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Editorial: On-going challenges, responsibility and influences in healthcare law and policy – essays in honour of Chris Newdick

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ABSTRACT

This special issue critiques the challenges, responsibilities and influences facing different stakeholders in the development of healthcare law and policy in the United Kingdom. It brings together leading scholars to offer insightful analysis on the many questions posed on how decisions on whom to treat are taken at macro and micro levels. The inspiration for this special issue stems from the work of Professor Christopher Newdick, who has been instrumental in forging a new way of resolving conflict between competing interests in the provision and regulation of healthcare. A symposium was held at the University of Reading in April 2022 to celebrate Newdick's work and some of the papers presented there make up this special issue.

Keywords: healthcare law and policy; NHS; regulation; patients' rights; funding.

The provision of public health – whom we should treat,[1] how it should be paid for, and how it ought to be regulated – poses on-going challenges and unresolved tensions across the United Kingdom (UK)[2] and elsewhere. The increasing prevalence of so-called lifestyle diseases,[3] the inadequacy of state funding to deal with them and the central tenets of individual autonomy and subjective rights[4] create a melting pot of conflicting interests and responsibilities. Added to that are the important commercial and socio-economic influences which

1 C Newdick, *Who Should We Treat? Rights, Rationing and Resources in the NHS* 2nd edn (Oxford University Press 2005).

2 Tensions which pre-dated the introduction of the NHS in England: H Lasswell, *Politics: Who Gets What, When, How* (Whittlesey House 1936).

3 See, for example, K Veitch, 'Obligation and the changing nature of publicly funded healthcare' (2019) 27 (2) Medical Law Review 267–294; J Coggon and B Kamunge-Kpodo, 'The legal determinants of health (in)justice' (2022) 30(4) Medical Law Review 705–723.

4 C Newdick, 'The positive side of healthcare rights' in S McLean (ed), *First Do No Harm: Law, Ethics and Healthcare* (Ashgate 2006) 573–586; R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

mean that, just as Newdick has previously asked, we are still left asking the question of '[W]hat is the proper responsibility of individuals, governments and corporate interests working within a global trading environment' to ensure health equality and social justice?[5]

The issues raised are not unique to the UK. Whilst the articles in this special issue focus on the national picture, the questions of equitable access to healthcare and how it is funded are relevant around the world. Irrespective of how a health service is funded, decisions need to be made as to how finite resources will be allocated and how individual rights will be exercised. Inevitably, these decisions will have a political element.[6] The global trading environment adds further pressures to cash-strapped public health services, and worldwide there is an increasing recognition of the role of commercial enterprises in determining health inequalities and outcomes.[7] The risk of embedding market fundamentalism within the healthcare sector is acute. There is thus an emerging awareness at an international level that more work needs to be done in addressing commercial determinants of health.[8] Indeed, as some of the articles in this issue candidly expose, the disruptive influence of commercial interests could be said to pose the greatest challenge to existing healthcare systems around the world.

To contribute to these debates, this special issue critiques the challenges, responsibilities and influences facing different stakeholders in the development of healthcare law and policy in the UK.[9] It brings together leading scholars to offer insightful analysis on the many questions posed on how decisions on whom to treat are taken at macro and micro levels. The inspiration for this special issue stems from the work of Professor Christopher Newdick, who has been instrumental in forging a new way of resolving conflict between competing interests in the provision and regulation of healthcare. His work has questioned the application, and interpretation, of traditional concepts such as autonomy, community and justice. Long-standing challenges – exacerbated notably by the Covid-19 pandemic – concerning resource allocation, community imperatives and individual interests are all in

5 C Newdick, 'Health equality, social justice and the poverty of autonomy' (2017) Health Economics, Policy and Law 1–23.

6 C Di Constanzo, 'Healthcare resource and priority-setting – a European Challenge' (2020) 27 European Journal of Health Law 93–114.

7 A B Gilmore et al, 'Defining and conceptualising the commercial determinants of health' (2023) 401 The Lancet 1194–1213.

8 See, for example, the World Health Organisation's preparation for a Global Report on the commercial determinants of health.

9 Whilst the Health and Social Care service in Northern Ireland is not technically part of the NHS due to its combined mandate of health and social care, it subscribes to the same founding principles: *Re Eileen Wilson and May Kitchen* [2023] NIKB 2, para 1.

need of a novel approach. At a one-day symposium held at the University of Reading, the contributors came together to celebrate Newdick's extensive contribution and to offer forward-looking critiques to some of the questions that Newdick has identified over the years. Responses to some of these issues range from judicial activism in reviewing the processes in resource allocation decisions, to public enquiries, or the introduction of criminal sanctions. The articles in this issue thus draw inspiration from the ground-breaking work of Newdick and reveal the richness of ideas which continue to flourish at both academic and policy levels. The original articles written by contemporaries of Newdick offer critical analysis on the on-going challenges that face both individuals and the National Health Service (NHS) and the reactive responses of government to help to address some of them. Indeed, as both Newdick[10] and Coggon identified some years ago, the questions raised by public health are inimically political.[11]

Through the articles, an argument emerges to support a new way of thinking about the regulation and provision of healthcare, and it becomes clear both that the focus on individual autonomy has to give way to a more communitarian approach and that traditional notions of society and solidarity must necessarily be revised within the context of economic, indeed market, forces.[12] One of the most complex issues is to identify how the inherent tensions between a universal healthcare system, on the one hand, and individual entitlement to access that system, on the other, can be resolved. At the heart of Aneurin Bevan's NHS was the notion of a healthcare system available to all and free at the point of need.[13] Newdick affirms this in his work, and the inevitable impossibility of agreeing on any hierarchy between these principles means that we need to turn to the *process* of the allocation of finite resources to help to find a solution – that is, who decides and how?[14] James Hart, Sapfo Lignou and Mark Sheehan engage with

10 C Newdick, 'Healthcare rights and NHS rationing: turning theory into practice' (2014) 32 Revista Portuguesa de Saúde Pública 151–157.

11 J Coggon, *What Makes Health Public? A Critical Evaluation of Moral, Legal and Political Claims in Public Health* (Cambridge University Press 2012).

12 Notwithstanding the fact that Bevan's vision has been characterised as 'a zone of non-commodified human relations': J Harrington, 'Visions of utopia: markets, medicine and the National Health Service' (2009) 29 Legal Studies 376–399.

13 See, for example, *The New NHS: Modern, Dependable* (Department of Health/HMSO Cm 3807 1997). Notwithstanding the challenges facing the NHS identified in the Darzi Report, the principle of a publicly funded system of healthcare, free at the point of use and based on need, is held to be absolute: Lord Darzi of Denham, *Independent Investigation of the National Health Service in England* (September 2024) (the Darzi Report) 131.

14 N Daniels and J Sabin, *Setting Limits Fairly: Can We Learn to Share Medical Resources?* (Oxford University Press 2022).

the Ethical Framework,[15] proposed originally by Newdick, to show how consistency and predictability in the decision-making process of allocating treatment offers the best chance of all patients having a 'fair opportunity at the best health that can be provided'.[16] These authors drill down into this process and offer a next steps approach to the Ethical Framework when considering how individual funding requests might be more fairly dealt with. Instead of requiring the patient to be an exception to other patients, they suggest that the patient is exceptional compared to the justification for the policy in the first place. Consequently, both the communitarian aspect of healthcare and the individual entitlement to healthcare are both better respected, compatible with the notion of 'social citizenship'.[17]

Building upon the limits associated with a focus on clinical exceptionality, and underscoring the fluidity[18] of this category, Rachel Horton explores the question of exceptionality from a complementary perspective – that of the potential discriminatory application of rationing policies in the light of protected personal characteristics.[19] She suggests that decisions must inevitably go beyond the simply clinical imperatives and that we need a transparent process for this to happen. If a robust process is to be at the heart of the provision of a fair healthcare system, Keith Syrett's insightful analysis into the 'priority-setting matrix', suggested previously by Newdick,[20] shows how challenging resource allocation requires an enhanced judicial review approach. Syrett has previously identified how courts in the different jurisdictions of the UK diverge in their willingness to adopt what Newdick has termed a 'hard look'[21] procedural scrutiny, and he argues that courts play an important role both for patients to seek redress and, arguably, to shine a light on the process to aid public understanding of the immensely difficult balancing act required in allocating finite healthcare funds.[22] In this issue, Syrett justifies

15 Thames Valley Priorities Committee, Ethical Framework.

16 J Hart, S Lignou and M Sheehan, 'Exceptionality in the context of individual funding requests' (this issue).

17 C Newdick, 'The European Court of Justice, transnational health care, and social citizenship – accidental death of a concept?' (2009) 26 Wisconsin International Law Journal 845–868.

18 D Hughes and S Doheny, 'Constructing "exceptionality": a neglected aspect of NHS rationing' (2019) 41(8) Sociology of Health and Illness 1600–1617.

19 R Horton, 'Equality, discrimination and exceptionality in access to healthcare' (this issue).

20 C Newdick, 'Can judges ration with compassion? A priority-setting rights matrix' (2018) 20 Health and Human Rights Journal 107–120.

21 Newdick (n 1 above) 100–107.

22 K Syrett, 'Why are we waiting? Judicial scrutiny of delays in access to healthcare in Northern Ireland' (2024) 75 (2) Northern Ireland Legal Quarterly 420–432.

singling out healthcare as worthy of special consideration in part due to the competing tensions (also identified in a number of other articles) between the communitarian aspirations of a national health service and the individual subjective rights which are engaged.[23]

The question of individual responsibility is one which is clearly becoming more visible in discourse on the provision of, and access to, healthcare. We might suggest that the inevitable corollary to recognising individual rights (as recognised by Hart et al, as well as by Horton) must be the acceptance of responsibility by individuals for their choices which have detrimental (and costly) effects on their own health. Patients have obligations too.[24] To what extent does justice require that a financially strapped health service should not have to fund an individual's irresponsible lifestyle choice? Newdick has identified what he termed the 'poverty of autonomy',[25] but Coggon further suggests that traditional concepts such as patient autonomy are misplaced in the context of macro-level healthcare implications.[26] Consequently, taking the patient's perspective as the starting point fails to get to the heart of the problem. In the same vein, as Coggon identifies, while individual responsibility may have a place at the table, it is necessary to look at the broader social context, as well as considering the significant commercial interests and pressures at play.

Commercial interests of a different kind are also at stake when we consider the phenomenon of the outsourcing of publicly funded healthcare to the private sector. Veitch articulates competing demands and further recognises how traditional notions of community and solidarity are brought into question by the necessary market nature of relationships created through schemes such as the private finance initiative.[27] Once again, the Covid-19 pandemic brought into sharp relief the tensions inherent in a constrained publicly funded national health service, forced to purchase equipment from private providers.[28] The final article in this issue brings together the questions of responsibility and commercial interests in the context of the use of artificial intelligence (AI) in healthcare. Just as recognition of

23 K Syrett, 'Into the matrix and beyond: seeking an understanding of problem priority-setting cases in the English courts' (this issue).

24 M Brazier, 'Do no harm – do patients have obligations too?' (2006) 65(2) Cambridge Law Journal 397–422.

25 C Newdick, 'Health equality, social justice and the poverty of autonomy' (2017) Health Economics, Policy and Law 1–23.

26 J Coggon, 'The boundaries and goals of legal scholarship within health of the public research' (this issue).

27 K Veitch, 'Contract, social relations and the outsourcing of publicly funded healthcare' (this issue).

28 'PPE procurement in the early pandemic' (Department of Health and Social Care 2021).

individual responsibility in healthcare is growing (as explored by both Newdick and Coggon), so too is the recognition that AI has a place in the provision of healthcare. Yet who may be identified as responsible for the consequences of AI remains an open question which James Devenney and Geraint Howells explore.[29] It is apt that this final article invokes the early work of Newdick on product liability regimes as it clearly shows the solution-based approach that has pervaded all of Newdick's work over the years. Just as Newdick faced the difficulty of reconciling Bevan's vision of health solidarity with increasing individual claims,[30] Devenney and Howells grapple with balancing the potentially disruptive forces of AI with the needs of citizens to access the latest, most effective healthcare as safely as possible. Ultimately, as other presentations during the symposium also identified, a culture of transparency and readily identifiable responsibility and liability are prerequisites for a well-functioning healthcare system that can meet the opportunities and the challenges of the twenty-first century.

The two book reviews in this issue complement the themes raised in the symposium, namely individual rights, justice, private commercial interests, technological advances and the common good. Shirin Boroomand in her review of *Justice in Global Health*[31] commends the book as offering a new perspective on practical challenges for global health justice. Just as Newdick explored through his work, Boroomand highlights how the book engages with the disparities between states, the pressures that commercial entities may bear and the inequalities in technological advances which require considerations of the different perspectives involved. Başak Bak's review of *Protecting Genetic Privacy in Biobanking through Data Protection Law*[32] also reveals how contemporary scholarship in this field engages with what Newdick essentially put on the map: how can we best achieve the necessary balancing between individual rights and legitimate communitarian goals? Bak's review also recognises that health knows no borders and that more can be done on an international level.

Taken as a whole, this collection of essays and book reviews pays tribute to the intellectual contributions of Newdick over many decades. During the one-day symposium at the University of Reading

29 J Devenney and G Howells and, 'Developing product liability networks for AI systems in the medical context' (this issue).

30 C Newdick, 'Citizenship, 'Free movement and health care: cementing individual rights by corroding social solidarity' (2006) 43 Common Market Law Review 1645–1668.

31 Shirin Boroomand, book review (this issue) of Himani Bhakuni and Lucas Miotto (eds), *Justice in Global Health: New Perspectives and Current Issues*.

32 Başak Bak, book review (this issue) of D Hallinan, *Protecting Genetic Privacy in Biobanking through Data Protection Law*.

to mark Chris Newdick's retirement, many colleagues, including the contributors here, bore testimony to the positive impact that he had had on them, both professional and personal. This special issue is offered as a reflection of Chris's dedication to informing, educating and inspiring others to consider healthcare law and policy in a way that promotes individual and societal flourishing: we hope that the articles collected here will further contribute to this end, in the UK and further afield.