine ethical standards and ensure that they are consistent with the law – is the only way to ensure there is no competition between categories of discourse...’. It can be argued that the last solution may be counterintuitive as the GMC in a way already has a role as such. A question that may be raised here is whether or not the proposed ‘new body with sole power to determine ethical standards’ would provide any policing of the two remaining issues. In light of this, a further approach may be to have a single ‘quality’ audit committee in health care that would essentially ‘check’ the GMC, BMA and the NHS against the law and its own ethics. In his final statement, there is emphasis on the ‘...law being part of the problem rather than a solution...’ which consequently makes its relationship with medical ethics a mutually detrimental one.

This is a very interesting text concentrating mainly on the ‘ethical’ component of legal cases and government commissioned reports. Many issues were highlighted in the text including the existence of a regulatory vacuum, cultural flaws, excessive professional autonomy and fragmentation in ethical discourse. Some judgments bolamised and medicalised ethical issues and some de-medicalised ethical issues. It is clear that words inherent in the judgments relating to ‘ethics’ were used interchangeably. Thus, the most important aspect voiced by Dr José Miola was that the judges, in their different approaches, did not conceptualise the term ‘medical ethics’. Also, in providing a solution to ‘fragmentation in discourse’, two topics still required addressing, namely ‘cultural flaws’ and ‘excessive professional autonomy’. One of many points raised in the text was the varying consistency in the guidance issued by the GMC and the BMA. Sometimes the author does tend to make assumptions on the judges’ ‘way of thinking’ and ‘direction’ by extending the interpretations of the individual judgments in the cases considered in the text. These assumptions may not always be accurate and were not backed by concrete data. Also, the author’s interpretations usually seem to be normalised to the application of medical ethics in the judgments. Overall, this is a brilliant piece of work and does answer the several questions raised in the introductory chapter. It touches on some important areas in medical ethics and is certainly a highly recommended read.