# Grounded ethical analysis

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There's no doubt that medical ethics should be 'grounded', in the sense that it aims to make a practical, normative contribution to significant ethical issues in medicine. There are a number of ways in which ethics can do that, two of which feature in this issue of the *Journal of Medical Ethics*. One way is by responding to significant new policy or legal developments that will have an impact on clinical practice. This issue discusses two legal developments that matter to patients and healthcare professionals: the sanctions applied to Dr Bawa-Garba and the Supreme Court's ruling on the withdrawal of artificial nutrition and hydration.

A second way of grounding ethical analysis in the reality and complexity of ethical issues is by using empirical methods. There are two papers in this issue from Canada that illustrate how the subtleties of complex ethical issues can be teased out via qualitative methods.

Medical tourism is an important and rapidly developing phenomenon that raises a set of interesting and tricky ethical issues.[1] It has been discussed in the *Journal of Medical Ethics* before and its implications for end of life, dentistry and other health interventions have been explored.[2 3] Reproductive tourism occurs in many countries and the complications it can create for issues such as the citizenship of resulting children have been discussed at some length in the JME.[4 5]

Reproductive tourism is a good example of an area where it is particularly important for ethical analysis to be grounded in the facts and reality of a situation and an empirical approach to ethics is therefore a good option for this topic. In this issue, Couture *et al* report on empirical work they conducted about the implications of cross border medically assisted reproduction between Canadian provinces.[6] They set out to understand the 'moral world' of the main actors in cross border medically assisted reproduction. They describe how the altruism about gamete donation required by Canadian legislation is inconsistent with the experience of using donor gametes, where commercial transactions are built into the system. That kind of observation is useful when framing ethical arguments about public policy. There are theoretical arguments for and against altruistic gamete donation, and they're important, but it is equally important that this analysis is grounded in the reality of what legislation means in practice, the commercial interests involved and what in fact happens. They also identify an important ethical tension between what happens when one jurisdiction, out of concern for avoiding exploitation, removes donor payment with the result that a potentially greater exploitation occurs in jurisdictions that don't have these restrictions. This is an example of how empirical methods can uncover the international implications of ethical issues, something that a narrowly theoretical mode of analysis might overlook.

The aid in dying (or euthanasia) debate continues and there are now many jurisdictions where this is permitted and others where proposed legislation is under consideration.[7] Palliative care is, perhaps, the specialty that is likely to be most affected by legalised aid in dying or euthanasia and it usually opposes legalisation. While medical ethics has analysed many of the central ethical issues in a scholarly and thorough way, it's important that this analysis is grounded in the practical implications of changes to public policy, including the views or specialists within the key professions involved.

Quebec passed legislation in 2015 that made it lawful for a physician to administer a lethal injection to a competent and terminally ill patient. Enough time has elapsed since then for it to be an important test case for finding out what this significant legislative change has meant for those in Quebec and working in palliative care. Belanger *et al* conducted qualitative interviews with 18 palliative care specialists to see how they 'positioned themselves' with respect to the legalisation of euthanasia.[8] An important challenge for empirical approaches to ethics is how to include a degree of ethical analysis within a qualitative study. This study drew on a concept from social psychology called 'ideological dilemmas' which refers to the tensions between beliefs that might be contradictory and are presented when people explain their views. This is interesting theoretically because it is a way of critically analysing and understanding moral reason that is both empirical but also involves testing ethical views. One of the ethical tensions they identify is between respecting patient choices about the value of their life and the wish to end it and the palliative duty to explore the nature of their suffering.

It is important that debate about aid in dying draws on the reasons that are significant for those helping patients at the end of life. Belanger *et al* observe that concerns about the sanctity of life didn't feature strongly in the concerns of the palliative specialists, which perhaps is a reason for redirecting our efforts when arguing about ethics and the end of life.

While new legislation does not always result in direct changes to clinical practice, there's no doubt that it often does, particularly when it involves the end of life or the professional censure of a doctor. In such cases there is an immediate connection between ethical analysis and the actual medical world.

Foster argues that the drift in English medical law away from medical paternalism changed course back to the authority of doctors in the Supreme Court judgment, *An NHS Trust v Y*.[9] His argument proceeds by tracking the development in common law of an approach that places less emphasis on medical expertise and more upon the assessment of best interests being a holistic judgement. His central claim is that by not requiring doctors who wish to withdraw artificial nutrition and hydration from patients with 'prolonged disorders of consciousness' to seek authorisation from the court, it has reinstated a form of medical paternalism. The worry is that affirming the role of clinical guidelines when making judgments about the patient's best interests, the Court has encouraged a medical tick box approach that might rule out the input of other voices on whether treatment should be discontinued.

Wade responds by pointing out the attention given in the judgement to the 2005 Mental Capacity Act (MCA) and the duties it places on doctors to ascertain the patient's wishes and values when determining what is in their best interests.[10] Moreover, the MCA establishes duties to consult with family members and relevant others about what the patient's values and attitudes with a view to establishing what they would have chosen.

The decision in January 2018 that Dr Bawa-Garba's 12 month suspension for gross medical manslaughter was inadequate and that she should be permanently struck off the medical register caused ripples of alarm to spread throughout the United Kingdom and other countries. The implications of this are far reaching and even have the potential to change the way that medical students and doctors reflect on and learn from clinical experience.[11] Samanta and Samanta argue that this intrusion of the criminal law into the domain of medical error is problematic for a number of reasons, including the systematic nature of medical errors and the shifting of blame that results from a criminal law perspective.[12] They argue that a 'just culture' approach to serious medical errors that emphasises the fair attribution of blame, openness and reflection so as to work toward improvement and proportionate sanctions are what the GMC and institutions should work toward. This case and the strong reaction to it by the medical profession can be gauged by the number of commentaries and letters about it that have appeared in the *British Medical Journal*. It is therefore pleasing that Hodson, a junior doctor, has written a commentary on this issue too.[13] He suggests that attention needs to be paid to the original conviction and that by overturning the January judgement, the Court of Appeal might undermine trust in the profession.

While empirical methods are one good way of grounding ethics, this can also be achieved by the ethical analysis of policy and legal judgments that are of significance to the health professions and patients.

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