

Ethical Judgments

Re-Writing Medical Law

Edited by

Stephen W Smith, John Coggon,

Clark Hobson, Richard Huxtable,

Sheelagh McGuinness,

José Miola and Mary Neal

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ETHICAL JUDGMENTS

This edited collection is designed to explore the ethical nature of judicial decision-making, particularly relating to cases in the health/medical sphere, where judges are often called upon to issue rulings on questions containing an explicit ethical component. However, judges do not receive any specific training in ethical decision-making, and often disown any place for ethics in their decision-making. Consequently, decisions made by judges do not present consistent or robust ethical theory, even when cases appear to rely on moral claims.

The project explores this dichotomy by imagining a world in which decisions by judges have to be ethically as well as legally valid. Nine specific cases are reinterpreted in light of that requirement by leading academics in the fields of medical law and bioethics. Two judgments are written in each case, allowing for different views to be presented. Two commentaries—one ethical and one legal—then explore the ramifications of the ethical judgments and provide an opportunity to explore the two judgments from additional ethical and legal perspectives. These four different approaches to each judgment allow for a rich and varied critique of the decisions and ethical theories and issues at play in each case.

Dedication

To the judges, healthcare professionals, patients and their families
who have to deal with these issues in practice.

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This project involved a great deal of consensus between the editors. However, as with any collaborative undertaking, not every view expressed is entirely shared by every member of the editorial team.

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NOTICE ON THE ORDER OF JUDGMENTS

In this collection, each case is taken in alphabetical according to legal convention, as opposed to chronological, order. There are two judgments for each case, followed first by a legal commentary and then by an ethical commentary. In legal cases, the first judgment is often considered more important and the 'majority' opinion, whereas subsequent judgments are seen as concurring or dissenting judgments. In this collection, neither judgment should be seen as stating a majority or minority view. Instead, we have simply used reverse alphabetical surname order for the judgments.

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Introduction—Medicine in the Courtroom: Judges, Ethics and the Law

‘[T]his is a court of law, not of morals’¹

I. Judicial Determinations: Legal, Not Ethical?

In the ‘conjoined twins’ case, *Re A*, the Court of Appeal had to issue a judgment under the sharp glare of the global media spotlight, on a question both divisive and morally significant: could English law sanction the separation of two legally distinct but physically united babies, knowing that one would be killed and one saved by the operation, and in the face of a refusal to consent by the parents but with medical opinion that favoured the surgery? In the much-cited *dictum* that heads this introduction, Ward LJ denies the relevance of the moral or ethical dimensions of the case as a component of his *legal* determination,² despite their obvious and urgent nature.³ His judicial reasoning, he suggests, draws purely from law. In conceptual legal jargon, he commits to a formalist position: judges should not bring extra-legal considerations to their decision-making, and by implication, can find all of the necessary answers to the question *within* the law itself.

Re A presented a true moral dilemma: whichever decision was reached, one of the children would die earlier than she had to in order that the other might live longer. But even in less dramatic health care cases, the ethical elements will be apparent, and will invite critical examination from within and beyond legal scholarship. In recognition of the weighty ethical components of health care law, and the fact that so much medico-legal doctrine has been developed in the courtroom, this book calls for an examination of three related, overarching questions that are respectively doctrinal, methodological, and substantive in nature. First, have judges, in making key medico-legal decisions, drawn a clear and compelling conclusion based on what the *law* requires, or (*pace* Ward LJ) have they in reality drawn upon extra-legal factors, suggesting that more than one outcome could have

¹ *Re A (Children) (Conjoined Twins: Medical Treatment)* [2000] 4 All ER 961, 969, *per* Ward LJ.

² We will use ‘morals’ and ‘ethics’ interchangeably here.

³ J Montgomery, ‘Law and the Demoralisation of Medicine’ (2006) 26 *Legal Studies* 185.